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Between Protection and Punishment: The Irregular Arrival Regime in Canadian Refugee Law

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The Stanstead border crossing dividing Québec from Vermont is not a typical border crossing point. One would expect to find a wall, a fence, or a checkpoint station to mark the international boundary line. Instead, a simple white line is painted on the concrete bearing the inscription 'Canada' and 'United States' on either side. A row of flowerpots sits atop that white line, dividing one country from another. East of the white line is the Stanstead library, constructed deliberately astride the border, with the front door located in the United States and the collection in Canada. One floor above, the Haskell Opera House stages productions that traverse the border: the cast performs on Canadian soil while the audience sits in the United States. Described by the *New York Times* as a 'symbol of cross-border friendship' (Austen 2007), the Stanstead border crossing presents the Canadian border as many imagine it: open, welcoming, and lined with flowers. This ideal is not simply imagined, but also finds expression in law. For example, in the landmark 1985 decision *Singh v. Canada*, the Supreme Court of Canada ruled that every person who is physically present at or within Canada's borders, including refugee claimants, is legally entitled to basic constitutional protection under section 7 of the *Canadian Charter of Rights and Freedoms*. With this decision, the Court effectively enacted the Canadian border as a site of limited, but nonetheless meaningful, rights protection for refugee claimants.[1]

While this ruling remains intact, the legal and symbolic landscape of the Canadian border has shifted in recent years. With the steady movement toward the securitization of borders in the aftermath of the 11 September 2001 attacks, and the concurrent expansion of Canada's

anti-refugee agenda, the Canadian border has been re-charted, re-enacted, and re-constituted as a 'smart' border: a border that is asserted differently 'in relation to different groups of border crossers' (Weber 2006, p. 23). The flowerpots and apparent openness of the Canadian border belie the reality that, for many refugee claimants, the Canadian border is no longer enacted as a site of rights protection, but is increasingly becoming a site of restriction, exclusion, and punishment. This chapter questions the Canadian border's reconstitution as a site of punishment for refugee claimants by examining the Designated Foreign National (DFN) regime, a highly criticized mechanism that permits the Canadian government to discipline foreign nationals for suspected violations of Canadian border laws. Implemented as an anti-smuggling mechanism, the DFN regime empowers the Minister of Public Safety to designate groups of foreign nationals as 'irregular' based on vague and discretionary criteria, including a mere suspicion—not concrete proof—that they were involved in human smuggling activities (Public Safety Canada 2012b). On being deemed 'irregular', designated persons are subject to penalties that are formally classified as administrative but amount to de facto punishment. These include mandatory arrest and detention as well as compulsory reporting and ongoing document inspection. Since implementing the DFN regime in 2012, the Canadian government has directed its application toward 85 refugee claimants, all of whom were suspected of having been smuggled into Canada at Stanstead (CBSA 2014b; Cohen 2012).

When the DFN regime was first introduced, then Minister of Citizenship and Immigration Jason Kenney explained that it was designed as a deterrence mechanism implemented, in part, to address the asserted ineffectiveness of the Canada-US *Safe Third Country Agreement* (STCA), a bilateral agreement between Canada and the United States that restricts asylum flows across the Canada–US border.[2] In this chapter, I analyze the DFN regime in relation to STCA to explore the links between these two measures in detail. My analysis revisits data collected for *Bordering on Failure: Canada–US Border Policy and the Politics of Refugee Exclusion*, a report I co-authored with Alletta Brenner, published by the Harvard Immigration and Refugee Law Clinical Program in 2013. For this report, we examined a series of Canadian and US border measures and analyzed their impact upon refugees, focusing specifically on the STCA. We conducted fact-finding investigations at four ports of entry along the Canada–US border: Buffalo, New York–Fort Erie, Ontario; Champlain, New York–Lacolle, Québec; Detroit, Michigan–Windsor, Ontario; and Blaine, Washington–White Rock, British Columbia. We met with

refugee shelters, non-governmental organizations, attorneys, and faith group workers on both sides of the Canada–US border and collected data about the STCA and its application. We requested interviews with various Canadian government officials, including representatives from the Canada Border Services Agency and Citizenship and Immigration Canada. Both agencies declined to participate in an interview.

Our study concluded that, through the STCA and other associated border measures, Canada systematically closes its borders to refugee claimants. We further concluded that since the STCA only applies to refugee claimants at the land border (STCA Art. 4), but does not bar claimants who cross the border clandestinely, it creates clear incentives for irregular entries and has in fact triggered a rise in irregular border crossings and human smuggling into Canada (Arbel & Brenner 2013). In so doing, the STCA contributes to what Audrey Macklin has termed the 'discursive disappearance of the refugee'—the broader process through which legal measures and popular conjectures recast refugees not as legitimate entrants in search of protection but as 'illegals', irregular arrivals, and criminal transgressors (2005). Building on Macklin's claim, I argue the STCA not only closes the Canadian border to refugee claimants, as we concluded in *Bordering on Failure*, it also reconstitutes those claimants through discourses of criminality and illegality, and thus plays a key role in producing the very 'irregularity' that the DFN regime is designed to punish. Proceeding from this claim, I argue that the DFN regime is premised on a legal and conceptual flaw: it presumes 'irregularity' to be an essential subject position that reflects a transgression of Canadian border laws when, in fact, it is a constitutive subject position produced by the laws. By punishing refugee claimants for being deemed irregular the DFN regime does more than enhance Canada's ability to subject refugee claimants to punitive measures like arrest and detention. The regime introduces a far more extreme form of punishment into Canadian refugee law: it effectively empowers the government to punish refugee claimants for trying to avail themselves of the right to seek asylum in Canada.

