An Inconvenient Obligation:

How the Major Political Parties of Canada and Australia

Justify the Restriction of Asylum Seekers

by

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Abstract

This thesis surveys the politics of asylum seeking in Canada and Australia, charting the asylum policies and related parliamentary debates of Jean Chrétien's Liberal Government (1993–2005) in Canada and John Howard's Liberal Government (1996–2007) in Australia, as well as those of their respective opposition parties. In doing so, this thesis reveals how the major political parties of Canada and Australia justified the disjunction between what they *said* about asylum (their rhetoric) and what they *did* (their policy). In regards to what they said, politicians of the centre-left and centre-right frequently affirmed their commitment to the state's obligations to refugees. Yet, in regards to what they did, the major political parties of Canada and Australia supported policy measures that restricted the entrance of asylum seekers. Given these findings, this thesis proposes to understand the politics of asylum as a conflict of aspirations. On the one hand, the major parties of Canada and Australia held an aspiration to provide asylum to refugees and, on the other, they held an aspiration to regulate the entrance of non-citizens into their national community. The practice of asylum seeking brought these aspirations into conflict because asylum seekers frequently entered nations by irregular means, frustrating a government's capacity to regulate entrance. In trying to reconcile this conflict, the major parties of Canada and Australia subordinated their aspiration to provide asylum, narrowing its scope to those refugees who arrived by regular means. This redefinition of the aspiration to provide asylum has substantial implications for the global refugee regime.

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Introduction

Over the last thirty years, asylum seeking has become a major political issue among liberal democratic nations. The simplest explanation for this is the dramatic growth of asylum claims made in the West throughout the 1980s and 1990s. According to OECD figures, annual asylum applications in Western Europe, Australasia, Canada and the United States rose from 90,400 in 1983 to a record high of 828,645 in 1992 (Castles 2003: 15). This boom put substantial pressure upon the asylum systems of these nations, creating administrative delays and vast backlogs of unprocessed asylum claims. Western governments have ‘converged’ in their response, implementing a range of policy measures which have had the cumulative effect of restricting the practice of asylum seeking.¹ The twenty-first century has seen a substantial downturn of asylum claims in industrialized nations, from 655,100 claims in 2001 to 336,100 claims in 2005 (UNHCR 2006). While this is partly a result of greater political stability in refugee-producing regions, the United Nations High Commissioner for Refugees (2006) has expressed the view that the West’s restrictive policies have ‘undoubtedly... played a role’ in this downturn. Indeed, many observers have expressed their concern over the state of asylum in the West,² with one declaring that ‘the institution of asylum for refugees faces a severe crisis’ (Nathwani 2000: 354). It is the nature of this ‘crisis’ that this thesis seeks to better understand.

¹ This is one dimension of the ‘convergence hypothesis’ of international immigration policy, the theory that labour-importing countries have become increasingly similar in their entrance policies, integration policies and public response to immigration. See Cornelius et al. (1994, 2004) and Meyers (2002).

² See also Ray Wilkinson (2004), Catherine Dauvergne (2004: 601–2), Jeff Crisp (2003), Matthew Gibney (2004: 1–15) and Gil Loescher (1992: 1–8).

More specifically, this research investigates the implications of an empirical observation made by Niklaus Steiner (2000) in his book, *Arguing about Asylum*. In his survey of parliamentary debates on asylum issues in Britain, Germany and Switzerland, Steiner found that ‘not a single parliamentarian in any of these debates spoke against refugees or against the principle of asylum’ (ibid.: 134), a finding that is reinforced by this study of parliamentary debates in Canada and Australia. This observation stands in curious contrast to the policy trend amongst Western nations towards the restriction of asylum seekers, and begs the question: How do major political parties justify the disjunction between what they *say* about asylum (their rhetoric) and what they *do* (their policy)?

