Globalizing Rights and Going Wrong
The 'Right' Path to Refugee Protection?

SHAUNA LABMAN*

I. Introduction

The call has gone out for a conception of rights detached from the sovereign state. In essence, it is a call for 'global rights.'[1] At the same time, a rights-based approach to the refugee regime is increasingly commonplace.[2] This article connects the call for global rights to the refugee rights context. Global rights could enable recognition of refugee rights in the absence of a sovereign. Would global rights effect greater refugee protection? Are rights-based arguments the appropriate approach for securing dignified refugee protection? Are rights the right path to protection? The answer here is no.

* Trudeau Scholar and Doctoral Candidate, Faculty of Law, University of British Columbia. The helpful feedback and suggestions of the JILIR editorial board and anonymous reviewers are gratefully acknowledged.

[1] I use the terms 'global rights,' 'globalized rights,' and 'globalizing rights' to loosely connote the movement of rights away from their attachment to sovereign states. How the arguments for such global rights are construed will be explored in the substance of the article.

[2] See Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007); Emma Haddad, *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008) [Haddad]; James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge; New York: Cambridge University Press, 2005) [Hathaway 2005]; Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford, New York: Oxford University Press, 2007).

Vol. 5, No. 2, pp. 141-165. ISSN: 1712-2988.

The danger is that rights go wrong.[3] Anti-rights and counter-rights mobilization and discourse mean that the attainment of rights risks reverberating against the rights claimant. Rather than protection, a rights claim risks vilification of the refugee and a diminished willingness on the part of the state to protect. The purpose of this article is to suggest that focusing on a globalized rights claim is not the best strategy; rights are not the right path to refugee protection.

The understandable draw of a rights-based stance is that it adds a concrete assertion of legal obligation and accountability to refugee protection. It further adds dignity to the demand. There is an entitlement to rights. There is equality. Stuart Scheingold suggests this is the 'call of the law.' The assertion of a right implies a legitimate and dignified reciprocal relationship that is societal and not personal.[4] The current, alternative calls in refugee protection are for compassion, humanitarianism and morality.[5] Such claims lack reciprocity and are founded on personal need. Need implies inequality whereas rights are grounded in equality.[6] So long as refugees seek only compassion they remain dependent, often invisible, outsiders in the realm between the persecuting and protecting countries. The call of the law offers the possibility of entrance and protection.

Refugees do not lack rights. The legal rights of refugees are set out in the 1951 *Convention relating to the Status of Refugees* (1951 Convention).[7] These rights, while refugee-specific, are informed by broader human rights.[8] The refugee problem is often conceived as an issue of rights; the violation of rights and the need for rights to be respected.[9] Article 33(1) of the 1951

---

[3] Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (Ann Arbor: University of Michigan Press, 2004), xxxii [Scheingold].

[4] *Ibid.* at 58.

[5] See Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws in Canada and Australia*, (Vancouver: UBC Press, 2005) [Dauvergne 2005]; Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) at 195 [Gibney 2004].

[6] Dauvergne 2005, *ibid.* at 174.

[7] *Convention relating to the Status of Refugees*, 1951, 189 UNTS 150 (entered into force 22 April 1954).

[8] Hathaway 2005, *supra* note 2 at 8. Hathaway interprets the 1951 Convention rights through (near) universally applicable international human rights as established in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, as opposed to other regional and specialized norms.

[9] Erika Feller 'Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come' (2006) 18 Int'l J. Refugee L. 509 at 518 [Feller].

Convention enshrines the right of non-refoulement in signatory states.[10] As the cornerstone of the refugee regime, non-refoulement is the refugee's right not to be sent back to the country from which he or she has fled. Once this right is triggered, the 1951 Convention sets out other rights that accrue as the refugee re-establishes in a new state.[11] A sovereign state is therefore required to trigger the protection offered by the 1951 Convention. The dilemma faced by refugees is that they exist between sovereigns.[12] The difficulty is that the 1951 Convention does not equip the refugee with the right to travel to the new state. The refugee challenge is one of rights realization.[13]

Getting 'there' is the impossible dream for most refugees. While signatory states grant refugee status and sometimes citizenship to refugees who reach their shores, other states, often overwhelmed by refugees and determined to discourage future flows, have not signed the 1951 Convention. According to the United Nations High Commissioner for Refugees (UNHCR) the global refugee population was 11.4 million at the close of 2007.[14] More than six million refugees, over one half of the global population, are now in 31 different protracted situations,[15] meaning that refugee populations of 25,000 persons or more have been in exile in a developing country for five years or more.[16] Matthew Gibney terms this uneven distribution the 'tyranny of geography'[17] and has more recently accused Western states of a containment policy through 'engineered

---

[10] Article 33(1) of the 1951 Convention provides: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

[11] Hathaway divides and approaches the rights according to when they are triggered: upon de jure or de facto state *jurisdiction*, upon physical presence in state's *territory*, upon *lawful presence* within the territory, upon authorization to *lawfully remain* in territory, and upon *durable residence*: 'An attempt is instead made to grant enhanced rights as the bond strengthens between a particular refugee and the state party in which he or she is present. While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state'; Hathaway 2005, *supra* note 2 at 154.

[12] Haddad, *supra* note 2.

[13] Feller, *supra* note 9 at 518.

[14] UNHCR, *Statistical Yearbook 2007* [UNHCR *Statistical Yearbook 2007*], online: <http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html>.

[15] *Ibid.*

[16] *Ibid.* UNHCR numbers exclude Palestinian refugees who fall under the separate mandate of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

[17] Gibney 2004, *supra* note 5 at 195.

regionalism.'[18] Whether by geographic tyranny or engineered intent, too many refugees are left with no access to solutions or anywhere to assert their rights. UNHCR states simply: 'Refugees trapped in these forgotten situations often face significant restrictions on their rights.'[19] As Hannah Arendt recognizes, statelessness and refugeehood create conditions in which individuals seem to exist without the 'right to have rights.'[20] As so many sit in what UNHCR recognizes to be 'a long-lasting and intractable state of limbo,'[21] the call for globalized rights grows louder.

Understanding the globalized rights call requires a focus on the seemingly growing potential for a conception of rights in a space not tied to statehood as a method for achieving those rights. I utilize the methodological lens of law and geography to illustrate this potential. Stepping beyond this threshold challenge of feasibility, I next review a select strand of American rights scholarship to demonstrate the dangers behind rights advocacy and attainment. Past incidents of refugee rights claims illustrate the point. Finally, the anti-rights and counter-rights mobilization and discourse in Australia and Canada that arise when asylum-seekers approach their borders reveal the failings of the rights-based approach. These lessons of the past reinforce my argument that while globalized rights may be increasingly possible in migration, they are not the right path to protection.

