Chapter 2

From Slavery to Expulsion: Racism, Canadian Immigration Law, and the Unfulfilled Promise of Modern Constitutionalism

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> And yet we live in the era of progress, don't we? I suppose progress is like a newly discovered land; a flourishing colonial system on the coast, the interior still wilderness, steppe, prairie. The thing about progress is that it appears much greater than it actually is.
>
> Johann Nestroy, *Der Schutzling*

> *For the master's tools will never dismantle the master's house.* They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.
>
> Audre Lorde, *Sister Outsider*

Introduction

The primary goal of pre-Confederation Canadian immigration policy was to divest the indigenous population of their sparsely populated "wild lands" and render them productive as quickly as possible (Tie 1995). For this reason, the early British and French settlers permitted unrestricted admission to their North American colonies. According to various accounts, the first nonwhite immigrant to arrive in Canada directly from Africa was a black slave by the name of Oliver LeJeune. He was brought to New France as a six-year-old child in 1628 (Winks 1971, 1). In 1689, the French colonizers in New France received the authorization of Louis XIV to import African slaves to work in agriculture. With the conquest of New France in 1760, the British legalized slavery under the *Québec Act* and it continued under British rule in Québec, Nova Scotia, New Brunswick, and Ontario until the early nineteenth century. Although slavery as a labour system did not develop on the large scale that it did in the United States, slavery produced an inferior status for blacks that had profound consequences for their place in Canada

long after its abolition (Bolaria and Li 1988, 204). Indeed, numerous authors have documented how the objective of building a white Canada translated into an explicitly racist immigration policy and how immigration law and its underlying ideology continue to exclude or restrict the admission of racialized persons today (Matas 1996; Jakubowski 1997; Walker 1997; Simmons 1998; Arat-Koc 1999; Li 2003; Preston 2003; Sharma 2005). As Stasiulus and Yuval-Davis observe, immigration laws have been utilized in settler societies to encourage "desirable" immigrants—that is, those of the hegemonic white "race"—to settle in the country and to exclude the "undesirable" ones (Stasiulus and Yuval-Davis 1995, 23–24).

Replicating a paradigm that was created and sustained by European imperialism, Canadian immigration law imposed admission restrictions based on "race." People of African, Chinese, Japanese, Indian, Jewish, and Caribbean ancestry were among the groups subjected to discriminatory treatment in post-Confederation Canada. The exclusion of blacks from subsidized settlement opportunities in Western Canada, the exorbitant head tax imposed on Chinese migrants from 1885–1923, the continuous-journey rule that turned away the *Komagatu Maru* from Vancouver Harbour in 1914, together with "preferred country" lists which restricted admission to all but Europeans, are merely a few examples of the stains on Canada's historical record. Throughout this exclusionary period in Canadian history the courts largely reinforced the policies of the day (Bolaria and Li 1988; Knowles 1997; Kelley and Trebilcock 1998; Kelley 2004).

The content and objectives of Canadian immigration law and policy have been shaped by a multiplicity of factors, including economic and demographic objectives, ideological and political considerations as well as concerns about public safety and security (Elliott and Fleras 1996, 290; Jakubowski 1999, 100). The relationship among these factors is exceedingly

complex, particularly now, with the ascendancy of the post 9/11 security agenda. In the contemporary context, immigration law and policy are informed by competing and often contradictory impulses (Dauvergne 2003). With the acceleration of economic globalization and transnationalism, international boundaries have declined in significance. Capital and information together with the elites that generate them circulate in a "borderless world" in which economies and societies are becoming increasingly integrated and networked (Castells 1997). In opposition to this trend, however, the state continues to play the most important role in immigration policy development and implementation. Immigration law remains an important (albeit contested) site for states to exercise their sovereign power over markets and people. In a world that is characterized by growing economic cleavages, in which poor nations and their peoples have been and continue to be exploited by the rich, migration flows from the South to the North and West have intensified (Lister 1997, 42–65; IOM 2003). Canada is one of just a few countries that actively plans and promotes immigration but managing and controlling who gets in remains central to the government's agenda. Immigration is characterized as a privilege rather than a right, and immigration regulation becomes a means of both inclusion and exclusion, of differentiating who may belong to the nation and who is "alien." Subject to some limited exceptions for refugees, the basic supposition that continues to underpin Canadian law and policy is that states have an absolute right of control over their borders and territories and a corresponding prerogative to adopt discriminatory admissions policies. In this regard, immigration law is consistent with both liberal and communitarian views of the world that defend the legitimacy of the state's gate-keeping function as critical for the preservation of the rights and interests of its members (Rawls 1993; Walzer 1982). As articulated by Justice John Sopinka of the Supreme Court, "[t]he most fundamental principle of immigration law is that non-

citizens do not have an unqualified right to enter or remain in the country…" (*Chiarelli* 1992). Immigration law in Canada — with the endorsement of the courts—continues to expressly exclude immigrants on the basis of poor health or disability as well as income. Criminality and security measures operate as further technologies of control.[1] Once admitted, the status of immigrants as non-citizens is also seen as a legitimate basis for restricting the scope of human rights protections afforded by the law. Canadian citizenship and immigration laws foster a hierarchical ordering of "insiders" and "outsiders" living and working *within* Canadian society (Sharma 2005, 13). As the text of the law and legal discourse in the area of immigration has evolved from its explicitly racist orientation to one of "objective" discrimination, racism in its less obvious, systemic forms has persisted. From slavery to expulsion, racialized people have been the victims of a legal system that has worked to disadvantage and oppress.

One of the central myths of our national identity is that Canada is an egalitarian, pluralist society free from the scourge of racism that exists in the United States and throughout most Western societies. The Commission on Systemic Racism in the Ontario Criminal Justice System noted that racism has "a long history in Canada" and remains a defining feature of Canadian society. While the primary focus of the provincial study was the criminal justice system, the commissioners emphasized that "[r]acism has shaped immigration to this country and settlement within it …" (Commission 1995, ii). Notwithstanding the scholarship and even judicial notice of the problem of racism in Canada, there has been relatively little focus on racism and immigration law by constitutional theorists.[2]

The purpose of my chapter is to address this important lacuna with a view to deconstructing our collective mythology concerning "race," immigration law and the role of modern constitutionalism. Harris and Hartog define constitutionalism in terms of the reliance on

words as a touchstone for shaping governing practices. I am using the concept in a somewhat broader sense to connote the supremacy of a legal rights discourse as the basis for practicing democratic politics. I will attempt to demonstrate that use of this discourse has failed to deliver the systemic changes required for a truly antiracist immigration program. Evaluating the success of legal mobilization strategies can be difficult. Even unfavourable decisions can exert a positive influence on the policy climate or may serve to strengthen the social movements which organized around the litigation (Manfredi 2004, 12, 150). The important, if limited, contributions of constitutionalism to the development of progressive legal doctrine as well as policy reform in certain areas has been charted by others (Schneiderman and Sutherland 1997; Manfredi 2001; Jhappan 2002). I contend however, that for immigrants and refugees the promise of transformative litigation remains wholly unfulfilled.

The chapter begins with an analysis of the meaning of "race" and racism and a brief introduction to critical race theory as a lens through which my central thesis concerning constitutionalism and immigration can be explored. At the outset, a note on the terms *race* and *racialized*: the word *race* has been placed in quotation marks throughout this paper in acknowledgement of its meaninglessness as a biological category. I am using the term *racialized* to emphasize that irrespective of the racial identities that may be affirmatively embraced by individuals and groups, "race" does not exist in the absence of its social construction (Appiah and Gutmann 1996, 71–74; Walker 1997, 303–305). The balance of the chapter examines key elements of contemporary immigration law and policy. A number of recent judgments will be analyzed to illuminate the extent to which the norms embedded in immigration law are so predominant that the basic concepts of constitutionalism are interpreted in agreement with them (Tully 1995, 9). Indeed, the appearance of change - the language of equity and

fairness in the text of the law and law talk - has served as a cover for preserving the status quo and sustaining systemic racism in the contemporary immigration program.

"Race" and Racism: Constructing the Other

In "Equality: Beyond Dualism and Oppression," Hodge suggests that the many forms of oppression, including racism and sexism, are sustained by a framework that codifies the world in terms of the struggle between the forces of good and evil. As Hodge states:

> The dualism of good and evil contains assumptions that enable those accepting it to believe that they have greater moral worth than those they oppress. Their victims, on the other hand, are seen as bad or as motivated by evil. The treatment of their victims is not viewed as oppression at all, but instead is believed to be justified as the victory of good over evil. Dualism helps create and sustain oppression by appearing to be rational (Hodge 1990, 89).

Derrida emphasizes that since the Enlightenment, the use of binary oppositions has formed the basis of Western thinking and language. Inherent in the idea of binary opposition is the notion of hierarchy or privilege of one over the other. Derrida maintains that this domination produces fear of the other:

> Absolute fear would then be the first encounter of the other as other: as other than I and other than itself. I can answer the threat of the other as other (than I) by transforming it into another (than itself), through altering it in my imagination, my fear, or my desire (Derrida 1976, 277).

In most societies, dualism has been the organizing principle and key justification for the creation and maintenance of all forms of violence and oppression. It is the basis for organizing our social experience in terms of "us" and "them" and the view that one's own group (family, generation, gender, class, *et cetera*) is better than "them" or the other (Essed, 1990). Similarly, the notion of "race" as a device for conceptualizing differences between persons and groups is a clear manifestation of dualistic thinking. It was not until the eighteenth century, however, that the

concept of "race" was used to signify certain physical or biological features that were believed to distinguish between various categories of human beings through the logic of a *natural* hierarchy (Outlaw 1990, 62). "Blackness" became associated with whatever was evil, ugly, filthy, and depraved while "whiteness" became associated with whatever was pure, clean, virtuous, and beautiful (Vizkelety 1987, 67). With the aid of science, skin colour became a potent rationale for slavery, a practice that emerged from the material quest of the European colonizers for a cheap source of labour to clear the lands and work the fields in the colonies. The colonizers initially perceived the Africans as other or unlike themselves, primarily because they were "heathen"- that is, not Christian. As the practice of slavery became institutionalized through the market forces of capitalist production, however, racism was the result. The colonizers came to essentialize and dehumanize the Africans whom they enslaved on the basis of their blackness. At the beginning of this century, a prominent English scholar, Gilbert Murray, encapsulated the prevailing imperialist view about "race":

> There is in the world a hierarchy of races …[Some] will direct and rule the others, and the lower work of the world will tend in the long run to be done by the lower breeds of men. This much we of the ruling colour will no doubt accept as obvious (Murray in Walker 1997, 12).

The view that the population of the world was divided into different "races" and that these "races" could be ranked in a hierarchy of biological superiority and inferiority has been wholly discredited (Anthias and Yuval-Davis 1993, 1). It is generally understood that there are no scientific grounds to use phenotype or biological heredity as an explanation of social inequality (Bolaria and Li 1988, 17). In the mid-nineteenth century, Marx commented on the role that capital assumed in defining the social relations between persons:

> A negro is a negro. In certain circumstances he becomes a slave. A cotton-spinning jenny is a machine for spinning cotton. It becomes *capital* only in certain relations. Torn from

> these relationships it is no more capital than gold in itself is *money* or sugar is the price of sugar…(Marx 1847, 207)

The essential meaning conveyed by Marx was prescient. Sociologists today speak of "race" as relational and historically specific. As both Li and Satzewitch explain, "race" is a socially constructed concept used to describe certain patterns of physical and other superficial difference (Li 2006, 1; Satzewitch 1988, 27). To the extent that "race" is a meaningful category in the law, it is the concrete expression of social discourse. Racism is both the symptom and the result of a social process in which unequal relationships between dominant and subordinate groups are defined, socially organized, and maintained on racial grounds. There are different types of racisms, and they may be understood as "modes of exclusion, inferiorization, subordination and exploitation that present specific and different characters in different social and historical contexts … There is not a unitary system of signification that can be labelled racist nor is there a unitary perpetrator or victim" (Anthias and Yuval-Davis 1993, 2).