This chapter begins with an overview of the DFN regime. While the regime applies broadly to all foreign nationals, I focus only on its application to refugee claimants, guided by Catherine Dauvergne's insight that the 'criminalization' of migration 'bite[s] most sharply at the asylum end of the immigration continuum' and thus deserves specific attention (2013a, p. 78). I then proceed to examine the DFN regime against the law and practice of Canadian border enforcement, directing my attention specifically to the STCA. Reviewing the data collected for *Bordering*

on Failure, I analyze the STCA by focusing on the discretionary practices of front-line officials tasked with its application. This analysis is guided by Alison Mountz's observation that a state's migration policies are best understood by examining the practices of those who 'produce its borders daily' (2010, p. xix). By focusing on these daily practices, I seek to 'pry open the black box of the border' (Pratt 2005, p. 11), to examine the administrative operation of the STCA and to tease out the links between the STCA and the DFN regime. After analyzing these links in detail, I conclude by highlighting the coercive effects of scripting 'irregularity' as a constitutive subject position into Canadian law, and by explaining what the DFN reveals about the changing role—and location—of punishment in Canada's refugee system.

Legislating irregularity

The Designated Foreign National regime was one of several reform initiatives ushered in by the Canadian government in 2012 through omnibus legislation known as the *Protecting Canada's Immigration System Act.* Introduced after the high-profile arrival of two asylum boats carrying 575 refugee claimants in 2009 and 2010—incidents depicted as revealing Canada's porous borders and its vulnerability to human smuggling[3]—the DFN regime was ostensibly intended to serve as an anti-smuggling strategy. Implemented as a public safety measure, the regime was devised to send 'a clear message to criminal organizations contemplating human smuggling ventures that Canada will take strong, targeted action to prevent abuse of our generous immigration and asylum systems' (Public Safety Canada 2012b), and to deliver 'the message around the world that Canada will no longer be the world's doormat' (Kenney 2011).

As noted briefly above, the DFN regime empowers the Minister of Public Safety to 'designate as irregular arrival' groups of foreign nationals whose identity cannot be verified or who are suspected of having been smuggled into Canada (Immigration and Refugee Protection Act [IRPA], s. 20.1(1)).[4] Importing criminal law tactics, practices, and rhetoric into migration law (Stumpf 2006; Dauvergne 2008; Bosworth & Kaufman 2011; see also Lynch in this volume), the regime mandates that all designated persons aged 16 and over be arrested and detained, with no right of appeal (IRPA, ss. 55(3.1); s.57.1). Those under the age of 16 can elect between two de facto forms of punishment: be held in detention or be separated from their parents and placed under the care of the state (House of Commons Debates 2012, pp. 1100, 1540, 1605;

Bond 2014, pp. 17–18).[5] The regime requires that all designated persons be detained for a minimum period of two weeks but empowers the minister to extend detention orders by six-month increments (IRPA, s. 57.1(2)). Since the IRPA does not impose clear legislative maximums on detention orders, designated persons may in theory be detained indefinitely (IRPA, s. 56(2)).[6] The regime allows designated persons to make refugee claims while detained; however, with limited access to legal assistance and community support, the prospects of advancing successful refugee claims from detention are significantly diminished. Claimants who are denied refugee status cannot appeal negative decisions and are subject to immediate removal (IRPA, s. 110(2)(a)).

While the DFN laws are formally classified as administrative, they enforce a punitive regime of de facto punishment. Upon their arrest, designated persons are typically held in dedicated detention facilities with razor wire fences, surveillance cameras, and guards. They may also be held in provincial jails with the criminal population. A recent Canadian Red Cross (2012–13) report pointing to serious shortcomings in immigration detention practices—including overcrowding and triple-bunked cells, frequent use of restraints, co-mingling with criminal populations, inadequate mental health care, inadequate access to counsel, family separation, barriers to outside family contact, and lack of support for detained children—raises concerns about the conditions designated persons could be forced to endure. The punitive nature of the DFN regime does not end with detention. Rather, the regime imposes restrictions on designated persons for five additional years after they are granted refugee status. During this time, they cannot apply for permanent residency, temporary residency, or stay in Canada on humanitarian and compassionate grounds (IRPA, s.11(1.1), 24(5), 25(1.01)). They also cannot obtain travel documents, leave the state, or sponsor family, and for these purposes are deemed not to be 'lawfully present in Canada' (IRPA, s.31.1), a legal status marked by a specter of illegality and transgression. Designated individuals may also be subject to ongoing reporting obligations and document inspection during this time (IRPA, s. 98.1). In sum, even absent a principled justification, designated persons are subject to significant restriction for five years after securing refugee status: their irregularity remains with them notwithstanding that they have 'regularized' their status as required by Canadian law.