II. Rights: Theoretical Foundations

1. Changing Space, Sovereignty and Rights

The refugee's dilemma is based on borders. It is in the space between borders that refugees are unable to realize their rights. Forced to flee beyond the borders of his or her home country, the refugee has no right to a new country. It is also at, and within, these borders that the disciplines of law

---

[18] Matthew J. Gibney, 'Forced Migration, Engineered Regionalism and Justice between States' in Susan Kneebone & Felicity Rawlings-Sanei, eds., *New Regionalism and Asylum Seekers* (Oxford: Berghahn Books, 2007) 57.

[19] UNHCR, *The State of the World's Refugees 2006* (2007 ATCR Agenda Item 4a) at 105.

[20] Hannah Arendt, *The Origins of Totalitarianism*, rev. ed. (San Diego: Harcourt Brace & Company, 1979) at 296. Arendt earlier explains at 291-2, 'The Rights of Man, after all, had been defined as "inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own governments and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.' See generally 290-302.

[21] Executive Committee of the High Commissioner's Programme, *Protracted Refugee Situations*, 30th Mtg., EC/54/SC/CRP.14 (10 June 2004) at para. 3.

and geography traditionally meet. Law tends to give little thought to geography beyond as a backdrop to disputes[22] or marker of differences.[23] Law and geography intersect but fail to interact. Within this static intersection, rights serve to outline the legal distinctions in social and physical space.[24] Both immigration and refugee law are premised on the gradual allocation of rights with growing attachment to the state.[25] Catherine Dauvergne conceives of rights in concentric circles: 'The closer one is to belonging to the nation, the more rights one has in the migration realm. Citizenship is the centre of the circle, where one has the full bundle of rights.'[26] Rights both mark and are marked by distinctions between insider and outsider, citizen and non-citizen, right-holder and non-right-holder.

The critical intermingling of law and geography challenges this traditional stance and shifts how both space and law are conceived. As conceptions of space and law change, rights are altered. Through a critical and transdisciplinary approach, Nicholas Blomley's work uses 'legal geographies – representations of the spaces of social and political life,'[27] to challenge perceived closures and 'institutional categorization' between law and geography.[28] He suggests the potential of a critical legal geography to explore 'the legal production of space, the law-space-power relation, and the link between legality and locality.'[29] The effect of such work is to blur the distinctions between insider and outsider. As law and space are perceived to interact, rather than intersect, the potential for the collision of legal orders arises.[30] As collision occurs, the implication is that rights can neither contain nor be contained.

Just as Blomley seeks to challenge categorizations and closures, Neal Milner and Jonathan Goldberg-Hiller argue through this spatial account that rights can be reimagined. They interpret growing notions of a globalized world as signifying a reimagining of reality, and suggest that as people

---

[22] Keith Aoki, 'Space Invaders: Critical Geography, the "Third World" in International Law, and Critical Race Theory' (2000) 45 Vill. L. Rev. 913 at 937 [Aoki].
[23] Nicholas Blomley, *Law, Space and the Geographies of Power* (New York: Guilford Press, 1994) at 25 [Blomley].
[24] Neal Milner and Jonathan Goldberg-Hiller, 'Reimagining Rights' (2002) 27 Law & Soc. Inquiry 339 at 363 [Milner & Goldberg-Hiller 2002].
[25] See Hathaway 2005, *supra* note 2; Linda Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 Theor. Inq. L. 389.
[26] Dauvergne 2005, *supra* note 5 at 171.
[27] Blomley, *supra* note 23 at 25.
[28] *Ibid.* at 37.
[29] *Ibid.* at 45.
[30] Milner & Goldberg-Hiller 2002, *supra* note 24 at 362-3.

reimagine reality they find themselves reimagining law as well.[31] This suggests that as understandings of space are changed by globalization, law and legal rights are also changed. Milner and Goldberg-Hiller explore the 'multiple sources of authority from which rights can be imagined and community boundaries redrawn.'[32] Connecting back to the geographic lens, the interaction of law and space highlights the complex indeterminacy of political boundaries.[33] Sovereignty and the state are thus implicated in the critical reimagining of law and geography. Keith Aoki notes that with pure—Blomley would say closed—legal analysis, 'boundaries often reduced complex questions about distribution and access to resources … into mere formalistic exercises in identifying boundaries.'[34] In contrast, some of the work he surveys—albeit with respect to race—uses geography to 'see beyond the formal artifice of nation-state sovereignty.'[35] Thus we see recognition of this fundamental shift from sovereign-based analysis to a globalized conception from diverse perspectives, each of which is using a geographic lens to 'spatialize'[36] their arguments and push legal boundaries.

The concept of globalized space is thus invading our imaginations and affecting our ideas of the attachment of rights to citizenship. Dauvergne, for example, argues there is growing potential for rule of law to become 'unhinged' from the nation.[37] She examines globalization's influence on sovereignty and the rule of law in migration and points to the few instances in refugee claimant cases where the executive was forced to meet higher standards of procedural fairness than judicial deference would previously have required.[38] To even make such an argument shifts the meanings of migration and nationhood. Fixed definitions are subverted.[39] Building on this shifting reality is the idea that the world has changed at the close of the twentieth century. There is arguably a greater porousness to borders.[40]

---

[31] *Ibid.* at 356-7.
[32] Jonathan Goldberg-Hiller and Neal Milner, 'Rights as Excess: Understanding the Politics of Special Rights' (2003) 28 Law & Soc. Inquiry 1075 at 1109 [Goldberg-Hiller & Milner 2003].
[33] Aoki, *supra* note 22 at 938.
[34] *Ibid.* at 937.
[35] *Ibid.* at 950.
[36] Blomley, *supra* note 23 at 8.
[37] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (New York: Cambridge University Press, 2008) at 171 [Dauvergne 2008].
[38] *Ibid.* at 175. Dauvergne recognizes locating rule of law's legitimacy in this global transformation is a 'crucial issue' and makes clear that her argument is not 'for and about human rights'; *ibid.* at 183, 184.
[39] Milner & Goldberg-Hiller 2002, *supra* note 24 at 343.
[40] Aoki, *supra* note 22 at 914.

Globalization seemingly makes movement more fluid and less containable.[41] Scholars are increasingly responding to this phenomenon by rethinking and questioning notions of space and sovereignty.[42] This idea of rethinking space and transforming ideas about sovereignty opens up the potential for globalized rights. And yet, this potential expansion serves also as a warning, as the desire for sovereign stability remains.

While globalization causes the rights discourse to transcend states and span boundaries, these same boundaries paradoxically not only retain but reinforce their significance.[43] The sovereign state reacts against the porousness of its borders.[44] With migration law, particularly in its response to refugees, the border becomes the 'last bastion of sovereignty' in the state's battle to preserve its status[45] against the pressures of globalization. Migration's key role thus results from the juxtaposition of the quest for globalized rights against a correlated increased need for the state to assert itself and defend its sovereignty. While many aspects of state control fall away to globalized regulation, borders remain an area of national lawmaking—and therefore control—as well as a mechanism for the state to assert its identity.