Researchers from a variety of theoretical traditions emphasize the importance of addressing the ways in which categories of racialized difference and exclusion intersect (or "interlock") with class, gender, and other variables, thereby particularizing the experience and outcomes of racism (Ng 1993; Crenshaw 1993; Anthias and Yuval-Davis 1993; Agnew 1996; Brewer 1997; Razack 1998). There are divergent views in the academic literature with regard to how to conceptualize the inter-relationship and significance of these categories. Informed by a political economy perspective, some scholars have suggested that racial injustice is derivative of economic exploitation. For example, Miles has argued that "race" should be considered in the context of class relations under capitalism. Miles identifies coloured labour as the racialized fraction of the working class and suggests that the process of racial categorization "… can then be viewed as affecting the allocation of persons to different positions in the production process

and the allocation of material and other rewards and disadvantages to groups so categorized within the class boundaries established by the dominant mode of production" (Miles 1982, 159). For Miles, the goal would be to dismantle the national and transnational structures of capital accumulation and distribution, thereby ameliorating the disparities between the rich and the poor and eradicating racism from its roots. History certainly confirms that racism originated with the drive—in both colonial societies and capitalist states—to reproduce cheap sources of labour (Bolaria and Li 1988, 19). Yet this analysis fails to account for the fact that injustice continues to afflict individuals because of their skin colour, assumed ancestry, and the corresponding racial identity that is imputed to these characteristics, regardless of their material conditions or class (Appiah and Gutmann 1996, 110). The early work of Stuart Hall also emphasizes the importance of class but acknowledges that socially constructed definitions of "race" are the "modalities" and the "medium" through which social and economic class relations are lived and experienced (Hall *et al.* 1978).[3] Etienne Balibar considers the articulation between racism and nationalism and emphasizes the role of state institutions in mediating and sustaining racism (Balibar 1991).

In the Canadian context, it is clear that racism is not the only cause of inequality and injustice in society and in the immigration program, more specifically. Indeed, racism may be more accurately understood as a manifestation of unequal relationships in a society in which salient sources of discrimination include "race," income, and class, as well as gender, sexual orientation, and age. Nevertheless, "race" continues to influence the opportunities and experience of racialized groups in North America, even after controlling for other factors.[4] Despite the divergence of theories with regard to the causes of racism, there is consistent support for the view that racism is a significant factor in informing public discourse and, in turn, the behaviour

of individuals and social institutions in settler societies. Depending on the context, institutional racism can be manifested in the form of explicitly racist policies in which the state directly reinforces existing racist biases in society or it can be found in a systemic form ("systemic racism") and concealed in systems, practices, policies, and laws that appear neutral and universal on their face but disadvantage racialized persons.

Critical race theory examines the meaning of "race" and racism in the specific context of legal theory and practice. Informed by critical sociology, neo-Marxism, and postmodern philosophy, the critical race theory movement emerged in the late 1970s with the work of Derrick Bell, Alan Freeman, and other American scholars (Bell 2004; Delagado and Stefancic 2000). The movement was a reaction to the failure of Marxism and liberal-pluralism to account for the social reality of racism and the role that the law plays as both product and promoter of racism. In conceptual terms, the focus of inquiry for critical race theorists is the privileging of whiteness as an invisible norm and societal organizing tool. The movement has stressed the importance of contextual analysis, examining racism from the perspective of those who experience it (Yamamoto 1997). It has also insisted on critical race praxis—the need for theory to incorporate pragmatic solutions to the problems identified. In this regard, some critical race theorists have sought to reconstruct rights discourse and litigation strategies premised on this discourse to shift the way in which "race" is articulated in the law and before the courts (Matsuda 1996, 22). On the other hand, these theorists, along with many other American legal scholars, have been less sanguine about the actual effectiveness of recourse to the courts as a means of achieving social justice. In the face of the widely acknowledged failures of the American civil rights movement and growing empirical evidence that decades of rights based litigation in the United States had not generated appreciable improvements in social conditions

or life opportunities for racialized people, many scholars are bringing rights down from their pedestal and assessing their impact in the context of everyday social and political experiences (Goldberg-Hiller 2002, 339). In the Canadian context, critical race theorists and other scholars remain divided about the transformative potential of legal mobilization and constitutionalism in particular. The dearth of judgments which have incorporated a "race-sensitive" lens is seen by some as evidence of the need for more effective and coordinated legal strategies, rather than a retreat (Aylward 1999; St. Lewis 2001). In contrast, socialist, certain feminist, and postmodernist scholars have emphasized the limitations of constitutional judicial review as an agent of progressive social and economic change (Mandel 1994; Glasbeek 1990; Turpel 1989–90; Smart 1989; Fitzpatrick 1990). More recently and with specific reference to Canada, a rare empirical study of the concrete, real-life effects of the *Canadian Charter of Rights and Freedoms* (the "Charter") as experienced by its intended beneficiaries concludes that contemporary constitutionalism has not changed Canada much, if at all (Arthurs and Arnold, 2).

It is not my intent to trivialize or underestimate the significance of a positive court decision in the lives of successful litigants. I support the drive for judicial appointments that better reflect the diversity of Canadian society and for more focused judicial and legal education on "race" and racism. Nevertheless, this chapter seeks to demonstrate that over twenty years of Charter litigation have failed to diminish systemic racism in immigration law and policy. Carol Smart's admonition concerning the paradoxical effect of legal intervention—that in "exercising law, we may produce effects that make conditions worse"—offers an important analytic lens for my inquiry (Smart 1989, 16).

Questions of democratic legitimacy and the appropriate relationship between Parliament and the courts have been the subject of much debate since the Charter's inception.[5] I agree with

Mandel's thesis concerning the dangers of over-reliance on the courts as a means of disrupting existing structures of oppression. On the other hand, I do not share the view, most commonly espoused by both leftists and social conservatives, that Parliament is an inherently more democratic or even trustworthy site for advocacy. Rather, I argue that neo-liberal resistance to progressive reform ensures that individual legal victories seldom translate into substantive gains for equality and justice for non-citizens. Litigation strategies predicated on rights claims may serve an important role in the redress of discrete cases of unfairness and prejudice. Nevertheless, they have been ineffective in attacking the embedded discriminatory premises of immigration law and utterly impotent in addressing the deeper, root causes of inequality in society (Bakan 1997, 62). To paraphrase Marx, the political instrument of enslavement cannot serve as the political instrument of emancipation (Marx 1871, 147). Audre Lorde's more contemporary caution about the perils of attempting to dismantle the master's house with the master's tools is my starting point (Lorde 1984).

Before proceeding further I believe it is important to address the question of my subject position. The project of critical scholarship requires the writer to identify her conceptual vantage point - the voice in which the story is being told (Brodkey 1987). I am clearly outside the "epistemic privilege" acquired by the experience of everyday racism.[6] At the same time, my understanding of what it means to live in this country as a racialized person is shaped by the interconnected personal and social spaces of my life. I have been involved as counsel or advisor in a number of the more recent cases that serve as the basis of my study. In *Looking White People in the Eye,* Razack underscores the importance of exposing how we are implicated in the systems and processes of oppression that we aim to critically evaluate. Razack states:

> …we need to examine how we explain to ourselves the social hierarchies that surround us. We need to ask: Where am I in this picture? Am I positioning myself as the saviour of

> less fortunate peoples? as the progressive one? as more subordinated? as innocent? These are the moves of superiority and we need to reach beyond them … Accountability begins with tracing relations of privilege and penalty (Razack 1998, 170).

Razack expresses concern that the white female gaze often sustains rather than disrupts white supremacy. Critical race theory asks us to look at the law from the perspective of people adversely affected by racism and allow our analysis to be informed by this perspective (Aylward 1999, 173). I am a white, Jewish academic and immigration lawyer. In this regard, the fact of my whiteness demands the exercise of methodological humility in approaching a study of immigration law and policy as a product and promoter of racism. From the position of ally, both insider and outsider, my primary objective is to contribute to the transformation of the structures of disadvantage that perpetuate the injustice of racialized borders.

Racism in Contemporary Immigration: Law, Policy, and Constitutional Adjudication

The *Charter of Rights and Freedoms* was formally entrenched in the Canadian Constitution in 1982 with a signing ceremony on Parliament Hill. In a celebratory statement launching the Charter, Justice Minister Jean Chrétien expressed a popular expectation:

> Now it is not just the politicians who will defend our rights, it will also be the courts. That is better because politicians tend to just go with the wind. Now, due to the Charter, it is possible to think about those issues in the courts away from the arena of political debate and where emotions and votes cannot influence you (Chrétien, 1986, 10).

Optimistic predictions suggested that the Charter would fundamentally alter the Canadian legal and political landscape and that its guarantees would "offer minorities a place to stand, a ground to defend, and the means for others to come to their aid" (Berger 1984, 83).[7] Section 52 of the Charter explicitly established the supremacy of the Constitution, thereby imposing a new constraint on the powers of government and cementing the judicial review role of the courts.

When legislation or regulations violated constitutional rights and the government could not defend the violation as a "reasonable limit that is demonstrably justified in a free and democratic society," the law could be declared invalid—"read down" to narrow its scope—or the offending portion of the legislation could be severed. In cases where the law itself raised no constitutional objections but protected rights were violated through the exercise of law enforcement discretion, section 24 of the Charter offered a broad range of remedies including stays of proceedings, damages, declarations, and even injunctions in exceptional circumstances. The Charter sought to protect a broad catalogue of civil and political rights. Most pertinent to immigration matters are the rights to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (section 7), the right not to be subjected to cruel and unusual treatment or punishment (section 12), the right to equality before and under the law, and the right to equal protection and benefit of the law without discrimination (section 15). The Charter makes an explicit distinction between citizens and non-citizens, according mobility rights to permanent residents and citizens exclusively and affirming that only citizens have the right to enter, remain in, and leave Canada (section 6).

The adoption of the Charter was preceded by positive changes to immigration law. As early as 1962, nondiscriminatory immigration regulations were implemented, marking a significant shift from the White Canada policy in which immigrant selection was explicitly predicated on "race," ethnicity, and nationality to a more "objective" assessment system that was formally colour blind. In 1976, a new Immigration Act was introduced, offering an express commitment to values of universalism and equality. This Act, together with the possibility of a constitutional judicial review based on an entrenched catalogue of rights, appeared to introduce a "new paradigm into the interpretation of rights and the judicial function" (Walker 1997, 324–25).

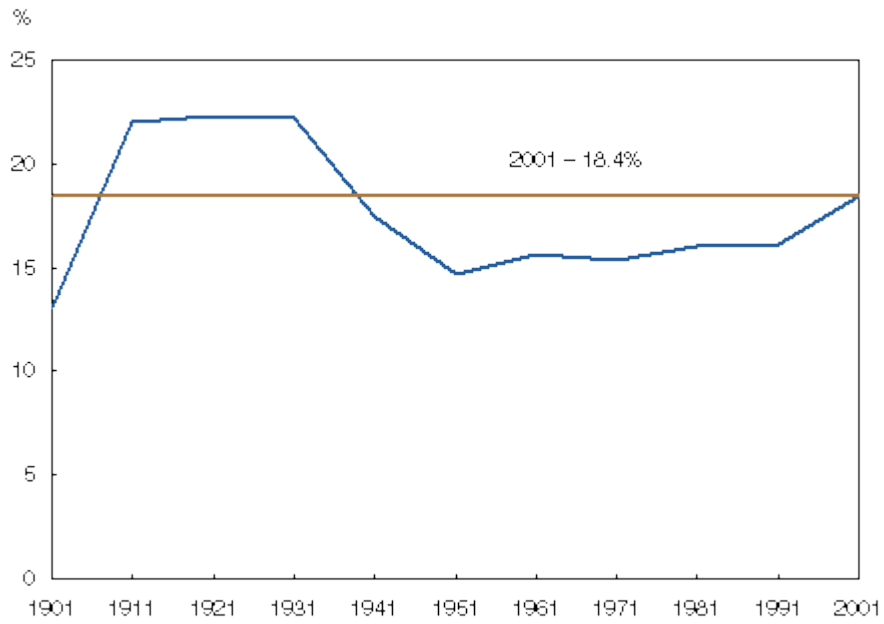
Canadian immigration law and practice would be informed by principles of fairness and respect for the equality rights of the immigrants and refugees to whom the reach of the law and its administration extended. The prospect of Charter challenges would offer an important mechanism of accountability with the courts providing aggrieved individuals direct access to public decisions affecting their lives and an opportunity to challenge laws, independent of government law reform agendas (Russell 1983, 49).

