A Political Anatomy of Detention and Deportation in Canada

by

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A thesis submitted in conformity with the requirements for the degree of Ph.D.
Graduate Centre of Criminology, University of Toronto

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For my mother and father
and
my sweetest Cayenne
A Political Anatomy of Detention and Deportation in Canada
Ph.D 2000
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Abstract

This thesis examines exclusionary Canadian immigration law, policy and practices as a distinct penalty: an immigration penalty which polices non-citizens and which administers coercive sovereign sanctions under the authority of the Canadian Immigration Act. It traces the discursive shifts in the governance of this penalty and it attends to the specific practices which these discursive developments have entailed.

The first part of this thesis maps the shifts in the governance of immigration penalty starting with the broadly discretionary, racist and otherwise discriminatory 1952 Immigration Act. The exclusions which it sanctioned were morally-charged, status-oriented exclusions which were governed largely through national purity discourses. It also expressed the continuing influence of Cold War anxieties relating to national security.

Over the 1960s, these guiding rationales were increasingly challenged by liberal legal and humanitarian discourses. The 1976 Immigration Act arguably represents a key point in the extension of liberal legal and humanitarian governance to non-citizens. It 'deraced' national admission policies, it curbed (some) discretionary powers and it entrenched a permanent on-shore refugee determination system. It legally constructed and confirmed the deservedness of genuine victims of state sanctioned persecution in their countries of origin. However, this triumph of liberal legality and humanitarianism was short-lived. In the 1980s and 1990s, the deservedness of the rights-bearing refugee was increasingly eclipsed by the undeservedness of the free-loading, fraudulent and criminal immigrant and/or refugee claimant. This thesis details the discursive reconstruction of refugees from deserving 'victim' to threatening 'offender', and considers the legal and policy consequences which this reconstruction entailed.
This analysis considers the steady erosion of the political currency of humanitarian liberal discourses and the rising influence of risk/danger, criminality and victim-focused discourses in the governance of most areas of public policy. Most relevant here is the way in which anxieties about the threats posed by refugees merged with the discourse on welfare fraud and with broader preoccupations with system integrity which construct the state as victim.

The second part of this thesis examines the implementation of these policy developments. It offers a case study of the processes through which Somali refugees living in Toronto in the mid-1990s were reconstructed as fraudulent, free-loading criminals are examined as are the coercive consequences of this reconstruction. The contemporary preoccupation with criminality that today governs immigration penalty and the proliferation of enforcement-oriented practices and techniques is documented in the second part of this thesis. In the year 2000, Canadian immigration penalty is governed primarily through the rationale of risk/danger, mobilized through criminality, fraud and state-as-victim discourses and operationalised through the interaction of law and discretion. The form of power which is operationalised through this process is sovereign. This dissertation closes with a detailed description of the carceral conditions and penal practices of immigration detention at the Celebrity Budget Inn Immigration Holding Centre in Mississauga, Ontario and with some reflections on the future of detention in Canada.
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Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title Page</td>
<td>i</td>
</tr>
<tr>
<td>Dedication</td>
<td>ii</td>
</tr>
<tr>
<td>Abstract</td>
<td>iii-iv</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>v-vi</td>
</tr>
<tr>
<td>Table of Contents</td>
<td>vii-xvi</td>
</tr>
</tbody>
</table>

Chapter One

Introduction

I) Detention and Deportation as Punishment                                  1-3

II) The Political Anatomy of Detention and Deportation: An Overview        3-5

III) The Relative Obscurity of Sovereign Power in the Contemporary Context of Immigration Penality 6-9

IV) Liberal Legality and the Law/Discretion Dichotomy                      9-10

V) Rights Versus Risks                                                    10-12

VI) Governing Crime Through Immigration and Governing Immigration Through Crime 12-15

VII) Power and Law                                                         15-19

VIII) Crime as Sign                                                        19-22

IX) The Foundational Exclusions of Liberal Law                             22-24

X) Chapter Outline                                                        24-25
Chapter Two
Dunking the Doughnut: Law, Discretion and Sovereign Power

I) Introduction 26-28

II) The Conventional Legal View of Discretion and the Emergence of Alternative Approaches 28-43

III) Administration and Judicial Review 43-52

IV) The Law and Policy Governing the Detention of Non-Citizens Under the Canadian Immigration Act 52-59

V) Judicial Review of Immigration Decision-Making 59-61

VI) Departmental Policy Checks on Discretionary Powers 61-65

VII) Contemporary Policy Debates on Detention 65-71

VIII) Discretion as Arbitrary and Discriminatory 71-77

IX) Conclusion 77-79
Chapter Three
Discretionary Power and Discursive Contests: Transitions in the Governance of Exclusionary Canadian Immigration Policy (1947-1976)

I) Introduction 80-83

   a) Mackenzie King’s 1947 Statement on Immigration 84-86
   b) The 1952 Immigration Act 86-93
      i) Discretionary Power and Exclusionary Provisions 86-90
      ii) Security Concerns 90-93
   c) Rising Opposition to the 1952 Act 93-105
      i) The 1962 Immigration Regulations 96-97
      iii) The White Paper of 1966 100-105
      i) The Adoption of the “Point System” (1967) 105-106
      iii) The 1976 Immigration Act 108-116

3) Conclusion 116-119
Chapter Four
Floods, Frauds and Refugees:
The Emergence of the ‘Bogus Refugee’ in the 1980s

I) Introduction 120-125

II) Reframing Risk in Canadian Immigration and Refugee Law and Policy in the 1980s 125-133
   i) The Changing International and National Contexts 126-128
   ii) Spontaneous Landings, Public Panics and the Fraudulent Claimant 128-133

III) Stemming the ‘Flood’: The Administrative Crackdown on ‘Bogus’ Refugees 133-140
   i) Administrative Measures 133-135
   ii) Legal Reforms: The Role of Bills C-55 and C-84 (1987) 135-140

IV) Expanding the Threat in the 1990s: ‘Bogus’ Refugee Meets the Terrorist and the Serious Criminal 140-143

V) In the Name of the ‘Truly’ Deserving: Bill C-86, the ‘Deterrence and Detention Act’ (1992) 144-153

VI) The Creation of the Canadian ‘Public Security Portfolio’ in 1993 153-154

VII) Conclusion 155
Chapter Five
From Deserving Victims to Undeserving Criminals:
Redefining and Regulating Refugees in the 1990s

I) Introduction 156-159

II) The Rise of Neo-Liberalism as a Rationality of Rule 159-164

III) The Emergence of the Problem of the ‘Welfare Cheat’ in Ontario 164-167

IV) The Merging of Fears About Immigration and Welfare 167-169

V) Extending and Acting Upon the Threat: Cracking Down on the ‘Fraudulent Criminal Claimant’ 170-171

VI) The Provincial and Municipal Dimensions of the Panics Surrounding the ‘Fraudulent Criminal’ Immigrant or Refugee 171-174

VII) From ‘Deserving Victims’ to ‘Fraudulent Criminals’:
The Case of Somali Refugees in Toronto in the 1990s 174-212

i) Somali Refugees: ‘Cheaters’, ‘Criminals’ and ‘Unscrupulous Masters of Confusion’ 177-183

ii) Conflict and Coercion at Dixon 183-191

iii) Fanning the Flames in the Popular Print Media and the Enforcement Response 191-199

a) ‘Dispatch From Dixon’ 192-194

b) Enforcing the ‘Problem’ 194-199

iv) Proof of Identity: Prudence or Prejudice 199-204

v) The Criminalization of Khat 204-212

VIII) Conclusion 212
Chapter Six
Discretion, ‘Danger to the Public’ and ‘Just Desserts’: The Legal Exclusion of Permanent Residents in the 1990s

I) Introduction 213-214

II) Discretionary Power and Exclusion 214-216

III) Exclusion, Discretionary Power and Bill C-44: A Detailed Interrogation 216-241
   i) The ‘Just Desserts’ Bill: Context 217-219
   ii) Legislative Content of Bill C-44 220
   iii) Administrative Guidelines, Appeals and the Question of Discretion 220-224
   iv) Judicial Review and the Question of Discretion 224-227
   vi) Conventional Critiques of s.70(5) 232-241
      a) The Humanitarian Liberal Welfarist Critique: The Corruption of Discretion as a ‘Quality of Mercy’ 232-234
      b) The Liberal Legal Critique: The Threat of ‘Unfettered’ Ministerial Discretion 234-238
      c) A ‘Radical’ Critique: Ministerial Discretion, Exclusion and Racism 238-241

IV) Conclusion 241-242
Chapter Seven

“Criminals First”: Governing Immigration Through Crime in the 1990s

I) Introduction 243-244

II) Administrative Policy Reforms 244-252
   i) ‘Criminals First’ Detention and Deportation Policy (1994) 244-247
   ii) CSIS Joins the Crackdown on Criminals (1996) 247-251
      a) The Expansion of the CSIS Mandate 247-250
      b) Immigration Security Screening 250-251
   iii) Drugs and the Deportation of Refugee Claimants 251-252

III) Creation of Special Departmental Units 252-258
   i) Organized Crime Section of CIC (1994) 252-254
   iii) CSIS Transnational Criminal Activity Unit (1996) 255-257
      a) The Triad ‘Menace’ and Project Sidewinder 256-257

IV) CIC ‘Partnerships’: From Cops to Communities 258-269
   i) The RCMP Immigration and Passport National Enforcement Program 258-264
      a) ‘Community Policing’ and Enforcement 260-263

iii) Municipal Police Forces 266-267

iv) Ongoing Collaborative Enforcement Activities 267-269
   a) CIC-RCMP Taskforce on People Smuggling (1997) 267-268
   b) Casino Taskforces 268
   c) CSIS and CIC Airport Collaboration Project 268-269
   d) Ski-Doo and Boat Patrols 269

V) Airlines, Airports and Interdiction 269-273

VI) Canada Customs and Crime Control 273-276

VII) Technological Developments 276-278

VIII) The Production of Knowledge on the Problem of the Criminal Immigrant 278-281
   i) The CIC Metropolis Project 278-281

IX) ‘Good Guys’ and ‘Bad Guys’: The Entrenchment of an ‘Enforcement Mentality’ Amongst Frontline Immigration Officers 281-285

X) Conclusion 285-289
Chapter Eight
Detention and Deportation:
Sovereign Power, Carceral Conditions and Penal Practices

I) Sovereign Penalty: The Death of Michael Akhimen in Immigration Detention 290-292

II) The ‘Celebrity Inn’ Immigration Holding Centre 293-328
   i) Carceral Conditions 295-303
      ii) Penal Practices: The Coercive Subjection and Control 303-308
          of Unruly Bodies
          a) Cuffs and Shackles 304-308
      iii) Coercive Regimes 309-312
          a) Admission Procedures 309-310
          b) Restrictions on Movement 310-311
          c) Patrols, Checks and Searches 311-312
          d) Use of Force 312
          e) Punitive Measures 312-313
   vi) Daily Routines and Schedules 313-319
       a) Time Schedule 313-314
       b) Visitor’s Schedule 314-316
       c) Baggage and Valuables Access Schedule 316
       d) Telephone Time Schedule 316-317
       e) Health Services 317-319
   v) Numbers and Composition of Detained Population at Celebrity 319-328
       a) Who is in Detention at Celebrity 320-324
       b) Length of Detention at Celebrity 324-327
       c) Release from Celebrity 327-328

III) The Nature and Scope of Immigration Detention Outside of Celebrity 328-334

IV) Conclusion 334-336
<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Epilogue: The Future of Detention in Canada</td>
<td>337-343</td>
</tr>
<tr>
<td>Sources of Information</td>
<td>344-346</td>
</tr>
<tr>
<td>Works Cited</td>
<td>347-363</td>
</tr>
</tbody>
</table>
Chapter One

Introduction

...The traveller glanced casually at the man, who, when pointed at by the officer, had kept his head lowered and now seemed to be all ears, trying to catch something. But the movements of his pressed, pouting lips made it obvious he could understand nothing. The traveller had wanted to put various questions to the officer, but at the sight of the condemned man, asked only: "Does he know his judgement?"

"No," said the officer, about to continue his explanations; but the traveller broke in: He doesn't know his own judgement?"

"No," the officer repeated, pausing for an instant as if demanding a more detailed explanation of the question. The officer then said: "It would be no use informing him. He's going to experience it on his body anyway."

I) Detention and Deportation as Punishment

Michel Foucault observed that in systems of punishment, the body is always at issue; "...the body and its forces, their utility and their docility, their distribution and their submission." He urged that systems of punishment, penalty, cease to be considered as a straightforward means of reducing crime but rather should be analysed as concrete, social phenomena; "...we must situate them in their field of operation, in which the punishment of the crime is not the sole element." The body is therefore enmeshed in a political field: "power relations have an immediate hold upon it; they invest it, mark it, train it, torture it.


3Ibid., 24
force it to carry out tasks, to perform ceremonies, to emit signs.”

Foucault called on scholars of punishment to consider its “political anatomy”. He meant by this that they should attend to the concrete and material political dimensions of the subjugation of human bodies which is accomplished through the discursive processes which turn these bodies into objects of knowledge. As he explained in *Discipline and Punish*:

> It is a question of situating the techniques of punishment - whether they seize the body in the ritual of public torture and execution or whether they are addressed to the soul - in the history of this body politic; of considering penal practices less as a consequence of legal theories than as a chapter of political anatomy.5

This study rests centrally upon the proposition that the detention and deportation of non-citizens which is ‘administered’ by Immigration authorities is, despite repeated legal and political denials, punishment. The conventional legal definition of punishment is “the infliction of some pain, suffering, loss, disability, or other disadvantage on a person by another having legal authority to impose punishment...In modern societies, punishment is generally confined to the criminal law.”6 It is the latter part of this definition that this thesis challenges. The argument that detention and deportation are forms of punishment is not a novel one. Writing in 1959, Victor Navasky argued forcefully that “It is totally unrealistic to deny deportation’s penal character” and that “As long as the courts adhere to the fiction that deportation is not punishment, it will be impossible to isolate the breadth and implications of the sovereign power in this area.”7

4Ibid., 25
5Ibid., 28
common. Banishment is a form of punishment, deportation is a form of banishment. *ergo* deportation is punishment. In 1836, the pain and suffering associated with banishment was eloquently summarised by a critic of the 1798 Alien and Sedition Laws in the United States:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, - a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the moveable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for,...if a banishment of this sort be not punishment, and among the most severest of punishments, it will be difficult to imagine a doom to which the name can be applied.⁸

II) The Political Anatomy of Detention and Deportation: An Overview

This thesis identifies detention and deportation as coercive sanctions, as contemporary manifestations of sovereign power which continue to dominate in the exclusion of undesirable and/or undeserving non-citizens in the 21st century. In the spirit of Foucault, in this thesis exclusionary Canadian immigration law, policy and practices are analysed as forming a distinct penalty: an ‘immigration penalty’ which polices non-citizens and which administers coercive sovereign sanctions under the authority of the Canadian Immigration Act. It traces the broad outlines of the discursive shifts in the governance of this penalty and it attends to the specific practices which these discursive developments have entailed. It is for these reasons that this study is entitled “A Political Anatomy of Detention and Deportation in Canada”.

In the year 2000, Canadian immigration penalty is governed primarily through the rationale of risk/danger, mobilized through criminality, fraud and state-as-victim discourses and operationalised through the interaction of law and discretion. The first part of this thesis traces the discursive shifts in the official governance of national exclusions from the post-second World War period to the mid-1990s in Canada. While, in the most

⁸quoted in Navesky 1959:221
general of terms, the changes in this governance are described in this thesis as broad ‘shifts’, it should be emphasized that the developments examined in this thesis point to much overlap and hybridity in the governing logics and practices of immigration policy. In this examination of law and policy, particular attention is paid to the shifting roles of law and discretion in effecting these exclusions. The second part of this thesis focuses more upon the contemporary practices of national exclusions under the current regime of governance, and their impact on those subject to their operations.

As described in Chapter Three, the 1952 Immigration Act was a broadly discretionary, distinctly racist and an otherwise discriminatory piece of legislation. The exclusions which it sanctioned were morally charged, status-oriented exclusions which were governed largely through national purity discourses. It also expressed the emerging influence of Cold War anxieties relating to national security. Over the 1960s, both the national purity rationale as well as the delegation of broad discretionary powers were increasingly contested through the deployment of liberal legal and humanitarian discourses. The 1976 Immigration Act arguably represents a key point in the extension of liberal legal and humanitarian governance to non-citizens. It ‘de-raced’ national admission policies, it curbed (some) discretionary powers and it entrenched a permanent on-shore refugee determination system. It legally constructed and confirmed the deservedness of genuine victims of state sanctioned persecution in their countries of origin. Less widely known though important nonetheless, is the fact that the 1976 Act continued to preserve broad tracts of discretionary power to exclude for reasons of national security and it extended the exclusionary grounds for reasons of criminality.

This triumph of liberal legality and humanitarianism was short-lived. No sooner had the government established a permanent on-shore refugee determination system, than it proceeded to limit access to both the shore and the system. The restrictive and enforcement oriented policies of the 1980s and early 1990s were justified by reference to the new and potent threats perceived posed by fraudulent, ‘bogus’ refugees and foreign criminals. The deservedness of the rights-bearing refugee was increasingly eclipsed by the undeservedness of the free-loading, fraudulent and criminal immigrant and/or refugee
claimant. This discursive reconstruction from deserving ‘victim’ to threatening ‘offender’, and the legal and policy consequences which this reconstruction entailed, were effected in part by the steady erosion of the political currency of humanitarian liberal discourses and the rising influence of risk/danger, criminality and victim-focussed in the governance of most areas of public policy. Most relevant here is the way in which anxieties about the threats posed by refugees merged with the discourse on welfare fraud and with broader preoccupations with ‘system integrity’. In this reconstruction, the state, ironically, emerges as the ‘victim’.

In the second part of this thesis, these policy developments are examined in their practical application. The processes through which Somali refugees living in Toronto in the mid-1990s were reconstructed as fraudulent, free-loading criminals are examined, as are the coercive consequences of this reconstruction. While the particular situation of Somalis living in Canada is the only mini-case study provided, it would be most interesting to examine the ways in which these developments are experienced by other groups of new immigrants and refugees in Canada.

The contemporary preoccupation with criminality that today governs immigration penalty to a degree unprecedented in Canadian history, and the myriad enforcement-oriented practices and techniques which have proliferated under this rationale, are documented and detailed in the second part of this thesis. This dissertation closes with a detailed description of the carceral conditions and penal practices of immigration detention; of the operation of sovereign power in Canada’s own ‘Kafka motel’: the ‘Celebrity Budget Inn’in Mississauga, Ontario which is also an Immigration Holding Centre.⁹

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⁹Airport motels in the United States which are used for immigration detention are commonly, and indeed appropriately, referred to as ‘Kafka motels’.
III) The Relative Obscurity of Sovereign Power in the Contemporary Context of Immigration Penalty

....How different the executions used to be! The entire valley was mobbed a whole day in advance; they all came just to watch. Early in the morning, the commander showed up with his ladies; fanfares woke the entire camp;...The machine was freshly polished and glistening; I used new replacement parts for almost every execution. In front of a hundred eyes - all the spectators stood on tiptoes as far as the hills - the commander himself placed the condemned man under the harrow...Everyone knew: Justice was being done. In the hush, all we heard was the condemned man's sighs, muffled by the gag...It was impossible to allow everyone who requested it to watch from up close. The commander, wise as he was, ordered that preference be given to the children. I, however, because of my profession, was always permitted to stand close by; I would often squat there with a small child in each arm, right and left. How profoundly we took in the transfigured expression from the tortured face, how intensely our cheeks basked in the glow of that justice, attained long last and already fading! What wonderful times, my friend!

Executions and the range of other bodily mutilations characteristic of pre-modern and early modern penalitv no longer take place in the public square. That sovereign power continues to reign supreme over the exclusion of undesirable and undeserving non-citizens in the 21st century and that it does so in relative obscurity and secrecy is of significant analytical interest. In addition to the necessary corporeality of sovereign punishments, as described by Foucault, the effectiveness of sovereign penalitv well into the early Modern period relied upon the visibility and public nature of its bodily sanctions; the ‘spectacle’ and ‘ceremony’ of punishment. Foucault documented how the emergence of a ‘higher aim’ of punishment, that of correction, served to displace the body “...as the major target of penal repression.” The disappearance of torture and public square executions marked “...the decline of the spectacle... (and) a slackening of the hold

10 Kafka, “In the Penal Colony” 1995:209-211
11Foucault, Discipline and Punish, 1979:8
on the body.” Foucault conceded that a “trace” of torture persists in the modern mechanisms of criminal justice; “...a trace that has not been entirely overcome, but which is enveloped, increasingly, by the non-corporal nature of the penal system.”

The operation of sovereign power in the exclusion and expulsion of undesirable and undeserving non-citizens in the current context of immigration penalty is thus markedly different from the days in which offenders were ceremoniously tortured in the public square. However, in contrast to modern criminal justice penalty, the ‘body’ of the undesirable non-citizen remains the primary target of the sanctions imposed. Unlike criminal justice penalty, there is no “higher aim” at work in the detention and deportation of non-citizens: there is no discipline. Detention and deportation and the various techniques of bodily subjection which they entail, are not merely ‘traces’ of the bodily preoccupations of the sovereign power of days long gone by, but rather represent the continuing centrality of the operation of sovereign power in the exclusion and expulsion of undesirable and undeserving non-citizens. Just as the public execution of the past was “...much more than an act of justice; it was a manifestation of force; or rather, it was justice as the physical, material and awesome force of the sovereign deployed there...”14, the same may be said of detention and deportation.

That today this power operates behind closed doors instead of in the public square is indicative of the degree to which it has been reconfigured by the influences and preoccupations of liberal legality. However, in the context of immigration penalty, it is ‘traces’ of liberal legality that inflect the administration of the bodily sovereign sanctions of detention and deportation rather than the reverse. While the painful and public excesses of the administration of sovereign power have been circumscribed, the inherent violence of these fundamentally bodily sanctions continues to be their defining feature. The essential violence of detention and deportation is not a ‘barbaric hangover’. but, as

12Ibid., 11
13Ibid., 16
14Ibid., 50
Foucault observed in the context of criminal punishment, "...is actually inscribed in the political functioning of the penal system." Nevertheless, the spectacle of these sovereign sanctions is clearly much diminished in the present day. Immigration penalty is even more secret and mysterious than criminal justice penalty; it is more withdrawn from the public eye and receives far less critical scrutiny than do prisons. Moreover, those subject to detention and deportation proceedings have fewer rights than prison inmates, not only legal rights but also everyday rights such as fresh air, exercise and direct contact with friends and family members.

In addition to the fact that liberal legality has dulled the sharp edge of the sovereign's sword in this area, it is perhaps also true that unlike public executions, the sanctions of detention and deportation need not strike terror into the hearts and minds of all people; their spectacular deterrent effect is particular to non-citizens. Nevertheless, there is still a degree, albeit limited, of spectacle involved. Word of mouth, occasional sensational media accounts of detentions and deportations, and political rhetoric all contribute to their continuing symbolic power. The lives and activities of non-citizens in Canada are indeed governed, in a very real way, by the 'terror' inspired by detention and deportation.

...I know its impossible to make those times comprehensible today. Anyway, the machine is still running and it still works on its own. It works even when it's alone in this valley. And, ultimately, the corpse, in an incomprehensibly gentle flight, still drops into the pit even if hundreds of people no longer gather around the pit like flies, as they used to do. Back then, we had to install a sturdy railing around the pit, but it was torn down long ago.16

IV) Liberal Legality and the Law/Discretion Dichotomy

15Ibid., 49

16Kafka "In the Penal Colony" 1995:211
National exclusions are accomplished through the interaction of law and discretion. This interaction facilitates the operation of sovereign power against undesirable and undeserving non-citizens. The conventional view of law and discretion, as an oppositional binary, serves to further obscure and distract attention away from the violence and coercion of detention and deportation, by setting and limiting the parameters of interrogation. That is to say, liberal legality abstracts and redefines real problems in legal terms. Coercion, discrimination and other abuses associated with national exclusions are reconceptualized as exceptional problems of ‘discretion’, usually framed in terms of ‘arbitrariness’. The largely taken-for-granted solution to these perceived problems of discretion is more law or law-like rules. Nicola Lacey offers the following definition of the legal paradigm:

...the subjection of areas of human conduct and practice to regulation according to clear, prospective, publicly announced general rules or rule-like standards. Problems are typically seen as arising from ambiguities or ‘gaps’ in the rules, calling for clearer interpretations or further legislation or quasi-legal action. Disputes are seen as calling for resolution on the basis of given rules and according to standards of due process. This approach is closely associated with the ideal of the ‘rule of law’ and hence with liberalism as a doctrine of political morality.

In Chapter Two, I provide a critical overview of the discursive parameters of the scholarly debates on law/discretion and consider the policy implications of the dominant discourse on discretion in the specific context of Canadian Immigration detention and deportation decision-making. In this analysis, I propose that the limits imposed by the conventional dichotomous view of law/discretion may be avoided by considering discretion as an activity, a technology employed in the governance of national exclusions and of ‘undesirable’ and/or ‘undeserving’ non-citizens. Chapter Three considers the historically shifting roles of law and discretion and the different political rationales and

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18 Ibid. 362
discursive contests that have governed their operation and inflected their use in Canada.

V) Rights Versus Risks

In Chapters Four and Five of this thesis, I seek to establish that the liberal legal conception of refugees as ‘rights bearing’ individuals and the related liberal humanitarian conception of refugees as ‘deserving victims’ have been steadily unsettled and increasingly supplanted by a view of refugee claimants (and indeed new immigrants in general) as posing various risks to the nation and public. This reconstruction of refugees from being ‘at risk’ to being inherently ‘risky’, evidences the increased prevalence of ‘risk’ as a rationale of governance. This development is consistent with the general observations made in the emerging criminological literature on risk (‘new penology’), about the emergence of a ‘risk-based’ society in which individuals and populations are increasingly governed through techniques of risk management.\(^2\)

While it is certainly true that risk discourses have indeed become more prevalent in the governance of national exclusions, the degree to which this development has entailed the real changes in either the actual technologies of governing or in the political

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and moral underpinnings of the categories of risk is far less certain. Further, as pointed out by Kelly Hannah-Moffat in the context of women's imprisonment in Canada, "...the presumption that risk governance acts uniformly across whole populations rather than differently according to gender, race and other variables..." (to which I would add citizenship status), must be critically examined.20

Mary Douglas theorises the vast discrepancy between, on the one hand, the 'neutral and objective' origins of risk theory and probability calculations and, on the other, the political and public currency and deployment of the concept of risk. Her insights are particularly resonant in the context of national exclusions. Douglas attends to the politicization of the concept of risk. She observes that while the view of risk assessment as a scientific, "...purely neutral, objective tool of analysis", vests the language of risk with its political power, in reality, the concept of risk and its persuasive power has very little to do with science; "...the risk that is a central concept for our policy debates has not got much to do with probability calculations. The original connection is only indicated by arm-waving in the direction of science. The word risk now means danger; high risk means a lot of danger." 21 She explains,

The language of risk is reserved as a specialized lexical register for political talk about undesirable outcomes. The charge of causing risk is a stick to beat authority, to make lazy bureaucrats sit up, to exact restitution for victims. For those purposes danger would once have been the right word, but plain danger does not have the aura of science or afford the pretension of a possible precise calculation.22

Douglas observes that despite its modernist origins, the political work of the concept of risk/danger resembles "antique" preoccupations with sin and taboo. Both construct a 'moral community' in need of protection. Risk/danger, like sin, is used to

20Kelly Hannah-Moffat, "Moral Agent or Actuarial Subject: Risk and Canadian Women's Imprisonment". (Draft) January 27, 1998


22Ibid.,24-25
"...protect individuals from predatory institutions or to protect institutions from predatory individuals." In a manner reminiscent of Durkheim on social solidarity, Douglas observes that "It may be a general trait of society that fear of danger tends to strengthen lines of division in a community." In the context of national exclusions, Douglas' analysis of risk/danger is most appropriate. While it is indeed true that risk/danger occupies an increasingly prominent place in the governance of national exclusions and while it has underpinned a wide range of enforcement oriented initiatives, there is little evidence that this development has entailed the use of new or different 'risk-assessment' techniques or that it has resulted in any significant changes in the populations being excluded on the basis of risk/danger.

When viewed in this light, risk/danger emerges as a powerful rhetorical exclusionary technique and a central mechanism for the related processes of constructing collectivities including, of course, that of the nation. In the context of immigration exclusions and the development of law and policy in this field, risk means danger and conceptions of danger continue to be constituted along the lines of race, morality and increasingly 'nationality'. As such, the concept of 'risk' is easily deployed as "... a slogan for mustering xenophobia."

VI) Governing Crime Through Immigration and Governing Citizenship Through Crime

In the current context of immigration exclusions, the rationale of risk/danger is constituted through and mobilized by crime and criminality discourses to an extent unprecedented in Canadian history. As I examine in Chapters Four and Five, dominant conceptions of criminality have come to include (certain kinds of) fraud; the 'foreign criminal', the 'welfare cheat' and the 'bogus refugee' have been increasingly linked and

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23 Ibid., 26
24 Ibid., 34
25 Ibid., 39
constructed and acted upon as risky 'predators' who pose a serious threat to the Canadian nation and public. Over the last two decades, exclusionary, restrictive and enforcement-oriented law, policy and practices have proliferated in the official effort to crack down on (reduce the 'risks' posed by) criminal immigrants and refugees. Chapters Six and Seven document the existence of an expansive and coercive immigration penalty which is justified primarily through reference to the risks/dangers posed by foreign criminals. On the level of public policy, exclusionary immigration penalty has emerged alongside, and intertwined with, law enforcement agencies as a central and largely taken for granted mechanism for the policing and punishment of non-citizens in Canada. It is in this sense that crime is today governed, in part, through immigration.

However, this official preoccupation with governing crime through immigration, and the range of crime control initiatives and practices which this preoccupation has entailed, serves to govern much more than crime. Indeed, the relative absence of any compelling evidence regarding the size of the crime problem posed by foreign-born criminals in Canada, as well as the relatively small numbers of people who are directly subject to coercive national exclusions on this basis, as well as the particular racial, ethnic and national characteristics of those being subjected, suggest that some other work is being done; something other than crime is being 'governed through crime'.

Jonathan Simon examines the emergence of this new mode of governance in the United States. Drawing on Foucault, he explains that "...We govern through crime to the extent to which crime and punishment become the occasions and the institutional contexts in which we undertake to guide the conduct of others (or even of ourselves)." Simon observes that the actual nature of the quantitative increase in crime in the United States cannot alone explain the trend toward governing through crime. And while the influence of the "...resurgence of conservative political forces....[which] favour the


27 Ibid., 174
criminal law as a tool of state governance” has been considerable, Simon notes that conservatives are not alone in their quick recourse to law and punishment based governance: liberals too “...are drawn toward punishment as the locus for governance.” 28

Simon argues that the trend toward governing through crime is part of a more general crisis in governance ushered in by the decline of welfarist liberal modes of governance; that the contemporary governmental preoccupation with crime and punishment is consistent with new neo-liberal technologies of governing which emphasise the importance of individual (as opposed to collective, socialised) risk management. Simon observes that governing through crime “is ...a way of imposing this model of governance on the population.”29 While this may be the case for citizens, in the context of national exclusions, non-citizens deemed undesirable and/or undeserving through the operation of these criminality discourses are not incited to better govern their risks: they are simply detained and deported.

Simon suggests that this trend toward governing through crime is particularly heightened in the United States because there, crime and punishment have been long been intertwined with the problem of race:

...the real and imaginary links of violence..with young African American men are helping to drive the imperative of governing through crime. Whether or not voters acknowledge such motives to pollsters, it is hard to ignore the continuities between the present situation and a traditional preference for governing predominantly African-American populations in distinct and distinctly less respectable ways.30

While the racist and discriminatory treatment of aboriginals in Canada by state authorities, including criminal justice authorities, has a long and entrenched legacy in Canada, arguably, the development of Canadian criminal justice penalty has not been as severely inflected by race as in the United States. However, the development of Canadian

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28Ibid., 176
29Ibid., 178
30Ibid., 181
immigration penalty certainly has. Race has always been a key variable in the governance of exclusionary Canadian immigration policy and new immigrants and refugees. The mobilization of crime and criminality in the governance of national exclusions produces and reproduces dominant constructions of the (un)desirable Canadian citizen. Historically specific constructions of the threatening outsider, the undesirable non-citizen, the ‘other’. are constituted, in varying degrees, along the lines of race, ethnicity and more recently nationality. For those non-citizens constructed and acted upon as undesirable, the dominant mode of power to which they are subjected to is coercive and repressive sovereign power.

The historical legacy of explicitly racist and otherwise discriminatory Canadian law and policy and the less explicit forms of racism which persist today (including, for example, the dearth of Canadian immigration visa offices in non-white, poor countries and the systemic discrimination which continues to inflect admissions criteria). speaks to the existence and persistence of race as a constitutive element of dominant conceptions of the (un)desirable non-citizen. The fact that the vast majority of non-citizens who are arrested, detained and deported are non-white, that the majority of those deemed to be a ‘danger to the public’ are non-white, and that the official criminal profiles used in the policing of non-citizens are explicitly organized according to race (ethnicity and/or ‘nationality’) are indeed, in Simon’s careful words, “hard to ignore”.

VII) Power and Law

The violent exclusion of ‘undesirable’ and ‘undeserving’ non-citizens through detention and deportation, and the discursive processes and material practices which inflect and accomplish this subjection, necessarily raise provocative and intellectually productive questions about the nature of governing power and the role of law under a liberal regime of governance. Two characteristics make this field of governance distinctive: the fact that those being coercively governed are not citizens and that the mode of power to which they are subject is distinctly sovereign.

The detention and deportation of undesirable and/or undeserving non-citizens
raises the issue of the persistence of ‘illiberal’ modes of power into the 21st century.\textsuperscript{31} Also evident in this study is the continuing primary place of territorial sovereign law and coercive sovereign penalty in the governance of national exclusions. These exclusionary modes of governance are ‘state-centred’; they continue to depend upon the legitimacy and coercive force derived from the sovereign state, as it is conventionally understood.

The national border continues to be grandly and practically defended through the deployment of sovereign rationales which underpin the actual practices of ‘controlling borders’. Entering Canada is a ‘privilege’ and not a ‘right’ and as such the infringement of liberal liberties at the nation’s borders is legitimised. The practices employed in the work of controlling the borders by customs and immigration officials continues to be justified explicitly and unapologetically by reference to sovereignty. Customs officers and front-line immigration officers carry out moment to moment infringements of liberal liberties in the name and interest of sovereignty. It should be emphasized that sovereign power at the nation’s borders governs citizens as well, although the effects of the operation of sovereign power are more severe for non-citizens.

Of course, sovereignty is not the only way that non-citizens (or indeed citizens) are governed. Indeed, Canada is arguably one of the most thoroughly liberal of western liberal democracies in respect to non-citizens. Indeed, the extension of the legal protections afforded under the Canadian Charter of Rights and Freedoms to \textit{all} people on Canadian soil\textsuperscript{32}, citizens and non-citizens alike, evidences the breadth of this liberal legal commitment as does the legal status afforded to permanent residents living in Canada. \textit{Canada is not a police state}. Indeed the degree to which governance has been legalized, including most notably for the present purposes, the governance of exclusionary immigration law and policy, is breath-taking. It is nonetheless true that in the ‘defence’ of


\textsuperscript{32}As confirmed in the famous 1985 \textit{Singh} decision.
the nation's borders, sovereign rationales and sovereign power trump all other considerations.

However, territorial sovereign law (understood as a straightforward expression of the will of the sovereign) certainly cannot explain the particular and specific policies and practices which are generated and applied in the field of national exclusions. Even the application of coercive sovereign power in the exclusion of undesirable and undeserving non-citizens must, under a liberal regime of government, be rationalised and legitimised by something other than sovereignty. In response to Alan Hunt's call for scholars to "re-open the problem of sovereignty" and re-acknowledge the discursive power of juridical law, Marianne Constable has evidenced the coexistence of different modes of power in the governance of immigration in the United States through a detailed analysis of two legal texts. Constable pays particular attention to the rise of governmental preoccupations in the justification and legitimization of American immigration law. She argues that while sovereignty continues to inflect the justifications for immigration legislation, what Foucault calls governmental preoccupations should not be ignored. Drawing attention to the interplay between different modes of governance evident in the texts of American immigration legislation, she argues that the non-sovereign rationales deployed are largely 'governmental'; i.e. pertaining to the national interests of the population;

Even as the modern state carries out its 'sovereign' powers and even as sovereignty is extended to and appropriated by the collectivity, the exercise and articulation of such power reveals the presence of a "governmental rationality", which justifies policies...by appealing to the complex interests of the population. Instead of grounding law in divine law or nature, modern policies - both state and non-state - for the distribution of goods ground themselves in knowledges of populations produced by social sciences.


Constable argues that the governmental rationale of ‘managing resources’ is a central feature of American immigration law and policy.\textsuperscript{35} Following Foucault, Constable aims to reveal the interpenetration of different governing rationales in the context of American immigration law (the ‘sovereignty-discipline-government triangle’) as well as to clarify and reassert Foucault’s argument regarding the analytical limits of a juridical conception of sovereignty which treats sovereignty and law “...as absolutely one and the same thing.”\textsuperscript{36} In response to Hunt’s concerns about Foucault’s ‘expulsion’ of law, Constable counters that: “Foucault does not “repulse” or “expel” law or the state from modern analyses of power; rather, he denies the capacity of sovereignty - as power and as theory - and of law conceived of as sovereign to account for the rationality of the modern state.”\textsuperscript{37}

There is little question that immigration law articulates and employs different modes of governance, and that sovereignty is but one of these rationales. Nor is there any doubt that governmental concerns with the national interest are central justifications for specific immigration policies. Nonetheless, the relative importance and centrality of sovereign power cannot be discerned by looking at legal texts alone. As the present study documents, the actual practices of controlling borders and effecting national exclusions remain expansively and unapologetically sovereign. Moreover, from the perspective of those subjected by and excluded through the practical operations of sovereign power governmental rationales are of little importance.

It is suggested here that while it is certainly true that different forms of power certainly co-exist in the governance of individuals and populations, it is a distinctly coercive and sovereign mode of governance which operates on those who fall outside of the definitional boundaries of the juridical citizen-subject. In the case of non-citizens, these boundaries are explicit. The violent exclusion of undesirable and undeserving non-

\textsuperscript{35}Ibid., 256

\textsuperscript{36}Ibid., 252

\textsuperscript{37}Ibid., 253
citizens powerfully exemplifies the illiberal treatment of those who both literally and symbolically fall outside of these legal and territorial boundaries. While governmental justifications are certainly deployed in support of national exclusions, no governmental efforts are actually needed to transform these ‘deficient’ outsiders into desirable citizens; when non-citizens are deemed undesirable, they are excluded and/or expelled.

VIII) Crime as Sign

_Founded upon the illusion of the social contract, [the nation's] inclusionary 'we' turns out to be exclusionary. The 'we' can only exist through the expulsion of the Others._

This study points to the ways in which the coercive national exclusions work, not only to repress and exclude, but to _produce_ dominant constructions of the desirable and deserving citizen and to define and enforce national boundaries - boundaries which are not merely sovereign and territorial, but which rest centrally upon moral conceptions of desirability and deservedness. Not all non-citizens are excluded; some possess attributes which facilitate their inclusion. An analytical preoccupation with identifying different rationales of governance in the abstract does little to illuminate their moral dimensions or the ways in which their applications are differently distributed along the lines of race, ethnicity, nationality, citizenship, gender, class, etc.

The moral dimension of national exclusions hinges upon the distinction between ‘deserving’ and ‘undeserving’, ‘desirable’ and ‘undesirable’. As with the distinction between the deserving and undeserving poor in the context of social welfare provision, the distinctions between the deserving and undeserving refugee, and the desirable and undesirable immigrant have the dual consequence of moralising the categories and legitimising differential treatment according to these moralised categories. The moral

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element of these categories "...involves any normative judgement that some conduct is intrinsically bad, wrong or immoral. It is an important supplement that moralising discourses frequently invoke some utilitarian consideration linking the immoral practice to some form of harm." As such, this "dividing practice" plays a key role in the production and reproduction of borders and boundaries, including national ones.

A central technology in the operationalisation of this exclusionary 'dividing practice' is 'crime'. The operation of 'crime as sign' in the construction and enforcement of, in this case, national borders and boundaries provides a valuable insight into the productive power of crime and victim discourses and the ways in which the construction of crime and criminality is inflected by such categories as race, gender and class.

As explained by Alison Young, the processes of criminalization and victimization are related in dichotomous opposition and work together to produce 'the community' and different representations thereof. In this view, this production of communities requires the continuous and repeated 'sacrifice' of the threatening outsider, the 'outlaw'. Young's observations regarding this process in the particular context of the nation are particularly relevant to this study;

The construction of a community founded upon the expulsion of textual outlaws ...requires the establishment of borders and boundaries. Beyond the boundary can be identified the outlaw, within the community exist the members of the community attempting to 'lead their lives free from fear and in relative security'...The localism of crime necessitates the nomadism of the law's response. ...Prediction becomes a major bulwark of the community's fight against crime; for prediction can suggest future locations of the boundary... Locating crime, pinning it down, becomes a major preoccupation of the crimino-legal complex. Where crime is located, the border can be strengthened. As crime is deemed continually to take new forms, new borders come into crisis, requiring reinforcement and vigilance...

Some borders are easily identified: immigration law establishes the nation

40 ibid.,7
41 ibid.,8
as a discrete community which is vulnerable to flooding by individuals from other countries. The recent development of a specific form of immigration policing...testifies to the increasing investment in and anxiety about the (in)vulnerability of the nation. Recent years have seen the intersection of criminal law, immigration policy and the criminal justice system in dealing with immigrants through detention and deportation.42

Governing through crime is accompanied by its corollary, governing through victimization, and victimhood has increasing become a new basis for inclusionary claims to citizenship;

Crime control becomes a matter of minimizing the risk of victimization.
...Passivity, for the victim, is initially unavoidable in that crime, like illness, happens to the individual, with all the force and randomness of circumstance. Agency can be regained, ...if the individual rejects such passivity and takes up a role in the prevention of crime. In this way, citizenship is acquired. As an active social agent, the citizen will fit locks and bolts to doors and windows, avoid dark streets and purchase alarm systems. If everyone is a victim, than everyone has a part to play in the struggle against crime.43

In the context of the formation, defence and reproduction of national borders and boundaries, it is the nation-state (and by extension the nation's 'public') that is constructed as the primary victim of the foreign crime problem and it is the state, as victim, that must be vigilant and proactive in the struggle against crime and criminals.

A stark example of the deployment of criminality and victim discourses, and the dividing practice' which pits the 'deserving' against the 'undeserving', in the construction and fortification of national boundaries through restrictive immigration law and policy is provided by a 1997 issue of the International Journal, published by the Canadian Institute of International Affairs. The cover of this issue promised two articles on "The New Slave Trade". The first, written by journalist Daniel Stoffman, bears the title "Making Room for Real Refugees" and the second, written by former Immigration

42Young, Imagining Crime, 1996:20
43Ibid.,56
and Refugee Board Member and Canadian diplomat William Bauer is entitled “Refugees, Victims or Killers”.

Historically specific constructions of crime and criminality are, to varying degrees, necessarily inflected by race, as they are by gender, class, nationality, and morality; “[T]he body of crime is being continually reconfigured as feminine, black, young, homosexual, maternal and on and on. Such a process does not and cannot end.”

It is through these never-ending productive processes of exclusion that these variables are translated into national policies and practices of exclusion.

IX) The Foundational Exclusions of Liberal Law

In the continuing efforts to theorize race and racism without resort to conventional structural analyses, some scholars have located a foundational exclusionary dynamic within liberal law itself. Peter Fitzpatrick has considered the dynamics of negation in the context of liberal law. However, unlike scholars like Young who concentrate on ‘exclusion’, Fitzpatrick seeks to understand both the inclusions and exclusions of law. In his view, the constituent force of liberal law is the constant effort to both negate and include; the outsider is called on to be the same yet at the same time is constructed as different and excluded. This dynamic issues out of, what Fitzpatrick terms, the ‘mythology’ of modern law.

Liberal law, while appealing to transcendence and universality, is necessarily historically specific and particular. Fitzpatrick proposes that this central contradiction (between the universal and the particular) can only be reconciled by considering the transcendence of law as myth and the ways in which the mythology of modern law is continuously constituted through negations;

Thus modern law emerges, in a negative exaltation, as universal in opposition to the particular, as unified in opposition to the diverse, as omnicompetent in contrast to the incompetent, and as controlling of what


45 Young, Imagining Crime 1996:19
has to be controlled... Law is imbued with this negative transcendence in its own myth of origins where it is imperiously set against certain ‘others’ who concentrate the qualities it opposes.46

While law claims universality, it simultaneously effects closure; it is a ‘fixed point’. The ‘fixed point’ of law is constituted in part through the opposition of savagery and civility. Fitzpatrick argues that the inclusionary liberal legal principles of equality and universality, which stand in opposition to racism, actually work “import racism into law”.47 As observed by Fitzpatrick, the western liberal subject and liberal legality are constituted through the negation of the ‘other’, the myth-ridden and uncivilized savage. In this view, savagery is an ever present feature of liberal law: it is outside of law, but always proximate to law. In this way racism is necessarily a key term in the operations of liberal law.48

One final insight drawn from Fitzpatrick’s analysis of liberal law is important to this thesis. Discretion is a key component in the reconciliation of the universality and particularity of liberal law. In this view, discretion is erected as an oppositional barrier to fixity; if fixity doesn’t exist, then either does discretion. The discretion/law dichotomy is


a thus a central constitutive feature of the mythology of modern law. Fitzpatrick frames this issue in terms of what he refers to as the mythic mutuality of law and administration: "[I]t is because of the particularist and pervasive powers of administration that the rule of law can be maintained in all its aspects of universality and equality and seen as marking out fields for free action...Administration is the necessary 'dark side' of law." This thesis incorporates this insight by contributing to the deconstruction of the law/discretion dichotomy and by considering the practical role of discretionary power in accomplishing national exclusions.

X) Chapter Outline

Chapter Two provides an overview of the contemporary literature relating to law/discretion and considers the limitations imposed by the dichotomous opposition of law and discretion in the context of Canadian Immigration detention decision-making policy and practices. It proposes that the analytical limits imposed by this dichotomy can be avoided by considering discretion as a form of power. Chapter Three provides an overview of the shifts in the governance of exclusionary Immigration law and policy from the 1952 Immigration Act up to, and including, the 1976 Immigration Act. It pays particular attention the role of discretion and the rise of criminality concerns in national exclusions. Chapter Four examines the rise of ‘risk-thinking’ in the particular context of refugee law and policy in the 1980s and details the reconstruction of the ‘deserving refugee’ to the ‘undeserving’ and inherently ‘risky’ refugee claimant. Chapter Five documents the emergence of the rationale of risk/danger as the dominant mode of governing immigration penalty. This rationale, constituted primarily through crime and criminality discourses, is seen to merge with broader neo-liberal concerns with ‘system integrity’ and welfare fraud. The concrete effects of these developments are examined through a case study of the reconstruction and regulation of Somali refugees living in Toronto in the mid-1990s.

Chapter Six examines the 1995 extension of ministerial discretion to exclude permanent residents deemed to be a ‘danger to the public’ under Bill C-44. This piece of legislation is held to represent the political and legal manifestation of a powerful shift in the governance of Immigration penalty in which ‘criminality’ concerns have merged with ‘security’ concerns and have emerged as the dominant rationale of governance in this field. Chapter Seven documents the emergence of exclusionary Immigration law, policy and practices as a central and largely taken-for-granted mechanism of national crime control. It details the range of enforcement-oriented developments and initiatives which have proliferated in the official efforts to crack down on the ‘problem’ of the criminal immigrant. Chapter Eight describes and examines the carceral conditions and penal practices of Immigration detention at Celebrity Inn, the Immigration Holding Centre in Mississauga. This study closes with an epilogue which reflects upon the future of immigration detention in Canada.
Chapter Two

Dunking the Doughnut:
Law, Discretion and Sovereign Power

Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.

I) Introduction

This often cited ‘doughnut analogy’ of Ronald Dworkin neatly encapsulates the conventional view of discretion. Three main assumptions are embedded in this view - that law is the primary instrument of social regulation, that discretion is a residual category of law and that this discretion is exercised by individuals who, though influenced in a wide variety of ways, are essentially autonomous. While recent scholarly analyses of discretion have begun to unsettle this conventional view, its core assumptions nonetheless continue to underpin political discussions and policy debates to such an extent that it sets the parameters of imagined policy and legislative reforms related to its use. This is the case despite contemporary and historical experiences which cast some doubt on the potential of law to effectively address the ‘problem’ of discretion.

This chapter aims to contribute to the unsettling of this conventional view of discretion and introduces an alternative understanding of discretionary power, the understanding which informs the thesis as a whole. It begins with a critical review of the academic literature on discretion, paying particular attention to the liberal assumptions identified above. Reflecting a belief in the importance of contextual analysis, it then discusses the uses of discretion in the context of the administration of a body of law in which discretion is particularly important but has not been much examined - the enforcement provisions of the Canadian Immigration Act (forthwith referred to as the Act), particularly with respect to the detention, release and removal provisions. Current legal, activist and political debates around discretion and detention are then discussed in

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1Ronald Dworkin “Judicial Discretion” 60 J. Philosophy 1963:624
the light of the 1997-1998 legislative review on Canadian immigration law and policy in general and of the subsequent parliamentary hearings on the specific issues of immigration detention and removal. The chapter ends with some reflections on how one might avoid, conceptually and methodologically, the conventional view of discretion and the limited legislative and policy reforms which an acceptance of this view entail.

Discretion has long been the focus of scholarly and policy related discussion and analysis in the field of criminal justice. Much attention has been paid to the uses of the discretionary powers of judges, prosecutors and the police. Surprisingly, despite the obvious comparisons between the enforcement powers related to the Act and those related to the Criminal Code, little analytical attention has been paid to the wide scope of discretionary powers accorded to immigration officials, particularly with respect to their broad powers of arrest, detention and deportation.

This is due, in significant part, to the analytical preoccupation with judicial settings that issues out of the dominant liberal legal paradigm and to the acceptance that the rights normally central to that paradigm are not applicable to non-citizens seeking admission to Canada. Clearly, whenever the law delegates discretionary powers which permit the abrogation of fundamental liberal rights and freedoms the issue is of particular concern. When this abrogation entails the application of extreme and coercive bodily sovereign sanctions, as is the case with immigration detention and deportation decision-making, the issue of discretion becomes that much more compelling.

This chapter hopes to demonstrate the analytical value of shedding the conventional view of the relation of discretion and law in favour of the alternative approach taken in this thesis. Rather than considering discretion as the absence of governance, discretion is considered here as a powerful form of governance, one which facilitates the translation of certain social concerns into exclusionary immigration law and policy and sovereign and coercive practices.

Discretion has always been a key component of the administration of Canadian immigration law and policy, exempt to a startling degree from the eyes of the courts and the public. The exercise of this discretion has been inflected by shifting, historically
specific discourses. In the past, discretionary powers facilitated the exclusion of large numbers of people on a variety of different discriminatory grounds that today are no longer judged to be socially or legally legitimate. As is argued in this thesis, in the present day, social concerns about criminality, inflected and constituted in varying degrees by racism and nationalism, provide the basis and justification for exclusionary immigration policies to a degree unprecedented in Canadian history.

This chapter begins by unsettling the conventional view of discretion and thereby sets the stage for the empirical and analytical exploration that follows.

II) The Conventional Legal View of Discretion and the Emergence of Alternative Approaches

_When law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or unreasonableness_.

For the most part, contemporary legal theorizing on discretion continues to reflect the liberal preoccupation with the rule of law. The conventional view of discretion expresses the liberal legal conceit that discretion is the unruly shadow of law; a space which is to varying degrees unconstrained by legal or legalistic rules. In this space, essentially autonomous individuals 'freely' make decisions that ideally reflect rational, reasonable and objective calculations and aim to apply general legal rules to individual cases. A standard dictionary defines discretion as "the power or right to decide or act, according to one's own judgement or choice." In the context of the administration of public law and policy, the 'freedom to choose' of autonomous decision-makers is defined in natural opposition to the constraints imposed by legal rules. Indeed the same dictionary defines 'arbitrariness', the most prevalent concern associated with discretionary decision-

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3 Random House 1987:563
making, as: "subject only to individual will or judgement, without restriction; contingent only on one's discretion: an arbitrary decision... having unlimited power; uncontrolled or unrestricted by law; despotic; tyrannical ...". The idea of discretion is thus heavily inflected with liberal assumptions and ideals relating to the power of law, autonomy and freedom of choice. Whether discretion is regarded benevolently or critically, its essential and inextricable binary relationship to law is largely taken for granted.

Ronald Dworkin theorized judicial discretion. As already noted, his "doughnut analogy" expresses a view of discretion which rests upon the opposition of law and discretion. This view assumes, in its most extreme form, that law and discretion are discrete and distinct entities that are negatively correlated: more law means less discretion and less discretion means more law. Discretion is regarded and treated as a residual category, existing only in the absence of law. It also implies that discretion is itself a rather uninteresting space, a 'hole in the doughnut’, and that the only meaningful constraint on discretion is law.

In her work on discretion, Nicola Lacey challenges and seeks to unsettle the dominance of the legal paradigm which she defines as follows:

...the subjection of areas of human conduct and practice to regulation according to clear, prospective, publicly announced general rules or rule-like standards. Problems are typically seen as arising from ambiguities or 'gaps' in the rules, calling for clearer interpretations or further legislation.

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4 Random House 1987:107

5 For fear of misrepresenting Dworkin's conception of discretion, it should be mentioned that in fact, Dworkin's conceptualization of discretion aimed to complicate and challenge this view by proposing that even where there is no explicit laws or rules which govern a decision, the constraining reach of the legal principles of the rule of law extends well beyond the written laws. Dworkin's account of discretion actually explains away discretion by arguing ultimately that discretion by its very nature is subject to its own limitations. Therefore he argues there is really no such thing as 'absolute' or 'unfettered' discretion. Judicial decision-making is always constrained by legal principles. Despite this positivistic departure, Dworkin's conception of discretion still rests upon its binary opposition to law; the only difference is the expansive way in which he defines 'law'.
or quasi-legal action. Disputes are seen as calling for resolution on the basis of given rules and according to standards of due process. This approach is closely associated with the ideal of the ‘rule of law’ and hence with liberalism as a doctrine of political morality.6

In the current political debates on discretionary decision-making in the administration of detentions and removals, critics repeatedly voice their concerns about the prevalence of arbitrary and inconsistent decision-making occasioned by broad allocations of discretionary powers. Critics charge that arbitrary decision-making, that is decision-making that is not guided by law or rules, allows for the influence of racism, sexism, homophobia and other discriminatory and irrelevant considerations in the making of a decision. For many, the solution seems logically to lie in the creation and application of more rules. Indeed, this is the approach given strong expression in a major recent report discussed below. Arguably, current political thinking on these matters hasn’t moved much past the 1960s, when discretion re-emerged as a ‘problem’.

In the 1960s, discretion was increasingly regarded by legal scholars as a serious real and potential threat to individual justice. Discretion became increasingly understood as synonymous with tyranny and caprice - until that time, discretion had been generally regarded benevolently, as a ‘humanizing’ device to permit the general rules of law to be adapted to the separate circumstances of individual cases. One of the first major critiques of discretionary administrative decision-making was written by an American lawyer, Kenneth Culp Davis. His major and influential work *Discretionary Justice: A Preliminary Inquiry*7, published in 1969, issued out of his important insight that justice for individuals is administered more outside the courts than in them. Rather than as a clear cut binary, Davis conceptualised the relationship between discretion and law in terms of a scale or continuum - with absolute discretion at one end and absolute law on

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the other. Davis was concerned with the potential for injustice associated with discretionary administrative decision-making. While he acknowledged the need for discretion in order to achieve individualised justice, he argued that the extent of discretion wielded by public officials was too vast. His proposals aimed to eliminate 'unnecessary' discretion and limit, constrain and structure 'necessary' discretion. He advocated the use of precise rules to 'confine' discretion thereby "eliminating and limiting discretionary power...fixing the boundaries and keeping discretion within them." Discretion is a problem for Davis only when it is inadequately regulated by rules.

In many respects, Davis' work echoed though modified the arguments made by A.V. Dicey in 1915 regarding the choice facing democratic societies between 'ordinary' law and courts and 'arbitrary' and discretionary powers of public servants. Dicey associated discretion with arbitrary might and coercion; discretion in his view was the 'antithesis of law'. It stands in direct opposition to the conventional view of the rule of law which dictates that people should be governed by laws not by arbitrary individual decisions.

Dicey's was the dominant traditional view of discretion in the late 19th and early 20th century. With the rise of the welfare state, this view was replaced by the more benevolent view until the 1960s when Davis and many others began to return to these preoccupations. Discretion was then again viewed as the antimony of the rule of law. Discretion was associated with tyranny, arbitrariness and caprice whereas the rule of law assures certainty, fairness and consistency. As such, discretion has tended to be constructed as a problem to be acted upon; to be eradicated, constrained, limited or structured. From the conventional liberal legal perspective, discretion poses particular problems when it threatens individual rights and individual justice. Accordingly, as put by Lacey, "...the issue of control is often represented in terms of the protection of the

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individual from state or bureaucratic abuse.” While most acknowledge that its presence is necessary, indeed inevitable, given the complexity and diversity of the administration of the modern liberal state - nonetheless, its use (or abuse) has, since the 1960s, been a matter of growing concern.

Not only are laws and rules considered to be the only meaningful check on discretion but where there is a ‘gap’ in them, it is assumed that the individual decision-maker is afforded the opportunity to flex their essential autonomy and to be, to varying degrees, ‘free to choose’ between possible alternatives. Davis’ definition of discretion is still widely cited, despite its generality: “A public official has discretion whenever the effective limits on his [sic] power leave him [sic] free to make a choice among possible courses of action or inaction.” Generally speaking, most definitions of discretion rest upon the liberal assumption that the decision-making subject is fundamentally and inherently autonomous and that discretionary decision-making is thus a matter of (free) choice - even if it is a choice which is guided by external influences.

A succinct example of this traditional view is provided by H.C. Black, who asserted in 1968 that agents who exercise their discretion, do so “according to the dictates of their own judgement and conscience, uncontrolled by the judgement and conscience of others.” As put by Bell:

(A)most any definition of discretion starts with the notion of choice ... The central aspect of this notion of choice is...the degree of self-determination which the actor possesses as a consequence of the responsibility which he [sic] has for achieving the success of a particular enterprise. Tied closely with this aspect is the freedom the actor

10Ibid..367

11Ibid...4

has from external constraints. 13

While the debates around the issue of discretion in the context of administrative decision-making reveal that these three assumptions (the primacy of law: law/discretion; and autonomy and choice) are still firmly underlie public and political debates and policy recommendations, recent scholarship on the issue of discretion reveals that these assumptions are beginning to be scrutinized and challenged. This study aspires to contribute to this more recent literature by developing and applying an historically sensitive, discursively oriented, social and political analysis of the exclusionary uses discretionary power in the development and enforcement of Canadian immigration law and policy.

In Davis’ acceptance of the discretion/law dichotomy, Davis’ solution to the ‘problem’ of discretion was to make administrative decision-making more rule bound and legalistic, assuming not only that rules and laws entail no element of discretion but also that the imposition of rules will necessarily result in increased individual justice. These assumptions reflect the more general and pervasive liberal legal conceit concerning the importance of the rule of law to the attainment of individual justice. It is assumed that procedural justice necessarily translates into substantive justice. Further, Davis’ work continues the longstanding preoccupation of liberal legal thinkers with individual justice. D.J. Galligan, in his substantial study of legal discretion takes issue with a number of Davis’ arguments. Central among these is his important observation that Davis excludes any consideration of policy-making in his definition of discretion. As put by Galligan, policy-making is “...the very heart of the discretionary process”14 This view is shared by Peter Manning who observes that policy, like legal rules, acts “...as one of the constraints


in the context or field within which individual decisions have to be made.”

The law/discretion dichotomy expressed in Dicey’s work and reasserted by Davis has also been increasingly subjected to critical scrutiny. Contemporary critical scholars now increasingly acknowledge that there is indeed no clear distinction between discretion and law. The law-discretion dichotomy has been increasingly unsettled though not totally undermined. Legal scholars concede that laws and their application are suffused with discretion and that administrative discretion is in fact extensively curbed by rules. As put by Madame Justice Beverly McLachlin: “Things are not as simple as Dicey perceived them. The law is not as certain as he would have it, nor are administrators as arbitrary.”

Lacey summarises the limitations of studies of discretion which derive from the legal paradigm. She argues that the legal scholarship on discretion tends to emphasise legal views and legal solutions over administrative ones. It is preoccupied with studying discretion in adjudicative settings and rests on a firm belief in the courts and adjudicative procedures. Emphasis tends to be placed on the importance of judicial review which in turn leads to an overemphasis on procedural justice at the expense of substantive justice. As Lacey points out, injustice can occur (as indeed can substantive justice) despite procedural controls. Ultimately, Lacey objects to the tradition of analytical jurisprudence, such as that engaged in by Dworkin, which tends to “...reinterpret the nature of the world by essentially imposing legal or quasi-legal categories of thought.” It is in light of these criticisms that Lacey calls for an interdisciplinary, pluralist approach to the study of discretion; an approach which views discretion in the context of legal, economic, political and social power.

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Joel Handler is a legal scholar who, like Davis, is concerned about the potential for injustice which discretionary decision-making brings in tow. However, Handler does not share Davis' optimism regarding the effectiveness of legal or 'law-like' rules to govern discretion and thus maximize individual justice. Neither does Handler share Davis' view of the inherent threat of discretion. Rather, Handler analyses how "discretionary authority can be harnessed to advance social policy by serving the needs of powerless groups." 18 Handler is particularly attentive to the question of unequal power relations and unequal resources in the context of discretionary decision-making. He makes the obvious, but surprisingly rare, observation that solutions which call for more rule of law, more legality, more due process are of limited application "...especially since procedural due process protections are such a problematic remedy for the vast majority of dependent persons." 19 Handler argues that discretion is inevitable and that "...as long as large social agencies are serving and regulating the disadvantaged, then the problems of unfair power in the exercise of discretion must be addressed." 20

Discretion is ultimately a political issue, not simply a legal one. Lorne Sossin's work on discretion, administration and the welfare state shares Handler's concern with identifying ways of making the use of discretion in administrative contexts more responsive to the needs of the disadvantaged. Sossin, like Handler, is concerned to identify ways in which discretion can be employed to advance the interests of the disadvantaged. As put by Sossin:

Discretion represents an important and long undervalued means of integrating human relations into the administration of public authority. The question is not whether to allow discretion (because it is both endemic and indispensable to the functioning of the welfare state), but rather what kind of discretion should be fostered, and whose participation should be

18 Keith Hawkins (ed.) The Uses of Discretion, 1992: 292

19 Joel Handler "Discretion: Power, Quiescence and Trust" in Keith Hawkins (ed) The Uses of Discretion, 1992:360

20 Ibid.,360
Sossin is dismayed with the 'depoliticization' of the public sphere. He calls for the increased democratisation of administration by engaging the public in its processes. The problem with public administration, in Sossin's judgement, is that it is "closed off to [the public] as a conduit of political participation". Sossin finds Dworkin's 'hole in the doughnut' analogy unsatisfactory, in its place he offers up a 'sponge'. He states:

I find the emptiness in the centre of the doughnut an uncompelling representation for discretion's porous potential. Discretion is shaped by far more than the formal legal structures which surround and legitimate it....In a sponge, there are a variety of holes and substance in between, and the two are impossible to detangle. The sponge, however, can absorb and retain the fluids with which it comes into contact. This is how I believe the relationship between discretion and law ought to be viewed - not simply as a particular form of authority - but as a potential forum for politics.

Sossin advocates the pursuit of a 'communicative community' in the Habermasian sense. However, he, like Handler, is cognizant of the effects of unequal resources and positions of dependency on the attainment, or at least the approximation of the ideal of an inclusive, communicative public sphere. As he puts it, "[W]hile Habermas was surely right when he asserted that '[m]oney and power can neither buy nor compel solidarity and meaning', they certainly can and do skew the communicative potential of a contemporary public sphere." Sossin's attention to material inequalities is important. It should however be noted that there is in Sossin an enormous assumption that greater popular involvement equals greater justice.

The legal conceit expressed by Dworkin's doughnut analogy has resulted in most

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22 Ibid., 9

23 Ibid., 12

24 Ibid., 13
attention being focused on the ‘surrounding belt of restriction’ rather than the ‘hole’ of
discretion. Sossin argues that only by revealing the artificiality of the legal and political
isolation of discretion can its ‘transformative’ potential be realised. In recent years there
has been a growing interest in discretion-centred studies (as opposed to ‘law/rule-
centred’). This is a positive development. Lacey argues that traditional legal approaches
to law, and their tendency to treat discretion as a residual category, has meant that
relatively little attention has been paid to how decisions are actually made and when
attention has been paid to actual decision-making it has tended to focus on judicial
discretion and judicial review.

Studies of ‘how decisions are actually made’ in other than judicial settings, have
tended to come from the social sciences. Where legal scholarship has tended to privilege
the law side of the dichotomy, social scientists have tended to focus on the discretion side
privileging, in the process, social forces. In this, social science studies contribute to the
gradual ‘de-centring’ of law by denying its essential primacy and by focussing analytical
attention on ‘extra-legal’ or ‘non-legal’ influences on discretionary decision-making in
particular contexts. The dividing line between law and discretion has been rendered less
definite and the primacy of law less certain, however, the fundamental binary remains
intact.

Social scientific approaches to discretion tend to emphasize that discretion is
shaped by a myriad of so-called ‘extra-legal’ or ‘non-legal’ forces; that rules/law are but
one of many possible constraints or influences on discretionary decision-making. While
not really escaping the dichotomy, these studies do contribute to the gradual de-centring
of law in the public, political and academic spheres. They seek to shift attention away
from law and focus on the ‘extra-legal’ influences on discretionary decision-making.
They acknowledge and take seriously the proposition that, contrary to the impression
conveyed by Dworkin, legal rules are not the only important or effective constraints on
discretion. As put by Bell,

(F)ar from being the uninteresting ‘hole’ in legal regulation, discretion is
the centrepiece of the institutional edifice to which legal rules play a
subservient role of setting the boundaries...the importance of legal controls
must be viewed in relation to other social controls which operate in a particular area.\textsuperscript{25}

While social scientists might be faulted for underestimating the influence of law/rules in discretionary decision-making, the contributions which they have made regarding the actual uses of discretion are illuminating. Further, where legal scholars have attended to actual uses of discretion, they have tended to focus on adjudication and, as noted by Galanter, this focus on adjudication is "...vastly disproportionate to its prominence as a source of rules."\textsuperscript{26} Traditionally, social scientists had been more interested in law and justice outside the courts. Although, as observed by Hawkins, over the last 25 years sociologists, criminologists and political scientists have been increasingly interested in discretion in legal decision-making.\textsuperscript{27} For example, an important contribution was provided by D. McBarnett who observed that discretion is not only present in legal decision-making, but it is in actuality functional for the legal system in that it allows for the management of the lack of fit between legal rhetoric and reality.\textsuperscript{28} Lacey also observes that social scientists have shed light on other uses of discretion, for example: obscuring the lack of consensus or ambiguity about official policy; pre-empting the use of formal legal controls; or bestowing political and administrative power such as that wielded by immigration decision-makers.\textsuperscript{29} Some social scientists have approached discretionary decision making as a form

\textsuperscript{25}John Bell, "Discretionary Decision-Making: A Jurisprudential View" in Hawkins (ed.) \textit{The Uses of Discretion}: 102


\textsuperscript{27}Keith Hawkins, "The Use of Legal Discretion: Perspectives from Law and Social Science" in Hawkins (ed.) \textit{The Uses of Discretion}, 1992:19-20


\textsuperscript{29}N. Lacey, "The Jurisprudence of Discretion: Escaping the Legal Paradigm" in Hawkins (ed.) \textit{The Uses of Discretion}, 1992:364
of administrative behaviour. One strain of analysis from this functionalist perspective is called the ‘rational actor model’ or ‘classical rational model’ of decision-making. This perspective assumes a fundamentally rational, free-thinking and autonomous conception of the individual decision-making agent. In this view, decisions are made in order to achieve the goals of an organization using the best available information. As described by Hawkins, in this view a decision “...is treated as a choice made by an individual based on unproblematic ‘factors’ or ‘criteria’ which may be deduced from the creation of a putative relationship between observed input (information) to a decision-maker and observed output.”

The usual criticisms of this approach are that: it assumes a congruence between the interests of the decision-maker and those of the organization; it assumes a clear and unproblematic and singular organizational goal or set of goals; and it assumes that decisions are made by autonomous individuals who are unconstrained by any other factors or influences. The full implications of this last criticism are rarely explored, namely that the fundamental premise of ‘choice’ and ‘autonomy’ belies an uncritical and taken-for-granted understanding of individual subjectivity; a criticism which, as we have seen, bedevils liberal legal analyses as well.

Additionally, the rational actor model thus fails to consider other ‘non-organizational’ factors which guide and shape discretionary decision-making. Influenced by this criticism, many social scientists have become increasingly interested in the importance of the broader context of decision-making and the various social, economic, political and legal factors which may guide (or shape or limit or determine - depending on your perspective) discretion. An expression of an extremely deterministic analyses of discretionary decision-making is provided by M. P. Baumgartner who asserts provocatively that discretion is a myth.

Baumgartner proposes that the legal view that laws are the only meaningful

30 Keith Hawkins, “The Use of Legal Discretion: Perspectives from Law and Social Science” in Hawkins (ed.) The Uses of Discretion, 1992:22

constraint on discretion has obscured the role of social forces in constraining or shaping discretion. Baumgartner speaks of 'social laws' which she argues determine administrative discretionary decision-making in an extremely predictable and consistent fashion. She even asserts that social 'laws' result in more certainty that legal rules because social laws are general and transcend time and jurisdiction. In Baumgartner's view, due to the functioning of social laws, discretion is synonymous with discrimination. Baumgartner, like Dworkin, presents an extreme analysis of discretion, however where Dworkin assumes the expansive and deterministic nature of legal laws, Baumgartner substitutes social laws.