To answer this question, this thesis proposes to understand the politics of asylum as a conflict between two aspirations: the aspiration to provide asylum to refugees and the aspiration to regulate entrance. For these purposes, an ‘aspiration’ will be taken to mean an earnest ambition which is held by a political agent. Three important features need to be mentioned here. Firstly, a political agent may hold multiple aspirations. Secondly, different aspirations are not necessarily compatible with each other, even when they are held by a single political agent. This means that situations will arise where an agent’s aspirations come into conflict, each dictating a different course of action where only one is possible. In such situations, the political agent will be forced to pursue one aspiration and subordinate the others. Thirdly, an aspiration does not cease to exist if it is not acted upon. If a political agent does subordinate one aspiration to another, or if circumstances determine that an agent is unable to act in accordance to an aspiration, the agent may nonetheless continue to earnestly hold that aspiration. Thus, a single

course of action does not necessarily come out of a single intention; it can emerge out of a muddle of conflicting aspirations.

To use an example, a budding academic may earnestly foster an aspiration to reduce her ‘carbon footprint’. In spite of this, she may choose to subordinate her environmental aspiration to her professional aspirations and fly around the world to attend illustrious academic conferences. Her actions are counter to her environmental aspiration yet it does not follow from this that her aspiration has been abandoned. It is quite conceivable that she will continue to aspire to carbon-neutrality in spite of her globe-trotting lifestyle. In the meantime, she will simply have to ignore, endure or excuse the gap between her actions and her aspirations. The restriction of asylum seekers can be understood in a similar way, seen as a compromise to the aspiration to provide asylum rather than an abandonment of it. A survey of policy will determine a government’s actions, while a survey of rhetoric will reveal the aspirations that lie behind it.

By thinking about the actions of governments as an outcome of conflicting aspirations, it is possible to capture the complexities that characterize the asylum issue. As noted by Steiner (2000: 6–10), contemporary research on asylum is often hindered by an overly simplistic view of its politics. Such research typically depicts the politics of asylum as ‘a tug-of-war between international norms and morality loosening asylum on the one hand and national interests tightening it on the other’ (ibid.: 7). By this account, the nation-state is seen as reluctant to admit asylum seekers, opposed to the way that they challenge control over who does and does not enter.

Yet Steiner’s analysis of parliamentary debates in Germany, Britain and Switzerland reveals a more complicated interplay of motives with ‘national interests also pulling to

loosen asylum, and international norms and morality also pulling to *tighten* it' (ibid.: 134). Clearly, morality, norms and interests are more normatively diverse than the 'tug-of-war' model assumes. Moreover, Steiner argues, these factors are 'significantly entangled' (ibid.) rather than clearly divisible. The crossover between morality and international norms is obvious enough: many norms, especially those related to the human rights regime, have moral reasoning at their foundations. Less obvious, however, is the way in which national interests are coexistent with norms and morality. Yet it can be argued that it is within a nation's interests to act in accordance with moral norms because to do otherwise would risk censure from the international community. This self-interested concern not to 'outrage world opinion' (Robertson 1999: 80) is at the root of a norm's coercive strength. In short, national interests are not naturally at odds with norms. By assuming a dualism between the state and the international humanitarian regime, the model of the 'tug-of-war' fails to capture the full complexity of the asylum issue.

Steiner's (2000: 134) observation that parliamentarians never 'spoke against refugees or against the principle of asylum' reinforces the conclusion that asylum politics are complicated. Given the financial costs of asylum and the political controversy it creates, it is pertinent to ask why parliamentarians have not simply argued for abandoning the practice outright. From the 'tug-of-war' perspective, the failure of the state's political organs to denounce asylum would only make sense if it were interpreted cynically, seen as a rhetorical *façade* to protect the public from the uncomfortable truth that national interests trump moral concerns.

However, an analysis of contemporary asylum policy offers evidence that material self-interest is not the only consideration for governments. For example, despite the broad trend towards restriction among Western nations, a substantial number of asylum seekers are given protection even when they do not strictly satisfy the criteria for refugee status and are at risk for reasons beyond the refugee definition's narrow focus (this point will be fully addressed in Part One of this thesis). Consequently, Western governments refrain from expelling them, sometimes creating additional immigrant categories to accommodate them. For example, in 2004, in addition to the 127,000 asylum seekers granted refugee status in industrialized countries, about 51,100 asylum seekers were allowed to remain under broader 'humanitarian' categories (UNHCR 2006b: 39). The fact that Western governments regularly go *beyond* what is strictly required by international legal norms suggests that states are not strictly driven by self-interest. It appears that states, at least some of the time, are willing participants in the asylum regime, providing protection to people who are in need of it, even when this takes them beyond their minimum legal duty. What is required, then, is a more flexible and nuanced theoretical understanding of asylum politics, a conception that can accommodate the apparent contradictions in the behaviour of states.