Since the early 1980s, thousands of racialized immigrants and refugees from so-called "nontraditional source countries" in Africa, Asia, and the Americas have been admitted to Canada. By 1992, the shift in immigration source countries was clearly reflected in the fact that approximately 81 per cent of new immigrants were persons of colour (CIC 1994a, 22). These immigrants were from precisely those groups that the government had historically discriminated against on the basis of their "race", national or ethnic origin, and colour (Tie 1995, 71). It would be misleading, however, to attribute the shift in immigration demographics to the influence of the Charter or even the legislative changes of 1978. In this regard, the dynamics of global capitalism have played a significant role in the changing face of Canadian immigration. For at least the past two decades, prospective immigrants from Europe have been less inclined to view Canada as a desirable destination. Relatively high levels of taxation combined with significant barriers in terms of access to trades and professions have fuelled the transformation of Canada's immigration and refugee programs. As economic factors have compelled a radical reorientation in the demographics of immigrant selection, the government has sought to maintain its grip on the program by retaining control of who gets in. As suggested by Simmons, the government shifted from a neo-colonial, racist immigration strategy to one that could be described as "neo-racist"; that is, one that "reveals significant racist influences and outcomes within a framework

that claims to be entirely non-racist" (Simmons 1998, 91). High-income earners with the skills to contribute to Canada's knowledge economy have been effectively "deracialized" while neo-racism remains embedded in core elements of immigration law and practice. Affluent business immigrants can purchase a visa, while immigration policies reinforce inequalities based in gender and race that intersect with and constitute class (Preston 2003). The courts and the Charter in particular have not shifted the balance of power in favour of racialized immigrants and refugees nor, as Mandel has observed, have they posed any serious obstacle to Canada's repressive immigration policies (Mandel 1994, 257). The following sections will examine some of the salient indicators of racism in the contemporary immigration program and take a closer look at the role of constitutionalism in sustaining that which it claims to counteract.

The Demographics of Immigration and Immigrant Admissions

Foreign-born persons constitute a growing proportion of Canada's population. According to the 2001 Census, they reached 5.1 million or about 18.4 percent of the country's total population. The graph below represents the proportion of foreign-born in Canada from 1901- 2001.



Source: Statistics Canada, *2001 Census*

For 2005, the federal government planned to bring between 220,000 and 245,000 new immigrants to Canada (CIC 2004, 19). Although the vast majority of these immigrants will be persons of colour, they will be a fairly selective group. Economic class immigration (primarily skilled workers and business immigrants) will represent approximately 60 per cent of the overall intake. Consistent with statistics for well over the past decade, most will come from a handful of countries in Asia—primarily the People's Republic of China, India, Pakistan, and the Philippines. In the period from 1991 to 1996, immigration from countries in Africa and the Middle East represented only 16 per cent of the total immigration to Canada. By 2004, immigration from Africa and the Middle East had climbed minimally to 21 per cent of the total number for that year. No country from Africa has ever made the list of top ten source countries for all classes of immigration. Targets for immigration from Central and South America remain limited at 9.2 per cent of the total intake. The distribution of Canadian visa posts around the world and the allocation of resources to these offices continue to reinforce these trends. In 1998,

for example, there were only four immigration offices to service all of sub-Saharan Africa while Hong Kong alone maintained a staffing level of eighteen officers (CIC 1998, 6–8; Kelley and Treblicock 1998, 411).

The chart below identifies the distribution of permanent residents according to immigration category and source region for the years 1995 – 2004.

CANADA – PERMANENT RESIDENTS BY CATEGORY AND SOURCE AREA

SOURCE AREA	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
					Number					
Africa and the Middle East	7,499	7,174	6,061	5,163	5,831	7,055	7,805	6,384	7,461	7,892
Asia and Pacific	44,151	37,292	32,423	27,377	29,601	32,532	35,263	36,630	38,649	34,038
South and Central America	13,951	11,743	10,356	8,025	8,753	8,742	10,038	7,831	7,381	7,437
United States	2,780	3,158	2,495	2,603	2,953	3,179	3,614	2,786	2,966	3,690
Europe and the United Kingdom	8,996	8,990	8,641	7,725	8,124	9,095	10,046	8,638	8,583	9,069
Source area not stated	9	2	3	5	15	11	28	30	84	120
Family class	**77,386**	**68,359**	**59,979**	**50,898**	**55,277**	**60,614**	**66,794**	**62,299**	**65,124**	**62,246**
Africa and the Middle East	18,249	20,234	23,121	19,284	18,996	23,411	30,705	30,604	25,386	27,590
Asia and Pacific	58,446	75,477	75,317	49,008	59,061	78,658	87,726	71,209	62,244	66,480
South and Central America	4,406	4,456	4,932	4,425	4,993	5,959	7,473	8,041	7,313	8,454
United States	2,361	2,591	2,470	2,103	2,544	2,575	2,242	1,938	1,703	2,977
Europe and the United Kingdom	23,148	22,606	22,511	23,077	23,629	25,683	27,551	26,058	24,403	28,240
Source area not stated	25	6	0	16	38	13	22	10	1	5
Economic immigrants	**106,635**	**125,370**	**128,351**	**97,913**	**109,261**	**136,299**	**155,719**	**137,860**	**121,050**	**133,746**
Africa and the Middle East	7,143	8,665	7,975	7,661	8,499	10,338	9,662	8,823	9,536	12,593
Asia and Pacific	9,608	8,977	7,201	6,218	7,260	9,323	9,858	10,197	10,166	12,158
South and Central America	2,087	2,450	1,752	1,329	1,417	2,220	2,657	2,842	3,712	4,597
United States	53	90	54	57	30	69	55	33	45	132
Europe and the United Kingdom	9,195	8,295	7,321	7,576	7,182	8,138	5,684	3,219	2,523	3,172
Source area not stated	1	1	5	1	9	4	3	6	2	34
Refugees	**28,087**	**28,478**	**24,308**	**22,842**	**24,397**	**30,092**	**27,919**	**25,120**	**25,984**	**32,686**
Africa and the Middle East	38	422	642	488	222	101	61	526	1,294	1,445
Asia and Pacific	689	3,071	2,159	1,616	643	224	99	998	2,639	1,869
South and Central America	21	228	386	267	113	85	40	752	1,935	1,760
United States	1	11	11	13	5	4	0	536	1,278	695
Europe and the United Kingdom	12	133	202	163	48	46	5	949	2,050	1,367
Source area not stated	0	0	0	0	0	0	0	0	0	10
Other immigrants	**761**	**3,865**	**3,400**	**2,547**	**1,031**	**460**	**205**	**3,761**	**9,196**	**7,146**
Africa and the Middle East	32,929	36,495	37,799	32,596	33,548	40,905	48,233	46,337	43,677	49,520
Asia and Pacific	112,894	124,817	117,100	84,219	96,565	120,737	132,946	119,034	113,698	114,545
South and Central America	20,465	18,877	17,426	14,046	15,276	17,006	20,208	19,466	20,341	22,248
United States	5,195	5,850	5,030	4,776	5,532	5,827	5,911	5,293	5,992	7,494
Europe and the United Kingdom	41,351	40,024	38,675	38,541	38,983	42,962	43,286	38,864	37,559	41,848
Source area not stated	35	9	8	22	62	28	53	46	87	169
Category not stated	0	1	0	0	0	0	1	0	1	0
Total	**212,869**	**226,073**	**216,038**	**174,200**	**189,966**	**227,465**	**250,638**	**229,040**	**221,355**	**235,824**

Source: CIC, *Facts and Figures 2004: Immigration Overview – Permanent and Temporary Residents*.

In addition to the distribution of visa posts, other factors that contribute to the under-representation of certain racialized groups in current immigration demographics include the continuing role of discretion under the *Immigration and Refugee Protection Act* (IRPA) and *Regulations* implemented in 2002, the selection criteria and associated income requirements, and

processing fees. An immigrant's admission to Canada as a "skilled worker" depends on how many points she or he receives on a scale that attempts to gauge her or his economic potential in terms of six selection factors: education, language ability (English or French), skills, work experience, age, and adaptability. Additional points are allocated for prospective immigrants with arranged employment. Although the discretionary category of "personal suitability" was eliminated with recent reforms, immigration officers are still permitted to override the points system altogether to either accept or refuse an applicant on the basis that the rating does not reflect the "immigrant's chances of becoming successfully established." The continued role of discretion in overseas immigration decision making permits individual, biased immigration officers to make discriminatory decisions, and it allows the law, more broadly, to act as a tool for perpetuating racism (Jakubowski 1999, 111).

Revamped in 2002, the methodology embedded in the points system favours immigrants with flexible skills that offer a significant economic benefit to Canada's knowledge economy (RIAS 2001). It admits only those tradespersons with significant certification and bars most service personnel below the managerial level. The selection grid effectively precludes both domestic and agricultural workers from successful consideration as skilled workers since childcare and farm labour are simply not included in the list of eligible occupations.[8] In the face of chronic labour shortages in these sectors, the federal government continues to rely on temporary worker programs.[9] Numerous scholars and advocacy organizations have documented how the precarious status of these workers, the requirement that caregivers and agricultural workers live in the homes or on the farms of their employers, and the ever-present threat of deportation reinforces their subordination and vulnerability to all forms of abuse (Macklin 1992; Arat-Koc 1999; Li Wai Suen 2000; Sharma and Baines 2002; Basok 2002; Cook 2004). In the

words of Noreen, a domestic worker from the island of St. Vincent: "…it's just the treatment that people dish out to you, you know they treat you worse than how they treat their dog or cat …You know sometimes I feel like a slave, sometimes I dream about freedom" ("Noreen" in Silvera 1989, 20). In a similar vein, a farm worker from central Mexico explains, "they treat us worse than animals … in my mind slavery has not yet disappeared ..." (farm worker in Lee 2003).

As Sharma and others have suggested, the use of temporary-work visas has facilitated significant growth in the temporary, low-wage labour sector while inhibiting the permanency of a resident non-white working class (Sharma 2005, 12; Simmons 1998, 106). In correlation with the barriers many workers face in qualifying under the selection criteria, a significant number of workers—particularly women who have less access to education, money, and information than men—are electing to migrate illegally (Langevin and Belleau 2000). Estimates of the actual numbers of undocumented workers living in the country vary widely but it is clear that many sectors of the Canadian economy, including food and services, manufacturing, construction, garment making, childcare, and cleaning, rely heavily on non-status labour. The health and social services available to these workers are limited. In general, people without status are not entitled to access hospital treatment while the children of non-status parents are often denied the right to an education. Fearing that any contact with authorities might lead to deportation, undocumented workers are particularly vulnerable to exploitation in the workplace and at home (Khandor *et al* 2004, 6).

For immigrants who qualify as skilled workers under the points system, a further hurdle of providing evidence of adequate "settlement funds" must be met. Current guidelines require approximately $10,000 per adult. Highly skilled individuals with strong employment prospects can be turned down on the basis that they have insufficient settlement funds. Even in cases where

discretion may be exercised positively to waive or at least adjust the requirement for "settlement funds," all immigrants must pay a $975 "Right of Landing Fee" together with a non-refundable $550 "processing fee." These fees, resonant of the head tax imposed on Chinese migrants in the earlier part of the last century, have been defended by the government as "a small price to pay to come to the best country in the world" and necessary to offset at least some of the costs of settlement programs (the success of the government's deficit-reduction strategy over the past several years makes this argument less persuasive). The government claims that the fees are not discriminatory because they apply to everyone. Yet given the disparities between Canadian currency and currencies in the South as well as between the rich and the poor in most countries of the world, the fees amount to a regressive flat tax that violate fiscal fairness. Among those disproportionately affected by this modern-day head tax are racialized immigrants from the South, where the fees very often represent up to three years of salary (CCR 1997).