The DFN regime also borrows heavily from the language of criminality and crime control. The regime does not require proof of criminal wrongdoing, but, in 'both legal approaches and public imagination' (Dauvergne 2004, p. 601), it depicts designated persons as dangerous

subjects to be feared and contained. On its website, for example, Citizenship and Immigration Canada (CIC) outlines an overview of the DFN regime under the heading 'Protecting Our Streets and Communities from Criminal and National Security Threats' (CIC 2012). The website explains that the DFN regime is targeted at 'possible human smugglers and traffickers, terrorists, or individuals who have committed crimes against humanity', and does not mention its application to refugee claimants (CIC 2012). Blurring lines between smuggler, smuggled, trafficker, and terrorist, CIC casts designated persons as criminal wrongdoers determined to 'abuse our generosity and take advantage of our country' (CIC 2012). Deploying the rhetoric of threat and risk, the website further explains that releasing designated persons into Canadian communities would pose an 'unacceptable risk' to the public (CIC 2012). As a result, CIC continues, it is 'essential that government authorities have the ability to detain, to impose conditions of release, and to remove those who are inadmissible to Canada' (CIC 2012). By raising the specter of danger and implied vulnerability, such depictions engender popular hostility toward designated persons. Akin to the freelance immigration-enforcement process Mona Lynch (this volume) identifies in Maricopa Country, Arizona, these representations imbue designated persons with criminal risk by virtue of their status and deem them as criminal without requiring proof of criminal activity. Also writing of the US context, Brett Story calls these practices de facto criminalization, defined as the 'cumulative effect not just of a political discourse devoted to the amalgamation of migration, illegality, and criminality, but of practices of immigration and asylum authorities, law enforcement officials, and state legislators' (2005, p. 3). Such statements encourage the perception that designated persons 'occupy the same societal role of essentialized threat as "criminals"' (Story 2005, p. 3).

The DFN regime grants the minister unprecedented power to designate any group of foreign nationals as 'irregular' based on elusive and arbitrary criteria like administrative convenience or a reasonable suspicion of human smuggling (IRPA s. 20.1). The legislation's broad language also permits designation by association and fails to differentiate between those who orchestrate, and those who are the subject of, human smuggling operations or other criminal enterprises (IRPA s. 20.1). Moreover, since the legislative scheme already contains provisions that make it an offence to knowingly or recklessly organize, induce, aid, or abet human smuggling operations (IRPA s. 117(1)), the DFN regime does little to enhance the government's ability to target global human smuggling syndicates, or 'protect the safety and security of the Canadian public', as

its ministers proclaim (Public Safety Canada 2012a). Instead, the regime functions more as a tool of enhanced border control, expanding the government's authority not only to penalize smugglers, but also to contain and discipline the smuggled. Like other mechanisms surveyed in this volume, the DFN regime operates as 'one among an arsenal of strategies of border control that draw on familiar penal technologies, imaginaries, and practices' (Bosworth & Turnbull in this volume) to restrict access to Canadian rights protection. To the extent that it functions as a tool of border control, the DFN regime is best analyzed against the law and practice of Canadian border enforcement.

Producing irregularity

Canada manages its borders through a complex matrix of territorial and extraterritorial instruments and measures. Underpinning these measures is the Multiple Borders Strategy, devised by the Canada Border Services Agency (CBSA) to rechart the Canadian border for the purposes of enhanced enforcement. The strategy's stated goal is to 'push the border out'—outside the geographic boundaries of the state—to allow Canada to 'identify and intercept illegal and undesirable travellers as far away from North America as possible' (CBSA 2009; CIC 2003a). To advance this goal, the strategy redefines the border as 'any point at which the identity of the traveler can be verified' (CIC 2003a, p. 8). It also deterritorializes the border, viewing it 'not as a geo-political line but rather a continuum of checkpoints along a route of travel from the country of origin to Canada or the United States' (CIC 2003b). The CBSA charts the Multiple Borders Strategy through a series of eight concentric circles. Each circle marks a different borderline, extending from the land border outward to various offshore locations in the high seas and outside state soil. These borderlines include the land border, airport/seaport arrival areas, points of final embarkation, transit areas, points of initial embarkation, airline check-in points, visa screen points, and countries of origin (CBSA 2009b). The Multiple Borders Strategy thus (re)imagines and enacts the Canadian border as multiple, moving lines that can be selectively positioned in various locations at once.

Through the Multiple Border Strategy, Canada shifts its border outward to prevent improperly documented migrants, including refugee claimants, from reaching Canada's territorial frontiers. As Ayelet Shachar explains, by shifting the border of immigration regulation in this way, states transform their borders into 'something more malleable and movable, which can be placed and replaced—by the words of law—in

whatever location that best suits the goals of restricting access' (Shachar 2009; see also Mountz 2010). These legal and geographic manipulations are very significant for refugee claimants, whose eligibility for rights protection in Canada is determined in part by reference to their physical location in relation to the territorial border. By shifting and deterritorializing the border, Canada makes it difficult for many refugee claimants to reach its territorial frontiers and claim the rights protections promised in *Singh*.