This thesis proposes an alternative to the 'tug-of-war' model. It argues that the politics of asylum can be defined as an attempt to reconcile the conflict between two aspirations: the aspiration to provide asylum to refugees and the aspiration to regulate entrance. By this account, morality, international norms and national interests are not exclusive to the domain of either aspiration—they are, rather, employed in support of both. Rather than thinking of the relationship between these aspirations as a 'tug-of-

war’, it might be more useful to use an analogy of two plants in a single potting box. To an extent, these plants can coexist but, as they grow, they will intrude upon the other. The gardener must then decide whether to let them struggle to their mutual frustration or to prioritize one by pruning back the other. In either case, the gardener is acting in a way that will preserve both plants, even if one must live a stunted life. Similarly, by ‘pruning back’ the aspiration to provide asylum, by limiting asylum to refugees who enter through regular routes of immigration, a government can preserve both aspirations by reducing the conflict between them. As such, this aspirational model captures the fundamental dilemma of asylum while remaining receptive to the complexities that define its politics. The first part of this thesis will be largely dedicated to fleshing out these aspirations and illuminating the factors—such as the specific morals, norms and interests—that are thought to compel a political agent to hold them.

Implicit within this conceptualization of asylum politics is the conviction that material factors *alone*, such as economic and strategic considerations, cannot explain the entrance policy of a state. Undoubtedly, material factors—economic considerations especially—have a critical influence on all facets of immigration, asylum policy included. However, approaches that focus solely on economic factors—such as Marxist or neo-Marxist theories of immigration—inevitably fail to accommodate the discernible influence of other important factors, particularly considerations of race or culture, foreign policy and national security (Meyers 2000: 1250–1). This is especially true of refugee policy where the influences of foreign policy, supranational organizations and international regimes are seen to have special significance (ibid. 1247). Moreover, the emergence of social constructivism as a major school of thought in political theory has

led to a far greater theoretical and empirical appreciation of the influence of ‘ideas’ on the behaviour of states, a range of influences which includes national identity, culture, norms and morality (Goldstein et al. 1993; Katzenstein 1996; Wendt 1999).³ Consequently, this thesis takes the view that a government’s aspirations for entrance policy emerge out of an array of influences, both material and non-material, and that a proper understanding of asylum policy cannot be achieved without being receptive to them all. It is not the intention of this thesis to argue for the greater importance of any particular factor over any others. The intention is simply to adopt a flexible and inclusive approach to the study of entrance policy.

As an agenda for empirical research, however, this sets a difficult challenge. Non-material factors, by their very nature, are not easily measurable. While one can turn to a range of well-established measures to quantify material influences, such as the economy or strategic capability, there is not any obvious way to measure the influence of non-material factors such as identity, morality, culture and norms. As subjects of investigation such ideational forces are a great deal more ambiguous, more controversial and only fairly recently the basis for substantive empirical research (Wendt 1999: 4).

To gain an insight into the material and non-material factors that are relevant to policy formulation, this thesis has undertaken a survey of political rhetoric. In doing so, it has employed a strategy used by other academics to capture ideational influences on policy formulation (Steiner 2000; Rathbun 2004; Lind 2005). Specifically, this thesis has principally drawn on the transcripts, known as the *Hansards*, of debates and

³ Steiner (2000: 146–50) also recognizes the potential contribution that social constructivism has for understanding asylum politics.

comments made in the lower chamber of each country's Parliament: the House of Commons in Canada and the House of Representatives in Australia.⁴ Secondary sources—news media and academic literature—have also been used to provide a wider context in which to situate and understand the debates. Online versions of the Canadian⁵ and Australian *Hansards* were used for this research. Debates on the asylum issue were identified by examining the transcripts for dates when relevant legislation was introduced or under discussion; when important asylum-related events had taken place; and by using the search engines that supplemented *Hansard* websites. To support the conclusions drawn from these transcripts, this thesis provides appropriate references to *Hansard* and, in many cases, direct quotations.