Income restrictions have been an increasing feature of family sponsorship rules as well. Regulations require family members to meet minimum income levels when applying to sponsor relatives other than their spouse and dependent children. New rules impose an absolute bar on family reunification for sponsors in receipt of social assistance for reasons other than disability. Although family unity is recognized as a fundamental right in a range of international and regional human rights treaties to which Canada is signatory, the notion that family reunification is a privilege one has to pay for has been incorporated in Canadian immigration law since the 1950s. Over the past decade, just as studies were confirming that racialized persons are over-represented among those who live in poverty and that the marginalization of immigrants has worsened across Canada, immigration policy has been imposing more rigid income requirements for family sponsorship. Although today's immigrants have arrived with more education and

skills than their predecessors, persistent barriers to accessing the trades and professions for which they have been chosen have resulted in increasing unemployment and under-employment for newcomers (Ornstein 2000; Worswick 2004). Clustered in low-wage work, today's immigrants suffer greater economic disadvantage relative to other Canadians than they did in the decades prior to the introduction of the Charter (Campaign 2000, 2005; Galabuzi 2001; Arthurs and Arnold). It is now taking university-educated immigrants at least ten years to achieve the employment earnings of comparably educated Canadians (RIAS 2001). During this difficult transition, immigrants find themselves increasingly isolated and alone, without the support and assistance of their families. For sponsors who are single parents unable to afford accessible childcare while working, the arrival of a spouse or other relative enables one or both parents to work outside the home generate income, and either terminate welfare payments or increase family income beyond the minimum cut-offs. Immigration law's one-dimensional construction of family in terms of economic dependency reinforces exclusionary policies that have a disproportionate impact on racialized, single parents—primarily women (Macklin 2002). Indeed, family-class immigration has declined dramatically from the largest component of the overall annual immigration intake to approximately 24 per cent for 2004 – 2005 (CIC 2004, 19). Reducing the number and proportion of family class immigrants in favour of preferred economic migrants has been an explicit policy goal of the federal government since 1994 (CIC 1994b, 21). Financial eligibility requirements, along with a range of bureaucratic obstacles, have been intentionally structured to stall family reunification for months or years, if not indefinitely (Macklin 2002).

Relatively few cases have reached the Supreme Court which have directly challenged the intersecting forms of discrimination inherent in current immigration laws and policies. In an

early Charter case, *Andrews v. Law Society of British Columbia*, the Supreme Court observed "non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions." Justice Gérard La Forest went on to note that "[d]iscrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin" (*Andrews* 1989, 195). It deserves mention that Mark David Andrews was a permanent resident who enjoyed a relatively privileged position in society as a white male lawyer. Three years after the decision in *Andrews*, the Supreme Court issued its ruling in *Chiarelli.* The ideological contradiction between these two decisions is a good indication of the tensions that characterize current thinking in the area of immigration. Quite apart from the question of the right to enter or the right to remain in a country—principles which international law actually supports in varying degrees—all persons, regardless of their citizenship status, "race," or national origin have a fundamental claim to be treated with dignity and accorded full equality as human beings (Nafziger 1983). Yet, until 2002, in decisions taken pursuant to the former immigration act, the Charter was held not to apply to the actions of visa officers outside of Canada (*Deol* 2003; *Lee* 1997; *Ruparel* 1990).[10] This reading of the Charter was upheld by the Federal Court, even in the face of a contradictory ruling by the Supreme Court that the Charter had extraterritorial application in the context of the criminal law, extending to Canadian police investigations undertaken in the United States (*Cook* 1998). Thus, the Department of Citizenship and Immigration's most significant sphere of activity was immune from Charter review. Section 3(3)(d) of the IRPA provides that the new law is to be construed in a manner that "ensures that decisions under this act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination." Prospects for successful

equality challenges do not appear promising. Jurisprudence confirms that admissions criteria that draw distinctions on the basis of the *actual* circumstances of each visa applicant rather than ascribed, stereotypical characteristics do not constitute unconstitutional discrimination (*Deol* 2003, 327).

In addition, practical deterrents remain to using the courts to challenge the basic underpinnings of the admissions scheme. These include the difficulty of finding plaintiffs outside Canada and sustaining their commitment to lengthy litigation with an uncertain outcome, the residual uncertainty regarding their status *vis-à-vis* the Charter and the fact that once inside Canada, they may fear the risk that litigation could pose to their already vulnerable status as well as to their future in the country. The prospect of serious delays in resolving their cases, together with the exorbitant costs associated with litigation and the limited availability of legal aid in most provinces, serve as further deterrents. After the federal government adopted the Right of Landing Fee in 1995, a Toronto-based coalition attempted to launch a Charter challenge of the fee. For three years, however, not a single client could be identified who was willing to risk the delays associated with raising a constitutional challenge and the prospect, even if successful at the first instance, of defending against further appeals to the Federal Court of Appeal and then the Supreme Court. In those cases that do go forward, resort to the courts has led to the quashing of admissions decisions that were made unfairly or in a discriminatory manner but has rarely generated any fundamental changes to the inequities of the legislative scheme itself.

Refugees

In 1979, Canada played a leading role in resettling tens of thousands of Vietnamese refugees in the aftermath of a decades-long war. While the government condemned the interception and piracy of Vietnamese boats on the high seas, it was forging innovative

partnerships with private groups across the country to receive and support the refugees. As a result of these efforts, the United Nations awarded the people of Canada the prestigious Nansen Medal "in recognition of their major and substantial contribution to the cause of refugees." Nevertheless, Canada's record of compliance with international human rights standards and the *Refugee Convention* in particular has been uneven. The government's responsiveness to refugee crises around the world has frequently been informed by racism as well as geopolitical and economic considerations, rather than respect for international legal obligations and the spirit of humanitarianism that both the former Immigration Act and IRPA allegedly enshrine. During the past decade, in the face of massive human rights atrocities in Sudan, Rwanda, and Burundi, and more recently in Sierra Leone and the Ivory Coast, only Somalia and the Democratic Republic of Congo ranked in the list of top ten source countries for refugees by source area for more than one year.

For 2005 the projected refugee intake was approximately 13 per cent of total immigration, consisting of 7,500 government assisted and 3,400 to 4,000 privately sponsored refugees as well as between 14, 500 to 16,500 "self-selected" refugees who will arrive in Canada on their own and successfully proceed through the in-land determination system (CIC 2004, 19, 25). The current rules for selecting refugees from abroad make use of establishment criteria modified from the points system for immigrants. With exceptions for urgent or "special needs" cases, applicants must convince a visa officer that they will be able to adapt to life in Canada and will be able to successfully establish themselves within three years of arrival in addition to demonstrating that they are at risk of persecution as a Convention refugee or are facing a refugee-like situation.[11] While the criteria are to be applied with an emphasis on social factors rather than strictly economic, subjective and highly discretionary considerations with regard to

the refugee's "personal suitability" continue to supplant the assessment of the refugee's need for protection. Canadian visa officers frequently overrule the advice of legal officers from the United Nations High Commissioner for Refugees with regard to deserving cases. Despite widespread criticism of the government's refugee resettlement model, officials have refused to eliminate the establishment criteria from overseas selection (Giles 1996, 45; Casasola 2001, 81).

For reasons explained in the previous section, the Charter has not afforded overseas applicants any prospects for challenging refusals. Even ordinary judicial review applications challenging visa officer decisions are relatively rare, given the constraints faced by refugees living in precarious conditions in camps or other circumstances where local integration is not possible. For in-land refugee claimants, the courts have had occasion to consider the scope of Charter protections and the leading cases will be considered in turn below.

In 1985, the Supreme Court released its decision in *Re Singh and Minister of Employment and Immigration and 6 other appeals*. It stated that where a serious issue of credibility is involved, fundamental justice required that credibility be determined on the basis of an oral hearing. Justice Bertha Wilson found that the system for determining refugee status inside Canada failed to meet the procedural guarantees of section 7 of the Charter. Prior to *Singh,* refugee claimants did not have an oral hearing or an opportunity to address the evidence the government might have with respect to their claim. Instead, they recounted the events that led to their departure from their country of origin in an examination under oath with an immigration officer who then forwarded the transcript of that examination to the "Refugee Status Advisory Committee," which made a decision on the claim without ever hearing from the claimant. Three of the six justices in the Supreme Court's ruling in *Singh* confirmed that everyone present in Canada as well as anyone seeking admission at a port of entry was entitled to the protection of

the Charter.[12] Refugee advocates and lawyers celebrated the decision, and each year commemorate the date of the decision's release in April as "Refugee Rights Day" across the country. In the short term, the implications of *Singh* were quite dramatic. The government had to spend millions of dollars to set up a refugee-determination system that included procedures for a full oral hearing and the right to counsel. By 1989 the Immigration and Refugee Board had been established, affording refugee claimants inside Canada a "quality" status determination by an independent, quasi-judicial tribunal. Developments in the wake of *Singh*, however, clearly demonstrate the extent to which legal victories so easily slide into irrelevance. In the aftermath of the decision, the government took swift steps to limit access to the refugee-determination system by limiting the appeal rights of claimants in Canada and increasing measures of interdiction to ensure that fewer refugees actually reached Canada in the first place. Introduced in 1987, Bill C-84, known as the Deterrents and Detention Act, authorized the government to turn away ships in the internal waters of Canada, the territorial seas, or twelve miles beyond the outer limit of the territorial waters when there are "reasonable grounds" for believing the vessels are transporting anyone in contravention of the act. Another provision of the bill made it an offence to assist anyone to come to Canada who was not in possession of proper travel documents, whether that person was a *bona fide* refugee or not. Transportation companies were subject to fines (or technically levied administration fees) if they brought any improperly documented passenger into Canada. Since 1990, the government has been expanding its interdiction efforts through its support for a network of immigration control officers (recently renamed as "migration integrity officers") stationed around the world to prevent migrants without proper documents from reaching Canada. Little is known about the circumstances of the approximately 6,000 persons whom these officers "successfully" intercept each year, but reports surface very occasionally of

refugees who have suffered serious human rights violations upon return to their countries of origin (Aiken 2001, 47–8; AI 1998).

By 1992, the Supreme Court had narrowed the application of *Singh* in the case of a permanent resident seeking to challenge the constitutionality of provisions that imposed deportation for serious criminal offences and denied an appeal to residents suspected of engaging in organized criminal activity (*Chiarelli* 1992). Joseph Chiarelli, who had come to Canada with his parents as a teenager, was facing deportation as a result of two criminal convictions as well as allegations that he would engage in organized crime. The Court assumed, without deciding, that section 7 could apply to the case but found that the provisions in question did not constitute a violation of fundamental justice. The judgment noted that Parliament had the "right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada." The conditions imposed by Parliament on a permanent resident's right to remain in the country represented "a legitimate, non-arbitrary choice…" (*Chiarelli* 1992, 735).[13] Although not a refugee case, the Supreme Court's decision in *Chiarelli* was extended to refugees facing similar circumstances. A year later, in *Nguyen v. Canada*, the Federal Court considered a constitutional challenge to provisions of the Immigration Act that rendered individuals convicted of serious crimes ineligible to make a refugee claim. The Court held that "[a] foreigner has no absolute right to be recognized as a political refugee under either the common law or any international convention to which Canada has adhered. It follows that … [t]o deny dangerous criminals the right, generally conceded to immigrants who flee persecution, to seek refuge in Canada certainly cannot be seen as a form of illegitimate discrimination.…"(*Nguyen* 1993, 704). In *Dehghani v. Canada*, the Supreme Court reinforced the citizen/non-citizen distinction in holding that the questioning of a refugee claimant in a

"secondary examination" at the border was equivalent to the routine procedures to which any non-citizen seeking entry was subject. Consequently, the implied compulsion and questioning did not constitute detention within the meaning of the Charter and did not attract any procedural rights to due process or the right to counsel. As a result of this ruling, statements made by refugee claimants at the port of entry in the absence of counsel were increasingly introduced in the initial "credible basis" hearing as evidence of prior inconsistent statements with a view to denying the claimant the right to proceed to the second stage which is a hearing on the merits of their claim. More generally, the prospects that the Charter could be used in aid of refugees seeking to challenge any aspect of their treatment by immigration law, policy or practice had been restricted to the narrowest of grounds (Kelley 2004, 268).