At each of these borderlines, Canada has intensified and expanded its use of interdiction measures and other enforcement technologies. Many of these measures are targeted specifically at refugee claimants. For example, Canada positions liaison officers in strategic refugee-producing states around the world and tasks them with blocking improperly documented persons from traveling to Canada, including refugee claimants. This program has proven an effective obstruction mechanism: between 2001 and 2012, for example, liaison officers intercepted over 73,000 persons offshore, many of whom were likely refugees (Arbel & Brenner 2013, p. 34). Offshore interdiction works in tandem with carrier sanctions and visa restrictions to 'den[y] most refugees the opportunity for legal migration' (Morrison & Crossland 2001, p. 28; see also Hathaway 2005). As critics have long recognized, these measures work together to close Canada's borders to refugee claimants such that 'vast numbers of bona fide refugees are being caught up in the web of immigration control with devastating results' (Aiken 1999, p. 6; see also Brouwer & Kumin 2003; Crépeau & Nakache 2006).

Offshore interdiction measures, visa restrictions, and carrier sanctions all 'push the border out' in similar ways: they relocate the site of Canadian border enforcement offshore to broaden Canada's discretionary powers in its treatment of refugee claimants and make it easier for Canada to circumvent its legal duties and refugee protection obligations under domestic and international law. As Macklin explains, 'Since asylum seekers' entitlement to claim refugee status is triggered by reaching the frontier of the asylum state, if the border is no longer the border, the state can deny responsibility for entertaining the refugee claim' (2005, p. 369). Reminiscent of other post-9/11 measures that move the physical bodies of detainees offshore to permit states greater leeway in circumventing domestic or international law, these measures instead move the Canadian border offshore, but to achieve the same end (see Koenig in this volume). With the expansion and intensification of these measures, more and more refugee claimants are blocked from reaching Canada by water or air.

Refugee claimants who enter Canada by land face additional barriers to securing legal entry. Those who make a refugee claim at the land border are subject to the Safe Third Country Agreement (STCA), discussed briefly above. The STCA blocks refugee claimants who are in the United States, or traveling through the United States, from making refugee claims at the Canadian border (and vice versa) subject to certain exceptions (STCA, art. 4(1)). While the STCA was not implemented under the rubric of the Multiple Borders Strategy, it follows a similar logic: it determines an asylum seeker's eligibility to enter Canada when she first sets foot on US soil, long before she presents at or even approaches the Canadian border (Arbel 2013). Unless she fits within one of the STCA's exceptions, the fact that she first entered the United States fixes her migration status and disallows her from lawfully making a refugee claim at the Canadian land border. Notwithstanding that the STCA is applied *at* Canada's geographic border, it nonetheless 'pushes the border out' by relocating the site of border enforcement outside Canada's territorial frontiers. Like offshore interdiction, visa restrictions, and carrier sanctions, the STCA enacts the Canadian border as a moving, malleable barrier that can be selectively positioned both within and outside state soil to restrict access to asylum.

The goal of restricting access to asylum was forefront in Canada's mind when implementing the STCA, though this was not initially acknowledged or disclosed. Several years after the STCA, Canada and the United States acknowledged that '[w]hile the primary focus for the United States was security, Canada sought to limit the significant irregular northbound movement of people from the United States who wished to access the Canadian refugee determination system' (US Customs and Border Patrol et al. 2010).[7] Indeed, the STCA ushered in what one US advocate described as a 'crisis on the border' (Vermont Immigration and Asylum Advocates [VIAA] 2012, interview, 10 August), triggering a precipitous drop in the number of refugee claims lodged at the Canadian border, as noted in Table 10.1.

As the figures in Table 10.1 show, the STCA prompted a steady decline in numbers, save 2007–09, when its 'moratorium country' exception was still in effect. This exception permitted entry to refugee claimants from countries on which Canada had imposed a temporary suspension of removals, on the rationale that refugee claims from these countries are often both compelling and urgent. This exception was repealed in July 2009, in part to 'reduce pressures on, and costs to, the refugee protection system' (Canada Gazette 2009, p. 1471).

Table 10.1 Refugee Claims at Canadian Border Before and After Safe Third Country Agreement*

Year	Pre-STCA Refugee Claims Made at the Border	Year	Post-STCA Refugee Claims Made at the Border
1995	7,545	2005	4,041
1996	6,792	2006	4,478
1997	6,000	2007	8,191
1998	6,224	2008	10,802
1999	9,556	2009	6,295
2000	13,270	2010	4,642
2001	14,007	2011	2,563
2002	10,856	2012	3,989
2003	10,938	2013	2,986
2004	8,904	2014	3,636

*Statistics from 2014 cited in CBSA 2015, and are current to 22 December 2014. Statistics from 2012–13 cited in CBSA 2014a. Statistics from 2001–12 cited in CBSA 2012. Statistics from 1997–2001 cited in Canadian Council for Refugees 2005.

The government's decision to remove the moratorium country exception from the STCA was acutely felt. Describing the effect of this change, one US attorney general interviewed for this study remarked:

> Before they got rid of [the moratorium country exception] for example, July 2008, we had 72 people, Freedom House had 72 people cross the border into Canada. And a lot of those people were from those countries. More recently since they got rid of the exception and now basically you are required to have a relative living in Canada, so far we've had 8 people cross the border. So the numbers we are seeing are significantly different given that change (Freedom House 2012, interview, 27 July).

A Canadian refugee-shelter worker explained:

> The number [of refugee claimants received] declined quite sharply when the moratorium country ruling came in... [W]e went from like 400 a month to like 200 a month almost right away. It was a solid 50 percent reduction in volume (Fort Erie Multicultural Centre [Fort Erie] 2012, interview, 25 July).