There is now as well a substantial social science literature that has focused specifically on police discretion. Most of these studies are preoccupied with identifying the 'factors' that affect the uses made of the discretionary decision-making of the police and with measuring their relative statistical importance. Unlike the more 'naturalistic' approaches mentioned above, these studies do little in the way of critically examining the fundamental assumption of the autonomous decision-maker. Discretion is understood to mean 'freedom to make choices' or 'power to choose'. For example, the policing literature on discretion subscribes for the most part to a 'rule-based' conception of and framework for, action32; just as we have seen with the legal analyses, the world of decision-making becomes divided into 'legal' and 'extra-legal' criteria which influence police decisions. in particular the decision whether or not to lay a charge. As summarised in a recent text on Canadian policing:

Ultimately the police must have the discretion to decide whether or not to lay a charge. The question is which criteria the police will use when enforcing the law, not whether they will use discretion. Very simply, the criteria police use can be classified into four groups: criteria relating to the offence, criteria relating to the offender, criteria relating to the officer and criteria relating to the setting in which the offence was committed. A few of these criteria, such as the seriousness of the offence and the availability of evidence are appropriate criteria as demonstrated by the fact that they

are authorised by law; however, many other criteria police use, such as the sex, race and sexual orientation of the offender, are prohibited by law and therefore should not be used by police. 33

Clearly, the rule-based conception of decision-making is pervasive in the policing literature and with it, the uncritical acceptance of the very notion of ‘freedom to make choices’ and the underlying assumption about the inherent autonomy of individual subjectivity which such notions presuppose. Also endemic is the zero sum concept of rules and discretion; more rules means less discretion and vice versa. The following observation made in a recent text on policing is typical: “The fewer the rules about handling incidents and situations, the more discretion officers have”34 Furthermore, most of the research in this area is quantitative, preoccupied with identifying and measuring the relative statistical importance of different ‘legal’ and ‘extra-legal’ criteria on police officers’ discretionary decision-making. The inherently autonomous decision-making agent is taken for granted.

A provocative departure from the conventional preoccupations of this particular field of study is provided by Shearing and Ericson. They, like Manning, make use of ethnomethodological insights and semiotics in their analysis of police action and culture. Shearing and Ericson bring to the discussion an attention to the construction of subjectivities and the role of cultural narratives in this construction thereby challenging what they term the ‘hegemony of the rule-based paradigm’. As put by the authors:

In studying policing, sociologists have examined the fit between legal rules, viewed as instructions, and police decisions. Typically they report that police officers deviate from these legal instructions...Instead of using these findings to question the rule-based paradigm, however, they have accepted as axiomatic the belief that all action is rule generated and concluded that there must be some other set of rules that is generating


police action.\textsuperscript{35}

This observation is generally applicable to a large number of sociological studies of administrative decision-making and indeed of sociological studies in general. Attempts to identify ‘law-like’ or ‘rule-based’ explanations of decision-making are widespread. Baumgartner’s study discussed above provides a typical, albeit extreme, example of this. Shearing and Ericson attempt to provide a theoretically more sophisticated analysis of police agency - one that does not simply explain action by reference to individual choice or (assumed) rules. In so doing, they bring the difficult questions of the constitution of subjectivities and the artful construction of realities to the fore. In this, their approach is similar to Manning’s analyses of administrative decision-making.\textsuperscript{36}

Manning approaches the uses of discretion from a ‘naturalistic’ perspective. The naturalist approach attends to the importance of context in understanding the nature of discretion. It is concerned to study how decisions are actually made; the basis of these decisions and their meaning and significance to the agents who undertake them. However, in this approach, decisions are not considered to be the product of individual choice or rational, autonomous judgement and planning. Rather, these social scientists have focused on the importance of structures of meaning (‘frames’) and contexts of decision-making (‘horizons’), including organizational, social, political and economic.

Manning, like Shearing and Ericson, is similarly opposed to rationalistic and individualistic views of discretion. Emerson and Paley’s work on administrative decision-making\textsuperscript{37} also shares this orientation. They observe that a case cannot be analysed independently of context; ‘facts’ and ‘files’ are ‘artfully’ assembled and this involves


\textsuperscript{36} P. Manning. “‘Big Bang’ Decisions: Notes on a Naturalistic Approach” in Hawkins (ed.) \textit{The Uses of Discretion}, 1992

\textsuperscript{37} R. Emerson and B. Paley “Organizational Horizons and Complaint Filing” in Hawkins (ed) \textit{The Uses of Discretion} 1992
"...not only the construction, but the selective reconstruction of reality." The 'naturalist' approach is strongly influenced by the insights of ethnomethodology and semiotics. It begins to explore how decisions are 'constructed' as opposed to 'made' by decision-making agents. It complicates the generally taken-for-granted understanding of subjectivity and rationality. Moreover, it does not seek to identify new 'universals' to explain decision-making but rather sees decision-making as an activity constructed by a myriad of shifting and dynamic influences - influences which do not merely shape decisions but which actually constitute them.

III) Administration and Judicial Review

In any policy discussion of discretionary administrative decision-making, the question of judicial review is frequently raised. Again, this preoccupation with judicial review is a further indication of the continuing dominance of the law/discretion opposition and its prevalence in public and political discourse. This is particularly relevant to the issue of detention under the Canadian Immigration Act which provides the primary focus and example for this discussion of discretion. The debates around the question of immigration detention always include consideration of the extent of judicial review available as a potential check on the abuses of discretionary decision-making in this area.

With respect to the question of judicial review, it has been observed that judicial self restraint is evident in all issues respecting immigration, national security and/or defence. The most extreme historical examples of this kind of restraint include the deference by the courts to the broad tracts of administrative discretion used by the state during wartime; measures which were extreme, coercive and discriminatory. This judicial deference subsided somewhat after the war, however, it has been observed that the courts continue to be reluctant to intervene in administrative decision-making when the decisions rendered are related to questions of national security and public order; as

38Ibid., 124
put by Cowan, "...considerations of national security and public order still influence judicial review." Cowan goes on to note that while the courts maintain a 'residual' jurisdiction to ensure procedural fairness, they have held that "the resolution of the conflict between national security and individual freedom was a non-justiciable issue, one for the Minister, who was responsible to Parliament alone, to decide."

An alternative approach to thinking about the relations between law, administration and discretion is developed by Peter Fitzpatrick. In contrast to treating the limited availability of the remedy of judicial review for immigration decision-making specifically, and indeed of administrative decision-making more generally, as a residual problem stemming from the inherent opposition and conflict between law and administration, Fitzpatrick examines this tension as a productive and positive one: one that results in the 'mythical mutuality' of law and administration.

In his work entitled The Mythology of Modern Law, Peter Fitzpatrick provides an account of the relation between law and administration that is particularly compelling. Fitzpatrick develops intriguing and persuasive analyses of the historical development of the relations between law and administration and the apparent binary which they represent. Fitzpatrick argues that instead of an antinomy existing between law and administration, there is "...an operative compatibility between them". Fitzpatrick is responding here to the claims made by scholars, in particular by Unger, of 'the death of law'. Fitzpatrick observes that the standard story is that the rise of bureaucracies and expanded administration has led to increased inconsistency, increased discretion and reduced generality; in this tale "...[t]he rule of law - as general in application, predictable


40Ibid. 32

41 P. Fitzpatrick The Mythology of Modern Law, Routledge: 1992

42 Ibid. 149
and autonomous - is thus undermined.\textsuperscript{43}

Fitzpatrick approaches the law as myth. Approached in this way, law and administration may be regarded as having a 'mythic mutuality'. Fitzpatrick's argument is that administration and law are mutually, mythically, coherent. That is, the limits of each are supplemented by the reach of the other and, in the process, the mythical existence of each is reaffirmed. In his words:

... [the] pervasive and tentacular penetration [of administration] inevitably displaces or at least marginalizes law. Yet this...is only part of the story. If we consider the nature of modern administration itself, we find that it is bound by certain operative limits. It is in those very limits that the rule of law assumes a dynamic existence, one distinct from and opposing an administration to which it forms a necessary supplement. Moreover, in this relation to administration, law itself is limited by and dependent on administration. A contradiction involved in which law and administration are integral and yet necessarily opposed. Law and administration in their mythic mutuality limit each other yet sustain the claim of each to be unlimited. \textsuperscript{44}

Fitzpatrick is taking issue with the widely held view that the demise of law originated in the late nineteenth century with the growth of extensive state administration. He rejects the view that administration has undermined law from the outside so to speak, arguing instead that the allegedly 'corrosive' effects of administration were in fact 'integral' to modern law.

Fitzpatrick explores Foucault's proposition that modernity entailed a shift from 'sovereign legal power to disciplinary rule. Fitzpatrick argues that the conventional tale which holds that the rule of law, in all its certainty, predictability and generality, was 'undermined' by an ever expanding administration characterised by discretion, particularity and variance, rather than evidencing the death or imminent demise of law, actually speaks to its continued power and influence. His argument is that the rule of law derives its very existence in contradistinction to the 'particularistic and pervasive powers'... 

\textsuperscript{43}Ibid., 147

\textsuperscript{44}Ibid., 149
of administration. Thus, it is not simply that law has been displaced to the margins or the periphery "...confined to some largely symbolic or procedural oversight of the operation of administration" but in fact, it is precisely because of these particularistic and pervasive powers of administration "...that the rule of law can be maintained in its aspects of universality and equality and seen as marking out fields for free action." Accordingly, in Fitzpatrick’s analysis, if law were substantially to counteract administration, it would in fact be undermining the conditions of its own existence; "administration is the necessary ‘dark side’ of law." 

Fitzpatrick supports this proposition by examining judicial review of administrative action. He aims to show that despite the fact that judicial review is held to be "...operatively the ultimate expression of the rule of law and its dominance over administration" it actually has "heightened the limits of law." He provides evidence which speaks to both the inherent limitations of the rule of law vis a vis administration and the converse. He outlines many of the mechanisms and requirements that preclude law’s interference with administration, including for example the requirement that judicial review limit itself to questions of procedural fairness or ‘improper’ uses of discretion and the vague, discretionary and and watered down application of the requirements of ‘natural justice’. He also describes those checks that are present in the field of administration which prevent or ‘obviate; recourse to the law. Fitzpatrick

45Ibid., 154
46Ibid., 154
47Ibid., 154
48Ibid., 154

My reading of the legal literature on the judicial review of administrative decision-making is consistent with Fitzpatrick’s thesis, more specifically, the law places considerable limits on the availability of judicial review for administrative decision-making. The limited availability of judicial review is particularly pronounced in the context of immigration and parole decision-making. While this will be addressed in a general way a little later on in this chapter, for a much more comprehensive discussion of administrative law, discretion and judicial review see Charter of Rights and Administrative Law, Law Society of Upper Canada, 1986.
concludes that the relation between law and administration is one of interdependence and mutual affirmation. Fitzpatrick argues that "...law, in short, provides a guarantee that everything is really so." He explains:

The scope remaining for law consists only in dealing with aberrations. Law is thence responsibly self-limiting. As an institution, it constitutes itself and its interventions as occasional and discontinuous. Law is not, however, simply responsive to the nature of things. It evokes, affirms, even creates the normal and authority as normal. Through law's shaping and dealing with the exceptional and the aberrant, with what is outside the properly administered world, administration is rendered normal and right.  

In this way, Fitzpatrick demonstrates the dynamic processes by which we become 'reassured about bureaucratic organization'. This view can be read as an elaboration of G.E. Frug's more conventional critical analysis of public administration. Frug was concerned to 'undermine the ideology of', and 'expose the false consciousness' induced by bureaucracy. Writing in 1984, Frug also made the shrewd observation that the scholarly, legal and political preoccupation with the judicial review of bureaucratic decision-making is precisely what "defines, perpetuates, explains, justifies and reassures us about bureaucratic organization."  

49 Ibid., 160

50 Ibid., 160

51 Fitzpatrick's analysis is provocative and intriguing. If there is a criticism to be made, it is that his analysis leaves little room for alternative processes or explanations. That is to say, while Fitzpatrick avoids the usual problems associated with critical legal theory - namely crude reductionism and determinism - he nonetheless arguably constructs an analytical framework that approximates a 'grand theory'. While Fitzpatrick doesn't reduce the law or administration in any simple way to, say, economics, ultimately his analysis is founded upon an understanding of liberalism which, while persuasive, provides the foundation of all that follows; his conception of the originating properties of liberalism ultimately underlie and shape his analyses of all that follows.

In his provocative work entitled “Welfare, Rights and Discretion” Robert Goodin makes a persuasive case for abandoning the longstanding preoccupation with the problems of discretion and legal avenues of addressing them. Goodin argues that the logical opposite of enjoying discretion is being bound by a rule.\(^5^3\) He observes that this binary leads to the unjustified conclusion that the problems of discretion can be resolved by the application of a rule. In his words:

...(L)ogically, the natural response to finding that certain problems are inherent in discretion is to impose rules in the place of those discretions. The assumption that that will automatically solve the problem of discretion, however, entails the unwarranted presumption that every problem necessarily has a solution. Saying that the problems ...are inherent in discretion means that those problems can be resolved, if at all, only by curtailing that discretion through rules. But it is perfectly possible that those problems cannot be solved in that way either.\(^5^4\)

Goodin argues that ultimately the problems associated with discretion as they have been conventionally understood (arbitrariness, inconsistency and discrimination) are largely ‘insurmountable’ and ‘ineliminable’. He makes the important observation that these problems conventionally associated with discretion may also be associated with rules. While Goodin’s analysis of discretion does not ultimately disrupt the law/discretion dichotomy, he does argue that the logical assumption that issues from this dichotomy—that the problems associated with discretion can be remedied through the application of rules - is misguided. Goodin argues that the only problem associated with discretion that can be addressed through rules is the problem of manipulation or exploitation by decision-makers. Apart from this possible remedy, Goodin points out that all the other problems commonly associated with discretion are also in evidence with rules and laws. He states that rules, ”...cannot (necessarily, or without substantial costs in other respects) prevent intrusiveness, arbitrariness or insecurity. For much the same reasons that


\(^5^4\)Ibid., 250
discretionary decisions must display those attributes, rule-based decisions can, and probably will. 

Goodin’s work is an important contribution to the study of discretion and is particularly germane to the analysis developed in this thesis. He meticulously makes his case against rule-based problems to discretion through a persuasive critique of the recourse to law that the law/discretion dichotomy implies. Goodin’s work is important for another reason as well. After making his case for circumventing the problem of discretion and the privileging of rules in the resolution of such problems, Goodin draws attention to the link between discretion and the particular purposes which underlie both rules and discretion in a given context. Goodin’s empirical site for his discussion of discretion is the provision of welfare assistance. He argues that the problems which appear to arise in relation to discretion, actually arise because of the underlying purpose of welfare decision-making to distinguish between needy and deserving claimants and the needy and undeserving. It is this purpose, rather than discretion per se, that underlies the problems associated with discretionary decision-making. Goodin concludes by proposing that rather than dispensing with, or seeking to dispense with discretion, it is this purpose that should be dispensed with. More specifically, Goodin proposes that:

Imagine, in contrast, a world in which officials were guided only be the first half of that twin obsession: suppose officials are anxious to ensure that everyone who needs/deserves benefits gets them, but that they are utterly unconcerned to ensure that only they receive them. 

For the purposes of this study, Goodin’s work is valuable not only because it whittles away at the law/discretion dichotomy, but perhaps even more importantly because it makes the link between discretion and discretionary context; the underlying purpose of decision-making. In the context of immigration detention decision-making, the problems associated with discretion are similarly derived from the underlying practical

55 Ibid., 259
56 Ibid., 259
purpose of the decision-making in question: to distinguish between desirability and undesirability in the context of prospective immigrants and between deservedness and undeservedness in the context of refugee claimants. Discretionary power in the context of immigration decision-making is, by definition, discriminating and preferential: what is of particular importance then, is the bases for and the effects of these preferences.

This study of discretion and immigration detention decision-making takes seriously the specific context of discretionary decision-making. It assumes that discretionary power cannot be studied in isolation or in the abstract. The nature, uses and effects of discretionary power must be considered in relation to the political rationales which govern and justify it, the specific institutional and organizational dimensions of its existence, the local and dispersed nature of its workings and the complex, overlapping and dynamic processes which it traverses.

The limitations of the discussion and debates around discretion, administration and law suggest the need for the development of new ways of thinking about discretion. This study of discretion in immigration detention-making attempts to contribute to this development. It seeks to avoid the problems that issue from the core assumptions which underlie the contemporary debates, namely the primacy of law, the law/discretion dichotomy and the notion of autonomy and 'free choice'.

Understanding how exclusionary immigration decision-making takes place requires a different way of thinking about discretion. Rather than thinking of it as a relatively uncomplicated expression of individual agency unchecked, to varying degrees, by legal constraints, discretion can be thought of as a particular form of power characteristic of liberal forms of governance. The conventional view of discretion reproduces and reinforces the liberal idea of the autonomous individual agent: it serves to maintain and reproduce the distinction between law and administration; and it insulates many areas of governmental decision-making from serious critical scrutiny.

In this work, discretionary immigration detention decision-making is regarded not only as a negative and coercive power, but also and necessarily as a positive and productive power. Discretionary power is positive in the sense that it may be employed,
albeit in varying degrees, in the advancement of different objectives. Discretionary power is productive in the sense that it produces subjectivities and identities which are then regulated accordingly. Discretionary power is local and dispersed, both within governmental and non-governmental spheres. While it is true that those discretionary powers that are associated most closely to the state are likely more powerful determinative of outcome, discretionary powers are also noteworthy at non-state levels. For example, while the discretionary powers of legal aid to grant or deny funding for legal counsel for a detention review may not be equal to those of adjudicators who determine the outcome of individual detention cases, they are none the less still extremely important and operate in conjunction with other discretionary powers in the resolution of individual cases. Discretionary powers are thus local and dispersed in the sense that they exist both inside and outside the state and are dispersed along different networks, processes and agencies. Additionally, discretionary powers are local and dispersed in the sense that even within the sphere of government, different agents and agencies all engage in discretionary decision-making that is not, and arguably could not possibly be, comprehensively regulated by legal rules or departmental policies. Understanding discretion in this way allows for the exploration of the complex and dynamic relations and processes that together all impact upon the administration of state law and policy in the context of immigration detention.

In this view, discretionary power produces the figure of the autonomous, free-thinking decision-maker, in this context, the immigration officer or the adjudicator. Discretionary power is part of, and indeed constitutes their subjectivities. In the context of Canadian immigration detention and deportation policy, this productive discretionary power is then employed in repressive sovereign ways against 'undesirable' (criminal, infected, destitute, uncooperative) and/or undeserving (for example the 'bogus refugee') non-citizens. However, these negative and coercive uses of official discretionary power are also productive. The application of coercive and repressive sovereign sanctions against undesirable and/or undeserving non-citizens (detention, use of body restraints, deportation) serves to reproduce the power and 'rightness' of sovereign penalty. Further,
the coercive and negative sovereign sanctions applied against non-citizens are also productive of a desirable and deserving citizenry (law-abiding, healthy, acquisitive and cooperative).

The discretionary power which governs both desirable and undesirable non-citizens in coercive and productive ways is inflected by dominant, historically specific discourses. In the present day, the dominant discourses which inflect the uses of discretionary power in the administration of the exclusionary provisions of the Act, in particular those provisions which sanction the detention and deportation of non-citizens, are the discourses of danger/risk and criminality. Certainly alternative discourses complicate decision-making in this area, most influential of these issue out of a human rights perspective and out of the liberal legal paradigm.

This proposition will be explored and developed throughout this thesis. For now, suffice it to say that in the present day undesirability is increasingly associated with criminality and danger/risk such that the detention and deportation of non-citizens is primarily justified on those grounds. Today, the archetypal undesirable citizen is the 'criminal immigrant' who represents a risk to the 'safety and good order' of Canadian society. The coercive regulation of the 'criminal immigrant' also serves to constitute and govern all non-citizens, not only those subject to its applications. More specifically, the negative and coercive sovereign powers of detention and deportation also represent the ever present looming spectre which contributes to the constitution and regulation of the figure of the law-abiding desirable immigrant. In this way it can be seen that negative and coercive uses of sovereign power, detention and deportation, interacts and coexists with less visible forms of regulation. It also can be seen how the particular use of discretionary power cannot be divorced from its specific context and the dominant discourses which inflect its uses.57

57 Discourses do not simply refer to ways of speaking or thinking about an issue, but also to ways of acting upon an issue; laws and policies, institutional and organizational arrangements, networks, strategies and processes.
IV) The Law and Policy Governing the Detention of Non-Citizens Under the Immigration Act

Discretion is today and has always been a central feature of the Canadian Immigration Act. Discretionary decision-making, political and bureaucratic, is integral to the political and legal determination of desirable and undesirable immigrants and deserving and undeserving refugees. The conventional legal definition of discretion is "the power to choose between two or more courses of action each of which is thought of as permissible." Administrative law has long been characterised by the degree of discretion afforded to its administrators. This discretion has been justified on primarily two grounds: a) discretion allows for the tailored application of general laws to individual cases facilitating the attainment of individualised justice and b) discretionary powers of decision-making are essential to the efficient and effective administration of legislation that affects huge numbers of people in complex and varying ways. Canadian Immigration legislation is suggestive, allowing for considerable scope for discretionary decision-making at each stage of the process. While the discretionary powers of criminal justice officials have been widely studied, monitored, debated and critiqued; not so the discretionary powers of Immigration officials.


59A review of the scholarly literature on immigration detention in Canada is not included here largely because it doesn’t exist. A recent American exception to this general lacuna is provided by Janet A. Gilboy (1991, 1996). Despite the proliferation of scholarly works, both historical and contemporary, on the subject of Canadian immigration policy and practises, very few engage in any analysis of discretion and/or detention as objects of study. If mention is made of detention, it is usually limited to a brief description of the law and policy which governs its uses. Where discretion is regarded as a ‘problem’, the focus tends to be on the need to tighten up judicial review and due process. This lacuna is not insignificant for my thesis. The absence of such studies indicates that for the most part, scholars too continue to be preoccupied with legal remedies and have not moved beyond the limits of the law/discretion dichotomy and the liberal legal paradigm. Moreover, the absence of any theoretical or empirical research on Canadian immigration detention certainly represents a ‘gap’ which this thesis addresses.
The debates around the uses of discretion in the administration of governmental law and policy have understandably been particularly pointed when the decisions that are taken on individual cases entail serious consequences for the life and liberty of the person in question. The administration of the legislative provisions of the *Canadian Immigration Act* (forthwith referred to as the *Act*), and in particular those provisions dealing with the detention and removal of non-citizens entails just such dire consequences. The *Act* sanctions the use of coercive sovereign power against non-citizens who, as a result of a series of broadly discretionary decisions and a complex web of interactions between governmental and non-governmental discretionary powers, have been determined to require detention.

Immigration officers (who are civil servants employed by CIC) and adjudicators (who are order in council appointees to the independent adjudicative tribunal, the Immigration and Refugee Board) have broad statutory powers to detain non-citizens. In the field of immigration, parliament has established two main grounds that justify detention: 1) the person is likely to pose a danger to the public; and 2) the person is not likely to appear for an examination, an inquiry or removal. (Sections 80.1 and 103 of the *Act*). Immigration officers make the initial decision to arrest and/or detain. All detention cases must then be reviewed by a Senior Immigration Officer (SIO) within 48 hours of the initial detention. The SIO reviews the case to determine whether release is appropriate. In exercising their power, the SIO has considerable discretion in imposing terms or conditions of release on a person who has been detained. If the person is not released within 48 hours of their initial detention, seven days later, the decision to retain

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60 Although ‘fail to appear’ and ‘danger to the public’ are the most common grounds for detention, other grounds exist under S.103.1. According to both the IRB *Guidelines on Detention* and the draft copy of the yet to be released CIC *Guidelines on Detention*, these grounds are however rarely applied. They relate to port of entry cases where a) a person is unable to satisfy an immigration officer with respect to that person’s identity, or b) in the opinion of the Deputy Minister or a person designated by the Deputy Minister, there is reason to suspect that the person may be a member of an inadmissible class described in paragraph 19 (1) (e), (f), (g), (j), (k), or (l).
is again reviewed, however from this time onwards, the review is carried out by an independent immigration adjudicator who is a member of the Immigration and Refugee Board, a quasi-judicial independent tribunal. Adjudicators have the power to order the detention or continued detention of a person. They may also order that a person be released subject to terms and conditions which the adjudicator deems appropriate, including for example the payment of a security deposit or the posting of a performance bond.\(^{61}\) If, at the 7 day interval, the detention is continued, subsequent reviews take place at 30 day intervals until the case is resolved.

The courts ruled in \textit{Sahin} (1994) that in addition to making a determination as to whether one or both of the two acceptable grounds for detention exist, the decision-maker, either the immigration officer or the adjudicator, must also consider whether continued detention accords with the principles of fundamental justice under section 7 of the \textit{Charter}. This judgment should perhaps be quoted at length:

\begin{quote}
Although the power which is given to the Secretary of State in para.2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorize detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.\(^{62}\)
\end{quote}

This means that while the \textit{Act} does not limit the total length of detention, there are implicit restrictions, namely that the length of detention must be "reasonable". As stated

\begin{flushright}
\textit{IRB Guidelines on Detention}, March 12, 1998
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in the IRB Guidelines:

..if a detention appears unduly lengthy, the reasonableness of the delay should be considered in order to ensure that the detention is not in fact an 'indefinite detention'. Such detentions constitute deprivations of liberty that come into conflict with the principles of fundamental justice."^63

In addition to these powers of detention, immigration officers also have broad powers relating to arrest without warrant. It has been frequently argued that these coercive powers of immigration officers actually exceed those of police officers. For example, immigration officers may detain someone if they are of the opinion that the person in question is not likely to appear for future immigration related proceedings. As put by Rivka Augenfeld, President of Table de Concertation de Montreal pour les Refugies during the 1997-98 Standing Committee hearings on detention:

...Immigration Officers have powers beyond the range of any policeman(sic) or soldier in this country. There is no policeman who can arrest somebody because he thinks the guy won't show up for a hearing next week. If the person doesn't show up, you issue an arrest warrant, but you can't decide Joe Blow isn't going to come next week, then go to his or her house, arrest them in their pyjamas and take them to detention.^^4

Despite these broad powers of arrest and detention, the decision to detain under the Act has not elicited anywhere near the same degree of critical public, political or academic attention as has the detention of an individual charged and/or convicted with a criminal offence. Both forms of detention represent extreme examples of the continuing 'coercive and 'bodily' powers of the sovereign. In a liberal regime, the deprivation of an individual's liberty by the state is considered to be a very serious matter and in the context of criminal justice administration the state takes great pains to check this use coercive state power against individuals. The criminally accused is protected by a myriad

^63IRB Guidelines, March 1998:3 (emphasis in the original text)

^4Standing Committee Hearings on Detention, Wednesday March 18, 1998:25
of legal safeguards and protections: the principles of fundamental justice, the rule of law, due process. State sanctioned deprivation of liberty is generally thought of in relation to the administration of criminal justice where the potential loss of liberty is justified on punitive grounds.

In contrast, according to official law and policy, the detention of non-citizens under the Immigration Act is preventative not punitive. This legal differentiation between preventative administrative detention and punitive detention is not likely to be readily apparent to those who are detained. On a general and somewhat abstract level, the designation of immigration detention as preventative means that it must be regarded as an exceptional measure. This principle emerges from statute and case law, and is encoded in, for example, the Canadian Charter of Rights and Freedoms, and the International Covenant on Civil and Political Rights.

This discursive distinction between punitive and preventative detention moves immigration detention from the ambit of criminal law into that of civil law and as such the merely 'quasi-judicial' nature of detention decision-making does not carry with it the same obligation to provide and apply the legal protections and safeguards which are required under criminal law. For those who are detained, the material consequence of this distinction is that while they may experience their detention as punishment, they are not accorded the degree of rights and protections as they would were they actually facing punishment. For example, legal rules of evidence do not apply, access to legal counsel is limited (there is no duty counsel available and until the late 1990s legal aid did not issue certificates for detention reviews), and the onus of proof is a reverse onus, that is to say it is the detained person who must bring forward evidence to prove that she should be released. The longstanding official legal distinction between punitive and non-punitive forms of state-sanctioned detention which underpins the reluctance of the courts to interfere with detention decision-making is an ideological distinction which contributes in a central way to the general lack of critical academic and political attention paid to

65This is particularly likely to be true for those people who are being detained in correctional facilities along side convicted criminals who are being punished.
immigration detention.

The legal status of immigration administrative decision-making and the longstanding tradition of judicial restraint in this area of public law and policy is centrally supported and reproduced by the ideological concept of state sovereignty. The broad powers to arrest and detain under the Immigration Act are officially related to national social, economic and political aims and objectives. The historical legacy of state sovereignty and the conceptions of sovereign rights and duties which derive from this legacy continue to underpin and justify even these most coercive of the activities of the Department. The evidence is overwhelming, from Canada's early treatment of Chinese labourers, to the detention of the Japanese and Canadians of Japanese origin, that the people and the Canadian government have easily and comfortably accepted that the rights of non-citizens can be abridged with vastly more ease than those of citizens, evidencing the continuing hegemony of liberal conceptions of sovereignty and national security which justify the uses of coercive state power against non-citizens.

The coercive powers of the state to detain and deport non-citizens are largely justified by reference to the sovereign right control national borders and populations and the sovereign duty to protect its citizens from danger, to maintain public order and economic well-being. The objectives which guide the Immigration Act are laid out in s.3 of the Act. The subsections that are of particular relevance here are the following:

3. 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 recognizing the need....

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 consistent with the Canadian Charter of Rights and Freedoms;

g) to fulfill Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;

h) to foster the development of a strong and viable economy and the prosperity of all regions;

i) to maintain and protect the health, safety and good order of Canadian society; and
j) to promote international order by denying the use of Canadian territory to persons who are likely to engage in criminal activity.

The tension between, on the one hand, ensuring that the requirements imposed by the *Canadian Charter of Rights and Freedoms* and the obligations regarding human rights derived from international legal obligations are fulfilled and, on the other hand, the sovereign obligation to protecting the 'health, safety and good order of Canadian society' pervades the administration of the *Act*. Those who are vested with the responsibility of enforcing the *Act* tend to regard the obligations relating to the legal and human rights of non-citizens as a constant frustration in their ability to do their job. This is reflected in the official designation of these legal rights as 'impediments to removal'. The detention of non-citizens under the *Act* is justified as an administrative prerogative of the state issuing out of its right to control its national borders and the nature of its population. As put by political philosopher Joseph Carens in making his persuasive case for open borders:

> Borders have guards and the guards have guns. This is an obvious fact of political life but one that is easily hidden from view - at least from those of us who are citizens of affluent Western democracies...most of those trying to get in are...ordinary, peaceful people, seeking only the opportunity to build decent, secure lives for themselves and their families...What gives anybody the right to point guns at them?

To most people the answer to this question will seem obvious. The power to admit or exclude aliens is inherent in sovereignty and essential for any political community. Every state has the legal and moral right to exercise that power in pursuit of its own national interest, even if that means denying entry to peaceful needy foreigners. States may choose to be generous in admitting immigrants, but they are under no obligation to do so.

The underlying principle of national sovereignty and its association with questions of national interest and the state's obligation to protect national citizens is a

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66 IRB Guidelines on Detention 1998:2

powerful one, so powerful that it is often seem to ‘trump’ the human rights related legal principles which are also included in s.3 of the Act.

V) Judicial Review of Immigration Decision-Making

Any study of discretionary powers in the context of the administration of public law and policy must consider the relationship of administrative decision-making with the rule of law and the principles of fundamental justice as manifested in the principles and processes which govern the judicial review of administrative decision-making. It is a generally accepted view that judicial review provides an important check on discretionary administrative decision-making powers. The longstanding association of discretion with arbitrary decision-making has been conventionally linked in dichotomous opposition with the rule of law. That is to say, it is generally accepted that judicial review functions as a necessary top-down check on the potential for injustices in administrative decision-making. Within this conventional approach, judicial review operates in accordance with universal principles of fundamental justice whereas administration depends upon the legislated granting of discretion for its effective management.

In part, the lack of critical attention given to discretionary decision-making in the field of immigration can be attributed to the fact that the administration of the immigration act, including those provisions which sanction the use of coercive measures such as detention, is governed by Administrative law. Administrative law and policy has always enjoyed a significant degree of protection from judicial oversight. This stems in part from the historical understanding that administration relies for its effectiveness on the highly specialized expertise of its administrators, expertise which is not possessed by the judiciary. Judicial non-interference is particularly pronounced in the area of immigration decision-making. As observed by legal scholar, P. Bryden:

Immigration law, like the law surrounding parole and prison discipline, has had a reputation among people interested in administrative law as a sort of waste land in which judges have been loathe to apply the legal principles we normally associate with a sense of justice in Canadian public
Administrative law experts confirm this impression. J.G. Cowan, for example, observed:

Cases involving immigrants, prisoners, and parolees are examples of other areas of discretionary power in which the courts are reluctant to interfere. Statutory powers exercised by immigration and prison officials are quite wide, and considerable scope has been given to the purposes for which they may be exercised and the factors that may be considered in reaching a decision, all of which are reflected in decisions in which the principles of natural justice have been modified significantly or ignored.  "

While the judiciary maintains a residual jurisdiction to review the procedural fairness and propriety to ensure that administrative decision-making operates within the general parameters of due process (that it is not arbitrary or capricious) and a rather watered down version of natural law and the principles of fundamental justice, the substance of administrative immigration decisions is rarely interfered with by the courts. Under administrative law, discretionary decisions which are deemed to be "purely administrative" in nature are not subject to judicial review. However, broad areas of decision-making under the Act are explicitly "quasi-judicial" and as such are subject to judicial oversight. In practice, however, the availability of the remedy of judicial review is quite limited; the courts have long been loathe to interfere with the discretionary decisions made under the Act. In the 1997-98 Standing Committee hearings on detention, Paul Thibault, Executive Director, Adjudication Division, Immigration and Refugee Board (IRB), offered the following numbers: 16,000 decisions are made by adjudicators on an annual basis. The Federal Court sets aside about .05% of these. This works out to

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about 8 cases annually which are set aside by the Federal Court.70

VI) Departmental Policy Checks on Discretionary Powers

In addition to the checks on administrative discretion, albeit limited, provided by the courts, the uses of discretionary decision-making may also be constrained and shaped through the development and application of ‘non-binding’ departmental policies and guidelines such as those recently issued by the Chairperson of Adjudication on the subject of detention. Departmental guidelines such as these are not binding, for that would represent an undue interference with the independence and discretion of the decision-makers. Rather, they articulate a ‘recommended approach’ with the aim of ‘promoting consistency, coherence and fairness’ in the making of decisions. However, even non-binding departmental guidelines elicit significant controversy and debate, revealing again the extent to which discretion continues to be a divisive and difficult issue in the context of the administration of the Act.

For example, in the fall of 1996, the Department of Citizenship and Immigration Canada (CIC) issued a new policy on the detention of non-citizens. Due in large part to growing concerns regarding the costs associated with detention, the new policy sought to limit the numbers of people in detention, and hence the costs entailed by detention, by focusing the attention and energies of immigration officials on criminality as the primary reason for detention. Detention was to be regarded as a last resort, justified only when there was a real possibility that release would endanger the Canadian public. The policy also sought to facilitate the release of people already in detention by setting dollar figure amounts on the sureties/bonds sufficient to obtain a release. The strongest opposition to this policy emanated from immigration officials who reacted with considerable hostility to the proposals. They felt that the policy fettered the discretion which they argue is essential for them to be able to effectively and efficiently carry out their duties. Due in large part to the ardent opposition from immigration officials which this policy elicited,

70 Transcript of the Standing Committee on Citizenship and Immigration, Tuesday March 31, 1998:3
CIC has since been engaged in drafting yet another new detention policy which is yet to be released. A senior CIC policy official indicated that the issuing of the revised guidelines was an extremely sensitive matter, due in large part to the sensitivity of immigration officers surrounding the question of discretion. The draft copy of the policy which I had acquired was still largely unchanged, with the interesting exception that the Department had taken out the final section of the policy which was entitled 'Expected Results'. The official confirmed that this section was deleted due to the likely apprehension that it represented an unjustified limit on the officer’s discretion. \(^7\)

Clearly, discretion represents an integral part of both the professional identity and responsibilities of immigration officers (similar in many respects to the importance of discretion to police officers). In official policy, discretion is commonly represented as the making of "good" or "professional" judgements based on the "objective" evaluation of complex issues of law, fact and relevant jurisprudence. \(^2\) The primary justification for the issuing of departmental guidelines regarding discretionary decision making is the need for greater "consistency" of decisions in accordance with liberal notions of due process and the principles of fundamental justice. In the view of critics, this lack of consistency amounts at best to "arbitrariness" and at worst to racism and other forms of discrimination.

Interestingly, different agents involved in detention and removal decision-making also have differing understandings of discretionary power. Policy officials tend to adhere to a strictly legal Dworkinian view of discretion. In this view, discretion does not exist unless there are "options" laid out in the relevant legislation and the officer has a legislated "choice" as to whether or not to exercise her authority. In this legalistic view, neither customs officials (who make the first referral to immigration) nor immigration officers carrying out the secondary inspection and who may recommend detention, have

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\(^7\)Interview with Neil Cochrane, Director, Case Presentation and Detention. Citizenship and Immigration, April 23, 1998,

\(^2\) CIC Draft Detention Guidelines, 1996
any discretion; in this view, if certain ‘facts’ exist, both customs and primary inspection immigration officers must exercise their legislated authority. It is only the Senior Immigration Officer (SIO) who reviews the initial decision to detain who is viewed as having a broad scope of discretion because their decision is not legally tied to the two legislated grounds for detention and because several options with respect to release are built into the legislation. The SIO may detain or release and may impose whatever terms and/or conditions on release that she deems warranted. Curiously, in this view, adjudicators who review the detention decision after 7 days and every 30 days after that are not regarded as having much discretion; as put by one senior immigration official. “At a detention review there really isn’t discretion....the adjudicator can only release when they are satisfied the grounds [for detention] don’t exist. Or, there really is a third element. they [the grounds for detention] can be superseded by the legality of jurisprudence.”

This official legalistic view of discretion as created and bound by law, differs from a more interpretive view held by advocates and even some decision-makers. This latter view regards discretion, rather than the law, expansively. Discretion here is regarded in relation to the interpretive dimensions of applying general legal rules to individual cases. For example, a former adjudicator with CIC explained that adjudicators have very broad discretionary powers; in making their decision they must interpret both law and policy and the individual ‘facts’, situations, circumstances, characters, etc., which together all contribute to the assessment of risk (of danger and of flight) which ultimately grounds their decision in law. Advocates and non-governmental commentators tend to share this more expansive, interpretive view of discretion.

Moreover, while policy officials maintain that frontline immigration officials do not have any discretion in making their initial detention recommendation, it would seem

73 Interview with Neil Cochrane, Director Case Presentation and Detention, CIC. April 23, 1998

74 Interview with Kathryn Clout, Senior CIC Policy Official and former CIC Adjudicator. April 24, 1998
that the immigration officers themselves disagree. The nature, extent and force of the opposition of Immigration Officers to the proposed 1996 CIC guidelines on detention speaks to their own perception of their discretionary power. As reported in the *Globe and Mail* at the time, Immigration Officers felt the proposed guidelines were a "...blatant attempt by management to fetter the actions of immigration officers." More recently, representatives of the Canada Employment and Immigration Union (CEIU) made a submission to the House of Commons Standing Committee on Citizenship and Immigration which, among other things, took serious issue with the 'fettering' of the discretion of immigration officers by management. As put in their submission, "Officers' decisions are fettered by management whose decision to over-rule and release detainees is based on cost factors rather than health, safety and security of the Canadian public. There are periodic blitzes of releasing people from at [sic] the Immigration Holding Centre (the Celebrity Inn near Pearson Airport) because the Inn has too many people there." Thus, there is a stark contrast between the impression provided by the conventional liberal legal view that discretion has clearly demarcated definitional content and parameters, and the presence of differing and often conflicting meanings and perceptions of discretion which vary depending, in this case, on one's professional location and preoccupations.  

VII) Contemporary Policy Discussions and Debates on Detention

In 1997-98, a Parliamentary Standing Committee heard submissions from a wide range of governmental and non-governmental representatives on the issue of immigration

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76 Canadian Employment and Immigration Union, Public Service Alliance of Canada. Presentation to the House of Commons Standing Committee on Citizenship and Immigration, March 25, 1998:2

77 While not discussed here, the uses of discretion are also influenced by more mundane organizational dynamics and imperatives.
detention and removal policy and practices as recommended by the Immigration
Legislative Review Advisory Group (LRAG) in their report entitled Not Just Numbers: A
Canadian Framework for Future Immigration. Both the Report and Recommendations
and the representations and submissions in the hearings attest to the degree to which
discretion continues to be a critical and politically contentious issue in the administration
of the detention and removal related provisions of the Immigration Act.

LRAG’s Report and the recommendations made in it are guided by the
understanding that greater consistency and accountability of Immigration decision-
making is necessary both in the interest of fairness and in order to restore public
confidence in the legitimacy of the system. This understanding underpins the reports’
recommendations that the laws, policies and criteria which guide decision-making in this
area be clear and transparent. LRAG’s recommendations are designed to remedy what the
authors term a crisis of public confidence in the Department’s ability to enforce the Act.
As put by the authors:

...immigration and protection laws (should) be implemented in such a way
that the criteria used to make decisions are derived directly from the Acts
and Regulations, and are readily available to the public in a language they
can understand. Transparency is a necessary condition for the effectiveness
and efficiency of the immigration and protection programs and the
maintenance or public confidence in their administration.

The discretionary nature of detention and release decision-making is of particular
concern. The report observes that:

The Act currently provides two bases for detention: unlikely to appear for
immigration proceedings and danger to the public. The power to detain is
vested in immigration officers and adjudicators. With such broad powers
given to officers to deprive persons of their liberty, concern has been
expressed by many that in the absence of specificity in the Act, and with

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LRAG, Legislative Review Advisory Group (LRAG), Ottawa: Minister of Public Works and
Government Services Canada, 1997

Not Just Numbers, 1997:13
virtually no policy guidelines issued by the department, the standards for detention are not transparent and vary greatly from office to office and officer to officer. \(^{80}\)

The report's recommendations are designed in large part to limit and constrain the discretion of decision-makers through the development of specific, clear and coherent law and policy. Decisions must not be, or appear to be, arbitrary. The perception of arbitrary decision-making undermines public confidence in the system and thus undermines the legitimacy of the system. The solution, as proposed by the authors of this report, is to develop and implement more rules and clear criteria to guide decision-makers.

The report also recommends that the current Immigration and Refugee Board (IRB), an independent adjudicative tribunal, be replaced by a 'Protection Agency' composed of civil servants who will take over the decision-making responsibilities of the IRB. The creation of a single protection agency, the authors of the report argue, will facilitate: the streamlining of procedures; the coordination and integration of the system; the sharing of information; and the development of a common information database. The report acknowledges that the creation of a protection agency staffed by civil servants is likely to raise concerns regarding the legal requirement to ensure the independence of decision-makers. The authors acknowledge that the elimination of order in council appointments and of the quasi-judicial setting of the IRB 'might be perceived' as threatening the independence of decision-makers. The authors response to this concern is to state simply that:

...[W]e believe that it is possible to design a protection agency that can be independent as well as sensitive to broader national imperatives. Our vision of the protection agency is that of a structure designed to ensure that its decision makers are free from bias and improper influence as they deal with individual requests placed before them. \(^{81}\)

This proposal represents a radical shift away from the thinking which underpinned

\(^{80}\)Ibid., 1997:104

\(^{81}\)Ibid., 1997:84
the creation of the IRB in 1989 under Bill C-55. The IRB was created largely in response to the major, precedent-setting *Singh* decision by the Supreme Court in 1985. 82 This decision asserted that where issues of credibility are being determined, fundamental justice requires that this determination be made on the basis of an oral hearing. At the time of *Singh*, the determination of refugee claims was, for the most part, a 'paper' determination. There were provisions for hearings but these were not mandatory, and hearings were in fact quite rare. The Canadian government responded to *Singh* with Bill C-55. It created a refugee determination process with mandatory hearings in every case to be carried out by an independent adjudicative tribunal, the IRB. Bill C-55 also extended and applied due process and procedural rights to claimants. This creation of an independent quasi-judicial adjudicative tribunal was regarded as necessary to ensure and protect the procedural rights of claimants. Essentially, *Singh* sought to curb administrative discretion in deciding refugee cases. Oral hearings represent a check against 'arbitrary' decision-making which was found to be contrary to the *Charter*, for citizens and non-citizens alike.

A further important dimension of the *Singh* decision was the care taken by the Supreme Court to ensure that the human rights entrenched in the 1982 Canadian *Charter* applied to refugee claimants. It ruled that the 'everyone' in s.7 of the *Charter* included not only everyone 'physically present in Canada' but also anyone 'seeking admission at a port of entry'. 83 In effect, this decision extended *Charter* rights to non-citizens on Canadian soil.

Detractors of the current refugee determination system, such as the authors of the LRAG report, are quick to point out that the *Singh* decision did not mandate the creation of the IRB and the current determination process, but rather, mandated more narrowly the opportunity for people to state their case and know the case against them; as stated in the LRAG report:

82 *Singh et al. V. Canada* (Minister of Employment and Immigration) [1985] 1 S.C.R.177

83 *Re Singh V Canada*, 1985: 456-463
The Court recognized that although the absence of a hearing was not necessarily inconsistent with the principles of fundamental justice in every case, the concern with any procedural scheme was not over the absence of a hearing in and of itself, but over the adequacy of the opportunity the scheme provided for persons to state their case and know the case they had to meet.\textsuperscript{84}

It is remarkable that while the creation of the IRB and the convention refugee determination process injected due process and procedural rights into the process, these initiatives was almost simultaneously accompanied by substantive measures which sought to restrict access to the process (such as visa requirements and fresh obligations on airlines) that restricted the numbers of non-citizens who could reach Canadian soil.\textsuperscript{85} Mandel suggests that the governments's intention was clearly to limit the practical consequences of Singh;

The problem with Singh is not that it required hearings for refugee applicants, but the fact that this requirement existed, not "in the air," but in the concrete context of a political determination to keep all forms of immigration subordinated to local and international power relations. In this social context, the purely formal right to a hearing could only legitimate a refugee policy that is the farthest thing from humanitarianism. In this respect Singh is exactly like the decisions on criminal procedure. It looks fine when it is detached from its context. The problem is that it cannot be detached from context....And the government has understood that if only it dresses things up in the formal requirements of due process and fundamental justice, it can get away with whatever it wants in the way of refugee policy.\textsuperscript{86}

It is also significant that more recently the Supreme Court of Canada has effectively undermined the guiding principles of Singh, leading some legal critics to charge that "...the alien's rights at common law were better than they are now under the

\textsuperscript{84} Not Just Numbers, 1997:79

\textsuperscript{85} For a more detailed discussion of this issue see Michael Mandel. The Charter of Rights and the Legalization of Politics in Canada Toronto: Wall and Thompson, 1989:172-183

\textsuperscript{86} Ibid., p.182
Charter. As these authors describe, in the case of Dehghani v. Canada, the Supreme Court ruled that "...a person "held" at the port of entry and forced to answer questions under the threat of criminal charge if he refused, was not "detained" for the purposes of right to counsel under s.10(b) of the Charter."

What then was the intention of the LRAG's proposal that the IRB be abolished and a new protective agency be created? What do these proposals say about the current social and political climate relating to immigration and refugee determination? And what do LRAG's proposals imply with regard to the relation between law and discretion? It is surely reasonable to suggest that LRAG's proposals reflect a heightened social and political hostility towards immigrants and refugees which now allows for law and policy proposals which no longer need to be 'dressed up' by due process in order to be acceptable to the public. While arguably there has never been overwhelming support for new immigrants and refugees, recent studies report a general "hardening" of public attitudes towards immigrants and refugees over the last few decades. As put in a recent comparative review of public opinion and public opinion polls on immigrants and refugees in Canada and Australia, "The overall conclusion from this scan of attitudes toward immigrants and refugees is that a deterioration has taken place in levels of public acceptability." Moreover, the "streamlining" of the processes through the creation of a central protection agency is consistent with current political and economic preoccupations with cost and efficiency.

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89 Weinreb and Galati, 1996:3

One can't help but wonder just whose 'protection' is being sought. LRAG's proposals focus less on the primary importance of due process and procedural rights and more on the need to deter unwarranted or 'fraudulent' claims. The contemporary discursive conflation of new immigrants and refugees with criminality, documented and discussed in the remaining chapters of this thesis, has arguably undermined the efforts of those who work on behalf of new immigrants and refugees and who seek to protect their human rights.

Not surprisingly, the debates surrounding the issue of discretion are reminiscent of those heard in the context of any criminal justice policy which has sought to limit the discretion of criminal justice officials. Immigration officials are vigorously protective of their discretionary powers, while non-governmental representatives and advocates argue for the need to limit, regulate and monitor discretion, relying very largely on recourse to law and legal rules. In this contemporary debate, the state's obligation to respect the Charter rights of all people on Canadian soil, citizens and non-citizens alike, is discursively pitted against the State's obligation to protect its citizens from danger. The broad powers of detention accorded to immigration officers and adjudicators are largely justified on this latter ground. Indeed, heightened fears about crime and criminality, a growing preoccupation with 'risk/danger' and the contemporary discursive conflation of 'criminal' and 'immigrant', all contribute to an immigration department that increasingly is governed by, and governs through, 'crime'. As put rather explicitly by Lucienne Robillard, Minister of Immigration in 1998:

I have spoken about finding ways to facilitate the movement and the integration of people. That is an important part of what we do, but...it is only part of what we do, and at CIC we also have a clear responsibility to protect the safety, security and well-being of Canadians. There are criminals and other undesirables who would like to come to a prosperous country like Canada.\textsuperscript{91}

Robillard continued to note that the CIC endeavours to balance Canada's "humanitarian

\textsuperscript{91}Transcript of the Standing Committee on Citizenship and Immigration, Wednesday April 29, 1998:23
approach with the integrity of the system and the protection of Canadians.”

VIII) Discretion as Arbitrary and Discriminatory

In contrast to official justifications of discretionary decision-making and the uses of coercive state power to detain and deport non-citizens, critics of the system tend to allege that the broad scope for discretionary decision-making under the Act allows for the widespread making of ‘arbitrary’ decision-making. The dominant discourses accept without question the binary that pits ‘arbitrary’ decision-making against liberal ideals of the rule of law. This focus leads almost inevitably to the view that the solution is a legalistic one, achieved through the adoption and application of clear rules and an enforced commitment to the rule of law and due process.

The Oxford Dictionary defines arbitrariness as: “derived from mere opinion; not based on law; discretionary; capricious; despotic.” The conventional understanding of arbitrariness is one that pits it in dichotomous opposition to law, revealing again the dominance of the liberal legal paradigm. As indicated in the above definition, it is simply taken for granted that law is not arbitrary by definition. Arbitrary decision-making is contrary to the liberal ideal of the rule of law; it undermines the premise that different judges hearing the same case would arrive at the same decision. Most of the critics of discretionary immigration decision-making centre on this problem of arbitrariness. This focus leads almost inevitably to the view that the solution is a legalistic one; the problem of arbitrariness must be addressed through the adoption and application of clear rules and an enforced commitment to the rule of law and due process.

Many critics also emphasise the need for an external review mechanism of detention decision-making, in addition to adequate judicial appeal. As put by the Toronto Refugee Affairs Council (TRAC), “Because of the high level of discernment and decision-making required in this very difficult area of Immigration work, transparency

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82 Ibid., p.23
and accountability to an outside body is essential." 93 David Matas, a prominent immigration lawyer and advocate, echoed this recommendation in his brief to the Committee:

Generally, in Canada, police enforcement systems have some form of civilian oversight and civilian-run complaints redress or ombudsman. Immigration enforcement is unique amongst enforcement systems in Canada as a system without any civilian supervision of the policing authorities. The courts with jurisdiction over immigration enforcement officials can correct errors of law, but they can do nothing about bad policies or inappropriate exercise of discretion.94

The submission by Mary Jo Leddy, Director of Romero House, a Toronto based voluntary community group which assists refugees, puts the same point in the following way: "...the enforcement section of Immigration Canada operates as a state within a state. It is the only police-like force with the powers of arrest and detention, with the life and death power of deportation, which has no oversight or review committee."95

Amnesty International’s brief to the Parliamentary Standing Committee on Citizenship and Immigration expresses a similar concern. It is in favour of preserving and expanding legal protections and safeguards for people facing detention in order to guard against arbitrariness. They submitted that “[E]ach case for detention should be tested by a prompt, fair, individual hearing before a judicial or similar authority. This hearing should be automatic and there should be a further review from time to time if detention continues."96 In their submission to the Standing Committee, the Metro Chinese and Southeast Asian Legal Clinic advocated the rejection of the entire protection agency

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93 “Brief to the Government of Canada about Recommendations by the Legislation Review Committee” Toronto Refugee Affairs Council, March 1998


95 Comments on Detentions and Removals” Brief to the Standing Committee on Citizenship and Removals, Mary Jo Leddy, Romero House, April 1998:3

96 Brief to the Parliamentary Standing Committee on Citizenship and Immigration, Amnesty International March, 1998:2
model. The Clinic agrees with the submissions made by the Canadian Council of Refugees relating to the threat posed by the proposed protection agency to the indecency of decision-makers in this field, the unreasonable time lines proposed for the making of a claim and the lack of a true appeal process.

In the view of many advocates and community representatives who work on behalf of new immigrants and refugees, this ‘arbitrariness’ not only leads to inconsistent decision-making, but also allows for the continuing influence of racist and otherwise discriminatory views. It is not insignificant, according to many critics, that the vast majority of people being detained by Immigration are non-white. Allegations of racism in the context of the administration of Canadian immigration law and policy are not new. The historical legacy of an explicitly racist and discriminatory immigration system, it is argued, continues to inflect immigration policy and decision-making despite official declarations to the contrary, despite the removal of explicit discriminatory provisions from the Act and despite the legal requirements of equality and non-discrimination which have been included in the Act and which are enshrined in the Charter. Allegations of racism are notoriously difficult to ‘prove’ and are often presented in rather indirect and suggestive ways. Specific references to ‘racism’ are fairly infrequent in official settings like that of the Standing Committee hearings. The Metro Toronto Chinese and Southeast Asian Legal Clinic has been more explicit than most on this question. In commenting on the 1997 hunger strike by people in detention at the Metro West Detention Centre, the clinic’s brief observes “..The detainees were striking in protest of arbitrary and indefinite detention as well as inhumane detention conditions. Almost all of the detainees are immigrants and refugees of colour.” The brief goes in to some detail on the links between the detention of people of colour “..and rising anti-immigrant and anti-refugee sentiment in recent years.”^97

The discriminatory historical development and application of Canadian immigration law and policy has been widely studied. There is no question that the degree

^97 “Submission to the Standing Committee on Citizenship and Immigration...” Metro Toronto Chinese and Southeast Asian Legal Clinic, April, 1998:1
of discretionary powers granted to immigration officers up to and including the 1952 legislation far exceeds the degree of discretionary powers under the current Act. The 1970 Gana decision provides an interesting discussion of the evolution of Canadian immigration law and policy. With respect to discretion, the Gana case observes that the 1952 Act (and those which preceded it) provided that the only people entitled to enter Canada as of right were Canadian citizens and persons having a Canadian domicile. All others required the permission of the Minister acting through his departmental officials. Any decision made by immigration officers regarding admission to Canada was an administrative discretionary decision, not subject to review by anyone other than the Minister. The broad discretion of early immigration administrators was often used in explicitly arbitrary and was employed in explicitly discriminatory ways to exclude ‘offensive’ or ‘undesirable’ groups of people (blacks, Chinese, communists, immoral women etc.).

Despite the considerable changes to the law and policy governing Canadian immigration since the Act since the early 1900s, the nature of the concerns and criticisms regarding immigration law and policy in Canada do not appear to have changed much. In her study of deportation from Canada between 1900-1935, Barbara Roberts observes that in the early part of this century the administration of Immigration law and policy was characterised by arbitrariness; by wide and unchecked discretionary powers; by the

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99The historical discriminatory exclusions carried out under Canadian immigration law and policy will be explored in more detail in a later chapter.

100A communication from Minister Calder in 1919 to the Canadian Jewish Congress could easily be mistaken for a present day communication. It read: “The Act...undoubtedly places large discretionary powers in the hands of the executive and its administrative officers...I need scarcely to assure you that every effort will be made to see that these powers are exercised sanely and reasonably.” quoted in Barbara Roberts Whence They Came:Deportation From Canada 1900-1935, Ottawa: University of Ottawa Press, 1988:198
relative absence of judicial review; and by a startling degree of public and political ignorance about the system. Decision-making relating to detention and deportation were then considered to be '"purely administrative proceedings' which had nothing whatsoever to do with punishment. Even though detention and release proceedings are now 'quasi-judicial' rather than 'purely administrative' the adherence to the principle that immigration detention is 'non-punitive' remains in force. Because detention and deportation were not considered to be criminal proceedings, people subject to these proceedings were not entitled to the same legal protections as an alleged criminal. The same objections are frequently made in the present day. For example, the Canadian Council for Refugees submitted in 1990, again in 1994 and again in 1998 that:

The wide area of discretion left to immigration officers will inevitably lead to some rather arbitrary decisions. Furthermore...while the legal standard of proof to justify detention on the statutory criteria requires that the decision-maker be satisfied on the balance of probabilities that detention is warranted, there are innumerable problems in practice. The degree of evidence required to meet this standard and the nature of evidence presented pose continual problems, leading to detentions based on hearsay and unsubstantiated allegations which are not susceptible to proof or to cross examination. While in criminal proceedings where liberty is in jeopardy the tribunal is bound by the legal rules of evidence, immigration decision makers may act on any evidence considered credible or trustworthy by them.  

The persistence of the 'problem' of discretion in the present day, despite the proliferation of laws and rules which were designed to rationalise, legalise and check the abuses of discretion, suggests that legalistic solutions do not actually represent a real or potential remedy for the problems conventionally associated with discretion in this field. Nevertheless, concerns about 'arbitrariness' issuing out of discretionary decision-making powers issue come from across the whole range of the political spectrum. On one side, arbitrary decision-making (seen as an expression of misplaced humanitarian compassion) is faulted for undermining the necessary 'toughness' of the system which must protect the

101Canadian Council for Refugees, "Refugee Detention in Canada" May 1994:2
Canadian public from dangerous non-citizens. On the other side, arbitrary decision-making (seen as discriminatory) is regarded as a vehicle for unjust, inconsistent and capricious decision-making which penalizes one of the most vulnerable and powerless groups in society, non-citizens. Despite these competing perspectives, the recommended solution to the ‘problem’ of discretion and its relationship to so-called arbitrary decision-making is the formulation and application of further rigid, specific and clear rules to guide and check its operation.

While the debate is now well known in the context of Canadian criminal justice administration, the debate is less well known, though none the less pointed, in the context of the administration of the Canadian Immigration Act. The underlying assumption guiding policy proposals in both these areas is that discretion exists in the absence of legal rules, therefore the problems associated with arbitrary discretionary decision-making can be ameliorated by developing more legal rules to guide, constrain and check the uses of discretionary decision-making powers. This is the case despite historical and contemporary experiences which seem to suggest otherwise. A persuasive contemporary example of the limitations associated with the liberal legal presumption of the effectiveness of ‘more rules’ to regulate the inappropriate uses of discretion is evident in the adoption of pro-arrest policies in cases of wife assault. The very same assumptions underpinned the arguments made in favour of these pro-arrest policies. Police discretion was regarded as the vehicle for sexist and outdated views about gender roles and male/female relations, the solution, it was argued, was to curtail their discretion through the adoption of more rules. Unfortunately, the pro-arrest policies have arguably had many negative ‘unintended consequences’, not the least of which includes the reality that pro-arrest policies may actually deter certain marginalized groups of women from calling the police rather than deterring the abusers from abusing.102

102 For a recent critical collection of articles dealing with this criminal justice policy dilemma see M. Valverde et al (eds) Wife Assault and the Criminal Justice System. Toronto: Centre of Criminology, University of Toronto, 1995.
IX) Conclusion

It can thus be seen how the degree of discretionary power which characterises administrative regulatory frameworks is generally set against the application of and commitment to the rule of law under liberalism. From a conventional liberal perspective, discretion in administrative decision-making has been defended as a crucial feature of individualised justice; that is, discretion allows for the tailored application of general rules and laws to individual cases. It thus provides the flexibility necessary for the humane consideration of the specific circumstances of individual cases. The critical, but still conventional view regards discretion as a vehicle for arbitrariness, tyranny, caprice and discrimination. As such, many have argued for the need to eliminate, or at least constrain and structure, discretion through the application of rules.

The debate has thus been polarized: discretion is good, discretion is bad; discretion is arbitrary, discretion is individualized justice; discretion is needs to be preserved and defended, discretion needs to be curtailed and controlled. The limited framework and circular nature of the debate is the result of the false discretion/law binary on which it rests. This binary implies a clear distinction between the two and that they are inversely related; ‘where law ends, discretion begins’. The dominance of the liberal legal paradigm is further evident in the primary place accorded to ‘law’ as the most important regulatory instrument in society, leading, in this context, to the assumption that the problems of discretion can only be effectively addressed through the constraints and checks offered by law.

This discussion has sought to highlight the problems associated with the conventional understanding of discretion and to support and reinforce a new way of thinking about discretion. It suggests that the largely taken for granted law/discretion binary must be undermined and the primacy of the liberal legal paradigm out of which the binary issues must be displaced. Also necessary is critical scrutiny of the assumption of individual autonomous subjectivity which the conventional understanding of discretion presupposes. This is, admittedly, no small challenge. Discretion has long been associated with the idea of the individual freedom of those to whom discretion has been delegated to
choose, unconstrained by the certainty of legal rules. To begin to think of it differently necessitates the shedding of longstanding liberal assumptions about law and administration and about choice and autonomy. A radical shift in analytical approach is required. In the first instance, this requires that the assumptions that discretion is a residual legal category and procedural checks on discretion necessarily result in greater substantive fairness. It also requires that: the political, economic and social context of discretionary decision-making be taken absolutely seriously; that particular attention be paid to the policies, processes, practices and effects of discretion in a given field of administrative decision-making; and that attention be paid to the diverse locations and junctures at which discretion is employed, both at and within governmental and non-governmental levels.

To view discretion as a form of power promises to provide a way out of the dichotomous impasse imposed by the law/discretion binary. This view requires that we ask different questions about discretion. Rather than asking how can it be eliminated, curtailed or expanded, made more fair or just, the guiding question becomes how does this power work? What are the practical purposes of its use? What are the historically specific discursive processes which inflect this use? What are the organizational and institutional networks and relationships that facilitate the uses of discretion in a particular governmental context? What are the dominant discursive influences on, and the effects of, the uses of discretionary power in the governance of both Immigration and of new immigrants and refugees?

It is these questions that must guide contemporary studies of administrative discretion, and indeed it is these questions that, in part, motivate and guide the examination of the historical development of exclusionary Canadian immigration law and policy in the next chapter.
Chapter Three

Discretionary Power and Discursive Contests: Transitions in the Governance of Exclusionary Canadian Immigration Policy (1947-1976)

I) Introduction

Exclusionary Canadian immigration law and policy has always been underpinned by shifting, historically-specific constructions of who or what poses, or is likely to pose, a threat to the nation and its citizens; who or what the collective Canadian ‘we’ need to be protected from. These constructions are constituted by and mobilized through historically specific, dynamic and analytically distinct discursive rationales which express dominant national insecurities vis-à-vis perceived and conceived external ‘threats’. Different eras have been dominated by different perceptions of what has constituted the dominant threat. While there is much overlap and intermingling of these rationales, there is discernible the broad outlines of a general shift over the last forty years from a primary preoccupation with governing the perceived threats to the nation’s racial and moral ‘purity’, to a guiding preoccupation with governing threats to national security; first to its ideological ‘security’, and then to the ‘safety’ of the nation’s ‘public’. Taken together with the material edifices which they entail, these preoccupations can be understood as governing logics; sets of discursive rationales that underpin, guide and legitimate, in this case the use of coercive sovereign power against undesirable and/or undeserving non-citizens. As will be demonstrated in this chapter, discretionary power is, and has always been, a central mechanism in the operationalization of these governing rationales.

In this thesis, exclusionary immigration law and policy refers specifically to those provisions of the Canadian Immigration Act which define categories of people who are to be excluded from Canada, either through the enforcement of the ‘inadmissibility’ provisions of the Act, which prohibit the entry of certain categories of people into Canada, or the ‘removal’ provisions which sanction the detention and deportation of
individuals who are already in Canada. Exclusionary immigration law and policy is most obviously an example of the continuing prominence and influence of the ideological and historically enduring conception of state sovereignty. While sovereignty has always provided the foundational rationale for (coercive) exclusions, the conventional understanding of sovereignty cannot encompass the full range of legal and non-legal, historically specific factors which contribute to the mode and manner of governing exclusionary immigration law and policy and new immigrants and refugees.

The existence and exercise of discretion, and in particular of Ministerial discretion, introduces a complicating factor into the view of immigration exclusions as a straightforward example of the application and enforcement of national sovereignty. This Chapter provides an historical map of the transitions in the governance of exclusionary immigration law and policy from the post-second world war period up to and including the adoption of the 1976 Immigration Act. It has two main objectives: first, to demonstrate that the discursive construction of the undesirable and thus excludable non-citizen is historically specific, shifting and dynamic and that the exclusion of these ‘undesirables’ is facilitated by the mobilization and employment of analytically and historically distinct logics; and second, to demonstrate the central place of (exclusionary) discretionary power which facilitates and gives coercive effect to these logics under a liberal regime of governance.

As explicitly discriminatory grounds for exclusion (race, morality, political ideology and various combinations thereof) were legally, politically and socially delegitimized in a process which began in the mid-1950s and took hold through the 1960s, ‘security’ emerged as the dominant guiding logic of exclusionary Canadian immigration law and policy, supplemented by increasingly influential concerns about criminality. The guiding currency of ideologically-based security discourses was at first complicated and ultimately diminished by a variety of national and international factors and by historically specific discursive contests. For example, the dissipation of the threat of international communist revolution over the 1980s and the end of the Cold War entailed an increased preoccupation with the threat to national security posed by
international terrorism, as opposed to domestic forms of political subversion which had previously been the dominant concern.

It was during the 1960s that the concepts of ‘criminality’ and ‘dangerousness’ began to gain prominence in the official definition of undesirability. They were mobilized and employed in association with increasingly modified conceptions of ‘security’ in the governance of exclusionary immigration law and policy. This development began to displace the guiding official preoccupation with the threats posed first, by communist revolution and later, by international terrorism as criminality and dangerousness emerged as the governing rationale for exclusionary Canadian immigration law and policy and for a wide range of enforcement-oriented legal and political reforms.

This shift was facilitated by a variety of national and international factors which eroded the force and guiding influence of liberal humanitarian discourses and liberal legal discourses which had raised a potent and sustained challenge to ‘illiberal’ exclusionary practices over the 50s and 60s. Liberal legal and humanitarian discourses had contributed in a significant way to the implementation of the ‘non-discriminatory’ point system and the creation of the Immigration Appeal Board in 1967. Their discursive influence can be seen to have peaked in the 1970s, culminating in the passage of the 1976 Act and its creation of an independent administrative and legalised system of refugee determination. These legislative and policy developments have been conventionally represented as the triumph of liberal and progressive values and interests over illiberal ones. And in a sense they were, but it was a short-lived triumph. As will be argued in Chapters 4 and 5, the intrusion of other preoccupations, primarily those related to ‘fraud’ and ‘criminality’, soon eroded the dominance of inclusionary liberal discourses.

This chapter maps and details the discursive shifts and contests which shaped the development and application of exclusionary Canadian immigration law and policy, from the extremely discretionary and explicitly discriminatory 1952 Act to the distinctly liberal 1976 Act. During this period, moral and racial national purity discourses and the ‘illiberal’ procedures of Ministerial discretion were increasingly contested by and through the mobilization of legal and humanitarian liberal discourses. However, significantly, the
use of sweeping Ministerial discretionary powers to exclude on the basis of ‘security’ was not, in any serious way, challenged during this time. Indeed it can be seen to intensify.¹

II) Shifts in the Governance of Exclusionary Canadian Immigration Law, Policy and Practice (1947-1976): Liberal Challenges and Legal Triumphs

What follows is a review of the shifts in the governance of exclusionary Canadian Immigration law and policy beginning with Mackenzie King’s famous 1947 Statement on Immigration and ending with the crowning achievement of liberalism in this field of public policy: the 1976 Immigration Act. In this review, particular attention is paid to the discursive rationales and contests which have inflected and justified the uses of exclusionary ministerial discretion over the years. Ministerial discretion has both exclusionary and inclusionary preoccupations. However, the exclusionary work of Ministerial discretion has a much longer, and more entrenched discursive history than the inclusionary work of Ministerial discretion. This analysis seeks to demonstrate that during the period under review, exclusionary Canadian immigration law and policy was guided and justified by two dominant analytically distinct governing rationales: (racial and moral) national ‘purity’ and ‘security’.

There was during this period a shift away from the identity based exclusions entailed by national purity discourses towards ‘risk’ based exclusions (assessing and governing (future) ‘threats’ to national security and public safety). The extent to which this shift has entailed a change in the composition of the actual subjects deemed undesirable and/or undeserving of exclusionary immigration governance is, however, less certain. There is reason to believe from the historical evidence that in this important area,

¹ As argued in Chapter Two, while discretionary power is not necessarily exclusively located in what is conventionally understood as ‘the state’, and while discretionary power is not necessarily created by law, nor does it exist only in relation to law, the examination of the development and application of legally sanctioned discretionary powers of the state to ‘exclude’ does nonetheless provide an important window through which dominant historically specific social concerns and governing rationales in relation to the governance of exclusionary immigration law and policy may be examined.
discursive shifts in the construction and mobilization of undesirability does not necessarily entail any real change in the people being governed and excluded.

While it is beyond the scope of this study to consider in any detail the earlier period of Canadian immigration history, the logic of (racial and moral) purity had long interacted with criminality concerns in the governance of exclusionary immigration law and policy\(^2\). And indeed, the influence of the logic of security had already become increasingly dominant with the emergence of war-time insecurities leading to the frequent use of discretionary powers to exclude against ‘subversives’, ‘enemy aliens’, communists, anarchists and the like. It should also be stressed that this analysis does not imply that criminality issues had never before played a part in exclusionary Canadian immigration law and policy. The point being made here, and to be substantiated in the following chapters, is that while criminality has always been, in varying degrees, a key ground for the exclusion of ‘undesirables’, the dominance which it now enjoys in the governance of contemporary law and policy is unprecedented.

The post world war two ebb and flow of the cold war heightened national insecurities and helped to fortify the logic of security and the Canadian security apparatus. However, the argument being made here is that as the logic of (racial and moral) purity was increasingly undermined in the 1950s, 1960s and early 70s, the logic of ‘security’ emerged, increasingly supplemented by criminality discourses, as the guiding rationale for coercive sovereign exclusions, despite periodic ebbs in the Cold War and despite liberal legal challenges to the uses of ministerial exclusionary discretion.

a) Mackenzie King’s 1947 Statement to Parliament on Immigration

In his speech in 1947, Prime Minister Mackenzie King gave expression to the underlying principles of Canadian immigration law and policy of the day, namely: admission to Canada was a privilege and not a right; immigration law and policy should

not exceed the nation’s economic ‘absorptive capacity’; and that immigration law and policy should not interfere with the demographic ‘character’ of the nation. The relevant and often quoted section of this speech reads as follows:

The policy of the Government is to foster the growth of the population of Canada by the encouragement of immigration. The Government will seek ...to ensure the careful selection and permanent settlement of such numbers of immigrants as can advantageously be absorbed in our national economy...I wish to make it quite clear that Canada is perfectly within her rights in selecting persons whom we regard as desirable future citizens. It is not a ‘fundamental human right’ of any alien to enter Canada. It is a privilege. It is a matter of domestic policy...The people of Canada do not wish, as a result of mass immigration, to make any fundamental alteration in the character of our population....Any considerable Oriental immigration would...be certain to give rise to social and economic problems.3

Many have read this excerpt as evidence of ‘how much has changed’ since 1947. Arguably as well, it speaks to ‘how much remains the same’. With the exception of the explicit expression of the racist dimensions of Canadian Immigration law and policy of the day, concerns about Canada’s economic ‘absorptive capacity’ and the sovereign declaration that ‘entering Canada is a privilege and not a right’ continue to be dominant.4

The assertion of Canada’s sovereign right to be selective with respect to whom it allows to enter the country has always underpinned the government’s control of immigration law and policy and has always provided the guiding rationale for broad Ministerial exclusionary discretion within this context. This was true then as it is today.