In 1993 new legislative amendments to the Immigration Act (Bill C-86) were introduced which centred on abuses to the system by outsiders. Included in the package of amendments was a provision that required Convention refugees to produce "satisfactory" identity documents in order to be landed.[14] Prior to the passage of Bill C-86, the Immigration Act exempted Convention refugees from the requirement to provide identity documents. Somali refugees were among those disproportionately affected by the new requirement. Since the collapse in 1991 of the Siyad Barre regime in Somalia, there has been no central government and thus no institutions to issue identity documents. The last legal Somali passports were issued in 1989 and by 1994 all of the valid Somali passports had expired. Even before the collapse of the government, however, a large majority of the population did not register their births, marriages, or divorces, a cultural reality that is shared by many other countries, especially in Africa (Brouwer 1999, 4). Three years after Bill C-86 was implemented, in a professed effort to address community concerns, the government set up the "Undocumented Convention Refugee in Canada Class" (UCRCC),

imposing a mandatory five-year waiting period on all Somali refugees seeking permanent residence.[15] The five-year period (reduced to three years in 1999) was calculated from the date of receiving a positive decision from the Immigration and Refugee Board, with the result that the total period of time that "undocumented" refugees have to wait prior to landing is at least seven years. By 1999 there were approximately 13,000 refugees, primarily Somali women and children and a comparatively smaller group of Afghans, in legal limbo as a direct result of the identity document requirement (Brouwer 1999). Several years after adoption of the UCRCC only 38 per cent of the original group of refugees in limbo had been landed (Maytree 2002, 7; Brouwer 1999, 5). While protected from removal, refugees without landed status are unable to leave the country for the purpose of a temporary visit to another country or to be reunited with family members whom they would have otherwise been able to sponsor. Due to the age restrictions of the family class sponsorship program (subject to a few, narrow exceptions, the former Immigration Act stipulated that dependent children could only be sponsored when they were under 19 years of age), parents who may have been forced to leave children behind in refugee camps in an effort to secure safety for themselves and their family in Canada were never able to sponsor any child who was over the age of eleven years when left behind. In addition, refugees in the UCRCC were denied access to postsecondary education, professional training programs, and bank loans for small businesses. As holders of temporary work permits, many refugees were forced to rely upon social assistance as employers were often unwilling to hire them. Many of the Somali refugees reported discrimination in the housing market where landlords were reluctant to rent to racialized women on social assistance who were also newcomers with large families (Murdie 2002; Preston 2003). These restrictions produced the social marginalization of an entire community.

The government justified the identity document requirement for refugees and later the Undocumented Convention Refugee in Canada Class using the rhetoric of maintaining the safety of Canadian society, suggesting that without identity documents, there was no way to confirm whether or not the refugee was a war criminal or a terrorist. Former Citizenship and Immigration Minister Lucienne Robillard stated somewhat equivocally that these measures were about "balancing risk to Canada against compassion." Yet there was no evidence of widespread danger. The refugee hearing itself affords an opportunity for extensive examination of identity issues. Refugee applications are routinely turned down if it is found that the individual is not who she or he claims to be. Prior to landing, every refugee is routinely subjected to a security screening process conducted by the Canadian Security Intelligence Service. For the few who have managed to obtain refugee status on the basis of misrepresentation or concealment of any material fact, proceedings could be initiated against the particular individual pursuant to existing immigration provisions.

A Charter challenge to the identity document requirements initiated by eleven Somali refugees in Ottawa in 1996 was successfully settled with a government commitment to accept affidavit evidence concerning a refugee's identity in lieu of identity documents (Maytree 2002). IRPA subsequently inscribed into law administrative guidelines adopted in the wake of the settlement which permit refugees with few or no identity documents to submit statutory declarations attesting to their identity. For those unable to obtain a credible organization or individual who can vouch for their identity, an "Undocumented Protected Persons in Canada Class" has been maintained with a waiting period of three years and all the attendant hardships. As Razack suggests, the identity documents rule acquires its coherence in the context of "a national story of white innocence and the duplicity and cunning of people of colour" (Razack

2000, 187). The rule is difficult to account for in any other terms, given the fact that verifying identity continues to be a central issue in protection hearings.

IRPA reinforces and extends the government's preoccupation with refugees as queue-jumpers and dangerous outlaws. Underpinning current policy is the myth that refugee claimants who travel with forged documents (often the only feasible way for an individual to escape a situation of danger and travel to a country of asylum) or "unsatisfactory" documents (*i.e.,* documents that do not conform to Western standards) are not genuine refugees.[16] A series of new measures have been adopted, aimed at addressing the "problem" of undocumented refugees. These measures include enhanced interdiction to intercept "improperly documented" people before they arrive in Canada, increased disembarkation checks as passengers leave aircraft, collaboration with other countries to develop a system of data collection on illegal migration, and the prospect of detention for refugee claimants who refuse to "cooperate" in establishing their identity. The legislation also expands the grounds for denying refugee claimants access to the refugee determination process of the Immigration and Refugee Board and imposes an absolute bar on repeat claims, regardless of the length of time that has passed or the extent to which conditions in the refugee's country of origin may have worsened.[17] Denied access to a hearing, "ineligible" claimants are only entitled to request relief from removal through a "pre-removal risk assessment" by way of a written application to the Minister. With a fairly consistent acceptance rate of less than 5 per cent, most advocates consider this administrative remedy to be an exceedingly poor substitute for a hearing.[18] In the introduction to the white paper that preceded IRPA, the government asserted:

> In reaffirming its commitment to an open immigration system and to the protection of refugees, the government wishes to ensure a sound immigration and refugee system that is not open to abuse.

> Canada, together with other major Western industrialized countries, has committed to developing a multidisciplinary and comprehensive strategy to address the common problem of illegal migration (CIC 1999, 46).

Despite the rhetoric of "open immigration" and a stated commitment to refugee protection, the government's agenda for reform has been predicated on stereotypes of refugees as criminals and threats to Canada's security.

Within days of the attacks on the World Trade Center and the Pentagon in September 2001, Canadian Prime Minister Jean Chrétien indicated that tougher requirements for would-be refugee claimants would be part of a package of reforms to respond to the new global realities (Harper 2001, A1). In fact, no changes were made before the bill was hurriedly proclaimed on November 1, 2001; new enforcement measures had already been included in earlier versions of the bill, well before September 11. On December 3, 2001 American Attorney General John Ashcroft, Canadian Immigration Minister Elinor Caplan, and Solicitor General Laurence MacAulay initialed an important new policy document—a "Joint Statement on Border Security and Regional Migration Issues." The statement focused on "deterrence, detection and prosecution of security threats, the disruption of illegal migration and the efficient management of legitimate travel." It outlined a series of new measures, including joint border patrols, a policy review on visitor visas, and information sharing on high-risk visa applications, an increase in the number of migration integrity officers overseas as well as the development of common biometric identifiers for documents (CIC 2001). A short time later, these measures were codified in a "Smart Border Declaration" with an accompanying thirty-point Action Plan. For refugee advocates, the most controversial part of the border accord was the proposed "Safe Third Country Agreement." Implemented in late 2004, the agreement requires, with limited exceptions, all refugee claimants arriving at a Canadian land border from the United States to pursue their

asylum claim in the United States and *vice versa*. Given the more limited availability of direct flights to Canada than to the United States, dramatically higher numbers of refugees arrive in the United States as their first destination. Indeed in 2003, approximately 11,000 refugee claimants made claims at Canadian ports of entry at the land border while the flow from Canada to the United States was barely a few hundred. The refugee populations that will be most disadvantaged by the agreement are likely to be racialized people the global South who lack the financial means to fly directly from their country of origin. In her discussion of the 1992 amendments to Canada's immigration law which permitted the designation of "safe countries," Jakubowski compares the safe country provisions to the *Continuous Journey Stipulation* of 1908 which refused entry to immigrants who came to Canada other than by way of a single, uninterrupted passage. The genesis of the continuous journey rule was the policy goal of curtailing immigration from India. As Jakubowski suggests, without ever mentioning the word "race," the ultimate effect of these provisions is "to control a particular dimension of the refugee population—developing world refugees, the majority of whom are classified by the government as visible minorities" (Jakubowski 1997, 85–86).

Canadian officials justify the Safe Third Country Agreement on the premise that protection will be readily available in the United States and that this is a measure simply aimed at "burden sharing" for international refugee flows. The implicit objective of the agreement, however, is simply to reduce the number of refugees who can claim refugee protection in Canada. The experience of similar accords in Europe suggests that the agreement may actually have the perverse effect of encouraging asylum seekers to cross Canadian land borders illegally and then pursue their claims inland (Canada 2002).[19] Refugees have every reason to assume those risks, given the lower standards of due process protection available in the U.S. with respect

to refugee hearings, the greater prospect of detention and deportation in expedited removal procedures as well as differing (and detrimental) U.S. interpretations of international refugee law. A Charter challenge of the agreement is currently being planned by a coalition of Toronto-based lawyers. Arguably however, the importance of the agreement has become less significant as increasing resources are being allocated to interceptions overseas—far from any Canadian land border. In support of this contention is the fact that the numbers of refugee claimants arriving in Canada have plummeted in the past three years with overall numbers at their lowest point since 1994 (UNHCR 2004).

Existing immigration law and practice with regard to refugee admissions, rules on identity documents, and the Safe Third Country Agreement represent classic examples of systemic racism. By using the logic of sanitary coding (the law is framed in neutral, objective language) and the technique of equivocation (the rationale for the law is framed in terms of keeping out system abusers while at the same time upholding the principles of the Constitution and international law), the government has been able to avoid any accountability for the adverse effects on racialized refugees of its efforts to manage the immigration program (Jakubowski 1999, 120). Viewed through the lens of recent experience, the due process guarantees achieved through the *Singh* decision have failed to protect substantive rights for most refugees. Indeed many features of current legislation draw directly from the Supreme Court's jurisprudence to the detriment of non-citizens and refugees in particular (Kelley 2004, 283). As increasingly fewer refugees are able to access a protection hearing in Canada, Canada's overall contribution to international refugee protection remains paltry in relative terms. Canada continues to host less than one-quarter of one percent of all the world's refugees (UNHCR 2004). The perception that the in-land status determination system established in response to the Supreme Court's ruling in

Singh is an unacceptable drain on public resources appears be to rising (Simpson 2003, 2005; Jiménez 2005), reinforcing a neo-racist, anti-refugee policy agenda.