Within this push-and-pull tension of globalization, the assertion of globalized rights remains vague and the likelihood of its realization challenged by reactions to its own growing strength. Milner and Goldberg-Hiller, for example, are unequivocal that current 'understanding moves away from state-centered and formal notions of rights,'[46] but they are less clear as to what the understanding is moving toward. The dilemma may be that rights discourse is tied to its evolution in international law where rights tend to be broadly enunciated but not clearly defined.[47] Observations on globalized rights amount not to an actualization of these rights but to a

---

[41] Stephen Castles, 'The factors that make and unmake migration policies' (2004) 38 Int'l Migration Rev. 852.

[42] See Aoki, *supra* note 22 at 956. The assertion that borders are increasingly porous is a contested claim and the counter-arguments will, to an extent, be explored in the following paragraphs.

[43] Catherine Dauvergne, 'Citizenship with a Vengeance' (2007) 8 Theor. Inq. L. 489 at 490.

[44] See, for example, Milner and Goldberg-Hiller's recognition of the particular pertinence of their reimagined rights argument to migration law; Milner & Goldberg-Hiller 2002, *supra* note 24 at 364.

[45] Dauvergne 2008, *supra* note 37 at 169.

[46] Milner & Goldberg-Hiller 2002, *supra* note 24 at 341.

[47] Dauvergne 2005, *supra* note 5 at 183.

growing global 'rights consciousness.'[48] And thus, while academics and others in the West are thinking more globally, so too are the waiting refugees who have grown conscious of the potential of rights to offer them dignity, equality and protection.

Implicit in the potential for rights to become global is the abandonment of the idea that rights must attach to a sovereign state. With such a reconceptualization of rights in a globalized space, the possibility arises for refugee rights realization in the absence of a sovereign. Global rights in this context, however, remain in the early stage of consciousness and far from attainment. Despite the *Universal Declaration of Human Rights*' proclamation that human rights are universal, indivisible and inalienable,[49] many remain condemned to 'a position, outside as it were, of mankind as a whole.'[50] The remainder of this article seeks to illustrate that even upon achievement of realizable, global rights, refugees may find themselves further condemned and in an impossible conundrum.

2. *The Politics of Rights*

In order to reflect upon the consequences of success in the achievement of global rights, I must now retract to a specifically spatially-located analysis. Scheingold's seminal work *The Politics of Rights* is conscious of space in the confined and particular example of the United States of America. While it is the tradition, culture and American consciousness that concern Scheingold, these characteristics nonetheless exist in and are created by the carefully demarcated and defended borders that define the American space.

Scheingold situates himself firmly within the American tradition—both the 'distinctively American faith in the law'[51] and the American system of court-based litigation. In 1974 he challenged the American devotion to law with his exploration and explosion of the myth of rights*:* 'The assumption … that litigation can evoke a declaration of rights from courts; that it can, further, be used to assure the realization of these rights; and finally, that

---

[48] Michael McCann explains: '*Legal (or rights) consciousness* in this sense refers to the ongoing, dynamic process of constructing one's understanding of, and relationship to, the social world through use of legal conventions and discourse'; Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, IL: University of Chicago Press, 1994) at 7 (emphasis in original) [McCann].

[49] *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No.13, UN Doc. A/810 (1948).

[50] Hannah Arendt, *Responsibility and Judgment*, rev. ed. (New York: Schocken Books, 2003) at 150.

[51] Scheingold, *supra* note 3 at 21.

realization is tantamount to meaningful change.'[52] The myth, Scheingold argued, was not only misleading but distracting. He suggested the legal framework led to over-simplified tunnel vision and an exaggerated role for lawyers and litigation in effecting social change.[53] Scheingold's argument is that a rights-based strategy for political change fails. In his clearest terms, the myth of rights is 'all promise and no delivery.'[54]

Scheingold's myth can be understood as an expression of rights consciousness. His politics of rights is a constitutive theory of law in that it views the 'mythical and ideological properties of rights' as constitutive of social practice.[55] His warnings as to the inherent danger and mythical disenchantment of rights therefore urges consideration in understanding the push for rights in a globalized context. On its face, however, a globalized rights discourse appears to leave Scheingold's analysis behind as a dated and particularized approach that lacks the spatial fluidity to transfer to an international discussion. For Scheingold the myth of rights is premised on the link between litigation and remedies with social change. Globalization has broken this litigation link. Court mandated remedies and declarations of rights are no longer the aim of many rights advocates. NGOs now protect and promote human rights through creative non-legal advocacy avenues.[56] The call for rights has taken on a more amorphous shape. Milner and Goldberg-Hiller note how the world has changed since Scheingold's work was first published:

> Rights frequently lose their formal institutional anchors in these transpositions. Their dynamics do not depend on the existence of courts that can declare them and states that can enforce them. Instead, rights work through yet-little-understood processes involving discourse strategies, borrowing, adjusting, adopting, threatening, and convincing in a context that differs significantly from the rights revolution that so much informs the civil rights and communitarian debates.[57]

Does Scheingold's analysis, therefore, retain relevance in the globalized rights context?

---

[52] *Ibid.* at 5.

[53] *Ibid.*

[54] *Ibid.* at xvii.

[55] *Ibid.* at xxi.

[56] Elizabeth McWeeny, President of the Canadian Council for Refugees, has noted: 'Advocacy NGOs seek protection and sustainment of human rights through political initiatives, international and national agreements and policies, donorship, and solution building'; Elizabeth McWeeny, 'North-South Dialogues in Forced Migration' (2007) 24 Refuge 11 at 12.

[57] Milner & Goldberg-Hiller 2002, *supra* note 24 at 341.

A second edition of Scheingold's work was published on its thirtieth anniversary in 2004. Scheingold titled his preface 'The New Politics of Rights.' In it he addresses the scholarship that has developed around, or as a challenge to, his original argument. Scheingold's review is openly non-exhaustive[58] and it does not take account of how globalization has released rights, in the imagination at least, from state control. Scheingold admits the dynamic evolution of rights from what he originally envisaged and recognizes attempts to 'expand the meaning of rights beyond its traditional boundaries.'[59] His reference is not, however, to the actual boundaries of the state. While he accepts the critique that his original discussion neglects a 'polyvocal' legal consciousness, the acknowledgement of the 'polyvocality of legality' remains situated in the United States.[60]

Scheingold does refer to non-American research, but his geographic lens expands only to other distinct and closed-societies and not to a globalized perspective.[61] The closest Scheingold comes to addressing global rights is in his recitation of Susan Coutin's research findings on cause lawyering for Central American immigrants that moved beyond the court and took on a transnational character.[62] That the example comes out of a migration context is yet further support for the arguments in the preceding section of a growing global consciousness, particularly attached to migration. In concluding his preface, Scheingold offers his vision of what a complete work on the 'new' politics of rights would look like. He suggests, without elaboration, that 'it would be comparative and empirical – reaching beyond the U.S. experience to analyze rights in other national settings, and in transnational settings as well.'[63] There is thus an acknowledgment here that rights can detach from litigation and movements may be transnational.

Likely near the same time that Scheingold was drafting his preface,[64] Milner and Goldberg-Hiller made a more direct link between American rights scholarship and the global expansion of rights consciousness in their

---

[58] Scheingold, *supra* note 3 at xxi.