Pointing to a similar drop in numbers, a Canadian faith worker observed: 'When [refugee claimants] were just free to make an asylum case because they needed protection, definitely, there were many more people coming through' (Casa El Norte (El Norte) 2012, interview, 03 August).

As this statement suggests, the STCA not only blocks refugee claimants at the border, it also marks a shift in Canada's policy toward refugee claimants. With the STCA, claimants are no longer 'just free to make an asylum case because they need protection'. Their eligibility for asylum is instead governed by the exceptions outlined in the agreement.

Since STCA exceptions are the primary means by which refugee claimants can seek asylum at the Canadian border, understanding how these exceptions are evaluated is crucial for a broader understanding of the STCA. The STCA recognizes four exceptions, permitting entry to refugee claimants who have a family member in Canada, have the requisite documentation, enter as unaccompanied minors, or can demonstrate that their admission into Canada is in the public interest (STCA, art. 4(2)(a)-(d), art.6).[8] The family member exception is the most frequently used (Arbel & Brenner 2013, p. 91). The exception requires a claimant to demonstrate that he or she has a spouse or common-law partner, child, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew in Canada (STCA, 4(2)(a)-(b); 1(b)).[9] The burden of proof is on the claimant, though Canadian border officers are instructed to make reasonable efforts to confirm family relationships and to accept credible testimony and sworn statements from relatives where documentary evidence or computer records are not available (CIC 2002, p. 63; Canadian Council for Refugees & Sojourn House 2010, p. 25). Moreover, when the STCA was first implemented, Canadian officials stated they would take a generous and liberal approach to the family member exception and would not insist on documents to prove family relationships (Canadian Council for Refugees & Sojourn House 2010, p. 25).

Interview data collected along the border suggests that despite commitments to the contrary, front-line officials are generally inflexible and inconsistent in assessing family relationships (Vive La Casa (Vive) 2012, interview, 27 July; Freedom House 2012, interview, 27 July; El Norte 2012, interview, 03 August). The data collected in *Bordering on Failure* suggests a lack of uniform procedure at the border and significant disparities in the practices of front-line officials. The assessments are largely subjective and vary between officers and ports of entry. As one US attorney explained: 'The Canadian officials do have a lot of discretion…they can decide at any point that they don't believe the person or there is something not quite right and just return them to the US' (Freedom House 2012, interview, 27 July). Another US attorney remarked:

> You've got some officers up there who are relatively sympathetic and understanding and humane and you've got others that think they're

> protecting the border from Osama Bin Laden... You have the whole gambit. I tell refugees when I'm talking with them that to a certain extent it's a crapshoot... As far as I can tell, it's entirely subjective (Vive 2012, interview, 27 July).

These accounts are further supported by a 2010 study about the experiences of refugee claimants at port-of-entry interviews, conducted by the Canadian Council for Refugees and Sojourn House. That study found significant inconsistencies between border agents in evaluating the family member exception to the STCA, observed a pattern of 'unreasonable and inconsistent assessments of family relationships', and concluded that this pattern had 'in some cases undermined the fair application of the family member exception' (2010, pp. 3, 23–25). These findings suggest that despite assurances to the contrary, refugee claimants are at risk of being blocked at the Canadian border for arbitrary or unprincipled reasons.

Data collected along the border further suggests that despite recommendations to the contrary in the operations manual, Canadian officials often demand original documents to prove familial relationships. One US attorney noted, 'The Canadians are really big on documents. They like to see an original birth certificate and original photo ID, or passport preferably or a country ID from the individual coming into Canada' (Vive 2012, interview, 27 July). Another Canadian faith worker remarked that while Canadian border officials would sometimes accept photocopied documents in the past, 'now they're getting much more strict. They're insisting on original documents' (El Norte 2012, interview, 03 August). Due to the difficulties asylum seekers face in securing official documents, many may be unfairly prejudiced by this requirement. In some cases, even the presentation of several original documents, as well as testimony from family members, proved insufficient (El Norte 2012, interview, 03 August; VIAA 2012, interview, 10 August).

The tendency toward inflexibility in assessing family relationships is well illustrated by the case of *Cishahayo v. Canada* (2012 FC 1237). Mr. Cishahayo, applicant in this case, fled Burundi to seek asylum in Canada. He left Burundi in November 2011 by plane and landed in Washington, DC. He made a refugee claim at the Canadian border 12 days later and sought admission under the STCA's family member exception (*Cishahayo v. Canada,* paras. 1–3; VIAA 2012, interview, 10 August). Mr. Cishahayo had two sisters in Canada, one of whom was a Canadian citizen and the other a Convention refugee. He presented several original identity

documents at the border, in apparent compliance with the STCA: his passport, national identification card, and health insurance card (VIAA 2012, interview, 10 August). The CBSA officer tasked with reviewing his file interviewed him in person and also interviewed his Canadian citizen sister over the telephone to confirm the relationship. The CBSA officer assessing Mr. Cishahayo's claim doubted the authenticity of his documents and returned him to the United States where he was detained in Clinton County Jail (VIAA, para. 62). When Mr. Cishahayo requested that the refusal be reconsidered, he provided six additional identity documents to supplement his claim: a birth certificate, proof of residence, marriage certificate, baptismal certificate, and copy of the biographic page of a previous Burundian passport. The CBSA officer assessing his claim again denied his application, on grounds that the new documents 'did not bring any new information to light' (*Cishahayo v. Canada*, para. 8). Eventually, with legal assistance on both sides of the border, Mr. Cishahayo appealed his negative eligibility decision before the Federal Court of Canada. The Court heard his case in October 2012, allowed his claim, and sent his case back for redetermination by a different CBSA officer (para. 26). Mr. Cishahayo's case points to the broad discretionary powers of front-line officials and highlights the inflexible application of the STCA's family member exception at certain border crossings.