The fact that King’s 1947 statement made explicit and racist reference to the potential threat to the ‘character of our population’ posed by ‘mass’ immigration. speaks

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3 Prime Minister Mackenzie King, in House of Commons Debates, 1 May, 1947, quoted in Kelley and Trebilcock: 1998:312

4 While the phrase ‘absorptive capacity’ continues to be bandied about, immigration law and policy is being increasingly reoriented to a ‘long-term’ plan rather than the ‘tap on, tap off’ approach entailed by the notion of ‘absorptive capacity’.
to the degree to which racist beliefs, articulated and applied in part through the mobilization and application of national ‘purity’ discourses, had been socially, legally and politically dominant prior to the 1960s. Until the 1960s, racism had intermingled with morality and class in the constitution of the ‘(un)desirable’ citizen; and ‘(un)desirability’ was linked discursively with the need to protect national ‘purity’. ⁵

b) The 1952 Immigration Act

The 1952 Act was the first Immigration Act since 1910. The 1952 Act codified existing racial and moral bases for exclusion and sanctioned sweeping Ministerial discretionary powers to exclude, either through inadmissibility or through deportation. The 1952 Act gave the federal Cabinet sweeping discretion which, "...in practice devolved to the minister responsible and his officials" ⁶ over (in)admissibility and deportation.

i) Discretionary Power and Exclusionary Provisions

Section 61 of the Act gave the Cabinet the power to exclude people from Canada on the following grounds:

(I) nationality, citizenship, ethnic group, occupation, class or geographical area of origin;
(ii) peculiar customs, habits, modes of life or methods of holding property;
(iii) Unsuitability having regard to the climatic, economic, social, industrial, educational, labour, health, or other conditions or requirements existing temporarily or otherwise, in Canada or in the area or country from or through which such persons come to Canada; or (iv) Probable inability to become readily

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³The racist dimensions of the historical development Canadian Immigration law and policy are now well documented. However, the logic of national ‘purity’ was not only about ‘racial purity’. For an interesting analysis of the shifting and dynamic relations between race, morality and class in the historical discursive construction of ‘purity’ in English Canada see Mariana Valverde The Age of Light. Soap and Water: Moral Reform in English Canada, 1885-1925, Toronto: McClelland and Stewart Inc., 1991

⁴Kelley and Trebilcock 1998:324
assimilated or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after admission.\(^7\)

This section is virtually unchanged from Section 38 c) of the 1910 Act with the one exception that the 1952 provision substituted 'ethnic group' for 'race'. There is little doubt that these provisions were designed to exclude non-whites. Particularly noteworthy is the inclusion of 'unsuitability' having regard to 'climatic' conditions. A 1952 letter from Walter Harris, then Immigration Minister, makes the following telling claims:

In the light of experience it would be unrealistic to say that immigrants who have spent the greater part of their life in tropical or sub-tropical countries become readily adapted to the Canadian mode of life which, to no small extent, is determined by climatic conditions. It is a matter of record...that natives of such countries are more apt to break down in health than immigrants from countries where the climate is more akin to that of Canada. It is equally true that, generally speaking, persons from tropical or sub-tropical countries find it more difficult to succeed in the highly competitive Canadian economy.\(^8\)

As observed by Jakubowski, "From the Immigration Act of 1910 up to and including the Act of 1952, Section 38 c) was the principle instrument through which the implicit 'White Canada' policy on Canada was implemented."\(^9\)

This view of the racist history of Canadian Immigration law and policy is today widely admitted and well-established. In a recent comparative analysis of Canadian and Australian immigration and refugee law and policy, this history is succinctly and directly summed up as follows:


\(^8\) Noteworthy (CCF member) reading letter from Harris, in House of Commons Debates 1953:4351-2, quoted in Kelley and Trebilcock 1998:325

The history of immigration in Australia and Canada is indelibly linked to racism, prejudice and xenophobia. Attitudes of racial prejudice shaped immigration policy in both countries, leading to the “White Australia” and “White Canada” policies which determined immigration selection procedures until the 1960s.10

The list of ‘Prohibited Classes’ was also virtually unchanged from the 1910 Act. It included “..idiots, imbeciles, morons, epileptics, beggars, as well as the insane, the diseased, and the physically defective ...individuals convicted of crimes of moral turpitude, and those advocating the subversion of democracy.” 11 Also among the prohibited were “...persons seeking entry for immoral purposes...persons who were public charges or judged likely to become such, alcoholics, drug addicts and persons who had trafficked in drugs.”12

It is analytically significant that the 1952 Act included the new categories of homosexuals, drug addicts and traffickers. The exclusion of homosexuals was officially justified by, and discursively linked to, cold war ‘national security’ concerns: ‘sexual deviants’ represented a national ‘security risk’. As argued by Philip Girard, this discursive linkage was in large part the result of pressure from the RCMP and the American security establishment “…which had decisively linked Communism and homosexuality in its collective mind as part of a complex of cold war subversion.”13 Arguably the exclusion of homosexuals under the 1952 Act, and the ease with which this exclusion was accepted,14 speaks, at least in part, to the growing primacy of the logic of security evident in the 1952

10 Adelman et al (eds) 1994:547(Vol.2)

11 Kelley and Trebilcock 1998: 325


13 Cited in Whitaker 1987:37

14 Whitaker describes the absence of any official opposition to the clause prohibiting homosexuals and how it “...was rushed through parliament with no discussion whatsoever...” Whitaker 1987:37
Act. Although the exclusion of homosexuals under the logic of security may appear as a new, disguised version of moral exclusions, in this analysis it indicates the intermingling or 'hybridity' of logics of governance in this field. Moreover, the addition of exclusion on the grounds of 'drug addiction' and 'drug trafficking' signals the emergence of an increasing preoccupation with 'true crimes' central to the logic of criminality.

With respect to discretion, section 39 of the 1952 Act preserved the very wide scope of discretionary power which had characterised the 1910 legislation. Section 39 ensured that the government, acting through the Minister and his officials, continued to have the ultimate and final authority over exclusionary decisions. It decreed that there was to be no recourse in law for those deemed undesirable and excludable:

No court and no judge or officer thereof has the jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister, Deputy Minister, Director, Immigration Appeal Board, Special Inquiry Officer or immigration officer had, made or given under the authority and in accordance with the provisions of this Act relating to the detention, deportation of any person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile.15

While the 1952 Act had provided for Immigration Appeal Boards, they could only decide on a limited category of deportation decisions and even then only on matters of law, and due to the wide degree of discretion accorded to immigration officials, errors of law were quite rare. Moreover any of their decisions could be overturned by the Minister.16 The 1952 Act "gave the Minister powers of discretion such as to give him

15Quoted in Hawkins, 1987:103
The 1952 Act had defined and entrenched the legal concept of 'domicile' for the purposes of immigration policy. Domicile, defined as a 5 year period of residency in Canada, effectively served as a protection against deportation for non-citizens, interestingly this 'protection' was eliminated from the 1976 legislation.

potentially the last word on every individual case."17 It was indeed a 'discouraging document', characterised by a 'negative tone' and a 'heavy emphasis on exclusion'.18

ii) ‘Security’ Concerns and the 1952 Act

It is analytically significant that during the late 1950s and throughout the 1960s, the 1952 Act was increasingly seriously scrutinized and criticized for its sanctioning of exceedingly wide discretionary power to exclude and its explicit racism. Yet the use of similarly broad ministerial discretion for the exclusion of ‘security’ threats (rather than ‘purity’ threats) attracted next to no critical attention. Moreover, not only were discretionary powers to exclude on the basis of ‘security’ immune to any serious criticism, the continued preservation and enforcement of this exclusionary discretion, in the context of the growing challenge posed by liberal legal and humanitarian discourses during the late 1950s and 1960s, was a matter of particular concern. Similarly, while the explicitly racist dimensions of the 1952 Act and the racist parameters of the ‘desirable citizen’ enforced through the application of ministerial discretion has been a matter of considerable recent critical scholarly attention, the ideologically and politically motivated exclusions affected through the security provisions of the Act have elicited far less critical attention.

The notable exception to this is provided by Reg Whitaker in his carefully researched and detailed study of Canadian immigration policy. Whitaker’s work raises a potent challenge to the conventional liberal view of the 1960s as a period of liberalization, legalization and progress in the field of immigration. He highlights the fact that although racist and otherwise discriminatory uses of exceedingly wide ‘unchecked’ Ministerial discretion to exclude were fiercely attacked on ‘legal’ grounds, similarly broad tracts of exclusionary discretionary power to exclude on political and ideological

\[\text{of Employment and Immigration},\ 16\ \text{Imm.L.R. (2d) 1, [1992] 1S.C.R. 711}.\]

17 Hawkins 1987:102

18 Ibid., p.105
grounds in the name of ‘security’ did not elicit parallel legal concerns. During the late 1950s and early 1960s, as increasing public, political and legal attention was being paid to immigration policy and in particular to the racist and discretionary dimensions thereof, “[N]one of these developments appears to have had any impact on the thinking of the security establishment as reflected in the practice of immigration regulation and control.” The logic of ‘security’, already well entrenched during war-time and over the postwar period, can be seen to expand and intensify, free from scrutiny, at the same time as the logic of (racial) ‘purity’ was increasingly contested. The 1952 Act radically extended the security related exclusionary provisions:

...when the act was passed, broader legislative authority was given to prevent the entry into Canada of persons associated “at any time” with any group about which there were “reasonable grounds for believing” that they advocated or promoted “subversion by force or other means of democratic government, institutions or processes, as they are understood in Canada,” or were “likely to engage in or advocate” subversion. Moreover, persons “likely to engage in espionage, sabotage or any other subversive activity” were also to be barred.

The critique of the 1952 ‘security’ provisions bears a striking resemblance to contemporary criticisms of the contemporary ‘criminality’ provisions ushered in with Bill. C-44. This should not be surprising given that the ‘security’ provisions of the 1952 Act largely parallel the ‘criminality’ provisions contained in the Bill C-44’s recent amendment. Both employ discretion in the work of determining the risk of future ‘threats’ posed; both lack any clear, full right to judicial review; both refuse the right of rejected applicants to be given the reasons for the decision made; and, both remove the right of permanent residents to appeal. As with the 1995 ‘danger opinion’, under the 1952 Act, with regard to landed immigrants “...the state’s invocation of “national security”

19 Whitaker 1987:204
20 Ibid., p.35
21 See Chapter 6 for a discussion of this.
consideration could effectively override any appeal process". Moreover, the definitional content of both the 1952 'security' provisions and of the 1995 'criminality' provisions are vague and unspecified. "Subversion" and 'likelihood to engage in subversion' were as difficult to define then as 'dangerousness' and 'likelihood of posing a danger' are today. And finally, both provisions are particularly serious in that they operate within the ever present looming sovereign spectre of the threat of deportation.

As with the slippage which is evident in the context of 'purity' discourses with respect to their racist, moralistic and class dimensions, 'security' discourses which facilitated exclusions on ideological and political grounds can also not be separated off from other, then familiar, prejudices. This difficulty in reducing exclusionary logics to a single explanatory axis is acknowledged by Whitaker. He notes that while his primary focus is on the "...political and ideological bias, the illiberality, and the duplicity that...characterised the implementation of Cold War security policies", at the same time, "...some more familiar biases, such as racism, appear anew, cloaked under the rubric of "national security". Similarly, while the contemporary governmental preoccupation with 'criminality' cannot be reduced exclusively to racism, there is no question that constructions of criminality are raced.

While Whitaker considers the exclusionary uses of discretion in the context of the Cold War to be 'illiberal' and thus offensive, I argue that the discretionary power to exclude on the basis of deservedness and/or desirability, whether governed by the logic of purity, security or criminality is distinctly liberal. While legal checks on discretionary decision-making are regarded as practically desirable, they do not represent a substantive

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22 Ibid., pp.35-36

23 As put by Whitaker with respect to the 1952 security provisions, "...specific criteria for applying these very general terms...were not part of the legislation...but were left entirely to administrative discretion." (Ibid.,p.36)

24 Ibid.,p.9

25 This too is discussed in a later chapter.
challenge to the fundamentally exclusionary preoccupations of discretionary power in the construction and reproduction of dominant conceptions of (un)desirability which guides exclusionary immigration law and policy. Liberalism, as a mode of governing, imposes restrictions on the state's power to govern individuals through coercion and force. Exclusionary discretionary power, in the context of immigration, is the central mechanism which facilitates and justifies the continued sovereign control of non-citizens under a liberal regime of governance. One might even suggest that legal protections actually facilitate this state sanctioned coercion by setting out how exclusions, which in the case of deportation is extremely coercive, can be carried out - legally.

c) Rising Opposition to the 1952 Act

The two problems of 'unfettered' or 'absolute' discretionary power (unless it was linked with security security issues), and of racial discrimination were the primary focus of increasingly widespread and vocal legal, social and political opposition throughout the 1960s. Most prominent amongst the critics of the 1952 Act were lawyers and members of parliament. The former were predominantly concerned about the absence of legal protections afforded to non-citizens in the context of (non-security related) discretionary exclusions and the 'arbitrariness' that this absence entailed, and the latter were particularly troubled by the discriminatory nature of the existing legislation, a concern largely explained by pressure from increasingly ethnically diverse constituencies.

During this period, liberal legal discourses relating to notions of due process, individual rights and equality gained currency and converged with humanitarian and compassionate discourses relating to notions of social responsibility, social citizenship and international human rights that had emerged and had gained social, political and legal influence after the Second World War; "...even if admission to Canada was still considered a privilege and not a right, basic due process protections were coming to be
seen as properly extended to aliens...the values and the interests that were driving immigration policy had taken on...a much more liberal complexion.\textsuperscript{26}

Opposition to the 1952 Act also emanated from economic sectors but for quite different reasons. The Economic Council of Canada, sensitive to the rising unemployment and recession in the late 1950s, was particularly concerned by what it viewed was an excessively large and unwieldy sponsorship program which was issuing in a veritable ‘flood’ of unskilled, dependent immigrants. This concern was fuelled and heightened by “...the increasing need for skilled manpower in Canada and the very real difficulties experienced by the unskilled in the Canadian labour market.”\textsuperscript{27} In 1964, the Council went on record with the assertion that “the future prosperity of a nation will depend upon an adequate supply of professional, technical, managerial and other highly skilled manpower.”\textsuperscript{28} Indeed, it was these two related issues, the impact of the sponsorship program and the argued need for more highly skilled workers that underpinned the government’s 1966 \textit{White Paper}, to be discussed in more detail below.

Finally, the wide scope of Ministerial discretion under the existing legislation had created an unmanageable workload for the Minister. From an organizational and pragmatic perspective, there was simply “too much discretionary power for the Minister.” \textsuperscript{29}

Of particular interest in this analysis are the debates, discussions and reforms which addressed the issues of ministerial discretion and exclusion. As with \textit{Bill C-44} in 1995, it was the liberal legal paradigm (individual rights, due process, procedural justice). coupled with related egalitarian (non-discrimination) and humanitarian (protection, asylum) discourses which guided and set the parameters of the sustained critique of the

\textsuperscript{26} Kelley and Trebilcock 1998:345

\textsuperscript{27} Hawkins 1972:160


\textsuperscript{29} Hawkins 1972:103
exclusionary discretionary powers. Indeed, there were as well serious and contentious questions relating to more inclusionary policies such as the need for skilled over unskilled labour, the nature and impact of the sponsorship program and the need for long-term immigration planning v. the 'tap-on, tap-off' approach. However, the most severe criticism, which began in the mid-fifties and gained momentum through the 1960s, emanated from lawyers and MPs and focussed on individual rights and non-discrimination in the context of exclusions.\(^{30}\)

Two of the first and most effective critics of the 1952 legislation were E. Davie Fulton, a member of the conservative opposition and John Diefenbaker, leader of the Conservative party in 1956, both lawyers. In 1955, Fulton, on behalf of the Conservative party, initiated a critical debate in the House of Commons on immigration law and policy. Fulton submitted various legal reports and resolutions of the Canadian Bar Association and made numerous critical representations focussing primarily on the issue of individual rights, or the lack thereof, in the context of discretionary ministerial exclusions. The substance of the legal critique of Ministerial discretion under the 1952 legislation parallels that which was levelled at Bill C-44 in 1995. Fulton charged the government with 'administrative lawlessness' that denied ...,simple justice to Canadians and non-Canadians alike."\(^{31}\) Echoing the political and legal defence raised today with respect to broad ministerial discretionary powers to exclude, the government of the day responded repeatedly that "...there were no rights attached to immigration. It was a matter of discretion only and could not be made a matter of law."\(^{32}\) Fulton expressed the dominant liberal legal view which has remained remarkably consistent over the years. The following quote from the House of Commons Debates in 1955 could be mistaken for a current objection to the 1995 'danger opinion' legislation. Fulton argued,

\(^{30}\)Ibid., p.103

\(^{31}\)Ibid., p.110

\(^{32}\)Ibid.,p.110
When reasons for decisions do not have to be given, ... as the government maintains that they do not, and when ministerial discretion, which means in the nature of things, departmental discretion, is the sole arbiter, then error, corruption, favouritism, and injustice are invited and rights and liberties are denied in principle as well as in fact. 33

i ) The 1962 Immigration Regulations

The 1962 regulations mark the beginning of the government’s dismantling of the discriminatory dimensions of the Act and the growing recognition of the need to protect the individual rights of non-citizens. The 1962 Regulations began to respond to the challenges raised by liberal legal discourses. They removed the ‘preferred classes’ provision (P.C. 1956-785) which had proclaimed a hierarchy of desirability based on country of nationality. 34 The 1962 Regulations removed almost all traces of racial discrimination with the principle of ‘skill over ethnicity’(s.31(a)). The notable exception was that racial discrimination was preserved in sponsorship provisions which continued to favour Europeans. While all immigrants could sponsor close relatives, s.31(d) stipulated which countries could sponsor more distant relatives, “this clause ruled out Asia and all of Africa except Egypt.” 35

The regulations also began to respond to the growing concerns regarding the protection of the individual rights of non-citizens facing deportation. They enlarged the jurisdiction of the existing IAB to allow all people facing deportation the right to appeal, not just the previously selected categories. The Immigration Department claimed in its annual report that under the new regulations, “...the responsibility for the hearing of all appeals rests with the IAB which is completely independent of the Immigration

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34 Kelley and Trebilcock 1998:328

35 Hawkins 1972:126
This overstated the case. Because the Regulations had been effected through executive order, rather than through an amendment to the Act, the Minister could still reverse any decision rendered by the Board. In addition, the IAB could still not hear sponsorship appeals and the Minister continued to be 'swamped' with individual cases. It was not until the Immigration Appeal Board Act was passed in 1967 that a more independent and effective Board was created.

ii) The Sedgewick Report of 1965

In 1964 lawyer Joseph Sedgewick was asked by the Minister of Justice to investigate 23 allegations of unlawful detention (20 of these were Greek sailors who had jumped ship in Canada). Sedgewick was also asked more generally to report on the "...procedure now being followed in relation to the arrest, deportation and prosecution of persons who enter Canada or remain there illegally." Sedgewick was subsequently asked by Prime Minister Pearson to expand his terms of reference to include consideration of ministerial discretion.

Accordingly, Part One of the Sedgewick Report addresses the particular issue of detention and Part Two examines the question of ministerial discretion. Sedgewick's investigations led him to defend the detention and deportation decisions made by the Immigration Branch in the cases at hand. He concluded that there had been no unlawful detention or unlawful denial of rights in these cases. He added that the problem of deserting seamen "...has developed into a wholesale...and deliberately planned method of

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36 quoted in Hawkins, 1972:126

37 Kelley and Trebilcock, 1998:333

38 Hawkins, 1972:126

39 Ibid., p.127

40 Ibid., quoted on p.145
circumventing Canada’s immigration laws.” Sedgewick was disturbed by what he perceived as unfair criticism levelled at the Immigration Branch in this matter, stating that “many of the attacks which have been made in this affair have been ill-founded or exaggerated.”

At the same time as Sedgewick was preparing his report, the Department of Citizenship and Immigration was preparing its own report on the deportation process as part of a series of background papers in preparation for a Departmental White Paper on immigration. The Department repeated the view that criticisms of the Department with respect to arrests, detention and deportation were largely unfair and groundless. Nevertheless, this report reluctantly conceded that although the criticisms had been ‘unfair’,

...it is felt that so long as the Immigration Act provides such broad and uncontrolled power to detain individuals, the legal profession, the public and the press will tend to be very critical of anything which appears to be an excessive and improper use of this power. Although current immigration policy and procedures have established safeguards against abuses, the public will not be satisfied that these safeguards are genuine unless they are reflected in the legislation itself.

Justice must not only be done, it must be seen to be done. Thus in all contexts, including detention, the guiding preoccupation during this period was the legal implications of ‘unchecked’ ministerial discretion to exclude - not with ‘exclusion’ per se.

The Sedgewick Report is most commonly regarded as a prescription for the curtailment and ‘checking’ of Ministerial discretion and ultimately as a prescription for the revision of the Act. Sedgewick recommended, among other things, that the IAB

42 Ibid., p.38
43 Quoted in Hawkins 1972:147
should be completely independent and authoritative, subject to a right to appeal to the courts. He also recommended that s.39, which preserved the final discretionary authority of the Minister, should be eliminated and that "...express provision should be made from the IAB to the Exchequer Court of Canada on questions of law with a further appeal to the Supreme Court of Canada, with leave of that Court." Sedgewick repeated once again the dictum that entering Canada is a privilege and not a right, a principle which he recommended should be clearly stated in the Act. He firmly believed that due process provisions and the respect of the individual rights of non-citizens should not unsettle or disturb the state’s sovereign and absolute right to select desirable citizens and exclude others.

The Sedgewick Report is most often remembered for its liberal legal recommendations relating to the curtailment of ministerial discretion. However for the purpose of this review, Sedgewick’s unwavering support for the ‘state’s right to exclude’ is of particular interest. The preservation and justification of this sovereign right rests in his view upon the logic of security; that it was ‘both necessary and proper that every effort be made to exclude aliens who are undesirable for security reasons.’ The inherently imprecise meaning of ‘security reasons’ is highlighted by Sedgewick himself. He acknowledges that “...while the word security immediately brings to mind the struggle with communism” it also covered other “totalitarian causes” and criminals as well. The mention of ‘criminals’ in the context of national ‘security’ is significant, providing an early signal of the expansion and shifts which the definitional categories of both ‘security threats’ and ‘criminality’ would undergo in the years to come. Sedgewick also included several enforcement related recommendations, including a system of ‘alien’ registration and fingerprinting. Thus, while most have focussed on Sedgewick’s recommendations relating to the legalization of Ministerial discretion, it can also be read quite differently:

"...[T]he Sedgewick Report can be viewed as a strong restatement of the traditional

44Ibid., p.148

45 Quoted in Whitaker 1987:220
conservative view on national security and the rights of the state as overriding the rights of individuals especially if they are not citizens. Arguably, the lack of attention to this aspect of the report speaks at least in part to the taken-for-grantedness of the guiding logic of security which increasingly stood alone as the logic of (racial) purity was contested and dismantled.

iii) The White Paper of 1966

At the same time that Sedgewick was carrying out his inquiry, the Immigration Department was preparing its own policy paper on immigration which appeared in 1966. Most commentators regard this document as a fairly predictable document which addressed the dominant concerns of the day; "...an exercise in persuasion for a particular policy." As noted, this report centred most obviously on the need to better manage and control the sponsorship program, the need for increasingly skilled labour (as argued by the Economic Council), the need to substitute 'skill' for 'ethnicity' in immigration selection procedures, and the need to create a more independent Immigration Appeal Board. The new Board would take over the Minister's discretionary power to exclude and would be limited in its jurisdiction only "...by the right to appeal its decisions on questions of law to the Supreme Court of Canada with leave of that court." and to

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46 Ibid., p.221

47 For a detailed discussion of the Sedgewick Report and its recommendations see Hawkins 1972:145-150


49 Hawkins 1972:160

50 This view was strongly opposed by representatives of Industry and Labour who argued that the selection of 'skilled' over 'unskilled' immigrants would 'hamper frontier development'. and who argued that there was still a need for unskilled immigrants. (Hawkins 1972:162)

51 *White Paper* 1966:35
accede finally to the 1951 *International Convention on the Status of Refugees* and create a domestic system to determine whether individual claimants had a well-founded basis for (were ‘deserving’ of) Canadian protection in the form of refugee status.

However, and more significantly for the purposes at hand, this document reflected the ongoing and increasing desire on the part of the government to exclude undesirables from Canada. It provides an early expression of the shift in rationality away from that which justified immigration exclusions on the basis of status and towards exclusions based on governing associated risks/dangers.

The priorities and practices of exclusionary Canadian immigration law and policy had been increasingly complicated by the emergent challenges of liberal legal discourses and by humanitarian discourses. The *White Paper* can be read as a contribution to the redefinition (reconstruction) of the dominant conception of undesirability, which could no longer be legitimately constituted through the mobilization of moral and racial purity discourses and which had to accord to the parameters set by the liberal legal paradigm.

The *White Paper* addressed the exclusionary preoccupations of the day. The ‘vexed’ question of ‘security’, as it was described by Sedgewick; the elimination of moralistic grounds for exclusion; the need to penalize transportation companies which brought inadmissible (undesirable) people to Canadian shores; and finally the *White Paper* addressed the need to develop new measures to deal with certain prohibited classes, most notably ‘organized’ criminals and subversives.

While the *White Paper* did recommend the elimination of certain moralistic status-based grounds for exclusion, the manner in which this recommendation was justified is revealing and speaks to the flexibility of official exclusionary rationales and to the emergence of ‘risk-thinking’ in government policy. Significantly, the *White Paper* did not justify its recommendation to revise the definitional content of the prohibited classes by reference to any humanitarian or otherwise ‘liberal’ or ‘progressive’ rationales. but rather it argued that while the exclusion of these categories of prohibited classes was

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52 Ibid., p.16
indeed understandable and desirable, given Canada's legitimate desire to keep out 'misfits', the *explicit* inclusion of moral and social exclusionary categories was unnecessary. *These same people could be excluded for the same underlying reasons but through the application of other grounds.* The relevant section reads:

Persons who are undesirable on moral or social grounds ought to be excluded as immigrants but not necessarily as non-immigrants, although any such flexibility must be balanced by a compensating provision for their prompt removal should they attempt to remain permanently or give other cause. The homosexual, the beggar or vagrant and the chronic alcoholic are at present specifically prohibited. Though not particularly desirable as immigrants or non-immigrants, such people are not true dangers to the national interest by virtue simply of their personal failings. To the extent that they represent an unacceptable risk because of factors associated with their weakness, they will be excludable on health, criminal or subversive grounds, or, as public charges. They therefore could safely be deleted from the specific list of prohibited classes.\(^{53}\)

This is indeed a telling justification. Sedgwick makes no effort to disguise his support for the continued exclusion of these 'misfits' and 'undesirables'. Official construction(s) of desirability as defined in legislation do not necessarily coincide with underlying exclusionary preoccupations, moreover, official definitions of undesirability may be specifically designed and employed in surreptitious ways which belie the official definitions. Additionally, the categories of 'security' and 'criminality' are revealed to be far less definitive and straightforward than official discourses would suggest.

Ministerial discretion to exclude on 'security grounds' was largely immune from sustained substantive criticism. However liberal legal discourses had begun to draw at least some critical attention to the procedural 'secrecy' of these exclusions, and in particular to the powers of the RCMP with respect to security screening. In 1957, the RCMP's involvement in this national service was raised in the House of Commons in defence of its 'illiberal' security screening and decision-making procedures and processes. In response to the suggestion that non-citizens who were subject to security proceedings should be accorded more individual rights, the response was, "[I]n the nature

\(^{53}\)Ibid., p.25
of things, unfortunately, we cannot prove these things [security reports provided by the RCMP, military intelligence, and the civil service]...There has to be an assumption that the people who do it, like our RCMP...are reliable.  

The question of security and security screening in particular was indeed "a vexed problem", and was clearly not easily amenable to the challenges raised by liberal legal discourses; in the contest between liberal legal and humanitarian discourses and 'security' concerns, national security wins. Thus, while there was an internal departmental review in the late 1950s and a Royal Commission on Security (The 'Mackenzie Commission' of 1969) which coincided generally with a 'thawing' of the Cold War, "Neither of these did more than scratch the surface of the immigration security process; some never even scratched [the surface], despite the growing disillusionment of Canadians with the old Cold War mould and despite some severe external shocks to the old thinking."  

These 'external shocks' included:

...the collapse of the international Communist monolith of years past, the Sino-Soviet split and its divisive ramifications throughout the left worldwide, the influx of American political refugees during the Vietnam War, and the challenge of left wing refugees from right wing totalitarian violence.

Nonetheless, evidence of the mounting challenge posed by liberal legalism is found in the *White Paper* in its important concession that the current legal definition of subversion was unlawfully broad; "[I]t is important that recognition be given to the fact that the holding or expression of unpopular opinions, or sympathy with such opinion, is not in itself indicative of subversive activity." However, beyond this, the question of the

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54 Quoted in Whitaker 1987:206

55 Whitaker 1987:204

56 Ibid., p.204

processes and practices relating to security screening was left largely alone in the *White Paper*. 58

Following the appearance of the *Sedgewick Report* and the *White Paper*, a Special Joint Committee of the Senate and the House of Commons on Immigration was appointed in 1966 to review, conduct hearings and report on both documents. Even more extensive hearings were carried out in 1975 following the government’s release of a Green Paper on Immigration in the previous year as background preparation for the long-awaited new Immigration Act in 1976. In the 1960s and the first half of the 1970s, Canadian immigration law and policy received historically unprecedented critical public and political attention and debate, leading some to describe this period as one which witnessed not only the de-racialization and legalization of immigration processes, but also the democratisation of the immigration policy-making process. 59 However, it is surely also significant that as the challenges posed by liberal legal and humanitarian discourses were gaining political and social currency, the number of deportations jumped to a record high. In the 1967-1971 period, deportations jumped to 11,766 (compared to “about 3,500 for each of the preceding five year periods”). 60 Unlike the figures for the depression period, very few deportations fell under the ‘public charge’ classification. The primary causes were ‘stealth or misrepresentation’ (57%) and criminality (32%). 61 870 or 7% were classified as ‘other’, which “presumably covered deportation for security reasons.” 62 While it is assuredly true that the official classifications of causes for deportation reveal very

58 The processes and procedures relating to security screening were the focus of increasing political and public attention over the 1960s, however liberal legal discourses did little to affect existing procedures until the mid-1980s. For more detailed discussion of the specifics of these debates and developments see Whitaker 1987.

59 Kelley and Trebilcock 1998:341

60 Ibid., p.348

61 Ibid., p.348

62 Ibid., p.367
little about the ‘actual’ reasons for deportation and that they “...conceal more than they disclose...”\(^{63}\), it is nonetheless analytically interesting. The period currently under review saw the numbers of people forcibly removed from Canadian soil more than triple. Moreover, of the 3,242 people who were deported between 1947/48 and 1953/54, more than half (1,956) were deported for ‘other civil causes’ (security reasons), while the remaining 1,286 people were deported for medical, criminal or economic grounds.\(^{64}\) Thus ‘criminality’ deportations are seen to jump dramatically over the 1960s, while ‘other civil causes’ (‘security’) deportations dropped almost equally dramatically.


During these years, three important pieces of legislation were passed which responded to the challenges raised by liberal legal and humanitarian discourses in the intervening years since Mackenzie King’s 1947 statement on immigration. This section examines these legislative reforms in light of their ‘exclusionary’ dimensions. Together, these legislative reforms conventionally represent the ‘triumph’ of liberalism in the context of Canadian immigration law and policy. However, they also speak to the continuing priority of exclusions and to the guiding influence of the rationale of security which not only continued to justify and underpin discretionary exclusions but which was entrenched and intensified.

Thus liberal legal and humanitarian discourses successfully challenged and ultimately displaced, the guiding logic of moral and racial national purity in national exclusions. They also successfully challenged the ‘illiberal’ discretionary procedures of exclusion. Nevertheless, the nature, substance and social construction of national ‘exclusions’ emerged unscathed; neither discretion, nor exclusion *per se* was at issue in the liberal challenge; the sovereign right to exclude was taken-for granted as was the idea

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\(^{63}\)Ibid., p.367

\(^{64}\) Whitaker 1987:195
that exclusions can be legitimately and 'objectively' justified and enforced - with the appropriate legal protections. Thus unlike the explicitly discriminatory and illiberal logic of national purity, which could not possibly be sustained in the face of the liberal legal or humanitarian discursive challenge (and indeed in the face of changing economic and labour market needs and changing international migration patterns), 'security' of the nation or public became largely regarded as a reasonably uncomplicated, objective and legitimate justification for the continued preservation, entrenchment and application of wide tracts of exclusionary discretionary power in coercive national exclusions.

i) The Adoption of the 'Point System' (1967)

In 1967, the government introduced new immigration regulations which implemented the 'point system'. The point system is conventionally understood as representing the official adoption of the principle of non-discrimination in the selection of immigrants. The introduction of the point system in 1967 "...officially ended racial and ethnic discrimination in the processing of independent immigrants" by making 'skills' the main selection criterion"65 thereby ending the implicit 'White Canada' policy that had shaped the historical development of Canadian Immigration law and Policy from its inception. However, it should be remembered that the guiding statute was still the racist and exceedingly discriminatory 1952 Act and indeed there is good reason to believe that the introduction of the point system had more to do with pragmatic international and domestic political and economic considerations than principled ones. Canada needed more immigrants and immigration from traditional (white) source countries was declining. 66 Also, as pointed out by Hawkins, there was "...an increasing recognition that Canada could not operate effectively with the United Nations, or in a multi-racial Commonwealth, with the millstone of a racially discriminatory immigration policy

65 Jakubowski 1997:18

66 Kelley and Trebilcock 1998:351
Moreover, critics have persuasively argued that less obvious non-legal discriminatory mechanisms persist: the ‘skill’ criteria continue to discriminate against immigrants from developing countries; most of the resources committed to the recruitment of migrants continued to reflect a ‘preference for British immigrants’; as did the government’s placement of foreign visa offices.

**ii) The Immigration Appeal Board Act (1967)**

As had been recommended in the *Sedgewick Report*, 1967 also saw the passage of the *Immigration Appeal Board Act*. It created an independent appeal tribunal which had final authority over all deportation decisions subject to judicial review (with leave) to the superior courts on questions of law and jurisdiction. The creation of the new Immigration Appeal Board (IAB) responded directly to the sustained liberal legal critique of (unchecked) ministerial discretion to exclude which had been gathering momentum since the mid-fifties. The *Immigration Appeal Board Act* devolved the final discretionary authority over exclusionary decisions from the Minister to the IAB. Unlike the previous and largely ineffective Board, the new IAB could hear appeals on both deportation and sponsorship decisions. Significantly, the jurisdiction of the new Board was expanded. It could now consider not only legal and factual questions but also humanitarian and compassionate factors (known as the Board’s ‘equitable jurisdiction’). After amendments, the IAB Act provided that the Board could take into account “…the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief.” The liberal legal critique with respect to the issuance of reasons as a requirement of natural justice (the right to know the case made against you) was also satisfied through this legislation which, in its final form, provided that the Board

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67 Quoted in Jakubowski 1997:18

68 Ibid., p. 19

69 Kelley and Trebilcock 1998:351

70 Quoted in Hawkins, 1972:163
"...may, and at the request to the parties of the appeal, shall give reasons for its disposition of the appeal."

Under the IAB Act, the cabinet retained the discretion to specify the classes of relatives that could appeal a negative sponsorship decision - indicating the continued efforts of the government to 'control' the sponsorship program and thus reduce the numbers of predominantly unskilled, dependent applicants. Even more significantly for the purposes at hand was the manner in which the Act dealt with the issue of security exclusions. Opposition members tried unsuccessfully to provide for some measure of judicial review for "...prospective immigrants rejected on security grounds, or on the grounds of an adverse criminal intelligence report, whose cases would not, under the Act, come before the Board if the Minister and the Solicitor General jointly decided that this would be against the national interest." The challenges raised by liberal legality with respect to the impact of unchecked discretion on the principles of natural justice lacked the discursive power to unsettle the guiding influence of the logic of security in discretionary immigration exclusions.

Despite these major legal amendments and liberal triumphs in the second half of the 1960s, the 1952 Act was still the guiding immigration statute. While the 1967 Regulations and the Immigration Appeal Board Act were important reforms, ...the flawed 1952 Immigration Act remained the guiding statute and it still contained many of the racist and ethnocentric biases of the early twentieth century, including prohibitions against the entry of a wide range of mental and moral defectives. Clearly, if Canada was serious about immigration reform a new Immigration Act was necessary.

As further indication of Canada's newly entrenched 'liberal' approach to immigration and settlement issues the government passed the Multiculturalism Act in 1971 which marked a significant shift in official policy long characterised by explicitly

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71 Ibid., p. 163
72 Ibid., p. 164
73 Avery 1995: 186
racist and assimilationist objectives. Thus as the 1970s began, liberalism had all but triumphed in the context of Canadian immigration law and policy. All that remained was to develop and implement a new Immigration Act.

iii) The 1976 Immigration Act and the 1978 Regulations

In 1973, the government announced its intention to carry out a major review of immigration law and policy and to publish its findings in a Green Paper prepared by departmental officials and academic consultants. In February of 1975, the Green Paper was tabled in the House of Commons, 21 public hearings were subsequently held across the country by the Joint Committee of the Senate and House of Commons, and in July of the same year the Committee submitted its report and recommendations, most of which were incorporated into the Immigration Act of 1976 (passed in 1977).  

The 1976 Act is conventionally viewed as representing the culmination of a substantive historical shift in the nature and orientation of Canadian Immigration law and policy; from ‘illiberality’ to ‘liberality’. Consider the following glowing summations made by contemporary political scientists:

The Immigration Act, 1976, as it is known, constituted the most liberal piece of immigration legislation ever to become law in Canada. The Act showed a positive emphasis and set as immigration priorities, the reunification of families, humanitarian and compassionate treatment of

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While a full discussion and examination of the political and public debates which followed the publication of the Green Paper is beyond the scope of this Chapter, it is worth noting that considerable attention was given by the RCMP and of the Ottawa security establishment to the issue of security exclusions. Others raised the now familiar challenges of liberal legality in the specific context of security; challenges which, as we have seen, do not question the underlying logic of security, but rather which focus on procedural justice and the need to further protect the individual rights of those subject to security related exclusionary processes. These developments are discussed in detail in Whitaker Double Standard, 1987
refugees, and the promotion of programs satisfying Canada’s economic, social, demographic and cultural goals.\textsuperscript{75}

Or,

The coming into force of the Immigration Act, 1976 on 10 April 1978 ushered in a new era in the history of Canadian immigration law...the new act was a significant departure from its predecessors.\textsuperscript{76}

Or finally,

...the 1976 Act marked the beginning of a new, more liberal and more cooperative era in Canadian immigration.\textsuperscript{77}

There is no question that the 1976 Act responded favourably to the then dominant discursive challenges raised by liberal legality and humanitarianism. It also and no less centrally entrenched and intensified the guiding exclusionary logic of security to an unprecedented degree.\textsuperscript{78} As observed by Whitaker, one of the few immigration scholars who highlights the continued ‘illiberality’ of the 1976 Act;

....the drafters of the new Act outdid themselves in offering the government the most sweeping statutory authority to exercise administrative discretion in national security matters.\textsuperscript{79}

\textsuperscript{75}Gerald Dirks \textit{Controversy and Complexity: Canadian Immigration Policy During the 1980s,} Montreal: McGill-Queens’ University Press, 1995:14

\textsuperscript{76}Kelley and Trebilcock, 1998:390

\textsuperscript{77}Hawkins 1988:xv, as quoted in Jakubowski 1997:19

\textsuperscript{78}While this study is primarily concerned with ‘exclusions’, it is certainly analytically significant that the vast majority of scholarly work which examines the development of Canadian Immigration law and policy focuses on the inclusionary, liberal legal and humanitarian dimensions of the 1976 Immigration Act.

\textsuperscript{79} Whitaker 1987:269
While I share Whitaker’s critical concern with discretionary exclusions, I do not regard them as ‘illiberal’ (except in a strictly legal sense). Rather, the continued and increased centrality of the logic of security (and more recently of criminality) in relation to immigration exclusions and the continued preservation of broad tracts of discretionary power to exclude are regarded as practical and effective technologies of liberal governance. Liberalism as a practical mode of government requires that the use of coercive state powers against private individuals be carefully socially, politically and legally legitimated and checked. From a legal perspective, ‘punishment’ discourses provide the guiding rationale in the context of the coercive powers of the criminal justice system and ‘sovereignty’ discourses underpin coercive exclusionary immigration practices. From a social and political perspective, the mobilization of national ‘security’ discourses and criminality and ‘danger’ discourses further contribute to the continued effectiveness and legitimacy of the sanctioning of extreme coercive powers in the enforcement of immigration legislation under a liberal regime of government. Under this regime, coercive exclusions in the context of immigration are effected through the operation of discretionary powers. The ‘inclusionary’, ‘humanitarian and ‘egalitarian’ dimensions of the 1976 Act are indeed liberal changes and certainly do speak to the relatively newly achieved dominance of liberal discourses as reviewed above. However, the preservation of widely discretionary, exclusionary powers in the Act, is no less liberal in the sense of liberalism as an active form of government, rather than as a relatively straightforward political doctrine or ideology.

The new inadmissibility provisions of the 1976 Act, removed all explicit traces of the moral (and racial) grounds for exclusion; gone were the long existing prohibitions against ‘physically defective persons’, ‘homosexuals’, ‘the insane’, ‘idiots, imbeciles and

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81 This discussion speaks to the provisions as they were set out in the original 1976 Act. There have been numerous and analytically significant amendments to these provisions but these will be taken up in the next chapter.
morons' and the like, and gone was the prohibition against individuals convicted of 'crimes of moral turpitude'. The 1976 Act replaced the 1952 prohibition against persons who were convicted of crimes of moral turpitude with a prohibition against persons convicted of crimes prohibited by Canadian Criminal Law. In their place, s.19 organized and itemized no less than 17 specified grounds of inadmissibility. The breakdown of these 17 specified grounds speaks volumes: one deals with medical inadmissibility of persons due either to the danger posed to public health or safety or the likelihood (on 'reasonable grounds') of causing excessive demands on health or social services (s.19 (1) (a)); another deals with economic inadmissibility due to the existence of 'reasonable grounds' for believing persons to be 'unable or unwilling to support themselves' (s.19 (1) (b); yet another deals with people who are not, in the opinion of an adjudicator, "genuine visitors or immigrants" (s.19 (1) (h); and one deals with those entering Canada without the express consent of the Minister when they were required under the Act (s.55) to have this consent (s.19 (1) (l). The remaining 13 grounds are entirely devoted to matters relating to criminality and security.82

Significantly, the inadmissibility provisions are concerned to exclude not only the 'threats' posed to the nation by subversion, terrorism and/or espionage, threats conventionally linked with the guiding logic of 'security', but also exclude 'threats' posed by 'organized' criminals. S.19 (1) (g) prohibits the entry into Canada of those persons.

...who there are reasonable grounds to believe will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or are members of or are likely to participate in the unlawful activities of an organization that is likely to engage in such acts of violence.83

82 The 1976 Act replaced the 1952 prohibition against persons who were convicted of crimes of moral turpitude with a prohibition against persons convicted of crimes prohibited by Canadian Criminal Law. (Kelley and Trebilcock 1998:395)

83 Whitaker 1987:269
As is evident from the above, the inadmissibility provisions of the 1976 Act are both backward and forward looking; concerned with deeds done, deeds ‘likely’ to have been done in the past, and deeds ‘likely’ to be done in the future. The ‘forward looking’ dimension of the provisions “...gives extraordinary leeway to the state since it deals with perceptions of intentions in the future rather than with actual acts in the present or past.”

Similarly, with respect to national security, s.19(1) (d) refers to:

persons who have engaged in or who there are reasonable grounds to believe are likely to engage in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada, except persons who, having engaged in such acts have satisfied the Minister that their admission would not be detrimental to the national interest.”

S.19 (1) (f) of the 1976 Act deals with “persons who there are reasonable grounds to believe will, while in Canada, engage in or instigate the subversion by force of any government.” The breadth of the discretionary powers being employed, is further increased by the fact that neither “subversion” nor “reasonable grounds” nor “democratic government, institutions or processes” are defined in the Act.

An additional extension of discretionary powers in relation to exclusions is provided by the removal of the concept of domicile in the 1976 Act. In the 1952 Act non-citizens who had been living in Canada for five years were deemed to have acquired domicile and could not be deported, with some exceptions. This deletion “...effectively

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84Ibid., quoted on p.269
85Ibid., quoted on p.269
86Ibid., p.269
87Kelley and Trebilcock 1998:430
extended the threat of removal from Canada to all non-citizens, no matter how long they had resided in Canada."

Of particular interest is the manner in which the 1976 Act dealt with permanent residents who were deemed to represent a ‘security risk’. This is specifically relevant given the obvious parallels being drawn between the use of Ministerial discretion to exclude based on ‘security’ and that used in the 1990s to exclude on the basis of ‘dangerousness’ and ‘criminality’. The 1910 Act had provided for no appeals against a deportation order vesting final discretionary authority over admissions and removals in the Minister. The 1952 Act had created a very limited and largely ineffective Appeal Board which could only review certain deportation decisions and whose decisions could be reversed by the Minister. The 1967 Appeal Board Act had for the first time conferred upon the IAB the authority to stay or quash a deportation order made against a permanent resident on the basis of ‘all the circumstances of the case’. However, this new power was subject to the discretion of the Minister and the Solicitor General if they agreed to issue a certificate indicating that based on security and criminal intelligence reports it would be against the national interest to provide discretionary relief. Thus, in accordance with the guiding principle of state sovereignty at common law, discretion was, and indeed still is, preserved for the Crown to decide whether the continued presence of a non-citizen in Canada was (not) in accordance with the ‘public good’.

The 1976 Act left unchanged the powers of the IAB to hear appeals. Appeal decisions would consider questions of law, fact, mixed law and fact and compassionate or ‘equitable’ grounds. However, the Act did limit access to appeal on humanitarian and compassionate grounds; if the Minister and the Solicitor General issued a jointly signed certificate that it would be contrary to the national interest to grant such an appeal (‘on all the circumstances of the case’). This certificate is considered ‘conclusive proof’; no evidence whatsoever need be filed other than the simple assertion, stated in a

88Ibid..p.430
certificate, that the minister has "reasonable grounds to believe" that the person is "likely to engage in" certain activities.  

The original act provided for a hearing before a Special Advisory Board in addition to the filing of a certificate. This was a very odd little board indeed. The Royal Commission on Security had recommended in its 1969 report that a security review board should be introduced as a 'check' on this particular use of exclusionary discretionary power. However the Special Advisory Board which was created under the Act was a caricature of the liberal legal discourse that had underpinned its creation. 90 After receiving security and/or criminal intelligence reports from the RCMP, the Minister and the Solicitor General could, if they so chose, make a report to the Board and the Board would give the person in question the 'opportunity to be heard’. However, even more oddly, the Act also indicated that the person in question could not know the evidence against him and could not cross examine potentially hostile sources of information. This Board only heard one case before it was eventually replaced by the Security Intelligence Review Committee (SIRC) under the Canadian Security Intelligence Service Act of 1984. 91

A conventional reading of the significance of the 1976 Act is that it marks the beginning of a new, liberal era in Canadian Immigration law and policy. Such a reading focuses on its inclusionary dimensions and considers, if at all, the exclusionary dimensions as a relatively straightforward and legitimate liberal attempt to 'balance' the

89 Whitaker 1987:271

90 Past recommendations by the 1969 Royal Commission to create a Security Review Board to take over responsibility for security and criminal intelligence screening from the RCMP had, not surprisingly, been met with fierce opposition from the RCMP. For a full discussion of this issue and the debates surrounding it see Whitaker 1987.

91 Whitaker 1987:271
civil rights of non-citizens with (legitimate) national security and criminality related exclusionary objectives. The forgoing review and analysis of the historical development of exclusionary immigration law and policy suggests a somewhat different interpretation. It is suggested here that the 1976 Act represents the peak of the legislative, political and social discursive dominance of liberal legal and humanitarian discourses in the historical development of Canadian immigration law and policy. Liberal legal principles of due process, individual rights, natural justice and formal legal equality (non-discrimination) were legislatively and procedurally entrenched to an unprecedented degree as was belatedly the humanitarian obligation under international human rights law to protect ("genuine") refugees. Additionally, and for the present analysis more significantly, the 1976 Act represents the legalization, formal entrenchment and expansion of the guiding exclusionary logic of security, supplemented by emerging concerns with criminality, facilitated and enforced by the operation of discretionary power, and justified by reference to traditional notions of national sovereignty.

III) Conclusion

The construction of a community founded upon the expulsion of textual outlaws...requires the establishment of borders and boundaries. Beyond the boundary can be identified the outlaw, within the boundary exist the members of the community, attempting to 'lead their lives free from fear and in relative security'...Some borders are easily identified: immigration law establishes the nation as a discrete community which is vulnerable to flooding by individuals from other countries.

92 It would be misleading to give the impression that Canada had taken no humanitarian action with respect to refugees prior to 1976. It certainly had. However its actions were largely reactive and ad hoc. Canada had resisted the creation of a permanent refugee determination system for 'on-shore' claimants until 1976, having previously preferred to maintain some control over which 'humanitarian' refugee needs should get priority.

What is interesting, as well as somewhat surprising, is the degree to which many scholars of Canadian immigration law and policy either ignore the entire question of ministerial discretion for security and criminality exclusions when discussing the development of Canadian immigration law and policy during the period under review, or treat these issues as a relatively straightforward and necessary way to ensure the 'public good'. They sometimes advocate more individual rights so as to make the process more fair, more just, more legitimate, however the exclusions for certain historically specific reasons are accepted as necessary and right. They do not probe the wider significance of this always and already sovereign and absolute right of the state to use its coercive exclusionary powers against individuals who are not 'legal' citizens. Under a liberal regime of government, such coercive powers must be legitimised, and in the context of immigration, legal notions of 'sovereignty' and political and social notions of the 'public good' have provided longstanding legitimating rationales. While racially, morally or ideologically motivated exclusions are clearly antithetical to liberal legal principles of formal equality and therefore obviously offensive under a liberal regime of governance, exclusions which aim to protect the nation and the nation's public, those governed by the logics of criminality or security, are far easier to justify and are conventionally received as relatively unproblematic and legitimate. Unlike racial, moral or ideological exclusions, criminality and security exclusions are not explicitly discriminatory. They are continuously constituted as neutral, objective and, therefore, legitimate bases for necessary exclusions.

Borders define national boundaries and immigration law and policy governs who will be excluded and how. The powers which are applied are coercive sovereign powers: searching and seizing, arresting, detaining, restraining and forcibly expelling. Under a liberal regime of governance, such extreme uses of coercive state power must be legally justified and socially and politically legitimated; the notions of 'sovereignty' and states as national 'communities' constitute foundational legitimating rationale. Illiberal and
coercive exclusionary state activities are 'liberalised' by legal checks and protections. Individual rights, appeals, reasons, hearings and such; this makes them less offensive to the humanitarian liberal conscience and more congruent with abstract notions of natural justice and formal legal equality. However, despite all the legal gymnastics which liberalism incites with respect to justifying and legalizing exclusions, the basic processes of exclusion continue regardless. And these processes are not legal. They are social and political processes, inflected by a variety of discourses and guided by distinctive governing preoccupations. Dominant constructions of drug dealers, war criminals, terrorists and organized criminals are historically specific social constructions: they are raced, gendered, moralised, ideological and classed, less obviously but no less significantly than other 'threatening' figures in the past. The "body of crime", or perhaps here more appropriately, 'the threatening outsider', "...is being continually reconfigured as feminine, black, young, homosexual, maternal and on and on. Such a process does not and cannot end."

In its exclusionary work, immigration law and policy produces and coercively enforces dominant conceptions of the 'undesirable' Canadian citizen; the 'threatening outsider'. This work is not merely repressive and negative. As the undesirable citizen is negated through expulsion, the 'desirable' citizen is produced; as the border is policed and enforced, the national community is produced; "Founded upon the illusion of a social contract, its inclusionary 'we'...can only exist through the expulsion of the others." 

Liberalism both complicates and legitimates national exclusions enforced through the policing of national boundaries. It requires that exclusions be legal and fair; that discretion be checked and constrained. It requires that the state bend over backwards to justify and legitimate any use of coercive force against its citizens. While non-citizens are

94Ibid.,p.19
95Ibid.,pp.12-13
easier to exclude. the state still cannot be seen to be acting arbitrarily; in this sense liberal legality legitimates exclusions. In the context of immigration exclusions the liberal challenge sparked more than a decade of legal and political attempts to justify and legalize the use of discretion in the coercive exclusion of non-citizens. The ideological concept of state sovereignty and its constituent consideration of the 'national interest' or 'legitimate social objectives' provides the foundational legal rationale for 'illiberal' state processes and practices of national exclusion. However, as argued here, national exclusions have to more to do with the social and political processes of constructing and reproducing collectivities than with legal concepts of sovereignty or the 'public good'.
Chapter Four

Floods, Frauds, and Refugees:
The Emergence of the ‘Bogus Refugee’ in the 1980s

I) Introduction

The Immigration Act of 1976 (the Act) has been held to represent a triumph of liberal legal and humanitarian values. Certainly much in the Act justifies this judgment. It curtailed ministerial discretion in sponsorship and deportation appeals. It very substantially removed all explicitly racist provisions in the immigration selection process. It ‘de-raced’ and ‘de-moralized’ exclusionary categories. Most significant for the present analysis, the Act entrenched a permanent, on-shore refugee determination system which embodied in Canadian law Canada’s obligations under the 1951 International Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees.

Canada has always preferred to select its own refugees. It wants to minimize the numbers of refugees-claimants who succeed in presenting themselves on Canadian soil. The government is much more at ease in the business of selective refugee resettlement, sending teams of immigration officers to refugee camps around the world and hand-picking those they judge most desirable, that is, those in good health, able to speak English or French, with the most marketable skills and high ‘establishment potential’. Indeed it wasn’t until 1973 that Canada established an administrative procedure for processing on-shore refugee claims.

Canada had previously admitted large numbers of refugees on a reactive basis through special programs set up to respond to particular international crises. For example, in 1968, one year before Canada finally acceded to the 1951 Convention (a delay attributed to Canada’s fears that it would constrain Canada’s ability to deport on security grounds), Canada responded to the Prague uprising and its tragic consequences by relaxing admission standards and providing transportation grants for Czechoslovakian

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1See for example Kelley and Trebilcock, 1998; Dirks, 1995, and Dirks 1977
refugees. By 1969, 12,000 refugees had arrived. In 1972 when Ugandan dictator Idi Amin Dada expelled 50,000 East Indians, Canada responded with a special program which sent an immigration team to Kampala to process applications. By 1973 more than 7,000 of these refugees had arrived. The political dimension of this approach to refugee protection became clear in 1973 when Chilean General Augusto Pinochet seized power from the democratically elected Marxist government of Salvador Allende. Despite a brutal crackdown by Pinochet which produced thousands of refugees, Canada did not relax admission policies under a special program; indeed it stepped up security screening for Chilean applicants. Only 780 visas were issued to Chileans by Canada over the six month period following the coup.2

In marked contrast to Canada’s comparative readiness to receive refugees whom it has chosen either individually or as specially designated categories of immigrants, responding to the needs of ‘spontaneous’ self-selected refugees who arrive at Canada’s borders had not been part of Canada’s history. That the Act introduced an admirable adjudication system for such claimants marks a high point of the impact of liberal ideology on Canadian refugee practices. However, the inclusionary and humanitarian dimensions of this major Act were short-lived. No sooner had the new system been implemented than it was subjected to a variety of potent national and international

challenges which, over the course of the 1980s, effectively undermined the ‘inclusionary’ and ‘humanitarian’ dimensions of the legislation and re-asserted exclusionary ones.

It will be argued in this chapter that the guiding inclusionary objective - to identify and protect genuine, and therefore deserving, refugees ‘at risk’ - was soon re-framed in exclusionary terms. The guiding legislative and policy preoccupation with assessing the risk of persecution that individual refugees would face were they to be returned to their country of origin (and therefore the genuineness of their ‘need’ for protection) has been increasingly supplanted by a preoccupation to determine, assess and minimize the risks to the Canadian state and society posed by putative ‘bogus’ refugee claimants.3

During the 1980s, the threatening figure of the undeserving, fraudulent, ‘bogus’ refugee claimant was born, with the state as the ‘victim’ of their abuse of the system. The ‘fraudulent claimant’ became increasingly criminalized as the perpetrator of offences against the state. While the deservedness of genuine refugees continued to be generally accepted, refugee claimants, particularly of ‘on-shore’ self-selected claimants were increasingly regarded as ‘undeserving’ and ‘undesirable’ due to the risk they were seen to pose to the state and to the public through fraudulence and criminality. The convergence and increasing currency of ‘fraud’ and ‘criminality’ discourses in the context of refugee determinations, and as will be discussed later in the context also of social welfare, were both guided and strengthened by a more general growing preoccupation with ‘victims’ evident in most areas of public law and policy. Significantly, while this preoccupation with victims could theoretically have lead to an expansion of sympathy for refugees, it translated into citizens at large regarding themselves as potential victims of criminal immigrants.

The liberal humanitarian ‘triumph’ of the 1976 Act, and in particular the creation of a national refugee determination system, was not undermined exclusively ‘from the outside’. Liberalism itself rests upon very particular notions of deservedness. In the

3 The categories of ‘fraudulence’ and ‘criminality’ have also become increasingly linked in social and political discourses with respect to welfare recipients. This development will be examined in considerable detail in Chapter Five.
context of social welfare for example, the deserving recipient of the state’s ‘compassion’ and ‘generosity’ is an acquisitive, independent, law-abiding citizen who has become needy and dependent ‘through no fault of their own’; they are a genuine ‘victim’ of circumstances beyond their control and as such they deserve the state’s help ‘to get back on their feet’ again. Their claim to state assistance is well-founded on the basis of their genuine ‘victim’ status.

These same parameters of deservedness apply in the context of refugee determination. It is only the genuine refugee who, by virtue of their genuine, legally defined, victim status deserves Canada’s protection and access to the benefits of Canadian citizenship. In both contexts, the ‘fraudulent’ claimant is the discursive epitome of undeservedness. Add to each of them a suspicion of criminality and an archetypal neo-liberal threat is complete: the ‘criminal immigrant’ who victimizes the state through fraudulent claims of deservedness in the context of welfare or refugee claims and who poses a risk/danger to the public. ‘Inclusionary’ welfare liberalism has not therefore been hijacked from the outside. Rather its foundational guiding binaries contain the conditions for its own demise. ‘Inclusionary’ welfare liberalism is necessarily exclusionary - not everyone deserves to be included, not everyone is equally desired for inclusion. The sorting out of who is (un)deserving and who is (un)desirable is a fundamentally liberal project, just as it is a fundamentally moral one. In this light, the discursive shift in Canadian immigration law and policy over the 1980s and early 1990s, is not accurately represented as a shift from ‘liberal’ to ‘non-liberal’ preoccupations, but rather as a shift from welfare liberal to neo-liberal rationales. Thus, it is not simply a question of a shift from liberal to conservative political platforms and agendas. ‘Dessert’ discourses are both inclusionary and exclusionary. While welfare liberalism highlights inclusion, compassion and ‘deservedness’ and neo-liberalism highlights exclusion, risk and ‘undeservedness’ Each represents one pole of the same guiding discourse.

‘External’ factors do of course come into play. The ‘on-shore’ refugee determination system was put to the test swiftly after it had been created by the 1976 Act. Refugees started arriving ‘on shore’ in greater numbers and from a wider range of ‘non-
traditional', (non-white, poor and non-communist) source countries than ever before. The significant increase in numbers threatened to overwhelm the new refugee determination system, a threat which has continued to govern its operation through the 1980s and up to the present day. Equally important, the Canadian government, though ready to admit more refugees than most other developed countries, remained determined to control their selection and therefore sought to ensure that the number of landed refugee claimants was as low as possible.

Many of the legislative and regulatory developments over this period which were designed to respond to these threats have a distinctly neo-liberal flavour. To manage the threat to the refugee determination process posed by the greater numbers of landed claimants the government sought to streamline and improve case processing time and efficiency (without infringing upon the individual rights of those being processed). In response to a series of severe, poorly managed backlogs, a central preoccupation of all these reforms was to find faster and more efficient ways to weed out blatantly unfounded, fraudulent or otherwise excludable claims at an earlier stage in the process.

However, the threat as it was perceived was not merely numerical. The numbers did indeed impose a significant challenge to the existing system and its staff. However mere numbers in and of themselves were not the subject of the public and political moral outrage and panic to which they gave rise. Rather, people were, people arriving in boats on our shores from ‘non-traditional’, non-white places with unfamiliar faces making claims to ‘our’ country’s largesse.

During the period under review, legal and policy reforms were justified by reference to the need to contain this threat in order to preserve the ‘integrity’ of the system and the safety of the public. Less well known but perhaps even more significant was the guiding policy objective to retain control of Canada’s borders and of the selection of immigrants. On-shore refugees complicate this governmental objective. No sooner had the Canadian government implemented an on-shore refugee determination system did it proceed to limit access both to the shore and to the system.

This Chapter traces these developments. It begins with a discussion of the nature
and context of the major relevant legislative developments of the 1980s and early 1990s. Particular attention is paid to the changing discursive parameters of exclusion in the context of refugee determination and of immigration law and policy more generally. The increasing influence of the logic of criminality and the mobilization and criminalization of fraud in the governance of exclusionary immigration law policy and practice will be explored in relation to the emergence of the regulatory figure of the 'bogus refugee'.

II) Reframing Risk in Canadian Immigration and Refugee Law and Policy in the 1980s

Two different conceptions of risk underpin and guide the development and application of Canadian immigration and refugee law and policy. The notion of risk, and the governmental objective to identify, assess and control risk in the context of immigration and refugee law and policy, is largely understood and operationalised in terms of threats or dangers posed by non-citizens seeking access to Canada. They threaten the liberal democratic state, the safety of members of the public, the integrity and efficiency of the state’s administrative systems and the national economy. However, Canada’s obligation under international law to provide protection to refugees means that risk must be assessed in two directions. Canadian authorities must assess as well the risks and dangers which would be faced by individual refugee claimants were they to be returned to their country of origin.

These two contrasting and often conflicting preoccupations with risk/danger have characterized and complicated the development of Canadian immigration and refugee law and policy over the last two decades. It is argued here that during this period, the discursive power of the humanitarian concern to protect those ‘at risk’, has been increasingly supplemented with and ultimately superseded by the governmental preoccupation with excluding those who are thought likely to pose a risk. Changing global conditions, domestic economic insecurity and rising xenophobia and racism account in part for this discursive shift.
i) The Changing International and National Contexts

After the implementation of the 1976 Immigration Act, unprecedented numbers of asylum seekers sought to avail themselves of Canada's protection. Between 1979 and 1990, some 154,000 refugee claims were made in Canada, peaking at more than 37,000 in 1992 and falling sharply to 22,000 in 1993. This increase is dramatic. Between 1963 and 1976, for example, the number of refugees accepted by Canada had averaged about 3,600 per year (including lows of 600 in 1971 and 1,400 in 1970 and highs of 10,000 in 1968 and 11,000 in 1976). This reflects the increasing numbers of people around the world who have been forced to flee the horrors of famine, civil unrest and oppression. In 1970, the number of refugees worldwide was estimated at 2.5 million. In 1980, this figure had increased to 8 million and by 1993 it was estimated at 18 million.

The numbers of government and privately sponsored refugees has also increased dramatically since 1976. In 1977, 7,300 refugees (government and privately sponsored) were admitted to Canada. Two years later this number jumped to 27,900 and by 1980 it had grown to a 40,300. Between 1981 and 1986, a period characterised by a major recession, the numbers of sponsored refugee admissions dropped significantly to averages between 15,000 - 20,000 per year. In 1991, this number peaked at 52,300 and has fallen significantly since then.

Since 1976, Canada has experienced two major recessions. The first spanned the late 1970s and the early 1980s and the second took hold in the early 1990s. Immigration numbers reflect this economic picture. For example, in 1974 the total number of immigrants admitted to Canada totalled 218,000; by 1985 this number had fallen to 84,000 (the lowest since 1962). In the late 1980s this number had risen again, reaching

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4 Kelley and Trebilcock 1998:383
5 Ibid., 347
6 Ibid., 383
7 Ibid., 383
250,000 in 1992. Also noteworthy is the change in the ‘complexion’ of Canadian immigration during this period. Prior to 1961, 90% of all immigrants to Canada had been born in Europe and only 3% in Asia and the Middle East. Between 1981 and 1991, 48% of all immigrants were from Asia and the Middle East. Between 1987 and 1990, the numbers of western European immigrants had dropped to 18% of the total. The 1970s and 80s thus witnessed an unprecedented surge in non-white immigrants and refugees admitted to Canada.

Canadians, along with the rest of the western world, responded to these changes with a certain hostility. The growing admission of non-white new immigrants and refugees was not paralleled by growing social acceptance. Over the 1980s, refugees and new immigrants in general were increasingly regarded as a multifaceted ‘threat’- a numerical threat to be limited in the name of administrative efficiency, fiscal restraint and economic growth; a threat to the ‘integrity’ of the system due to so-called ‘bogus’ claims made by unscrupulous claimants; a threat to national security posed by organized criminals and terrorists; and a criminal threat to the safety of the public.

Racism and xenophobia inflected much of the public and political discussions in this field finding expression and legitimation (of sorts) in the anti-immigration political platforms of, for example, the Reform Party of Canada. One survey after another reported the unsettling findings that Canadians were increasingly hostile towards new immigrants and refugees, and in particular to visible minorities. New immigrants and refugees became the lightening rod and the scapegoat for the lack of jobs in Canada, perceptions of rising crime and the general decline of social order and cohesion.

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8Ibid., 382

9Ibid., 383

ii) Spontaneous Landings, Public Panics and the Fraudulent Claimant

Throughout the 1980s, the dominant preoccupation of the Immigration Department was not with the plight of the soaring numbers of refugees worldwide. Rather, what secured their attention was the growing backlog of in-land refugee claims. In popular and political discourse this backlog was then and continues to be primarily attributed to ‘fraudulent’ refugee claims made by ‘bogus’ refugees. For the most part, the ‘bogus’ refugee was seen to be an ‘economic’ migrant who, although not covered by the 1951 Geneva Convention which defined the term refugee, had “...learned that claiming refugee status increased the chance of admission to a more affluent country”11. Subsequent to and in part flowing from the Singh decision in 1985,12 many refugee claimants, were economic migrants. However, given the global conditions noted above, it is unlikely that economic pressures alone were responsible for the huge increase in refugee claims. Indeed a 1986 study conducted by the United Nations High Commissioner for Refugees found that the level of public and political panic centring on abuses of western refugee determination systems by so called bogus refugees was vastly disproportionate to the actual seriousness of the problem. It reported the number of ‘manifestly unfounded claims’ made in western countries was no more than 10 - 15% of the total claims made.13 Nonetheless, the objective of finding better and more efficient ways to dispose of ‘manifestly unfounded’ claims in order to better control, manage and ultimately eliminate the refugee backlog was to be the central focus of and justification for the political and legal actions of the government during this period. In a real sense, the Singh decision provided the government with the political opportunity and legal imperative to restrict access to the system by refugee claimants be they legitimate or ‘bogus’; an objective they pursued with vigilance and determination.

11Kelley and Trebilcock, 1998:412
12See discussion in Chapter 2, supra fn. 71, 72
13Victor Malarek Haven’s Gate: Canada’s Immigration Fiasco, Toronto: Macmillan. 1987:97
Interestingly, the restrictive, enforcement-oriented exclusionary measures introduced in the late 1980s were usually justified, as will be described, by reference to the still influential humanitarian liberal inclusionary ideals which had underpinned the 1976 Act and its creation of a permanent on-shore refugee determination system. While on the face of it, this increasingly hard-line, exclusionary shift might appear to be inconsistent with inclusionary humanitarian objectives, in actuality it is entirely consistent with liberal humanitarian discourses which privilege and reward ‘deservedness’ and ‘desirability’. Particular conceptions of deservedness and desirability are necessarily, always already, constituted by their discursive opposition: the figure of the deserving genuine victim exists only in constant and continuous opposition to the figure of the undeserving ‘abusive’ and/or criminal migrant.

In the 1980s, the primary contemporary association of undesirability and undeservedness with criminality and fraud was forged in the public, political and legal realms. Thus, the importance of liberal and humanitarian concerns with deserving victims, in this case the ‘bona fide’, ‘genuine’ Convention refugee, was not in the least inconsistent with or contrary to this emergent discursive shift. Moreover, the rising influence of ‘victim’ discourses which has underpinned ‘law and order’ reforms in the context of the criminal justice system \(^\text{14}\) have bolstered calls for stricter immigration and refugee measures. The argument thus becomes that the undeserving and the undesirable must be more rigorously and effectively excluded \textit{precisely in order} to ensure that genuine and therefore deserving victims may be appropriately protected. This discursive twist is clearly captured in the comments made in 1987 by then Minister of State for Immigration Gerry Weiner, who defended the hard-line measures taken by the government in the following terms:

\begin{quote}
We will not tolerate abuse, either within the system of without, because to do so is to deny protection to those who need it and to undermine this country’s long-standing immigration policy itself. We are only too aware of public attitudes and opinions. We will \textit{not} jeopardize Canada’s...
\end{quote}

\(^{14}\) See for example Allison Young’s discussion of the ‘universal victim’ in \textit{Imagining Crime} 1996: 51-79
openness through complacency or inefficiency....the perception that both our refugee and immigration policies are open to widespread abuse will fuel those [racist and xenophobic] fears. This, we simply will not allow. Refugee policy is for refugees. And within the policy, the person who claims refugee status from Canada, must merit it. This must be clearly understood. Canada's determination system has but one purpose. To distinguish the genuine refugee in need of Canada's help from all other claimants.\textsuperscript{15}

In addition to the increasing hostility toward new immigrants and refugees and to the large and increasingly unmanageable refugee backlog, the adoption of hard-line enforcement-oriented exclusionary legislative reforms in the late 1980s was further facilitated by the eruption of public and political panics around illegal immigrants and refugees. The initial trigger for this panic was squeezed in the spring of 1986 when 155 Tamils from Sri Lanka were found in a boat off the coast of Newfoundland. While the Tamils were relatively compassionately received and quickly granted landing, subsequent news that they had lied about their origins elicited a backlash about 'queue-jumpers' and the adequacy of Canada's control of its borders. In the face of this nasty backlash, Prime Minister Brian Mulroney declared sanctimoniously that "...if we err, we will always err on the side of justice and on the side of compassion."\textsuperscript{16}

Indeed the initial public reaction to the Tamil landing was positively cordial when compared with the veritable explosion of panic, xenophobia, racism and moral outrage which took hold fifteen months later following the 'spontaneous landing' of a boat carrying 173 Sikhs and one Turkish woman on the east coast of Canada. As has been well-described by several authors, the so-called 'Sikh landing' and the public and


\textsuperscript{16} Victor Malarek, Haven's Gate: Canada's Immigration Fiasco, Toronto: MacMillan of Canada, 1987:120
political reaction to it provided the government with the justification for enforcement-oriented exclusionary reforms. The rhetoric blossomed exponentially. The government was called upon to respond to this newly constructed ‘refugee crisis’ which had been propelled by unscrupulous ‘queue jumpers’, ‘bogus refugees’ (including primarily the economic migrant but also organized and disorganized, past and modern-day war criminals) and so called ‘waves’ of naive and witless migrants taken advantage of by international smugglers. A trickle of 174 refugees was quickly likened to a ‘wave’ - a comparison that inevitably raised fears about the impending ‘flood’.