[59] *Ibid.* at xxiii, xxxiii.

[60] *Ibid.* at xxiv.

[61] Scheingold notes: 'Comparable findings have emerged from research in Latin America (Meili 1998), Israel (Morag-Levine 2001), and Japan … (Kidder and Miyazawa 1993)'; *ibid.* at xxxix.

[62] *Ibid.* at xxxviii.

[63] *Ibid.* at xlii.

[64] While the argument in Milner & Goldberg-Hiller 2002, *supra* note 24 ('Reimagining Rights') is not noted, Scheingold does cite both Goldberg-Hiller's 2002 work *The Limits of Union: Same-Sex Marriage and the Politics of Civil Rights* (Ann Arbour: University of Michigan Press, 2002) [Goldberg-Hiller 2002] and Neal Milner's article 'The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation' (1986) 8 Law & Pol'y 105 in his preface.

review of texts by Davina Cooper, Eve Darian-Smith and Carl Stychin.[65] By studying authors not associated with American rights research they sought to expand the applicability of rights discourse.[66] Having de-linked rights from court-based litigation, they suggest that the authors examined draw new links between global, national and local rights politics.[67]

Stychin's work focuses on the discourses of citizenship and nationhood employed by gays and lesbians to reimagine identity.[68] His is an exploration of how pressure to conform to international standards led to domestic legal changes. Davina Cooper's collection of disparate studies on the construction and contestation of 'excessive governance' is linked by a concern with space, belonging and the role of law.[69] For Milner and Goldberg-Hiller, Cooper's work is a pertinent contrast to American rights research. Rather than being driven by litigation, they note that in Cooper's case studies, 'rights move in and out of the picture in all sorts of interesting ways that she can tap into because she does not assign the state any privileged place in her analysis, even while she recognizes the special attributes state institutions may have.'[70] Finally, Darian-Smith uses the Channel Tunnel as a material representation of 'a reordering of power relations between local, regional, national, and transnational entities through its disruption of an idealized national landscape.'[71] Milner and Goldberg-Hiller see the relevance of her research in the observations that '[c]ontemporary changes in landscape that are propelled by globalization and new sources of nonsovereign legal authority are all signaled by the physical presence of the [Channel] tunnel's terminus.'[72] Darian-Smith's description of the legal problematic encompasses the concern of all three authors surveyed as well as the surveyors themselves:

> … it is not appropriate to analyze national versus transnational processes as though they were distinct, opposing, and mutually

---

[65] Milner & Goldberg-Hiller 2002, *ibid*. See Davina Cooper, *Governing Out of Order: Space, Law, and the Politics of Belonging* (New York: Rivers Oram Press, 1998) [Cooper]; Eve Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in New Europe* (Berkeley and Los Angeles: University of California Press: 1999) [Darian-Smith]; Carl Stychin, *A Nation By Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press: 1998) [Stychin].

[66] Milner & Goldberg-Hiller 2002, *ibid.* at 339.

[67] *Ibid.*

[68] Stychin, *supra* note 65 at 15. See also Milner & Goldberg-Hiller 2002, *ibid.*

[69] Cooper, *supra* note 65 at 7-21. See also Milner & Goldberg-Hiller 2002, *ibid.* at 348.

[70] Milner & Goldberg-Hiller 2002, *ibid.* at 349.

[71] Darian-Smith, *supra* note 65 at 193. See also Milner & Goldberg-Hiller 2002, *ibid.* at 355.

[72] Milner & Goldberg-Hiller 2002, *ibid.* at 356.

> exclusive. Nor is it appropriate to presume that law is coherent, holistic, and state-bound. In the very connectedness of national and transnational processes, what should be recognized are the complex political and cultural shifts that underlie the contradictions of the coexisting endurance and vulnerability of law as an expression of national unity. … In short, strategies both endorsing and resisting transnationalism, and through such strategies the reflexive modification of what constitutes a legal system and legal sovereignty, may increasingly have to be recognized as problematizing our understandings of law.[73]

Here, then, we understand global rights not as a distinct development detached from state-based analysis but as an outflow and interweaving of national and transnational processes.

The authors surveyed demonstrate the fluidity of analysis when space is taken into consideration and provide the new politics of rights to bring Scheingold's argument to a globalized world. Milner and Goldberg-Hiller conclude by returning to the American context where Scheingold's original analysis remains. They note that even here, the civil rights movement that initially cultivated the rights myth[74] 'has become a more international issue, and over time, court decisions have become a smaller portion of the mix of cultural, political, and economic forces that affect race in America.'[75] A globalized rights consciousness is clearly at work.

While Milner and Goldberg-Hiller argue for an outward looking analysis by American rights scholars, a reverse reflection beginning outside the American context is likewise beneficial. Milner and Goldberg-Hiller highlight the globalized potential of rights research and Scheingold's new preface seems at least open to such use of his work. I take this as permission to detach the rights scholarship from the state and the courts in an examination of predominantly non-litigious assertions of rights in the refugee context. What follows is thus an application of the politics of rights analysis to the refugee rights movement.

---

[73] Darian-Smith, *supra* note 65 at 157, qtd. in Milner & Goldberg-Hiller 2002, *ibid.* at 360.
[74] 'Pictures of federal troops escorting black children up school steps have taught America powerful lessons about law's majesty and limits. Such pictures have been the backdrop for what Stuart Scheingold called the myth of rights'; Milner & Goldberg-Hiller 2002, *ibid.* at 366.
[75] *Ibid.* at 367.

3. Where Rights Go Wrong

Scheingold does more than just expose the call of the law as enchanting mythology lacking descriptive validity;[76] he debunks the myth as a potentially dangerous strategy of social change. The risk of rights campaigns arise out of their own success, as they may create a backlash. Further, Scheingold warns the politics of rights are as easily employed for right-wing purposes as those of the liberal-left.[77] Particularly in the migration context where tension is already building at the borders, the expansion of the American analysis to the world stage seems to heighten the potential risks of a rights-based strategy.

The essence of Scheingold's warning is that 'rights can go wrong.'[78] He references Goldberg-Hiller's observation that 'some social movements mobilize *against* the law and seek to transform discourses about rights – particularly civil rights – into exclusionary limits.'[79] Goldberg-Hiller and Milner refer to this mobilization as the creation of special rights.[80] The appellation 'special' is meant to distinguish these rights claims as beyond the basic rights to which one is entitled. They are characterized as exorbitant demands by those 'who seek to oppose or to qualify other forms of rights mobilization by reference to the excessive quality of the original rights claims.'[81] Goldberg-Hiller and Milner point to an 'inversion process' in which 'the rights claimants become the transgressors, and everyone else becomes the victims of this violation.'[82] The special rights discourse becomes a powerful weapon of exclusion against rights-claimants.