In addition to inflexible and inconsistent standards for assessing the STCA's exceptions, the data collected for *Bordering on Failure* also points to a growing culture of hostility toward refugee claimants along the Canadian border. Advocates, attorneys, and NGO workers on both sides of the border described the current climate as one of disbelief, suspicion, and antagonism, wherein Canadian officials routinely dismiss and demean refugee claimants. As one US advocate described: 'I saw a huge shift...before it was an attitude of kindness and we're obligated as a country to accept refugees... After 9/11, people were being...some were called cockroaches. You know, just horrible' (VIAA 2012, interview, 10 August). A Canadian faith worker observed a similar pattern, noting that with some exceptions, Canadian officers have become 'much more strict' and tend to be 'very insensitive', such that increasingly, 'people are treated as if they're criminals before they're found guilty. Even people that just come in regularly' (El Norte 2012, interview, 03 August).

The inconsistent application of the STCA's exceptions, as well as the hostility of front-line officials, raise concerns about whether the STCA is being properly applied at the Canadian border. This pattern resonates with the questions posed by Nadya Pittendrigh's

(this volume) treatment of US supermaxes, as to whether law enforcers interpret people as deserving or undeserving of protection based on criteria that have little to do with their legal status or need (see also Hannah-Moffat & Klassen and Reiter & Blair in this volume, discussing arbitrary decisions about whether the mentally ill are treated or punished for their acts). The pattern further suggests that the lines between protection and punishment are increasingly being blurred at the Canadian border, sometimes for arbitrary or unprincipled reasons. For many, seeking asylum at the Canadian border is not a matter of law so much as a matter of luck: 'a crapshoot' (Fort Erie 2012, interview, 25 July; Vive 2012, interview, 27 July).

Reproducing irregularity

These accounts tell only part of the story of the STCA. Insofar as the STCA only applies to refugee claimants at the land border (STCA, Art. 4), but does not bar claimants who cross the border clandestinely, it creates clear incentives for irregular entries.[10] Well before the STCA came into effect, critics cautioned that its implementation would prompt both irregular migration and human smuggling. In the course of parliamentary hearings before the Standing Committee on Citizenship and Immigration Canada in 2004, for example, UNHCR warned that '[a]sylum seekers who know they can no longer seek admission at the border...may very well engage the services of smugglers to take them across the border illegally in order to make a claim inland' (CIMM 2004, para. 1604). Amnesty International Canada similarly warned that a 'crude instrument' like the STCA 'is going to increase the likelihood that people are going to take dangerous, stupid chances...and cross borders illegally' (CIMM 2004, para. 1715). Writing of the STCA in 2005, Macklin warned that while the agreement 'may initially thwart asylum seekers arriving on the US side of the border... [e]ventually, smugglers will divert asylum seekers who would otherwise present themselves at the Canadian border into a clandestine flow of undocumented migrants crossing the border surreptitiously' (2005, p. 398). Even the Department of Homeland Security acknowledged that the STCA could prompt more unauthorized border crossings. The supplementary information accompanying the US regulations, for example, states clearly that the department is 'aware of the potential for increased smuggling and trafficking after the Agreement is implemented' (Department of Homeland Security, cited in Macklin 2005, p. 398).

And indeed, the data collected for *Bordering on Failure* suggests that since its implementation, the STCA triggered a rise in irregular border

crossings and human smuggling into Canada (MOSAIC BC 2012, interview, 16 May; VIAA 2012, interview, 10 August; Vive 2012, interview, 27 July; El Norte 2012, interview, 03 August). Away from official ports of entry, the border is now more disorderly and dangerous, and more refugee claimants are resorting to perilous measures to seek asylum in Canada, sometimes risking their lives doing so (Arbel & Brenner 2013, p. 12). Before the STCA, it was estimated that 90 percent of migrants crossed into Canada at 20 of the 130 ports of entry along the 5,255-mile border (Coderre, cited in Harvard Law Student Advocates for Human Rights 2006). As one Canadian faith worker explained, '[T]here was no reason for irregular entry... It was not the dangerous situations we see now' (El Norte 2012, interview, 03 August). In contrast, after the STCA, practitioners saw a marked increase in unauthorized border crossing. 'It's really common' (MOSAIC BC 2012, interview, 16 May), said one Canadian advocate. Another explained:

> We see more now than ever... People are risking their lives because they don't have an anchor relative. It is their only way to get into Canada. For us, to see someone swim the Niagara river, or take the canoe across the river, they're obviously desperate (El Norte 2012, interview, 03 August).