Of course, this was not the only sample of political rhetoric that might have been undertaken and a more comprehensive study could have included surveys of Senate debates,⁶ press releases, media statements, political speeches, and personal interviews. Nonetheless, a study of lower chamber parliamentary debates serves as a useful window to the concerns, values and ambitions that contribute to a particular policy outcome. In the hostile and combative environment of the parliamentary debating

⁴ Punctuation has been adjusted in *Hansard* quotations where it is necessary to clarify meaning, and to maintain consistency with the main body of text. In regards to spelling, quotations from parliamentary debates and secondary sources will retain regional variations in spelling, respecting, for instance, the North American preference for '-ize', the Australian preference for '-ise', and the preference of both for 'labor'.

⁵ Canadian parliamentary debates, delivered in a mixture of English and French, are translated in full into both languages. This research draws only on the English language version.

⁶ Being federal states, Australia and Canada both have a Senate, an upper chamber of Parliament. An analysis of Senate debates was not included, however, because legislation is typically introduced, debated and amended in the House, being subsequently passed onto the Senate for approval. Usually, this is a matter of formality; the focus is on whether legislation is constitutionally sound and bills are rarely rejected. In the case of Australia, however, the Opposition had an unusually strong presence in the Senate during the period covered and used this power to robustly oppose and criticize legislation, far more so than it did in the lower chamber. While this anomaly does not weaken the findings of this research, any future analyses of the Australian Labor Party's rhetoric during the Howard era could be augmented by the inclusion of Senate debates.

chambers, politicians must do all they can to fortify their arguments against criticism. They will draw on any relevant justifications that they believe will strengthen their position *vis-à-vis* other parties, or will help to make it resound with the electorate. A politician may appeal to economic justifications for their policies; raise concerns relating to potential threats such as terrorism, criminal activity or health issues; or appeal to non-material factors such as national identity, morality or international norms and trends. By surveying these justifications, this thesis has created montages of the factors that the major political parties of Canada and Australia purport to be relevant to the development of asylum policy. By revealing this complex tangle of motives, these montages demonstrate the need for a more flexible and nuanced framework for understanding asylum policy formulation.

It is important to note here the limitations of this research. By including an analysis of political rhetoric, this thesis identifies the material and non-material factors that politicians *declare* to be relevant to the formulation of asylum policy. This may not be equivalent to the factors that *actually* determined the formulation of policy. Because political rhetoric is designed with a public audience in mind, an analysis of it cannot claim to openly expose the factors that influence entrance policy. Politicians may declare that their policy is shaped by factors that in fact have little influence; or they may refrain from publicly revealing factors that have, in fact, had a significant influence on policy formulation. While political rhetoric does offer a window into policy formulation, it is a window that is subject to distortion.

Nonetheless, there is no good reason to dismiss political rhetoric as a wholly unreliable or meaningless source of data. Given the high level of scrutiny by the media,

non-governmental organizations and other political parties, politicians are not free to invent any excuse for acting the way they do. Moreover, in the competitive environment of the debating chambers, a politician cannot expect to have a contentious claim go unchallenged, unless there is widespread consensus or ignorance on an issue. This is an important reason for examining both sides of a parliamentary debate, for surveying the rhetoric of the Government and the Opposition. Such an analysis will be receptive to inter-party conflict where it occurs, providing a wider context in which to situate the claims of politicians.