Scheingold provides his own example of the destabilization of the myth of rights corresponding to the special rights discourse. He reviews Carol Greenhouse, Barbara Yngvesson and David Engel's research in Sander County on the litigation of personal injury claims. Scheingold's explanation of the dynamics of the Sander Country discourse connects the myth of rights to special rights:

> newcomers who turn to the law and litigation to deal with personal injury claims are labeled troublemakers by long-time residents who

---

[76] Scheingold, *supra* note 3 at 203.
[77] *Ibid.* at xxxii.
[78] *Ibid.* at xxxii.
[79] Goldberg-Hiller 2002, *supra* note 64 at 34, qtd. in Scheingold, *ibid.* at xxxii (emphasis in original).
[80] Goldberg-Hiller & Milner 2003, *supra* note 32 at 1075.
[81] *Ibid.* at 1076.
[82] *Ibid.* at 1078.

> argue that rights-claiming by the newcomers is a threat to the community … rights claiming by newcomers was deemed illegitimate; they were expected to subordinate rights to community solidarity and coherence.[83]

The moniker of 'special rights' is thus also tied to conceptions of community and determinations of how that community is constituted.

Community is central to the special rights discourse as a marker of entitlement. Goldberg-Hiller and Milner note that in the cases they studied, 'rights claimants were labeled as privileged, selfish individuals who in some ways were outside the bounds of proper community life.'[84] Special rights operate as a transformative mechanism. Transformation is achieved by 'highlighting the inappropriate moral credentials for rights claimants and reasserting the limits of a normative community.'[85] Scheingold suggests this is the counter to the myth of rights—the competing 'myth of community.'[86]

The connection to the migration and refugee context is immediately clear.[87] As a result of the nexus between rights and citizenship, migration discourse weaves together discussions of law, rights and belonging.[88] Special rights serve to stigmatize outside rights claimants and remove them from the moral sphere of universal rights and belonging.[89] Refugees, as discussed above, already exist outside the sphere of universal, inalienable rights. Their outsider status makes them easy targets for accusations of special rights. Moreover, despite globalization's growing influence, state borders remain an important marker of community.[90] The community's protective stance is particularly evident in the migration context: 'In the realm of migration law, once a claim is articulated as a rights claim, the liberal nation's "right" to exclude all outsiders is triggered almost as an

---

[83] Scheingold, *supra* note 3 at xxvii. Milner and Goldberg-Hiller similarly comment on the community aspect of the Sander County research; see Milner & Goldberg-Hiller 2002, *supra* note 24 at 364-5.

[84] Goldberg-Hiller & Milner 2003, *supra* note 32 at 1077. Their case studies concerned same-sex marriage, property relations between landowners and leaseholders, and Native Hawaiian sovereignty.

[85] *Ibid.* at 1083.

[86] Scheingold, *supra* note 3 at xxxiii.

[87] Goldberg-Hiller and Milner encourage the application of their analysis in other contexts: '…special rights processes and languages appear in other issues as well and can be viewed as a common idiom of anti-rights mobilization'; Goldberg-Hiller & Milner 2003, *supra* note 32 at 1115.

[88] Milner & Goldberg-Hiller 2002, *supra* note 24 at 363.

[89] Goldberg-Hiller & Milner 2003, *supra* note 32 at 1081.

[90] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 61-2 [Walzer].

automatic response.'[91] As will be seen in the next section, this is the hierarchy of rights with the community of citizens in the concentric centre of the nation.

III. Special Rights in Refugee Discourse

This article argues that despite the intriguing potential of globalized rights in the advocacy of refugee protection, the risk is that the myth of rights is misleading and refugee rights claimants fall as easy victims to the special rights discourse. The devotion of energy to a globalized rights claim is therefore not the best strategy for change in refugee protection. While the focus is future-oriented, in order to make the argument I turn now to long-standing theoretical debates and past examples of recognized rights going wrong for refugee rights-claimants. In looking back, the hope is to tread a better path forward.

The question of the validity of the state's right to exclude outsiders is the central axis on which migration's theoretical debate balances. Liberal theory is the usual location for arguments both for and against this exclusion, commonly framed as a case for open or closed borders. Liberalism's open border argument is premised on assertions of the moral equality of all individuals, and that the individual exists prior to the community.[92] This theoretical basis argues against restrictive immigration policies.[93] The communitarian counter to this argument is that closed borders are a necessary pre-condition of justice. Best expressed by Michael Walzer, the argument is as follows:

> Across a considerable range of the decisions that are made, states are simply free to take in strangers (or not) … the right to choose an admissions policy … is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.[94]

---

[91] Dauvergne 2005, *supra* note 5 at 168. See also Scheingold, *supra* note 3 at xxviii.

[92] See Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 Rev. of Politics 251 [Carens].

[93] *Ibid.* at 252.

[94] Walzer, *supra* note 90 at 61-2.

The rhetoric of special rights is not used here as a basis for exclusion, nor is the opposing entrance assertion put forth as a rights argument, but the analogies to rights-based claims in the argument can be made.

The moral equality claim of liberalism is deflected by the exertion of a superior community claim. The *right* to self-determination trumps the asserted *right* to equality by demonstrating the false basis of the equality assertion. Equality is here confined to the 'community', and 'strangers' are definitively outside of that community.[95] Entrance demands are therefore considered excessive and unfair. Goldberg-Hiller and Milner likewise remark on their case studies on special rights: 'In each case opponents distinguished rights claimants' "selfish" demands from equality.'[96] The myth of community triumphs; strangers remain strangers and outsiders are left outside. And yet there is more to this special rights discourse than denial.

Beyond a simple negation of the rights claim, rejection is accompanied by a 'trope of vilification'[97]: 'In this stigmatization, an element of moral pollution is attached to these out groups, which are accused of threatening the health and well-being of the community.'[98] The trope can be seen in Walzer's argument where the essence of the community is at stake. It is the very 'shape of the community' and the 'core of communal independence' that is being threatened.[99] However, while Walzer's analysis is theoretically grounded and well-regarded,[100] the distance between scholarly reasoning and political practice must be acknowledged. The theoretical communitarian exclusion does not extend to all rejections of refugee rights claims. Examples of the reactions by the Australian and Canadian governments to asylum-seekers approaching their borders bring the theory into a more troubling reality.

The Australian *Tampa* 'crisis' that erupted in 2001 and the Australian government's self-labeled 'Pacific Solution' is a darker example of actual vilification. The 'crisis' refers to the rescue of 433 mostly Afghan passengers

---

[95] Consider, further, Goldberg-Hiller and Milner's assertion that special rights '… place rights mobilizers outside the bounds of moral community'; Goldberg-Hiller & Milner 2003, *supra* note 32 at 1078.

[96] *Ibid.* at 1077.

[97] *Ibid.* at 1078.

[98] *Ibid.*

[99] Walzer, *supra* note 90 at 61-2.