Liberals have an underlying respect for rules - their fairness, their equality of application, their objectivity. Those who respect and obey the rules are commonly morally outraged when others break them. Think of the irritation which is generated during rush hour on a Friday afternoon towards those who shamelessly flout respect for the long-standing practice of taking one’s proper place at the end of the line of people waiting for their turn to board a bus. The analogy of ‘queue jumping’ was quickly deployed in the public discussion of the landed refugee claimant. Moving to the head of a queue before one’s turn, whether one is in line for the bus, the cinema or an immigration visa is quickly and easily portrayed as a strong indication of moral undesirability and undeservedness in a liberal society.

The ill will towards the refugee claimant who is seen as a queue jumper is compounded by those who both queue-jump and lie in their efforts to gain admission to Canada. They are seen as showing a complete disregard for the rules, for the liberal sense of fair play. The threatening figure of the immigration ‘queue jumper’, the ‘bogus refugee’ the economic migrant (and, to a lesser degree, the criminal - in this case the criminal smuggler) was constructed by and through this public panic. These threatening and undeserving figures were quickly abstracted and generalized and elicited a nationwide panic that was riddled with racism and xenophobia. As put by Julius Grey:

1987 was not a good year for refugees. The arrival of a shipload of illegal

\footnote{See for example the discussions in Kelley and Trebilcock 1998; Avery 1995; Mandel 1989; Foster 1998; and Nash (ed) 1988}
Sikh claimants, following groups of improbable pretenders from Turkey and Portugal, set off a panic, both in the Canadian government and in the public. Groups of several hundred were likened to 'waves' of applicants. Elements of racism, which had never died down, came to the fore... 18

Grey refers to the Sikhs as 'illegal Sikh claimants'. It is an open question as to whether this is an accurate designation. The Singh decision in 1984 had confirmed that all people on Canadian soil enjoy the rights and protections of the Charter and have the right to make a refugee claim and to have that claim heard in accordance with the Charter. The 174 Sikhs who arrived in 1987 sought refugee status. They arrived by boat rather than by plane, and like many refugees were lacking travel documents. It is not clear why they are being deemed 'illegal'. Presumably it is because it is contrary to the Immigration Act to enter Canada without travel documents - a provision which has been hotly contested in its various applications to refugees who, given that they are fleeing governmental persecution, commonly and understandably do not have the requisite government issued documents.

The labelling of those who land on Canada's shores and who claim refugee status as 'queue jumpers' caught on fast. This was the case despite the reality that there is for those hoping to claim refugee status in Canada, very often no 'queue' to join, let alone jump. In many cases, the use of this designation which is both defamatory and inflammatory, reveals a lack of knowledge and understanding about the differences between immigrants and refugees:

The "queue-jumping" is explained by the fact that most immigrants have to apply for visas outside the country, but most refugee status claimants arrive here and then make the claim. The argument against "queue-jumping" would be somewhat stronger if a queue in fact existed. But most immigration applicants are accepted or refused within a relatively short time. There is no list of people waiting for a "place" to become vacant. It is therefore difficult to see over whom refugee claimants are "jumping". 19

18Julius Grey "Refugee Status in Canada" in Nash (ed) 1988:306
19Ibid., 306
III) Stemming the ‘Flood’: The Administrative Crackdown on ‘Bogus’ Refugees

i) Administrative Measures

After the Singh decision but prior to the Sikh panic, the government had already been seeking ways to counteract the impact of the Singh decision both by trying to deal with the existing refugee backlog and by limiting access to Canada’s refugee system. The government felt it necessary to resolve the administrative problem of the backlog without being seen to grant a general amnesty, fearing that such an amnesty would ‘open the flood gates’ to thousands more ‘bogus’ claims by economic migrants hoping to be granted another amnesty by a soft government. In fact a partial amnesty was granted in May 1986 which in one fell swoop had reduced the 21,500 refugee applicant backlog figure by 15,000.20 However it was not long before a second backlog developed and tough talk by Immigration officials about cracking down on abusers became louder.

In February 1987 the government announced several ‘administrative measures’ purportedly intended to help genuine refugees by cracking down on and deterring abusers. Changes in American immigration law the previous November had made the situation difficult for Central American refugees, in particular those from Guatemala and El Salvador, two countries acknowledged by Canada to be ‘refugee producing countries’. The tightening of the U.S. refugee legislation resulted in an increasing number of Central American refugees seeking protection in Canada. Canada responded by sending claimants from the U.S. back across the border to wait for their hearings.21 This clearly was very threatening to any Guatemalan and El Salvadorian claimants for they might well then be returned by American authorities to their home countries. It can only be interpreted as indicating that the Canadian government was determined deter from making on-shore claims not just ‘bogus’ refugees but rather the great bulk of potential Latin American claimants.

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21Kelley and Trebilcock 1998; Whittaker 1987; Dirks 1995
As well, Canada had already slapped a visa requirement on travellers from both countries (El Salvador in 1978 and Guatemala in 1984) in spite of (or more cynically on account of) the well-documented and widely observed political persecution and terror which characterised them. Malarek reports that at that time, a secret cabinet document revealed that Canada’s response was underpinned by a desire to reduce and deter refugee claims. The government also imposed transit visas on 98 countries to prevent potential claimants from booking flights that include a transit stopover at a Canadian airport with the intention of disembarking in Canada and claiming refugee status.

Visa requirements have long been employed as an immigration control mechanism and their effectiveness is bolstered by the enlisting of airlines in this control function. Visas serve to place a liability on airlines for the return of any passenger who does not have the required documents. The same cabinet document revealed that this measure was aimed primarily at reducing the number of Chileans from disembarking at stopovers in Toronto and Montreal and making refugee claims.

A further initiative, also intended to reduce the number of landed claimants, eliminated the ‘B-1’ list which had provided for the issuance of Minister’s permits which would give people from 18 recognized refugee producing countries automatic admission and the right to stay in Canada and work for up to a year. Those claimants already in Canada under these permits were streamed back into the existing refugee determination system despite the growing backlog.

These restrictive administrative measures implemented in February of 1987 shed some light on the way in which the ‘problem’ of the bogus refugee was politically constructed and manipulated. In the name of the controlling ‘abuse’ and deterring bogus refugees, the government justified the adoption of measures to control and reduce the number of all on-shore refugee claims. However, the measures implemented clearly had

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22 Malarek 1987:118

23 The Canadian government had already imposed a visa requirement on this legitimate refugee producing country in 1979. Ibid., 118
the undeniable consequence of restricting the access of many deserving and legitimate refugees to Canada’s shores and to its refugee determination system. Many critics attacked the government for its ‘draconian administrative measures’ and charged that the Immigration department had fuelled and then taken advantage of exaggerated public and political concern about ‘abuse’ in its efforts to maintain control over which refugees Canada accepts. As put by the Chair of the Refugee Status Advisory Committee in 1987:

There has been an effort [by senior immigration officials] ...since 1980, to delegitimize the whole process of refugee determination in our country, to characterize this movement as abusive...Their view is that anyone who comes to Canada without prior permission of the Canadian government has abused our process.24

He went on to observe that Immigration officials had deliberately created “a sense of crisis, a sense of being inundated by unscrupulous people who see us as patsies”25

Winnipeg lawyer David Matas echoed this concern, observing that:

The department isn’t against refugees. What it is opposed to is the notion that somebody can choose Canada rather than Canada choosing the person. So it is trying to set up a system where it decides who enters, and in effect, it is taking advantage of public concern about abuse to get its way.26

ii) Legal Reforms: The Role of Bills C-55 and C-84 (1987)

In May 1987 the government introduced Bill C-55, followed swiftly, two months later, by the ‘Deterrents and Detention Act’, Bill C-84. Together these marked a major mobilization of additional legal mechanisms to augment the additional administrative controls just discussed.

Bill C-55, which was discussed briefly in Chapter One, created the Immigration and Refugee Board, a new two-tiered refugee determination system This Act, though respecting, to an unprecedented degree, the procedural rights of refugee claimants.

24Ibid., 121
25Ibid., 121
26Quoted in Malarek, Ibid., 122
simultaneously limited access by claimants to the system itself. The central justification which was offered for this limitation was that it would reform the determination system so as to preserve its integrity "...by ensuring the protection of legitimate refugees, while deterring the 'shameful manipulation' of false or abusive claims".  

Bill C-55 acted upon the constructed and exaggerated problem of the 'bogus' refugee in several ways. It required a person to make a claim at the outset of their immigration inquiry or they would forever be denied eligibility to make a claim later: it significantly expanded the grounds for denying eligibility; it permitted the exclusion of claimants deemed to have come from a 'safe third country', the government intending soon to produce a list of such countries; it excluded from making a refugee claim those with a criminal record who had been certified by the Minister as a "danger to the public in Canada"; and it denied a refugee hearing to any who had been granted refugee status in another country or who had already had a refugee claim rejected in Canada. In addition, those found to be eligible still had to receive a decision from the immigration adjudicator and the Refugee Board member that their claim has a 'credible basis' (as opposed to the previous standard that excluded only 'manifestly unfounded' claims); and, finally it placed contentious limits on access to judicial review of negative determinations of a claimants' 'credible basis' and/or their refugee status. Under Bill C-55 claimants do not have the right to appeal to the Federal Court, rather they are conceded the much more limited right to apply for leave to appeal to the Federal Court of Appeal.  

Bill C-84 marks the serious intrusion of the language of deterrence into exclusionary immigration and refugee law and policy. While Bill C-55 aimed mainly to screen out 'system abusers' through the tightening up of eligibility and credibility criteria, Bill C-84 which was tabled just over a month after the June 1987 'spontaneous Sikh landing', sought to enhance control of Canada's borders by providing for tough deterrence oriented penalties for smugglers and others who assist in the 'transportation' of illegal immigrants. Bill C-84 increased the government's power to deal with so-called

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spontaneous landings. It increased powers of search and seizure for immigration officials; it imposed fines and jail terms for smugglers and transportation companies; and it even provided authorities with the legal right to turn away boats suspected of carrying refugees before they land.28 Both bills were widely attacked by immigrant and refugee advocates as anti-humanitarian, draconian and dangerous. A representative of Amnesty International, for example, commented that “these measures are designed to keep refugee claimants out of the country as opposed to ensuring that genuine refugee claimants are given protection.”29

Public and political opinion had been well-primed for an extreme and hard-line reaction before the July landing of the Sikh claimants. The increasing numbers of refugee claimants coupled with the frequently heard representation of these claimants as ‘queue-jumpers’ and ‘bogus’ refugees by politicians and immigration officials had already sparked a widely covered national backlash against all new immigrants and refugees. Opinion polls, radio talk shows, letters to newspapers and MPs and a ‘rising chorus of so-called ordinary Canadians’ expressed increasingly racist and xenophobic sentiments. A banner front page story in the Globe and Mail on March 6, 1987, reported that 80-90% of callers to open-line radio talk shows were strongly against accepting more immigrants and refugees30

One of the most unsettling aspects of this backlash was its racist nature. The then Minister of Employment and Immigration, Benoit Bouchard, as good as acknowledged this when he identified the increasing hostility to immigrants and refugees as an expression “of a sort of fear” because the new arrivals were “are from such places like

28 A provision which was later dropped in light of the Prime Minister’s claim at the time of the Sikhs’ arrival that Canada was not “in the business of turning away refugees and we never will under this government.” quoted in Kelley and Trebilcock 1998: 417

29Ibid., 124

30Malarek, 1987: 74
Asia, whereas in the old days they came from Europe.\textsuperscript{31} The Conservative government even called an emergency session of Parliament to “deal with an issue of grave national importance”\textsuperscript{32} and quickly tabled the tough, enforcement and exclusion oriented Bill C-84.

Some have argued that the Immigration Department through willful neglect or intentional mismanagement, contributed to the general panic about system abuse and bogus refugees in order thereby to clear the way for the development of the measures already discussed which limit the numbers of refugees who are able in the first instance to reach Canada and which restricts their access to the determination system once they are here. They point to the Canadian government’s failure to impose a visa requirement in a timely fashion on, for example, Portuguese and Turkish travellers to Canada in 1985 which then led to a ‘crisis’ that could have been easily prevented. When the government did finally require a visa of travellers from Turkey and Portugal, the so-called ‘flow’ of refugee claimants ‘abruptly ceased’.\textsuperscript{33} Prominent lawyer Barbara Jackman argues persuasively that “[T]he Immigration Commission, by becoming incapable of managing the refugee determination system...had used its very mismanagement to justify its wish to close the doors to refugees”. With respect to the increased numbers of Portuguese and Turkish claimants, Jackman shrewdly observes that:

In one year, 400 Guatemalans made refugee claims in Canada and 75% of them were recognized as refugees. As a result, visas were introduced to control the flow of refugees into Canada from Guatemala. The government did not hide its purpose. In the case of the Portuguese, the government did not respond until there were 3,000 claimants, until it was publicly known across the country that Portuguese claimants were abusing the process. Only then did they impose visa controls. They used the Portuguese case to justify closing the door to people who abuse the process, yet it was the

\textsuperscript{31}Quoted in Malarek 1987:75

\textsuperscript{32}Kelley and Trebilcock 1998:417

\textsuperscript{33}Ibid.,415
government that let the situation develop.\textsuperscript{34}

As noted in the opening paragraphs of this chapter, Canada had never been keen to become a country of first asylum and has been determined to remain to as full an extent as possible a country of resettlement for refugees it chooses. This continues to be a major influence on government policy and practice. In 1983, senior Immigration official Raphael Girard, who would later be the principal drafter of Bills C-55 and C-84, spelled out this position in a departmental discussion paper: "...it is not desirable to have a resettlement program straddling two main themes, active off shore selection and the use of asylum as a pro-active program" He argued that the main emphasis of Canada's refugee program should continue to be off-shore selection. His arguments were that off-shore selection favoured those who could 'best benefit' as opposed to the self-selected, was responsive to domestic concerns and priorities, could be easier 'managed and controlled', was amenable to foreign policy objectives, and did not entail the problems associated with removing unsuccessful claimants.\textsuperscript{35}

The public reaction which developed in the late 1980s around the threat posed by the so-called 'bogus' refugees, provided the official justification for the restrictive and exclusionary dimensions of Bill C-55 and Bill C-84. However, as described above these measures were not designed to facilitate access for genuine refugees, nor to exclude only those who could not credibly claim to be refugees as defined in the International Convention. They sought to limit the numbers of all on shore refugee claimants.

This analysis can now be advanced a further stage. It is true that these measures were usually justified as a protection for \textit{genuine} refugees and that this illustrates the continued discursive importance of humanitarian liberal ideals. Nevertheless, and more significantly, this discursive power of the deserving 'genuine' refugee was maintained

\textsuperscript{34}Nash (ed.)1988:323

and fortified only in contradistinction to the increasing influence of the socially, politically and legally constructed figure of the undeserving and unscrupulous figure of the fraudulent claimant - the economic migrant, the 'queue-jumper', the ‘bogus’ refugee.

Weiner, the Minister of Immigration illustrated this important observation when he declared:

The thrust of Bill C-55 was to streamline Canada’s refugee-determination system so as to maintain ‘the integrity of our refugee determination system’ by ensuring the protection of legitimate refugees while deterring the ‘shameful manipulation’ of false or abusive claims.”

Indeed, while this legislation was explicitly defended in the name of genuine refugees, absolutely nothing in the legislation sought to actually facilitate the admission of genuine refugees. Rather it was simply assumed that humanitarian ends would be furthered by cracking down on fraudulent claimants. All this parallels and is bolstered by the rising influence of victim discourses which have underpinned calls for hard-line law and order reforms to the criminal justice system. In each arena the undeserving and undesirable must be effectively excluded precisely in order to ensure that the genuinely deserving victims may be adequately protected, be they law abiding citizens of our own society or the victims of state sanctioned persecution in other countries.

IV) Expanding the Threat in the 1990s: ‘Bogus’ Refugee Meets the Terrorist and the Serious Criminal

Thus far, this chapter has traced the emergence of the ‘bogus refugee’ as a discursive regulatory figure. Once named and identified, a problem may be acted upon; it becomes an object of regulation. The bogus refugee elicited a backlash against immigrants and refugees that was widespread, self-righteous, and racist. This backlash was further heightened by a discursive link which was made between ‘bogus refugees’ and terrorists and/or criminals. During the 1980s, a major threat to national security was

presented and represented by the figure of the international terrorist. Whittaker identifies this development well:

International terrorism is the great frisson of the decade, not unlike the great fear of international Communism that gripped the Western world, and especially the United States, in the late 1940s and early 1950s. Terrorism presents, of course, a real threat to security and public safety. But as in the earlier case, there is also much exaggeration about it, much panic, and much talk of extreme measures. There is no shortage of self-proclaimed ‘experts’ on terrorism prepared to sell their nostrums to a fearful public. And there is no shortage of voices counselling the abandonment of liberal freedoms and the need for stern repressive measures.  

During 1986, the perceived threat of terrorism provided the focus for several governmental initiatives including the striking of a special governmental committee on terrorism and the holding of a conference on terrorism in Quebec attended by military, security and police officials. In both arenas terrorism was regarded as a serious and growing threat to Canada, and in both arenas the refugee determination system was identified as a ‘security’ problem. The special committee gave particular attention to ‘terrorist prone’ ethnic groups and the conference attended to similar preoccupations. Not surprisingly, Sikhs were identified in both contexts as a particular terrorist threat.  

The threat posed by international terrorists which had emerged over the 1970s and 1980s became the discursive replacement of the threat previously posed by domestic subversives during the height of the Cold War. Thus, while the numerical threat posed by ‘bogus’ refugees provided the primary and immediate justification for increasingly exclusionary and enforcement oriented measures, the fears sparked by the image of ‘waves’, ‘floods’ or ‘tides’ of bogus or fraudulent claimants were heightened by a discursive linkage made with the threatening figures of the terrorist and the ‘serious’ criminal immigrant or refugee, posing a fresh and additional risk to the state and the

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37 Whittaker 1987:300

38 Ibid., 300
nation’s public.

Immediately upon the arrival of the Sikhs in June 1987, an ‘orchestrated hysteria’ was created by the Minister of Immigration, the Immigration department and the Prime Minister to incite public opinion. They made many inflammatory statements about the Sikhs including comments implying that they were serious security threats and terrorists. As observed by Jackman:

They took advantage of these events by not reacting in a responsible manner, particularly with the Sikhs. Instead, they lead people to believe the Sikhs were dangerous security threats and terrorists. Thus they pandered to public xenophobic reaction and produced a rise of racism.

Less explicitly but no less significantly, the Tamil landing of 1986 was also linked with international criminal and subversive organizations. This linkage of the ‘bogus’ refugee and the criminal or terrorist threat is clearly made in the following defence of Bill C-55 and Bill C-84 by Jim Hawkes, then MP for Calgary West:

...We need quick decisions if we are going to have a system of law in which protection is offered to legitimate Convention refugees and abusers can be removed quickly and efficiently. In a world of increasing international terrorism their has to be a means of determining and detaining people.

Bill C-84, as already explained, sought to deal with so-called ‘spontaneous landings’ by acting primarily upon smugglers and transportation companies. However, it also provided some fairly serious ‘security-related’ changes. First, Bill C-84 excluded anyone certified by the Minister and the Solicitor General as a danger to the public due to criminal convictions, this certification not being reviewable. Secondly Bill C-84

39 See Jackman and Heap in Nash, 1987

40 Jackman in Nash 1987:322-323

41 Ibid., 323

42 Avery 1995:221

43 Hawkes in Nash (ed.) 1987:255
sanctioned the detention of undocumented persons upon their arrival in Canada until such a time as their identities could be confirmed, a measure approximating indefinite and therefore unconstitutional, detention. This arbitrary detention, defended on security grounds, was likely to affect most negatively refugee claimants who often do not have the required documentation.\(^{44}\)

The Bill also provides for the detention at the border of anyone thought by the authorities to pose a security threat. Both groups may be detained for up to 28 days without review. Persons thought to be a security threat are likely to be detained for even longer for they become the subject of a security review procedure entailing that they appear before a federal court judge. While anyone who is the subject of such a review may respond to the judge's summary of the case, they have no right either to hear or confront the witnesses or to challenge the evidence presented against them. If the security threat is judged to be real, the Bill provided for the exclusion and immediate deportation of the person in question. These provisions constitute an application of article 32 of the International Convention Relating to the Status of Refugees which allows for the refoulement of refugees (the return of people to a place where they would face persecution under the Convention definition) only in those cases where they are duly found to represent either a 'security' or a 'serious criminality' threat to the nation and/or public.

What is remarkable about the two Acts of 1987 and centrally important for the argument of this chapter is that they act upon, and arguably thereby link, three distinct discursive categories of undeserving and undesirable non-citizens: frauds, terrorists and criminals. Each represents a significant threat to the integrity of the state's administrative systems, to commerce, to government and to the safety of the public respectively. This linkage became increasingly dominant in the early 1990s.

\(^{44}\)see Jackman in Nash 1987:322-323
V) In the Name of the ‘Truly’ Deserving: Bill C-86, The “Deterrence and Detention Act” (1992)

The discursive linkage of criminality and fraudulent abuse became front and centre with the next major piece of immigration legislation, Bill C-86, the *Deterrence and Detention Act* in 1992. Danger and criminality discourses, already well-established in the context of domestic criminal justice law and policy were mobilized with a vengeance in the context of immigration and refugee law and policy. Thus in addition to emphasizing the need to to protect Canadians against those outsiders who “abuse the system” through fraudulent claims, Bill C-86 ‘responded’ in a major way to the growing ‘problem’ of the criminal immigrant and/or refugee.

Refugees had already been increasingly criminalized through the mobilization of fraud discourses. Since the 1976 Act, the regulatory figure of the criminal immigrant encompassed an ever-widening range of threatening criminal ‘types’. These have included: international terrorists seeking to found new bases for terrorist organizations; war criminals, either the ‘modern day’ or the traditional (Nazi) variety; ‘serious’ criminals with ‘serious’ criminal histories; and the relatively new category of organized criminals.\(^4^5\) The exclusionary conception of ‘criminality’ as grounds for denying immigration or refugee applicants has expanded. It is now understood and acted upon as a threat to the security of Canada and of Canadians, thus justifying increasingly repressive political and legal responses. Similarly, the notions of ‘system abuse’ and the lack of ‘control’ over the system which allows such abuse to flourish, which were previously primarily linked with the numerical and moral threat posed by the ‘bogus’ refugee, has been discursively extended and linked with the threat posed by terrorists and other dangerous criminals:

An immigration program that is not properly controlled is vulnerable to abuses by criminals, terrorists and others who might jeopardize the safety and well-being of Canadians. In recent years we have seen the

\(^4^5\) It is analytically relevant that the mandate of CSIS was later expanded to encompass organized crime and criminals as a threat to national security.
development of more organized, highly professional criminal networks intent on circumventing international and national laws....As the volumes of people seeking to enter Canada increase, vigilance is needed to ensure that Canadian society is protected from those who are not welcome in our country and who are intent on breaking its laws. 

Bill C-86 was represented as a new ‘managerial’ approach to immigration necessary in the face of a global context characterized by “...growing, unpredictable, and large scale movements of people from one country to another.” The policy paper just quoted set the stage for the Bill’s restrictive and enforcement-oriented provisions by painting a global picture which would likely evoke fear and insecurity in Canadians. The image of ‘volumes’ of internationally displaced, dispossessed and needy foreigners clamouring at ‘our’ borders is conjured up as a potential threat to the Canadian state, its administrative systems and its public. Sheer numbers of global migrants are emphasized in dramatic and ominous fashion: “[S]ome estimates suggest that today, as many as eighty million people-more than three times the entire population of Canada-are moving from one country to another at any given time.”

Specific reference is also made to the fact that although the numbers of refugee claimants has increased exponentially, “the proportion of claimants who are found to be convention refugees is falling.” An observation made in the context of a hard-line piece of British refugee legislation in 1993, may be applied to the Canadian scene. A ‘culture of disbelief’ about the legitimacy of claims to asylum has been effectively created and “...that is the reason for the dramatic decline in the proportion of asylum seekers granted refugee status or exceptional leave to maintain. Those figures are then used to justify the

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47 Ibid., 3

48 Ibid., 4

49 Ibid., 4
belief that most asylum seekers are ‘bogus’.”

As documented by Jakubowski, numerous polls and surveys carried out at this time of recession, provide evidence that Canadians were “...feeling far more vulnerable economically, [were]...developing a growing sense of mistrust and intolerance towards outsiders, and...[were] increasingly disillusioned and discontented with the government.” Moreover, it was commonly reported that many Canadians were concerned about the increase in immigration during a period of economic recession and in particular about the increase in non-white immigration and refugee admissions.

In this less welcoming environment, the Canadian government, rather than attempting to diffuse some of these hostilities and fears, mobilized and exploited them for their own purposes. For example, the Minister of Immigration, Bernard Valcourt, publicized the findings of two 1992 government sponsored studies which highlighted the xenophobia felt by many Canadians towards immigrants and refugees. One of these studies reported that one third of its respondents had agreed that it was important to “...keep out people who are different from most Canadians” and that nearly half were “really worried that they might become a minority if immigration is unchecked.”

Valcourt’s tactics are summed up nicely in the following journalistic observation:

Valcourt has used some strong language in comments defending the bill. He’s evoked images of millions of refugees from Third World countries fleeing poverty and turmoil, implying that they may soon be clamouring at our door. He’s warned that the government needs more power to keep criminals and terrorists out of the country. He’s told the story - several times - of a Montreal refugee claimant who filed 14 fake claims in order to cheat welfare.

50 “Asylum for Torture Victims” The Guardian Monday April 29, 1996

51 Jakubowski, Immigration and the Legalization of Racism 1997:66

52 Ibid., 66-70

53 quoted in Jakubowski 1997:70

54 The Citizen Valley, “Complicated, Confusing and Controversial” November 23, 1992
Immigrants and refugees were generally represented as a threat which needed to be contained and controlled; “[I]n trying to sell Bill C-86 to Canadians, Valcourt play[ed] on their insecurities by socially constructing the immigrant or refugee as a potential system abuser of whom we should be wary.” In Valcourt’s own words, “Canadians are compassionate and humane, but we don’t want to be taken for a ride.”

Bill C-86 thus promised to reduce significantly the opportunities for ‘system-abusers’ and ‘criminals’; by introducing this new, tighter and more efficient managerial immigration regime. The predominant policy objective was to protect society. And once again, one of the main justifications for this ‘toughening up’ of the system was putatively humanitarian: it was necessary to crack down on the undeserving and undesirable in the name of the genuinely deserving bona fide, convention refugee: “The proposed changes... provide for a more streamlined refugee determination system. ensuring that we can help those who truly need refuge.”

Bill C-86 radically extended the criminality-based exclusionary grounds for inadmissibility. With this Bill, immigration law, policy and practices are represented and justified as the thin blue line protecting Canadians from the wide ranging criminal threats which lurk just outside of our borders. Canadian immigration law and policy have emerged in the 1990s as a critical and necessary instrument of crime control to an extent

55 Jakubowski 1997:71

56 “Legislation Would Tell Immigrants Where to Live” Toronto Star, June 17, 1992

57 Immigration Canada, “Explaining the New Immigration Bill” 1992: preface (my emphasis)

58 Bill C-86 also extended the grounds for medical inadmissibility, again under the general rubric of ‘protecting’ Canadians from potential sources of danger. While not directly relevant to the current analysis, it is noteworthy that the image of the ‘diseased’ immigrant (in the 1990s tuberculosis is the dominant looming threat carried by the ‘volumes’ of the poor and needy masses seeking access to Canada) is once again gaining discursive prominence in exclusionary immigration law and policy. It is foreseeable that this developing ‘problem’ will increasingly provide the justification for more restrictive exclusionary measures.
unprecedented in Canadian history.59

Bill C-86 sought to fill perceived gaps in the existing legislation with respect to the inadmissibility of criminals ‘and others who threaten the security of Canada’ (sections 19 and 27 of the Act). Specifically it aimed to exclude ‘organized criminals’ previously unaddressed in the Act. As explained in a governmental guide to the new legislation, existing legislation was inadequate because it did “...not directly enable immigration officials to refuse admission to persons who may have no criminal convictions, but who are nevertheless involved in organized crime or other criminal activity, according to foreign police reports or intelligence sources.60

In response, Bill C-86 expanded the definition of criminal inadmissibility to include where there are ‘reasonable grounds to believe’ the person was or is a member of an organization ‘that there are reasonable grounds to believe’ is or was engaged in activity “that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable...by way of indictment.”(s.19 (c.2) of the Act) Moreover, it also allowed for the exclusion of persons where there are ‘reasonable grounds to believe’ that they have committed an ‘act or omission’ outside Canada that would constitute an offence inside Canada. (s.19 (c.1)(ii)) No conviction is required by this provision.

Bill C-86 also addressed the perceived weakness of the existing legislation to exclude terrorists. As observed in the guide to the legislation,

59 With respect to its inclusionary preoccupations, Bill C-86 was primarily supported by economic arguments. It sought to enhance the responsiveness of immigration law and policy to the ‘economic and labour force needs of Canada’. For example, as put by the government, investors must be accepted “without limits” for their contributions to the economy. Bill C-86 also made much of the government’s humanitarian objective of family unification, arguably hoping to tap into the increased influence of fundamentally conservative and traditional ‘family values’ evident in the broader social and political context.

60 "Explaining the Immigration Bill" Section 2: “Protecting Society”, 1992:3
Current provisions do not explicitly refer to terrorists, although reference is made to espionage, subversion, and group activity involving violence against persons. Amendments would define terrorism as activities directed at, or in support of, acts of serious violence against persons or property for political ends.61

Bill C-86 authorized immigration officials to bar entry and/or deport individuals who have engaged in or who, upon ‘reasonable grounds’ are believed may engage in espionage, subversion and/or terrorism as well as those who are members of an organization which has, or is reasonably believed, may engage in espionage, subversion, terrorism and/or "other acts of violence that would or might endanger the lives or safety of persons in Canada" (ss. 199(e)(f)(g)). The bill also included a new ‘catch-all’ ground for exclusion on security grounds. S.19 (k) sanctions the exclusion of persons “who constitute a danger to the security of Canada” but who are not covered by existing grounds. Even permanent residents may be deported under these provisions.62

The Bill also introduced s.19(1) of the Act to facilitate the exclusion of people who are or were “senior members of or senior officials in the service of a government that is or was engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity...” The section goes on to provide a ‘general’ guide to the definition of ‘senior members’ or ‘senior officials’, but makes clear that the list of positions and/or functions is not exhaustive. This list includes: a) heads of state or government; b) members of the cabinet or governing council; c) senior advisors to either heads of state, cabinet or governing council members; d) senior members of the public service; e) senior members of the military, intelligence and/or internal security apparatus; f) ambassadors and senior diplomatic officials; and g) members of the judiciary.

61ibid.,4

62A comment made in the Parliamentary Committee hearings on the Bill nicely sums up one of the central criticisms made about these amendments. Alan Borovoy of the Canadian Civil Liberties Association described them as sanctioning “deportation by clairvoyance” (quoted in Kelley and Trebilcock, 1998:431)
In addition to extending the criminality provisions of the Act, Bill C-86 toughened up the provisions and penalties relating to the transportation of illegal migrants to Canada (ss. 85, 86, 89.1, 91.1, 92, 92.1, 93, 97.1) and the smuggling of illegal immigrants into Canada (ss. 94.1, 94.2, 102.01(1)). For the present purposes, one final set of amendments needs to be mentioned, those pertaining to border 'controls'(s. 110). These provisions gave immigration officers the discretion to fingerprint and photograph refugee claimants and expanded their search and seizure powers. The latter amendment sanctioned the search of person, luggage and/or vehicle when there are 'reasonable grounds to believe' the person has hidden their identity documents. The same authorization is given to officers to search "...persons seeking to come to Canada who are believed on reasonable grounds to be smugglers, document couriers, and others involved in the illegal entry of persons..." 63

Bill C-86 thus ushered in a new discursive era in the governance of immigration and refugee law and policy. It broadly defined and acted upon the emergent threat of the criminal immigrant to a degree unparalleled in foregoing immigration legislation and it similarly enhanced the coercive policing powers of immigration officers to enforce the Act.

As was true for Bills C-55 and C-84, Bill C-86 was greeted with extensive and well-organized criticism from a wide range of legal and non-governmental groups 64. Much of that criticism focussed on the 'draconian' security and criminality provisions of the Act. However, many of the changes made to the existing refugee determination system were also sharply criticised. Of particular concern to non-governmental representatives was the revival of the safe-third country provision which had been included in Bill C-55 but which had never been acted upon by the government. This provision disallowed refugee claims made by individuals if they had travelled to Canada

63 "Explaining the New Immigration Bill" Section 2, 'Protecting Society', subsection 3, 'Controls at the Border' 1992:12

either directly or indirectly from a country prescribed by the governor in council as ‘safe’. A ‘safe’ third country is one which complies with article 33 of the Refugee Convention which prohibits refoulement. Objections to this provision were extensive and have been discussed in some detail elsewhere.\textsuperscript{65} For the present purposes it is significant that this provision, if and when it is operationalised, “would systematically exclude those refugee populations from the developing world (most of who are visibly different) who cannot get direct flights out of unsafe countries.”\textsuperscript{66}

The racist impact of this Bill was widely criticized; “Critics have called it mean-spirited, sinful and racist.”\textsuperscript{67} One third of all refugee claims are made along the border with the U.S.. Were the U.S. to be prescribed (despite its poor and highly politically partisan record of refugee determination), the number of refugees who could make their claim in Canada would be dramatically reduced. As reported in an Ottawa daily newspaper, “[T]hat could mean Canada would turn away up to 75% of the 30,0000 refugee claimants who arrive at our border each year because they travel via the United States or Europe.”\textsuperscript{68} The safe third country provision, along with most of the other exclusionary amendments of Bill C-86, evidences once again the Canadian government’s determination to limit as fully as possible the numbers of refugees (genuine or otherwise) who arrive on the shores of Canada and seek acceptance as a Convention refugee.

Canada’s ‘humanitarian’ commitment is thus at best highly selective and inconsistent. As evidenced by Bill C-86 and as expressed by many critics, the government, was more concerned to keep refugees out of Canada than it was with protecting them. To quote Canadian immigration lawyer David Matas:

\textit{...the bill itself does not appreciate the refugee issue from the angle of refugee protection...Really, immigration management and refugee

\textsuperscript{65} see for example Jakubowski 1997:81-89

\textsuperscript{66} Ibid., 1997:85

\textsuperscript{67} The Citizen Valley “Complicated, Confusing and Controversial” Nov.23, 1992

\textsuperscript{68} Ibid.
protection are two different things and require two different approaches. Immigrants are people who are coming to Canada to settle permanently. Refugees are people being forced to flee a situation of danger, often on a moment's notice. Management suggests that Canada is choosing its immigrants in a planned way. Yet refugees in fact, in law and by the terms of Canada's international obligations are self-selected. Managing immigration really means, in a refugee protection context, denying protection to people who otherwise might be allowed and entitled to come as refugees. That is indeed the effect of many of the provisions in the bill. They make it more difficult for refugees to seek protection or even to arrive in Canada to make a claim for protection.69

Finally, the new legislation eliminated the first stage credibility and eligibility hearing introduced by Bill C-55 to weed out 'system abusers' at an early stage in the process.70 Bill C-86 instead gave Senior Immigration Officers the power to rule on refugee eligibility, again an administrative decision replacing a quasi-judicial one. The government sought to minimize the significance of this expansion of the discretionary power of SIOs. It asserted that the eligibility decisions to be made by SIOs will be made on the basis of a checklist of 'facts' (rather than on 'matters of judgement') and will therefore be entirely non-discretionary.71

Thus it can be seen that the governmental logic of national security (encompassing more and more varieties of criminal activity) and the corollary notion of protection of the

69 Quoted in Jakubowski 1997:79

70 Interestingly, the number of clearly unfounded 'bogus' claims was not readily apparent to Immigration officers who had referred a substantial 94% of claims to the CRDD for a full hearing Ibid.,81

71 This checklist denies claimants access to the refugee determination system on one of five grounds: a) prior recognition of refugee status in another country; b) coming to Canada directly from or through a prescribed 'safe third country'; c) repeat claims; d) have already been determined in Canada or by a visa officer abroad to be a Convention refugee; or e) "undesirable persons- criminal and security risks" (Immigration Canada, "Explaining the New Immigration Bill" Section 3: The New Refugee Determination System, subsection 1: Access to the Refugee Determination System,1992:2)
public provided the dominant rationale for the exclusionary provisions of Bill c-86. The ‘problem’ of the ‘bogus refugee’ had been legally constructed by and acted upon through Bills C-55 and C-84. It re-emerged with Bill C-86 as the more general problem of ‘system abuse’ which was attributed in large part to a lack of adequate control over the immigration system. This lack of control was in turn linked with the more dominant threat of the 1990s, that posed by the criminal refugee or immigrant broadly defined. Bill C-86 legally constructs and acts upon these two ‘problems’, system abuse and criminality, by sanctioning ever more repressive and exclusionary means; “With Bill C-86 we introduced a wide range of tools to deal with those who try to abuse our immigration program or violate our laws.”

VI) The Creation of the Canadian ‘Public Security Portfolio’ in 1993

In one of the more honest and transparent political decisions of this period, in 1993 the Conservative government, on the heels of Bill C-86, created a new Public Security Portfolio. This brought together Immigration, the RCMP, CSIS and the Canada Parole Board into a newly created government department, the Department of Public Security. The first Minister of Public Security, Doug Lewis, explained the logic behind move by reference to the “…global community [which] is awash with people seeking new homes” (again the water metaphor conjuring up a disastrous flood) and the consequent the need to “reinforce and defend the integrity of our generous and valuable immigration policy”; to “give extra weight to the issue of enforcement”; to have “more efficient control over the security of our borders”; and to better protect Canadians.

By consolidating management of our border activities and our immigration enforcement activities, I am convinced that we can exercise more effective control over entry to Canada; ensure that we better protect all Canadians; and reduce abuse of Canada’s generous immigration and refugee programs”

72Doug Lewis, “Notes for an Address by the Honourable Doug Lewis, P.C., M.P.. Minister of Public Security, Solicitor General of Canada, August 9, 1993

73Lewis, “Notes for an Address” 1993
While the discourses of fraud and criminality are employed in this political justification, primary emphasis is given to populist reasons for the switch. Lewis quite freely admitted that of the 220,000 newcomers who arrived in 1991, "only a very tiny percentage of those arrivals were mired in controversy". He even lamented that many Canadians don't share this view and acknowledged the powerful and deleterious effect of exaggerated, sensational and inflammatory coverage of "...the isolated case of people who abuse our generosity". What is curious and indeed telling, is the determinative value placed by Lewis on public support with respect to the changes at hand. It is the need to restore 'public confidence and support' that seems to underpin this move, rather than any real or substantiated threat posed to either the system or the public: the choice. according to Lewis is straightforward: "We can either reinforce and defend the integrity of our generous and valuable immigration policy or we can watch public confidence and support for the policy collapse."  

This move was not a subtle one. Critics charged that conservative Prime Minister Kim Campbell was fanning the populist flames against new immigrants and refugees by "baiting Canadians fear that immigrants commit a disproportionate amount of crime, and by...linking the solution to the perceived crime problem with cleaning up the immigration and refugee system." As succinctly stated by Shyla Dutt of the Asian Canadian Caucus, the government had succeeded in "re-focussing public debate away from immigration as an economic and social issue, and [toward immigration] as a security and public safety issue."  

Responding to these complaints, Lewis likened this administrative and organizational decision to that which gave police officers the authority to enforce

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74Ibid.
76Ibid., 7
highway traffic regulations:

There are those who claim that, by placing elements of the immigration program in the Public Security Portfolio, we are 'tarring' all immigrants and refugees as criminals or as 'threats' to public security. I am honestly puzzled by the logic of this argument. Police officers are responsible for enforcing highway traffic regulations. Does this imply that all drivers are criminals? Of course not. And it doesn't mean that the police cannot protect the vulnerable of our society and promote the good of society... It is surely just as important [as enforcing traffic laws] to maintain the integrity of our borders and to enforce Canada's Immigration Act in the most effective way possible."

VII) Conclusion

Just as Bills C-55 and C-84 acted upon (and reproduced) the 'bogus refugee' as the archetype of moral and legal 'undeservedness', Bill C-86 acted upon the 'criminal immigrant or refugee' as the archetype of moral and legal undesirability. The victim of the fraudulent character of so-called bogus refugees has been constructed as the state, specifically state administrative systems and 'Canadian generosity'. It is similarly the case that different forms of criminality have been incrementally but steadily redefined as posing a risk/danger to the security of the Canadian state and of the public. Once so viewed, criminal and security risks may then be 'legitimately' acted upon through increasingly repressive and enforcement oriented sovereign power.

By 1992, the criminal immigrant or refugee was produced as the archetype of undesirability. It now stands alongside the archetype of undeservedness, the 'bogus refugee'. By 1992, the figure of the 'bogus refugee' was mobilized more as evidence of a poorly managed system open to abuse by criminal and security risks rather than as a dominant problem in and of itself. In the following chapter, the discursive redefinition of refugees (from deserving victims to undeserving frauds/criminals) will be examined in more detail as will the material impact of these developments on the lives of particular groups of new immigrants and refugees in Canada.

77 Lewis, “Notes for an Address” 1993
Chapter Five

From Deserving Victims to Undeserving Criminals:
Redefining and Regulating Refugees in the 1990s

Security is the great commodity of our time... Government is virtually defined by the problem of managing the security of the population... For those outside the limited access environments in which these new security mechanisms proliferate, the hard edge of traditional social control remains the predominantly experienced means of security. But this apparatus of security is decidedly ambiguous. Its aim is both to secure the underclass and to secure others against it. 1

1) Introduction

On the heels of yet another recession in 1993, and in the face of the massive displacement of people globally, it is not surprising that the issues of welfare and immigration would be considered in relation to each other. But what is perhaps less straightforward is the way in which the discursive figures of the 'welfare cheat' and the 'bogus refugee', constructed by and through panics and crackdowns in both the immigration and social services contexts, merged and were mobilized in distinctly punitive and coercive ways, ways which, moreover, particularly and adversely affected visible minorities. Alongside the increasingly powerful construction of the 'criminal immigrant and/or refugee' (in spite of consistent statistical evidence that immigrants and/or refugees are not over represented in the prison system, and despite a steady decline in national crime rates2), over the late 1980s and early 1990s, the regulatory figures of the

1 Jonathan Simon Poor Discipline Chicago: University of Chicago Press, 1993:258
2 As observed by sociologist Morton Weinfield in dialogue with Daniel Stoffman, "Many people do make the linkages between immigrants and crime. In fact, if we look at the evidence...you find, for example, in the federal prisons that the foreign born are under represented as a proportion of the inmate population. So the whole notion that immigrants are heavily involved in crime just doesn't withstand scrutiny."("How Many Immigrants Should Canada Admit" Globe and Mail, March 4, 1994) For a comprehensive look at the relationship between immigrants and crime see "Immigration and Crime" Allan Borowski and Derrick Thomas in Adelman et al (eds.) Immigration and Refugee Policy: Australia and Canada Compared, Toronto: University of Toronto Press, 1994; "Race, Ethnicity
welfare cheat and bogus refugee emerged, both within and without ‘our gates’. Social and political anxieties about the threat posed by criminal immigrants and refugees merged with the public and political panic about the ‘welfare cheat’ and the ‘bogus refugee’ to produce a powerful backlash against certain visible groups of new immigrants and refugees in the 1990s. On one level, these discursive developments can be understood as the incremental but steady redefinition of the ‘claimant’ of the benefits of administrative justice, from that of a deserving victim ‘at risk’ to an undeserving, risky ‘offender’ (whether represented in terms of ‘fraud’ or ‘criminality’ or a rather explosive blend of both).

This shift in turn reflects the broader shift in governmental rule, from humanitarian welfarist liberal to neo-liberal. This more general shift in the rationality of governmental rule has entailed the emergence of different governing logics. In the context of exclusionary Canadian immigration law and policy, in the 1960s and early 70s, the inclusionary logics of human rights and liberal legalism challenged and supplanted the previously dominant logics of immorality and national ‘purity’. Since then, the logic of national security has been incrementally expanded to include more and more forms of ‘criminality’ which were themselves redefined as posing a threat to national security and/or protection of the public.

While the logic of national security was certainly firmly in place when the 1976 Act was adopted, it encompassed the more traditional Cold War concerns with threats to the Canadian political state posed by political subversives, terrorists and those engaging in espionage. The 1976 Act articulated the new ‘security’ concern of organized crime; however this concern was still in its early stages. Since 1976, the logic of ‘security’ has underpinned and justified the steady intensification, specification and in some cases redefinition of a wide range of new threats, those posed by organized criminals, international terrorists, domestic political terrorists, war criminals (traditional and modern and Criminal Justice in Canada” Julian Roberts and Anthony Doob in Ethnicity. Crime and immigration: Comparative and Cross-National Perspectives in Crime and Justice. Vol.21, Chicago: University of Chicago Press.
day), persons connected with regimes who have perpetrated wide scale human rights abuses, and dangerous criminal offenders. Moreover, the logic of ‘protecting the public’ has also become increasingly dominant and has been discursively linked with the notion of ‘national security’. Protecting national security and protecting the public have emerged over the last three decades as the guiding rationales of exclusionary Canadian immigration law and policy. The rise in dominance of these rationales has entailed the increased mobilization of the constitutive discourses of criminality, victimhood and risk/danger. As discussed above, the logic of ‘system integrity’ and its corollary, the constitutive discourses of abuse and fraud, also emerged during this period in a manner most consistent with the general decline of welfarist humanitarian liberalism and the rise of a more punitive neo-liberal mode of governance.

This chapter begins with a brief discussion of the rise of neo-liberalism as a rationality of rule and the criminalization of certain kinds of fraud. It traces the emergence of the problem of the ‘welfare cheat’ in Ontario in the early 1990s. It then examines the ways in which the discourses of fraud and abuse converged with criminality discourses in the construction and regulation of the fraudulent criminal immigrant. This discursive redefinition of deserving refugee ‘victims’ to undeserving abusers, frauds and/or criminals will then be considered in terms of the direct and indirect racist and coercive consequences that this shift entailed and indeed facilitated for Somali refugees living in Toronto who became the specific subjects of this redefinition in public and political realms and who consequently were the objects of increased coercive control and legal regulation.
II) The Rise of Neo-Liberalism as a Rationality of Rule

Look upon fraud as a crime greater than theft... for they allege, that care and vigilance, with a very common understanding, may preserve a man's goods from thieves but honesty hath no fence against superior cunning... where fraud is permitted or connived at, or hath no law to punish it, the honest dealer is always undone, and the knave gets the advantage. 3

The linkage and increasing dominance of fraud and criminality discourses over the late 1980s and early 1990s is not limited to the field of immigration and refugee governance. Indeed, in the early 1990s, provincial governments were increasingly preoccupied with fraudulence in the context of social welfare provision. Alongside the construction of the 'bogus refugee' emerged the regulatory figure of the 'welfare cheat'. In the 1990s, the figures of the 'bogus refugee', the 'welfare cheat' and the 'criminal immigrant or refugee' came to be closely linked in popular and political discourse.

Like the figure of the fraudulent refugee claimant, the fraudulent welfare claimant evokes considerable moral indignation and condemnation. Taking advantage of Canadian generosity, cheating the system, getting something for nothing, both the bogus refugee and the welfare cheat easily offend many of the essential qualities of the desirable liberal citizen: autonomy, (economic) independence, acquisitiveness, merit, dessert. accountability and rule-governed. The spectre of fraud is mobilized as a technology of liberal governance; it is employed in the continuous and varied project of producing and reproducing governable - self-regulating - citizens.

The logic of fraud enjoys a heightened discursive influence in most areas of public policy under a rationality of rule that has shifted from a humanitarian welfarist orientation to a neo-liberal one. Neo-liberalism grew in influence as the post war boom came to a close in the 1970s and high inflation, unemployment and recession marked the next few decades. Since the 1970s, both the economy and public discourse have changed.

3Gulliver's Travels, Swift, 1726 quoted on the 1999 Web Page of the Toronto Police Service Fraud Squad
dramatically. Neo-liberalism seeks to reassert pre-Keynesian classical economic theory. The classical liberal commitment to a minimal state has been revived, neo-liberalism seeks to shrink the size of the state and restore the primacy of market forces. The 'welfare state' must be retrenched if not completely dismantled as it is wasteful, excessive, a hindrance to wealth creation and to the state's ability to compete economically in international markets.⁴

This neo-liberal rationality rests on a blend of economic, political and moral arguments. The claim is that the welfare state has reduced freedom by enforcing financial redistribution from taxpayers to welfare recipients. It has eroded the work ethic and made recipients dependent. It has created a huge public sector which has a vested interest in its perpetuation.⁵ That situation is viewed as untenable in face of massive economic global restructuring; "market forces must be liberated, by downsizing the state and by emasculating social welfare policies, so that the state can meet the challenges posed by global restructuring."⁶ Neo-liberalism holds that economies must adjust to the changing opportunities that are available to them in the global economy. These adjustments certainly unsettle labour markets, rendering employment more uncertain and insecure. However, these features of the labour market are legitimized as 'unavoidable', 'normal' even 'desirable'.⁷ A belief in the superiority of the market as a mechanism for organizing society underlies the economic propositions of neo-liberal doctrine. State intervention is an impediment to the smooth functioning of the market:

The logic of the doctrine of market superiority requires the state to remove


⁶Ibid.,4

⁷Ibid.,4
impediments through such measures as reduced expenditures, deregulation, privatization, contracting out, and tightening the rules for unemployment insurance and other social welfare programs.\(^8\)

Neo-liberalism, when understood as a political rationality, a mode of governing, requires the constitution of a new subject-citizen. As argued by Burchell, liberalism taken as a broad formula of rule, "..requires of the governed that they freely conduct themselves in a certain rational way."\(^9\) The 'certain rational way' is accomplished through governmental strategies which seek to constitute the subject in ways that are compatible with governmental objectives. Liberal doctrines of freedom and limits of power are thus accompanied by strategies to foster the self-regulating or self-organizing capacities of markets, citizens and civil society in desired directions.\(^10\)

The integral elements of neo-liberal rationality include: a belief in the efficiency of markets, the importance of accountability, individual liberty, enterprise, responsibility and independence and the virtues of the non-interventionist state. Neo-liberal political rationality does not accept as legitimate any avoidable adult dependency. Unlike liberal welfarism, which tempered the liberal commitment to 'independence' through the employment of notions of collective social responsibility, neo-liberalism brings 'independence' back to the fore. And in contrast to liberal welfarism which tempered the devaluation of dependency by its acknowledgement of its social causes, neo-liberalism individualises and stigmatizes dependency through its reassertion of notions of individual responsibility and enterprise. 'Independence' is still fundamentally associated with waged labour and is valorized as a desirable personal quality, and dependency signifies not only lack of paid employment but "has been inflated into a behavioural syndrome and made to

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\(^8\)Ibid., 7


\(^10\) Nikolas Rose "Government Authority and Expertise in Advanced Liberalism" ” in *Economy and Society* Vol. 22, No. 3, August 1993
seem more contemptible. People who receive welfare are thus increasingly stigmatized under neo-liberalism; they are not independent, enterprising or responsible. Rather they are deviant.

Moreover, whereas the equation of waged labour with independence was gendered in the industrial period, and anxieties about economic dependency were by in large anxieties about the dependency of adult males, in the post-industrial period independence has been discursively 'de-gendered' as the industrial hegemonic acceptance of female dependency has been increasingly challenged and undermined. As stated by Fraser and Gordon, "Whereas industrial usage had cast some forms of dependency as natural and proper, postindustrial usage figures all forms as avoidable and blameworthy." Individual responsibility is a central tenet of liberalism. In the context of social service provision this translates into policies which have historically been based on some measure of 'deservedness'; "...a person's inability to earn a living must clearly be established before public assistance is granted. The poor must always qualify as a deserving poor."

The early 1990s witnessed a distinctly neo-liberal campaign to stigmatize all recipients of state social benefits as possible criminals through the linking and mobilization of fraud and criminality discourses in the public panic around and the governmental crackdowns on 'welfare cheaters'. A provincial government report on social welfare provision in Ontario released in 1992 in the early days of the left-leaning New Democratic Party government, drew particular attention to the problem associated with the moral determination of deservedness. It observed that the system had "...become infused with value judgements about people, about whether they are considered to be deserving or undeserving of assistance, the authors or the victims of their own

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12Ibid., 323

13Ronald Manzer Public Policies and Political Development in Canada Toronto: University of Toronto Press, 1985:50
impoverished circumstances." Interestingly, at the time of this report the NDP
government played down concerns about fraud and abuse of the system. While it
recommended a comprehensive audit system for the welfare system, it was careful to note
that this was not because "we believe there is widespread fraud in the system. We believe
that it is the hallmark of any efficient system to monitor itself."15

Evidencing the force of the rise in neo-liberalism as a rationality of rule, one year
later the same NDP government issued yet another policy paper on social service
provision, entitled Turning Point. The neo-Keynesian discourse of collective
responsibility, entitlement, social justice and equity, so prominent in the earlier report is
completely absent in Turning Point. In contrast, this later report gave expression to a
distinctly neo-liberal discourse of competitiveness, independence, individual "talents" (a
specifically economic "value-added" term), long-term economic strength, training,
incentives and disincentives, the changing global economy and sound fiscal management.
This discursive shift certainly reflects the increasing influence of neo-liberalism in
political and economic policy-making. No longer do notions such as collective
responsibility, human dignity and respect underpin the proposed changes. Rather the
changes are justified by reference to the increasing competitiveness of global
economics.16 Whereas the earlier policy orientation directly countered the growing
assumption that social assistance is a preferred lifestyle, that welfare recipients simply
don’t want to work and are abusing the system, the government in its subsequent report
expresses the widely held concern that welfare recipients are “locked in a lifestyle of
dependency”17. The notion of a ‘lifestyle of dependence’ reflects the neo-liberal
preoccupation with rational choice and cost-benefit analysis as the basis for individual
decision-making about the distribution of their labour and leisure time. The implication of

15 Ibid., 171
16 Ibid., 2
17 Ibid., 9
this orientation for the social construction of welfare recipients is clearly that they ‘freely choose’ to be on welfare and therefore they are, already and always, system abusers.

III) The Emergence of the Problem of the ‘Welfare Cheat’ in Ontario in the Early 1990s

*Fraud:* “deceit, trickery, sharp practice, or breach of confidence, perpetrated for profit or to gain some unfair or dishonest advantage”

*Fair:* “legitimately sought...proper under the rules”

‘Cheaters’ offend our sense of fairness, our valorization of merit and individual accountability. In the context of humanitarian social welfare systems which are premised upon liberal notions of merit and dessert, cheaters are a threat to the system. By cracking down on cheaters, the liberal moral universe is maintained and discursively reproduced.

Over the 1990’s, fraudulent claims to the state’s ‘generosity’, whether in the context of claims for refugee status or claims for social assistance have been increasingly constructed as serious social problems occasioning tough governmental action. Fraudulent claimants, ‘bogus refugees’ and ‘welfare cheats’ are the epitome of undeservedness; not only are they not deserving victims who have come to their needy situation ‘through no fault of their own’ but they dishonestly misrepresent themselves as victims. Moreover, in the increasingly neo-liberal context of policy-making, even the ‘genuine’ welfare claimant is, to a certain degree, always and already conceptualized as receiving undeserved (freely-chosen) governmental assistance.

It is telling, that in Ontario, the cutting of social assistance benefits and the crackdown on welfare fraud in 1994 was spearheaded by the New Democratic Party. The incongruity of these initiatives with the traditional politics of the NDP was not lost on political commentators. Michael Valpy, journalist for the *Globe and Mail*, observed wryly at the time, “Think of this: For the first time in Ontario’s history, a provincial

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government, encouraged by its premier, is talking about cutting social assistance benefits. That government is socialist. Valpy went on to observe that Ontarians saw the NDP government as 'abandoning its promises and its socialist philosophy' "They hear the Premier speak publicly about Ontario's benefits being the most generous in the country. They hear him speak about the dangers of welfare dependency. On both subjects, he panders to those eager to believe that welfare recipients are lazy frauds living off the sweat of others' labour." It is particularly interesting that Mike Harris, the current conservative premier of Ontario and author of the neo-liberal 'Common Sense Revolution' in the province, articulated just this mean spirited and punitive view in his reaction to the NDP's proposed welfare reform as then leader of the Ontario Progressive Conservative Party:

If it truly deals with welfare reform, with removing from the rolls those who are ripping us off, those who are staying home and doing nothing because they want to do nothing then that will be good enough for me...It's all those people who can get out of the house, who can do something and are choosing to stay home and do nothing.

Since the early 1990s, the categories of 'fraudulence' and 'criminality' have become increasingly linked in social and political discourses. However, not surprisingly this is most pronounced not with corporate or white collar crime, but with respect to governance of the poor, the powerless and the marginalized. In 1995 Premier Harris stated that wealthy citizens who evade taxes, while 'regrettable', are reacting in accordance with 'human nature' against 'wasteful government spending' (presumably he had in mind the nature of the archetypal desirable, acquisitive, independent liberal subject). At the time of this provocative pronouncement, his government had just launched a massive 'crackdown' on welfare 'cheats' which included a toll-free provincial fraud hotline and a 20% cut of welfare rates. Opposition members were quick to point out

19 "Globe and Mail," "Where's the Compassion of the NDP?" March 22, 1994
20 Ibid.
21 Toronto Star " Welfare Cuts May Come Swiftly"March 22, 1994
that in Harris' Ontario, poor people who make fraudulent welfare claims are criminalized. They are portrayed and acted upon as crooks, whereas rich people who defraud the government are normalized, they are merely acting in accordance with their inherently acquisitive and independent (and, needless to say, essentially desirable) human nature.22

In March 1994, Tony Silipo, the Ontario NDP Minister of Community and Social Services, announced a major crackdown on welfare fraud. The government hired 270 inspectors to review almost 690,000 welfare cases. They did this despite the acknowledged absence of any concrete evidence of the extent of the 'problem'; "Mr. Silipo said he does not know just how serious a problem welfare fraud is...[He] said the government is responding in part to a widely held belief that welfare fraud is increasing, even though there is no evidence to back up that belief.23 Indeed, what evidence does exist places the level of welfare fraud at less than 3% of all claims.24

This 'crackdown' and the admittedly unsubstantiated 'problem' of welfare fraud that it targeted received massive media coverage. A brief survey of the headlines in The Toronto Sun, a conservative daily tabloid newspaper illustrates the tone and mood of the public panic. Headlines screamed: "Living High off the Hog"25; "Cheaters Beware"26; "Welfare 'Gravy Train' Derailed"27; "Welfare Fraud Deluge"28. The extent to which the 'problem' of welfare fraud was constructed and manipulated is further revealed in confidential documents obtained under the Freedom of Information Act which were

22Globe and Mail "Tories Accused of Double Standard on Fraud: Welfare Cheats Face Courts as 'Crooks' While Tax Evaders get Sympathy for being 'human' Liberals Charge" Nov.16, 1995

23 Globe and Mail "Ontario Takes Tough Stand on Welfare Cheats" March 29, 1994

24 Toronto Star "Welfare Bashing" April 3, 1994

25 Toronto Sun, March 18, 1994

26 Toronto Sun, March 28, 1994

27 Toronto Sun, April 14, 1994

28 Saturday Sun February 19, 1994
presented in the legislature in April 1994, but which did little to diffuse the panic. These documents attributed the ‘skyrocketing’ costs of provincial social assistance to government error in the form of massive overpayments. As put by Liberal leader Lyn McLeod, “Instead of hiring 270 inspectors to search for welfare cheats the government should get its own house in order and stop sending excess money out to people...The problem is really government mismanagement.”

As part of the 1994 crackdown, the NDP also investigated the idea of issuing welfare ID cards to social assistance recipients as a means of combatting fraud. As well it even looked into fingerprinting as an anti-fraud measure. There is perhaps no greater illustration of the criminalization of welfare recipients underway at the time than that provided by the idea of taking their fingerprints, entailing as it does “...the physical laying on of hands that fingerprinting requires, the taint of criminality that has always surrounded it, the sense of being psychologically violated...” Larry Hannant warns. “Government officials who want to impose it had better face up to history: Barring a national emergency - and the supposed epidemic of welfare fraud hardly qualifies - Canadians won’t leave their mark with the government or police.”

IV) The Merging of Fears about Immigration and Welfare

1994 was also a big year for controversy and debate about Canadian immigration and refugee law and policy. The federal government’s announcement in February that it was going to maintain immigration levels at 250,000 sparked much criticism. Summing up the basic objection, the Reform Party of Canada said “...immigration is still twice what it should be ... demanded an explanation for continued high levels while unemployment

29Toronto Star “247 Million Was Overpaid on Welfare, Liberals Charge” April 14, 1994

30Toronto Sun “Double Duty for Photo ID Cards”, April 21, 1994:16; Globe and Mail “No Fingerprints, Please, We’re Canadian” March 7, 1994

31Globe and Mail Larry Hannant, “No Fingerprints, Please, We’re Canadian” (op-ed.) March 7, 1994
continues to soar and Canada’s social welfare system is under strain.”32 In its anti-immigration platform, the Reform Party routinely alluded to “rising crime rates, bulging welfare rolls, unemployment and underfinanced social services.”33

Support for the arguments of Reformers and other anti-immigration advocates is provided by freelance Toronto journalist, Daniel Stoffman and author of a report on immigration for the independent conservative think tank, the C.D. Howe Institute.34 Stoffman refutes the argument that immigrants are an economic asset to the Canadian economy, arguing that their effect on the incomes of the ‘host’ country is ‘neutral’. For this reason, he suggests that economic justifications for existing immigration policy are not well-founded. Instead, Stoffman draws attention to such non-economic deleterious effects of immigration as increasing racial tensions and the overburdening of social services. For these social reasons, Stoffman concludes that immigration should be reduced and that the priority should be placed on taking more skilled and highly trained and educated independent applicants and fewer humanitarian ones.35 Stoffman’s position

32Toronto Star, “Liberals Open Canada’s Door to 250,000 immigrants in 1994” February 3, 1994

33 Toronto Star, “Nose to Nose on Immigration” February 5, 1994

34Globe and Mail, “Putting a Price on Immigration” February 11, 1994

35 The February 1994 announcement that the government was not going to reduce immigration levels was met with dismay from anti-immigration groups who had hoped, in line with Stoffman, that they would be. However, the changes that the government did make to the intake levels of the different classes of immigrants reveals a certain agreement with the view articulated by Stoffman and others. These changes do indeed reflect certain changes in priority with respect to the admission of different classes of immigrants. Within the overall number of 250,000, there were to be more independent immigrants chosen for their skills and potential economic contribution to the economy, more family class immigrants and significantly fewer refugee admissions. In this last respect, off-shore refugee selection was preferred. This reflects another interesting analytical shift in contemporary inclusionary notions of governmental humanitarianism which have been increasingly associated with ‘families’ and ‘children,’ and decreasingly with refugees. In 1994, approximately 45% of those immigrants were to be accepted under the family class category, 44% were to be selected on the basis of the point system
opens the door for positions on immigration which emphasize the alleged deleterious effects of immigration, and in particular of 'uncontrolled' on-shore refugee admissions, including as social decay, racial tensions, cultural difference, safety and security issues. Such arguments easily provide discursive cover for underlying racist and xenophobic sentiments.

Over the late 1980s and early 1990s, the 'problems' posed by immigration were the subject of many polls and surveys which sought to uncover Canadians’ opinions about immigration. The findings consistently revealed a Canadian public that was increasingly intolerant of immigrants and critical of immigration policy. Many of these studies found Canadian opinions on these matters to be inflected with xenophobic and racist fears and beliefs.36

So it was that by the early 1990s, the regulatory figures of the 'bogus refugee' and the 'welfare cheat' were well-established in Canadian public and political discourse and efforts were underway to crack down on both. Over this period, fraudulent claims for social benefits were increasingly criminalized. However, as already suggested, this criminalization was not felt equally by all Canadians. Corporate fraud, white collar fraud, tax fraud were not the subject of political and public panics over this period. Rather, it was the least powerful members of society who were targeted: new immigrants and refugees and welfare recipients.

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for skills and business credentials and 11% were to be accepted as refugees fleeing persecution. (The Toronto Star, “Nose to Nose on Immigration” February 5, 1994) The decline in refugee admissions is telling, particularly at a time when the world refugee population was increasing dramatically indicating a shift in priority within the humanitarian class of immigration admissions from refugee admissions to family class admissions.

V) Extending and Acting Upon the Threat: Cracking Down on the ‘Fraudulent Criminal Claimant’

The increased preoccupation with and criminalization of (certain kinds of) fraud under neo-liberalism facilitated the relatively easy link forged between fraud and criminality mobilized against new immigrants and refugees. Neo-liberalism, premised as it is upon notions of individual responsibility, autonomy and rational choice, has a distinctly punitive edge. Thus while criminalization is not necessarily consistent with neo-liberal strategies of governing, implying as it does increased costs of criminal justice administration and state administered carceral institutions, the language of deterrence central to criminal justice processes is nevertheless consistent with the neo-liberal preoccupation with utilitarian notions of rational choice and cost-benefit decision-making. The logic of deterrence, in the context of immigration just as in the context of criminal justice or social welfare, justifies an enforcement oriented, get tough, law and order response to whatever ‘threat’ is being posed. By increasing the ‘costs’ of coming to Canada through punitive crackdowns, ever tougher legislation, more vigorous enforcement, interdiction initiatives and increased sanctions, the rational decision-maker will be dissuaded from choosing to come to Canada to abuse the system and endanger the public.

One of the troubling aspects of the increasingly deterrence-oriented Canadian immigration law and policy is that it tends to construct all new immigrants and refugees as system abusers and criminal threats, who in turn are acted upon as such. Thus it fosters a ‘culture of disbelief’. While ‘genuine’ refugees, by legal definition, are still widely considered and are acted upon socially, legally and politically as deserving victims, the vast majority of refugee claimants are represented as criminals or system abusers or both. While it is generally conceded that genuine refugees are deserving of protection and that genuinely needy welfare recipients are deserving of assistance, the discursive emphasis has shifted to the undeserving and undesirable side of the liberal equation.

However, Canada’s relatively high rate of accepting refugee claimants as genuine
refugees reflects a judgment that most claimants are not frauds or criminals despite their current construction. Under the current governmental regime, the legally and administratively confirmed status of the refugee claimant as a genuine and therefore deserving refugees is fragile and arguably always suspect. In one moment, and in a wide range of social, political and legal contexts, the claimant is constituted as, in all probability, an undeserving, opportunistic criminal, fraud or both, who 'freely chooses' to come to Canada for illegitimate reasons, and who poses a threat to national security, protection of the public and/or system integrity. In the next moment, legally and rhetorically the successful claimant is confirmed to be a deserving victim who had no choice but to flee to Canada and who therefore has a right, under national and international law, to be here.

VI) The Provincial and Municipal Dimensions of the Panic Surrounding the 'Fraudulent Criminal' Immigrant or Refugee

Federal developments attest to the heightened preoccupation with and discursive links between immigrants and/or refugees, criminality and system abuse at this time. Provinces and municipalities were no less animated by the same issues. The level of fear-mongering and hyperbole which similarly characterised the more local panic in Ontario is nicely captured in the following dire picture of the state of Canadian immigration painted by a Toronto Sun columnist in 1994:

Worst of all the word has gone out to foreign violent criminals that Canada is easy to enter and has a loosely run system that can be 'worked' to frustrate deportation even when caught. Many of these criminals—murderers, drug traffickers, terrorists, pimps, etc., - apply for "refugee" status and stay on for years. And when they run out of time they simply

Indeed, arguably provinces and municipalities were motivated by a further issue not shared at the federal level, that is the rising costs borne by provinces and municipalities for social service provision due to cuts in transfer payments. In addition, Metropolitan Toronto has always been extremely vocal on immigration issues due to the huge numbers of new immigrants and refugees who choose to live there and the particular issues that that raises as well as due to the potent dictates of electoral politics.
When you see the amount of chronic, large scale unemployment in Canada – with 3 million on the welfare rolls - you have to wonder about the insanity of these new immigration increases. 38

The above quotation provides a compact compendium of the dominant discourses mobilized in the governance of immigration at this time: criminality, risk/danger, fraud, system abuse, and their association with economic insecurities and welfare. It is through the operation of these discourses that the figure of the deserving refugee is transformed and undermined. Panics tend to focus on simplistic identities and here, the deserving victim, the genuine refugee, is consistently eclipsed by the fraudulent criminal. 39

In April 1993, restricted police and immigration documents were leaked to a municipal politician in Toronto, John Papadakis. Soon after, Papadakis released them at a public forum on crime which he had organized after seeing a report issued by the East York Council on the impact of refugee claimants on local municipal governments. In attendance at the forum were other municipal politicians, representatives of the Immigration department and of the police. Its stated purpose was to “focus attention on bogus refugee claimants and illegal immigrants”40. The fact that they were confidential leaked documents only bolstered Papadakis’ resolve. As he explained, the fact that individuals would leak this information is proof that ‘law-abiding’ citizens are “fed up with government inaction, with having their country abused, with being afraid to walk around at night, with being robbed in their stores, and with being accused of being racist every time they open their mouths to say there’s something wrong”.41 Another reading is possible of the bureaucratic leak which Papadakis acted upon. As observed by Lorne

38Toronto Sun, “Immigrant Boost is Insanity” Feb.4, 1994

39Globe and Mail, January 21, 1993

40Globe and Mail “Probe into Leak on Refugees Sought”, April 29, 1993

41Ibid.
Waldman, Member of the Refugee Lawyers’ Association,

A broader question has to be asked: Who’s leaking this and why? Some people inside the Immigration Department have an agenda...This agenda a lot of times, is an agenda to try to create an anti-immigrant, anti-refugee backlash. There are refugees who collect welfare...There are visitors who come to Canada who commit crimes. But as a proportion of the total number of people who come to this country it’s very insignificant.42

Papadakis, and his allies in Immigration, used this information to further forge the link between illegal immigrants and refugee claimants and the ‘crime problem’. This link, as already described, had been evidenced by the creation of the new ‘Public Security’ portfolio in the same year thus reproducing the discursive message that immigrants and refugees are a threat which needs to be contained and controlled; “...a menace that society has to be protected from.”43

Papadakis emphasised that national security and public safety supersede any privacy laws; ‘every Canadian has a right to safety’. The easy slippage between criminality and fraud/system abuse, as well as the general view that any government assistance is, in a sense, ‘criminal’, is evidenced in his remark that “Crime is Crime. When my folks came to Canada in the 1950s they had no help, no handouts.”44

The leaking of these documents by civil servants, their release at a public forum and the media reports on this event all contributed to the continued production and reproduction of the panic around immigrants and refugees, fraud/system abuse and criminality. The information contained in them was presented by Papadakis as “proof” that “Canada has a serious problem with foreigners coming into the country and

42Globe and Mail “Use of Leaked Data Called Irresponsible”. April 30, 1993

43Globe and Mail, “Shifting New Ministry seen as Fanning Flames of Racism” July 13, 1993

44 Ibid.
committing violent crimes”. He concluded that any and all refugee claimants or immigrants who are convicted of a criminal offence should be automatically deported with no right of appeal.