Statements issued by Canadian and US government agencies support these anecdotal accounts. In 2007, for example, in a bilateral Integrated Border Enforcement Threat Assessment report, Canadian and US agencies concluded that '[m]ore migrants are attempting to find a way around the provisions for the Safe Third Country Agreement, arriving in Canada by air, ferry or illegally between the ports of entry in order to enter refugee claims in Canada inland' (Integrated Border Enforcement Team 2007). In a 2010 evaluation study, the CBSA identified a rise in 'irregular migrants entering Canada between [ports of entry]...to avoid being turned back at the border based on the Safe Third Country Agreement' (CBSA 2010). In a more recent report, Canadian and US agencies recorded a staggering 58 percent increase in Canada-bound human smuggling attempts between ports of entry between 2011 and 2012 (Integrated Border Enforcement Team 2012).

It is against this backdrop that the DFN regime was implemented, and by reference to which it must be understood. Facing this steady rise in irregular migration and human smuggling activities, the Canadian government decided it was high time to crack down on the 'dangerous and despicable crime' of human smuggling (Public Safety Canada 2012b). It

did so without examining the links between the human smuggling activities it was steadfastly trying to curb and the restrictive border policies it was all the while enforcing. Examining the DFN regime by reference to the law and practice of Canadian border enforcement, as this chapter has done, helps illuminate the fact that irregular migration does not simply occur in violation of border laws but is, at least partially, produced by them. As Anna Triandafyllidou and Thanos Maroukis convincingly show, migration controls sometimes 'inadvertently foster the migrant smuggling phenomenon and the smuggling "business"' (2012, p. 1; see also Düvell 2011 and Macklin 2005). Indeed, just as exclusionary policies and restrictive border measures converge to 'make people illegal' (Dauvergne 2008), so too do they make people 'irregular'. The STCA serves as a clear example: by prompting a rise in irregular border crossings, it has played a key role in constructing the very problem the DFN regime was designed to address. In doing so, as Macklin rightly cautioned, the STCA has discursively disappeared countless refugee claimants (2005, p. 365). With the STCA, a growing number of claimants have entered Canada not as refugees but as 'irregulars' or smuggled persons. And with the DFN regime, a growing number of these claimants are now at risk of being designated as 'irregular arrivals', and produced not as legitimate entrants entitled to protection, but as transgressors deserving of punishment.

Conclusion

On 5 December 2012, then Canadian Minister of Citizenship and Immigration Jason Kenney announced the first application of the DFN regime at a press conference held at the Stanstead border crossing.[11] Standing by the snow-filled flowerpots, Minister Kenney announced that 85 Romanian nationals, 35 of whom were children, would be designated as 'irregular', arrested, and detained (Public Safety Canada 2012a).[12] According to the Canada Border Services Agency, only 14 of the 85 designated individuals had outstanding theft and fraud criminal charges against them (CBSA 2014b).[13] Since the designation was made, six of the 85 claimants have been declared Convention refugees, while 64 have made refugee claims that are still in process (CBSA 2014b). Notwithstanding that some of these claimants are indeed genuine refugees, all 85 individuals were cast as lawbreakers whose very arrival threatened the 'security and safety of Canadians' (Public Safety Canada 2012b). They were scripted in Canadian law not as refugee claimants who are lawfully entitled to protection, but as dangerous subjects to be captured, contained, and punished.[14]

That Minister Kenney chose to announce this designation in the cold chill of the Stanstead border crossing, some 200 miles away from the national capital, is telling. Quite apart from being the site at which the claimants were suspected of having entered Canada, the announcement gestured a decisive shift: it signaled the Canadian border's reconstitution from a site of hospitality and rights protection for refugee claimants, consistent with the principles outlined in *Singh v Canada,* to a site of restriction, exclusion, and punishment. Indeed, with the DFN regime, it is not just the role of punishment in the Canadian refugee system, but also its location, that has shifted. Punishment is no longer enacted in the confines of the jail or the detention center, but is increasingly being meted out on the Canadian border, reflecting a global pattern whereby state borders are becoming legal and symbolic sites of punishment (Aas & Bosworth 2013; Bowling 2013). Indeed, the DFN regime may be understood as marking the innermost borderline in the Multiple Borders Strategy. Except rather than 'push the border out' like the STCA and Canada's other border measures, the DFN regime pushes the border in: it builds a shifting, fictional border around designated persons and imagines that border as traveling with them into Canada to deem them as 'irregular' even after they cross the geographic boundary line. Their irregularity is both defined and maintained by reference to this imaginary border, in relation to which they are always defined as transgressors.

There are clear dangers in reconstituting the Canadian border as a site of punishment for refugee claimants in this way. These dangers lie not only in the erosion of legal protections available to refugee claimants, or the weakening of the legal instruments designed to guarantee them. They lie rather in providing tacit justification for the Canadian government to produce refugee claimants as 'irregulars' and cast them as criminal transgressors without requiring proof of wrongdoing. By punishing refugee claimants for their deemed 'irregularity'—an irregularity that is itself produced in and by Canadian border law—the DFN regime turns a core principle of Canadian refugee protection on its head. By the letter of the law, the Immigration and Refugee Protection Act (IRPA)—the federal statute governing immigration and refugee matters in Canada—proclaims that Canada's refugee system 'is in the first instance about saving lives and offering protection to the displaced and the persecuted' (IRPA, s.3(2)(a)). While the IRPA also delineates certain offences and penalties (ss.122–128), it prohibits Canada from enforcing these on refugee claimants pending a disposition of their claim (s.133). The logic behind this is simple: as a signatory to the United Nations *Refugee Convention,* Canada must first offer claimants protection, and