[100] Joseph Carens, the key proponent of the open-door policy, considers Walzer 'the theorist who has done the most to translate the communitarian critique into a positive alternative vision'–one that provides a 'rich and subtle discussion of the problem of membership'; Carens, *supra* note 92 at 265-6.

from a sinking Indonesian fishing boat, the *Palapa,* by the Norwegian freighter *Tampa* in August 2001. The *Palapa*'s passengers were attempting to cross the Timor Sea from Indonesia to Australia's offshore territory in order to make asylum claims. The Australian government, aware of the *Tampa*'s rescue, closed its port at Christmas Island, refused to allow passengers to disembark, and sent special-forces troops to board the ship.[101] While court challenges and appeals were heard in the Federal Court as to Australia's obligations, agreements were concluded between the governments of Australia, Nauru and New Zealand essentially enabling Australia to offload its refugee responsibilities. Ultimately, Australia excised parts of its own territory from its 'Migration Zone'[102] so as to avoid the obligations of Australian migration law and responsibilities to would-be asylum seekers.[103]

The *Palapa* was merely one of boatloads of desperate individuals, mostly fleeing persecution in Iraq or Afghanistan, traveling from Indonesia in order to claim refugee status in Australia. The passengers made these perilous journeys specifically because Australia has codified its commitment to the non-refoulement of recognized refugees under Article 33(1) of the 1951 Convention. Australia voluntarily attached itself to this international convention in 1954.[104] The Australian *Migration Act* has specifically referred to the 1951 Convention since 1980.[105] That asylum-seekers would come was predicted. That recognized refugees would be permitted to stay was enshrined in law. This is not therefore a rights-claim in the vague uncertain realm of globalized rights. The asylum seekers had made the journey on their own; they did not need to get anywhere. They were seeking to assert their unequivocal legal right of non-refoulement set out in international and Australian law—once refugee status was confirmed—to not be sent back to the risk of persecution in their home countries.

Australia framed its response to the *Tampa*'s arrival, however, in the language of a defense against encroachment. The concocted danger was that of Australia being over-run and threatened by an inundation of illegal

---

[101] See *Ruddock* v. *Vadarlis* [2001] FCA 1329 (Full Court).

[102] *Migration Act 1958,* (Cth) at s.5 [*Migration Act*]. The 'Migration Zone' defines the land and water areas of Australia for visa purposes and where, upon entering, one could make an asylum claim in Australia.

[103] *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).

[104] Australia ratified the 1951 Convention in 1954 and the 1967 Protocol in 1973. UNHCR, 'States Parties to the Convention and the Protocol' (1 December 2006) [UNHCR 'States Parties'], online: <http://www.unhcr.org/cgi-bin/texis/vtx/protect?id=3c0762ea4>.

[105] *Migration Act, supra* note 102; see also Dauvergne 2005, *supra* note 5 at 94, fn.39.

migrants.[106] The resulting rights claim followed a traditionally litigious path. When the initial Federal Court challenge in *Ruddock v. Vadarlis* (*Vadarlis*) went against the government, Prime Minister John Howard asserted: 'This is a matter that relates to the integrity of Australia's borders and the integrity of our borders is surely a matter for the democratically elected government.'[107] The myth of community is forefront in the rhetoric. A subtitle in the consequent appeal decision made the exclusion point clear: 'The Executive Power - The Gatekeeping Function.'[108] The image of a gate further suggests the need for protection from the excluded outsiders. Now siding with the government, Justice French echoed Walzer in a majority decision of the Federal Court:

> The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community, from entering.[109]

As Scheingold predicted, the myth of community trumps the myth of rights.[110]

Assertions of sovereignty are warily pointed to in warnings to rights advocates.[111] Sovereignty claims have the advantage of asserting both the claim of community as well as rights-based claim of their own. In *Vadarlis,* the appeal court's siding with the government confirms the state's right to defend its sovereignty despite the refugee's right of non-refoulement. Scheingold notes that rights can work in this way as a double-edged sword,[112] serving both egalitarian and anti-egalitarian purposes.[113] The dangers amount to Scheingold's warnings of backlash and right-wing use.

---

[106] Jeremy Webber argues: 'The Howard government's actions showed a similar desire to drive a deep wedge between the Australian identity and the asylum seekers, to treat the asylum seekers as a dehumanized, threatening other, regardless of their actual threat'; Jeremy Webber, 'National Sovereignty, Migration, and the Tenuous Hold of International Legality: the Resurfacing (and Resubmersion?) of Carl Schmitt' in Oliver Schmidtke & Saime Ozcurumez, eds., *Of States, Rights, and Social Closure* (New York: Palgrave Macmillan, 2008) 61 at 69 [Webber]. See also Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 Pac. Rim L. & Pol'y J. 49.

[107] Qtd. in Webber, *ibid.* at 67.

[108] *Ruddock* v. *Vadarlis, supra* note 101 at para.186 (French J.).

[109] *Ibid.* at para. 193.

[110] Scheingold, *supra* note 3 at xxviii.

[111] Jonathan Goldberg-Hiller, '"Entitled to be Hostile": Narrating the Political Economy of Civil Rights' (1998) 7 Soc. Leg. Studies 517 at 520 [Goldberg-Hiller 1998].

[112] Scheingold, *supra* note 3 at xxxvii.

[113] *Ibid.* at xxiv.

The dueling sovereignty concerns, as Goldberg-Hiller explains, are 'the claims that rights endanger traditional institutions, values and their champions …', and '... at the same time that rights are upheld as integral to the authentic expression of groups whose goal is the conservation of proper sovereignty.'[114] The message on both sides of the sword in the *Vadarlis* decision is that Australian community and sovereignty must be preserved against 'people not part' of Australia.[115]

Similar reactions to asylum seekers have also played out in Canada. In 1987, 174 Sikhs arrived in lifeboats off the Nova Scotian coast. Their arrival sparked an emergency recall of Parliament to 'deal with an issue of grave national importance.'[116] The emergency session resulted in the introduction of Bills C-55 and C-84. The combined bills 'aimed at streamlining Canada's refugee system, curbing alleged abuses and enhancing border control ... [and] radically restructured the in-land refugee determination system and established the Immigration and Refugee Board.'[117] Just over a decade later in 1999, four ships carrying close to six hundred Chinese migrants arrived off Canada's western coast of British Columbia to an angry, unwelcoming Canadian public and government.

While admittedly the majority of refugee claims by these migrants were eventually rejected or abandoned, the public outrage and heavy-handed response of detainment by the government was extreme. Immigration lawyer Doug Canon noted: 'Canada has criminalized and incarcerated a

---

[114] Goldberg-Hiller 1998, *supra* note 111 at 528.

[115] Webber adds an interesting addendum to this cautionary tale with the personal example of campaign material delivered around the time the *Tampa* events were playing out. He was living in a Sydney suburb and received a mailing from Liberal MP Alan Cadman with a radar grid of concentric circles superimposed on a bull's eye picture of the *Tampa.* The pamphlet addressed anti-terrorism measures and asylum seekers; Webber, *supra* note 106 at 69. Recalling the concentric circles of the hierarchy of rights with citizenship at the core, the pamphlet presents an example of visual backlash reinforcing the government's rhetoric.