The linkage between immigrants and refugees, fraud/system abuse and criminality discursively constituted all new immigrants and refugees as potential threats to national security, public safety and system integrity. However, it was also mobilized in local, 'ethnically-specific' directions. In Toronto in the 1990s, Somalis were one group which bore the coercive brunt of this development. Their experience illuminates the nature of these discursive processes and their coercive impact on people.

VII) From ‘Deserving Victims’ to ‘Fraudulent Criminals’: The Case of Somali Refugees in Toronto in the 1990s

The historically specific conceptions of (un)desirability and (un)deservedness which underpin and guide the development of exclusionary immigration law and policy and the dominant rationales that explain and justify their enforcement are constituted, mobilized and reproduced by and through the discursive ‘production’ of particular social problems (dangers, threats, risks) and by and through efforts to regulate and control the ‘problem’. In the production of these threats, discourses are mobilized and employed: criminality, risk/danger, fraud, abuse, system integrity, Canadian generosity and sovereignty are but a few which have been highlighted here.

In what follows, the concrete and coercive impact of these discursive developments will be explored in the particular context of Somali refugees residing in Toronto in the 1990s. The processes by and through which ‘genuinely deserving’ Somali refugees were incrementally and steadily reconstituted and acted upon as undeserving and undesirable will be examined. It is argued that this redefinition was effected primarily through the mobilization of fraud and criminality discourses against particular groups of

45Globe and Mail, “Use of Leaked Data Called Irresponsible” April 30, 1993

46Globe and Mail, “Probe into Leak on Refugees Sought” April 29, 1993
new immigrants and refugees who were (re)presented as ‘threats’ to Canadians and Canada. What follows makes clear that these discursive developments entail concrete and coercive consequences for those subject to their operation. In the case of the Somalis, these consequences reached quite literally into their very homes.47

This discussion is not intended as a comprehensive micro-study of the production and consequences of the anti-Somali panic and backlash in Toronto in the mid-1990s, although that would most certainly be a valuable and interesting project to pursue. Rather, what follows provides an overview of that situation as illustrative of the convergence, employment and racist and coercive dimensions of fraud and criminality discourses in a local and human context. Key players in the multi-contextual production of the panic and the coercive crackdown that ensued included: ‘Dixon’ condominium owners, security personnel and residents/owners; the city of Etobicoke Social Services ‘Dixon Task force’; the print and broadcast media (in particular the Toronto Sun, and an article entitled “Dispatch From Dixon” by Toronto freelance journalist Daniel Stoffman which appeared in the Toronto Life Magazine in August of 1995), municipal and provincial politicians. Immigration ‘intelligence’ bureaucrats, the RCMP, and the municipal police. Each ‘player’ could easily be subjected to much more detailed and thorough description and analysis.

We begin with a quotation from an Africa Watch report on the distressing situation in Somalia by the beginning of the 1990s:

47 In the final section of this chapter, this linkage will be examined in the context of the Somali community in Toronto. It should however be emphasised that other groups were and continue to be similarly governed by these discursive developments, for example the Sri Lankan community felt the effects of a widely covered emergent concern with criminal ethnically based gangs as well as with fundraising activities in support of ‘terrorist’ activities in their homeland; the Chinese community was effected by a sustained and widely covered panic about ‘Triads’ (the ‘threats’ posed by organized crime groups and measures taken to respond to this threat will be examined in Chapter 6); Sikhs were the subjects of considerable enforcement-oriented fall-out after the Air India crash in 1985; and people from the Middle East felt the effects of the sustained enforcement preoccupation with (fundamentalist) terrorists.
It is difficult to overstate the Somalia government’s brutality towards its own people, or to measure the impact of its murderous policies. Two decades of the Presidency of President Siad Barre have resulted in human rights violations on an unprecedented scale which have devastated the country. Even before the current wars the human rights of Somalis were violated systematically, violently and with absolute impunity.  

Over the 1980s and 1990s, hundreds of thousands of Somalis were forced to flee state sanctioned persecution in their country. Most ended up in neighbouring countries in refugee camps. However, many who had the resources to travel further afar, were granted refugee status in Canada and the United States. The Somali community in Toronto began to form in the mid 1970s soon after refugees had begun to flee the Ethiopian-Somalian war. Thousands more followed over the 1980s and 1990s as conditions within Somalia steadily deteriorated. According to the Somali Immigrant Aid Association, over the 1990s the size of the Somali community in Canada grew from 65,000 to over 90,000: “Next to the Sri Lankan Community, ours has one of the largest influxes of desperate refugees seeking refuge... in Canada.”

After arriving in Canada through the major airports in Toronto, Montreal, Vancouver and through the Canada/US border, many Somalis moved to Toronto, drawn by the large Somali community. Thousands of Somalis live in six high rises on Dixon Road in Etobicoke, a suburb of Toronto. In the general panic that had been created about the character and fraudulent and criminal activities (identities) of Somali refugees, conditions faced by the Somalis living at ‘Dixon’ steadily worsened as the more general panic most certainly fuelled and propelled a racist and coercive backlash which was played out where they lived.

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48 Africa Watch Somalia: A Government at War with its own People, New York: 1990:1
49 Somali Immigrant Aid Association Website, Background Information, October 1999
50 Hereafter referred to as ‘Dixon’
i) Somali Refugees: ‘Cheaters’, ‘Criminals’ and ‘Unscrupulous Masters of Confusion’

This ‘ethnically-specific’ tale of the mobilization of the merged threat posed by fraudulent criminal claimants begins with yet another leak of ‘secret federal reports’, this time to provincial liberal leader Lyn McLeod in October, 1993. These reports, one of which bore the racist and inflammatory title “Desert Gypsy”\(^{51}\), were written by a bureaucrat in the Immigration Department’s Intelligence Unit. They alleged that Somalis were engaged in widespread and organized welfare abuse and that the Canadian government was being defrauded of millions of dollars as a result of this abuse.\(^{52}\)

McLeod’s interest in the reports was not in the evidence they supplied of the prejudices within the Immigration Department. Rather she used them as part of her campaign against welfare fraud. In the reports, Somali refugees were described as “masters of confusion” who “were importing refugees to systematically pillage our vulnerable and exposed social welfare systems.” The report also contained allegations that the money was being used to buy weapons for use by Somali ‘war lords’ in the continuing civil war in Somalia.\(^{53}\) The report, according to another source, went on to describe Somalis as “the greatest threats to Canada’s internal security.”\(^{54}\) Somalis were described as ‘opportunists’ whose “...use of confusion and misrepresentation is unparalleled except by the Gypsies of Eastern and Western Europe.” As described in a Toronto Star article, the author of the report claimed that “....Our western and primarily Christian-based way of life has little meaning or relevance to these people...one Somali interpreter has been quoted as saying you can

\(51\) This title gives blatant expression to the increasing prejudice against traditionally nomadic people over this period. This prejudicial theme, as will be seen, resurfaces in the context of the Somalis, but which clearly peaked in reaction to the arrival of ‘Gypsy’ refugees in Canada in the mid-1990s.

\(52\) Toronto Star, “Minister Unveils Steps to Curb Welfare Abuse” March 10, 1994

\(53\) Globe and Mail, “Refugees Accused of Fraud” October 28, 1993

\(54\) This Magazine, “They Believed the Hype” Dec-Jan. 1995:30
believe only 50 per cent of what a Somali tells you. My experience tells me that 50 per cent is extremely generous.”

The substance of these allegations were also reported in a *Vancouver Sun* article in October 1993. This story relied in large part on comments made by an anonymous former immigration investigator whose allegations were reportedly confirmed by similarly anonymous ‘law-abiding’ Somalis. It reported that tens of millions of dollars in welfare money was being fraudulently collected by Somali refugees across Canada and that the practice of ‘tithing’ resulted in a huge percentage of this money being sent back to Somalia to buy weapons for ‘warlords’. The article quotes the words of this former investigator who, when asked why Somali refugees come to Canada when many of them arrive in the US first, responded that ‘You can’t buy arms in Mogadishu with food stamps’. 

This report was leaked and publicized at the time of Silipo’s crackdown on welfare fraud in Ontario. While distancing himself from the specifically racist dimensions of the allegations, Silipo did little to calm the fears about refugees and welfare fraud. He responded that the government was currently investigating allegations that “some refugees are receiving multiple welfare cheques by using false identification.” While he observed that some of the statements in the report could incite racism, he nonetheless did not challenge the validity of its content: “I don’t know if the particular report is authentic. I can’t tell, but certainly the issue that’s raised is an authentic issue.”

Just as the more general ‘welfare cheat’ panic was not grounded in any statistical evidence of the actual extent of the problem, this refugee-specific panic was also not substantiated by any numbers. Numbers are indeed irrelevant in these panics. As admitted by Silipo, the government of the day had no estimate on the size of this ‘problem’; “I

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55*Toronto Star*, October 29, 1993

56*Vancouver Sun*, October 1993.

57*Globe and Mail*, “Refugees Accused of Fraud” October 28, 1993

58 Ibid.
don’t think that one can say there is fraud in the millions. I don’t think we know that quite honestly...I think that what we have to do is to make sure we get at whatever level of fraud there is in the system.” In fact, according to Silipo, the report in question provided “very few” cases of fraud, “something like twenty.” Moreover, according to a subsequent news story, “...the reports make specific reference to only a handful of cases and provide no proof - other than assurances from Somali community ‘sources’ - that money being bilked from welfare is being sent to warlords in Mogadishu. Thus while the focus of the allegations was on Somali welfare fraud, this report raised the added dimension of criminality evoked by the reference to welfare payments for weapon purchases in Somalia. The confirmed legal status of Somali refugees as deserving victims was thus unsettled. Somali refugees were reconstituted as undeserving and undesirable threats. Indeed, their engagement in ‘systematic’ welfare fraud, already socially and politically criminalized, was said to be directly in aid of further ‘criminal’ activities abroad.

The leaked document and the allegations it contained received very wide coverage in the press. The very identity of Somalis was being recast. Instead of deserving victims of persecution, Somalis were re-presented as unscrupulous and cunning ‘masters of confusion’; they were moreover seen not as not novices or newcomers to this kind of activity - but rather they were pros, ‘masters’. While the report itself was subsequently discredited in the media and even the Minister of Immigration, Sergio Marchi, explicitly distanced himself from it, the dye had already been set.

The damage, which was severe, had been done. Shortly after the report became public, 500 Somalis met in Ottawa to discuss their situation and many reported

59 Ibid.

60 "Toronto Star," Minister Unveils Steps to Curb Welfare Abuse" March 10, 1994

61 Bill C-86, it will be recalled, had ‘criminalized’ (through its inadmissibility and removal provisions) any activities of individuals which could be linked with terrorism, organized crime or support of groups, governments or organizations that use violence and/or engage in human rights violations.
experiencing the coercive edge of this development; according to one report, "many told stories of harassment by neighbours and strangers, of being denied jobs and of their children being taunted at school."\textsuperscript{62}

Over 1993 and 1994 this 'fraudulent criminal' identity of Somalis was the particular object of media attention. In 1994, the \textit{Toronto Sun} tracked a number of welfare fraud allegations, taking care to specify both the alleged offender's ethnicity (Somali) and immigration status (refugees or refugee claimants). Headlines were sensational. Even mere 'suspicions' of welfare fraud by Somalis were reported at this time: "A Somali refugee claimant is being sought on suspicion that he defrauded an immigration welfare program of $4000 while his claim was being heard."\textsuperscript{63} Another article entitled "Somali Woman Shopping for a Country"\textsuperscript{64} included a 6" by 8" photograph of the woman in question and her two children, identifying her in upper case letters as "COLLECTOR". While in the text the woman is later identified as having claimed refugee status, she is introduced as "Somali expatriate". By avoiding the designation "Somali refugee", her national origin is emphasised while her status as refugee claimant is not acknowledged; even the merest possibility of evoking her 'victim' status (and hence identity) is completely avoided. On March 16th, 1994 the \textit{Toronto Sun} ran another story on the same woman entitled "On the Move on the Dole"\textsuperscript{65}. Once again, the woman is identified without mention of her refugee status, this time she is a 'Somalia-born globetrotter'.

The latter designation speaks to the 'problem' of 'asylum-shopping' which had also been the subject of increasing attention during this period. Indeed a major official justification for the restrictive and discriminatory safe third country provision of Bill C-

\textsuperscript{62} \textit{This Magazine}, "They Believed the Hype" Dec-Jan 1995:30

\textsuperscript{63} \textit{Toronto Sun} "4Gs Welfare Payout Probed" February 21, 1994

\textsuperscript{64} \textit{Toronto Sun}, March 11, 1994

\textsuperscript{65} \textit{Toronto Sun} "On the Move on the Dole" March 16th, 1994
86 was the need to stop ‘asylum shopping’. Asylum shoppers is the derisive term used for those suspected of “freely choosing” to come to Canada rather than being compelled by virtue of state sanctioned persecution. People who ‘asylum shop’ have been, or could have been granted asylum in a so-called ‘safe’ third country in which they had been present before arriving in Canada. Oddly, justifications like the need for western ‘developed’ countries to ‘share the burden’ of the world’s ills were mobilized in defence of this restrictive measure at a time when most other western European countries were doing the same thing: closing their doors and thereby shifting, not sharing the burden.

While asylum shoppers may once have been recognized as ‘genuinely deserving victims’, this status is negated as soon as they ‘freely choose’ to leave the safe place which had ‘generously’ and ‘compassionately’ allowed them to stay, and opportunistically and undeservedly claim refugee status in Canada. Asylum shopping, like the ‘bogus refugee’, offends liberal sensibilities. And while not to the same degree perhaps as the ‘bogus refugee’, during this same period ‘asylum shopping’ was similarly constructed and acted upon as an emergent and serious ‘problem’ requiring restrictive and enforcement oriented attention.

Despite the absence of any reliable statistical evidence of the extent of the ‘problem’ of welfare fraud (nor indeed of any reliable ethnically-specific data on this issue) and despite official pronouncements on the exaggerated reaction to this so-called problem, Immigration Minister Sergio Marchi announced in March, 1994 that ‘information sharing’ measures were being implemented with municipal governments in order to assist in the crackdown already in progress. Once again, Marchi announced these initiatives while being at the same time cautious about exaggerated reports of the problem: “…the problem of welfare abuse by refugee claimants - while worthy of attention and action - should not be exaggerated.” He also took the opportunity to again distance himself, as did in November of 1993, from reports about Somali welfare abuse: “I just don’t buy it when there’s references in the report that go from individual guilt to a
The extent to which the identity of Somalis became indelibly tainted by unsubstantiated welfare abuse and criminality related allegations was evidenced by the ‘common-place’ association made between welfare fraud and Somalis. In an April 1994 Toronto Star piece critical of the ‘scapegoating’ of welfare recipients that was occurring in Ontario over this period, the association between welfare fraud and Somalis which is increasingly taken for granted is highlighted: “You hear everywhere a little litany that goes something like this:...A friend of mine told me about this Somali guy who came right from the airport to the welfare office.”67 As Don Richmond, the Commissioner of Metropolitan Toronto’s Social Services noted, “[W]elfare clients are becoming the other. the stranger, the Jews.”68

In 1994, similarly unsubstantiated allegations about the fraudulentness and criminality of Somalis surfaced in the local community in Etobicoke. According to Ali Mohamud, at the time a member of the Somali Community in Etobicoke and presently (2000) Executive Director of Dejinta Beesha, a Somali settlement services community organization, members of the Somali community were accused of misappropriating government funds that had been allocated to Dejinta Beesha. As with the Somali welfare fraud allegations, these local allegations also linked fraud and criminality. Somalis were accused of redirecting the fraudulently obtained funds to Somalia to support the ongoing criminal activities of warlords.

This allegation triggered an RCMP investigation. In 1994, members of the RCMP came to Dejinta Beesha to investigate the charges. According to Mohamud, the RCMP was satisfied with the legality of the organization’s operations and produced a report...

66Toronto Star, “Minister Unveils Steps to Curb Abuse” March 10, 1994

67The Toronto Star, “Powerless welfare clients are Scapegoats of the 90s” April 8, 1994

68Ibid.
which indicated that there was "no substance to the allegations." 69 This was however, not the end of the matter. As will be shown, less than two years later the very same allegations sparked a second RCMP investigation. Its findings were the same as those in 1994.

The panic which developed around the ‘problem’ of cheaters and criminals in the early 1990s in the context of the administration of Canadian social welfare and immigration policy converged upon the Somalis in a particularly powerful and explicit way. The panic that grew around the Somalis was facilitated by a national social and political climate of rising fear of and hostility toward outsiders, economic insecurity and a certain lack of confidence in government. It was also fuelled by, and in turn helped to fuel, racist and xenophobic sentiments. For Somalis living in Toronto, it most certainly contributed to an increasingly difficult situation in which they struggled in various ways to be heard in the face of increasingly oppressive preconceptions and repressive practices.

ii) Conflict and Coercion at Dixon

Thousands of Somali refugees live in six high rises located on Dixon Road in Etobicoke (Dixon). The population of Somalis is so great here that these buildings are sometimes referred to as Little Mogadishu. Many family members still in war-torn Somalia will know about Dixon from their correspondence with those who managed to leave. Many of those left behind continue to wait to be reunited with their families here. Foiled by the twin administrative requirements that permanent residency not be granted without ‘satisfactory’ proof of identity and that refugees cannot sponsor family members until they are permanent residents.

In the early 1990s the numbers of Somalis living at Dixon increased, commensurate with the growing exodus of refugees from Somalia. In July 1993, hundreds of Somali residents demonstrated on Dixon Road in protest of what they described as racist and discriminatory treatment by building management and security. According to

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69 Interview with Ali Mohamud, Executive Director, Dejinta Beesha (Somali Multi-Service Centre) January 13, 2000
press reports and subsequent interviews with Somali and non-Somali residents, this
demonstration was triggered by an altercation over a parking infraction between a security
guard and a Somali visitor to the building. As the altercation developed, a crowd grew
and the security guard called for reinforcements. A security dog was brought onto the
scene by the reinforcements. It was let loose by the guards and soon after bit a Somali
woman who had to be taken to hospital for medical attention.

Interviews carried out with resident Somalis and non-Somalis in 1994 by Kelly
Grover reveal a history of tensions and conflict among some Somalis and non-Somalis
and between some Somalis and security personnel dating back to 1990. The interviews
clearly point to overcrowding as a central variable in the hostilities. However once again,
it is not just about numbers. The interviews reveal that for many non-Somali residents,
the problem of overcrowding was inextricably connected to and heightened by the
perceived ‘problem’ posed by Somalis in particular. Building security personnel were
frequently called upon by disgruntled non-Somali residents to take action against Somali
residents or visitors whom they regarded as ill-behaved and building security frequently
dealt with Somali residents in particularly hostile and coercive ways.

Much of the tension that had been brewing before the demonstration of July 1993,
can be explained by a lack of communication and understanding between residents.
However, the nature and degree of the hostilities was certainly heightened by distinctly
racist sentiments, no doubt fuelled to varying degrees by the more general denigration of
the character of Somalis that was taking place around them. It is suggested here that these
hostilities, and the conflict and coercion which they entailed, were facilitated by the

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I am grateful to Kelly Grover for sharing her data with me. The interviews she carried
out with the residents of Dixon were used in her Masters’ thesis: “The Social
Organization of a High-Rise Neighbourhood: The Influence of Race, Culture, Economic
Class and Tenure on the Community Sentiments of Kingsview Park.” Grover’s thesis
was for the School of Urban and Regional Planning, Queen’s University, June 1995.

71Ibid., All subsequent quotations of and observations about the residents of Dixon and
are drawn from the transcripts of the interviews carried out by Kelly Grover.
already familiar and well-entrenched social and political construction of the undeserving and undesirable fraudulent criminal refugee. In a sense, this broader discursive development provided a certain moral legitimacy and justification for the hostility of non-Somali residents towards the Somali residents and for the coercive and discriminatory treatment of Somali residents by security personnel. It is therefore reasonable to suggest that the reactions of Somali residents to such hostilities and coercion were also likely heightened by their awareness of the distorted and offensive picture that was being painted of them in political and public discourse and their desire to challenge and resist it.

Non-Somali residents at Dixon describe Somalis refugees as 'animals' who have no respect for rules or for non-Somali residents. They talk too loud, gather in the courtyard in large groups, they don’t control their children, they walk on the grass. They don’t hold the door open for non-Somali residents, they monopolize the elevators. Totally unsubstantiated rumours flourish about Somalis defecating and urinating in the elevators. They routinely flaunt parking regulations and other rules of the apartment complex. They leave garbage in the hallways. They don’t talk to anyone but themselves. They are rude, aggressive and impolite. They are unclean and uncivilized. Because they are 'transient' renters and not owners, they have no respect for the upkeep of the building and residential units. They sit around all day and collect welfare. They own cars.

Evidently, the problem is not merely overcrowding. While there is certainly no question that many of the complaints of non-Somali residents were not racially specific and referred to problems that clearly stem from overcrowding: rising utility costs, increased noise, increased usage of the elevator and few parking spots, more often than not, the identification of these more practical issues was infused with denigrating moral and racial stereotyping. For example, one non-Somali resident commented that the major problem at Dixon was the problem of overcrowding, and that management needed to limit the numbers of residents. The moral underpinnings of her position were quickly clear when she stated that only single families should live in the units, "...no opposite sex kids in the same bedroom. Two of each sex in a bedroom that’s a normal family. A normal family is not a clan."
Another respondent who was also dismayed by the problem of overcrowding referred to increased elevator usage as a negative consequence. However the manner in which she articulates this issue is heavily loaded. The elevator is more crowded, she observes, because “...if they have to go up two floors they will take the elevator.” The implicit character judgment here is that Somalis are lazy. The same respondent observed that overcrowding has entailed more people traffic in the courtyards. As she put it, “there are more kids under ten, running all over”. The problem, she suggested, is with the poor parenting skills of Somalis who do not supervise their children adequately. Thus the ‘problem’ which elicits the most moral outrage and hostility is not overcrowding per se, but rather with the imputed (im)moral character of the Somalis.

Some of the non-Somali residents were remarkably candid in their remarks about Somalis. One resident commented that “these people were as low as animals could go”. The same respondent observed that while there had always been a racial and ethnic mix at Dixon, prior to the Somali “invasion” everyone had gotten along well. Another respondent observed, “...this is a country for humans and when you bring animals in from other parts of the world, it takes animals time to adjust...these people are not working, are on fixed incomes, and are sitting at home.”

Doubts were raised about the credibility of the Somalis refugee status. There is little question that in the eyes of many of the non-Somali residents, the Somali residents of Dixon did not fit the dominant construction of the genuine and deserving refugee. They did not appear to be grateful to Canada and Canadians for their generous protection. They were “aggressive” and “difficult”, rather than compliant. They were wealthier than refugees should be and, to make matters worse, they “milk the system” by collecting welfare. One respondent observed that “...all of a sudden the fad is when refugees come they can afford cars - when I was an immigrant we had to work for many years to afford a car. As a matter of fact since my husband died I don’t have a car. Refugees are getting free rent and free homes, we’re not...what do we do with our lives, we can’t start over.” And most frequently it was reported that they were flagrant ‘rule-breakers’. They were, in essence, undeserving and morally deficient.
A few of the non-Somali residents who were interviewed expressed dismay at the way in which Somalis were being represented and treated by non-Somali residents and by security. One respondent noted that in her opinion, "...management, security and racist owners have caused a lot of the problems in this community." Another observed that he didn't think that security was "...very good with Somalis in the courtyard...I have watched and they pick on them, Somalis just want to sit out there." Another respondent stated bluntly that she had "...no respect for this administration or the in-house security." In her view the security personnel were racist.

Non-Somali residents offered a variety of similarly 'get tough' recommendations to ease the 'problem' at Dixon. These included: tighter immigration screening procedures; increased removals ("people should be kicked out of Canada if they misbehave"); limits on the numbers of people allowed to live in the units; stronger enforcement of the rules; a prohibition on renting to welfare recipients ("get rid of welfare recipients"); facilitate management's access to the units (to "get proof of what's going on"), distribute the Somali residents more thinly ("...even out the population, spread the one dominant culture around so that you don't have a concentration of one group.")

While a few non-Somali respondents focussed on the lack of understanding and communication between Somalis and non-Somalis, Somali respondents invariably emphasized the importance of encouraging communication and cross-cultural understanding between the two groups. Many advocated holding workshops and seminars to facilitate communication and understanding. Many felt misunderstood. their identity and experiences as refugees unknown, forgotten or ignored. The vastly different conceptions held by refugees, and Somalis in particular, of what constitutes a 'problem' is emphasized here:

Some other residents might say there is noise such as the aeroplanes which are a problem but when you have stresses like you have, like the problems in Somalia - you don't notice these things as much. People from Somalia had other pressures when they were living in Somalia - people dying, trying to stay alive.

People don't understand how hard some of these people have it. A lot of
Somali women...now have no husband, they don’t speak much English, they have five or six children. They are in a dream, a trauma. People don’t understand. There is a lack of communication. Neighbours don’t understand. They think that all of us want government help and want it easy. Many of us want to work and can’t find daycare. These women are not having it easy and people don’t understand because of language barriers and lack of communication. Not all of us are on welfare.”

For Somalis, one of the most valuable of the results they hope for from improving contact and communication with non-Somalis is that increased understanding on the part of non-Somalis about the experiences and culture of Somalis would foster better, more livable relations. Many also concede that Somalis do need a bit of extra encouragement and explanation when it comes to rules; “...to some degree Somalis don’t know about rules. Back home there was corruption...now we are newcomers here. Rules at home were dictatorial, now, here they know about the rules but they don’t take them as seriously.”

Many Somalis desirous of changing the attitudes and coercive practices of security, also recommended hiring a Somali security guard. One respondent wished that security would “cooperate with people ” rather than always being “mean to the children and visitors, telling them to move and giving them a hard time. If they hired a Somali person maybe people could understand everyone. Sometimes when someone doesn’t understand the language they can seem rude. The Somali person could help by translating.”

Non-Somali residents were particularly adamant about the Somalis apparent disregard for the rules of the buildings. Some interpreted it as indicative of an inherent lack of consideration and were morally appalled. A particularly extreme position is provided by one resident who observed:

Nothing can be done. Even if you had Somalis involved and were talking to them, they don’t care. They don’t listen or care about anything except themselves. They will stand and talk in the elevator doorway while people are trying to get on. They don’t care. They have no sense of anyone but themselves.

Another more insightful but no less pessimistic view voiced by another resident is
that attempts to bridge the gap between the Somalis and other residents were unlikely to succeed due to the power of the moral denigration and character defamation of Somali refugees that had taken place all around them. As he put it, it wouldn't even matter if Somalis were 'owners' rather than renters of the units, "...they would still be seen as the same - people see them as milking the system."

Finally in July 1993 when Somalis took to the streets to protest their treatment at Dixon. The events which took place and the sentiments which underpinned them cannot in any simple way be explained by 'overcrowding'. Nor can it be reduced to mere 'cultural difference'. The broader context of this very preliminary 'micro' study of Dixon must be considered - a context of rising intolerance to outsiders, increased economic insecurity, distrust of government; a context of increased punitiveness and decreased compassion; a context in which the morally despicable figure of the undeserving fraudulent refugee was already well-familiar as was its companion figure of the despicable welfare cheat.

These events at Dixon, which developed over the first few years of the 1990s, provide a local window into the negative and coercive impact of exclusionary discourses at a particular place and time on a particular group. Somalis living at Dixon were constructed and acted upon as a problem. That some Somalis admit that they do tend to speak loudly, or that they don't take some rules as seriously as others neither explains nor justifies the resort to coercive and confrontational tactics by the security personnel. The fact that overcrowding and the 'transient' nature of the many of the residents' stays has resulted in circumstances and situations that pose, at the very least relatively minor inconveniences and irritations (such as increased people traffic resulting in slow and crowded elevator service, increased noise) and at worse increased financial costs of residency (hydro, water) neither explains nor justifies the racist and morally denigrating assumptions and stereotypes that fuelled the fire.

Somalis at Dixon were constructed and acted upon as a 'problem'; by management, by owners, by residents and by security. Shortly after the demonstration in 1993, the City of Etobicoke held an emergency meeting and set up the 'City of
Etobicoke/Dixon Task force to deal with the 'problem' posed by Somalis, with a primary but not exclusive focus on the situation at Dixon. The Task force organized monthly 'community meetings' over a period of two years. Interestingly the 'community' was comprised of non-Somali residents and owners, security guards, parks and recreation, public health, political representatives and social services. At any given meeting there were only one or two Somalis in attendance. According to Maggie Redmonds, a community development officer for Metro Social Services who attended several of the meetings, the underlying point of view which was frequently made explicit was that the 'problem' inhaled in Somalis.

Several speakers sought to diffuse the panic about Somalis by addressing certain misconceptions and fears about the community. For example, the myth of widespread Somali welfare fraud was debunked by then commissioner of Metro Social Services Don Richmond and a representative from the department of Public Health sought to tone down fears about tuberculosis in the community. Nonetheless, the very fact that this Task Force was set up and these issues were addressed speaks to the degree to which the 'problem' of Somali refugees had become the focus and object of public and political concern.

In the very attempts to diffuse hostilities by addressing and dispensing with the various 'problems' thought to be posed by Somalis, the forum itself served to legitimize and reproduce the idea that Somalis were a 'problem'. This rather cynical view of the work of the Task Force is unfortunately supported by the fact that Somalis were not an active part of these 'community' meetings in which they were assumed to be a 'problem' and which sought to address the 'problem' (either through deconstructing it or through reproducing it) as well as the fact that the end result of the work of the Task Force was an "...unsubstantive report with no real recommendations despite its apparent pro-Somali

72Interview with Maggie Redmonds, former Community Development Officer, Metro Social Services, April 1999.

73Ibid.,
orientation.” Redmonds describes the entire process as a public relations “smokescreen for not doing anything.”

Arguably, while the Task force did not succeed in producing any semblance of a coherent and proactive plan to address the issues raised, it did effectively reproduce the idea of the ‘problem’ of Somalis, supplemented by and exemplary of the broader ‘problem’ posed by undeserving and undesirable refugees and new immigrants in general.

**iii) Fanning the Flames in the Popular Print Media and the Enforcement Response**

At the same time as the 1993 Federal Immigration ‘intelligence’ reports on Somali fraud and criminality were leaked, a similar allegation had been made in Toronto. As mentioned above, information had been received by the RCMP alleging that Somali employees of an Etobicoke Somali settlement services agency had misappropriated government funds allocated to the agency and that the funds were being sent back to Somalia to support the criminal activities of warlords in Somalia.

Two years later, in 1995, the very same allegations resurfaced in a letter written by a well-known Somali community member. This time, this allegation and others, made it into the popular press. In August, 1995 the widely distributed magazine *Toronto Life* published a seven page article on the ‘problem’ of Somalis and what this problem should

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74 In the year 2000, the same problems persist in one part of Dixon. According to Ali Mohamud, management of 3 of the 6 buildings has changed its security regime. They hired a new private security company whose officers more accurately represent the community, including Pakistani and Somali officers. In this part of Dixon, the problems of conflict and coercion have been largely taken care of. In the other part of Dixon, however, the same security company is in place, there is no minority representation amongst its officers, and conflict and coercion continues to be a serious problem. In December 1999, a complaint was lodged with the Ontario Human Rights Commission by a Somali resident of Dixon regarding the “racial insults, intimidation and the targeting of their children”, of Somali residents by the Property Management company, including security. “Home Hassles” *NOW*, December 9-15, 1999

75 Ali Mohamud, Interview January 13, 2000; Maggie Redmonds, Interview, May 6, 1999
teach Canadians about their too generous, inefficient immigration system. The piece was written by Daniel Stoffman, already well-known in anti-immigration circles. Stoffman argues that the deleterious effects of an open and unselective immigration system must be considered. These effects, in his opinion, justify a more restrictive and selective immigration policy. In the August 1995 Toronto Life article, Stoffman is clearly intent on substantiating his position by providing a concrete example of the problems associated with an open immigration system. Once again, the 'problem' is posed by Somalis.

The impact of this article was significant. In addition to reinforcing and reproducing now familiar negative stereotypes of Somalis and adding to the shadow of suspicion that was already cast over the Somali community, the allegations contained in Stoffman's article triggered another RCMP investigation into the very same allegations that had been made, and disposed of, two years earlier. It also precipitated at least one series of RCMP raids on the homes of suspected Somali 'war criminals' and several subsequent arrests and deportations. While Stoffman's article outraged many, it clearly fanned the anti-immigrant/refugee flames and provided fuel for the enforcement fire already well underway.

a) "Dispatch From Dixon" and the (re)Construction of Somalis

In his article, "Dispatch from Dixon", Stoffman begins by restating what had by then become rather commonplace and inflammatory allegations levelled at the Somali community living in Toronto. In bold type-face, Stoffman states that "many" Somalis "are cheating the welfare system" and that "some are probably war criminals" (my emphasis). These sweepingly general allegations which introduce the article provide the impetus and basis for what follows. Stoffman sets out to explain 'how we created this mess'?

That there is 'this mess' and that it is evidenced by Somali welfare cheating and by the presence of Somali war criminals in Canada is uncritically accepted by Stoffman. Welfare fraud is but one of the allegations pursued by Stoffman in this article. He also

76 Daniel Stoffman, "Dispatch from Dixon" Toronto Life August 1995
attends to the criminality/fraud related allegations of corruption and cronyism amongst government officials in Toronto, of shady clan-based practices of ripping off the welfare system in order to send money back to Somali warlords, and of the presence of Somali war criminals in Canada. Stoffman's article is based in large part on interviews with a handful of sources without any evidence that they are either credible or reliable. Stoffman treats most of the allegations as 'fact'. These 'facts', made up largely of rumour and inflected with innuendo, are then treated as the supporting 'evidence' for Stoffman's own reflections on the more general issues of international migration, Canadian immigration and refugee policy, social welfare policy and administration. 77

Stoffman offers that "...anyone with dark skin who arrives at the border or an airport without documents and claims to be fleeing Somalia is allowed to apply for the status of a Geneva Convention Refugee." In fact individuals fleeing persecution are not 'allowed' to claim refugee status, they have the 'right' to do so under International Conventions and domestic legislation. The colour of their skin is not relevant to this right. Moreover, the fact that many do not have government issued travel documents is hardly surprising given the circumstances of their departure and, particularly in the case of Somalis, given the absence of a functioning civil authority in Somalia.

Further forging the link between Somali refugees and criminality, Stoffman ruminates provocatively about the husband of one of the Somalis whom he interviewed. He asks a series of provocative questions which lead the reader to think of her husband as complicit in the atrocities of the Barre government. He concludes this line of questioning by asking "Isn't this the sort of abuse that has brought our refugee determination system

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Bob Swain, a 'sympathetic outsider', is another source for Stoffman. He is a biologist affiliated with the Canadian Baptist Ministries who worked with Somalis in Kenya and who is now actively involved in assisting in the resettlement of Somalis in Toronto. According to Stoffman, it is Swain who recounts stories of the misuse of public funds and the lack of accountability of public officials. Despite Stoffman's own admission that the tale is constructed out of rumours, they are each mentioned in turn. Significantly, a subsequent issue of Toronto Life carried an angry letter from Swain criticizing the irresponsible and misleading use by Stoffman of his interview. Toronto Life, October 1995
into disrepute?” Stoffman here transforms what is pure speculation on his part into a fabricated allegation of *bona fide* abuse. Even the layout of the article makes its own contribution. It carries bright red enlarged quotations which run across the top and bottom of each page: "The real beneficiaries of the world's most open refugee determination system are the Somali criminals of war"; "Some Somalis think of all governments as the enemy. They call welfare "shab" - meaning something for nothing".

At the close of the article, Stoffman makes reference to the stated wish of one of his Somali sources that the Somali's would “disappear”, assimilate, adapt to the “Canadian way of life”. Canadians are imagined as a homogeneous group, bound by common practices and sensibilities. Somalis are constructed as the problematic dark skinned alien 'other' whose practices and sensibilities are, by in large, criminal.

By 1995 it was beginning to feel like a campaign. Somali welfare cheats and warlords were routinely in the press, racism and coercion had tainted their home life; “[W]hen the Stoffman article hit the press, the Somali community was outraged.” Members of the Somali community organized, held many meetings and strategized on how to respond to the unsubstantiated and discriminatory allegations contained in the article. Representatives of the community went to Metro Council and delivered a ‘protest speech’ to Councillors. Ali Mohamud remembers that this “...was a very difficult time for Somalis in Toronto”, that Stoffman’s article had been “...very, very damaging to the Somali community”; “The article was the starting point for all that followed. It triggered everything. Even some people, some anti-immigrant groups, duplicated and distributed the article, free of charge in front of the University Avenue Immigration offices.”

**b) Enforcing the ‘Problem’**

Shortly after the publication of Stoffman’s article, the RCMP were back on the case again; the very same case based on the very same substantive allegations as in 1993. However, according to Mohamud, they readily conceded that their return was politically

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78Ali Mohamud, Interview January 13, 2000
motivated;

[After one and a half years, they came back. The same RCMP officers as in 1993. They said that they were there because they needed to be able to say that they had talked to the manager of Dejinta Beesha, but that this was because of political pressure and that they knew that there was nothing. So they came, had a coffee, we talked about some other things and that was it. They wrote the same report that there was nothing wrong and that the allegations were false and unsubstantiated.]

After Stoffman’s article, the RCMP also contacted Peter Crosbie of the Family Services Association, one of Dejinta Beesha’s trustees. According to Crosbie, there was no question that Stoffman’s article was a central factor in their renewed interest in the Somali agency’s financial operations. Indeed, they specifically referred to it, as well as to another ‘community-source’ in their explanation for their visit. Crosbie was first contacted by the RCMP by phone in early September 1995, was visited by an RCMP officer in late September and, “just when [he] thought it was all over”, the officer came back to visit Crosbie in November, 1995. According to Crosbie, a member of the Somali community who was the primary source of the ‘community-based’ information attained by the RCMP, had written many letters to politicians and law enforcement authorities restating the allegations. The publication of these allegations in Stoffman’s article in August 1995 tweaked the RCMP into action again. However, just as in 1993, no evidence was ever found of any wrong-doing.

Stoffman’s article claimed legitimacy by giving prominent place to ‘community-derived’ information. It relied extensively on the comments and allegations of a member of the Somali community, indeed many of Stoffman’s arguments and observations are initially raised by one of several Somali voices. Just as ‘community-based’ information had been the primary source of information for Stoffman’s article so it was for the 1993 RCMP investigation, and, so it was for the 1995 RCMP investigation that followed the

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79Ibid.,

80Peter Crosbie, Director, Client Service Division, Family Service Association of Metropolitan Toronto, Interview, January 14, 2000
publication of Stoffman's article. However, it appears that in all three cases, the information derived from the 'community' and upon which enforcement activity was justified, was not only the same substantive information but it was also likely derived from the same community member; one Somali, many allegations, one article, two RCMP investigations, and the criminalization and denigration of an entire community.

These events highlight several important critical issues— the nature and use of community-derived information by authorities, particularly when that information has the potential of provoking an enforcement oriented response; the social construction of 'problems' (in this case 'the fraudulent Somali war criminal'); the political dimension of enforcement responses; and the selective use of community-based information by authorities.

The enforcement fall-out against Somalis living in Toronto did not end there. Corruption and fraud were only two of the allegations given expression in Stoffman's piece. The other particularly damming allegation made about Somalis was that 'many were probably war criminals'. While this was not a new issue, it had been somewhat displaced by the increased attention being paid to the fraudulent character of Somalis. However, allegations of war criminality within the Somali community were indeed acted upon. One holiday weekend in 1995, the RCMP conducted several raids on the homes of Somalis in Etobicoke, who were suspected of being 'senior members of a government which has committed war crimes or crimes against humanity.'

It will be recalled that this provision was included in the enforcement oriented Bill C-86 of 1992. According to Ali Mohamud, several people were arrested, including both former diplomats at Somali embassies and former military officers. It was also known in the community that a former chauffeur of a government official had been arrested, as was

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81 Indeed, the problem had already been the topic of considerable contention and debate having received considerable public attention after CBC's Fifth Estate aired a program on the subject several years prior.

82 Interview with Maggie Redmonds May 6, 1999
a former Minister of Education and an anti-female genital mutilation activist. Some of those arrested were subsequently deported, and some left voluntarily.

As was reviewed briefly in the last Chapter, the 1992 changes to the Immigration Act under Bill C-86 included a new provision to exclude individuals by virtue of the fact that they had occupied a ‘senior’ government position or had a senior government title in a government that had committed war crimes or crimes against humanity (s.19(1)). The provision is given effect by Order in Council which specifies the nations to which this provision will be applied. Somalia has been named and there is certainly no question that the prolonged and brutal dictatorship of Said Barre in Somalia qualifies.

However, the provision casts the exclusionary net widely, in large part as a result of systemic bias. It is the mere fact that a Somali was a ‘senior’ member of the Barre government that renders them inadmissible. It is assumed, through the application of Canadian standards, that the occupation of a ‘senior’ government position or the holding of a ‘senior’ government title necessarily reflects the degree of decision-making power and influence wielded by the person in question; their complicity is legally inferred and need not be proven. Moreover, the guidelines on the definition of ‘senior members’ and ‘senior officials’ are vague and explicitly open-ended.

Even where specified, the provision does not allow for the possibility that those in senior positions may have had no power over government policy at all and therefore no complicity. Moreover, while the provision is written to apply to ‘senior’ members of government, the fact of working for the government in any capacity has often been enough to raise suspicion and trigger an enforcement response. This heightens the impact of this provision on those Somalis who did not end up in refugee camps but managed to flee to Canada. Only Somali refugees with substantial resources could do this. They are

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83 Ibid.,
84 Interview with Ali Mohamud January 13, 2000
85 For the list of positions which inherently qualify as ‘senior’ see discussion of Bill C-86 in Chapter Four
generally well-educated and have considerable work experience. They are also therefore those refugees most likely to have occupied at least one, probably many, government positions under Barre’s 23 year rule. After all, in Somalia the government was the main employer. This provision has effectively criminalized most of the Somali refugees in Canada.

From chauffeurs to activists to military officers, all manner of government workers have been recast as being potentially complicit in the crimes of their employer. This range of positions formerly occupied by the Somalis who were arrested in the 1995 RCMP night-time raids illustrates the systemic bias of this provision in its implementation:

That piece of legislation was and still is unfair to the Somali community in Canada. It is well known that Said Barre ruled the country for 23 years. The government was the main employer, it was a socialist form of government, no private ownership...so, most people, when you finish university, you were placed in one of the government departments. You go from there, you work here, you work there, you become the head of the section. And since the salaries were so low, people were given some titles in order to get some extra benefit. So, to become a director was nothing. People compare it to being a director or a manager in Canada, but you can’t compare it. The practice was: you are a Minister and probably you don’t have any power. Or you could have been a secretary and you could have had lots and lots of power. It all depended on you relationship with government, with the ruling elite.

When people came here as refugees they told [the authorities] I was the director of that department, I was the member of the government, I did these jobs. And that was held against them. People said if you were in a decision-making position you are a war criminal. Not necessarily that you have committed any crimes against humanity, but the mere fact that you held that position excludes you; makes you a member of an inadmissible group. 86

After the Stoffman enhanced panic died down, so did RCMP enforcement activity in the Somali community. As observed by Mohamud, “...since that sweep and the

86 Ali Mohamud, Interview January 13, 2000
subsequent deportations, the RCMP and political interest has died down and we haven’t seen a lot of other deportations under that legislation”. Presumably this does not reflect a change in the seriousness with which the problem of war criminals is treated by enforcement authorities, nor does it indicate any change in the size of the problem or the success of enforcement efforts. It does, however, illustrate how, in an already hostile social and political context, the ‘problem’ of Somali war criminals was constructed and mobilized, in part by and through the popular media. And how the existence of this ‘problem’ triggered an enforcement oriented coercive response against a particular group of new immigrants and refugees.

iv) Proof of Identity: Prudence or Prejudice

In 1992, Bill C-86 effectively assured that the vast majority of Somali refugees in Canada would not be able to become permanent residents. The Immigration Act now requires that refugees (those determined to be ‘genuine’ by the Immigration and Refugee Board) provide ‘satisfactory’ (government-issued) identity documents in order to be granted landed status (permanent residency). The legislation also sanctioned the detention of refugee claimants without official papers. Two large groups of refugees already in Canada bore the brunt of the former requirement, Somalis and Afghans. Although as noted by Ali Mohamud, grouping Afghans and Somalis together has the effect of disguising the legislation’s particular impact on Somalis. Mohamud points out that the Somali community in Canada is much larger than the Afghani community and moreover “...sometimes Afghans can get documents. There is a government there. It’s easier.” In contrast, there is no functioning government in Somalia; “...there is no civil authority. Everybody knows that there is no government in Somalia. There is a civil war. You can’t get any documents. You can’t get a passport, you can’t get anything.”

The denial of permanent residency status is indeed a severe blow to those already

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87Ibid.,

88Ibid.,
displaced and disempowered. Without it, refugees who have been found to be 'genuine' cannot travel outside Canada, sponsor relatives or attend university. They are ineligible for many jobs and training programs and cannot obtain a bank loan. The inability to sponsor family members is a particularly painful consequence for many Somalis who had to leave behind close family members when they fled their country. As put by the Canadian Council for Refugees, "Lack of identity documents for these refugees means that they cannot get on with their lives. It means they cannot heal. It means the persecutors have in a way 'won'. "

The anger felt by Somalis left in legal limbo by this legislation was further heightened by the fact that just as Bill C-86 took effect, the federal government had taken measures to facilitate the acceptance of 26,000 refugees from the former Yugoslavia. Critics, while supportive of helping these refugees, were quick to point out that no such measures had been initiated to help Somali refugees and that furthermore, the newly adopted safe third country provision would have precisely the opposite effect. As put by one refugee lawyer during the Legislative Committee hearings on Bill C-86, while advocates supported the move to help refugees from the former Yugoslavia, 

...we do not understand why it is in the Horn of Africa in situations like this, where frankly, many, many more people are being killed, many more

89 Canadian Council for Refugees "Kosovar Refugees - Losing ID" Jetty Chakkalakal, April 14 1999, mimeo

90 Ibid.

91 The Refugee Lawyers Association strongly condemned the Safe Third Country provisions on the ground that "...this provision discriminated against black, brown and yellow people, against people from the developing world. The bottom line is that most people who can get to Canada on connecting flights are people who are coming from European countries. If you come from Asia or from Africa or from South America or Central America, you simply cannot do that...We’re very concerned for many reasons...when you look at the statistics of the IRB, you’ll see that since 1989 the majority of people who have received protection have been from developing countries, mainly from Somalia and Sri Lanka....This bill is being considered precisely at a time when the situation for these people is most desperate." (Quoted in Jakubowski 1997:86-87)
civilians, the possibility of some sort of solution is, quite frankly, impossible, completely remote. We do not understand why people in those situations are not being helped.  

Mohamud observed simply, "...if we had been from the former Yugoslavia, we would have been landed a long time ago."  

The official response to criticisms of the unequal treatment of different groups of refugees by the government served to further malign and anger Somalis. Bernard Valcourt, then Minister of Immigration, explained that the Somalis situation was less compelling owing to the fact that they were ‘nomads’ who didn’t want to come to Canada anyway. This remark sparked a protest at Queen’s Park in Toronto by Somalis angry at this dismissive and offensive official response to their very desperate circumstances.  

Ostensibly, the difficult and differential impact of this requirement on Somali refugees was officially acknowledged in 1997, when the government announced measures to deal with undocumented refugees. The Minister stated that many refugees from Somalia and Afghanistan “have been unable to obtain proper documentation due to sustained civil war and lack of an effective government authority to issue identity documents.” In response to this situation the government introduced new regulations which would allow Convention refugees, from specified countries, to become permanent residents five years after a positive refugee board decision.  

Many then argued that the waiting period was unfair, given that many of the refugees had already waited up to three years to have their claim heard, the government was, in the end, not persuaded. The persuasiveness of the humanitarian argument was  

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92 Quoted in Jakubowski 1997:86

92 Ali Mohamud, Interview January 13, 2000

94 Toronto Star, August 16, 1992

eclipsed by law and order concerns and by corollary notions of deservedness. The Minister's justification for imposing the five year waiting period is quoted here at length:

I have carefully reviewed all the comments received during the pre-publication period. I understand and share the humanitarian concerns expressed by certain organizations, which argued that we should find a more generous solution to the difficult situation that Somali and Afghan refugees are experiencing in Canada. I certainly would respond differently if my only concern was the specific circumstances of the affected communities. As the Minister responsible for immigration to Canada, I must ensure that every effort is made to discern the background and character of applicants for permanent residence. At the same time, the asylum system must not be abused by those who may choose to conceal their identity as Canada continues to be generous to those who really deserve protection.\textsuperscript{96}

The Minister a year later made the same point even more explicitly. "Because they have no ID, we will not grant these people permanent resident status until they have had time to demonstrate respect for the laws of Canada and for us to detect those who may be guilty of crimes against humanity or acts of terrorism...The message is clear -- fraud will not be tolerated."\textsuperscript{97}

As mentioned earlier, the method of 'detection' employed by authorities relies in a central way upon the gathering community-based information. As explained by Brian Grant, Acting Director General of the Department of Citizenship and Immigration in 1998, this is an important dimension of Immigration enforcement practices particularly when identity is an issue;

...we have tried to build flexibility into the system, precisely because you often don't know who they are. They don't have a document. They've come from outside North America so you don't have linkages. The police system may not be reputable in the country they've come from. They will

\textsuperscript{96}"Lucienne Robillard Announces the Introduction of the Undocumented Convention Refugees in Canada Class" News Release, Ottawa: January, 1995

\textsuperscript{97}"Minister Robillard Announces Measures for Refugees Lacking ID to Become Permanent Residents" News Release, November 13, 1996
gravitate towards their community and often that happens is that people in the community might recognize them and come forward. You’ll often get tip-offs like oh, so-and-so, we know him and he was involved in this. That will often give us the lead we need to follow up on security threats or perhaps criminality. 98

In response to this statement made in 1998, another member of the Standing Committee pointed out that this method of gathering information “creates its own problems too, particularly in the Somali community where one group doesn’t like the other group” to which Grant responded “yes, you have to sort through all that.” 99

While community-based information is treated seriously enough by authorities in the context of exclusionary enforcement activities, to the degree that it may justify extreme, state sanctioned coercive responses, it appears that when community-based information is offered as a way of confirming identity for the purpose of inclusion, authorities are less willing to act on it. In 1996, prior to the announcement of the 5 year waiting period, representatives of the Somali community announced a legal challenge of the identity document requirement on the grounds that it discriminates against their community. Representatives of the Somali community suggested that in the absence of documents, and given the relative impossibility of acquiring them, that the community’s “elders and clergy would verify the authenticity of the claims.” They stressed that they share “...the federal government’s concern that sworn affidavits could be abused to allow criminals and imposters enter the country” and that clearly Somalis “...have no desire to live alongside law-breakers.” As evidence of their status of good ‘deserving’ citizens and of their credibility, they observed that “..the community has already identified 6 members of the former Said Barre regime to the RCMP and CSIS.” 100

The difficulty of having inclusionary identity related community-based

98 Brian Grant, Standing Committee Minutes, Thursday February 19, 1998:10-11

99 Ibid., p.11

100 Globe and Mail “Refugees to Challenge Immigration Act, Somali Group Alleges Discrimination” February, 6, 1996
information acted upon by authorities stands in stark contrast to the willingness of authorities to act upon similarly identity-related community-based information when that information is negative and exclusionary. It also highlights the different uses of dominant discourses. Criminality and fraud discourses produce both the undeserving and the deserving new immigrant and refugee. In the contemporary discursive climate, new immigrants and refugees frequently seek to (re)present themselves as law-abiding, and otherwise deserving; arguably this is one of the reasons that enforcement oriented efforts have been effective in soliciting ‘tips’ from the community.

In this instance, fraud and criminality concerns converged and were mobilized in direct opposition to humanitarian ones in the official justification for the five year waiting period. Moreover, resort to criminality/danger and security discourses legitimized the use of various coercive and invasive means to ‘contain the threat’. So, for example, in addition to the rather punitive consequences facing Somalis without identity documents who must wait years for family reunification, they are often “...forced to undergo expensive, time consuming and invasive DNA testing to prove their family ties.”

viii) The Criminalization of Khat

There is little question that the impact of the convergence of fraud and criminality discourses over the enforcement oriented decade of the 1990s was felt particularly sharply by Somalis in Canada. They have been the subject of sustained identity ‘reconstruction’ since they arrived in Canada as refugees. This reconstruction from that of legally-confirmed) genuine victims of persecution deserving of protection to that of (socially,

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101 Canadian Council for Refugees, “CCR Calls on Canadians to Respond Warmly to Refugees” May 6, 1999. According to Ali Mohamud of Dejiinta Beesha, (interview, January 13, 2000) the announcement in 1999 made by the new Minister of Immigration, Eleanor Caplan, that the 5 year waiting period was to be reduced to 3 years in recognition of the difficulties it poses for so many refugees from Somalia and Afghanistan has not been translated into practice. Indeed, he reported that in January 2000, nobody from the Somali community had yet been landed under the 3 year rule. In fact, Immigration officials had reported to members of the Somali community in January that they had received no official directive regarding the new policy.
politically and publicly constituted) undeserving fraudulent criminals, entailed concrete and coercive consequences for Somalis.

There is one final entry in this (re)constitutional tale. The fact that many Somali refugees in Canada are living in legal limbo with no affirmed or protected citizenship status makes them particularly vulnerable to deportation for reasons of criminality. This fact, coupled with the fact that Somalis have been increasingly criminalized in Canada over the 1990s, means that the spectre of deportation looms particularly large for the community.

This reality was further entrenched in 1997 when the Canadian government criminalized the plant Khat under the new *Controlled Drug and Substances Act* (CDSA).\(^{102}\) The CDSA was an enforcement oriented and prohibitionist piece of legislation.\(^{103}\) It consolidated Canadian drug policy in accordance with international obligations. It repealed the *Narcotic Control Act*, and Parts 3 and 4 of the *Food and Drugs Act*.\(^{104}\) The chemical properties that justify the inclusion of Khat under Schedules 3 and 4 of the CDSA is that it contains cathinone, a ‘psychoactive ingredient’ and sometimes d-amphetamine.\(^{105}\) However, illegal drugs, like illegal activities, are not simply objective unchanging facts; they do not exist in nature.

Khat is a plant with stimulant properties that is grown in East Africa and the Arabian peninsula and which is known to be popular with some members of the Somali community. Chewing Khat has long occupied a central place in the cultural tradition of male Somalis (a fact, which was duly noted in Stoffman’s 1995 article). As explained by

\(^{102}\) *The Controlled Drug and Substances Act*, Ch.19, Canadian Statutes of Canada, 1996

\(^{103}\) Diane Riley “Drugs and Drug Policy in Canada: A Brief Review and Commentary” Canadian Foundation for Drug Policy, November 1998

\(^{104}\) Diane Riley, “Drugs and Drug Policy in Canada”, (A study prepared for Senator Pierre Claude Nolin as a background document for his June 1999 motion to have Canada’s Senate conduct a thorough review of Canadian drug law and policy), Canadian Foundation for Drug Policy, 1999

\(^{105}\) Ibid.,
Farah Khayre; “Khat in the Somali culture has traditionally been used socially. much like coffee in the western culture. It has no criminality associated with it...”.106 While Ali Mohamud concedes that it may be the cause of some “family conflict” due to its gendered consumption, he notes that the degree of conflict associated with Khat does not compare with that of alcohol, for example: “...if you eat some, you might want to eat some more...but it doesn’t make you want to kill or fight; it’s a harmless pastime.”107

The United States criminalized Khat not long before Canada did. The American inclusion of Khat as a Schedule 1 narcotic (the most restricted category), alongside heroin and cocaine, derives from the exposure to the plant which US marines had when they were posted in Somalia as a peace keeping force in the early 1990s and which was subsequently brought to the attention of the drug enforcement authorities.108 The United States subsequently placed Khat on its list of prescribed substances and urged other governments to do the same.109

Canada followed the American lead. Prior to 1997, the use of Khat was legal in Canada while bringing it into the country was not. It was regulated as an ‘alien plant’ by the Canadian Food and Drug Inspection Agency and could be seized by Canada Customs at the border. However, Khat had become the focus of official attention before 1997. In the midst of the panic surrounding Somali refugees in Canada, Canada Customs had stepped up their enforcement of Khat related import violations.110

The CDSA creates six major offences, possession, trafficking, cultivation, import.

107Ali Mohamud, Interview, January 13, 2000
export and prescription shopping. Since 1997, the possession of Khat is a hybrid offence, that is it may be processed summarily or by indictment. For example, if possession is dealt with as a summary offence, the punishment is up to 6 months in prison and a $1,000 fine for the first offence, 12 months in prison and a 2,000 fine for subsequent offences. If it is proceeded with by way of indictment, the maximum punishment is 7 years in prison.111

The consequences of a conviction for possession of Khat for an individual who does not have permanent residency status in Canada are extremely serious. Under s.4(2.1) of the Act, a person found to be a Convention refugee loses their “right to remain in Canada” if they have been convicted of an offence under any Act of Parliament for which a term of imprisonment of: a) more than 6 months has been imposed; or b) five years or more may be imposed. For the majority of Somalis in Canada, therefore, a conviction for the possession of Khat has the real potential to trigger deportation; because of the administratively imposed delays on their access to Canadian permanent residency. they have no secure status to protect them from removal.

Another significant dimension of the CDSA is its strongly ‘prohibitionist’ orientation and resultant emphasis on empowering enforcement activity. The CDSA sanctioned increased enforcement powers for those engaged in the ‘war against drugs.’ Among other provisions, the Act extended the powers of search and seizure. In the 1995 Legal and Constitutional Affairs Standing Committee Hearings on the Bill which created the CDSA (Bill C-8), Robert Kellerman, a member of the Law Union of Ontario, forcefully criticized the enforcement orientation of the Bill from a legal, rights-based perspective. Kellerman argued that the enforcement of drug laws has resulted in the court sanctioned “erosion of many of our civil liberties,” despite the protection of privacy rights afforded by the Charter. He noted that “an overwhelming number of searches

111 Diane Riley, “Drugs and Drug Policy in Canada”1999
take place under our drug laws."\(^{112}\)

The clauses dealing with seizure or forfeiture of property under the Act are broad. As observed by Kellerman: "...This clause has the danger [that]...property could be taken away from people who are totally innocent." He explained that: "The idea is that the property of drug dealers can be seized. Yet it is so broadly defined that it includes even the seizing of property for the simple offence of possession of marijuana."\(^{113}\)

Since Somalis make up the vast majority of Khat consumers in Canada, the consequences of criminalization were for the most part limited to them. And the consequences were severe; involving the mobilization and application of both criminal justice and immigration enforcement systems and sanctions. Soon after the criminalization of Khat, in the spring of 1998, York region police carried out numerous raids on Somali residences at Dixon on the grounds of suspected Khat related offences. Armed with the increased powers of search and seizure described above, officers did both. They confiscated substantial amounts of gold and jewellery without providing receipts and according to reports they also damaged other items of Somalis' property in the course of carrying out the raids;

Police from York region came to Dixon Road, invaded people's homes. confiscated jewellery and money without explaining anything, in the name of drugs, in the name of Khat. Khat is a tradition that Somalis chew and they made it one of the controlled substances. They know that Somalis chew Khat. And you cannot equate Khat with other narcotics. So it was one way of criminalizing Somalis.\(^{114}\)

According to members of the Somali community, the police engaged in unprofessional and downright nasty conduct during these raids:" [T]hey wore trench coats and they had their pistols and they would come into our homes and destroy everything;

\(^{112}\) Robert Kellerman, Law Union of Ontario, Submission to Standing Committee on Legal and Constitutional Affairs", transcripts, December 13, 1995

\(^{113}\) Ibid.

\(^{114}\) Ali Mohamud, Interview, January 13, 2000
break personal property and destroy computers, break everything...”

What is both particularly troubling and revealing is there had been no prior effort to communicate the changes in the law and in enforcement priorities to the Somali community. In a background paper prepared for Senator Pierre Claude Nolin’s June 1999 motion to have Canada’s Senate conduct a thorough review of Canadian drug law and policy, Diane Riley of the Canadian Foundation for Drug Policy made specific mention of this rather shocking fact. Riley observes that the inclusion of new drug offences under the CDSA ensures “...that more Canadians than ever...would be burdened with a criminal record for simple possession (this is already occurring with respect to Khat, especially among the Somali community who were not even informed of the criminalization of activities related to a previously legal substance...” (my emphasis). According to Farah Khayre of Midyanta,

The law was passed quietly, not even fully debated in Parliament, no community information was sought, and [there was] no outreach to the community for information about this law. We just started getting calls from people who had been arrested or their homes had been broken into.116

Kellerman’s dire predictions about the abuses associated with the strict enforcement of drug laws were indeed accurate. According to reports, homes were searched and property seized of Somalis who had never even used Khat, let alone sold it.117

Outraged once again, the Somali community organized a large community meeting to decide how to respond to the criminalization of Khat and the severe enforcement response that had been executed in the Somali community; “[M]embers of the Somali community are in shock over a sudden police crackdown against the substance Khat, with attendant civil rights abuses, and are seeking to have police searches of their

115Ibid.,

116Farah Khayre, Midaynta, Association of Somali Service Agencies, interview quoted in "Khat: What the Hell’s That"

117Ali Mohamud, Interview, January 13, 2000
homes reigned in, and the legislation that banned the substance last year repealed."\textsuperscript{118}

The number of people convicted under the CDSA for Khat related offences is in the hundreds, and the number of arrests much higher. For Somalis living in limbo in Canada, a conviction for Khat means "...that's the end of it, you are gone..."; "Hundreds and hundreds of Somalis have been wrongfully convicted of drug charges and other minor things and they were refused to be landed for the reason of criminality."\textsuperscript{119} Indeed, even in the absence of actual criminal convictions, the prohibition of Khat has served to further criminalize Somali refugees in the public eye. And unquestionably it has contributed in a powerful and blatant way to both the entrenchment and reproduction of the undeservedness of Somalis and the coercive crime control response which that undeservedness elicits today.

These consequences had been anticipated; the government had been warned. During the course of the \textit{Standing Committee on Legal and Constitutional Affairs} hearings on Bill C-8 (CDSA), the consequences of criminalizing Khat were raised as a particular concern. Perry Kendall, President and CEO of the Addiction Research Foundation (ARF), warned strenuously of the dangers of criminalizing drugs and intensifying enforcement. From a public health harm reduction perspective, Kendall observed that criminalization and tough enforcement has been associated with the magnification of the potential health harms posed by certain substances, and that this was a pattern that the criminalization of Khat could provoke;

Aggressive enforcement has been associated with public health harms, including the phenomenon of illicit substances becoming purer, more potent and cheaper in recent years. Some suggest that the prohibitionist policies south of the border have increased the size of illicit markets, the potency of drugs and the profit from the trade.

We are concerned that, in a tiny way, the same pattern could happen to Khat, a drug which in plant form is popular in East Africa and the Arabian peninsula and is used by a considerable percentage of some immigrant

\textsuperscript{118}"Khat: What the Hell's That"

\textsuperscript{119}Ali Mohamud, Interview, January 13, 2000
groups in Canada.

Criminalizing this drug as this bill would - and the drug is currently only available in the form of a vegetable - could have the unintentional consequence of encouraging sellers and markets to refine it into a more potent power whose effects would be potentially more severe than the current use of the vegetable.\(^\text{120}\)

Arguably, this 'public harm' argument against criminalization held out the most promise to be persuasive in the enforcement oriented, prohibitionist context of the bill. However, Kendall also raised concerns relating to the discriminatory and inequitable enforcement of drug laws in general and of the criminalization of Khat in particular: "We are concerned that prohibiting Khat would create a new form of a dangerous drug and criminalize a whole community in this country.\(^\text{121}\)

The warnings were not heeded. The concerns raised regarding the consequences of the criminalization of Khat were well-founded. It did criminalize an entire community, it did facilitate the inequitable application of drug laws, it did facilitate abuses of the civil rights of Somalis, and it did bring in tow extremely severe and coercive consequences for Somalis, including, police raids, searches, seizures, arrests and removals. It also had wider implications, as observed by Eugene Oscapella of the Ontario Bar Association:

The war on drugs allows us to dress our racism and xenophobia in less obvious trappings. In North America, our early drug laws were to a significant degree premised on the vilification of immigrants and people whose skin colour or ethnic culture did not make the grade... This [still happens]. In Canada for example, in 1996, criminalized a stimulant called 'Khat.' Khat is a substance used by some people of African origin. It is not used by white Canadians of European descent to any appreciable extent, if at all... Why prohibit these recent immigrants to Canada, these people of another culture, another skin colour and another continent - from using a

\(^{120}\)Dr. Perry Kendall, President and CEO of the Addiction Research Foundation. submission to the Standing Committee on Legal and Constitutional Affairs hearings on Bill C-8 (CDSA), evidence, Dec.13, 1995

\(^{121}\)Ibid., emphasis added.
substance that has long been part of their lives.122

viii) Conclusion

Genuine refugees who are found to be ‘truly deserving’ are still for the most part rhetorically and legally welcomed by Canada. However the presumption has taken hold in the 1990s that most refugee claimants are not genuine victims, but rather are fraudulent unscrupulous and dangerous opportunists and criminals. Whereas the undesirable and undeserving ‘other’ of the past were variously excluded through the mobilization of moralistic and racist discourses of national purity or through the political justification of national security defined more narrowly as a political threat, the contemporary construction of the undesirable and undeserving other is excluded through the mobilization of a more expanded version of national security which now encompasses not only the traditional ‘political’ threats posed by subversion and espionage and national terrorism but also international terrorism, organized crime and serious criminals who pose a threat to public safety.

Relatedly, as has been argued here, immigration exclusions in the 1990s have been increasingly governed by fraud and criminality/danger discourses, a development which has also taken place in the context of domestic social welfare provision. Moreover, as this chapter has demonstrated these developments are not merely abstract shifts but entail concrete and coercive consequences those subject to their operations. These dimensions are not readily apparent in official law and policy. They become more apparent when certain groups become the focus of national and local political and public panics.123


123 Certainly other groups have been variously constructed and acted upon at different times, and in different locations, including: Eastern European ‘gypsies’, Chinese triads, Jamaican drug dealers, Middle-Eastern terrorists, Nigerian frauds, Eastern European strippers.
Chapter Six

Discretion, ‘Danger to the Public’ and ‘Just Desserts’:  
The Legal Exclusion of Permanent Residents in the 1990s

I) Introduction

Chapter 5 mapped the emergence, mobilization and conflation of criminality/danger and fraud discourses in the governance of Canadian exclusionary immigration law and policy in the late 1980s and early 1990s. These developments were then examined in terms of their impact on the construction and regulation of the Somali community. In this period, criminality, as an exclusionary definitional category, was steadily redefined and expanded as representing a threat to 'national security'. Parallel to this, over the decade of the 1990s, the dominant understanding of national security has been extended and modified to encompass various forms of criminality. Evidence of this discursive development is provided by the expansion in the 1990s of the official mandate of the Canadian Security Intelligence Service (CSIS). CSIS' concerns over 'threats to national security' had previously focused on threats posed by terrorism ("...the planning or use of politically-motivated serious violence") and espionage. ("...undeclared foreign intelligence activity in Canada and detrimental to the interests of Canada"). In the 1990s, organized 'transnational' criminality was incorporated into the CSIS mandate. This was no small development.

Criminality has always been, to varying degrees, an effective and adaptable supplementary definitional category for the construction and exclusion of 'undesirable' immigrants and refugees. In the 1990s it has emerged as the dominant discursive rationale for exclusionary immigration policy operating in and indeed fortified by the definitional shadow of the spectre of 'security'.

This chapter focuses upon the legal construction and regulation of the problem of the 'criminal immigrant' and the nature and use of ministerial discretionary power in this

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1The Canadian Security Intelligence Service Website, 'The CSIS Mandate'
regulation. It begins with a discussion of discretion and immigration exclusions, followed by a more detailed discussion of the legal construction and regulation of the 'criminal immigrant' through a tough and major piece of legislation, Bill C-44 in 1995.² The social and political context, the legal content and the implications of this reform are examined in some detail with particular attention being paid to the place and use of discretionary power preserved by and through the Bill. The specific question of discretion is front and centre in this legal reform which sanctioned the deportation without appeal of even permanent residents who are deemed by the Minister to represent a 'danger to the public'. It will be argued here that this radical extension of Ministerial discretion to exclude 'serious' criminals deemed likely to pose a 'danger to the public' under Bill C-44 in 1995 can be read as the political and legal manifestation of the powerful shift in the governance of exclusionary Canadian immigration law and policy; a shift which has redefined, expanded and merged 'criminality' and 'security' concerns and which has brought both to the fore of exclusionary Canadian immigration policy.

II) Discretionary Power and Exclusion

As emphasized in Chapter Two, the context of discretionary power must be taken seriously. Within Canadian immigration law and policy, discretionary power has always has been preserved and employed in the historically-specific work of identifying and excluding undesirable non-citizens and producing and reproducing the desirable Canadian citizen. As such, discretion is better regarded as a productive activity rather than a residual and latent 'space'; discretion picks and chooses, assesses and evaluates, judges and weighs, denies and grants, bestows and withdraws, includes and excludes, produces and negates; in short, it governs. Discretionary power affirms and enforces historically specific constructions of desirability.