Yet let us imagine the worst-case scenario: a politician who is shaped by the worst clichés of their occupation and whose rhetoric in no way resembles his or her own actual views on the matter. Imagine, for example, a politician who publicly declares that states do have a moral obligation to provide asylum yet privately believes that this is not the case, or is not the case all of the time. If rhetoric can plausibly be used in this way, then what can be learnt from its analysis? The answer is that while rhetoric may not accurately represent the personal motives of the speaker, it can still reflect the material and non-material factors that are affecting policy formulation. By meretriciously declaring that the state has an obligation to provide asylum, our hypothetical politician is recognizing the political importance of being seen to support that obligation, irrespective of his or her own beliefs. Given the widespread acceptance of asylum in liberal society, it would be electorally deleterious (and thus contrary to the interests of a politician and his or her party) to be seen as wholly dismissive of asylum. Thus, a politician must give the impression that they respect the principle of asylum, and will do this through their rhetoric and their policy. Similarly, a politician may argue

that entrance policy ought to be tightened because the nation's identity is under threat, even though he or she personally believes that cultural matters ought to be irrelevant to statesmanship. This cynical rhetoric does not reflect the politician's beliefs but it will probably reflect the beliefs of their constituency and thus be essential to their electoral strategy. In conclusion, then, while rhetoric may not represent the speaker's personal views, it still reflects their political considerations on pertinent material and non-material factors, such as public opinion, intra-party politics, issues of security or economy, moral principles, legal constraints and international norms. While it would certainly be naïve to take political rhetoric at face value, it would also be short-sighted to dismiss it as having no value at all.

Given this capacity for untruthfulness, however, it is necessary to further clarify the relationship between political rhetoric and policy. Thus far, political rhetoric has been described as subsequential to policy, a public justification of decisions and strategies that have already been devised behind closed doors. Yet there are ways in which, as the saying goes, the tail can wag the dog. After all, if 'ideas' do have an influence on policy outcomes, as social constructivism argues, then one would expect political rhetoric to have a measure of influence insofar as it contributes to a nation's pool of ideas. This is implicit within the study of 'securitization', advanced by the Copenhagen School of critical security studies (Wæver 1995; Buzan et al. 1998). This approach sees 'security' as a process of political classification whereby a securitizing agent 'imbues [an issue] with a sense of importance and urgency that legitimizes the use of special measures outside of the usual political process to deal with it' (Smith 2005: 34). Importantly, securitization is seen to be 'a discursive act, a speech act' (ibid.), a product of

persuasion rather than inevitability. Given that this thesis includes an examination of political discourse, this is an important point to keep in mind, especially in light of the securitization of immigration since the end of the Cold War (Huysmans 1993, Wæver et al 1993). Thus, whether or not an issue is an urgent threat is not as important as whether it is *perceived* to be an urgent threat—only in the case of the latter will it become the object of responsive policy. As such, a genuine threat to security can be overlooked, or an insignificant threat can become a pressing security issue by way of exaggerated or erroneous discourse. Certainly, in the view of some commentators (Gibney 2002; Turk 2003; van Selm 2003), asylum seekers have been securitized in this latter manner, unreasonably labelled as threats through a process of overwhelmingly negative discourse, a point that will be returned to later.

This sort of thinking has not only emerged in the field of security studies. Academics have developed the concept of ‘frames’ to describe the means by which ideas influence domestic policy outcomes. As defined by Erik Bleich (2002: 1063), ‘[a] frame is a set of cognitive and moral maps that orients an actor within a policy sphere.’ Cognitive maps involve the ‘definitions, analogies, metaphors and symbols that help actors to conceptualize a political or social situation, identify problems and goals, and chart courses of action’ (ibid.: 1064). Moral maps involve the allocation of moral relevance to certain terms and courses of action (ibid.). In his analysis of race policies in Britain and France, Bleich demonstrates that, while traditional explanations⁷ of policy outcomes play an important role, race policy cannot be properly understood without an appreciation of the way the issue of race was framed (ibid. 1071–3).

⁷ Specifically, these traditional explanations for policy outcomes are the roles of power, self-interest, institutions and problem-solving.