[116] *House of Commons Debates* (11 August 1987) at 7910 (L. Bouchard) (official translation) [Bouchard (*Debates*)], qtd. in Sharryn J. Aiken, 'Of Gods and Monsters: National Security and Canadian Refugee Policy' (2001) 14 R.Q.D.I. 7 at para 14 [Aiken].

[117] Aiken, *ibid.* Bill C-55 was also influenced in favour of refugees by the landmark Supreme Court of Canada decision in *Singh* v. *Canada (Minister of Employment and Immigration)* [1985] S.C.J. No. 11 where the Supreme Court considered the procedural rights of refugee claimants, and in particular whether claimants were entitled to oral hearings. Bill C-55 therefore positively included the concept that refugee claimants would have access to an oral hearing before a quasi-judicial tribunal. The tribunal established by the government went beyond the Supreme Court of Canada's requirements in *Singh.*

group of people whose only crime was desperation.'[118] A commentary in the *Globe and Mail* at the time colloquially reported:

> With each Chinese migrant rustbucket that shows up off British Columbia's coast, a bizarre form of behaviour becomes more commonplace on the streets of Vancouver. Total strangers will accost you and shout these things into your face: (a) The House of Commons should be recalled for an emergency debate; (b) Parliament should invoke its special powers to override the Constitution to deal with the "crisis"; (c) the Constitution should be amended, if needs be, to deal with these people.[119]

While the author intentionally offers a legalistic response unlikely to have been uttered by any actual individual but reflective of the 1987 government response, he does go on to report a man who brought his dogs to the dock at Port Hardy to bark at the migrants and a woman who declared: 'we should force the ships back out to sea and all the better if they sank.'[120] The lack of sympathy for the migrants could be explained by Scheingold's notion of 'blaming' in which '[s]ocial control takes precedence over rights-claiming by those who have abused their freedom and *chosen* to threaten the social and moral orders.'[121] The migrants' active choice to illegally enter Canadian waters serves to justify reactions ranging from detention to desired death. They are seen to have brought these consequences upon themselves. As in the past, and to be repeated soon after with the *Tampa* in Australia, a triptych is created with boatloads of asylum-seekers in the first panel, sovereign panic occupying the centre and revised legislation in the final panel.[122] Bill C-31, the first incarnation of legislation that eventually became Canada's *Immigration and Refugee Protection Act*,[123] was brought in to replace Canada's *Immigration Act*,[124] and is tweaked with even tougher responses to illegal migration.

Another layer of rights-analysis can be applied to the reactions against the 'boatpeople' and to the ever more protective stance Western nations are

---

[118] Qtd. in Jane Armstrong, 'The boat people's big gamble' *The Globe and Mail* (22 July 2000) A7.
[119] Terry Glavin, 'Why such loopiness over a few rusty boats?' *The Globe and Mail* (10 September 1999) A11.
[120] *Ibid*.
[121] Scheingold, *supra* note 3 at xxxvi (reference omitted, emphasis in original).
[122] Audrey Macklin, 'New Directions for Refugee Policy: Of Curtains, Doors and Locks' (2001) 19 Refuge 1 at 2.
[123] *Immigration and Refugee Protection Act*, S.C. 2001 c. 27. Bill C-31 was first tabled on 6 April 2000 but died when Parliament was dissolved later that year. Amended legislation, Bill C-11, was introduced and passed in November 2001.
[124] *Immigration Act,* R.S.C. 1985, c.I-2.

taking against outsiders. There is an inherent paradox in increasingly restrictive asylum policies and the incorporation and expansion of rights protections. The conflict appears rooted in the nature of the constitutional state—founded on principles of respect for human rights and inclusion but guided by democratic rule, which may demand exclusion.[125] In resorting to non-arrival measures, states free themselves from the rights obligations they have taken on within their territory;[126] 'the cost of increasingly inclusive practices towards asylum seekers *within* the territory of the state is the rapid development of exclusive measures *outside* it.'[127] Rights advocacy, understood in this light, works against refugees who remain *outside* of the right granting states.

A further undercurrent of these incidents, affecting those asylum seekers *within* the state, is the denial of their legitimacy as refugees. Audrey Macklin labels this the 'discursive disappearance of the refugee,'[128] but the dynamics of the dialogue also demonstrate the assertion of special rights. The discursive disappearing act Macklin points to is performed by the magic of semantics. Migrants are re-categorized into a legal/illegal dichotomy that removes refugees from the equation. The refugee discursively disappears and is replaced by the illegal. While refugees have the right not to be sent back, illegals do not and have by definition already performed a transgression by entering the state illegally. From the outset, the Chinese migrants in British Columbia were labeled illegals rather than refugee claimants. 'Illegal migrants' outlaw designation exceeds the particular violation of immigration law and assumes a kind of existential, totalizing character: they are known simply as "illegals."'[129] This re-labeling permits an accusation that the right to non-refoulement is a special, and undeserved, right. Beyond vilification, the re-labeling illustrates Goldberg-Hiller and Milner's inversion process. The victims of persecution are transformed into transgressors. While 'real' refugees are still acknowledged to exist, they are perpetually left 'over there.'[130]

---

[125] Matthew J. Gibney, 'The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy' in Susan Kneebone, ed., *The Refugee Convention 50 Years On: Globalisation and International Law* (Aldershots, Hants, England; Burlington, VT: Ashgate, 2003) 19 at 43.

[126] *Ibid*.

[127] *Ibid*. at 44 (emphasis in original). Scheingold similarly suggests that 'once rights are granted, continued rights-claiming becomes even more culturally suspect'; *supra* note 3 at xxxvi.

[128] Audrey Macklin, 'Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement' (2005) 36 Colum. H.R.L. Rev. 365.

[129] *Ibid*. at 366. See also Dauvergne 2008, *supra* note 37 at 50-68.

[130] *Ibid*. at 369.

The distinction between asylum seekers claiming refugee status in Western democratic countries and those refugees waiting in camps 'over there' leads to a further semantic inversion. Recall that the one absolute right possessed by refugees is the right to non-refoulement in signatory states to the 1951 Convention. There is no right to get to these states. Yet the discourse of 'need' creates the perception of a reversal of entitlement between right holder and non-right holder. Returning to Australia, the immigration scheme makes an intentional distinction between onshore asylum seekers and offshore refugees, and formally links the intake from the two categories. Refugee numbers are balanced such that the offshore resettlement intake is reduced when onshore claimants increase.[131] This scheme permits Australia the rhetoric of repeatedly labeling those who arrive on its shores as 'queue jumpers' who compromise Australia's ability to help the 'neediest' refugees still overseas.[132] Entitlement to a right is inversed into a justification for exclusion. Need is presented as triumphing over right. In reality, Human Rights Watch has described Australia's system as an attempt to grant asylum 'by invitation only.'[133] The Refugee Council of Australia further found the Australian program to offer not 'a place in a queue but a ticket in a lottery.'[134] The needy refugee gains sympathy in his or her characterization as needy but rarely gains in terms of actual protection. Annual global refugee resettlement sits at less than 1% of the refugee population.[135] Needy refugees still overseas receive sympathy but rarely resettlement.