²An Act to Amend the Immigration Act and the Citizenship Act and to make a consequential amendment to the Customs Act, S.C.1995, c.15 [hereafter Bill C-44]. Royal Assent received 15 June 1995; came into force 10 July 1995.
Discretion is clearly a central mechanism in the normative and fundamentally moral project of constituting ‘desirability’ and negating ‘undesirability’. Yet under a liberal regime of governance discretion is officially constructed and regulated as disinterested, objective and professional evaluation and calculation. If it is employed unjustly or unfairly this is attributed to inadequate legal or legalistic regulation leading to ‘arbitrariness’ and the undermining of procedural fairness and objectivity. Chapter 3 demonstrated that in the context of immigration exclusions, discretionary power has historically always been employed in a particular kind of exclusionary ‘national service’. Facilitated and inflected by and through the operation of dominant discourses, discretionary power is a central technology in the production and enforcement of historically specific conceptions of the desirable and undesirable, the deserving and undeserving. It is as well a central mechanism which both facilitates and justifies the application of coercive ‘sovereign’ state power against ‘undesirable’ non-citizens.

Exclusionary discretionary power thus facilitates the enforcement of different, historically specific discursive constructions of desirability and undesirability. In the present day these are framed primarily through criminality and danger discourses. This view of discretion stands in contrast to the conventional welfarist liberal view of discretion as a compassionate provision for the exercise of mercy. It challenges the liberal legal view of discretion as the unruly corollary of law which facilitates the attainment of individual justice as long as it is adequately regulated to protect against ‘arbitrariness’ and tyranny.

While it is true that exclusionary discretionary powers are and have always been to varying degrees inflected by racist discourses and have often been applied in racist and otherwise discriminatory ways, the analytical approach followed here resists the analytical temptation to explain either discretion (or social constructions of ‘undesirability’) by reference to any single, universal axis of oppression or to any single governmental

\[3\text{Dessert’ discourses are predominant in the context of inclusionary, humanitarian regimes of immigration decision-making. Discourses related to exclusions revolve around dominant notions of (un)desirability.}\]
preoccupation. While not disputing the central influence that racist discourses have had in the development and application of exclusionary Canadian immigration law and policy, it is important to preserve analytical space for the consideration of the myriad of different and often conflicting discourses which inflect discretionary power in this field. Dominant constructions of criminality which underpin and justify contemporary allocations and uses of discretionary power in the exclusion of undesirables are not in any simple or straightforward way necessarily or exclusively reducible to race.

III) Exclusion, Discretionary Power and Bill C-44: A Detailed Interrogation

In July 1995, Bill C-44 became law in Canada. Among other changes, it amended the deportation appeal provisions of the Act in the form of s.70(5) and in so doing this reform represents the most radical extension of wide-ranging Ministerial discretionary power to exclude since the 1952 Act. In this present case, Ministerial discretion is specifically aimed at 'criminals', in particular those who are deemed likely to represent a 'danger to the public'. This amendment provides a powerful example of the contemporary dominance of criminality and danger discourses in immigration exclusions and of the way in which discretionary power works to facilitate the translation of dominant social concerns into concrete and coercive exclusionary immigration law and policy. It also represents a clear example of the ways in which systemic forms of discrimination in the context of criminal justice enforcement intersect with and influence exclusionary immigration law and policy.

This amendment has elicited much controversy. The new provision, s.70(5), permits the deportation without appeal of landed immigrants (permanent residents) deemed by the Minister to represent a 'danger to the public' regardless of how long they have resided in Canada. It provides for the deportation of people who may have lived in Canada for many years but who, for one reason or another, did not acquire Canadian citizenship. Also contentious and analytically significant is the possibility preserved by the amendment of the forced removal even of refugees.
This chapter begins with in a brief discussion of the contemporary context, content and debates surrounding s.70(5) as contained in Bill C-44. It then examines the different ways in which scholars have sought to make sense of this recent legislative development.

i) The ‘Just Desserts’ Bill: Context

In April, 1994 Georgina Leimonis, a 22 year old white woman was shot and killed by three black men in ‘Just Desserts’, a small cafe in an affluent neighbourhood in downtown Toronto. In July of the same year, Police Constable Todd Baylis (also white) was shot and killed by black, Jamaican-born Clinton Gayle. The massive and sensationalist media coverage of these two events tended to gloss over the facts that: a) only one of the black men, Oneil Grant, involved in the Just Desserts killing was in fact Jamaican born, the other two men involved were Trinidadian and Canadian; and b) both Grant and Gayle had come to Canada as children.4

These murders, coupled with already heightened tensions between the black community and the police, triggered a massive public panic around the issues of race, crime and immigration, a panic which the government seized upon and responded to swiftly, decisively and on several different fronts. In brief, Bill C-44 was first tabled on June 15, 1994 and was passed into law in July, 1995. The ‘danger to the public’ provision( s.70(5)) was not the only reform contained in Bill C-44; it was one of several which aimed to streamline enforcement through, for example, the expansion of the circumstances under which deportation orders are issued, the extension of powers of arrest and seizure of documents and increased powers to deal with multiple or fraudulent refugee claims.5

4Julian Falconer and Carmen Ellis “Colour Profiling: The Ultimate Just Desserts” (Draft) 1998:16

5 Department of Citizenship and Immigration CIC Update, Ottawa, No.8, April 1997:1-2; see also Canadian Bar Association, National Immigration Law Section, Submission on Bill C-44, November 1994:1-2
On July 7, 1994, Sergio Marchi, Minister of Citizenship and Immigration, announced the reorientation of Canada's removal policies; a reorientation termed the 'criminals first' detention and deportation priority. Soon after, the Minister of Immigration and Citizenship also announced the creation of the Joint Immigration RCMP Taskforce to assist, among other responsibilities, in the tracking down and arrest of non-citizens with criminal records and who are wanted for removal. Also in 1994, the Department of Citizenship and Immigration announced the creation of an Organized Crime Section. Certainly, the expansion of the mandate of CSIS to encompass certain varieties of 'organized' criminality also in the mid-1990s is of central analytical importance as well. These developments will be discussed in more detail in Chapter 7. For now, the important point is that Bill C-44 was the first of a flurry of government initiatives following the 'Just Desserts' murder that aimed to 'get tough' on criminal immigrants - hence its informal reference: the 'Just Desserts Bill'.

The current linkage between immigration and criminality evidenced by Bill C-44 must be understood in its historical context; a context that long predates 'Just Desserts'. Todd Baylis and Bill C-44. As argued in this thesis, the historical development of Canadian immigration law and policy consistently reveals a central and guiding preoccupation with the exclusion of undesirables and moreover, that broad tracts of discretionary power have always been preserved in order to facilitate the exclusion and/or expulsion of those deemed undesirable. It is also the case, as described in Chapter Three, that the seeds of the contemporary governing rationale of protecting the security of the state and the public from criminals were sown long before 1995.

Moreover, the force of the current political preoccupation with getting tough on 'criminal immigrants' reflects a more general contemporary concern with crime and criminality evident in most areas of public policy. The current social and political climate

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6More recently as the trial of the accused has slowly and painfully moved through the criminal justice system, slowed by allegations of racism and illegalities by the defence, the case has been referred to as the 'justice deserted' case. "Just Deserts Case a Mess, Judge Reveals" The Globe and Mail, Nov.11, 1998
is in large part fuelled by populist concerns about criminality, danger and victims resulting in the adoption of increasingly punitive measures in a wide range of governmental spheres.

In the 1990s, 'get tough' politics have become everyday politics as crime and justice receive unprecedented levels of media coverage. Popular calls for draconian measures against criminals fuel a climate of punitiveness that politicians find irresistible for fear of appearing soft on crime.  

Immigration law and policy has not been immune to this. Indeed, as documented in Chapters 4 and 5, the conceptual slippage between criminals and immigrants is more pronounced today than it has ever been. 'Criminal immigrants' have become Canada's public enemy number one. Exclusionary Canadian immigration law and policy has become an instrument of crime control engaged in the work of minimizing the risk of the victimization of 'the state', 'the nation' and 'the public'. The association between criminality and immigration exclusions is not, in and of itself, a new development. However, the emergence of criminality and danger discourses as the guiding rationale in the governance of exclusionary immigration law, policy and practices is indeed historically unprecedented.

Understood in this wider context, Bill C-44, while extreme and troubling, is not surprising. And Bill C-44 has indeed troubled a lot of people. Criticism has been largely focussed on the radical extension of Ministerial discretion sanctioned by s.70(5), namely the Minister’s power to exclude permanent residents on ‘criminal’ grounds, without appeal, regardless of how long they have resided in Canada. As put by lawyer David Matas, “...if somebody came here at the age of 5...they didn’t come here as a criminal. They came here as a child.”

7Carolyn Strange, Qualities of Mercy 1996:14

8Allan Thompson, “Falling Through the Cracks”, The Gazette, July 2, 1994
ii) Legislative Content of Bill C-44

This then, was the context of the presentation of Bill-C-44 to the House in June 1994 by then Immigration Minister Sergio Marchi. As mentioned, the effect of s.70(5) is to remove the right of a permanent resident to appeal a deportation order to the Immigration Appeal Division (IAD) under s.70 in cases where the individual in question a) has been convicted of a crime for which the maximum available penalty is ten years or more and b) has been deemed by the Minister or her delegate to represent a “danger to the public”. There are now two categories of non-citizen ‘criminals’ who are excluded from the normal deportation appeals process: those deemed a ‘security’ threat to the nation and those deemed a ‘danger to the public’.² The former deals with what are conventionally understood as ‘political’ crimes and the latter with so-called ‘true crimes’ - although the distinction between the two has been increasingly blurred. The text of the provision relating to the latter category reads as follows:

No appeal may be made to the Appeal Division by a person described in subsection (1) or paragraph 2(a) or (b) against whom a deportation order or conditional deportation order is made where the Minister is of the opinion that the person constitutes a danger to the public in Canada and the person has been determined by an adjudicator to be c) a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed.¹⁰ (emphasis added)

iii) Administrative Guidelines, Appeals and the Question of Discretion

The Department of Citizenship and Immigration issued very sparse guidelines to assist in the forming of a ‘danger opinion’ by the Minister’s delegates. These guidelines echo those which guide adjudicators in carrying out their regular 30 day review of

²However, as will be discussed, those deemed to be ‘security threats’ are afforded significantly more legal protections than those deemed to constitute a ‘danger to the public’. The substantive significance of this difference will be taken up in Chapter 7.

¹⁰Immigration Act 1976-77, c.52, s.1, s.70(5)
detention decisions. With respect to the 'danger opinion' the Minister (and her delegates) are counselled to consider the following factors in making a determination\(^\text{11}\):

1) the nature of the offence: did the offence in question involve violence, weapons, drugs; was it a 'sexual' offence;
2) the circumstances of the offence: its severity, what led to its commission;
3) the sentence given: as a measure of its severity;
4) recidivism;
5) humanitarian and compassionate considerations.\(^\text{12}\)

Similarly, adjudicators making a ‘detention release’ decision in the context of the detention review, are guided by the following factors which “...should be weighed when considering whether a person is likely to be a danger to the public”:

1. The seriousness of the offences:
   - their nature (offences against the person vs. offences against property);
   - the circumstances in which they were committed; and
   - the number of offences, their frequency and the pattern of criminal activity.

2. The likelihood of re-offending:
   - the person’s criminal record;
   - association with or membership in a criminal organization
   - willingness to be rehabilitated and possibility of rehabilitation; and
   - family and community support.\(^\text{13}\)

Under the Act, a crime that carries a maximum sentence of ten years or more is officially designated a ‘serious’ crime. It should be emphasised that under this piece of

\(^{11}\) Legally, the decision taken is not considered to be a ‘determination’ which would have certain constitutional implications with respect to due process requirements. Instead, legally speaking, Ministerial delegates are merely ‘forming an opinion’. The status of s.70(5) \textit{vis a vis} judicial review will be explored in more detail a little later in this Chapter.

\(^{12}\) Cited in Falconer and Ellis, 1998:20

\(^{13}\) Guidelines of the Chairperson of the Immigration and Refugee Board, \textit{Powers of Adjudicators to Order Detention: Chairperson’s Guidelines issued pursuant to Section 65(4) of The Immigration Act} Ottawa: 1998:7
legislation, the mere possibility of a 10 year sentence is a determinative factor; a non-citizen may meet the 'danger' criteria for expedited deportation even if they had received a fine or a suspended sentence. 'Lesser' criminals may receive a deportation order on the basis of criminality if they a) are not a Canadian citizen and b) if the offence committed falls under a Federal statute for which the maximum available sentence is 5 years or more or if a sentence of at least 6 months has been imposed. This category of 'criminals' continues to have the right to appeal their deportation to the Immigration Appeal Division (IAD) on legal (on questions of law, fact or mixed law and fact) or equitable (humanitarian) grounds.

For the moment it is important to know that while the IAD must consider each case independently and according to its own facts, general guidelines were laid out in the Ribic decision\(^\text{14}\) which continue to be cited today and which summarise the factors to be considered with respect to the Division's equitable jurisdiction (consideration of humanitarian and compassionate grounds). These are summarized as follows:

1) seriousness of the offence
2) possibility of rehabilitation
3) length of time spent in Canada and degree of 'establishment'
4) consideration of 'dislocation' effects of deportation on family
5) family and community support
6) the degree of hardship that would be caused by deportation to country of nationality. \(^\text{15}\)

While adjudicators reviewing detentions regularly form 'danger opinions' in deciding whether or not to advise the release of someone from detention, an adjudicators' decision that a person should not be released because he or she is likely to pose a danger to the public does not mean that the person will also be found to pose a danger to the public in the opinion of the Minister or her delegates. Conversely, and more

\(^{14}\) Ribic v. Canada (Minister of Employment and Immigration) (unreported, August 20, 1985, I.A.B., docket no.84-9623)

provocatively, a person released from detention because they are found not to represent a danger to the public may still be deported without appeal because they are found by the Minister to represent a danger to the public. While the latter scenario is rather unlikely, it nonetheless highlights not only the subjective, interpretive and discretionary nature of the 'danger' decision itself but also the rather odd and inconsistent effect of the division of powers between government and administrative tribunals with respect to the making of danger opinions and the consequences which they entail. As observed in the Guidelines on Detention,

[I]t should be noted that the Minister's opinion to the effect that a person constitutes a danger to the public is not binding on an adjudicator. The latter's decision must be based on the adjudicator's own [discretionary] analysis and assessment of facts of the case. Therefore, it is possible that an adjudicator orders a person's release from detention although the Minister has issued a "danger to the public" opinion.17

Writing in 1996, Weinreb and Galati observe that the Minister was applying a very wide definition of dangerousness. In their words, "Persons who have been convicted of trafficking in small quantities of crack have been found to constitute a danger where there has been no evidence of violence or weapons. Presumably the rationale is that since crack is a dangerous drug, persons who sell it are dangerous."18 Section 70(5) is implicitly premised upon the dubious assumption that 'dangerousness' can be assessed and predicted with at least a modicum of consistency and reliability based on the consideration of certain 'factors'; ironically, this is the very same assumption often criticized by enforcement oriented observers in relation to the release decisions of the National Parole Board.

16 Adjudicators are cabinet-appointed members of the Immigration and Refugee Board (IRB) an independent administrative tribunal. Immigration officers with the delegated discretion to form danger opinions are Ministerial representatives, civil servants of the government.

17 IRB Guidelines, 1998: 16, fn.33

18 Weinreb and Galati, 1996:57
The racist dimensions of s.70(5) have been the subject of considerable attention and contention. The ‘danger opinion’ is intimately linked, both definitionally and in its application and enforcement, with criminal justice definitions and enforcement activities. The generally accepted research finding that whites are less likely to be stopped and caught than non-whites, as documented by the Commission on Systemic Racism\(^{19}\) and reasserted by criminologists,\(^{20}\) means that this provision, resting as it does on the policing and enforcement practices of the criminal justice system, applies and enforces the systemic racism which traverses through the CJS.

iv) Judicial Review and the Question of Discretion

The nature and status of these guidelines have been the subject of much legal attention as lawyers have attempted to draw constitutional attention to the excessive ‘vagueness’ of the legal provision and the guidelines. However, the courts position on the legal status of Departmental guidelines has been consistent; as affirmed by Judge Strayer in *Williams v The Minister of Citizenship and Immigration*:

I should mention briefly the guidelines issued by the department for the guidance of officers in recommending that a minister’s opinions should be issued under subsection 70(5). It was argued that the guidelines do not adequately define and limit the grounds for a finding that a person constitutes a public danger. I would first observe...that the guidelines are not law, are not binding, and they do not purport to be exhaustive. Indeed if they did purport to be exhaustive the Minister could not so fetter her discretion. I see nothing in the guidelines that is irrelevant to the proper formation of an opinion under subsection(5) (other than perhaps, humanitarian considerations to which the respondent cannot take exception) but they can in no way be seen as a definition of the totality of...

\(^{19}\) *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, 1995

the considerations of which the Minister could properly take into account.21

While many have challenged and continue to challenge the constitutionality of s.70(5), in the Williams case, the Federal Court of Canada upheld the overall fairness of the public dangerousness scheme. This decision nicely encapsulates, in the particular context of the danger opinion, some of the central issues raised in the Chapter Two regarding the conventional view of the relations between law and discretion in the context of exclusionary immigration law, policy and practices. In Williams, the Federal Court reemphasized the finding in Chiarelli22, a case respecting exclusion on ‘security’ grounds. that there is no obligation on parliament to provide any kind of appeal or discretionary relief to people who have ‘violated an essential condition under which they were permitted to remain in Canada’. It thus reaffirmed once again what is perhaps the most enduring of all founding tenets of Canadian immigration policy: that entering Canada is a privilege and not a right.

Williams goes on to argue that the deportation of a permanent resident, without appeal, on the basis of a Ministerial ‘danger opinion’ does not represent a breach of fundamental justice. In the opinion of the court, Williams’ fundamental legal rights had not been ‘invaded’ by the removal of his right to appeal his deportation: “...the substitution of judicial review for a right of appeal, by virtue of the Minister forming his opinion, does not strike me as a serious effect on his rights.” The Federal court refused to entertain the proposition that a Ministerial danger opinion is the equivalent of “an arbitrary order issued by a despotic official ordering the random imprisonment or exile of otherwise innocent citizens”.

In the words of Judge Strayer J.A.:

21 Judge Strayer J.A. in Reasons for Judgement Williams v Minister of Citizenship and Immigration April 11, 1997 A-855-96(IMM-3320-95)

At worst it replaces an appeal on law and facts with judicial review, substitutes the Minister’s humanitarian discretion for that of the Appeal Division, and substitutes the possibility of a judicial stay of deportation for the certainty of a statutory stay.

In *Williams*, the failure of s.70(5) to require the Minister to provide reasons for finding that a person constitutes a danger to the public was also challenged. That courts and tribunals should provide reasons for their decisions is a generally accepted principle of fundamental justice. However in *Williams*, the failure of the danger opinion legislation to compel the provision of reasons for the Minister’s ‘opinion’ is defended on the grounds that while reasons are ‘desirable’, they do not constitute a ‘legal duty’ particularly if the decision is discretionary and if there is no statutory requirement to provide reasons.

Moreover, the decision notes that regardless, the issue of reasons is not really ‘properly raised by this case’ because the Minister is not making a ‘determination’ as to potential dangerousness but rather is merely ‘forming an opinion’.

Nonetheless, the decision goes on to argue that even if it is properly understood as a ‘decision’, judicial review of discretionary, ‘subjective’ decision-making is limited to “grounds such as that the decision-maker acted in bad faith, or erred in law, or acted upon the basis of irrelevant considerations.” Interestingly, this acknowledgement of the very limited grounds for the judicial review of discretionary immigration decision-making, in this instance in the form of the ‘danger opinion’ does not figure at all in the judge’s opinion regarding the effects of a danger opinion *vis a vis* the individual’s fundamental rights. There is in fact no absolute ‘statutory’ right of non-citizens to appeal a deportation order based on a danger opinion to a superior court. Nor indeed does there exist a statutory right to appeal almost any decision under the Act, with a few exceptions. There is rather, a ‘very limited right to commence a judicial review’ by applying for ‘leave’ of the Federal Court Trial Division; only about 15% of cases obtain leave. However, the

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23 See Weinreb and Galati 1996:16

24 Ibid.,16
judge nonetheless maintains that the removal of the right of permanent residents to appeal a deportation order to the Immigration Appeal Division of the Immigration and Refugee Board, an independent administrative tribunal, through the issuance of a danger opinion, simply 'substitutes' possibility of judicial review for the certainty of appeal on facts and law.

As noted above, the judge in Williams also addressed the question of whether the danger opinion provision is unconstitutionally 'vague'. Interestingly but not surprisingly Strayner argues that the provision provides sufficient direction to the Minister that both she and the courts can determine whether she is exercising her discretionary authority for purposes intended by parliament. He cautions against using the constitutional doctrine of fairness "to prevent or impede State action in furtherance of valid social objectives" and adds that "...a measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one."

Hence, the primary defence of the 'generality' of the provision (and thus the wide scope of discretion which it entails) rests upon the importance of not impeding the 'valid social objectives' pursued by Parliament through the legislation. The guiding 'objective' is the exclusion of undesirable criminal non-citizens; 'getting tough' on 'criminal immigrants' is thus taken as an unproblematically valid social objective. Only secondarily is the possible humanitarian consequence of this vagueness mentioned and, as described above, the court had already cast some judicial doubt on the appropriateness of these 'humanitarian' considerations in the forming of a danger opinion.

v) Convention Refugees, 'Refoulement' and s.70(5): 'Deserving Victims' or 'Undesirable' Criminals'.

The question of the 'humanitarian' implications of the provision comes into stark relief when the implications of s.70(5) are considered with respect to refugees. In its consideration as to whether s.70(5) 'engages interests affecting liberty and/or security of the person', the court acknowledged the unsettled nature of the question. It suggested that
it is unclear whether the question of liberty and security of the person is only relevant in the context of the deportation of a refugee claimant who "by definition" would be able to "assert a potential danger to himself in returning home". As put succinctly by the judge in *Williams*,

Without purporting to decide the question in respect to refugees, I have difficulty understanding how the refusal of a discretionary exemption from a lawful deportation order, as applied to a non-refugee who has no legal right to be in the country, must be seen as involving a deprivation of liberty. Unless 'liberty' is taken to include the freedom to be anywhere on wishes, regardless of the law, how can it be 'deprived' by the lawful execution of a deportation order.

Canada has an obligation under the 1951 United Nations Convention Relating to the Status of Refugees\textsuperscript{25} not to return to the country from which s/he had fled, any refugee whose life or freedom would thereby be threatened for reasons of race, religion, nationality, political opinion or membership in a particular social group. It is nevertheless the case that Canadian immigration law and policy often now gives precedent to exclusionary objectives over these humanitarian international obligations.\textsuperscript{26}


Inclusionary humanitarian discourses in the context of refugee determination produce and act upon the liberal figure of the ‘deserving victim’: in this case, the genuine victim of state sanctioned persecution. Exclusionary ‘criminality’ and ‘danger’ discourses produce and act upon the undeserving and/or undesirable criminal. The right to asylum in Canada of an individual found to be a Convention Refugee (a genuine and therefore ‘deserving’ victim) under the Convention is completely negated should there be a subsequent finding by a Ministerial delegate under s.70(5) that the individual is also a ‘danger to the public’ (an ‘undesirable’ criminal): the non-citizen effectively cannot be both deserving and undesirable and remain in Canada. As outlined by Douglas Lehrer, s.70(5) of the Act does indeed apply to Convention Refugees. The International prohibition against *refoulement* prohibits the removal of a Convention refugee from Canada “...to a country where the person’s life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless...”, as provided for in S.53 (1) (a) of the Act, the person is a member of an inadmissible class and “...the Minister is of the opinion that the person constitutes a danger to the public in Canada.” As observed by Lehrer, “the impact of a decision under 53 (1) (a) is that a person may be forcibly returned to the country of nationality, that is the country of potential persecution - in refugee law...this is called ‘refoulement’.”

Canada, by signing the Convention committed itself to granting asylum to those found to be genuine convention refugees. It is worthy of note that Canada did not sign this Convention until 1969, a full 17 years after it was drawn up. This delay is particularly troubling given that Canada had lobbied hard for the Convention’s promulgation. The


reason Canada did not sign it until the “vast majority of countries beyond the developing world had long been signatories”\textsuperscript{28}, was the fear that signing the \textit{Convention} would undermine Canada’s ability to deport refugees on security grounds.\textsuperscript{29}

This concern seems to have been completely unfounded. As observed by Whitaker, the \textit{Convention} “provides escape clauses for signatory states that wish to override refugee claims for reasons of national security.”\textsuperscript{30} Article 32 of the Refugee \textit{Convention} addresses the issue of ‘expulsion’, it reads: “1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.” The \textit{Convention} refugee loses their right to protection against expulsion, even to a place which presents a threat to their life or freedom, if they are deemed to be a ‘danger to the public’ or a ‘security’ threat. While the \textit{Convention} does stipulate in Article 32.2 that this exclusionary decision must be made in accordance with ‘due process of law’, exceptions to this requirement are forgiven if there are ‘compelling reasons of national security’ which require otherwise. Article 33 of the U.N. \textit{Convention} sets out the prohibition against \textit{refoulement}:

\begin{enumerate}
\item No Contracting State shall expel or return (“\textit{refouler}”) a refugee in any manner whatsoever to the frontiers of territories where his [sic] life or freedom would be threatened on account of his [sic] race, religion, nationality or membership of a particular social group or opinion.
\item The benefit of the present provision may not, however, be claimed by a refugee of whom there are reasonable grounds for regarding as a \textit{danger to the security of the country in which he [sic] is. or who, having been convicted of a serious crime, constitutes a danger to the community of that country}. (emphasis added).
\end{enumerate}

Inclusionary humanitarian discourses have a far shorter history in Canada than do exclusionary discourses and in the contest between inclusionary humanitarian discourses

\textsuperscript{28} Dirks, 1977:180-2

\textsuperscript{29} Reg Whitaker, \textit{Double Standard: The Secret History of Canadian Immigration.} Toronto: Lester & Orpen Denny’s, 1987: 53

\textsuperscript{30} Ibid.,p.292
and exclusionary danger discourses, danger discourses have tended to be dominant. The very same individual may be constituted almost simultaneously in two different governmental contexts as both a ‘deserving’ innocent victim and as an ‘undesirable’ dangerous criminal, but it is the undeserving dangerous criminal who ultimately is acted upon through the enforcement of the exclusionary provisions of the Act: arrest, detention and deportation.

As described in Chapter Three, inclusionary legal and humanitarian discourses relating to international human rights and liberal legal notions of natural justice and due process gained currency in the 1960s when they were officially embedded in the legislation and apparatus of on-shore refugee determination and deportation and sponsorship appeals. Inclusionary humanitarian discourses constituted the figure of the deserving genuine refugee and entailed the creation and development of a new set of governmental apparatuses to identify, verify and act upon this deserving figure. This discursive development was indeed significant and continues to entail an extensive range of political, social, economic and legal efforts, energies and expenditures relating to international and national refugee issues. However, as described in Chapter 4, over the last two decades there is evidence of a discursive shift in the governance of refugee determination; from a concern to provide protection for those who are deserving of asylum owing to ‘a well-founded fear of persecution’ in their country of nationality to a concern to identify and exclude those who are undeserving of Canada’s protection.

It is nonetheless the case that inclusionary humanitarian discourses continue to have official political, legal and social currency. Anyone facing deportation, may apply for a ‘humanitarian and compassionate review’ (in 1999 the cost for making this application was $500.00) in which the Minister (through her delegates) has the case by case discretion to override all exclusionary decisions already made under the legislative provisions of Act and allow an individual already in Canada to stay on ‘humanitarian and
compassionate’ grounds. The Minister may also allow the ‘discretionary entry’ (30 day permit) of individuals seeking entry to Canada who would be otherwise inadmissible.31

It is still widely accepted, even by Canada’s harshest critics of its ‘liberal’ and ‘generous’ immigration and refugee systems, that Canada has an international humanitarian obligation to provide asylum to ‘genuine’ Convention refugees (although clearly most would prefer that the Canadian government select them off shore), and Canada does still grant full citizenship to Convention refugees, unlike many European countries. Similarly, liberal legal discourses relating to the critical importance of individual rights, equality, due process and the basic principles of natural justice also continue to inflect administrative decision-making in this field as is evident in the continuing existence of complicated legal and administrative provisions for Ministerial permit applications, judicial reviews and administrative appeals and in rules governing procedural matters. However, as described above, both inclusionary humanitarian and egalitarian liberal legal discourses stand down and step back when contested by exclusionary criminality and danger discourses.

vi) Conventional Critiques of s.70(5)

a) The Humanitarian Liberal Welfarist Critique: The Corruption of Discretion as a ‘Quality of Mercy’.

The passage of Bill C-44 sparked immediate outrage among community advocates and lawyers working on behalf of new immigrants and refugees. They had long been troubled by the increasing ‘criminalization’ of non-citizens. Scholarly critiques of the legislation have now also begun to emerge. Many community advocates have tended to

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The issuance of discretionary Ministerial permits to facilitate the entry of individuals who are otherwise inadmissible under the Act for reasons of criminality is indeed analytically revealing. These temporary exclusionary permits are much more closely linked with the conventional understanding of discretion as a ‘mitigating’ quality of mercy. There have been recurring concerns expressed about the issuance of these permits, particularly when they facilitate the admission to Canada of individuals who were deemed inadmissible for reasons of criminality. These permits will be discussed further in Chapter 7.
regard the change as yet another instance of the hardening of governmental hearts regarding immigrants and refugees; in this they give expression to the welfarist/humanitarian liberal view of discretion. As shrewdly observed by eminent Canadian social commentator, Ursula Franklin,

Discretion has shifted from being a humanitarian, quality of mercy to being a license to think the worst. Discretion was initially intended to mitigate, to allow the context of an individual case to be of benefit to the recipient whereas now discretion protects the decision-maker's 'freedom to choose'; it is today a quality of protecting officials from critical questions and accountability. Whereas discretion used to be founded upon an intent to 'help', it now justifies doubly harsh decisions. Discretion used to imply 'if in doubt assume the best' and now it means 'if in doubt assume the worst case scenario and act accordingly'. This is not the intent of discretion. The new Immigration Act (currently in the works in Canada) ought to specify that discretionary power ought to be used to mitigate'\(^\text{32}\)

In this view, the inherent benevolence of discretion has been corrupted and discretionary processes have been highjacked from their original humanitarian objectives and has been commandeered in the name of 'getting tough'. Discretion has been conventionally regarded as a essentially inclusionary, humanitarian and desirable quality of mercy. And, as exemplified in the brief discussion of the Williams case provided above, discretion does operate to protect decision-makers from legal and political scrutiny. However, amendments such as Bill C-44 exemplify the harsh and exclusionary uses of discretion which, in the contemporary context, aim to 'crack down' and 'get tough' on 'criminal immigrants'.

To argue that the original, 'real' intent of discretion is benevolent, compassionate and inclusive, turns an analytical blind eye on the long-standing historical, exclusionary uses of discretion. As demonstrated in Chapter 3, the increasing discursive dominance of humanitarian and liberal legal discourses in the post-war period did indeed provide the governmental rationale for a series of significant ('liberal' and 'progressive') changes to immigration and refugee law and policy in the 1960s and 70s. However, even in the

\(^{32}\) Ursula Franklin in conversation January, 1999
context of those decades, humanitarian and liberal legal discourses never displaced the longstanding preservation of discretionary power to facilitate the exclusion of ‘undesirables’. Thus, to regard discretion as originally and inherently inclusionary, humanitarian and compassionate compels one to ignore or explain away the reality that discretion has always also been employed in the exclusionary work of Canadian immigration law and policy.

In the liberal welfarist view, discretion tends to be most commonly associated with the ‘humanitarian and compassionate review’, a provision that is, at least in its official rationale, inclusive and compassionate. As discussed in Chapter Three, while the 1960s has frequently been imagined as a watershed, a period of social and legal upheaval, a period of ‘progress’ and ‘liberalization’, even a revolution of sorts, with respect to the exclusionary uses of discretionary power, this ‘revolution’ was only partial. While it challenged the nature of exclusionary procedures and instilled an attention to ‘fairness’ and ‘equality’ in these procedures, it did not question the basic need for exclusionary discretionary authority to ‘protect against threats’, nor did it displace the primacy of this objective over any other inclusionary, humanitarian inclinations. Only when humanitarianism and compassion and liberal legality stand alone, uncontested by security or criminality or danger discourses, is it likely to prevail; and this, in and of itself, is not a new development.

b) The Liberal Legal Critique: The Threat of ‘Unfettered’ Ministerial Discretion

The liberal legal critique of s.70(5) is characterized by a central and guiding preoccupation with the effects of this legislation on the legal ideals of individual justice and notions of fairness. Liberal legal scholars by in large are not troubled by the basic

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33 There is a persuasive case that the so-called ‘humanitarian and compassionate review’ is a misnomer. See for example, Anna Pratt “New Immigrant and Refugee Battered Women: The Intersection of Immigration and Criminal Justice Policy” in Wife Assault and the Criminal Justice System” Mariana Valverde et al (eds) University of Toronto, Centre of Criminology, Toronto:1995:85-103
existence of discretionary authority to exclude ‘undesirables’ on the basis of criminality and danger discourses; they are primarily concerned with the degree to which the processes of exclusion respect the principles of fundamental justice and individual rights. As discussed in Chapter Two, in this view, exclusionary discretion is a problem only when it is inadequately constrained, checked and/or guided by legal or legalistic rules.

Procedurally, the Bill C-44 regime provides neither coherent discretionary structure nor adequate checking. There is no notice. There is no hearing of any kind (in fact, the point of the exercise is exactly the opposite - to remove the chance of a hearing)... At no stage is there a requirement to consult with another executive member... It is, in its lack of explicative detail and absence of any kind of external involvement in making the decision, much more an exercise in absolute discretion... Ultimately, the process is pure discretion with no objectifying factors.34

The liberal legal paradigm redefines social, political and economic issues into legal issues: unchecked discretion is a legal problem in that it poses a threat to legality by introducing the risk of personal prejudice and political interference in decision-making and by producing ‘arbitrariness’. This is offensive to and contravenes liberal legal principles, most obviously those relating to individual rights. The solution required, therefore, is the legal regulation of discretion. As put by the Canadian Bar Association (CBA): “Political determinations are unpredictable, inconsistent and risky. Accessibility to the Minister and the Minister’s delegate, for all parties involved, may become a significant and unfair factor.” 35

A good and recent example of the nature of the liberal legal critique of s.70(5) is argued by the Richard Haigh and Jim Smith in their recent article.36 What distinguishes this critique from the welfarist liberal view described above is their a direct


35 CBA 1994:6

36 Haigh and Smith, 1998
acknowledgement that the changes made in the 1960s, in particular the creation of the Immigration Appeal Board in 1967 which replaced Ministerial discretionary powers as the final authority on deportations and sponsorships, were from their inception not only concerned to preserve the legal rights of individuals subject to either negative sponsorship application decisions or deportation orders, but was also and *equally* concerned to ‘ensure public safety’ and national security\(^\text{37}\).

Haigh and Smith cite an early decision of the Board which expresses an unusually candid view of Canadian immigration policy. In *Chirwa v. Minister of Manpower and Immigration* (1969), it was held that discretion “was not intended [by Parliament] to be applied so widely as to destroy the *essentially exclusionary nature* of the Immigration Act and its Regulations.”(emphasis added)\(^\text{38}\). The authors argue that from its inception, the Board was always concerned to find ways to structure and guide their discretion in such a way as to take cognisance of the legal rights of the individual without jeopardizing the state’s interest in ensuring public safety. Ultimately, Haigh and Smith argue that the Board was better equipped to make these (necessary) exclusionary decisions in accordance with the principles of fundamental justice and fairness than the Minister.\(^\text{39}\)

This view was echoed by the CBA in their submission *Bill C-44*. The CBA was troubled by the fact that “[a]lmost every provision of the Bill seeks to diminish the existing rights of individuals within the purview of the *Immigration Act* or regulations.” The CBA was then, and continues to be, critical of the ‘procedural’ dimensions of the Ministerial ‘danger opinion’, noting that “[r]emoval decisions as rendered by an immigration official rather than an independent tribunal, even on the basis of Ministerial

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\(^{37}\)In fairness to the authors, they do incorporate some consideration of social and political factors into their predominantly legal analyses of s.70(5).

\(^{38}\)Quoted in Haigh and Smith 1998:271

\(^{39}\)In this, their objections to the use of ‘unchecked’ Ministerial discretion to exclude rest on virtually the same (legal) grounds that were asserted by those who called for the drastic curtailment of Ministerial discretion to exclude under the 1952 *Act*, as was discussed in Chapter 3.
guidelines, may suffer from lack or procedural formality, sufficiency of evidence, inconsistency, and absence of accountability.”. However, as with the liberal legal critique discussed above, the concerns are with form, not substance. The common argument is that the IAD is better situated to make exclusionary danger decisions than the Minister (which means her delegates). The underlying exclusionary objective of the provision is not legally troubling - indeed it is legally justified. As put in the CBA submission:

The existing structure of review mechanisms works well. Failings of the system to identify and remove appropriate residents may be best addressed through enhancement of the investigation and enforcement departments of Citizenship and Immigration and through the continued appointment of qualified members to the Appeal Division.

Haigh and Smith compare s.70(5) with two other legislative mechanisms that seek to govern potential ‘danger’. Most relevant for this analysis is the ‘security certificate’. the issuing of which can limit appeals, deny access to refugee claim determination, justify detention and facilitate and expedite deportation. The authors argue that the procedures for the finding that a person poses or is likely to pose a threat to the security of the nation are, by virtue of legal checks, less offensive than those associated with the issuing of a ‘danger opinion’. In 1984, the Canadian Security Intelligence Service (CSIS) Act was proclaimed after considerable debate. This Act gave CSIS responsibility over national security issues, a responsibility previously held by the RCMP. The CSIS Act also created the Security Intelligence Review Committee (SIRC). This committee “...was to

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40 CBA 1994:4

41 Ibid., 5

42 It should be noted that while names, ranks and designations were changed and while “the red serge and riding boots have gone, 95% of the men (and very few women) who woke up and started the day on July 1, 1984 as agents of the Canadian Security Intelligence Service were exactly the same people who had gone to bed the night before as members of the Royal Canadian Mounted Police Security Service.” Whittaker, Double Standard 1987:282-283
oversee the operations of CSIS and to hear individual complaints against any of its activities or its security assessments. Both the Immigration Act and the Citizenship Act were amended to provide hearings before SIRC in cases of security rejections in immigration and citizenship applications." 43 The Act provides that the Minister and the Solicitor General may make security reports to SIRC. SIRC holds a hearing in which the person in question is represented and may make a submission on their own behalf. They are not, however, provided with any comprehensive information about the nature of the evidence against them, due to “all the secrecy and governmental discretion associated with the term ‘national security’ ” 44. While clearly the question of legal checks on Ministerial discretion to exclude is a compelling one, the focus again is on ‘procedural’ rather than ‘substantive’ justice.

c) A ‘Radical’ Critique: Ministerial Discretion, Exclusion and Racism

In contrast to the liberal welfarist critique of the corruption of humanitarian discretion evidenced by s.70(5) and in contrast to the liberal legal view which is preoccupied with the protection of individual (legal) rights and ‘procedural’ justice, a more radical critique of s.70(5) focuses on its essential racist dimensions and applications. Discretion in this view is regarded as an ‘instrument of’, or less deterministically as a ‘vehicle for’, state sanctioned racism in immigration exclusions. The contemporary preoccupation with ‘criminality’ is read as a thinly veiled, socially legitimate guise for officially delegitimized systemic and individual racism. In this view, S.70(5), and the sweeping, largely ‘unchecked’ Ministerial discretion which it entails, have opened up the possibility of the targeting of black Jamaican males for deportation:

43 Ibid., 281
44 Ibid., 282
“The unfettered discretion available to the Minister in issuing opinions opens the door for colour profiling and the targeting of certain groups.”

In this more radical approach, the analytical danger of reductionism is ever present, despite concerted efforts to avoid its temptation. The result is that it is often unclear whether the racist effects of the legislation are regarded as the result of a racist state agenda or as unintended negative consequences.

The article by Falconer and Ellis is illustrative in this regard. Ministerial discretion sanctioned under s.70(5) is variously represented as either merely ‘opening the door’ to racism, as ‘facilitating’ racism, or finally as being racist ‘in purpose and effect’. For example the authors argue that statistics show that “...the Immigration Department and its officers are operating under a system of criminal profiling that seems to target black Jamaicans in a manner that defines them more commonly as dangers to the public than any other immigrant population in Ontario, leading to their deportation in record numbers.” This rather ambiguous observation (‘seems to target’) is expressed in more definitive terms a little later on: “These statistics bear out that a government initiative has been in place since 1995 to target a specific racial group with the specific aim of cleansing the community of those perceived as a ‘danger to the public.’” And finally, at the end of the paper, the authors refer in no uncertain terms to “...the agenda of the state in targeting members of a particular racial community.”

The radical critique of s.70(5) should be welcomed for its attention to historical context and to substantive justice. Moreover, given the close definitional link between the Ministerial ‘danger opinion’ and the criminal justice determinations of criminality on which the danger opinion is largely based, and considering the now widely accepted

45 Julian Falconer and Carmen Ellis “Colour Profiling: The Ultimate Just-Desserts” Draft, 1999:21

46 Ibid., p.23

47 Ibid., p.24

48 Ibid., p.26
findings that criminal justice enforcement, particularly the ‘discretionary’ components of it, gives expression to and applies systemic and individual forms of racism, the analytical focus on the racist dimensions of s.70(5) is important and compelling. This is all the more true when one takes into account the longstanding and potent historical influence of previously legitimate and explicit racist ideals, historically posed explicitly in terms of social or national ‘purity’, which contributed to and justified the development of exclusionary Canadian immigration law and policy. As described by Valverde in her study of moral reform in English Canada in the period 1885-1925,

...social purity had a clear racial and ethnic organization. The ‘whiteness’ favoured by the movement was not merely spiritual but also designated...a skin colour...”Racial purity” is a phrase that appears but seldom in the texts studied, but the concept underlies common phrases such as ‘national purity’ or ‘national health’.49

The more radical view of immigration exclusions and discretionary power tends to view discretionary immigration exclusions as necessarily and inevitably racist. Explanatory reductionism is implied in the more radical critique by the lack of attention it pays to other contributing and influential factors. As a result it conveys the impression that racism is the underlying structure that ultimately governs and determines all discretionary immigration exclusions.

This view is compelling, but partial. While racism has always played a central role in the development and application of exclusionary Canadian immigration law and policy, the influence of other factors over the years must surely complicate the analytical picture. The historical development of Canadian immigration law and policy reveals that a diverse range of historically specific factors, from race to ideology to morality, to economics and labour market issues, to pragmatic concerns relating to the exigencies of electoral politics, to shifts in global migration patterns and other international conditions, have contributed to the development and enforcement of law and policy in this field.

49 Mariana Valverde The Age of Light Soap and Water: Moral Reform in English Canada, 1885-1925 Toronto: McClelland and Stewart,1991:32
Therefore, while the current linkage between criminality, discretion and race is particularly profound in the enforcement of immigration exclusions, as is suggested by the large number of Carribean blacks who have been the subject of s.70(5), and while certainly race has always been a central factor in the development of Canadian immigration law and policy, the approach taken here focuses on the processes and practices of contemporary exclusions; exclusions which are no doubt ‘raced’, but which theoretically, are not exclusively or inevitably so. That being said, in the examination of non-legal enforcement initiatives in the governance of exclusionary immigration contained in the following chapter, the startling extent to which dominant contemporary constructions of criminality are indeed heavily ‘raced’ will be abundantly clear.

VI) Conclusion

This chapter has argued that Bill C-44 provides a contemporary example of the guiding primacy of the logic of criminality in the governance of immigration exclusions in Canada in the 1990s. S.70(5) of the 1976 Act is read as evidencing a major shift in the governing logics of immigration exclusions, from (ideological) ‘security’ to ‘criminality’. Liberal legal scholars Haigh and Smith, troubled like many by this legislative development and cognizant of the extreme and sustained opposition which parallel tracts of ‘unchecked’ exclusionary discretion has elicited in the past, sought to address the question: “Why then do we have the appearance of such legislation now, in the face of historical antipathy...?”

This is indeed a fair and interesting question. Haigh and Smith mark it down to the political and social impact of sensational media reports on the Leimonis and Baylis murders. It is suggested here that this apparent historical ‘antipathy’ extended only to the formal legal dimensions of exclusionary procedures and not to the substance of exclusions, unless they were overtly and explicitly contrary to liberal legal ideals of equality. The extreme infringement of fundamental liberal legal principles entailed by and

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50 Haigh and Smith 1998:283
through the recent enactment of *Bill C-44* and s.70(5) has to do with a more general decline in the discursive dominance of governing liberal rationales and the rise of neoliberalism over late 1970s and 1980s. The discursive dominance of liberal legality and of liberal humanitarianism has always had a fragile, tenuous and inconsistent impact on exclusionary immigration decision-making. As argued in chapters 4 and 5, this already shaky influence has further declined with the rise of punitive neo-liberal rationales, mobilized in part through central discursive preoccupations with ‘fraud’ and ‘abuse’ and ‘deserving victims’ and by the recent emergence of the governing logic of ‘criminality’ and ‘public safety’. It is in this sense then that this thesis addresses the questions ‘why this?’ and ‘why now?’

The next chapter turns to the question ‘how?’ In the present and previous chapter the argument has been that in the 1990s, new immigrants and refugees have been incrementally and steadily re-presented and acted upon as a frauds and criminals and as threats to public safety, to administrative systems and to national security. It is this redefinition that facilitated and legitimated the punitive legal response of *Bill C-44*. The following chapter takes the argument a step further, arguing that immigration policy and practice have become, to an unprecedented degree, a primary instrument of crime control. It examines the proliferation of non-legal enforcement oriented initiatives since 1994 which act upon the ‘problem of criminal immigrants/refugees’.
Chapter Seven

"Criminals First": Governing Immigration Through Crime in the 1990s

I) Introduction

Throughout the 1990s, both new immigrants and refugees and exclusionary immigration law and policy have been increasingly governed by and through crime. This proposition refers to much more than merely the legal expression and enforcement of danger and criminality discourses as discussed in the previous chapter. What follows, will demonstrate the range of public and political concerns about criminality/security issues in the context of immigration have underpinned a broad range of institutional, organizational, procedural, technological and knowledge-based initiatives, networks and practices that produce and reproduce the 'problem' of the criminal immigrant acting upon this problem. The extent to which the 'problem' has been acted upon legally, politically and socially and the number of agencies, agents and resources that have been enlisted in the 'fight' against it illustrate the degree to which the 'problem' of criminality

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It is worth repeating that these extensive and sustained initiatives to get tough on crime and criminality (both in the context of criminal justice and immigration) bear no reasonable relationship to any statistical evidence available pertaining to the actual size of the criminal threat posed. The Canadian Council for Refugees (CCR) points out that "There is no established connection between immigration and crime. Immigrants are actually less likely to commit major crimes than the Canadian-born, and are underrepresented in the prison population." Citing the findings of Derrick Thomas, the CCR notes that "In 1991, 20.5% percent of the Canadian population older than 15 had been born outside the country, while only 11.9 percent of the total prison population were foreign born." (CCR, "Facing Facts: Myths and Misconceptions about Refugees and Immigrants in Canada" mimeo, 1994:4) As observed by Matthew Yaeger, author of a comprehensive review of the empirical literature on this question, despite the fact that research has consistently found that the foreign born commit fewer crimes than the native born in Canada, "It would be felicitous to be able to record that current evidence suggests we ought to be able to dispense with the immigrant criminal myth. However, as one reviewer put it, such popular demonologies seem to be able to survive any amount of exorcism." Matthew Yeager "Immigrants and Criminality: A Meta-Survey" Prepared for Strategic Policy, Planning and Research and Metropolis Project, Citizenship and Immigration Canada, January 1996:2
has become *the* central preoccupation of exclusionary immigration policy in the 1990s. Indeed, this chapter advances the argument that Immigration itself has become a central and largely taken for granted mechanism of national crime control.

The previous chapter described the 1994 extensively covered murders of a white woman and a police officer in Toronto that had triggered wide ranging and immediate enforcement-oriented initiatives. While the murders and the heightened panic which ensued gave rise to increased research activity and scholarly interest in the subjects of ‘race’, ‘crime’ and the criminal justice system, surprisingly little attention was paid to the ‘crime control’ developments of immigration law, policy and practice. It is to these developments that this discussion now turns.

II) Administrative Policy Reforms

i) ‘Criminals First’ Detention and Deportation Policy (1994)

On July 7, 1994, on the heels of the murders and the public and political outcry that followed, the Minister of Immigration announced the adoption of the ‘Criminals First’ removals policy; a major re-orientation of the priorities of Canada’s detention and deportation policies. The results of this policy change was significant. In the 1993-1994 fiscal year, 15% of removals were for reasons of criminality. In 1995-1996, this figure had more than doubled, increasing to 35%.\(^2\) Previously, the priority of the Department had been to remove failed (‘undeserving’) refugee claimants. As observed by Richard Flageole, Auditor Principal of the 1990 Audit of Canada Immigration,

...the balance between the removal of refugee claimants and non-refugee claimants is quite different in 1996-97 than it was in 1991-92. We had more removals of claimants; now we have removals of non-claimants. That reflects the priority of the department to switch resources from removing failed refugee claimants to removing criminals.\(^3\)

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\(^3\) *Citizenship and Immigration Standing Committee Hearings*, February 11, 1998:10
This shift in priority is certainly consistent with the argument of this thesis that the 1980s were characterized by a guiding governmental preoccupation with fraud and system abuse (the 'bogus' refugee) and that the 1990s witnessed a shift towards criminals and criminality as the guiding governing rationale. The following table provides the numbers of criminal and non-criminal removals from Ontario and Canada from 1993 to 1997.4

Table 1: Removals from Canada and Ontario, 1993-1997

<table>
<thead>
<tr>
<th></th>
<th>ONTARIO</th>
<th>CANADA</th>
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<tbody>
<tr>
<td></td>
<td>Criminal*</td>
<td>Non-Criminal**</td>
</tr>
<tr>
<td>1997</td>
<td>940 (27%)</td>
<td>3460*</td>
</tr>
<tr>
<td>1996</td>
<td>997 (29%)</td>
<td>2491</td>
</tr>
<tr>
<td>1995</td>
<td>1070 (38%)</td>
<td>1756</td>
</tr>
<tr>
<td>1994</td>
<td>1057 (38%)</td>
<td>1738</td>
</tr>
<tr>
<td>1993</td>
<td>n/a</td>
<td>n/a</td>
</tr>
</tbody>
</table>

* Criminal Removals are those stemming from criminal convictions, they may be, but are not necessarily, recipients of a Ministerial danger opinion. The bracketed figures represent the numbers of criminal removals as a percentage of the total removals.

** Non-Criminal Removals include failed refugee claimants and others who have violated the Immigration Act through, for example, overstaying their visa, working illegally or those who have been refused admission.

*** The numbers may not add up because some persons removed by have been counted in several categories. According to Immigration officials, the statistic try to capture ‘primarily’ the last documented reason for removal.

The impact of the murders is further evidenced by the response of the

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4This table has been created from official statistics obtained from the Public Affairs Department of CIC through a response to information request in March, 24. 1997
Metropolitan Police Association to the shooting of Constable Todd Baylis by Clinton Gayle. After the Baylis shooting, the Association sponsored a lawsuit against the government of Canada on behalf of Todd Baylis and his family. In response to a government report which claimed that the failure to deport Gayle was a result of 'systemic' failures, the Police Association stated their position succinctly:

Notwithstanding that one of the principal objectives of the Immigration Act is to maintain and protect the safety and good order of Canadian society, and notwithstanding that Gayle was known to be a commercial drug trafficker, heavily armed and prepared to use his firearm, immigration officials did nothing to carry out the deportation order. As a direct result of government inaction, incompetence, bureaucratic indifference and gross negligence, one of our own was murdered in cold blood. This tragedy will be repeated if we do not hold those responsible, accountable for their actions.  

After the shootings and Bill C-44 there was an increased preoccupation with risk, danger and criminality. However, this shift was neither smooth nor consistent. As was discussed in Chapter Two, the department, responding to pressures to limit financial expenditures, issued a new detention policy in the Fall of 1994 which directed immigration officers to detain only as a last resort. This both frustrated and angered Immigration officers who felt they were being given mixed and contradictory messages: first the Department reorganized its priorities around criminality and then directed that detention only be used as a last resort.

Lucienne Robillard, the Minister of Immigration, explained in 1998 that although most removals are not for reasons of criminality, the department does "...place a special emphasis on finding and removing criminals",

We will not tolerate the presence of people within Canada who threaten or prey upon the Canadian public...In 1995 we implemented Bill C-44 to speed the removal of dangerous offenders. We also created a 24 hour, seven day a week, immigration warrant response centre to provide support to our partners in the law enforcement community. These initiatives have

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proved very successful, with more than 3,250 removals of criminals in the last two years, and they helped lay the groundwork for some of our recent successes.6

ii) CSIS Joins the Crackdown on Criminals (1996)

a) The Expansion of the CSIS Mandate

In January 1996, CSIS created a ‘Transnational Criminal Activity Unit’ as part of a “government-wide effort to combat this threat. This unit will be discussed in more detail below in the section on special departmental units. In brief, however, it draws on the Services’ operational and strategic analysis resources in order to collect intelligence related to transnational crime.7 In its 1998 Public Report to Parliament, CSIS provides the justification and explanation for this unprecedented enhancement of its mandate such that it now, in its application, encompasses certain forms of criminality and merits its own unit. “Globalization”, CSIS explains, has created a world “virtually devoid of national borders.” And this, according to CSIS, provides vast opportunities for “members of highly sophisticated and organized criminal syndicates to pursue a complex web of lucrative legal and illegal activities worldwide.” Whereas terrorism and espionage have traditionally posed the primary ‘threat’ to Canada’s national security, with the demise of traditional cold war enemies and fears, in today’s’ changed global context, organized ‘transnational’ crime now poses a similarly serious threat. “...Transnational crime threatens various aspects of Canadian national security, law and order, the integrity of government programs and institutions, and the economy.”8 This expansion of CSIS’ mandate was effected without any amendment to CSIS’ legislated terms of reference. CSIS now monitors ‘transnational’ organized criminal activity under its existing mandate to “...investigate foreign-influenced activities detrimental to Canadian interests, as set out

6 Citizenship and Immigration Standing Committee Hearings, April 29, 1998:5
8 Ibid., 1 (emphasis added)
in Section 12 and 2(b) of the CSIS Act."9 This new focus of operations is "...in order to provide strategic advice to the government on how to deal with this immense problem."10

In this way, certain forms of criminality have been reconceptualized and acted upon as threats to national security. Conversely, and no less significantly the dominant conception of 'national security' has been radically modified so as to encompass certain forms of criminality, thereby justifying more extreme, enforcement-oriented, widely discretionary exclusionary measures. CSIS emphasizes the 'quasi-corporate' level of organized crime encompassing "...large scale insurance fraud, the depletion of natural resources, environmental crime, migrant smuggling, bank fraud, gasoline tax fraud and corruption." However, organized criminals "...are still involved at the lower level with drug trafficking, prostitution, loan-sharking, illegal gambling and extortion."11 The range of criminality included in the new operational mandate of CSIS is thus considerably wide.12

In contrast to the social and legal prohibition against the collection and publication of race/crime statistics, there is no official reluctance to identify the nationality and/or ethnicity of organized criminals. Indeed, organized criminals are officially and explicitly organized by nationality and ethnicity (with the curious exception of the category of "major outlaw motorcycle gangs"). According to CSIS, there are approximately 18 active transnational criminal organizations 'represented' in Canada, including: "Asian triads, Colombian cartels, Japanese yakuza, Jamaican posses, Mafia groups from the USA, Calabria and Sicily, Russian/Eastern European mafiyas. Nigerian

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9 Ibid., 1
10 Ibid., 1
11 Ibid., 4
12 One cannot but speculate that this expansion and merging of the categories of criminality and security in the context of CSIS also serve to justify and reassert the importance of CSIS' continuing existence and activities in the post cold war period.
crime groups and major outlaw motorcycle gangs."  

This emergence of such a central and guiding preoccupation with organized crime as a threat to national security signals a shift in the way in which different modes of governance construct the state. The focus on ideologically based threats to national security which had been the central feature of governance in Canada throughout the Cold War years, was consistent with a conceptualization of the state as a political institution. In contrast, the contemporary focus on criminal threats to national security tend to construct the state as commerce; primarily concerned to promote the security of property in Canada and the advancement of (free-market) economic interests.

This focus on cost, on the security of property and of free market economics, however vague, is nonetheless consistent with neo-liberal priorities including notably its primary focus on the economy and its related regulatory preoccupation with and criminalization of fraud and system abuse (the need to protect the ‘integrity’ of Canadian programs and institutions). According to CSIS, organized crime threatens Canadian society in multiple and fundamental ways. It threatens “...law and order [thereby] directly affecting people’s sense of security, trust, order and community - the very underpinnings of Canadian society”; it jeopardizes the integrity of government programs and institutions through corruption; it adds to enforcement costs; it further burdens the criminal justice system; it contributes to long-term social costs including drug dependency and a rise in violent crime; and finally it “...also poses a serious threat to the economic security of the nation” in that its basic activities could “...undermine the

13 CSIS, “Public Reports” 1998:2

14 Indeed, the seriousness of the problem is often flagged by reference to the cost of transnational criminal activity. For example, in its 1998 Public Report, CSIS addresses the cost issue in a rather curious way. It begins by citing U.N. estimates of the cost of transnational criminal activity in developed states: 2% of the annual gross national product (GNP). Based on this estimate, CSIS observes that the “potential transnational crime related losses for Canada in 1995 ‘would have been about 14.8 billion dollars, based on a GNP of 742 billion.’ (Emphasis added) There are no real figures whatsoever provided in this rationale.
workings of the free-market economy."\textsuperscript{15}

This final threat to the ‘free-market’ economy is detailed as follows:

Due to their illegal activities, transnational crime groups have access to huge sums of money, which needs [sic] to be ‘washed’. This large-scale money laundering has an impact on the operations of legitimate financial institutions that, in the long term, can go beyond the business sector with negative effects on the investment climate, tax revenues and consumer confidence. Moreover, these large amounts of money, combined with a willingness to use violence, enables transnational crime organizations to bribe, extort or coerce employees of financial institutions and governments.\textsuperscript{16}

\textbf{b) Immigration Security Screening}

One of the duties of CSIS under the CSIS Act of 1984 is to provide government departments and agencies with security assessments on both government employees and contractors and on prospective immigrants and citizens in Canada. A ‘security assessment’ is defined in the CSIS Act as meaning “...an appraisal of the loyalty to Canada and, so far as it relates thereto, the reliability of an individual.”\textsuperscript{17} It is the latter responsibility that is of interest here. Security screening of new immigrants and refugees involves the cooperation of several government departments and agencies: CIC, Health Canada, Human Resources Development, the RCMP and CSIS. The Solicitor General and the Minister of Immigration make a joint report to the Security Intelligence Review Committee (SIRC) indicating that in their opinion the person in question represents a threat to national security. SIRC conducts a hearing and either confirms or rejects the conclusion of the initial report. SIRC’s report is forwarded to the Governor in Council which may direct the Minister to issue a ‘security certificate’ barring the person’s

\textsuperscript{15}CSIS “Public Reports” 1998:3-4

\textsuperscript{16}Ibid., pp.3-4

\textsuperscript{17}\textit{Canadian Security Intelligence Service Act}. 1984, c. 21, s.1
admission to Canada and/or mandating their deportation.\textsuperscript{18}

The advice provided by CSIS relates directly to the inadmissibility criteria contained in s.19(1) of the Immigration Act. According to CSIS, the amendments made to the inadmissibility provisions in 1992 by Bill C-86, particularly the insertion of explicit prohibitions against terrorists and members of criminal organizations, brought immigration’s inadmissibility provisions into closer alignment with CSIS’ definition of threats to the security of Canada, namely and primarily, terrorism and espionage.\textsuperscript{19}

In 1997-98 the Service reports that it processed 53,029 requests from CIC under the Immigration Screening Program. The average processing time was 24 days and approximately 51\% of all cases were completed within this time frame. The remaining 49 percent averaged 73 days and less than 1\% took longer than a year.\textsuperscript{20}

\textbf{iii) Drugs and the Deportation of Refugee Claimants}

As has been previously discussed, a person may be excluded from making a refugee claim under the Geneva Convention. Amendments to the Immigration Act in 1989 granted the Minister (and her delegates) the power to intervene in refugee claims if exclusion issues are raised. Under the Convention, a person may be excluded if they committed a serious non-political crime outside the country of refuge or if they are guilty of acts contrary to the ‘purposes and principles of the United Nations.\textsuperscript{21}

\begin{itemize}
\item[\textsuperscript{18}]This is a vastly oversimplified description of the security review process. For the detailed provisions, see ss.39 - 40.2 of the Immigration Act.
\item[\textsuperscript{19}]Canadian Security Intelligence Service, “Operational Programs: Security Screening”, CSIS Web Site. The complete threat definitions are found in s.2 (a,b,c,d) of the CSIS Act
\item[\textsuperscript{20}]Ibid.,
\item[\textsuperscript{21}]The international and national intersection of drug law and policy with exclusionary immigration law and policy is both interesting and important, but, yes, beyond the scope of this discussion. The issue is raised, albeit indirectly, in Chapter 5’s discussion of the criminalization of the plant \textit{Khat} in Canada in 1997.
\end{itemize}
Traditionally, neither of these provisions was interpreted as extending to drug offences. However, since the U.N. introduction of several Conventions and initiatives relating to international drug trafficking, the Toronto CIC Appeals office "...began to argue that drug traffickers should be denied protection as refugees." The CRDD has accepted the argument, and on appeal the Federal Court has affirmed, that drug trafficking is contrary to the purposes and principles of the United Nations. As a result, as of 1997, "...drug traffickers are now routinely excluded from protection as refugees." 22

III) Creation of Special Departmental Units
In addition to policy changes which elevated criminality to its primary place in the governance of immigration, the years 1994 to 1997 also witnessed the creation of several new departmental units/sections dedicated to the identification and removal of criminals.

i) Organized Crime Section of CIC (1994)
In 1994, CIC created its own 10 member Organized Crime Section. Officers in this section rely primarily upon the provision of the Act which allows immigration officials to refuse admission or remove any individual if there are 'reasonable grounds' to believe that they are a member of a criminal group that has engaged or is likely to continue to engage in a pattern of organized criminal activity (s. 19 (1)(c.2)). As put by Michel Gagné, Director of the Section, "We don't have to show that the person participated in crime, just that the person is a member of an organized criminal group." In quick recognition of the obvious implications of this provision Gagné added, "Some people believe the section offends the Charter, but we've never lost a case yet. ...when people knowingly associate with criminal groups the burden of proof is on them to show it would not be detrimental to Canada to allow them in." 23 At a conference in February

22 This quote and the related information drawn from CIC Public Affairs CIC Update, No.8, 1997:2-3

23 "Canada Shuts the door on Criminals" National Post, November 21, 1998
1997, Gagné reported that the mandate of the section is to: 1) understand organized crime as a global issue; 2) gather intelligence; 3) target overseas; 4) intercept at ports of entry; and 5) ensure that identified criminals are removed if found in Canada. According to Gagné, the criminal group or organization need not be tightly ‘organized’, rather it may be “loosely structured”.

In 1998, the section boasted that it had developed a databank that contains “…the names and aliases of 7,000 suspected criminals, and those of their wives, children and parents.” Lists of suspected organized criminals are shared between CIC, the RCMP, CSIS and international law enforcement officers. These are entered into the database which includes information on the person’s physical description, criminal activities and links to criminal organizations. Immigration officers overseas and at ports of entry use this database for screening travellers to Canada. In its work, the Organized Crime Section of CIC cooperates most closely with the RCMP, their main ‘partner’.

In addition to exclusionary work within Canada and at ports of entry to Canada, the Organized Crime Unit is also active overseas. For example, in Hong Kong its officials screen potential immigrant and travel visa applicants. In this capacity they establish profiles, carry out police checks, check with RCMP headquarters and field intelligence. Since the creation of this section in 1994, Canada has denied visas to 114 out of 182,963 applicants from Hong Kong due to suspected triad membership. It has also denied visas to


“Canada Shuts the Door on Criminals” National Post, November 21, 1998

Ibid.,

807 out of 44,665 applicants from the former Soviet Union.29

"Profiles" play a central part in the work of identifying potential criminals. And, as with those used by CSIS, the profiles developed by the Organized Crime Section of CIC accord with different national or ethnic classifications. There are Japanese syndicates, Chinese triads, Russian mafia, Jamaican posses, Colombian cartels, and then the (unstated and unspecified) 'white' categories of motorcycle gangs and what the CIC refers to as 'traditional organized crime' (previously known as the Mafia).30 In the context of the CIC Organized Crime Section, profiles of members of Japanese syndicates (Yakuza) and Hong Kong triads and of members of organized crime groups from the former soviet union (vor v sakonye or thieves-in-law) have been centrally important as the above figures reflect: "Officers...target people who fit the profile of organized criminals: Japanese with missing fingers and tattoos could be yakuza; Russians who can't explain their sudden millionaire status and sport tattoos of an eight point star could be 'thieves-in-law'."31

ii) The CIC Modern War Crimes Unit (1996)

In 1996, the government established a centralized national unit within the CIC to monitor modern war crime cases. Regional CIC offices now have a designated coordinator to track cases and the Unit holds workshops and training sessions for CIC and the Department of Justice. As reviewed in Chapter 5, CIC immigration officers have three main tools in their efforts to exclude those who have committed war crimes, "offences against the laws of war applicable in international conflicts, for example carpet bombing" or those who have committed crimes against humanity, "... murder, extermination, enslavement, deportation, persecution, or inhumane acts or commissions committed against the civilian population or an identifiable group of persons, for example genocide.

29Ibid.,

30Ibid.,

31Ibid.,
ethnic cleansing". These three tools are: 1) the exclusion clause of the United Nations Convention Relating to the Status of Refugees (s.1Fa)) relating to the exclusion of war criminals and those who have committed crimes against humanity; 2) s.19 (1) (j) of the Immigration Act, adopted in 1987 which created a new inadmissible class: those who there are reasonable grounds to believe have committed war crimes or crimes against humanity; and 3) s.19 (1) (l) of the Immigration Act, also a new provision under Bill C-86 (1993) which deals with the exclusion of individuals who were senior members or officials of a government or regime that has been designated by the Minister as having committed gross human rights violations, war crimes or crimes against humanity.

What is interesting about the modern (post- World War II) war crimes’ provisions is that they rely primarily upon humanitarian discourses yet they nonetheless mobilize characteristically punitive criminality/security concerns and entail coercive consequences. This suggests the continuing discursive power of humanitarian discourses, but perhaps even more significantly analytically, it demonstrates the way in which humanitarian discourses may be employed in both inclusionary and exclusionary regulatory efforts.

iii) CSIS Transnational Criminal Activity Unit (1996)

Following suit, and marking the significant shift in their orientation as mentioned earlier, CSIS created the Transnational Criminal Activity Unit in 1996. According to CSIS, this service was created “…as part of a government-wide effort to combat this threat.” The nature of the threat posed by organized criminals, as described by CSIS, is monumental; “...they attack the very fabric of life in a democratic, law-based society like

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32Georges Tsai, Assistant Deputy Minister, Corporate Services, CIC, Submission to Citizenship and Immigration Standing Committee hearings, March 3, 1998:2

33Ibid., pp.2-3. It is this last provision that was used against members of the Somali Community in Toronto in the mid 1990s as discussed in Chapter 5.

34CSIS “Public Reports” 1998:6
The work of CSIS' Transnational Criminal Activity Unit is distinguished from that of law enforcement agencies in that where the police collect 'tactical intelligence' ("short term and operational in nature, geared towards action in the field leading to arrests and prosecutions"), CSIS' Unit provides the government with "reliable information and strategic intelligence on the extent and nature of transnational crime in Canada." Strategic intelligence is long-term in nature, and "...provides a comprehensive view of a threat environment, assesses the extent of the threat and points out which areas are at risk."

It is reasonable to suggest that CSIS' new mandate issued out of a growing sense of the need for CSIS to reassert its importance in the post 1989 world order in which traditional cold war foes and fears are, for the most part, absent. Organized crime, now defined as a threat to national security, provides a new and expansive threat to be contained.

a) The Triad 'Menace' and Project Sidewinder

The following tale illustrates the degree to which factors, other than the existence of a clear and present danger, contribute to the emergence (construction) of different crime problems. In the mid-1990s in the midst of the flurry of enforcement oriented governmental initiatives related to crime and criminality, one of CSIS' first new projects related to organized crime was initiated. Project Sidewinder was a joint CSIS-RCMP inquiry into the activities of "what it felt were disturbing links between Chinese criminal gangs called triads operating in Canada and government officials in Beijing". Indeed, in CIC, CSIS and Law enforcement reports on Organized Crime, these activities of triads are given prominent place; "Chinese triads are a main client...[they] are major. major

35Ibid.,p.4

36Ibid. 

37Ibid. 