"Humanitarian and Compassionate" Cases

Immigration law has long provided a residual authority to the Minister of Citizenship and Immigration to exempt anyone from any of the requirements of the act or otherwise facilitate their admission to the country, based on "compassionate or humanitarian considerations." Neither IRPA nor the regulations provide any indication of the meaning to be ascribed to "humanitarian or compassionate," nor of the procedures applicable to an individual seeking such an exemption. Administrative guidelines have been developed and are contained in the *Immigration Manual*. A series of changes were introduced to these guidelines in 1999 and again with implementation of IRPA. The newest version suffers from the same lack of transparency and inconsistent application as the older versions. Current guidelines indicate that applicants bear the burden of satisfying the decision maker that their personal circumstances are such that the hardship of having to obtain a visa outside Canada in the normal manner would be (i) unusual and undeserved or (ii) disproportionate. In practice, applications are rarely given favourable consideration unless the applicant can demonstrate successful establishment in Canada in addition to whatever hardship might be suffered by returning to their home country. A request for humanitarian and compassionate consideration can be made in the context of any application to the department, but arises most frequently in the cases of individuals already in Canada and seeking special consideration to remain. For failed refugee claimants, this procedure is frequently the only safety net available to ensure that there will be some consideration of the reasons why they may be at risk, if returned to their country of origin. The program provides for the possibility of spouses and other members of the family class to remain in the country with their

family rather than endure the hardship of the lengthy separation of overseas sponsorship. In the past, the policy guidelines also included a special category for "illegal *de facto* residents" who had established themselves in Canada after a period of many years and sought to regularize their status. This category was the only remedy available for many racialized women who came to Canada to take up positions as domestic workers outside legal channels. The underlying policy rationale for this category seemed to be a recognition that people who have severed ties with their home country and demonstrated an ability to be self-sufficient in Canada over a significant period of time should not be subject to an indefinite penalty for gaining illegal admission to the country. Current guidelines, however, specifically proscribe such recognition, noting instead that favourable consideration may be warranted when individuals have been in Canada for a prolonged period of time due to "circumstances beyond their control."[20] The language of the guidelines does not appear to translate easily to a situation where someone has been "underground" and seeks to regularize their status. A humanitarian and compassionate application is processed as an administrative review. There is no right to a hearing although the person concerned may be requested to attend an interview. For many years, the courts refused to accept that an applicant seeking judicial review of an immigration officer's decision was entitled to anything more than minimal fairness in what was otherwise characterized as a wholly discretionary decision (*Shah* 1994).

In 1999, the Supreme Court rendered its decision in *Baker v. Minister of Citizenship and Immigration*, a case concerning the rights of Canadian-born children in the context of their parent's immigration proceedings. Mavis Baker is a woman from Jamaica who came to Canada and overstayed her visit. She supported herself as a live-in domestic worker for eleven years and was self-sufficient until she suffered an attack of postpartum psychosis following the birth of her

youngest child. While undergoing treatment, two of her children were placed in the custody of their father, a citizen of Canada, and the other two went into foster care. As her health improved, the two children placed in foster care returned to live with Ms. Baker. The other two remained with their father but Ms. Baker and her former partner maintained a hybrid family in which the children visited back and forth between the two homes. Ms. Baker's humanitarian and compassionate application was turned down by the immigration officer who reviewed her case with the explanation in his notes that:

> This case is a catastrophy [sic]…The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will of course be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford that sort of generosity…(*Baker* 1999, para. 5).

Justice Claire L'Heureux- Dubé writing for five justices of the Court found, among other things, that the immigration officer's comments gave rise to a reasonable apprehension of bias, noting as "most unfortunate" the link made between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would be a strain on our social welfare system for the rest of her life. She stated that the officer's notes and the manner in which they were written "do not disclose an open mind or a weighing of the particular circumstances of the case free from stereotypes." In addressing the rights of the children, the Court noted that international human rights law was a "critical influence" on the interpretation of the scope of the rights included in the Charter. Yet the court did not address any of the underlying problems with the discretionary decision-making scheme. Although constitutional issues were raised, they were sidestepped by the court when it rendered a decision that rested primarily on administrative law principles. Mavis Baker, like a number of other people whose

applications were rejected in a similar manner, won the right to have her application reconsidered. After a lengthy delay, Baker eventually received permanent residence and the standard of review applicable to humanitarian and compassionate cases has been clarified as "simple reasonableness," a threshold that provides a little more latitude for judicial intervention.

On the one hand, the *Baker* case has been quite significant in terms of its impact on administrative law doctrines relating to standard of review. It has opened up the possibility of subjecting a range of discretionary administrative decisions that had been otherwise beyond the reach of the courts to judicial scrutiny. Several years after the court's ruling, however, it has become increasingly clear that the decision has meant relatively little to migrants in circumstances similar to Baker's.[21] Officers' notes no longer reflect in so transparent a manner any hint of racism or stereotyping. The children's interests are more carefully weighed, rather than so abruptly dismissed. While the *Baker* ruling may provide somewhat easier access to the courts for judicial review and, in this sense, widen the scope of procedural or due process rights for all categories of migrants, the barriers to justice for racialized women like Mavis Baker are significant and the remedy more hypothetical than real. At best, this small legal victory has resulted in one person at a time being allowed to stay in the country and, even then, perhaps only for a limited time (Sterett 1997, 13). The Court overlooked the question of racism in society, its relationship to poverty, and the systemic problems associated with the humanitarian review process. The judgment reflected little of the analysis urged upon the Court through interventions by the Charter Committee on Poverty Issues, the Canadian Council of Churches and the joint submissions of the Canadian Council for Refugees, the Canadian Foundation for Children, Youth and the Law and the Defence for Children International-Canada.[22] With the implementation of the current guidelines, it is even less likely that racialized women who have contributed their

labour as domestic workers, permitting middle-class Canadians the benefits of two incomes and someone to care for their children, will be afforded any recognition by the immigration system. Proof of this contention was readily available in the court of public opinion in the wake of the decision's release. An editorial in the *Globe and Mail* suggested that Mavis Baker was the "author of her own misfortunes" and that when her case was considered again, she should be deported because the "integrity of the immigration principles demands it." Similarly, an editorial in the *National Post* intoned that if Mavis Baker "truly believes the welfare of her children is paramount, she would return to Jamaica and reconcile her two sets of children."

Francis (Litigation guardian of) v. Canada (Minster of Citizenship and Immigration) was a direct constitutional challenge to the humanitarian and compassionate decision-making structure. By the time her case reached the Ontario Court of Appeal, Maria Francis had been living in Canada without status for eleven years. She had two Canadian-born children; her eldest son, born in Grenada, was ordered deported with her. When the Federal Court denied their application for a stay of the removal, the Canadian-born children filed an application in the Ontario Court on the grounds that deportation of their mother would violate their Charter rights, and that the Department had failed to properly consider their best interests before ordering the deportation of their mother and brother. A broad coalition including the African Canadian Legal Clinic, Women's Legal Education and Action Fund, Congress of Black Women, National Action Committee on the Status of Women, Metro Toronto Chinese and Southeast Asian Legal Clinic and the Coalition of Visible Minority Women, intervened to address issues of racism. The coalition argued that fundamental justice in the context of a humanitarian and compassionate review should necessarily include the right of both Francis and her children to a fair hearing, one which was not influenced by systemic discrimination or by myths about racialized Caribbean

women who immigrate to Canada. Although the children's application had been successful at the first instance, the government's appeal was allowed by the Ontario Court of Appeal on the basis that the ruling in *Baker* afforded adequate instructions to immigration officers to ensure that the children's interests were considered in deportation proceedings. While the Court allowed Francis and her son to remain in Canada to pursue a new humanitarian review, none of the issues raised by the coalition appeared to inform the Court's judgment. In the face of a political determination to preserve the integrity of immigration control and eradicate any incentives for "abusers," the courts and the government have been mutually reinforcing. Drawing on the judgment in *Baker*, section 25 of IRPA sets out the general authority for humanitarian and compassionate applications and indicates that the Minister's discretion to exempt an individual from the usual requirements of the Act should take account of the "best interests of the child". Similarly, the current humanitarian guidelines, which were not applicable to either the *Baker* or *Francis* cases, actually make reference to international human rights standards and indicate that the applicant's submissions *may* (emphasis added) be considered in light of these standards.[23] Arguably, such references will serve to ensure that immigration officers seeking to refuse particular applicants will now do so using the language of human rights standards, without importing human rights reasoning into the substance of their decisions.

Expulsion of African-Canadian Residents

On April 5, 1994, twenty-three-year-old Georgina Leimonis was killed during a late-night robbery of Just Desserts, a café in Toronto. A few months later, in June 1994, police constable Todd Baylis was killed. Both deaths were the result of shootings alleged to have been committed by Jamaican immigrants already under deportation orders. Some of the men charged had been in Canada since they were children, but had, like many other Caribbean immigrants, neglected to

apply for Canadian citizenship as soon as they became eligible (Pratt and Valverde 2002, 145). Both deaths were embraced by the media as potent symbols of a deeply flawed immigration system that, had it been functioning effectively, could have prevented the deaths of two innocent victims. Responding to Canadians' worries about their personal safety came to be seen as a key priority by the federal government. The notion that more effective legal tools were needed to improve "system integrity" swiftly acquired currency in the Canadian policy arena. Within a year, in a climate of rising public hysteria about "immigrant criminals," the government accomplished the swift passage of Bill C-44, a set of amendments to the Immigration Act (Noorani and Wright 1995). Bill C-44 introduced significant changes to the rights of refugees and long-term permanent residents in Canada. Individuals classified as a "danger to the public" could be arrested and held indefinitely, pending deportation from Canada under an opinion issued by the minister. The right to an oral hearing was replaced by a paper process in which the minister was both adversary and decision maker, and the person concerned was provided with a scant fifteen days in which to respond to the minister's submissions.

Williams v. Canada was a decision involving a challenge of the public danger provisions by a Jamaican-Canadian man who was facing deportation as a non-citizen. Jeffrey Williams had resided in Canada for over twenty years, arriving as a child at the age of ten. As a young man he was convicted of a number of narcotics offences and one offence of assault. The Federal Court of Appeal's ruling confirmed that the danger opinion process met minimum common-law requirements for procedural fairness and that "liberty" did not include the right of personal choice for permanent residents to stay in Canada where they have "deliberately violated an essential condition under which they were permitted to remain in Canada" (*Williams* 1997, para. 26). In a subsequent judgment the Court refused to accept that a permanent resident with family

and deep roots in Canada should be accorded an independent Charter-based right to be considered a citizen and protected from deportation (*Solis* 2000). As Kelley points out, until 1976 most grounds of deportation only applied to persons with less than five years residence. With the 1976 Immigration Act the concept of "domicile" was removed, permitting the deportation of long-term permanent residents, but providing a right to appeal their removal on compassionate grounds except when a security certificate had been issued against them. The combined result of *Chiarelli* and the more recent judgments in *Williams* and *Solis* was that what a non-citizen could expect from the Charter was actually less than what had been provided by immigration legislation before the Charter was adopted (Kelley 2004, 266-68). Most Canadians would enjoy greater rights of appeal in relation to minor traffic violations than long-term permanent residents had in relation to decisions depriving them of their liberty and separating them from family members and the only home they know.

Between 1995 and 2000, the Department sought and issued danger certificates in an estimated 2, 000 cases, numbers that did not conform with an expressed intention of limiting the use of the process to exceptional cases where appeals would be manifestly without merit. In a discussion paper on the implementation and impact of the public danger provisions, the African Canadian Legal Clinic documented that the common denominator among persons who have been subject to removal based on a public danger opinion is that they are members of racialized groups, including "an overwhelming number of persons of African descent with previous drug-related offences" (ACLC 1999, 3). The department's own statistics confirm that two years after Bill C-44 had been implemented, nearly 40 per cent of the total public danger removals executed in Ontario were deportations to Jamaica, constituting more than five times the number of the next highest recipient country of Trinidad and Tobago, and more than the total number of deportees to

all of Europe, the United States, and South America (CIC 1997). The subjective nature of the danger opinion process often led to lengthy litigation, thwarting the policy intent of removing dangerous criminals from Canada as quickly as possible. It also led to charges by some that the public danger scheme was reinforcing systemic racism in the immigration program and that the removal of long-term permanent residents offended both the Charter and international human rights norms. In a brief to the UN World Conference on Racism held in 2001, the African Canadian Legal Clinic submitted:

> While Blacks have difficulty migrating to Canada, they are also the group that is being expelled most frequently. Racist anti-immigration sentiment has fuelled the mass expulsion of long-term African Canadian residents from Canada. For example, while African Canadians comprise only 3% of the population of the Province of Ontario, approximately 60% of the people deported from the Ontario Region since 1995 have been people of African descent, many of whom have lived in Canada since childhood as permanent residents … (ACLC 2001).