The Canadian government employs similar manipulations. During the 1987 emergency recall of parliament, the statement was made that: 'we must not forget that our first priority as a country is to help *genuine refugees who are confined overseas*' in contrast to 'refugee claims made in Canada.'[136] The clear

---

[131] For a more detailed discussion of Australia's policy see Dauvergne 2005, *supra* note 5 at 92, fn.30; Refugee Council of Australia, 'Australia's Refugee and Humanitarian Program: Community Views on Current Challenges and Future Directions' (2009) 2009 Intake Submission.

[132] Dauvergne 2005, *ibid.* at 92, fn.31. See also William Maley, 'Receiving Afghanistan's Asylum Seekers: Australia, the Tampa "Crisis" and Refugee Protection' (2002) 13 Forced Migration Rev. 19 at 20 [Maley]; Richard Wazana, 'Fear and loathing down under: Australian refugee policy and the national imagination' (2004) 22 Refuge 83.

[133] Human Rights Watch, 'By Invitation Only: Australian Asylum Policy', online: (2002) 14:10(C) Human Rights Watch <http://hrw.org/reports/2002/australia/>.

[134] Refugee Council of Australia, *The Size and Composition of the 2000-2001 Humanitarian Program: Views from the Community Sector* (Refugee Council of Australia, 2000) at 53, qtd. in Maley, *supra* note 132 at 20.

[135] UNHCR, *Statistical Yearbook 2007*, *supra* note 14 at 39.

[136] Bouchard (*Debates*), *supra* note 116 at 7912 (original English, emphasis added).

message being that refugee claimants in Canada are not genuine. Similarly, when tabling Bill C-31, then Minister of Citizenship and Immigration Elinor Caplan stated: 'Closing the back door to those who would abuse the system allows us to ensure that the front door will remain open.'[137] The 'front door' here refers to refugees brought into Canada through resettlement initiatives. The 'back door' refers to those, like the Sikh and Chinese migrants, who enter illegally on their own to claim refugee status. Canada has been a signatory to the 1951 Convention since June 1969.[138] Article 31 of the 1951 Convention prevents the imposition of penalties for illegal entry by asylum seekers.[139] As with Australia, there is an implicit recognition in signing the 1951 Convention that refugees may come to Canada. That these refugees may need to enter Canada illegally in order to make their refugee claim is predicted, addressed and accepted by the 1951 Convention. Illegal entrance is therefore arguably a legitimate form of 'front door' entrance for a genuine asylum seeker. Reviewing Caplan's presentation of the legislation, Michael Casasola notes:

> Unfortunately the most negative aspect of the legislative package was that the many positive resettlement initiatives were presented as a counter to some of the more punitive actions the government planned in order to limit access to the refugee determination system in Canada. In fact, the resettlement initiatives became an important part of the selling of the bill to the Canadian public. … Resettled refugees were presented as part of the refugees using the "front door." And by providing refugees greater access, Canada suggested it had the moral

---

[137] Citizenship and Immigration Canada, News Release 2000-09, 'Caplan Tables New Immigration and Refugee Protection Act' (6 April 2000), online: <http://www.cic.gc.ca/english/press/00/0009-pre.html>.

[138] UNHCR 'States Parties' *supra* note 104.

[139] Article 31 states:

> 1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

> authority to limit access to those refugees described as using the "back door."[140]

Here the special rights discourse is not being applied to distinguish the over-demanding refugee from the Canadian community attempting to preserve its identity and secure its borders. Rather, and more perversely, the right-holding refugee 'over here' is portrayed as furtively preventing the non-right-holding refugee 'over there' from attaining protection to which the refugee 'over there' has no actual entitlement. Rights in this rhetoric are obliterated and protection swings back to the obligation-free zone of voluntary compassion and humanitarianism.

In essence then, refugee rights discourse is left back where it began, lured by the 'lore of the law'[141] to shift from calls of compassion to dignified demands for rights. The conundrum refugees currently face in relation to rights they already possess clearly points to the need for more effective protection and the appealing potential of globalized rights. Scratching at the surface of the refugee dilemma, however, points to the reality that rights have not been—and cannot be, even in a globalized form—the solution. Entitlement to rights has not equated to protection for refugees. The myth of rights holds outside of the litigation context and allegations of special rights are a dangerous weapon against which refugees are particularly vulnerable as the ultimate outsiders. Rather than protection through rights, the refugee identity is corrupted by the invocation of special rights. The very reality that pushes the call for increased rights proves why rights are the wrong answer.

IV. Conclusion

Almost twenty years ago, James Hathaway noted that the perception of refugee law as a rights-based regime was 'largely illusory.'[142] The illusion still stands, even with respect to those rights to which a refugee is clearly entitled in law. Rights attainment does not necessarily equate to social change[143] and may in fact reverberate against the rights claimants. In the

---

[140] Michael Casasola, 'Current Trends and New Challenges for Canada's Resettlement Program' (2001) 19 Refuge 76 at 79.

[141] Scheingold, *supra* note 3 at xviii.

[142] James. C. Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 J. Ref. Studies 113 at 115.

[143] But see McCann, *supra* note 48 for a counter argument. McCann counters Scheingold's argument that 'litigation provides at best a momentary illusion of change' with an 'alternative understanding'; *ibid.* at 3. McCann argues 'the evidence suggests that taking legal rights seriously has opened up more than closed debates, exposed more than masked systemic injustices, stirred more than pacified discontents, and nurtured more than retarded the

refugee case, the right to non-refoulement has led to increased obstacles preventing asylum seekers from reaching safe countries on their own[144] and a vilification of those who do so as illegal queue-jumpers. In abandoning compassion for rights, the compassion for the cause is lost without the achievement of dignity and equality. While globalized rights may be increasingly possible in migration, they are not the right path to refugee protection.

development of solidarity …'; *ibid.* at 232. Scheingold takes McCann's research as 'empirical confirmation of the claims made in *The Politics of Rights* about the indirect, rather than direct, payoff of legal rights'; *supra* note 3 at xxx. McCann's argument does nothing to erase the risks explored in this article.

[144] See *Canada-U.S. Safe Third Country Agreement*, 5 December 2002, online: <http://www.cic.gc.ca/english/policy/safe-third.html>. The agreement came into force on 29 December 2004 and requires asylum seekers to make their refugee claims in the first country of arrival. Asylum seekers arriving in the United States, as the majority inevitably do as a result of the greater number of American embassies worldwide and international flight routing through the United States, will be denied entry into Canada. The clear objective of the agreement, instigated by Canada, is to decrease the number of asylum seekers able to gain access to the refugee determination process within Canada. See also *Canadian Council for Refugees v. Canada* [2008] F.C.J. No. 1002, 2008 FCA 229, leave for appeal denied, *Canadian Council for Refugees v. Canada* [2008] S.C.C.A. No. 422.