38"The Trouble with CSIS" Globe and Mail, Wednesday December 15, 1999
criminals with large financial resources.” The number, however, of triad members in Canada is in fact “very small”; CIC admits “[W]e issue 60,000 visas a year in Hong Kong. Only a very small proportion are involved in triads.” 39 However, it is the position of some officials in this area that the absence of triad members in Canada indicates how well enforcement officers are doing their jobs of excluding them. Gagné, Director of the CIC Organized Crime Unit, even went so far as to depict Immigration and its ‘partners’ in the RCMP, in CSIS and in the police forces as the ‘thin blue line’ between an orderly and lawful Canadian society and the violence, corruption and economic devastation which would ensue were enforcement officers to be less vigilant. In Gagné words. “We are not being invaded by triads, because the police have displayed a vigorous response, but individual members are coming and we cannot let them multiply.” 40

Interestingly, the first major report about the threat posed by triads in Canada was circulated just before the introduction of Bill C-86, which contained sweeping amendments to the Immigration Act. A second report was circulated amongst immigration bureaucrats and RCMP officers while the Bill was still being debated (the Bill came into force on January 1, 1993). Among other changes, Bill C-86 included the new provision to exclude anybody ‘reasonably’ suspected of being organized criminals.41

According to a newspaper article with the sensational headline “Triad Menace”, these reports described the Triad menace as an “iceberg” and lamented that CIC was receiving requests from “…ruthless, vicious criminals.” 42

It is this ‘threat’ that provided the impetus and justification for Project Sidewinder. After producing a 12 page report on the results of their intelligence gathering, the Project Sidewinder team asked for additional resources to launch a formal probe. However, as reported in the above mentioned article, the project was dropped


40Ibid.,

41Globe and Mail, “Triad Menace” October 10, 1993

42Ibid.,
because senior CSIS officials found that it had produced a “rumour laced conspiracy theory” with little intelligence value.\(^{43}\)

IV) CIC “Partnerships”: From Cops to Communities

The term ‘partners’ and variations thereof, come up repeatedly in current immigration enforcement policy documents; the importance of enhancing and nurturing inter-agency cooperation, communication and exchange of information. Important ‘partners’ of CIC include: CSIS, the RCMP, ethnic communities, airlines, Customs, municipal, provincial and regional police forces, Interpol, foreign law enforcement authorities and governments.\(^{44}\) In light of the dominant policy objective of ‘interdiction’, the forging and strengthening connections with foreign authorities, national and international airlines and airports has become a primary preoccupation of CIC and their enforcement ‘partners’.

i) The RCMP Immigration and Passport National Enforcement Program

Historically and to the present the RCMP and CIC have worked very closely on the identification and exclusion (either through the inadmissibility provisions of the Act or through deportation) of criminals. The RCMP has an ‘Immigration and Passport National Enforcement Program’ which is primarily responsible for the investigation of violations of the Immigration Act. In April 1998, the program had 198 regular members posted across Canada. A major and continuing concern of this program is the “...proliferation of high quality fraudulent travel and identity documents”. The program

\(^{43}\)“The Trouble with CSIS” Globe and Mail, Wednesday December 15, 1999

\(^{44}\)

Also important in the enforcement effort are CIC’s links with Social Services and Public Health departments. Social Services for the obvious reason of concerns about welfare fraud committed by new immigrants and refugees, and Public Health because of increasingly dominant fears about health risks posed by new immigrants and refugees carrying diseases, for example AIDS and tuberculosis. These links will not however be examined here.
reports that between April 1997 and April 1998 it seized 597 fraudulent travel or identity documents.\textsuperscript{45}

The RCMP submission to the 1997-98 CIC Standing Committee hearings outlined the 5 priorities of the program:

1) “Combatting criminal organizations involved in smuggling illegal migrants into Canada.”\textsuperscript{46} In 1997 the program undertook 888 smuggling related cases. MacDonald reported that triads and crime groups from central Europe have been identified by the program as being actively involved in people smuggling. The submission noted that “…due to our efforts over the past three years, it is estimated that more than one thousand inadmissible migrants have been prevented from arriving in Canada by ship.” In addition, the program has developed a database of close to 16,000 suspects and other related tactical information and shares this information with foreign and domestic law enforcement agencies. It also shares this information with Interpol “for the creation and circulation of information bulletins to all member countries.”

2) “Deterring Unscrupulous or illegal activity on the part of professional immigration facilitators.” The RCMP investigates cases of ‘malfeasance or corruption’ on the part of Government employees and of complaints about immigration lawyers and consultants.

3) “Criminal identification screening investigations of Convention refugee claimants arriving in Canada.” The criminal screening process provides CIC with information on inadmissible applicants for visitors’ visas, on potential permanent residents or on potential business investors; “The criminal screening process is designed to provide information to CIC that members or associates of organized crime groups, terrorists, persons with criminality or war criminals are attempting to enter Canada.” Over 26,000 convention refugee criminal identification screening files were opened in 1997. The RCMP also receives, records and maintains the classified fingerprints of all refugee claimants in Canada until the person becomes a citizen (or until the person reaches the age of eighty as provided under the Privacy Act) In April 1998 this program reported that their databank

\textsuperscript{45}Sergeant Ian Macdonald, Immigration, Federal and Foreign Policy Branch, RCMP. “Background on the RCMP Immigration and Passport National Enforcement Program” Submission to the Citizenship and Immigration Standing Committee hearings, April 1998

\textsuperscript{46}Ibid., This brief review of the five priorities of the RCMP Immigration and Passport National Enforcement Program is drawn from this RCMP submission to the hearings. All references and quotations contained in this section are drawn from this source.
contained the classified records of 165,000 refugee claimants.

4) “Criminal screening to identify organized crime groups and modern day war criminals.” There are two areas in which the program is active with “problematic groups”, once again, Asian and East European organized crime. The program reports that the screening process has identified 919 cases “fitting the East European organized crime profile.” The matching of the profile with the individual was successful half the time; “Of these cases, 50% were subsequently linked to criminality or organized crime groups.” With respect to modern day war crimes and crimes against humanity, the RCMP maintains a database on these specific types of crime and shares information from it with CIC and other government departments.

5) “Arrest of persons with serious criminal history who are the subject of an Immigration Act Warrant.” The RCMP responds to requests from CIC to assist in the actual arrest or removal of an individual, where “...in the view of both agencies, the individual poses a danger to the public due to a history of criminality, or who resides in a geographic location known to be hostile to law enforcement personnel.”

In their work, members of the Unit cooperate very closely with municipal and provincial police forces; “Metro, Peel, regional police and any others in the area, the O.P.P. - there’s real partnerships there.”

a) ‘Community Policing’ and Immigration Enforcement

The exclusionary work of Immigration has not been immune to the emergence of the idea of “community policing” which has taken hold in the context of law enforcement across the country. Sgt. Ian MacDonald expressed in an interview the importance of this relatively new mode of policing in no uncertain terms: “In my opinion, community policing is the only way to do immigration work...any other way is not successful. You need to get the communities on side.” Sgt. MacDonald explained that the RCMP in general, and the Immigration Branch in particular, was in a “transitional” period, “...from

47Interview with Sgt. Ian MacDonald, Senior Policy Analyst, Immigration, Federal and Foreign Policy Branch, RCMP, April 23, 1998. The work of this task force is addressed in more detail in the section on the Metropolitan Toronto High Risk Unit which follows.
what they call traditional response-based policing to community-based policing.”

In the Immigration context, “community policing”, “creating partnerships with communities” “working with communities” etc., emerge in practice and indeed intent, as a way of facilitating a more ‘open’ relationship between immigration authorities and different ethnic communities in order, “...to facilitate open communication with the RCMP by ethnic communities about people who represent a threat or danger to everyone’s well-being.” Notwithstanding the possible challenge posed by different cultural perceptions of state authorities, for example those held by individuals from a totalitarian regime. Sgt MacDonald observed that “...we find that after they’ve been here a few years and they see what’s going on, they’re actually quite eager to come forward.” He added that this eagerness is due to the fact that, “...they see a challenge or threat to their lifestyle and when people from their country come in and they see they are criminals or war criminals or whatever, they see that as a threat to their own community, so they’re really keen, they definitely come forward.”

In recognition of the central importance of “getting the communities on side”, the Immigration section of the RCMP reaches out to communities. Where this is not possible due to lack of resources, as is the case in Vancouver, they have “communicated their message” through the community-based print and broadcast media of different ethnic communities. In order to effectively encourage community members to ‘inform’ on criminals and other ‘undesirables’, the RCMP has “focussed on a particular angle”. This ‘angle’ rests firmly and squarely on liberal notions of deservedness, increasingly dominant ideas about victims and victimhood as well as a certain amount of fear. Consider the following comments of Sgt. MacDonald on the self-described ‘angle’ adopted by the RCMP vis a vis their dealings with ethnic communities:

So we’re focussing on the angle that just because you’re an immigrant or a refugee, you don’t deserve to be ripped off, and we want to know if you are, you don’t deserve to be a victim, you don’t deserve to be harassed.

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48Ibid.,
These discourses are mobilized with the *specific* intent of drawing out the *deserving*, law-abiding members different communities and enlisting them in the work of identifying and ultimately expelling the undeserving criminal from their communities and indeed from the country. In this instance ‘community policing’ is revealed as a technology of governing. A technology which quite literally *broadcasts* dominant discourses in the work of ‘hailing out’ (producing and reproducing) and enlisting self-identified law-abiding deserving new immigrants and refugees in the work of identifying (producing and reproducing) the undeserving⁴⁹. This constitutive Durkheimian strategy is quite consciously employed by governmental officials.⁵⁰ The other angle pursued by the RCMP in this process is “the safety issue”. While Sgt. MacDonald was quick to acknowledge that having visited a number of “these third world countries”, he understands why people want to leave, “...what we also have to focus on is the safety issue.” By this, Sgt MacDonald is referring to the safety of the people attempting to circumvent Canada’s immigration laws. He recounted several grisly stories of people dying in the course of attempting to come to Canada illegally and stressed the degree of control “alien smugglers” have over people once they have been transported here; “you’re basically their servant.”

The RCMP, CIC, CSIS and law enforcement agencies all employ ‘informants’ in their operations. Telling about this policing strategy in the context of exclusionary immigration is that it values, encourages, relies and acts upon community derived information about the identity of others. This stands in stark contrast to the unwillingness to accept as reliable community derived information about the identity of others when the context is inclusionary. More specifically, as discussed in the last chapter, CIC refused to accept any alternative community derived modes of verifying identity when faced with

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⁴⁹Readers will recall the nature and uses of ‘community-derived’ information used against the Somali community discussed in Chapter 5.

⁵⁰Durkheim regarded crime a serving a positive function for ‘Society’ (substitute with ‘the Community’) in that it caused law-abiding members of society to stand together and against the criminal threat thereby enhancing solidarity.
the problem of, for example, undocumented Somalis applying for landed immigrant status. Affidavits from family members, employers and/or close friends were explicitly rejected by the government as an alternative to identity documents as were sworn statements from community elders and clergy. Government and law enforcement authorities are quick to accept and act upon community information when it is negative in that it implies exclusionary enforcement action, but appear completely unwilling to accept and act upon community information that is positive in that it implies an inclusionary response.

In his concluding remarks on community policing by the RCMP in the context of immigration, Sgt. MacDonald remarked that all in all he felt the approach was working. In his words, "[W]e’re going at it from that angle. I think its had a pretty positive effect, of course...,” he added, “...Rome wasn’t built in a day.”


Sgt. MacDonald also discussed the generation and use of ‘target profiles’. When not engaging in community policing, the RCMP continues its ‘traditional response-based policing’: checking and monitoring flights. In their efforts to identify criminals as they disembark, the RCMP, in cooperation with CIC and Customs, develop and use risk profiles. Profiles are generated through monitoring and observing trends. As explained by Sgt MacDonald,

For example, Air Canada flights from Singapore are starting to transport an increasing number of undocumented passengers,...obviously noticed by Customs and Immigration...If this continues it becomes a trend, then authorities become interested in that flight, they can be there at the terminal to wait for the plane to disembark and then they develop individual person profiles or ‘target profiles’. So you may be looking for a male, Asian, 18-35 years old, well-dressed, new shoes, no luggage. You can hone it down that far.

While ‘target profiles’ differ depending on the ethnic and/or national origin of the criminal in question, they do not change much over time; “You may have a profile from
Asia, say Singapore, you may have another from Sri Lanka or another from Somalia or another from Russia or Israel. They are generally male, if they are female it is likely for prostitution.”

During the Citizenship and Immigration Standing Committee Hearings, Brian Grant, Director Program Management, CIC, first stated that one of the techniques used to prevent people from entering Canada is disembarkation checks. These, he said were not done on all flights, but that CIC “...targets certain flights.” Soon after he contradicted his statement and indeed those made by a Sgt. MacDonald. He denied that CIC targeted flights from high risk countries and suggested instead that CIC does disembarkation checks “at random.”51


Until 1995 the RCMP was responsible for responding across Canada on an ‘as needed’ basis to requests from CIC to carry out high risk arrests on its behalf. However, in 1995 in the wake of the 1994 murders52, CIC and the RCMP announced the creation of the ‘Greater Toronto High Risk Arrest Unit’, to be permanently located in the greater Toronto area. This is the only ‘fully dedicated’ arrest unit. Sgt. MacDonald explained that while they had considered other areas, Toronto was the only jurisdiction that “so clearly demonstrated a need for a full time unit of this nature.”

Sgt. MacDonald spoke about the influence of public and political pressure generated by the 1994 murders and their news coverage on the decision to create the Unit. He observed that when Constable Todd Baylis was shot, the media and the public had a “huge influence” on the decision. He noted that “after Baylis, suddenly we had a task force and with existing funds.”

Interestingly, the official justification for the provision of this service on a

51 Brian Grant, Acting Director General, Enforcement Branch, CIC, Citizenship and Immigration Standing Committee Hearings, February 5, 1998:31

52 See discussion of the context of Bill C-44 in Chapter 6
permanent basis in Toronto, was framed in terms of the need to protect the safety of CIC enforcement officers responsible for arresting individuals with outstanding deportation orders against them and related to that the understanding that certain areas of the city were known to be traditionally hostile to law enforcement. As recounted by Sgt. MacDonald:

After the Baylis shooting it was my understanding that Immigration had quite a few deportation orders. That they weren’t able to action them all...because there were so many of them and people obviously weren’t willing to be found. Baylis’ killer was ordered deported one year prior to his involvement with the metro police. There was a real hue and cry and there were a lot of questions asked in the press and other contexts, as to why he was still here...Immigration reviewed their situation and one of the things they came up with was that these dangerous people pose a threat to their people who are trying to arrest them, and also that certain areas of cities were traditionally not friendly to enforcement officers. And again the risk factor skyrocketed. And I guess there was a certain reluctance on the part of immigration officers to go in there.

Sgt. MacDonald added that the fact that Immigration officers “don’t carry any firearms at all” supports their safety concerns.

In light of these concerns, the RCMP put together a temporary task force at the request of CIC “to see if there was a need.” After 6 months the temporary Task force found a “real demonstrated requirement” and became permanent unit. The Unit is staffed by 12 regular RCMP members and 5 CIC investigators. CIC does the initial assessment to determine whether the case is likely to entail a “high risk arrest.” If they so find, they refer the case to the High Risk Arrest Unit which also reviews it before accepting it. When asked whether the Unit ever declines to assist on the basis of their review, Sgt. MacDonald responded that “...there is a really strong rapport between the arrest and immigration officers.”

The criteria for assessing the risk level of an arrest are whether the crimes committed by the person to be arrested involved violence and whether the person lives in an area hostile to law enforcement. Sgt. MacDonald reluctantly agreed (“I don’t know I’m just guessing”) that the area surrounding Jane and Finch in Toronto, home to a large black
population, is an example of 'an area traditionally hostile to law enforcement'.

iii) Municipal Police Forces

CIC cooperation with municipal and provincial law enforcement agencies has also become increasingly important in Canada's contemporary enforcement climate. The links are technological (integrated databank systems), organizational (co-locating of personnel) and practical (informal practices and procedures).

If somebody slated for deportation does not appear as required, a warrant is issued by CIC for that person's arrest for the reason that they did not appear for removal. The warrant is entered into the Canadian Police Information System (CPIC) which can be accessed through the computer of every police officer's vehicle across Canada. When the police stop somebody for whatever reason, if they turn out to be wanted under an Immigration Warrant, CIC is contacted, now with the assistance of the centralized Immigration Warrant Response Centre, and the person is arrested.

Constable Rob Purves, of the Morality Squad of the York Region Police, provided an example of the way in which informal understandings and communications operate in the context of policing new immigrants and refugees. As he explained, CIC enforcement officers will routinely communicate with police departments regarding possible criminal concerns relating to non-citizens in Canada, even when the concerns are not legally founded. Constable Purves described one such communication in which CIC contacted York Region police and told them that they should keep a special eye on a group of Jamaicans who had just entered the country as visitors with all their documents in order. CIC suspected that this group of Jamaican musicians was planning to perform for money at a named club during their visit. York region police responded by putting the club under surveillance. After last call, the police raided the bar and wrote a few tickets for alcohol related charges; however no immigration violations were detected. Clearly, at a time when immigration and criminal justice enforcement are both engaged in increasingly

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53 Interview with Constable Rob Purves, Morality Squad, York Region Police Department, June 4, 1999
similar crime control work, systemic discrimination and selective policing are ongoing concerns.

With respect to organizational links, CIC works closely with all levels of police forces and the RCMP. In Toronto, the Joint Immigration RCMP Task force described above operates on a permanent basis and deals exclusively with criminal cases. In Vancouver, CIC has an officer who is seconded to the police department to assist on immigration cases. In Montreal, while there is no formal CIC representation, CIC does work closely with the police there as well.54

In 1995, CIC set up the Immigration Warrant Response Centre in partnership with the RCMP and the Canadian Police Information Centre (CPIC) "...in order to assist our law enforcement partners."55 It enables immigration and police officers across Canada to "confirm immigration warrants anytime, day or night." Arrangements may also be made to have an immigration officer take custody of the person named on the warrant. This initiative is technology based:

The Warrant Centre manages a computer interface that links CPIC and the Field Operations Support Service (FOSS- Immigration's computer system). This interface allows Immigration personnel to access the CPIC system and obtain valuable enforcement information. The IWRC uses technology such as the photo phones which directly transmits photographs to assist in the confirmation of identity of individuals who have warrants issued against them.56

iv) Ongoing Collaborative Enforcement Initiatives57

54Brian Grant, Acting Director General, Enforcement Branch, CIC, Citizenship and Immigration Standing Committee Hearings, November 27, 1997:6


56CIC Public Affairs CIC Update, No. 8, April 1997:4

57The following initiatives are included here, albeit very briefly, in order to illustrate the extent and variety of the crime control activity underway.
a) CIC-RCMP Task force on People Smuggling (1997)

As a means of acting upon the problem of people smuggling, the Ontario East area of Citizenship and Immigration established a task force with the RCMP in 1997. Its mandate is "...to detect and apprehend persons involved in the smuggling of persons across the border as well as those persons that have been or are being smuggled." Task Force officers focus on obtaining sufficient evidence to lay charges under the Immigration Act.

b) Casino Task forces

Casino Intelligence Units have been set up by law enforcement agencies in Ontario in response to the 'safety and security' concerns posed by the opening of three casinos in Ontario. According to CIC, casinos attract a "multi-national criminal element." Immigration Intelligence officers are assigned to each unit and where they work alongside representatives of the Ontario Provincial Police and the Customs Border Service. Their mandate is to "...monitor and target organized criminal groups to prevent their profiting by the casino industry, both nationally and internationally." According to CIC, the three casinos conduct 600 investigations per year "...on various criminals and their associated organizations." These cases involve both residents and non-residents of Canada. A permanent resident may be subject to removal if a conviction results from the investigation.

c) CSIS and CIC Airport Collaboration Project

In 1997, a pilot project was initiated at Pearson International Airport in which CSIS officers and CIC officers conduct joint interviews "...of those persons posing a potential threat to the safety and security of the country." This initiative is attributed to

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58 Public Affairs, CIC Update, April 1997

59 Ibid., 2

60 Ibid., 2
the two departments' mutual recognition of the importance of "...interdiction activities in refusing entry to those persons who pose a threat to the safety and security of Canada." 61

d) Ski-Doo and Boat Patrols

In 1997, some CIC port of entry staff who work and land border points in Ontario were part of a collaborative Customs and Ontario Provincial Police (OPP) program in which they carried out border patrols on ski -doos and boats. Accordingly, they received 50 hours of training in a formalized OPP boating course. 62

V) Airlines, Airports and Interdiction

In light of the dominant policy objective of ‘interdiction’, the forging and strengthening of connections between CIC and foreign authorities, national and international airlines and airports has become a primary preoccupation of CIC and its law enforcement ‘partners’. According to Sgt. MacDonald, the inability to effectively monitor all planes at all times means that CIC and the RCMP must be “multi-dimensional.” So, while the Immigration Branch has ‘dedicated officers’ at centres at the Toronto and Vancouver airports, they must also pursue other strategies. 63

One such strategy is interdiction. As has been discussed, since the 1980s, there has been an increasing preoccupation with interdiction and deterrence as policy justifications and objectives in the field of immigration exclusions. The RCMP Immigration Branch is centrally and actively involved in interdiction initiatives overseas.

61 I bid., 6
62 I bid., 6
63 Airline liability assists the RCMP and CIC in enforcing interdiction oriented policies. Airlines are a ‘stakeholder’ in this problem, because if they do bring in undocumented people they are subject to stiff fines. As pointed out by Sgt. MacDonald, they can also be held accountable for that person’s expenses while in Canada as well as for the cost of returning them; “...so the airlines do have a real stake in keeping these people out.” (Sgt. Ian MacDonald, RCMP, Interview April 23, 1998)
As explained by Sgt MacDonald,

With 125 million global migrants, the world is becoming a smaller place. That’s understood, but we find that more and more we have to work with foreign authorities to address these issues, instead of just waiting for the thing to happen in Canada when it’s just too late.64

CIC agrees; “[F]or us, a tremendous emphasis is placed on trying to screen out inadmissible persons before they get here, because we know that once they get here, they’ve got full access to our courts, and they can delay proceeding for a long period of time.”65 Lucienne Robillard, Minister of Citizenship and Immigration, stated in 1998 that interdiction efforts are of paramount importance; “The most important thing is to prevent these people from coming to Canada. That means trying to stop them before they come...part of our strategy is to work overseas in the different airports...we also work with other countries.”66

In the interdiction effort pursued by CIC, enhancing links with national and international airlines is key. In the mid-1990s, CIC introduced a new approach with airlines that resulted in greater cooperation in the policing of travellers. Fraudulent and/or missing travel and identity documents are the primary focus of many of the initiatives taken. CIC works very closely with airlines at major transit points around the world training airline employees and other authorities on how to detect fraudulent documents. for example, in Frankfurt, London, Paris, Hong Kong, Tokyo and Singapore.67 In addition to training initiatives, CIC also posts officers at international airports to actually assist foreign authorities in the detection of fake documents. Sgt. MacDonald explained

64Interview with Sgt. Ian MacDonald, April 23, 1998

65Gerry Campbell, Assistant Deputy Minister, Operations, CIC, Submission to Citizenship and Immigration Standing Committee Hearings, October 21, 1997:19

66Lucienne Robillard, Minister, CIC, Citizenship and Immigration Standing Committee Hearings, November 18, 1997:29

67Brian Grant, Acting Director General, Enforcement Branch, Citizenship and Immigration Standing Committee Hearings, November 7, 1997:7-8; March 3, 1998:19-20
that sending Canadian officers abroad to do this work is necessary because "...we can't expect them to look after our interests, and they don't know what they are looking for." CIC also 'insisted' that international airports check documents before getting on the plane, as opposed to relying on the disembarkation check in Canada. The CIC officers posted abroad have also been given the legal authority to hold the documents of people getting on the plane.

The largely unacknowledged 'unintended' consequence of 'successful' interdiction efforts which aim to prevent people from getting on a plane in the first place, or from being admitted to Canada at an airport or a border port of entry, is that other avenues of entering Canada are likely to be explored. As was learned from the prohibition of alcohol in the 1920s, successful interdiction measures are likely to redirect the undesired activity in more covert, risky and dangerous directions rather than eradicate the activity. This restrictive enforcement oriented immigration policy and practices that focus primarily upon interdiction and deterrence oriented measures actually produce and reproduce some of the very problems which it is designed to address and ameliorate, including most obviously people smuggling, and other methods of system abuse. This likelihood is considered in the following observation made by Brian Grant, Director of Program Management, CIC:

...while [interdiction] is necessary in order to protect the system from being overrun, and I believe it would be...nonetheless, we are offering resistance. If we could prevent everyone from stepping on an airplane, I suspect you would have boats arriving on the coast. People will try to get here no matter which way.

Official measurements of how successfully interdiction measures are working

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68 Interview with Sgt. Ian MacDonald, April 23, 1998

69 Brian Grant, Acting Director General, Enforcement Branch, Citizenship and Immigration Standing Committee Hearings on Immigration, March 18, 1998

70 Brian Grant, Acting Director General, Enforcement Branch CIC, Citizenship and Immigration Standing Committee Hearings, February 18, 1998:27
include the number of overseas ‘interceptions’ and the total number of people arriving at Canadian airports. On both counts, tough interdiction measures do appear to be ‘working’; in 1991 the interception rate was 30% and in 1998 it was 54%. The number of people arriving at airports also dropped by half.71 However, as noted by Grant, the number of people arriving at our land border has increased; ‘...you just keep chasing after the problem.’72 At the time of writing (January 2000) a recent series of arrivals of Chinese nationals on the west coast of Canada, smuggled across the ocean in a shipping containers, several not surviving the journey, seems likely to be a very sad example of the ‘unintended consequences’ of get tough exclusionary immigration policy.

Further concerns about intensive interdiction measures question the consequences of preventing, and thereby endangering, genuine refugees from making a refugee claim in Canada. And, despite international pronouncements on the need to ‘share the burden’ of massive international migration, tough interdiction and exclusion measures clearly indicate a desire on the part of the Canadian government to keep to an absolute minimum the numbers of all refugee claimants, ‘genuine’ or not, who are able to reach Canada and avail themselves of the on-shore refugee determination system.73

Notwithstanding these concerns, CIC is clear that one of their major priorities continues to be to increase cooperation with respect to overseas interdiction. CIC has control officers in different airports around the world is convinced that these links (‘partnerships’) with foreign airlines and authorities need to be strengthened in order that Canada “doesn’t become a safe haven.”74

71Brian Grant, Citizenship and Immigration Standing Committee Hearings, November 27, 1997:8

72Ibid.,8

73As has been discussed in Chapter 4, the ‘Safe Third Country’ provision provides further strong evidence that Canada has prefers to ‘shift’ rather than ‘share’ the so-called burden of the world’s migrating populations.

74Minister Lucienne Robillard, Citizenship and Immigration Canada, Citizenship and Immigration Standing Committee Hearings, April 29, 98
Initiatives in this regard are also technological. CIC is trying out what is called an "Advance Passenger Information System". This involves drawing information from the tickets of passengers flying to Canada and sending that information ahead. CIC officials in Canada then run the information through the available 'criminality databanks' to see "...whether we get a hit either in terms of criminality or a security concern...so we can know who's getting off the plane." There have also been concerted efforts to develop alternative measures that would harness and effectively employ the potential of technology, document scanning technologies for example; "...as the technology develops it gets easier to do this sort of thing."

Disembarkation checks by CIC officials are also being employed more frequently. CIC officers board international flights upon their arrival and prior to the disembarkation of the passengers in order to check documents. At Pearson International Airport in Toronto, it was reported that between September 1996 to January 1997, 660 disembarkation checks were completed compared with 237 checks done over the same period the previous year.

VI) Canada Customs and Crime Control

January 26th, has been designated "International Customs Day." This tribute is designed to "recognize the contribution of the men and women of Canada Customs to the safety of Canada's communities." There are about 4,000 customs officers at border points and ports of entry across the country. Their responsibilities range from "collecting

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73Brian Grant, Citizenship and Immigration Standing Committee Hearings. February 18, 1998:20

74Ibid.,p.35

75Public Affairs, CIC Update, April 1997:5

76Revenue Canada “Customs Officers Recognized for Role in Keeping Streets Safe” Press Release, Ottawa: January 24, 1997
duties, to enforcing health regulations to investigating drug smuggling.”


Customs officers are represented as the “..first line of defence against drugs, contraband, and illegal firearms.” In 1997, Minister of National Revenue, Jane Stewart, emphasized their crime control function: “Working with the RCMP and other domestic and international law enforcement agencies, the men and women of Revenue Canada’s customs’s’s operations have contributed greatly to keeping our communities and our streets safe.” Customs officers are also responsible for carrying out the ‘primary inspection’ of travellers for CIC as discussed in Chapter Two.

In March, 1997, Minister Stewart announced the tabling of legislation (Bill C-18) which sought to expand the powers of customs officers under the Criminal Code and in May 1997 the Bill was given Royal Assent. Bill C-18 expresses the view that customs officers provide the “first response” to criminals seeking entry to Canada. As such, it vested them with expanded powers “...to arrest and detain individuals suspected of having committed offences under the Criminal Code.” When fully implemented, 3,000-3,500 of the approximately 4,000 customs officers will be “...designated to provide this first response capability.”

This legislation’s development and adoption was explicitly attributed to the contributions of a variety of agents and agencies including law enforcement, Canada Customs employees and most notably non-governmental lobby groups including “Canadians Against Violence Everywhere Advocating Its Termination” (CAVEAT) and

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70 Ibid.,
71 Ibid.,
72 Ibid.,
Mothers Against Drunk Driving (MADD). Revenue Canada explains that it has always had to balance its responsibilities of "facilitating trade, travel and tourism" with that of "maintaining a strong and credible enforcement role." It has implemented a "Smart Border" strategy. This strategy is "based on effective risk management, which allows for the speedy clearance of low-risk people and goods while at the same time keeping out undesirable merchandise and people." The expansion of the coercive powers of customs officers designated as "first responders" is part of the latter exclusionary objective.

ii) CANPASS and the 'Low Risk' Traveller (1995)

In 1995, the Canadian government launched a "smart card" to speed customs clearance for 'low risk' travellers as part of its CANPASS Program; the inclusionary dimension of the 'Smart Border' Strategy. This initiative issued out of a 1995 Accord with the United States (the "Canada-U.S. Accord on our Shared Border" February 1995). Prime Minister Chretien expressed the rationale for the initiative as follows: "we have a long history of cooperation with the United States. Revenue Canada is building on that tradition to improve the way we do business...Better service at the border will boost tourism and trade and that means more jobs in Canada." The economic rationale for inclusionary measures is of course historically long-standing and consistent. As has been argued, in the 1990s inclusionary policy objectives are opposed primarily by criminality

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83Ibid.,


85Ibid.,

86Ibid.,

87Revenue Canada, "RC4062/CANPASS - Airport", Memorandum on CANPASS. last updated July 16, 1998

88Ibid.,
based exclusionary rationales. According to National Revenue Minister David Anderson. “Our goal is a hassle-free border for honest travellers and businesses, and a brick wall for those who try to smuggle illegal weapons, drugs or break other laws at the border.”

To be eligible for a CANPASS ‘smart card’, one must qualify as a ‘low risk’ traveller. A low risk traveller is: a citizen or permanent resident of Canada; a citizen or resident of the U.S. who meets the Canadian visitor requirements (is of “good health, no criminal or narcotic record an the ability to financially support yourself while in Canada);

a citizen or resident of the US entering Canada to work or study “who meets all immigration requirements, which may include possession of a valid written authorization from an immigration officer. Conversely, you are deemed a ‘high risk’ traveller and are therefore ineligible for the CANPASS program if you: do not meet the above requirements; have a criminal record for which a pardon has not been granted; had a customs seizure within the past 5 years; have been subject to an enforcement action under customs or immigration legislation; or are inadmissible under the Immigration Act.

VII) Technological Developments

The importance of technology in the crime control work of immigration is no doubt by now abundantly clear. As has been described, it is a central part of CIC’s ongoing efforts to enhance ‘partnerships’, forge new links and share information. It also holds out the promise for many that enforcement authorities will, through the development and implementation of new technologies, be able to better identify, track, detain and exclude those who are found to pose a threat to public safety and security.

Currently CIC maintains the ‘FOSS’ system which records immigration transactions. CIC has undertaken the development of integrated processing systems, to replace the various tracking systems which had been developed in different regions and which are for different stages in the process and which are not integrated. The National

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89Ibid.,

90Ibid.,
Case Management System would standardize client identification codes and would provide all enforcement officers across the country with access to an ‘integrated client file’ which would enable CIC to track cases throughout the process without having to jump from one system to another. This system would also include a ‘data warehouse’ which would facilitate decision-making, reporting and statistical calculations and reports.91

CIC is also working to enhance its links with other ‘partners’ and ‘stakeholders’. It would like to see paper interactions replaced by electronic ones and is working to “...build suitable interfaces between the various systems.”92 CIC would also like to see the United States and Canada integrate their tracking and information technologies so that illegal immigrants could be tracked in the U.S. and in Canada. To that end, Minister Robillard explained that, in 1997, CIC was setting up a working group with the U.S. to explore the possibilities.93

CIC is also developing a CIC Explorer, an Intranet, to assist officers in Canada and internationally to access to a wide range of information which they need to draw from in their work. CIC has begun using video-conferencing for detention reviews, and is exploring the use of electronic bracelets as an alternative to detention. As already mentioned, document scanning technologies are also being explored and developed. While not new technologies, the fingerprint and the photograph are critical devices in the identification and tracking work of CIC. As put by one official, “people may have fabricated an ‘identity’, but they do have a fingerprint and a photograph. CIC has what’s referred to as a ‘positive identifier’.94

91Roman Borowky, Director, Information Management and Technologies Branch, Citizenship and Immigration Standing Committee Hearings, February 26, 1998:4-5

92Ibid., p.7

93Minister Lucienne Robillard, CIC, Citizenship and Immigration Standing Committee Hearings, November 18, 1997:17

94Brian Grant, CIC, Citizenship and Immigration Standing Committee Hearings, February 26, 1998:18
As summed up by Foster:

There has simultaneously been a preoccupation with the advanced technology and science of "admission and control" procedures. Infra-red surveillance devices, magnetic strip documentation, telephonic fingerprinting, computer databanks, x-ray security at airports, electronic filing systems and automated mail in systems all serve, in a rather emphatic attempt, to regulate the flow of economic migrants and refugees from Africa, Asia, the Caribbean and Latin America.  

VIII) The Production of Knowledge on the ‘Problem’ of the Criminal Immigrant

The discursive construction and reproduction of the problem of the criminal immigrant/refugee also takes place in contexts devoted to the production and dissemination of knowledge about the ‘problem.’ This takes place in, for example, political and social forums, in committees, in public hearings and in the media.

The 1990s have witnessed a proliferation of research-oriented initiatives on different issues relating to Canada, immigration and immigrants. The relationship between immigrants, immigration and crime is one such issue that has received much attention. One illustrative example of an important, government-initiated and funded site of knowledge production on the ‘problem’ of criminal immigrants/refugees is CIC’s ‘Metropolis Project’.

i) The CIC Metropolis Project

Meyer Burstein, the Executive Head of the Project in 1997, explains that it has become apparent to governments that they need to take leadership, "...to build new institutions, to engage a broader spectrum of stakeholders and to create a shared strategic focus.”  

In order to effectively manage both “the flow of immigrants” and the


96 Meyer Burstein, Executive Head, Metropolis Project, CIC, Letter to Metropolis’ ‘Justice-Immigration Domain Seminar’ participants, January 27, 1997
"consequences of immigration for the host society", information is required "that we do not presently have." Governments therefore have realized that they "need to invest more heavily in knowledge." (emphasis in original) The objectives of the Metropolis Project are to:

... improve public policy by situating knowledge at the core of decision-making. Our goals are to build a unique network of researchers and decision-makers; to create a policy thrust by continually involving governments and stakeholders in project design and problem definition; and to energize the network through conferences, policy forums and extensive informational exchanges.

Related to this endeavour, four ‘Centres of Excellence’ have been set up by CIC in Montreal, Vancouver, Toronto and Edmonton. These centres conduct research related to settlement and integration issues, with consideration extended to both the so-called ‘host’ communities and to the immigrants themselves. Burstein explains that these research parameters are so wide that the ‘stakeholders’, consisting of both “knowledge producers” and “knowledge consumers”, need to identify clear priorities to guide this research. This was the stated aim of the Justice/Immigration Domain Seminar, held by Metropolis in February, 1997.

In spite of its title, the issue of crime and immigration and criminality and immigrants provided the policy focus for this two day seminar. The issue of ‘justice’ was not much addressed; in the mix of the issues addressed during the seminar, it was ‘enforcement’ that was the dominant preoccupation. It provides a good example of a specific site in which knowledge about the ‘problem of the criminal immigrant’ and related preoccupations were produced and reproduced. It was co-sponsored by the RCMP, the Correctional Service of Canada, the Solicitor General of Canada Secretariat and the Department of Justice.

Government conference organizers in fact took great pains to acknowledge the

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97Ibid.,

98Ibid.,
existence of, and rhetorically to refuse to reproduce dominant myths and misconceptions which inform the ‘public’s perception of immigrant criminality’. They also acknowledged the limits which ‘polemic and partisan’ debate on this issue place on policy discussions, development and decision-making. The difficulty, according to Burstein, was that few researchers have avoided the tendency to approach the issue from either the ‘immigrants as victims of crime’ or the ‘immigrants as perpetrators’ of crime. The promise of a new approach was quickly dashed when it became clear that the dichotomy was not to be unsettled by this conference, but rather would be more comprehensively reproduced; both sides of it were to be addressed, not just one. As put by Burstein, “This seminar will address both aspects of the issue...This comprehensive approach [is] reflected in the two-fold structure of the seminar.”

The conference was accordingly divided into two sessions: ‘immigrants as participants in crime’ and ‘immigrants as victims of crime’. In the first session, seminar participants heard from senior representatives of KPMG Security Inc. (a private security company), the Criminal Information Service of Canada (CISC, a national police organization), the Organized Crime Unit of CIC, a sociologist on the subject of gangs and a representative from the Dutch Ministry of Justice. In the second section, three academics made presentations on hate crimes, racism in criminal justice and legal pluralism. The seminar’s working groups were similarly structured by the victim/offender opposition. All workshops were open to all participants except one which was ‘open to law enforcement personnel only.’ The result was that very few enforcement officials worked with anybody other than other enforcement officials. Although there was a stated concern to avoid a we:they approach and to sidestep the limits of conventional oppositions and misconceptions, the very organization and structure of the seminar did little to unsettle conventional understandings and assumptions.

Another aspect of this seminar was the guiding and pervasive tendency to conflate and treat as one and the same immigration enforcement and criminal justice enforcement.

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*Ibid.*,
This was identified in the executive summary of the seminar as one of the ‘critical issues’ identified in the ‘enforcement’ working group: “There has been a general failure to distinguish between immigration enforcement and criminal justice enforcement. While there may be overlapping areas of responsibility, the two systems need to be distinguished from each other.” However, as has been argued in this thesis, there is a very good reason for the constant slippage between the two varieties of enforcement. Immigration law and policy has over the past decade been reconstituted as a primary crime control instrument. In the present analysis, there is little need to specify what agency is doing the enforcing as they are today both regarded as being in the same business of controlling crime and criminals in the interest of public order and safety.

**IX) ‘Good Guys’ and ‘Bad Guys’: The Entrenchment of an Enforcement Mentality Amongst Frontline Immigration Officers**

The incremental and systematic reconceptualization of immigration law and policy as a critical and central instrument of crime control is a process which took hold with the 1976 Immigration Act and has continued to the present day. The sustained preoccupation with exclusionary enforcement which this reconceptualization has both relied upon and reproduced has contributed to the entrenchment of an ‘enforcement mentality’ amongst front-line immigration officers. This is neither a new nor an uncommon concern. Indeed it is one that was raised frequently by representatives of non-governmental organizations during the course of the 1997-98 CIC Standing Committee Hearings. They were clearly dismayed that the recommendations made in the 1996 Tasse Report regarding this problem had not been taken seriously. In 1996, the enforcement mentality of the Enforcement Branch of CIC was identified as a serious problem which results in numerous infringements of people’s rights, inappropriate uses of coercion and intimidation, inhumane practices that are illegal, borderline legal, or merely underhanded. As noted in the Tasse report, “Removal officers often act as if they believed that

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100*CIC* Metropolis Project “Justice/Immigration Domain Seminar” Report 1997
all individuals under a removal order were dangerous criminals, liars and dishonest. This leads to bad attitudes and the improper treatment of people.” In response to the finding that there was an understanding amongst enforcement officers that they should do everything necessary to carry out a removal, and that there was little consideration given to ethics, the Tasse Report recommended a complete overhaul of CIC Enforcement’s code of ethics.

Immigration ‘enforcement’ consists of five main components: investigation, detention, inquiry, appeals and removals. There are over 550 enforcement officers across Canada who deal with immigration ‘violations and violators.’ According to Gerry Campbell, Assistant Deputy Minister, Operations, CIC, the Enforcement Branch of CIC “...is probably one of the most difficult and complex spheres of all CIC’s activities. High profile cases often involve deportations, security certificates, and legal challenges of refusals.”

Former frontline immigration officer, Lorne Foster, observes that “[t]here is no doubt that being on the frontline in the immigration business affects one’s view of the human panorama.” Foster’s description of the enforcement mentality shared by frontline officers nicely exemplifies this view:

To seasoned immigration officers the matter is clear: you either do the job of enforcement and control or you get out. There is no alternative or in between. For the frontliner, the big tribe always takes precedence over the little tribes; ...There are only “good guys” and “bad guys.” You do your damnedest to get the good guys in and get the bad guys out....This good-guy-bad-guy equation on the frontline...guides immigration

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102 Ibid.,

103 Gerry Campbell, Assistant Deputy Minister, Operations, CIC, Citizenship and Immigration Standing Committee Hearings, October 21, 1997:16

104 Foster Turnstile Immigration, 1998:24
officer’s conduct beyond explicit rules.”

This enforcement mentality results in many questionable practices. Indeed, the Tasse Report itself was commissioned in October 1995 by the Minister of Immigration in response to one such practice that had been made public a month prior. A former police officer and manager of CIC in Winnipeg was accused of falsifying deportation papers to expedite the removal process. While the CIC advised the RCMP that the story “did not merit a formal investigation”, the RCMP went ahead with its own internal investigation to find out why the case had not been acted upon. They also initiated a criminal investigation. It was after this incident that the Minister appointed Tasse to review removal policies, observing that: “[I]t’s not an easy job but...forgery is unacceptable and should never be condoned.”. Subsequently, two other immigration officers from Mississauga, one of whom was also a manager, were charged with forging a document also to expedite removal.

No charges were laid against the Winnipeg Immigration manager and in March 1996, the criminal charges against the two Mississauga immigration officers were dropped. While initially the Crown had wanted a conditional discharge and community service, one of the officers charged had been promoted while the case was being handled. Because her posting was in Tokyo and she could not therefore be monitored, the crown considerately agreed to drop the criminal charges and instead she and her colleague were charged under the Immigration Act with ‘making a false statement.’ According CIC, the officers were also ‘disciplined’ by the department; in fact they received a several day

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105 Ibid., 30
106 CBC, ‘The National’, Transcript from September 6, 1995
107 Globe and Mail, “RCMP Probe Forgery. Deportation Staff to be Questioned”, October 10, 1995
108 Ibid.,
Immigration lawyer David Matas describes the enforcement mentality as an organizational and systemic problem that issues in part from the dual purposes of the Immigration Act, inclusion and exclusion, admissions and enforcement:

If you look at the Act [it] serves two purposes. It is to allow some people in and to keep other people out...the department is bicephalous. But the individual people, they only perform one function. There's an admissions side and an enforcement side. The enforcement people develop a group ethic and they tend to support one another, they tend to agree with what they are doing, they attend to trade practices.¹¹⁰

This process of sub-culture formation entails a shared perspective that informs the ethic and the practices. In the case of the 'enforcement side', this content resembles those now fabled days of the wild west; there are 'good guys' and 'bad guys', cops and criminals, borders and badges, cuffs and shackles, cells and exercise yards;

...the custodial 'feeling' or 'desire' of the frontline immigration officer is to wrestle the bad guy to the ground right at the nation's turnstiles, take him for a spin and send him home...Despite all the fine print and officialese, seasoned frontline immigration officers are really only concerned with one thing - rooting out the bad guys; everything else is bureaucratic minutiae and 'small potatoes' and not really worth worrying about.¹¹¹

This view is not a secret; as observed by Matas: “The problem is that...policy is administered by people who see themselves as protecting Canada's borders. They see everyone in front of them as trying to trick and cheat their way into Canada. They're very hard, and in some cases much too hard.”¹¹²


¹¹¹Lorne Foster Turnstile Immigration, 1998:30

¹¹²David Matas, Citizenship and Immigration Standing Committee Hearings submission, March 25, 1998
Arguably, for all intents and purposes, the perspectives, objectives, powers and practices of immigration enforcement officers today bears a striking resemblance to those shared by police officers; a resemblance which most certainly underpins the tendency to conflate the two varieties of enforcement. There are, of course distinctions. Two are relevant here. First, immigration officers carry no firearms. However, as was reported when the CIC/RCMP Task force was first announced in July 1994, "[A]s part of the beefed up effort to catch foreign criminals, especially violent ones, many enforcement officers will be equipped with pepper spray, collapsible batons and police-style training."

These innovations when coupled with the already extensive powers of immigration officers (arrest, search and seizure and detention) surely make the difference owed to the absence of guns less compelling. Second, the enforcement powers and practices of immigration officers as governed by the Immigration Act are not subject to nearly same degree of legal, organizational and public scrutiny as are those of police officers. This reality, as discussed in Chapter Two, has lead some critics to call for an external civilian review mechanism of enforcement operations and other measures to increase accountability.

X) Conclusion

The construction of a community founded upon the expulsion of textual outlaws...requires the establishment of borders and boundaries. Beyond the boundary can be identified the outlaws, within the boundary exist the members of the community, attempting to 'lead their lives free from fear and in relative security'...The localism of crime necessitates the nomadism of law's response. Locating crime, pinning it down, becomes a major preoccupation...Where crime is located, the border can be strengthened.

The degree to which criminality is a rhetorically powerful 'problem' in the governance of immigration is also evidenced by the existence and use of an important

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113 *Globe and Mail, "Immigration Squad Made Permanent"* September 9, 1995

114 *Young Imagining Crime* 1996:12
inclusionary discretionary Ministerial power: the discretionary temporary entry permit. The issuance of this (non-extendable) temporary permit under s.19(3) of the Act overrules any and all exclusionary decisions previously made allows a legally inadmissible person to be enter Canada for a period not exceeding 30 days. In this, it resembles a “merciful” application of discretion providing “relief” from the hard edge of the law. However, it is relief with a twist. Whereas inclusionary Ministerial discretionary power is most commonly associated with the granting of “humanitarian and compassionate” relief, this measure does not have anything explicitly to do with humanitarianism. Under s.19(3) of the Act, the discretion to issue a temporary entry permit is delegated to senior immigration officers and adjudicators. They are to consider three factors: 1) that the applicant is a member of an inadmissible class under s.19(2) of the Act; 2) that the purpose of the entry justifies admission; and 3) if entry is to be granted, appropriate terms and conditions are imposed for entry and for the duration of the stay in Canada.

What is of particular analytical importance with respect to this provision is that it is used to grant entry to criminals, even so called ‘serious’ ones. Clearly, the government’s prohibition against criminals is not a zero tolerance position, despite the rhetoric. The 1997 Ministerial report to the House of Commons on the issuance of discretionary entry permits, reported that over 4,000 permits had been issued in that year. Of those, 1,497 were issued to people who were otherwise inadmissible for reasons of criminality. Of those 1,497, 395 of the crimes in question were described as “serious”.115 In the 1997-98 Citizenship and Immigration Standing Committee Hearings, this practice was the cause of considerable contention. The Reform Party of Canada sought to have a motion passed requesting the names, crimes and countries of origin of these 1,497 people. This elicited much opposition from those who were concerned about the racist uses of such information as well as about privacy issues. For the Reform party, the issuance of discretionary Ministerial permits to criminals brings the integrity of the system into question and casts doubt upon the government’s commitment to cracking

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115Citizenship and Immigration Standing Committee hearings, June 11, 1998:6, 9-41
down on criminals.

For this author, however, the issuance of these permits indicates the degree to which the problem of criminality, along with the myriad of interventionist techniques which it justifies, is discursively produced. The official and political representation of immigrant and refugee crime and criminality is for the most part, unwavering in it condemnation. The Ministerial granting of relief to criminals is seemingly inconsistent with that condemnation. It has been seen time and time again that humanitarian notions of mercy or relief are consistently 'trumped' by criminality/danger discourses. This practice indicates a crack in the constructed armour. A quiet, backdoor provision which concedes that 'criminals' are not always undesirable, and that strict hard-lined prohibitions against criminal immigrants, while publicly important, are in practice are not as definitive as the rhetoric implies.

On yet another analytical level, the issuance of these discretionary permits is consistent with the form of sovereign power employed against undesirable and undeserving non-citizens in the context of contemporary immigration penalty. The sovereign’s power to be merciful necessarily accompanies the sovereign power to exact bodily punishment. Like the sovereign of the middle ages, the Minister of Immigration (and her delegated officials) are present,

...not only as the power exacting the vengeance of the law, but as the power that could suspend both law and vengeance. [the sovereign] alone must remain master, he alone could wash away the offences committee on his person; although it is true that he delegated to the courts the task of exercising his power to dispense justice, he had not transferred it; he retained it in its entirety and he could suspend the sentence or increase it at will.\(^\text{116}\)

The 1990s have witnessed an unprecedented preoccupation with crime and criminals in the field of immigration. In cooperation with a vast array of ‘partners’, CIC has pursued a systematic and comprehensive agenda to get tough and crack down on

\(^{116}\text{Michel Foucault, }\textit{Discipline and Punish: The Birth of the Prison}, \text{ New York: Vintage Books, 1979:53. This understanding of immigration penalty as contemporary sovereign power is elaborated and exemplified in the following chapter.}\)
criminal immigrants/refugees. The ‘criminal immigrant/refugee’, as constructed over the 1990s, threatens the security of Canada, the efficiency of the free-market economy, the integrity of state systems, and the health and safety of Canadians, to name more significant threats posed. The magnitude of the problem and the seriousness of the threat is not evidenced by any consistent or reliable statistics about the actual size of the ‘foreign crime problem’ in Canada. Often the subject is raised with the official disclaimer, ‘we’re not talking about big numbers but...’ The image of the ‘iceberg’ used in relation to the triad threat is illustrative in this regard in that it is evocative of a massive, yet largely *invisible* danger. Indeed, one of the difficulties in approaching this issue is that the apparent absence of the problem is itself used as evidence that the enforcement people are doing their jobs well and that they must continue to be supported lest the thin blue line dissolves and disorder reigns.

However, from the analytical perspective developed here, the magnitude and seriousness of the ‘problem’ as it has been constituted over the 1990s is, in fact, evidenced by the extent to which it has been acted upon legally, politically and socially and the number and range of agencies, agents and resources that have been enlisted in the ‘fight’ against it. From this perspective, there is little question that the ‘problem’ of criminality has become the central preoccupation and justification of exclusionary immigration policy in the 1990s. It is in this sense that this chapter has proposed that immigration law and policy is today a central and largely taken for granted mechanism of national crime control; that exclusionary immigration in the 1990s is ‘governed through crime’.

One further distinction between immigration enforcement and criminal justice enforcement needs to be addressed. Criminal justice enforcement is guided by the socially, politically and legally sanctioned objective of punishment. Criminals are caught and punished. Immigration enforcement on the other hand has nothing officially to do with punishment. As discussed in Chapter Two, detention and deportation and related enforcement processes and practices are constructed as straightforward administrative measures underpinned by notions of state sovereignty and territorial rights. Thus, while
immigration enforcement may look like criminal justice enforcement and while it may be experienced as punishment, it is neither. At least not in its representations. The following chapter thesis turns to a detailed examination of just what immigration enforcement looks like and just how it is experienced in the particular context of detention.
Chapter Eight

Detention and Deportation:
Sovereign Power, Carceral Conditions and Penal Practices

Arrest is the Political Art of Individualizing Disorder

I) Sovereign Penalty: The Death of Michael Akhimen in Immigration Detention

On December 17 1995, 39 year old Michael Akhimen’s lifeless, naked body was found in a bathtub filled with water; he had slipped into a coma from which he did not awake. Akhimen was a Nigerian refugee seeking protection in Canada. He died in the ‘Celebrity Inn’ Immigration Holding Centre. Shortly before his death, Akhimen had written the following words to Immigration officials: “[I would rather] die in Nigeria for a reason than waste away in [detention in Canada] when I had done nothing wrong.”

Michael Akhimen had become increasingly unwell while in immigration detention. His pleas for medical attention were met with derision and disbelief by the facility’s security guards. On several occasions he had been placed in solitary confinement after verbal confrontations with the guards. Twice before his death, Akhimen had been found unconscious by security guards in this segregated room.

While in detention, Akhimen suffered from nausea, dizziness, fuzzy vision and fatigue. He lost weight and was having difficulty eating solid foods. Akhimen made 12

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2 Lawyer Chile Eboe Osuji from the Nigerian Canadian Association represented Akhimen at the Coroner’s Inquest. He presented these details of Akhimen’s case in his deputation on detention for members of the Inter-American Commission on Human Rights in Toronto: October 22, 1997

3 NOW “Guards Ignore a Dying Man’s Cry for Help” Vol.15, No.43, June 27-July 3. 1996

4 Ibid.,
written requests for medical treatment, and many verbal ones. He even offered to pay for a check-up with his own money. He was either ignored or disbelieved. On the one occasion that he was seen by the doctor at the centre, the doctor had found nothing to be seriously wrong with him, although no tests were carried out to confirm this conclusion.

After his death, it was determined that Akhimen had been suffering from a diabetic disease (‘diabetic keto acidosis’).

In frustration and desperation, Akhimen indicated that he would rather return to Nigeria than remain in detention in Canada and he withdrew his refugee application. His return was further delayed, and his detention prolonged, because CIC had lost his birth certificate, seized from him upon his detention.

On December 17th, Akhimen asked security for some water. When they did not bring him any, Akhimen went without security escort to the kitchen to get it himself. Upon finding him outside of his room and without security escort, guards forcibly returned him to solitary confinement and left him there. Shortly thereafter Michael Akhimen, alone and still in solitary confinement, slipped into a coma, and died.

Michael Akhimen had sought protection in Canada in accordance with national and international human rights law. His claim to be, a ‘deserving victim’ was doubted by immigration officials. As a direct result he was subjected to coercive sovereign power and penalty; power which, through detention and deportation, restrains, subjects and ultimately expels the very bodies of sovereign transgressors. This sovereign penalty which operates in the context of exclusionary immigration law and policy continues to be distinguished from punishment; a distinction which serves to protect its coercive and

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5 Osuji, deputation on detention for the Inter-American Commission on Human Rights, Toronto: October 22, 1997

6 NOW “Guards Ignore a Dying Man’s Cry for Help” June 27-July 3, 1996

7 Amnesty International Human Rights Report 1997

8 NOW “Guards Ignore a Dying Man’s Cry for Help” June 27-July 3, 1996

9 Osuji, deputation on detention, October 22, 1997
punitive operations from serious judicial, political and public scrutiny.

Michael Akhimen's death was the subject of a coroner's inquest. It ruled that Michael Akhimen died of natural causes and did not address the harm of solitary confinement. It held that it was not its place to comment on immigration policy and practices, and it therefore ignored the state sanctioned punitive and coercive circumstances and practices which had, at the very least, exacerbated Akhimen's suffering before he died and at worse had actually contributed to his death.10

If judged undesirable for reasons of criminality, non-citizens are held in provincial and federal correctional institutions. If criminality is specifically not an issue, non-citizens are detained in immigration holding centres. In the United States, as in Canada, airport motels have been used as holding centres. Michael Akhimen died in the 'Celebrity Budget Inn' in Mississauga. That sovereign power operates today in motels and not in the town square reflects the degree to which the coercive edge of sovereign power has been reconfigured in accordance with the discursive influence of liberal humanitarian and legal influences. Indeed, there is little doubt that had Akhimen's final days been a matter of public spectacle, the public would have opposed it, at least there certainly would have been no cheering. However, the extent to which the 'Kafka' hotels have been modified and operate in accordance with 'medium' security carceral conditions speaks to the limits of these mitigating discourses in altering the fundamentally punitive and coercive nature of the sanction imposed. Indeed, the relatively hidden nature of sovereign penalty in this area contributes to and exacerbates the continuing punitive and coercive conditions of immigration detention.

10NOW "Guards Ignore a Dying Man's Cry for Help" June 27-July 3, 1996
II) The ‘Celebrity Inn’ Immigration Holding Centre

"Travellers Under Cloud Stay at the Inn of Unhappiness"

Welcome to the Celebrity Inn - an Immigration Holding Centre. In bureaucratic parlance. In reality, it is an immigration jail for the unlucky, the fraudulent and the suspect.  

In the United States, hotels which double as immigration holding centres are commonly referred to as “Kafka motels”  

The designation is evocative. Perhaps the most enduring feature of Franz Kafka’s writing is his powerful depiction of the absurdly coercive qualities of modern bureaucracy. The main character of his novel, The Trial, is quite literally a ‘prisoner of administration’. He is unable to learn anything about the charges against him and his very life and liberty is in the hands of faceless and anonymous accusers. Significantly, he is known only as ‘K.’, his identity irrelevant in the maze of mysterious and coercive workings of a strange punitive administrative system. While the workings of this system are mysterious and incoherent, its coercive power is real and its punitive impact profound.

The ‘Celebrity Inn’ in Mississauga is Ontario’s own Kafka motel. ‘Celebrity’, the immigration detention centre is located in one wing of the fully functioning and busy airport motel, the Celebrity Budget Inn. Conveniently located less than a kilometre from Toronto’s Pearson International Airport, Celebrity Inn promises to “treat all guests as celebrities”. Kafka couldn’t have said it better.

There are two entrances for those who stay at the Celebrity Inn, one for those who deserve to be welcomed and one for those who do not, one for those who can leave freely and one for those who cannot, one for those who are treated like criminals and one for those who are not. At the Celebrity Inn the included and the excluded bunk in different

11Globe and Mail, December 28, 1995

wings of the same motel. This illustrates quite dramatically the contrasting destinies of those deemed through the operation of discretionary immigration powers to be deserving and/or desirable and those deemed otherwise.

As already mentioned, individuals whose cases involve criminality are *not* sent to Celebrity but to provincial criminal justice 'correctional' facilities. This makes detention at Celebrity a particularly interesting and analytically revealing case. CIC's 'holding' centres are specifically designed to accommodate *non*-criminals. Thus while one might expect that those held on immigration hold in more secure correctional institutions for reasons of criminality would likely be subjected to the coercive and punitive dimensions of criminal justice incarceration, 'temporary holding centres' which are specifically for detaining non-criminal immigration cases might reasonably be expected to operate under a different, non-carceral, regime. However notwithstanding the absence of 'criminals', and notwithstanding official declarations to the contrary, immigration detention - even in a 'holding centre' for non-criminals located in a motel - is a distinctly carceral and penal experience.

The distinctions between immigration detention and deportation and criminal justice incarceration hinge centrally on the concept of punishment; immigration 'administers' offenders whereas criminal justice punishes them.\(^\text{13}\) It is however telling that despite this longstanding legal distinction, many people, including the Minister of Immigration\(^\text{14}\) and one of the members of the Immigration Legislative Advisory Group, are a little unclear on this point. Indeed even 'experts' confuse the objectives of immigration detention and criminal justice incarceration; "...we use detention punitively but we don’t use it productively...Its counter-productive, *and punitive is only one*

\(^{\text{13}}\)The legal distinction between immigration detention and deportation and punishment is discussed in Chapter 2.

\(^{\text{14}}\)As mentioned in Chapter 2, Minister of Immigration, Lucienne Robillard, stated explicitly during the 1997-98 CIC Standing Committee hearings that punishment was but one of the purposes of detention.
purpose, when it ought to be multi-purpose.”

Clearly, the emergence of immigration law and policy as a major mechanism of crime control, the related proliferation of crime control enforcement powers, practices and attitudes, the increasing currency of deterrence rationales in this field and the criminalization of new immigrants and refugees have all contributed to the blurring of this abstract legal distinction. This distinction disintegrates further when one considers the actual carceral conditions and penal practices of immigration detention and deportation.

i) Carceral Conditions

The presence of a medium security detention facility in the isolated rear wing of the Celebrity Budget Inn would likely come as a surprise to most of Celebrity’s paying customers. From the main entrance to the Inn, there are few visual clues that it doubles as a medium security detention centre. Around the side of the building, a keen observer might notice a surveillance camera mounted on the outside wall, just above a steel door entrance with a coded locking mechanism just beside it. This is the visitor’s entrance to the detention facility. It is permanently locked. To enter, visitors ring a buzzer and their image is recorded and transmitted to a security officer within who may then deactivate the lock and allow entry.

The door opens into a large, dingy, yellowish room which is empty of furniture except for the chairs which line the walls. There is another surveillance camera and a pay phone in this room. Apart from posted notices which detail certain institutional regulations regarding visitation, there is no other printed public information available here. One corner of this room has been sectioned off and a security guard permanently posted behind fortified plexiglass acts as the facility’s ‘visits’ officer’. Just behind this security post is the ‘detainee visiting area’ in which detainees sit at cubicles and meet their visitors through plexiglass barriers and communicate through a telephone. There are

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15Sue Davis, Member of ILRAG, CIC Standing Committee Hearings, February 25, 1998:8
twelve visiting ‘stations’.

In order to enter the ‘inner’ regions of the centre, the locks on two more steel doors need to be deactivated by security. A metal detector lines the frame of one of these doors. Immediately on the other side are blue tiled stairs which lead up to the second floor of the ‘detention wing’ of the Inn. It is indeed a very gloomy place; dim lighting, non-descript beige/brown walls, long empty corridors. It is exceptionally clean; not new, nor necessarily in good repair, but clean. Celebrity, the detention centre, is serviced by the cleaning staff of Celebrity, the hotel. The detainees rooms and every floor of every room is cleaned daily, in the winters sometimes twice or three times because of the snow and salt from outside. The disinfectant smell of ammonia and cleaning fluids hovers throughout. The walls, inside and out, are frequently painted. The air quality within the facility can only be described as terrible due to the permanently sealed windows and lack of ventilation and fresh air circulation.  

Located at the top of the immaculate but gloomy stairway are the separate entrances to the male and female ‘dining’ and smoking rooms and the cafeteria style kitchen. A long, dimly lit motel hallway leads away from the dining rooms to the detainees rooms. The sex segregated dining rooms are also used during the day for scheduled ‘telephone time’. The men’s area has 7 free phones for local calls and 2 pay phones, the women’s has 4 free phones and 1 pay phone. There are security posts at each end of the hallway, and at each entrance of the dining areas. There are surveillance cameras in the hallway and in each of the ‘common’ areas. Both dining areas are brightly lit by natural light; windows sealed with ‘lexon’ (a high quality plexiglass) line their outside walls. The windows in the men’s area look out onto Airport Road and the Airport

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16The air quality at Celebrity has been frequently raised as a matter of concern. In 1997, the Inter-Church Committee on Refugees issued a report after being given a tour of Celebrity. The report raised many items of concern relating to health and safety standards at the facility, including that of poor air quality. Legal support for criticisms of immigration detention is commonly sought in International Treaty Standards, for example the poor air quality at Celebrity contravenes the UN Standard Minimum Rules for the Treatment of Prisoners. (See fn.47)
Cargo bay. The men's dining area is considerably larger than the women's. In both, long cafeteria style tables occupy most of the floor space. A bookshelf in the corner of each room (the 'library') holds dog-eared, second hand and multi-lingual books donated by non-governmental organizations. Posted notices in each room provide a few phone numbers of frequently needed agency contacts (legal aid, a couple of metro shelters, embassy numbers), detail emergency procedures (fire) and other regulations (eg. "luggage, money may only be accessed between 1800 to 1900 hours, 6-7 pm unless otherwise specified"; nurse and doctors hours, visiting hours, phone messages, CIC 'Rules for Detainees'), and provide a daily listing of court dates.

The immigration officials who run the facility, Enforcement Detention Officers (EDOs), and their support staff, work primarily out of three rooms, the entrance to which is located kitty corner from the dining areas. A security officer is posted outside of their door, which is usually closed. It is here that the administrative work of the facility is done. The resemblance of the role of Celebrity's EDOs to that of correctional officers is striking. EDOs wield an enormous amount of discretionary power over detention and detainees, including the power to overturn an enforcement decision to detain and replace it with their own decision to release within the first 48 hours of detention. In addition to admission and release powers, the EDOs at Celebrity are responsible for every aspect of the daily administration of the facility; from managing contracts with private suppliers (security\textsuperscript{17}, hotel\textsuperscript{18}, medical\textsuperscript{19}) to hearing and investigating complaints to taking

\textsuperscript{17}CIC contracts a private security company to guard the detainees. The current contract is held by Wackenhut Security Inc., an American company which specializes in prison security.

\textsuperscript{18}In 1997, CIC signed another three year contract with the proprietor of the Celebrity Budget Inn. Since January 2000, the contract is renewable every 6 months. Plans are in the works for the purchase by CIC of a new, centralized detention centre in Ontario which would be entirely administered by CIC. For this reason, in January 2000, CIC has moved to six month renewable contracts with the Celebrity Budget Inn. (Interview with SIO at Celebrity, February 3, 2000)

\textsuperscript{19}CIC contracts the part-time services of a community based doctor and 2 nurses. (Ibid..)
disciplinary action against difficult detainees. In these three rooms, phone calls are made, interviews carried out, reports completed, statistics generated and photocopies made. In 1997, a rather eerie representation of the increasingly equivalent roles and powers of immigration and law ‘enforcement’ was located in CIC’s photocopy, fax and supply room - a toy gun and handcuffs sealed in clear hard plastic with the direction to “break plastic in case of emergency.”

Across from the Immigration office is the ‘children’s playroom’. This room was created in response to pressure from the Toronto Refugee Affairs Council (TRAC) concerned about the frequent presence of young children in Celebrity and the absence of any special programs to address their particular needs. The children’s playroom is empty of furniture, miscellaneous toys litter the floor: a plastic slide, a rocking horse, a ‘make-up’ station. It is not the practice to detain young children. They are there with their detained parent(s) as ‘guests’ of Immigration.

The remaining rooms down the second floor hallway are the women’s accommodations. The men’s rooms are in a separate wing of the Inn. There used to be several ‘family’ rooms in the women’s wing where families were permitted to remain together, but this practice was eliminated when “a few poorly behaved detainees spoiled it for everyone.” Families may still eat together and spend time together in a designated ‘family room’, but husbands/fathers now all sleep in the men’s wing and children remain

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20 As observed during my field work at the ‘Celebrity’ detention centre between August 1997 and June 1998. During this period, I volunteered as the on site case worker for the Toronto Refugee Affairs Council (TRAC). TRAC has an agreement with CIC which provides office space and telephone access for a case worker who provides information and referral services to detainees. The case worker is specifically prohibited from performing advocacy services, they are only there to ‘facilitate access to the system’. I performed this function for TRAC, two days a week for 9 months. I am particularly grateful to Fred Franklin of TRAC for having facilitated and supported my work at Celebrity, and to the CIC officials at Celebrity who for the most part responded to my queries and tolerated my curiosity while I was there, and who were open and forthcoming subsequent interviews. See footnote 25 for additional information regarding TRAC.

21 Interview with SIO at Celebrity, Feb.3, 2000
with their mothers in the women’s wing. All rooms have two single beds, a dresser, a cable television and an off-suite bathroom. While there are glass mirrors on the walls, and there are some light bulbs in fixtures, bars house the non-functioning airconditioners and the doors have been removed from the room’s closets.

Escape, not violence, is the primary security concern.22 Each room has an outside window, which is sealed with reinforced plexiglass. Beds have also been modified; the ordinary, iron rail bed frames were replaced because “people were ripping them out, using them as pry bars and weapons, so we got rid of that.”23

On the first floor of the detention wing, the rooms which line the hallway are used for a variety of purposes: several are designated as ‘meeting rooms’ for detainees and their lawyers or other ‘professional’ contacts; in 1999 several were adapted to function as ‘video-conferencing’ detention review rooms where detainees now present their case for release, via video, to Immigration adjudicators. Until recently, detainees were transported off site to attend these reviews. They now are done from Celebrity with the technology of video-conferencing. This manner of conducting the reviews has been criticised for further undermining a detainee’s ability to make their case persuasively. Eusavio Garcia, part time case worker for TRAC at Celebrity and Refugee and Settlement Worker for the Quaker Committee for Refugees, observed that because so much of the detention release decision depends on the perceived ‘credibility’ of the detainee, the disconnected and impersonal medium now employed presents a further obstacle to detainees. Another consequence of this initiative is that because lawyers and other representatives of the detainees do not have to be physically with their client during the proceedings, many are choosing not to make the trek out to the airport location of Celebrity. This separation of client and counsel presents a further disadvantage of this practice.24

22Ibid.,

23Ibid.,

24See chapter two for a discussion of these detention reviews. Interview with Eusavio Garcia, part-time TRAC case worker, February 3, 2000
In addition to the video-conferencing rooms, the facility's doctor and nurses administer health care services out of two rooms; there is a detainees' 'baggage' room; a room for the Toronto Refugee Affairs Council (TRAC)\(^25\) caseworker; and finally there are several rooms which are used for the purposes of segregation and solitary confinement for health or security/disciplinary purposes. It was in one of these rooms that Michael Akhimen died.

The beige and brown hallway on the first floor of the detention wing leads ultimately to the security headquarters of the facility. Three rooms, the main security (or 'supervisor's) office, the 'admissions and discharge' office, and the 'holding room', form a triangle at the end of the hall. The Supervisor of Security and the Head Guard are permanently posted at the main security desk. The supervisor's desk faces a wall of television monitors which are continuously transmitting the surveillance images generated by the facility's five internal and seven external surveillance cameras.\(^26\)

Across the hall from the security office, is the detainee 'holding room'. Of all the rooms in the Inn, this room most closely resembles and evokes the popular image of a police cell. It is small, no more than eight to ten feet square. It is a dirty shade of pale, institutional yellow. It is lit by florescent lights. There are no windows. Wooden benches are bolted to the walls. There is a good size plexiglass window in the door to permit viewing of the room from the outside when the door is closed. Once closed, the door

\(^{25}\) The Toronto Refugee Affairs Council is a non-governmental group that has maintained a presence at 'Celebrity' since 1985. TRAC caseworkers posted at the detention centre work interview detainees, assess their needs, provide information and make appropriate referrals to community and legal contacts. TRAC also holds 'detention review seminars' to provide information and guidance relating to the detention review process. CIC reports being pleased to have TRAC on site and leaves all programming and special service delivery to TRAC's volunteers, for example English as a Second Language, Spiritual Counselling, Art Therapy, Assistance in filling out official forms. Sadly, in February 2000, these initiatives had fallen to the wayside due to TRAC's severe resource limitations. The implications of this are serious, as put by the Celebrity SIO, "If TRAC doesn't do it, then it isn't done." (Interview February 3, 2000)

\(^{26}\) Interview with SIO at Celebrity February 3, 2000
cannot be opened from the inside.

The third room in the security triangle is the Admissions and Discharge office. The safety deposit boxes for the valuables and money of the detainees is located in this room. Just beyond these 'rooms is the third entrance of the Inn, the detainees’ entrance. This opens into the ‘loading and unloading’ area of the compound which forms a corner of the detainees’ ‘exercise yard’. The ‘loading and unloading’ area is just inside the constantly monitored double gate through which detainees are delivered to or transported from the facility in customized, dark blue Immigration Enforcement vans. After being ‘unloaded’, detainees are delivered under escort through the detainees’ entrance to the main security desk and the admissions and discharge security officer.

The ‘exercise yard’ used to be the parking lot for the motel rooms in this wing. It measures about 25 feet wide by 100 feet long. It is empty save for two picnic benches which are bolted to the pavement and a poorly situated basketball hoop. It is surveilled by several cameras mounted to the outside walls of the Inn. Cigarette butts quickly accumulate on the cracked asphalt. Other than the basketball hoop and the occasional soccer ball, the only provisions for those detained to exercise are a stair-master and an fitness bike located in the children’s playroom.