Strong support for the clinic's concerns may be found in evidence of the unequal treatment of racialized persons in the criminal justice system (Commission 1995, 191, 262, 284). The reliance on the criminal background of a person as the rationale for expulsion without due regard for the other circumstances of their life, perpetuates the effects of systemic racism in the combined apparatus of criminal justice and immigration control.

IRPA replaced the danger opinion process by statutorily defining "serious criminal" as a permanent resident or foreign national who has been convicted of an offence punishable by a sentence of at least ten years or more or has been convicted of an offence for which a term of imprisonment of more than six months has been imposed. The consequences of a "serious criminal" designation is significantly extended, permitting immigration officers to issue removal orders supported only by the fact of a conviction, denying permanent residents any right of appeal on legal or equitable grounds and denying access to humanitarian and compassionate

applications. In the context of the concerns raised with regard to the public danger process under the former act, the measures contained in IRPA represent a further indication of the extent to which public stereotypes concerning the foreign and immigrant nature of Canadian crime have entered into immigration policy discourse and law.[24]

Racial Profiling and National Security Post 9/11

While various definitions of racial profiling have been advanced by scholars and policy makers over the years, the Ontario Human Rights Commission has offered a useful starting point. The Commission defines racial profiling broadly to include "any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion to single out an individual for greater scrutiny or different treatment" (OHRC 2003, 6). Racial profiling, the report explains, differs from criminal profiling which is not based on stereotypes but rather relies on actual behaviour or on information about suspected activity by someone who meets the description of a specific individual. In other words, criminal profiling is not the same as racial profiling since the former is based on objective evidence of wrongful behaviour while racial profiling is based on stereotypical assumptions. As the commission suggests, "[w]hile it may be somewhat natural for humans to engage in stereotyping, it is nevertheless wrong. And, it is a particular concern when people act on their stereotypical views in a way that affects others. This is what leads to profiling" (OHRC 2003, 6). In the context of Canada's war on terrorism, legal scholars have emphasized that racial profiling entails the use of race as a proxy for assessing the security risk posed by individuals (Bahdi 2003, 295; Choudhry 2001, 372).

None of the national security measures in IRPA have anything to say about racial profiling. They neither explicitly condone nor prohibit racial profiling. However, as Bahdi notes, "the lack of explicit endorsement of racial profiling … does not mean that it does not take place in Canada … the silence of the legislature regarding the practice, at best, fails to effectively check racial profiling and, at worst, creates opportunities for racial profiling" (Bahdi 2003, 297). As in other manifestations of systemic discrimination, racial profiling is embodied in the exercise of discretionary powers by officials enforcing apparently neutral laws. Well before 9/11, the Canadian Council for Refugees had documented the extent to which certain refugee communities seemed to be particularly targeted under immigration security provisions, including Iranians associated with the Mujahedin-E-Khalq movement, Kurds, Sri Lankan Tamils, Sikhs, Algerians, and Palestinians, while other groups were not subjected to the same levels of security scrutiny (CCR 2001). In the wake of 9/11, ample anecdotal evidence suggests that refugees and even naturalized citizens of Arab and Muslim descent have been the targets of increased surveillance and security scrutiny by immigration officials (CCR 2004; Bahdi 2003; ICLMG 2003).

According to national security exclusions in IRPA (and the former Immigration Act), refugees and prospective immigrants are "inadmissible" where there are reasonable grounds to believe they will "engage in terrorism" or are "members of an organization that there are reasonable grounds to believe will ... engage in terrorism." An additional subsection provides that persons are inadmissible if they engaged in terrorism in the past or are "members of an organization that was engaged in terrorism" unless they can satisfy the minister that their admission would not be detrimental to the national interest. As "terrorism" and "membership" are undefined in the law, these largely indeterminate concepts have afforded both immigration officers and the judges who reviewed their decisions, the broadest possible discretion. Non-

citizens may be barred from entering Canada on the basis of security inadmissibility or once inside the country, they may be subject to removal at the conclusion of an immigration inquiry or a "security certificate" procedure.

With implementation of IRPA in June 2002 and the availability of greater revenue allocated for immigration enforcement pursuant to the federal government's multi-pronged "Anti-Terrorism Plan," there has been an increase in the overall numbers of non-citizens, including refugee claimants, subject to preventive immigration detention (CBSA 2004, Dench 2004). Confronted with the raw statistics, it is often difficult to interpret the data. Is the use of detention on the rise because more dangerous people have turned up at our borders? Or is it a tangible result of a moral panic about security in the wake of 9/11? The numbers alone reveal little about the circumstances of the detainees but one recent and fairly high-profile case drew media attention and suggests at least a partial answer to these questions.

In August 2003, a group of twenty-three South Asian men were arrested and detained on security grounds as a result of "Operation Thread," a joint investigation by the RCMP and Citizenship and Immigration Canada. Twenty-two of the young men were from Pakistan while one was from India. Initial reports splashed in Canadian newspapers identified the group as an al-Qaeda sleeper cell. The incriminating allegations, which department officials were unable to substantiate, included a plot to destroy the CN Tower, a student pilot with a flight course over the Pickering Nuclear Plant, several young men living together in sparsely furnished apartments, the setting off of a smoke alarm in a kitchen (supposedly a sign of testing explosives), and one man who knew someone with an al-Qaeda connection (Jiménez, Freeze and Burnett 2003; Khan 2004). Officials very quickly backed away from their initial claim that the men posed a threat to national security as the cases devolved into simple immigration fraud with an illegitimate

Scarborough business college at the centre. The aftershocks of the investigation, however, cast a long shadow over the men's lives. Marked as terrorists, many of the men continue to face harassment and unemployment back in Pakistan (Shepard and Verma 2003; Verma 2004). Department officials may have had a reasonable basis for pursuing investigations in at least some of the "Operation Thread" cases—namely the visa violations—but the decision to detain the men as security risks appears to have been a blatant example of racial profiling.

For non-citizens subject to the security-certificate procedure, the decision of a single, designated judge in a review of the reasonableness, but not the merits, of the ministerial security opinion is considered conclusive proof of the allegations against the individual and cannot be appealed. The certificate process allows the government to arrest, detain and deport non-citizens after secret hearings without the person or her counsel being present. In 1996 a Charter challenge of these procedures was unsuccessful (*Ahani* 1996).With implementation of IRPA, the entitlement of permanent residents (in contrast to other non-citizens) subject to an adverse security report to have their case investigated by the Security Intelligence Review Committee with direct recourse to an administrative hearing was clawed back. Now all non-citizens are offered only an "informal and expeditious" Federal Court review with diminished due process guarantees Although fewer than thirty security certificates have been issued since 1991, the procedure and related preventive detention provisions have continued to draw criticism from a wide range of observers and advocates (IACHR 2000; Aiken and Brouwer 2004; Jackman 2005; AI 2005).

Manickavasagam Suresh is a Tamil man of Sri Lankan origin who was recognized as a Convention refugee in Canada in 1991. His involvement as a coordinator for two Toronto-based agencies which Canadian Security Intelligence Service alleged to be fronts for the Liberation

Tigers of Tamil Eelam (LTTE) resulted in the filing of a security certificate against him on grounds that he engaged in terrorism and was a member of organizations engaged in terrorism. The Federal Court upheld the reasonableness of the security certificate, emphasizing that terrorism "must be seen through the eyes of a Canadian" and that "the term 'terrorism' or 'terrorist act'… must receive a wide and unrestricted interpretation" (*Re Suresh* 1997, para. 29).[25] Subsequently Suresh lodged a wide ranging constitutional challenge of the Immigration Act's anti-terrorism provisions along with the specific sections which authorized the deportation of Convention refugees deemed to be threats to the security of Canada. In a unanimous judgment, the Supreme Court ruled that fundamental justice required that Suresh should not be removed without a more careful review of the risk of torture he might face upon return to Sri Lanka. The Court's ruling was a clear victory for Suresh. The judgment, however, reinforced a number of disturbing doctrinal and policy trends. In holding that heightened due process was required only in cases where there was a "*prima facie* risk" of torture, the Court accorded the Minister considerable latitude to determine when such protections apply. Apparently grave harm that falls short of torture would not even be entitled to the same level of protection afforded to Mavis Baker. Further, in ruling that the Minister retained the discretion to deport a refugee to face torture in "exceptional circumstances", the judges flouted the absolute prohibition incorporated in the Convention against Torture and endorsed the Minister's prerogative to interpret the ambit of such exceptional circumstances in a largely unfettered manner. Neither the appellant nor any of the eight separate pubic interest interveners succeeded in persuading the Court that the legislation's failure to define "terrorism" or "membership" was unconstitutional (*Suresh* 2002; Kelley 2004, 276-82).

The Supreme Court released its decision in *Suresh* in early 2002. On the very same day, the Court authorized the deportation of another Convention refugee, Mansour Ahani, on the basis that his case failed to disclose a *prima facie* risk of torture (*Ahani* 2002).[26] By 2005, five Muslim men were facing deportation to countries where Amnesty International has indicated they face a risk of torture (Egypt, Algeria, Morocco, and Syria). All had been named threats to national security pursuant to ministerial certificates issued between 1999 and 2003 and all five had been jailed - with one man, Adil Charkaoui, recently released under stringent bail conditions (AI 2005).

Hassan Almrei, one of the four currently jailed on a security certificate, is a refugee who fears return to his native Syria. Government lawyers, arguing against a stay of his deportation order, suggested in Federal Court that Almrei faced no personal risk of torture if returned to Syria, just when human rights monitors and even the U.S. Department of State had documented that torture in detention was routine in Syria and that members and associates of the Muslim Brotherhood, such as Almrei, were at particular risk. The lawyers offered an alternative argument as well: in the event that a risk of torture could be substantiated, the "exceptional" danger posed by Almrei justified deportation. Although most of the evidence upon which this assessment was based has not been disclosed on national security grounds, the essence of the government's case appears to be that Almrei "is a member of an international network of extremist individuals who support the Islamic extremist ideals espoused by Osama Bin Laden and that Almrei is involved in a forgery ring with international connections that produces false documents" (*Re Almrei* 2001). In a candid affidavit, Almrei has offered convincing explanations of his activities, including time spent as a teenager in a weapons training camp in pre-Taliban Afghanistan with anti-Soviet factions (Freeze and Abbate 2003). Without access to the classified

evidence, a thorough analysis is impossible. It can be stated with certainty, however, that unlike Suresh, Almrei was not even alleged to have played an important role with an organization directly or indirectly affiliated with terrorist activities. To the extent that exceptional circumstances could not justify Suresh's deportation, it is hard to rationalize the exercise of such extraordinary discretion in Almrei's case. On what basis, then, have federal officials decided to invoke these special security measures? The government could have elected to deny Almrei's permanent residence application on grounds of security inadmissibility and either sought to deport him at that stage or simply permitted him to remain in Canada in limbo and under close surveillance, as it had elected to do in the cases of many other Convention refugees throughout the 1990s (Aiken 2001). Equally possible would be the prospect of prosecuting Almrei under the antiterrorism amendments of the Criminal Code. None of these options were pursued. The government seems to be sending a clear signal that when it comes to non-citizens, being Muslim with some unseemly associations may be all that is necessary to justify the invocation of secret hearings and mandatory, indefinite detention in unacceptable conditions.