can only dispense penalty where protection is unwarranted. The DFN regime inverts this logic, thus blurring the lines between protection and punishment in Canadian law. By allowing the government to arrest and detain refugee claimants prior to hearing their claims and absent concrete proof of wrongdoing, the DFN regime first dispenses punishment, and only allows for the possibility of protection as an afterthought. In doing so, the DFN regime effectively punishes refugee claimants for trying to avail themselves of the right to seek asylum in Canada. It does so based on their deemed irregularity, an irregularity that is itself scripted into Canadian law, in part, through the law and practice of Canadian border enforcement.

Notes

1 In *Singh v. Canada,* the Supreme Court of Canada held that refugee claimants present at or within Canada's borders can claim protection under s.7 of the *Charter of Rights and Freedoms*. This principle is grounded in the rationale that a refugee claimant's presence at or within the Canadian border makes him/her amenable to Canadian law and thus also entitles him/her to benefit from its protection. As Catherine Dauvergne illustrates, however, despite its early promise, *Singh* has failed to secure meaningful rights protection for non-citizens under the *Charter* (2013b).

2 In a Global News interview dated 9 December 2012, for example, then Minister of Citizenship and Immigration Jason Kenney drew direct links between the STCA and the DFN regime. While being interviewed about the first DFN designation, made on 5 December 2012, Minister Kenney explained: 'Well, the reason why these folks crashed across the border and didn't stop to register their refugee claim at the port of entry is because they would have been turned back at the port of entry because of this agreement where we say, look, if you were in the States, you come north to seek asylum, you should be seeking protection in the United States.... That's the principle of the law, but by crashing across the border getting inland, they're then exempt from that Safe Third Country Agreement.... So the agreement become [sic] a bit of a paper tiger unfortunately, and that's why we have to find other ways to deter people who are not bonafied [sic] refugees but are trying to abuse our generosity from doing so' (Global News 2012).

3 For an analysis of the unprecedented moral panic triggered by these boat arrivals, see, for example, Neve & Russell (2010).

4 More specifically, s.20.1(b) of the IRPA empowers the Minister of Public Safety to make this designation if he or she 'has reasonable grounds to suspect' that the group entered Canada in contravention of the IRPA through 'association with a criminal organization or terrorist group'.

5 As Jennifer Bond explains, while the regime does not specify what happens to designated persons under the age of 16, several government ministers have indicated that children would either be detained with their parents or taken into custody by the relevant welfare agency (2014, 17–18).

6 The IRPA empowers the Minister of Public Safety to release designated foreign nationals from detention on request by a designated foreign national, but only in exceptional circumstances (s. 58.1(1)), or on the minister's own initiative, where the minister is of the opinion that the reasons for the detention no longer exist (s. 58.1(2)).

7 Notably, since the STCA applies at official ports of entry, and does not prevent asylum seekers from crossing the border clandestinely to lodge asylum claims inland, it is not clear how it would address 'irregular' movements into Canada. This question is not asked or answered in the report.

8 In Canada, the public interest exception has been applied narrowly and extends primarily to refugee claimants facing the death penalty.

9 While Canada recognizes married couples as well as common-law spouses (same sex and opposite sex) for the purposes of the STCA's family member exception, the United States only recognizes opposite-sex married couples.

10 The STCA does not apply to asylum seekers entering Canada by air or water. It can apply at airports, but only if 'a person seeking refugee protection in Canada who has been determined not to be a refugee in the United States, has been ordered deported from the United States and is in transit through Canada for removal from the United States' (CBSA 2009).

11 The overlap between criminal and migration law powers that underpins the DFN regime is evident in the manner in which the 5 December 2012 designation was made: formally designated by the Minister of Public Safety in the exercise of law enforcement, corrections, crime prevention, and border control powers, but publicly announced by the Minister of Citizenship and Immigration in the exercise of immigration powers.

12 While Minister Kenney's announcement conveyed the impression that all 85 nationals would be designated 'irregular' under the DFN regime, materials provided by the CBSA responding to an Access to Information request indicate that of the 85 individuals designated on 5 December 2012, only 40 individuals (21 adults and 19 children) entered Canada after the DFN regime came into effect. The remaining 45 individuals (29 adults and 16 children) entered Canada at two different points before the DFN regime was implemented: on 2 February 2012 and 26 April 2012. They were not formally designated 'irregular' but nonetheless produced as such. Of these 45 individuals, it appears that only 29 were located, of whom at least 18 (including five children) were detained and 13 (including four children) were removed. The remaining individuals advanced refugee claims that are still in process.

13 Since the 5 December 2012 designation was made, two of the designated individuals were found not to be Convention refugees, and 13 individuals, including four children, were removed (CBSA 2014b). The CBSA does not specify whether the removed individuals were the same individuals that had outstanding theft and fraud charges against them.

14 The language of chase and capture was used by various news sources soon after the 5 December 2012 designation was made. That same day, for example, several news sources issued stories bearing the headline 'Hunt is on for Romanians believed to be part of human smuggling ring' (Levitz 2012).

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