The ‘exercise yard’ and the loading and unloading area are encircled by two wire fences. The outside fence is twelve feet high and is capped with barbed wire; of the ‘ordinary’ as opposed to the ‘razor’ variety. The inside fence is eight feet high with “…an inward leaning overhang which is covered with mesh so that you can’t get your fingers through it and climb up it.”27 This recently added innovation was a response to the proven ability of a certain number of detainees to climb up and over the previously existing single barbed wire fence with no mesh overhang; “…we’d have these athletic young guys who could get over anything.” Reportedly many did. However, since the modification, nobody has gone over.28

\[27\text{Ibid.},\]

\[28\text{Ibid.},\]
CIC contracts a private security company to police Celebrity. The current 2 year contract is with the Wackenhut Security Company, an American company that specializes in prison security. During the day, there are 14 guards on site, including 3 drivers, the Security Supervisor, the Head Guard, the Visits Guard, and the Admissions and Discharge Guard. During the evening and midnight shifts, the number of guards on site is reduced to 9 or 10. CIC provides Wackenhut guards with a 5 day specialized training session. Guards, who are paid about $9.50 an hour, must also pass a minimally demanding physical fitness test. They receive basic defence training, training on the proper use of body restraints and training on the security Post Orders. While guards are instructed to respect the principle of non-discrimination, they do not receive any form of cultural sensitivity training from CIC.

Section 2.06 of the 1996 Post Orders, summarises the responsibilities of the security contractor:

- Supervise persons being detained.
- Admit/release detainees from the Holding Centre.
- Provide information to new detainees concerning rules of the Centre.
- Take control and be responsible for the personal effects of detainees.
- Order meals and verify delivery.
- Conduct frequent and unscheduled room checks.
- Admit visitors and ensure that visitors are not in possession of weapons, alcohol etc.,
- Obtain medical treatment for detainees as required.
- Evacuate the Centre in the event of an emergency.
- Operate metal detecting devices.
- Complete reports.
- Transport all persons under order of detention as requested by Citizenship and Immigration.
- Prevent escapes.
- Apply restraints.

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29 Interview with SIO at Celebrity, February 3, 2000

30 CIC, Detention and Removals, Mississauga Immigration Holding Centre Post Orders, February 29, 1996.
ii) Penal Practices: The Coercive Subjection and Control of Unruly Bodies

The technologies and practices employed by CIC and the private security company in the running (policing) of immigration detention are those conventionally associated with, and historically employed in, criminal justice punishment. That is to say, the ‘how’ (the means, the strategies, the practices, the ‘technologies’ of governing) of both criminal justice imprisonment and immigration detention are, to a significant degree, the same. However the underlying rationales for the employment of these coercive practices in the fields of criminal justice and immigration are vastly different. The ‘humanizing’ influences which in the nineteenth century reformed, at least to a degree, the prison system in order to transform the character of prisoners left untouched and unchanged the application of the essential sovereign nature of immigration penalty. While liberal legality has influenced the development of policy and practice in the coercive governance of immigration detainees and deportees and the manner and ‘form’ in which penal technologies and practices are employed, the object of the actual penal practices employed is to achieve bodily subjection, control and ultimately expulsion; no more, no less.

In the Celebrity detention centre, these procedures and practices are governed by the above cited Post Orders. The ‘Post Orders’ detail CIC’s operational procedures relating to the security aspects of immigration detention. CIC admits the term ‘post order’ is a misnomer as it implies a public posting of the ‘orders’ which govern the facility. In fact, they are more accurately described as the Department’s instructions to the Security personnel that police Celebrity. In true Kafka fashion, these ‘Post-Orders’ are not in fact publicly ‘posted’ and accessible to all, but rather are chained to the security posts in the facility and are only accessible to Security. In February 1996, under some pressure from the public criticism and scrutiny that was sparked by Michael Akhimen’s death, the Department transformed previously looseleaf, largely ad hoc departmental memorandums and directives regarding security matters into a sirlox bound mimeo publication. The

31Interview with SIO at Celebrity, February 23, 2000
1996 *Post Orders* responded to the recommendations made by the Coroner, by detailing and strengthening the sections relating to the provision of health care within the facility.

**a) Cuffs and Shackles**

*Handcuffs are revealed not merely as the technical instruments of security...Requiring a deportee to travel in handcuffs confirms that it is the body which is at stake here, the unruly body identified as the illegal immigrant.*

The use of body restraints on detainees is standard policy and practice during transport to and from the Celebrity detention facility. In particular, handcuffs and leg irons or shackles, constitute the ‘standard’ from which deviations may arise. Exceptions may be made with the preauthorization of the Enforcement Detention Officer (EDO) or the Security Supervisor. In general, reduction of the standard uses of body restraints may be made in the case of ‘children, old people, very pregnant women, disabled persons or person’s who should not be handcuffed for a specific reason.’

The standard must be applied in full in the case of male detainees being transferred to or from a more secure correctional facility (jail). In such cases, handcuffs and leg irons may be further supplemented by the use of a ‘transportation belt’ if the guards judge that there is a risk of violence. A transportation belt works to secure handcuffed wrists at the waist level thereby eliminating the danger of the person using their cuffed wrists as weapons. Exceptions to this standard must be approved by a Senior Immigration Officer. Female detainees being transported from a correctional facility are also always cuffed but are spared the leg irons unless specifically directed by the EDO or the Security Supervisor. The use of these traditional penal instruments of bodily control

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32 *Post Orders* ('Restraints' s.12 and 'Transportation' s.11)

33 Alison Young *Imagining Crime* London: Sage, 1996:71

34 Interview with SIO at Celebrity, February 3, 2000

35 The relevant sections of the *Post Orders* for these regulations are: ss.11.08, 11.13 and 11.20
is guided in the context of immigration detention by the principle of 'safe restraint'\(^36\) and is justified by reference to the need to protect safety and prevent escape.

Still, handcuffs, leg irons and transportation belts cannot help but evoke images of criminal justice penalty and the forcible subjection and confinement of suspected criminal offenders. The physicality and brute forcefulness of these instruments of restraint are also powerfully reminiscent of medieval penalty, particularly when linked with the expulsion. Handcuffs and shackles are standard fare for deportees as well whose bodies are forcibly and physically subjected as part of the expulsion process. However, their power is not merely negative and repressive, to the contrary it is a 'productive force'. As Allison Young comments, the use of body restraints on detainees and deportees "is part of a programme...to produce docile subjects...to train the individual body, the social body and the nation." \(^37\)

This association of forced bodily restraint and expulsion with pre-modern and early modern sovereign modes of penalty (stocks and banishment) is heightened by tales of abuses and extreme bodily interventions which occasionally come to light. In 1990, there were reports of 'unco-operative' deportees who were forcibly drugged and sedated during their removal.\(^38\) Enforcement officers were also known to seal the mouths of particularly unruly and vociferous deportees with duct tape.\(^39\) In 1999, 5 'manacled and shackled' Nigerians were deported from Canada aboard a US Federal Service flight nicknamed 'Con Air'.\(^40\) CIC paid $4,800.00 (American) for each of the one way tickets, reportedly only a third of the cost of using commercial airlines.\(^41\) The U.S. leases planes

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\(^{36}\)Interview with Immigration officer at Celebrity, February 3, 2000.


\(^{38}\)Canada Sends Deportees Home Aboard 'Con Air'" *Globe and Mail*, January 20, 1999

\(^{39}\)Ibid.,

\(^{40}\)Ibid.,

\(^{41}\)Ibid.,
which are used in a fleet officially known as the “Justice Prisoner and Alien Transportation System”. The flights carrying ‘aliens and criminals’ are heavily guarded by armed U.S. Marshals:

Con Air is an Airline with a Difference. The standard operating procedure by the flight attendants - armed US Marshals clad in bullet proof vests - is to handcuff obstreperous passengers to their seats. Really disruptive ones have their handcuffed hands taped around tennis balls.\textsuperscript{42}

On their flight, the Nigerians were also ‘escorted’ (subdued, transported and guarded) by CIC Escort officers. While the use of ‘Con Air’ to deport the Nigerians was carried out ‘in utmost secrecy’, CIC officials later declared that it represented an “innovative method” of deporting “disruptive people” in an “economic and efficient” way. As evidence of the disruptiveness of the Nigerians in question, an immigration source stated that the Nigerians “...were kicking, scratching, fighting and spitting as they were being boarded.” All 58 passengers on this flight were described as criminals. According to CIC, the Nigerians “...had committed crimes ranging from theft and drug offences to assault and carrying a concealed weapon.”

The symbolic importance of the use of restraints on deportees is perhaps more forcefully illustrated by the following example recounted during the 1997-98 Standing Committee hearings:

The newspapers have reported actual cases where persons were drugged before being sent back without any medical supervision, or handcuffed for their return flight, or even put in leg irons....It is hard to forget the case of a young Dominican who was deported a short while ago from Canada. Despite the fact that both of his feet had been amputated, he was nevertheless handcuffed.\textsuperscript{43}

The symbolic and historical association of coercive bodily restraints with criminal, penal practices is deeply embedded and internationally understood. Criminals

\textsuperscript{42}Ibid..

\textsuperscript{43}Jean-Michel Montbriand, President, Association Quebecoise des Avocats et Avocates en Droit de L’Immigration, CIC Standing Committee Hearings, April 23, 1998:3
are handcuffed. Really dangerous criminals might be shackled and cuffed and belted. The people being transported to and from Celebrity are neither, yet in this important bodily respect they are acted upon as if they were criminals. State sanctioned, direct and physical subjection and control of bodies by force through the use of body restraints is universally associated with criminal justice enforcement. Their use in the non-criminal, administrative context of immigration enforcement both evidences and reproduces the association between immigration and crime control, immigrants and crime and the coercive edge of traditionally sovereign power which characterises 'immigration penalty'.

This point was voiced succinctly by Louise Hardy, Member of Parliament for the Yukon, during the 1997-98 Citizenship and Immigration Standing Committee Hearings:

The fact is....that they do shackle them, and they shackle them all the time...If there's no suspicion of them being criminals, I question why they should be there in a centre. Its called a detention centre, but I've been through a lot of jails, and its like a jail and it has the same security. It has more security than the jail in the Yukon. So these people are subjected to treatment as if they were criminals, whether they are or not.

For those being physically subjected, the use of body restraints is experienced as

44 While beyond the scope of the current analysis, it is nonetheless important to note that international legal instruments provide legal support for many of the criticisms levelled at immigration detention conditions and practices. For example, on the subject of restraints, lawyer David Matas points out that “people who are put in detention are typically put in handcuffs, chains and irons, even though it is against the [United Nations’] ‘Standard Minimum Rules for the Treatment of Prisoners’....”(CIC Standing Committee Hearings, March 25, 1998:13) CIC has recently acknowledged the importance of these legal standards and has incorporated them in their “National Standards and Monitoring Plan for the Regulation and Operation of CICs Detention Centres” (Draft copy, February 5, 1998). This document details all the different aspects of immigration detention and identifies the relevant international legal standards for each. These include relevant provisions of the Canadian Charter of Rights and Freedoms, UNHCR Guidelines on Detention of Asylum Seekers, the U.N. Body of Principles for the Protection of All People Under Any Form of Detention or Imprisonment and the above mentioned UN Standard Minimum Rules for the Treatment of Prisoners

45CIC Standing Committee Hearings, April 22, 1998:11
a distinctly penal practice; coercive, punitive, humiliating and undeserved. The official policy justification for this use of restraints stresses, in part, safety and security issues. However, significantly, it also recognizes the symbolic importance of their use:

The practice is that when people are being removed or transported for whatever reason outside of the centre, usually to a hearing and sometimes to removal, they will be handcuffed. It's a recognition that the people are in detention. Its partly related to safety and security issues. We do have, from time to time, people who do attempt an escape. Sometimes that escape will involve some violence. If we're going to maintain control of the people, we do use handcuffs. We recognize that being detained, which includes the use of handcuffs in those circumstances, is a serious issue. (my emphasis)

That immigration detainees are treated like criminals is clearly evidenced by the use of these conventionally penal, coercive instruments on the bodies of 'non-criminals' in the context of an enforcement oriented immigration 'penalty' that is anything but a 'purely administrative' proceeding. Indeed, the toy gun and handcuffs hanging in the Immigration office at Celebrity, surely an example of rather grim gallows humour, also indicates a rather dark and cynical understanding of the shared bodily objectives of immigration and law enforcement.

46 "Why do they treat us like criminals?" is perhaps the question I heard most frequently during my time at Celebrity as TRAC's on-site caseworker. The use of handcuffs was a constant focus of anger, bewilderment, humiliation and frustration. Of particular concern to the detainees was the use of handcuffs on mothers in front of their children. This concern, which was also voiced during the 1997-98 hearings, has been responded to in the forthcoming CIC Post Orders, which bans this practice. (Interview with SIO at Celebrity, February 3, 2000)

47 Neil Cochrane, Director Case Presentation, Enforcement Branch, CIC, April 22, 1998:12
iii) Coercive Regimes

2) Admission Procedures

The dark blue Immigration Enforcement van passes through the gate in the doubled, 12 foot high barbed wire fence. A surveillance camera tracks it as it enters the ‘loading and unloading’ area of the compound. The detainees being transported are ‘unloaded’ and escorted by guards into the facility. Body restraints are removed and detainees are placed in the ‘holding room’ where they are ‘frisked’ (‘pat’ searched). Their shoes are removed and checked, and a hand-held metal detector is passed over their bodies by a guard of the same sex. Any luggage is seized, searched (in the presence of the owner) tagged and stored in the permanently locked baggage room. All valuables and any money are recorded and locked in safety deposit boxes. If any identification documents are found in the possession of detainees, regulations detail which are to be seized and to whom they are to be forwarded. Detainees may bring clothes and other ‘non-threatening’ items to their rooms. They may keep up to 30 dollars on their person for their personal use. Detainees have access to their seized luggage and valuables between 1800 and 1900, or by special authorization.

New detainees are assigned a log number, a room number and the time of their admission is recorded. Security must ensure that each of the new detainees are provided with ‘...and allowed to read/view the rules of the Centre.’ Detainees are provided with two information handouts: ‘Rules for Detainees’ and ‘Information for Person’s Detained’. These do not contain the same information as the Departmental ‘Post Orders’, nor are they summaries of the Post Orders. The ‘rules’ provided to detainees are largely prohibitive and govern their behaviour while in detention. Items covered in the rules include the seizure of certain belongings, restrictions on mobility and movement, visiting hours, doctors hours, television volume controls, the expectation that detainees keep their

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48 Admission procedures are set out in s.4 of the Post Orders

49 The procedures relating to the transportation of detainees are found in s.11 of the Post Orders
rooms “neat and clean”, lights out at 11:30 pm, the presence of TRAC on site and the complaints process. It is important to emphasize that while Celebrity is not a jail, jail is never very far away for those in detention. Indeed, the spectre and ever-present threat of jail is a key and powerful technology of control at Celebrity; so powerful that it is explicitly detailed in the final and penultimate rule:

#14. These rules are designed for the safety, security and comfort of all persons in the Centre. You are expected to respect them. Disruptive behaviour, including damage of property, will not be tolerated. Such behaviour may lead to your transfer to a more secure detention facility.  

The ‘information’ provided to detainees outlines briefly the detention and release process and their rights under the law.

Before being escorted to their rooms, new detainees must be frisk-searched one more time. From this point on, detainees may not leave their room except under security escort and only for certain regularly scheduled and carefully coordinated and controlled movements and activities (meals, ‘fresh air’, ‘telephone time’, visitor’s hours), or with permission for special requests (visit with the doctor or a lawyer for example). Visits with other detainees in their rooms are prohibited.  

b) Restrictions on Movement

The movement of detainees within the facility is carefully coordinated and controlled by security. Detainees must have a security officer escort when being moved from one location of the facility to another. They must have special permission to leave their rooms at unscheduled times and if permission is granted, they must be escorted by a guard at all times. If a guard is not available for escort at the time of the request, the detainee is locked in the holding room until a guard becomes available. A minimum of

50 CIC “Rules for Detainees” Immigration Holding Centre (Mississauga)  
51 Ibid.,  
52 Post Orders, ss 8.00
one officer must escort a maximum of 5 detainees (the security officer must walk behind the group). More than 5 detainees must be escorted by 2 security officers (one in front and one behind) and "under no circumstances are there to be more than 10 detainees moved at one time." For 'mass movements' of detainees, such as that required at meal time, telephone time and fresh air time, 10 groups of detainees are moved at a time from security post to security post. The security procedures governing the movement of detainees and their supervision at meal times and fresh air time are particularly detailed and specific.53

c) Patrols, Checks and Searches

Floor patrols, outside patrols, room checks and room searches are carried out by security personnel on a regular basis.54 Floor Patrols must take place 'on an unscheduled basis', at least once every half hour. Room checks are also performed regularly. The specific provisions which detail the manner in which they should be carried out at night reveal there two functions: to confirm the detainee is both physically present and alive; "...shine a flashlight on the body of the detainee, to ensure that there is breathing movement."55 The section specifically warns against shining the light in the eyes of

53 Post Orders s.8.04-8.09 (‘Banquet Hall’) and s.8.10-8.19 (‘Exercise Yard) Other aspects of detainees behaviour are also regulated; for example 8-10 detainees must be seated at each table at meal times, no smoking is allowed during meal times, even in the smoking rooms, and detainees are not allowed to bring food back to their rooms. Detainees are not allowed to "touch the TV" in the dining rooms, channel selection and volume is "...under the control of the head guard.” The TV will be "OFF" during meal times. The Security Supervisor has the discretion to allow detainees to remain in the dining areas to "watch something special”.

54 These items are covered under s. 9 of the Post Orders.

55 Many of the sections of the Post Orders reflect the reactive process of rule-making at Celebrity; sections are added as problems requiring attention arise. The prohibition against shining a flashlight into the eyes of sleeping detainees is an example of this as is the rule governing the closure of blinds in the rooms of detainees. The windows of the men’s and women’s rooms face each other. There had been reports of rude and offensive
sleeping detainees. Outside patrols are conducted twice on the afternoon shift and four times on the midnight shift and guards are instructed to be on the look out for “suspicious persons, vehicles, property damage, noise, etc.” “Thorough” room searches are to be carried out at least three times a week, while the detainees are in the dining rooms. The searches are done by two security guards who are to record and/or seize anything “unusual.”

**d) Use of Force**

CIC staff and security personnel at Celebrity are governed by the relevant provisions of the Criminal Code of Canada regarding their use of force. They are empowered to use ‘necessary force’ to prevent an escape and/or to protect themselves against an assault. They are prohibited from using ‘excessive’ force, that is, force that is intended or is likely to cause ‘death or grievous bodily harm’.

**e) Punitive Measures**

The policing and control of detainees is also effected through disciplinary measures taken against disruptive or otherwise unruly detainees. When presented with a relatively minor disciplinary problem, the preferred initial action by the EDO is ‘counselling’ (“talking to the guy and finding out what happened, what the problem is and trying to resolve it”). If that doesn’t work, the EDO may confine the person in question to one of the ‘isolation/overflow’ rooms on the first floor for an unspecified length of time.

behaviour by the male detainees in full view of the female detainees. A rule mandating blind closure was subsequently adopted.

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56 *Post Orders* s.16.01

57 The relevant sections of the Canadian Criminal Code are set out in s.17 of the *Post Orders*: s.25 (Protection of Persons Acting Under Authority); s.26 (Excessive Force); s.34 (Self Defence Against Unprovoked Attack); s.37(1) (Preventing Assault) and s.17.05 (Rescue or Permitting Escape).

58 Interview with SI0 at Celebrity, February 3, 2000
time. While CIC is quick to point out that these rooms are identical to the accommodations on the second floor and that their doors are not locked, the fact remains that those confined in these rooms are confined alone and may not leave them.

The ultimate, and arguably the most powerful sanction available to the EDO with respect to a 'disciplinary problem' at Celebrity is to transfer the person to jail. The threat of a sanction - isolation or transfer to jail - is frequently employed to control unruly subjects. Actual transfer to a prison is generally assured in the case of a more serious 'disciplinary problem' such as posed by a violent or abusive detainee or someone who has attempted escape. In 1999, several people who were detained at Celebrity went on a hunger strike. They too were transferred to prison.  

In a rather strange and symbolically evocative arrangement, the isolation/overflow rooms on the main floor are used for both punitive/disciplinary reasons (solitary confinement) and for reasons relating to the health of detainees (quarantine). It is equally grim that the sanction of transfer to prison may similarly be imposed for either punitive/disciplinary reasons or for 'health and safety' reasons (detainees thought to pose a 'suicide risk' are transferred to prison).

iv) Daily Routines and Schedules  
The daily lives of detainees at Celebrity are organized by and revolve around various 'schedules': the daily time schedule, the visiting schedule, the baggage access schedule, the telephone time schedule, the medical services schedule.

a) Time Schedule

0700-0800 Breakfast

0800-0900 Detainees to be in their rooms

0900-1100 Telephone time and fresh air (weather dependent)

59 Interview with Eusavio Garcia, TRAC Caseworker at Celebrity, February 3, 2000

60 Post Orders, s.8.20
1100-1300 Lunch
1300-1400 Detainees to be in their rooms
1400-1500 Telephone Time
1500-1700 Detainees to be in their rooms
1700-1800 Supper
1800-2100 Detainees to be in their rooms and fresh air
2100-2200 Telephone time
2200 Detainees to their rooms
23:30 T.V.s off

b) Visitor’s Schedule

Visitation at the Celebrity detention centre is strictly regulated. Visits are permitted only between the hours of 9:30-11:15 am, 13:30 - 15:15 pm and 19:00 - 20:45 pm. In addition to the temporal restrictions, an individual detainee may not be visited by more than two visitors at a time, and may have no more than 3 visitors during any one of the three time slots. A maximum of 12 detainees may meet with visitors at any one time, a quite severe restriction as there are often more than 80 detainees being held at the Centre.

The identification requirements for visitors are very particular. Acceptable forms of Photo ID must be provided or two pieces of acceptable corroborating identification.

Different visiting conditions apply to two different categories of visitors, those classified by CIC as ‘professional’ visitors and as unprofessional visitors. No direct, physical contact is allowed between detainees and unprofessional visitors. They must meet in the designated visiting area of Celebrity. They are separated by plexiglass and communicate through telephones. In addition to family and friends, visitors of the ‘unprofessional’ variety include:

Immigration consultants, church groups, doctors, Amnesty International personnel and other similar groups are not to be treated as Professional Visitors without prior approval from the EDO. They are not to be allowed

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61 Post Orders, s.7.01
access into the Centre unless previous authorization has been obtained. These groups will use the detainee visiting area to conduct their business.

In contrast, 'professional' visitors may enter the inner regions of the facility. They include:

a) Lawyers
b) Embassy and Consulate Officials
c) Police
d) Interpreters
e) Approved Non-Government Officials, i.e. TRAC and Legal Aid with photo identification, the UN Commission for Refugees

Professional visitors are allowed into the Centre anytime to meet with detainees in the 'boardrooms' on the first floor.

In February, 2000, a new edition of the Celebrity's Post Orders was soon to be released. The draft of this new edition contains quite a few changes. One of them will amend the 'professional' and 'unprofessional' visitor categories. This is not surprising given that restrictions on access to the facility by Amnesty International 'and other similar groups' as well as by physicians has been particularly contentious. During the 1997-98 Citizenship and Immigration Standing Committee Hearings on Detention, critics charged that a letter was posted at the visits guard's desk which 'banned' Amnesty and other NGO groups. CIC officials denied the existence of such a letter: "[F]or the record, there is no such list. Despite our best efforts, we're unable to find what this possibly was referring to." In fact, what critics were referring to was not a 'letter', but rather the above quoted sections from the 1996 Post Orders, which were indeed posted at the Visits Guard's desk for at least as long as I was working there. It did not specifically 'ban'

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62 Post Orders s.7.08

63 SIO interview, February 3, 2000

64 Neil Cochrane, Director, Case Presentation, Enforcement Branch, CIC, Citizenship and Immigration Standing Committee hearings, April 22, 1998:6
named ‘unprofessional’ groups, but rather ‘restricted their access’ to the facility. Further, the EDO could use their discretion under special circumstances to facilitate their admission into the facility. CIC’s denial was thus technically accurate - there was no ‘letter’ and there was no ‘ban’. However, without further clarification, it was clearly misleading. In the new forthcoming Post Orders, Amnesty International representatives and clergy have been upgraded to the category of ‘professional’ visitors. Doctors, Psychiatrists and other medical specialists who were deemed ‘unprofessional’ visitors in the 1996 Post Orders will now be treated as somewhat of a hybrid category. They will be allowed into the facility, however only with a referral or recommendation from the facility’s on-site doctor. The restrictions on the access afforded to consultants and paralegals will remain in force.

As with most of the rules and regulations of Celebrity, the EDO has the discretion to make and approve exceptions. With respect to the restrictions on visits by unprofessional, exceptions to their restricted access are most frequently granted for ‘humanitarian’ reasons. For example, an EDO might allow a detainee scheduled for imminent removal to meet directly with loved ones in order to be able to say goodbye more intimately. This is done ‘from time to time’.

c) Baggage and Valuables Access Schedule
Detainees may have access to their personal belongings being held by the Detention Centre’s authorities daily during the hours 18:00 -20:00 or as authorized by the supervisor.

d) Telephone Time Schedule
Detainees can have access to a public telephone between: 9-10am, 2-3pm, 6-7pm, and 9-10pm or otherwise while in the dining rooms “...but not while food is

65SIO interview, February 21, 2000

66Ibid.,
The telephones are a vital part of the detainees' existence. Telephones connect them with the 'outside'. Contact with and access to friends and family members, lawyers and advocates, ethnic and religious community groups, embassies and shelters are critical for detainees who are seeking release. The phones are a precious and much vied for resource; people's lives are hanging in the balance. The demand for phones far exceeds their availability and their use is carefully governed. Long distance calls must be made from the pay phones, local calls may be made on the free phones. As a general rule, calls should not exceed 10 minutes. If a detainee requests to use a phone outside of the designated telephone times, a special request may be made and will generally be granted, 'operational requirements permitting'. Incoming telephone calls may not be directly received by detainees but are received by security who "should obtain the name and the phone number of the caller, and pass the message to the detainee as soon as practical."  

**e) Health Services**

A medical doctor and nursing staff are contracted by CIC to attend to the health needs of the detainees. A nurse can be seen every morning between 9:00am and noon, and a doctor on Monday and Thursday during these same hours. Specialized health services, for example psychiatric counselling, may be provided if recommended by the doctor. Detainees are required to hand over all medications upon their detention and forthwith the onsite doctor has the responsibility of dispensing all medicines ('patent' or prescription') as needed. However, in the absence of medical staff, security personnel takes over this responsibility. According to TRAC representative Eusavio Garcia, it is not uncommon to have the threat of transfer to jail used in the context of the provision of medical care. For example, a sick Chinese man was told by one immigration officer.

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67 Post Orders, s.10.03

68 Post Orders, s.10.01

69 Post Orders s.15.03
that if he refused to take his medication he would be transferred to jail. 5 detainees who had begun a hunger strike in January, 2000 were actually transferred to jail. 50

Since 1996, after the death of Michael Akhim, any request to see the on-site medical staff will be accommodated. 51 On their scheduled days, medical staff first see those on their own lists of cases. Once they have seen everybody they want to see, they will see as many ‘new’ patients as time permits.

Not surprisingly, increased attention was paid to the health care conditions of detention at Celebrity after the death of Akhim. The Coroner made several recommendations which CIC subsequently implemented, including first aid training for the security guards and routine examinations of detainees held longer than a week. However concerns about the quality of care persist. While the physical health of detainees is unquestionably a primary concern of CIC officials and while access to on-site medical services for physical illnesses has been improved, the mental health of detainees remains a serious concern.

As a matter of policy, ill or injured detainees are transferred to a medical facility. Exceptions are made “in minor cases”. 52 Many of those in detention exhibit serious depressive symptoms and suicide is an ever present concern. The preferred way of dealing with ‘suicide risks’ is to transfer them to jail. If a detainee is deemed to be a ‘low-risk suicide threat case’ they are confined to one of the isolation rooms under ‘special watch’; “the person’s status...will be checked every 10 minutes on all shifts.” 53

70 Interview with Eusavio Garcia, TRAC Caseworker at Celebrity, February 3, 2000

71 Pre-existing regulations gave the nurse the power to refuse any request to see medical staff for “alleged” complaints. (Post Orders Appendix ‘H’). They even required medical staff to “report abusive or hypochondriac detainees to the EDO. The EDO will, as required, provide appropriate counselling to such detainees” (Ibid.). This is no longer sanctioned by CIC. All requests to see the on-site medical staff must be accommodated. (Interview with SIO at Celebrity February 3, 2000)

72 Post Orders s.15.01

73 Post Orders s.15.02
Generally speaking, CIC officials at Celebrity would prefer not to have either sick or suicidal people in their facility. Transfers out of Celebrity, either to a hospital or to a community health care facility for the sick or to jail for the suicidal, are sought wherever possible.\textsuperscript{74} The justification for the transfer of suicidal detainees to jail is that jails are better set up to deal with such cases; they have special ‘suicide watch rooms’. However, there is little question that jail is the last place that a seriously depressed or suicidal person should be. This reality is particularly pronounced in the case of refugee claimants who may have experienced torture and other human rights violations while being detained by authorities in their country of origin.

There are no provisions on-site for assisting detainees with psychological problems. While the medical staff may refer those with psychological problems to a counsellor, the practice is quite rare. It is more common to transfer such cases to jail. A case recounted in a recent report on detention at Celebrity sheds some light on the attitudes which inflect the provision of health care at Celebrity. In 1997, a young woman refugee claimant, one of Celebrity’s many ‘long term’ detainees (over 30 days), was increasingly depressed and was suffering from serious physical symptoms. In response to queries made by the on-site TRAC representative regarding her health, medication and the possible need for a psychiatric referral, the on-site nurse vehemently argued “why should ‘we’ pay for a psychiatrist when she should be deported anyways”.\textsuperscript{75}

v) Numbers and Composition of Detained Population at Celebrity

The Celebrity Inn in the Toronto suburb of Mississauga is one of the three principal immigration holding centres in Canada. The other two are located in Vancouver, British Columbia and in Laval, Quebec. The facilities differ considerably in terms of the numbers of people detained and the conditions of detention. Vancouver utilizes a

\textsuperscript{74} Interview with SIO at Celebrity, February 3, 2000

downtown pre-trial facility and retains a small number of motel rooms at the airport. Laval's facility, officially designated the ‘Immigration Prevention Centre’, is located in a refurbished former prison. Generally speaking, there are between 75 and 100 people detained at Celebrity which has the capacity to detain 100 people “comfortably”\(^{76}\). In contrast, Vancouver and Montreal hold approximately 20 to 40 people.\(^{77}\)

a) Who is in detention at Celebrity

As previously mentioned, immigration ‘holding centres’ are for the detention of non-criminal non-citizens; people who have come to the attention of the authorities, who have violated or are suspected of violating the Immigration Act \textit{and} who are judged, initially by Immigration officers and subsequently by adjudicators, to represent a ‘flight risk’. As explained by one CIC policy official, the people in detention at Celebrity and the two other holding centres “...are not people who have committed a crime. They’re not a danger, but they don’t have the right to remain in Canada...So we want to make sure we’re able to remove them.”\(^{78}\) In this sense, detention is \textit{for} deportation. ; “...the intention [of detention] with the non-criminal is that detention be as short as possible. In most cases it really is to facilitate removal, so there is not a justification for a long detention.”\(^{79}\)

People detained in each of the three national holding centres include: those who have been deemed inadmissible to Canada and who have been refused entry (for a variety of non-criminal reasons including, for example, those suspected of not being ‘genuine visitors’); those who have been found working in Canada without authorization; those who have overstayed temporary visas and those whose refugee claims have been rejected. Approximately half of those detained at Celebrity are detained at the ‘front-end’ of the

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\(^{76}\)Interview with SIO at Celebrity, February 3, 2000

\(^{77}\)“Is This Canada” 1998: 13

\(^{78}\)Greg Fyffe, Assistant Deputy Minister, Policy and Program Development, CIC Standing Committee Hearings, April 22, 2000: 20

\(^{79}\)Ibid.,
immigration process (at the airport or other port of entry), and the other half at the 'back-end' (from within Canada, usually after a routine encounter with the police or other local authority).  

Ontario is the only region which regularly detains people with active refugee claims even when there is no criminal history. On February 3, 2000, for example, 10 of the 84 detainees at Celebrity (12%) had active refugee claims. The detention of asylum seekers is a matter of considerable concern. Not surprisingly, in recognition of the generally accepted inappropriateness of detaining refugees, CIC officials are quick to emphasize the distinction between the (genuine and deserving) refugee and (the always and already suspect) refugee claimant. CIC, they stress, does not detain refugees, only refugee claimants and only very few. As put by Minister of Immigration, Lucienne Robillard. "We put them in detention only if we have a serious reason to do so. and once there, their conditions - again these are not prisons- are quite acceptable."

In justifying the detention of refugee claimants, CIC observes that the practice is rare and exceptional:

Of the 100 people being detained because it is believed they would be unlikely to appear for their removal or for a hearing, approximately 15 of these people have an outstanding refugee claim [out of approximately 30,000 refugee claimants in Canada in total]. So we can see that it is unusual for a refugee claimant to be detained, and most of those cases involving a refugee claimant who is detained have circumstances that are unusual.

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80 Interview with SIO at Celebrity, February 3, 2000
81 Ibid., 14
82 Neil Cochrane, Director Case Presentation, Enforcement Branch, CIC Standing Committee Hearings, April 22, 1998: 5
83 Lucienne Robillard, Minister of Immigration, CIC Standing Committee hearings, November 27, 1997: 15
84 Cochrane, CIC Standing Committee Hearings, April 22, 1998: 5
While the numbers of refugee claimants in detention at Celebrity at any one point in time is usually between 10 and 15 people, the numbers over time are slightly more significant. For example, TRAC case files indicate that during the 7 month period between September 1996 and March 1997, of those who sought the assistance of TRAC at Celebrity, 31 were front-end refugee claimants and 26 were rejected refugee claimants. Moreover, the fact that the number of refugee claimants detained are generally small, does not diminish the particularly profound and debilitating effect of detention on refugees. Not only are their efforts to find, retain and communicate with legal counsel for their refugee claim as well as their ability to prepare their cases effectively severely restricted by their confinement, the impact of detention on their mental health and well-being can be debilitating;

The detention of refugees who have experienced violent persecution, often including imprisonment and torture, creates a set of circumstances which pose great risk to the well-being of the detained individual. The consequences of being detained again can cause traumatic affectations generally described as post-traumatic stress syndrome...a vulnerability to retraumatization exists....These psychological stresses severely limit the efforts of a person to establish a refugee claim. There is no recognition of their special circumstances and no medical treatment to meet their special needs.86

The vast majority of those detained at Celebrity are non-white, male, and between the ages of 20 and 40 years old. In early 2000, it was reported that China, Somalia, Iran, India and ‘the Caribbean’ were commonly represented among the detainees.87

While statistics on the composition of the detainee population at Celebrity over time are not available, the following numbers provide a snapshot of the composition of the detainee population at Celebrity on one day, February 3, 2000. On this day there were a total of 85 people in detention. 32 (37%) were from Asia (China (14), India (7), Korea

85TRAC, "Is This Canada" 1998: 23
86TRAC, "Is This Canada" 1998: 23
87Interview with SIO at Celebrity, February 3, 2000
(4), Philippines (2), Vietnam (1), Malaysia (1) Sri Lanka (2), Pakistan (1)). 19 (22%) were from Central and South America (Suriname (1), Guyana (4), Costa Rica (2), Venezuela (2), Mexico (4), Honduras (2), Argentina (1), El Salvador (2), Brazil (1). 14 (16%) were from Africa (Nigeria (5), Zimbabwe (3), Ivory Coast (1) Senegal (1), Somalia (1), Uganda (2), Namibia (1). 9 (11%) were from the West Indies (Dominican (2), St. Lucia (2), Jamaica (4), Grenada (1)). 8 (9%) were from Eastern Europe (Ukraine (1), Russia (2), Poland (1), Albania (1), Hungary (2), Uzbekistan (1). 1 person was from the Middle East (Iraq), 1 person's national origin was unavailable, and 1 person came from western Europe (Netherlands). There were at least 5 pre-school age children in the detention centre as 'guests' of CIC, and at least one unaccompanied minor. The vast majority of those in detention were without resources, financial or otherwise.

While these numbers reflect the specific composition of the detainee population at Celebrity on one particular day, the general characteristics of the detainee population at Celebrity remain relatively stable over time. That is to say, the vast majority is always non-white, generally poor, mostly male. There are usually a handful of children with their mothers, one or two unaccompanied minors, one or two families, and about a dozen refugee claimants. While the specific countries represented at any one time vary, reflecting the shifting foci of CIC and police enforcement practices (the targeting of certain airlines, selective policing practices), the continental regions represented by the detainees remains relatively stable over time: Asia, Central and South America, Africa and Eastern Europe.

There is also some consistency over time with respect to the backgrounds of those detained. For example there are frequently eastern European sex trade workers at Celebrity, while many of the young women who come from the West Indies bear the scars of domestic violence. Many of the refugee claimants have fled the war-torn regions

88CIC Detention and Removals Unit, Month End Statistics Report, 03-02-2000
89Interview with Eusavio Garcia, TRAC Caseworker at Celebrity, February 3, 2000
90Interview with SIO at Celebrity, February 3, 2000
of Eastern Europe and Africa, the repressive Chinese regime and Central and South American countries.

b) Length of Detention at Celebrity

CIC defines a 'long-term' detention as one which exceeds 30 days in length.91 While most of the critical attention paid to long-term detentions focuses on those being held in correctional institutions for reasons of criminality, the concern is also present at Celebrity. While the Celebrity detention centre is designated for the short term, temporary detention of non-criminal non-citizens, many of those detained here remain for periods far exceeding 30 days.92 On February 3, 2000, for example, 40% (34) of the current detainees were, by CIC's definition, long term detention cases. Of these 34 detentions, 11 had been detained for a period of 1-2 months; 6 had been detained for 2-3 months; 1 had been detained for 3-4 months; 8 had been detained for 4-5 months; 2 had been detained for 5-6 months; 5 had been detained for 6-7 months; and 1 had been in detention for 9 months. Of the 6 held in detention for more than 6 months, 3 were from China and 3 were from India.

Long term detentions at Celebrity often are related to identity and/or travel

Interview with SIO at Celebrity, February 3, 2000. This definition was also provided in the Citizenship and Standing Committee hearings, October 21, 1997:24 However, it should be noted that CIC's definition of the official length of a 'long-term detention' is variable. CIC's 'Ontario Region Long Term Detention Statistics' (31 December 1997) defines 'long-term' as 'over 60 days'. And in the 1996-97 CIC Standing Committee Hearings, a 'long-term detention' was defined by Paul Thibault, Executive Director. Adjudication Division, CIC, as 'over 90 days'.(March 31, 1998:3)

These concerns are shared by non-governmental critics as well as by the CIC officials at Celebrity who report that one of their major frustrations stems from the inappropriate fit of the actual physical facility (the Celebrity Budget Inn) and the nature and length of the detentions. Further, as reemphasized by a SIO at Celebrity, law and policy dictates that people should not be detained if there is no end to the detention in sight, either through release or removal. (See Chapter 2) However, despite this there are still many 'long-term' detentions at Celebrity.
documents. For example, adjudication often continues the lengthy detention of people who are slated for removal but who do not have the requisite identity/travel documents from their country of origin. These people often remain in detention while their applications are being processed by their national governments. Certain countries, for example India, are known for taking a very long time to produce the necessary documents. The longest term detainees at Celebrity are thus commonly citizens of India.

A long term detention at Celebrity may also be related to an active refugee claim. It is not uncommon for refugee claimants to be detained for the entire period during which their claim is processed and heard. While the IRB gives priority to detention cases, the wait can still be several months. As was the case for Michael Akhimen, this wait can be lethal. Like Akhimen, many refugee claimants are driven to withdraw their refugee claim even in the face of danger and loss of protection.93

The rationale for the continued detention of refugee claimants resembles a catch-22. TRAC has found that the more obvious it is to CIC officials and to adjudicators that the person seeking release from detention desperately wants to stay in Canada, the more likely it is that they will not be released because they are considered a flight risk.

Refugees who honestly express their fear of returning home in their detention review are thus unwittingly strengthening the case for their continued detention. For this reason, TRAC routinely counsels detainees as to the difference between the detention review and the refugee hearing and emphasizes the importance of saving the details of their fears of persecution were they to be returned to their country of origin for their refugee hearing.

A long term detention may also be the result of a person refusing to sign the necessary papers in order to apply for the travel document. Indeed, CIC cites the "lack of detainee cooperation" in securing their travel documents, alongside the non-cooperation of the country of origin as being the primary reasons for long-term detentions, although they do admit that non-cooperation of detainees is a significantly smaller problem than

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93TRAC, "Is This Canada" 1998:24
the non-cooperation of foreign governments. Nonetheless, one of CIC’s primary preoccupations is to gain the ‘cooperation’ of detainees in the effort to apply for the necessary documents. Celebrity officials frequently use the promise of release from detention as an incentive to get detainees to ‘sign’. CIC has also begun to attempt to facilitate this ‘cooperation’ during the course of detention reviews. As reported in the 1997-98 CIC Standing Committee hearings:

[CIC is]...currently working on initiatives to encourage our clients to comply with our requests for travel documents. For example, when we have clients who are detained, before they’re released from detention our case presenting officers make arguments to the immigration adjudicator that the person should apply for a travel document before they are released from detention.

It is also the case that the threat of transfer to jail is sometimes employed as a means of coercing a detainee to ‘sign’. In such cases, the refusal of a detainee to sign their application for a travel document is construed as evidence of non-cooperation with CIC officials and this ‘unruliness’ becomes the subject of a punitive response.

Many refugee claimants do not have the necessary identity/travel documents. For them, the consequences of this ‘signing’ has an additional edge. While the lack of requisite documents is commonly interpreted as an indication of a potential flight risk or possible danger and therefore justifies continued detention, the credibility of refugee claimants who agree to sign is immediately cast in doubt; “They say, you help us get a passport for you or we will keep you in detention. Then they help get a passport, and then the department turns around and says, you’re not a refugee, because you applied for a passport.”

94Paul Thibault, Executive Director, Adjudication Division, CIC, Standing Committee Hearings, March 31, 1998:3

95Interview with SIO at Celebrity, February 3, 2000

96CIC Standing Committee hearings, February 18, 1998:10

97David Matas, CIC Standing Committee hearings, March 25, 1998:20
The central importance of the signing of the travel document to immigration penalty bears a strong resemblance to the importance of a confession to sovereign penalty. Both legitimize and affirm the ‘rightness’ of the coercive policy and practices in question. Both facilitate and expedite these practices. Both render the subject of these practices complicit in their own subjectification. And, the withholding of both results in a more onerous challenge for the authorities who must work harder to achieve their desired objective. Moreover, the refusal to ‘sign’ is arguably the only bit of leverage available to detainees in their efforts to avoid deportation, for whatever reason. For all of these reasons, the ‘signing’ (in the context of immigration detention and deportation). like the ‘confession’ (in the context of criminal justice punishment), is a central and guiding preoccupation of authorities.

c) Release from Celebrity

Detention at Celebrity ends either with the release of the person into the community or the removal of the person from the country. As described in Chapter 2, an SIO may release someone from detention within the first 48 hours (the ‘48 hour review’). Once that 48 hours has passed, release may only be ordered by an independent adjudicator at the ‘detention review’. Usually release conditions are imposed usually including cash amounts or a performance bond, or both. Bonds have been set by adjudicators at levels ranging from 2,000 to 10,000 dollars. It is often the case that a person must remain in detention because they lack the resources to fulfill the release conditions. In this important respect, release from immigration detention differs from release from criminal incarceration. It is a fundamental and guiding principle of criminal justice bail reform that people should not be jailed for being poor. In the context of immigration detention, people are routinely refused release because they do not have enough money. Indeed, as observed by lawyer David Matas, the above mentioned principle of bail reform “…is totally absent from the Immigration Act. We have exorbitantly high bail amounts for immigration release and people do stay in immigration
detention because they are poor. That should not be so."\(^98\)

### III) The Nature and Scope of Immigration Detention Outside of Celebrity

For the most part, Canada has resisted calls for a blanket increase in the use of immigration detention, choosing instead to target certain groups for increased detention (criminals and failed refugee claimants). In 1994, CIC detained just over 9,000 people (including 'criminals' and 'non-criminals').\(^99\) Since then the Canadian trend has been downward with respect to the total numbers of people detained. In 1996-97, CIC detained a total of 6,400 people for a total of 138,000 detention days.\(^100\) In 1997-98, CIC reported that they had detained just under 6,000 people in immigration detention, a decrease of 3,000 in 3 years.\(^101\) However, the length of individual detentions has steadily increased in Canada. For example in Ontario, the total number of immigration 'jail days' in provincial correctional institutions rose from just under 35,000 in 1992-93 to approximately 82,000 in 1995-96.\(^102\) Over the same period, the total number of 'holding centre days' in Ontario also rose dramatically, from 37,000 in 1992-93 to 48,000 in 1995-96. Since 1996, however, these numbers have been declining.\(^103\)

The 1995-96 increase in the lengths of jail and holding centre detentions reflects the heightened preoccupation with enforcement triggered by the 1994 Leimonis and Baylis shootings in Toronto. Significantly, the enforcement response which ensued ('criminals first') resulted in longer lengths of detention in both criminal and non-

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\(^98\)Ibid.,

\(^99\)Neil Cochrane, Immigration and Citizenship Standing Committee Hearings, submission, April 22, 1998:4

\(^100\)Standing Committee Hearings, April 22, 1998:20

\(^101\)Ibid.,

\(^102\)Ontario Region Jail Day Histories, CIC Enforcement Statistics, 1997

\(^103\)Ibid.,
criminal cases; in both correctional institutions and in holding centres.

The majority of immigration detention cases in Canada involve criminality issues. For example, in Ontario between 1994 and 1997, for every 1 person in detention at Celebrity, there were 3 being held in other correctional institutions. The majority of long-term immigration detentions are ‘danger to the public’ cases; cases in which the adjudicator judges that the release of the individual from detention would pose a danger to the public. As explained by CIC, “The dilemma the department is placed in is that if we release someone who is considered a high risk individual and they go out into public and kill a police officer or a citizen, we’re accountable for that.”

CIC reported in June 1997 that there were a total of 184 long term detentions in Ontario. 35 (20%) of these were non-criminal ‘flight risks’ being held at Celebrity. The remaining 149 (80%) involved criminality and danger issues and were being held in correctional institutions across the province. Of these 184 long term detentions, 83 (45%) had been detained for at least 6 months, 36 (20%) had been detained for at least a year and 9 (5%) had been detained for more than 2 years. The average length of detention for individual detainees before they were released or deported was 8 months (239.9 days). Of these 184 people, 86% (158) were non-white, 49% (90) were of African

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104 CIC Public Affairs. Response to Information Request, March 24, 1997

105 These dangers to the public have been so found by an adjudicator. This finding does not necessarily mean that the Minister has declared them to be a danger to the public under s.70(5) of the Act.

106 Gerry Campbell, Assistant Deputy Minister, Operations, CIC, CIC Standing Committee hearings, October 21, 1997:24

107 CIC. ‘Ontario Region Long Term Detention Statistics’ 30 June 1997. The variable definition of ‘long-term’ detentions complicates the statistics. The numbers quoted here are based on the 30 day definition of a ‘long-term detention’. Curiously, the statistical report dated 31 December 1997, uses a 60 day definition of ‘long-term’ thereby making comparisons difficult.

108 Ibid.,
descent, 39% (50) were Jamaicans and 20% (32) were Vietnamese. 109

On July 14, 1997 about 150 detainees at the Metro West Detention Centre, the facility where the majority of Ontario’s criminal immigration detainees are held, went on a hunger strike to protest the circumstances of their detention. 110 Of particular concern was, and continues to be, the situation facing long-term immigration detainees. Typically, about 60% of the long-term detainees are permanent residents who have been declared by the Minister to be a danger to the public under s.70(5), and about 40% are failed refugee claimants who have been detained for reasons of criminality and who were judged by adjudicators to pose a danger to the public in their detention reviews111. They have already served their criminal sentences, yet they remain in prison under ‘immigration hold’ while CIC attempts to effect their removal. Sometimes the time spent in prison in immigration hold exceeds the length of the criminal sentence served, a situation referred to as ‘double punishment’. For example, a refugee from Surinam who was granted refugee status in Canada in 1985, was convicted of several narcotics offences which netted him 4 months in jail. In July 1997, he had been on immigration hold for over 2 years.112

At the time of the hunger strike, there were about 70 immigration detainees who had been detained at the Metro West Detention Centre in Toronto for more than 6

109 Ibid., These statistics were submitted to the CIC Standing Committee on March 26,1998

110Parkdale Legal Services Inc., Memorandum re: “Metro West Detention Centre Hunger Strike by Immigration Detainees” July 22,1997

111Paul Thibault, Executive Director, Adjudication Division, CIC Standing Committee hearings, March 31, 1998:3 Thibault points out that the reasons for long-term detentions in criminal cases are similar for non-criminal cases: lack of detainee cooperation in securing the necessary travel documents or non-cooperation of the country of origin.

112Ibid.,
In addition to protesting against the ‘double punishment’ of long-term immigration detainees, the detainees were also protesting the “overcrowding and unsanitary conditions of their imprisonment: three inmates to a cell designed to sleep only two, so that one person has to sleep on the floor.”

In the United States, the INS has been busy building and opening new detention facilities. There, immigration detention is very big business. In 1986, The United States passed the Immigration Reform and Control Act. One of the consequences of this restrictive piece of legislation was the expanded use of detention for immigration violations. This trend was intensified with the passing of the 1996. Illegal Immigration Reform and Individual Responsibility Act. In 1995, the Internal Naturalization Service (INS) detained 6,000 people. In 1999, this figure had risen to 16,400. The average length of detention in the United States has also increased. In the United States, thousands of Mexicans are usually detained for a day or two before being deported. Still, hundreds of people have been held in INS detention for more than six months and dozens for more than a year. In 1994, the Americans spent approximately 200 million dollars (American) on immigration detention. Since the 1980s, it has opened more than 26 detention centres, some of which have been described as large ‘state-of-the-art’ facilities.

In Canada, government bureaucrats have developed a plan to build a similarly ‘state-of-the-art’ immigration detention facility which would be run by CIC and which would be equipped to ‘accommodate’ all varieties of immigration detainees; from failed

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113 Parkdale Legal Services Memorandum, July 22, 1997

114 Ibid.,

115 “Immigration Detention: A Rapidly Growing Business” North Jersey, April 11, 1999, cars.com


117 Ibid., 44
refugee claimants, to visa overstays to 'serious' criminal offenders. If this plan for the creation of a mega-detention complex is ever implemented, it would arguably represent the institutional manifestation of the culmination of the discursive developments which this thesis has traced: CIC would then be in the business of running 'prisons'. However, whether or not the government goes ahead with this plan remains to be seen. In the meantime, CIC continues to detain non-citizens in provincial jails and detention centres and in 'immigration holding centres.

The cost of detention is an extremely significant factor in the development of policy and practice in this area. While increasingly intensive enforcement practices imply more detentions, fiscal imperatives increasingly dictate restraint. In 1994-95, the Canadian government spent 21.1 million dollars on Immigration detention. In 1995-96, 23.4 million was spent on detention. In 1997, the national budget for detention was capped at 19.8 million. Approximately 13 million dollars is budgeted for immigration detention in Ontario. Of that figure, 4 million is designated for the 'Celebrity' detention centre which leaves 9 million dollars for the detention of criminals in Ontario. According to CIC, "...the cost to detain a person for a full year at the Celebrity Inn is $33,000.00. This is equal to $90.41 per day per person...Not included in this figure are the medical bills that range from 150,000 to 200,000 at the Celebrity Inn, or transportation costs (to immigration proceedings etc.)." CIC observes that "[D]etention costs a lot of money...[that it] is used quite sparingly and with restraint...by the domestic regions across the country." And the numbers of immigration detainees are indeed relatively small; the numbers of non-

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118 Interview with SIO at Celebrity February 3, 2000.

119 CIC Public Affairs, Response to Information Request, March 24, 1997

120 Ibid.,

121 Ibid.,

122 Gerry Campbell, Assistant Deputy Minister, Operations, CIC Standing Committee hearings, October 21, 1997:23
criminal detentions even smaller. So small in fact that the question of the real purpose and objective of immigration detention is necessarily raised.

This question becomes that much more pressing in light of the fiscal imperatives which ultimately govern detention and release decisions at Celebrity. Regardless of law, the bottom line is resources; “It is completely resource-driven. If there are no more beds, we pick up the phone and say don’t arrest any more people, don’t bring any more people here.”123 On one occasion, CIC temporarily gave up the use of 10 beds at Celebrity. When the beds became available again CIC officials were reluctant to get them back “...because they would just get filled up again.” 124

In late February, 2000, there was no more room at the Inn. Celebrity was over capacity with 119 detainees. Arresting officers were told “...to stop arresting people we can’t remove, we can’t keep them here.”125 The resource-driven nature of detention decisions at Celebrity lead one SIO at Celebrity to conclude that detention at Celebrity serves no official policy purpose or objective whatsoever other than public relations: “...so Immigration can say ‘we’re doing something.’”126

While it may be true that immigration detention at Celebrity serves no official policy objective or purpose other than public relations, the importance of this exercise in public relations should not be underestimated. Immigration detention at Celebrity and elsewhere is a critical instrument for the maintenance and reproduction of coercive sovereign power and exclusionary sovereign objectives. In this analysis, detention and deportation are understood as ‘political rituals’ as ‘social phenomena’ which “cannot be accounted for by the juridical structure of society alone.”127 From this perspective the

123Interview with SIO at Celebrity, February 3,2000
124Ibid.,
125Ibid.,
126Interview with SIO at Celebrity, February 3,2000
127Foucault Discipline and Punish p.24
relatively small numbers of people involved does not diminish the effects; while ‘discipline’ must act upon many people in order to be an effective governing power, sovereign power need only act upon a few, with the knowledge and assent of the many.

IV) Conclusion

Celebrity Inn is not a correctional facility, it is an Immigration ‘holding’ centre. The detainees are not convicted criminals, they are in fact specifically designated as ‘non-dangerous’ and non-criminal non-citizens. They are supervised and controlled not by prison guards, but by private security guards. Confinement at Celebrity is not carceral punishment, it is administrative detention. But this is indeed sovereign power in action. The forcible confinement of these individuals does not aim to ‘correct’, ‘reform’ or ‘transform’ souls. It has no official aim or purpose other than to confine, restrain and ultimately expel the actual bodies of non-citizens in accordance with the administrative exclusionary requirements of the Immigration Act.

Notwithstanding the longstanding legal distinction between administrative detention and deportation, and imprisonment and punishment, those who are suspected of violating the Immigration Act for whatever reason, criminal or otherwise, are constructed and acted upon as criminals (a trend which, as demonstrated in this thesis, has intensified over the last decade). And violations of the Immigration Act are acted upon through the application of a distinctly sovereign penalty, traditionally reserved for those convicted of criminal offences. The penalty to which Immigration violators are subject is one in which the ‘body’ (not the mind, or soul, or habits) is still the primary object of the sanction imposed, and the sanction is occasioned and justified by virtue of the juridical transgression of longstanding and resilient territorial sovereign law. In the context of immigration, detention and deportation are the most extreme, coercive and bodily sanctions available to sovereign states; sanctions which remain largely protected from serious judicial and/or public oversight precisely by virtue of this rationale. Needless to say, that these measures are legally defined as something other than punishment and that those being governed are legally acknowledged to be ‘non-criminals’ is largely irrelevant
to those who experience it as punishment and who are constructed and acted upon as if they were criminals, but who, ironically, are accorded fewer legal protections, fresh air, and support services than would be available to them if they had committed a crime.

Detention and deportation thus work on two distinct levels: as sovereign sanctions which work ritualistically and symbolically to produce and reproduce both the supreme and ultimately coercive power of the sovereign and of sovereignty and of the 'rightness' of the specific, territorial sovereign policies and practices in question; and as sovereign sanctions which act upon, in coercive and discriminatory ways, the bodies of those constructed in the wider social and political context as undeserving and undesirable threats.

Sovereign penality used to be a very public affair. Indeed, the effectiveness of punitive classical sovereign power depended upon the public 'spectacle' and 'ceremony' of bodily criminal punishment; sovereign penality depends upon hegemony. However, physical pain and torture are no longer legitimate and hegemonic objectives of state sanctioned criminal punishment, and the spectacle of sovereign penality has accordingly largely disappeared from criminal justice administration in Canada. As observed by Foucault, only 'traces' of sovereign power persist in the context of criminal justice, and these traces provoke shame and reform. Indeed, immigration detention and deportation is arguably the last remaining site where sovereign penality is central and relatively unapologetic, largely unaffected by the humanitarian liberal influences on and reforms to the criminal justice system. In the context of contemporary exclusionary immigration, it is sovereign penality that surrounds recently imposed 'traces' of liberal legality and humanitarianism.

In the late twentieth century, bodily sovereign power is no longer a public and shamelessly painful affair. Neither detainees and deportees nor convicted criminals are pilloried and paraded; notions of individual and human rights have dulled the sharp edge of the sovereign's sword. However, while it is certainly true that in the context of Canadian Criminal Justice the body has been displaced as the object of punishment, in the context of exclusionary immigration law, policy and practice, the body continues to be
the constituent feature and object of the sanction. Immigration penalty entails, at its extreme, a fundamentally and inherently ‘bodily’ sanction: deportation, removal, banishment, exile; the physical subjection and expulsion of the offending ‘bodies’ in the name of the sovereign. There is no need to normalize or correct undeserving and/or undesirable non-citizens, through the operation of law, discretion, and sovereign power, they may be ceremoniously and force-fully expelled.
Epilogue: The Future of Immigration Detention in Canada

"Before the Law"

by

Franz Kafka

Before the law stands a gatekeeper. To this gatekeeper comes a man from the countryside and requests admittance to the Law. But the gatekeeper says that he cannot admit him just now. The man reflects and then asks whether he will be able to enter later on. "It is possible," says the gatekeeper, "but not now."

Since the gate to the law is open as usual and the gatekeeper steps aside, the man bends over to look through the gateway, into the interior. When the gatekeeper notices this, he laughs and says, "If it entices you that strongly, then try to go on in despite my prohibitions. But mind you: I am powerful. And I am only the lowest of the gatekeepers. And from hall to hall gatekeepers stand, each more powerful than the last. I myself cannot endure the sight of even the third one.

The man from the country did not expect such difficulties; after all, the Law, he thinks is supposed to be accessible to everyone. But when he now takes a closer look at the gatekeeper in his fur coat, his large pointed nose, the long, thin, black Tartar beard, he decides he would rather wait until he receives permission to enter. The gatekeeper hands him a stool and lets him sit down at the side of the door.

There he sits for days and years. He makes many attempts to to be admitted and tires the gatekeeper with his requests....Eventually his eyesight starts dimming, and he does not know whether his surroundings are actually darkening or his eyes are merely deceiving him. However, in the darkness he does recognize a glow breaking out inextinguishably from the door of the Law.

Before his death all his experiences of the entire period gather in his mind as one question that he has never asked the gatekeeper. He beckons to him since he can no longer raise his rigidifying body. The gatekeeper bends way down to him, for their difference in size has changed greatly to the man's advantage.

"What else do you want to know?" the gatekeeper asks. "You are insatiable." "All people strive for the Law," says the man. "How come in these many years no one but me has asked to be let in?" "No one else could be let in here, for this entrance was meant for you alone. Now I'm going to go and shut it."

In February 2000, the Enforcement Detention Officer at Celebrity was adamant. With 120 detainees on its register, there was absolutely no more room at the Inn. At these times, a phone call is made and CIC enforcement officers are directed to stop arresting people and delivering them to Celebrity. Rather than representing a meaningful and substantive check on the initial decision to detain, the ‘48 hour review’ of the detention of new detainees (which is carried out on site by CIC officials at Celebrity within the first 48 hours of the initial detention decision, and which affords them the discretion to overturn the initial detention decision and to set release conditions) is used here as an important mechanism for the day to day control and management of the numbers of the detainee population at Celebrity. However, after this 48 hour period is over, the discretion of Celebrity officials to release is all but removed. Release decisions then become the prerogative of adjudicators whose mandate and concerns are different from those relating to the administration and management of the detention facility. Enforcement detention officers may then try to influence adjudication’s decision, but they have no further direct control over release. So, when the beds are full, and there are no more 48 hour releases to be made, arrests and detentions are temporarily halted. The effective bottom-line at Celebrity with respect to detention and release decision-making is set by administrative and fiscal concerns; beds and budgets are the ultimate governing rationale here, not public policy objectives.

There are also the numbers to consider. At any one time, there are approximately 200 people detained in Canada by CIC for non-criminal reasons; most are at Celebrity (100-120 people; Vancouver and Laval usually house 20 - 40 people). While Celebrity is one of three locations across Canada where people are detained for non-criminal reasons, it is Canada’s only semi-permanent ‘Kafka hotel’. In terms of the size of its detainee population, it is the largest of the three facilities.

200 people. Even if one considers the frequent recomposition of this population through releases, deportations and new detentions, the annual detention figures of non-criminals are still small: criminal detentions outnumber non-criminal ones by
Of the 200 or so people in detention across Canada for non-criminal reasons at any one time, approximately 10 to 12 are likely to be refugee claimants detained at Celebrity (Ontario is the only region that regularly detains refugee claimants for non-criminal reasons). This represents a minute percentage of the approximately 30,000 refugee claims that are made on a yearly basis from within Canada.

So who are these people? It would be reasonable to assume that they are somehow exceptionally deserving of detention. After all, the decision was taken to detain them when the vast majority of similarly situated people are not, and indeed couldn't possibly be, detained. These 200 people, who are innocent of any criminal wrongdoing, are subjected under the authority of the Canadian Immigration Act to what is the most onerous form of punishment available under the criminal justice system; with, as we have seen, significantly fewer rights, protections and services than those accorded to citizens convicted of crimes. However, there is nothing particularly exceptional about these 'prisoners', except of course that they have committed no crime. Like the majority of Canada's new immigrants and refugees they are non-white, and like the majority of people in prison for criminal offences, they are predominantly male and poor.

In February 2000, approximately 80% of those in detention at Celebrity were 'long-term' detainees (more than 30 days), a situation deemed most undesirable by the facility's critics and administrators alike. Long-term detainees are brought before immigration adjudicators every 30 days for a review of their continued detention. While they have the legal right to representation at these reviews, in practice many attend them without any representation at all. Because of the reverse onus at the detention reviews, release is a difficult case to argue successfully, even with the assistance of legal counsel. It is also commonly known that, with or without legal representation, the chances of release by adjudication drop dramatically after a detainee's first 30 day review as the rightness of the initial detention decision becomes entrenched over time. However, after a certain period, the chances of release for long-term detainees rise again. People who have been in detention for exceptionally long periods of time (usually for reasons relating to
bureaucratic delay and the lack of cooperation of foreign governments in issuing new identity documents required for deportation) are likely to be eventually released as it becomes clear that their case will not be resolved ‘imminently’ and therefore that their continued detention cannot be legally supported. As observed by an immigration official at Celebrity, many long-term detentions could and should be avoided by an early recognition that the resolution of the case at hand is likely to take some time due to well-known ‘impediments’ to removal, rather than waiting to make this decision until after a lengthy period of detention has been served.

The detention and release of non-criminal non-citizens at Celebrity is driven ultimately by fiscal and administrative imperatives, rather than by public policy objectives. Those who administer detention at Celebrity readily admit, and with more than a hint of cynicism, that there is no real policy objective being effectively served by the detention of these people at Celebrity and that the only real purpose of Celebrity detentions is public relations: “...so we can point at Celebrity and say we are doing something.”

In light of the above, it would make sense to close the Celebrity Inn immigration detention centre and stop the detention of all non-criminal non-citizens and refugee claimants across Canada. As criminal justice initiatives have shown, there are many non-carceral techniques for keeping tabs on people: indeed, in the face of budget restraints CIC has already been urging the expanded use of alternatives to detention for non-dangerous non-citizens. The evidence collected for this thesis would support a policy decision that CIC ‘holding centres’ be replaced by the use of non-carceral alternatives.

This sort of policy move would likely have more effect on the well-being of non-citizens who are not allowed to stay in Canada than potential legal moves to increase ‘rights’ and curtail administrative detention. As argued in this thesis, the liberal legal paradigm works to deflect critical attention away from unjust practices which, when they are addressed, are redefined and acted upon as legal problems requiring legal solutions.

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2 Interview with Enforcement Detention Officer at Celebrity, February 3, 2000
Consequently, much time, energy and resources is spent on resisting official policy and practices through the deployment of abstract legal arguments in formal legal and political contexts. Critical attention and resources are thus deflected away from material conditions and practices.

Moreover, there is a huge gap between the abstract formal existence of legal rights and protections for non-citizens in Canada, and the degree to which these rights may be accessed and operationalised to the concrete and material benefit of those who ‘bear’ them. This is not to say that liberal legal principles are not powerful and important potential checks on abuses, nor that they cannot be deployed in the resistance of unjust practices, for certainly both are true. However, the effective use of legal rights and protections in the pursuit of justice depends upon the ability of the ‘rights bearer’ to access and deploy them. Access is determined largely by resources. Non-citizens in general lack resources and issues for non-citizens in detention are obviously magnified. They generally lack the economic, political and legal supports, resources and contacts which are necessary in order to effectively mobilize legal discourses in the resistance of forms of subjectification. Without effective and practical access to liberal rights and protections, their abstract existence is at best irrelevant to those in detention, and at worse, provides ideological legitimation for coercive and unjust practices while simultaneously deflecting critical attention away from them.

This study is, however, somewhat at odds with current CIC thinking and indeed with international trends. In Canada, there is now a proposal to build or buy a new ‘mega-detention centre’ in Ontario in which CIC detainees would be confined. Those who are currently serving time in prison for criminal offences would be transferred to immigration hold at the new detention centre upon the completion of their sentences. The new centre would accommodate both ‘dangerous’ and ‘non-dangerous’ non-citizens in medium and maximum security facilities under one roof. It would be large, modern and equipped with state of the art surveillance technology. It would be specifically designed to meet all national and international formal legal and human rights requirements regarding detention conditions. Immigration detention would be stream-lined, centralized and standardized. In
short, CIC would enter the business of administering prisons.

Canada is not alone in this preoccupation. Since the late 1980s, there has been a general increase in immigration detention and in the detention of asylum seekers in the United States and in most western European countries. Western Europe has also seen the proliferation of increasingly restrictive immigration legislation, including, for example, the 1993 ‘Aliens Act’ in Germany, the 1995 ‘Federal Law on Security Measures to be Taken in Relation to Foreigners’ in Switzerland, the 1994 French ‘Waiting Zone’ detention legislation, the 1996 Asylum and Immigration Act in the United Kingdom and the 1995 Danish ‘Aliens Act’. Much of the legislation has expanded the scope for immigration detention and has therefore been accompanied by plans in a number of countries to open new detention centres or to extend existing ones, especially for this purpose. For example, in the United Kingdom, a new, ‘purpose-built’ detention centre was opened in May 1996 at Gatwick Airport, and the passage of a proposed 1999 Immigration and Asylum Bill would establish a system of ‘cashless support’ for asylum-seekers in ‘designated’ accommodation around the country. As reported by Amnesty International, since the opening of new detention facilities in the United Kingdom, the number of immigrant and refugee detentions has steadily increased. Similar trends are evident in France, Germany, Belgium and Switzerland.

While the building of a mega-detention centre in Ontario might be an improvement for those currently languishing in the Don Jail or other correctional facilities under ‘immigration hold’, and while there is little question that the current conditions of immigration detention are less than adequate, we know from the literature

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3Inter-Church Committee for Refugees, “Detention in Europe and Legal Aspects of Challenges to Detention in the United Kingdom” Workshop on Detention, July 7, 1997 (mimeo)

4Ibid.,


6Ibid.,
and experiences of criminal justice that the building of new, large and modern carceral facilities results in an increase in imprisonment, a concern, as mentioned above, already expressed in the context of immigration detention in the United Kingdom. Relatedly, this policy move would also serve to legitimize immigration detention and deflect critical attention away from it, in a way that is not possible under current conditions.

Whatever the eventual outcome of CIC’s current policy deliberations, efforts should be made to ensure humane conditions and practices prevail in the future governance of the detention of non-citizens. Short of an end to the use of detention for non-criminal non-citizens, several features are critically important in this regard and should at the very least form a part of any new policies and practices relating to immigration detention in Canada. These include:

a) The creation of an external independent civilian review process for all CIC enforcement activities;
b) The creation of an independent complaints mechanism for people in detention;
c) Regular inspections of immigration detention facilities by an independent human rights authority;
d) Meaningful and substantive access to legal counsel, interpreters, information, services and supports;
e) Fresh air and exercise;
f) Direct contact between detainees and their visitors;
g) The provision of independent, culturally-sensitive, medical services (including comprehensive provisions for identifying and responding to the physical and psychological needs of people in detention and an end to the practice of transferring ‘suicide risks’ to jail);
h) The end to the indiscriminate use of body restraints on detainees who are being transported or who are appearing before a court or tribunal.
i) The provision of intensive, cross-cultural, anti-discrimination and human rights training for all those engaged in the enforcement functions of CIC, including immigration officers, private security officers and medical personnel.
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Conversations

In addition to the above listed formal interviews, and of course to conversations with the teaching staff of the Centre of Criminology at the University of Toronto (including in particular the members of my thesis committee) and with fellow students at the Centre, conversations with several individuals were particularly helpful in instrumental and insightful ways; Fred Franklin, Detention Committee, Toronto Refugee Affairs Council (TRAC); Ursula Franklin, Professor Emeritus, University of Toronto; Nicola Lacey, Fellow and Tutor in Law, New College, Oxford; Peter Fitzpatrick, Professor of Law and Social Theory, University of Kent.

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NGO-CIC Working Group Meetings, Toronto: October 14, 1997; December 12, 1997; and March 11, 1998.

Toronto Refugee Affairs Council (TRAC) meetings with Immigration Enforcement officials responsible for detention at the ‘Celebrity Inn’ Immigration Holding Centre in Mississauga, Ontario: August 20, 1997; November 20, 1997; and January 6, 1998.
Field Work

Between August 1997 and June 1998 I volunteered as the on-site case worker for the Toronto Refugee Affairs Council (TRAC) at the ‘Celebrity Inn’ Immigration Holding Centre in Mississauga. TRAC has an agreement with CIC which provides office space and telephone access for a case worker who provides information and referral services to detainees. Such case workers are specifically prohibited from performing case-specific advocacy services; they are there to ‘facilitate access to the system’. I performed this function for TRAC, two days a week for 9 months. I am particularly grateful to Fred Franklin of TRAC for having facilitated and supported my work at Celebrity, and to the CIC officials at Celebrity who for the most part responded to my queries and tolerated my curiosity while I was there, and who were open and forthcoming in subsequent interviews. While I was not able, for ethical reasons, to use any of the case-specific information that detainees provided to me during the course of many interviews, observations were nonetheless plentiful.

Print and Broadcast Media

I collected newspaper clippings on immigration and refugees, criminality and exclusions and welfare issues from September, 1993 and December 1998. I draw largely, but not exclusively, from The Toronto Sun and The Globe and Mail. I also used the transcripts of several CBC Radio Broadcast of relevant news stories including: the use of profiles in the granting of overseas visa applications (September 9, 1998); the deportation of a long-term permanent resident deemed to be a ‘danger to the public’ (1997); the forging of official deportation papers by immigration officials.
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