At the time of writing, Almrei has been detained in solitary confinement in a "transitory" detention facility for over three-and-a-half years. His lawyers were forced to seek a judicial order to afford him the right to wear shoes on the cold concrete floor of his jail cell (*Almrei* 2003). In a separate case, the constitutionality of the indefinite detention regime pursuant to which Almrei was detained has been upheld. The Federal Court of Appeal was satisfied that the detention provisions had "a close and direct relationship to the objectives of the IRPA, the obligation to ensure the protection of national security and the *right of the Parliament of Canada to control the access to and sojourn in Canada of permanent residents*" (*Re Charkaoui* 2004: para. 130; emphasis added). Reinforcing the Supreme Court's reasoning in *Chiarelli*, the status of an

individual as a non-citizen is seen by the Court as a relevant factor in determining whether someone can remain in the country. The notion that someone's status, in itself, should be the primary lens for assessing the fairness or constitutionality of the procedures invoked to detain that person is perverse (Jackman 2005, 9). Meanwhile, the Federal Court of Appeal has given Almrei a temporary reprieve from deportation, ordering that his case be reconsidered by another delegate with regard to the risk he faces upon return to Syria as well as the risk he poses to the security of Canada. The Court declined to consider a constitutional challenge of the provisions that permit removal to torture, a matter that is currently the subject of ongoing litigation and may yet return to the Supreme Court (*Almrei* 2004).

Conclusion

Reva Siegel has observed that history can serve many purposes in law, but most often it functions to preserve the authority of the past (Siegel 1997, 1146). In advancing rights-based claims in the courts today, however, advocates are assuming a distinctive stance toward the past. Rather than turning to the past as a source of legitimation, constitutional argument often seeks to deconstruct and repudiate traditional practices. In the American context, Siegel demonstrates how repudiating past practices has both preservative and transformative effects; it facilitates continuity as well as rupture (Siegel 1997). The act of repudiating past practices can exculpate present practices, if we characterize the wrongs of the past narrowly enough to differentiate them from current regulatory forms.

In the United States, early constitutionalism legalized slavery. In the nineteenth century, slavery was abolished on constitutional grounds and a regime of segregation and lynching was produced, usurping its place as a new form of racial injustice. In the 1950s, the American Supreme Court dismantled segregation in the landmark decision of *Brown v. Board of*

Education, [27] but its swift adoption of the "discriminatory purpose" doctrine (which requires plaintiffs to demonstrate that those acting on behalf of the state intended to discriminate in order to successfully challenge apparently neutral state actions alleged to discriminate on the basis of "race") continues to sustain racial stratification in America today. While constitutionalism in Canada is distinct from the United States, the American experience offers an interesting vantage from which to evaluate our own struggles with law and justice. Through a contemporary lens, we can easily condemn the "race"-based classifications in the earlier immigration laws and practices just as we repudiate an appellate court's reasoning in *Re Munshi Singh* concerning a challenge to the continuous journey rule and the grounding of the *Komagata Maru* in 1914:

> Better that peoples of non-assimilative- and by nature properly non-assimilative-race should not come to Canada, but rather, that they should remain of residence in their country of origin and there do their share, as they have in the past, in the preservation and development of the Empire (*Munshi Singh* 1914).

Yet Siegel challenges us to inquire into whether we have really broken decisively with our past or whether we have merely adopted a new rule structure to legitimate the same substantive inequalities. Despite significant changes in Canadian immigration law over the past thirty years, we can still see the continuity of historic racism in the neo-racist stratification that remains embedded in the fabric of the law. With the exception of the admission and mobility guarantees of section 6, the text of the Charter appears to apply to "everyone" regardless of status or location. Yet historically and today, judges, policy makers and parliamentarians operate on the contrary assumption that non-citizens, by reference to their status alone, are to be accorded diminished forms of both substantive rights and due process. In the area of immigration, constitutionalism has not only failed to dismantle the discriminatory policy and practice of border control, it has perpetuated injustice and subverted our attention from the wider

terrain of conflict. Charter litigation may have achieved limited gains for certain sectors in Canadian society but there is little evidence that any dents have made with regard to systemic racism (Herman 1997, 213). As I have attempted to demonstrate in this chapter, constitutional challenges of immigration law and policy may occasionally redress some of the manifestations of racism, but they can only do so in an incremental and individualized manner.

Constitutionalism or "the judicialization of politics" has been steadily expanding throughout the world (Tate and Vallinder 1995, 5). In South Africa, for example, the new anti-apartheid regime moved swiftly to adopt a constitution with entrenched equality guarantees and a prominent role for the courts. Yet the structures of racism are deeply embedded in South African society, and the Constitution has failed to deliver the promise of social transformation. The liberation struggle in South Africa originated in the ideal of anti-apartheid with socialism: that is, in the sense of a radical project of equality. Instead, what has been achieved is anti-apartheid within the structures of globalized capitalism—a system that is predicated on racism and inequality. Similarly, here in Canada, constitutionalism, even in the context of litigation informed by critical race theory, is not competent to disrupt the structures of racism and exclusion that underpin the federal immigration program. As Fitzpatrick suggests, law by its very nature is unable to counter racism because "racism marks the constitutive boundaries of law," placing "persistent limits on its competence and scope" (Fitzpatrick 1990, 250). Thus, the task of forging truly antiracist immigration laws has to be a profoundly political struggle that should be inseparable from a larger project of social justice and grounded in a fundamental transformation of individual and collective consciousness as well as social institutions.

∗ I am grateful to R. Cheran, Harry Arthurs, Sherene Razack and Emily Carasco for helpful comments on earlier drafts of this paper.

Endnotes

[1] These exclusions are found in sections 33–42 of IRPA.

[2] One notable exception is Michael Mandel's analysis (1994, 240–257), which was the inspiration for my own interest in this area. For the British context, see also, Susan Sterett (1997, 183–195) and Stephen H. Legomsky (1987).

[3] More recently, Hall's writing, informed by strands of postmodernist theory, emphasizes cultural constructions of "race" but does not deny the importance of political economy. See, for example, "New Ethnicities" in David Morley and Kuan-Hsin Chen (1996).

[4] In his introduction to *Color Conscious* (Appiah and Gutmann 1996), Wilkins comments on the picture painted by advocates of "class, not race," noting that in the United States black middle-class workers are nearly twice as likely as their white counterparts to become unemployed.

[5] For an excellent review of the contours of this debate in Canada, see Kent Roach (2001).

[6] Uma Narayan suggests that the feminist notion of the "epistemic privilege of the oppressed" means that outsiders must sensitize themselves to the fact that insiders may have more subtle and complex understanding of the ways in which oppression operates and is experienced. Narayan, Uma. 1988. Working Together Across Difference: Some Considerations on Emotions and

Political Practice. *Hypatia* 3(2).

[7] Harry Arthurs and Brent Arnold offer an instructive review of the range of positive Charter related commentary generated by judges and lawyers as well as social activists and equality seeking groups in the 1980s (Arthurs and Arnold).

[8] While farmers and farm managers are included in the National Occupation List used as the basis for skilled-worker selection, only owners or individuals with significant managerial experience are awarded points. The government *may* even require a college diploma in agriculture as a condition of admission.

[9] The Live-in Care Giver program permits workers to apply for permanent residence after completing two years of employment within a three-year period. In contrast, the Seasonal Agricultural Worker program is premised on workers returning home upon completion of temporary contracts. In the past few years, the federal government has piloted other temporary work programs including a software pilot project and CREWS—The Construction Recruitment External Workers Services Program.

[10] See, Tie, Chantal.1998. Only Discriminating Visa Officers Need Apply: Visa Officer Decisions, the Charter and *Lee v. Canada (Minister of Citizenship and Immigration)* Imm. L.R. 2d. 42:197–209.

[11] Section 139(1)(g) of the *Immigration and Refugee Protection Regulations* indicates that "successful establishment" will take account of the following factors: (i) the refugee's "resourcefulness and other similar qualities that assist in integration in a new society, (ii) the

presence of their relatives, including the relatives of a spouse or a common-law partner, or their sponsor in the expected community of resettlement, (iii) their potential for employment in Canada, given their education, work experience and skills, and (iv) their ability to learn to communicate in one of the official languages of Canada." According to section 139 (2) these criteria do not apply to refugees who have been determined by an officer to be vulnerable or in urgent need of protection. In the case of refugees destined for Québec, different rules apply [s. 139(1)(h)].

[12] This was the view of Justices Wilson, Dickson, and Lamer. Although the court was unanimous in result, it was split on the question of the Charter's applicability to the case. Nevertheless, Justice Wilson's reasoning soon became the accepted point of departure for the Court in terms of refugee cases.

[13] For an analysis of the *Chiarelli* decision, see Eliadis, Pearl.1993. The Swing from Singh: The Narrowing Application of the Charter in Immigration Law. 26 Imm. L.R. (2d) 130.

[14] Section 46.04 (8) of the former Immigration Act stated: "An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependent of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or a satisfactory identity document."

[15] The Undocumented Convention Refugee in Canada Class also applied to Afghan refugees.

[16] In 2000, an estimated 60% of refugee claimants arrived in Canada without adequate

documents or false documents. Office of the Auditor General. 2003. Report of the Auditor General of Canada, Chapter 5, Section 5.95.

[17] Section 101 of IRPA provides that a claim is ineligible to be referred to the Refugee Protection Division of the Immigration and Refugee Board where a prior refugee claim has been made; where the claimant has Convention refugee status in another country and can be returned to that country; where the claimant could have sought protection in a country prescribed by the regulations as 'safe' before arriving in Canada; and where the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

[18] In 2004 only 2.7% of decisions from this procedure were positive (Email from Janet Dench to CCRList, 23 April 2005). See also, CCR. 2005. The Refugee Appeal: Is No one Listening? Montréal: Canadian Council for Refugees, 31 March. Available from www.web.ca/~ccr/refugeeappeal.pdf.

[19] In testimony before a parliamentary committee in 2002, Judith Kumin, former representative of the United Nations High Commissioner for Refugees in Canada, cited the example of Germany. When refugee claims became illegal at German land borders after adoption of a safe third country rule in 1993, the claims received at land borders dropped from 100,000 annually to zero almost overnight. Since then, the overall numbers shot back up to previous levels with all claims being pursued inland (Canada, Standing Committee on Citizenship and Immigration,

2002). See also, Hayter, Theresa. 2004. *Open Borders: The Case against Immigration Controls*. 2[d] ed. Pluto Books.

[20] See CIC, *Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds*, IP-5, section 5.21. Available from www.cic.gc.ca/manuals-guides/english/ip/index.html. The former policy was contained in Employment and Immigration Canada*, Examination and Enforcement, IE-9*. Section 9.06 of IE-9 set out the "public policy" grounds which would warrant favourable consideration and included the category of "illegal de facto residents."

[21] For example, in *Selliah v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1134, the Court found that an immigration officer's decision concerning the risk faced by a child if removed to Sri Lanka was not unreasonable because the officer had duly considered the child's application separately from his parents, considered his young age, that he had not attended school, and that he had limited integration in Canadian society. Application of the *Baker* principles has failed to offer overseas visa applicants much beyond the barest form of due process: *Khairoodin v. Canada* [1999] F.C.J. No. 1256 (Fed.T.D.) and *Hayama v. Canada (Minister of Citizenship and Immigration)* (2003), 33 Imm. L.R. (3d) 89 (Fed. T.D.).

[22] The Court denied the intervention request of a coalition consisting of the African Canadian Legal Clinic, the Congress of Black Women of Canada and the Jamaican Canadian Association (*Baker v. Canada*, [1997] S.C.C.A. No. 85). The Coalition had sought to introduce a critical race analysis into the case.

[23] CIC. *Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds*, IP-5, section 12.10, Separation of parents and children.

[24] Although 2003-2004 statistics on removals with country of destination information were unavailable at the time of writing, Marie Chen, litigation lawyer with the African Canadian Legal Clinic, indicates that the clinic has continued to see through their work, "a disturbing number of deportations of Black men to Caribbean countries, many of whom have lived in Canada since their childhood" (Email to the author, 18 April 2005).

[25] See also, the more recent cases of *Canada v. Mahjoub*, [2001] F.C.J. No.1483 (Fed. T.D.), and *Re Harkat*, [2005] F.C.J. No. 481 (Fed. T.D.), for similar reasoning.

[26] For commentary on the Convention against Torture, its status in domestic law and the judgments in the *Suresh* and *Ahani* cases, see Heckman, Gerald. 2003. International Human Rights Law Norms and Discretionary Powers: Recent Developments. *Canadian Journal of Administrative Law and Practice* 16: 31.

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