Given the wide dissemination of political rhetoric and its testimonial air, politicians contribute significantly to policy frames and the process of securitization through the concepts and language that they employ. This is especially true of the asylum issue where much of the terminology is ill-defined and susceptible to misrepresentation (Steiner 2000: 8–9). The way in which politicians represent the asylum issue impacts on how asylum seekers are perceived by the greater community and on which policy response is seen to be appropriate. Of course, the ability to use ‘the power of language to set the political agenda’ (Steiner 2000: 9) is vulnerable to misuse. There is an opportunity for politicians—deliberately or not—to misrepresent the issue of asylum and create public support for pre-established policy objectives. While this possibility must be kept in mind, it is not the intention of this thesis to judge the veracity or prudence of political rhetoric, merely to describe and document it. For these purposes, it is not necessary to know the truth-value of everything that politicians say—it is enough to simply know that they said it. As such, critical commentary of political arguments will be restricted to that which is necessary for understanding the asylum issue in each case. It will be largely left to the reader and to other researchers to decide whether political rhetoric on asylum in Canada and Australia was morally or factually correct.

To sum up so far, two explanations have been given for how a study of political rhetoric can contribute to our understanding of asylum policy. Firstly, it helps to reveal the material and non-material factors that influence policy outcomes. Secondly, political rhetoric itself plays a minor but significant role in policy outcomes. It is for these reasons that there is some empirical value in augmenting an analysis of asylum policy with a study of the associated parliamentary debates. The result is a deeper and

more nuanced analysis of policy trends in Australia and Canada: an analysis that does not overlook the political considerations that played a role in a government's calculations yet did not ultimately determine its actions. As such, this is not merely a study of policy and rhetoric specifically, it is a study of the relationship between them. In asking how politicians justified the restriction of asylum seekers, this thesis is asking how politicians legitimized policy through their rhetoric. In an authoritarian state, such justifications would be largely unnecessary, but in a liberal democracy—such as Canada and Australia—an important factor in policy formulation is how successfully a policy can be 'sold' to the voting public. As such, the empirical case studies of Canada and Australia begin with a comprehensive survey of the entrance and asylum policies of each nation, including a description of the general asylum situation. These policies represent the tangible outcome of the conflict between a government's aspirations for entrance, demonstrating the shift of these nations towards greater regulation. The subsequent surveys of rhetoric bring a depth of understanding to this policy trend, revealing some of the factors that encouraged a government to take the actions that it did, and highlighting the instrumental role that rhetoric played in advancing certain policies.

This focus on asylum policy and associated parliamentary rhetoric has the additional benefit of encouraging analysis at the sub-state level, a level of analysis that has generally been neglected in immigration research. Typically, political analysis of immigration has tended to focus on the state, treating it as a unitary actor and thereby overlooking the influence of domestic agents (Avci et al. 2000: 193, 197–8). Moreover, those studies that do examine sub-state politics are usually weakened by their neglect of

a general theoretical context and a tendency to assess a single country over a limited time period (Meyers 2000: 1259). This thesis avoids these shortcomings by situating the research within the context of contemporary political theory. It also draws on the cases of two countries, Australia and Canada, both ‘settler societies’ with well-established immigration regimes that are broadly similar in structure and aspiration (Freeman et al. 1995).

Given that asylum policy and its related parliamentary debates are the major empirical focuses of this study, the appropriate units of analysis are the majority political parties of the left and right, as they are a clear manifestation of the bipolar parliamentary environment. Under usual circumstances,⁸ one of these major parties will be in government, either as a majority government or in coalition with one or more minority party; and the other will be in opposition. For a focus on party politics, the case studies of Canada and Australia provide a unique opportunity for analysis. From October 1993 to January 2006, the Canadian Government was controlled by Jean Chrétien’s centre-left Liberal Party, while from March 1996 to December 2007 the Australian Government was controlled by John Howard’s centre-right Liberal Party. Despite sharing the same name, these parties had very different political agendas. The Canadian Liberal Party was essentially a Third Way party, both economically and socially liberal, while the Australian Liberal Party was economically liberal and socially conservative. Of equal interest was the rhetoric of the opposition parties: the left-wing Australian Labor Party and, in Canada, a right-wing opposition that variously

⁸ It is possible for the government and opposition to be controlled by parties on the same side of political spectrum—as indeed was the case in Canada between October 1993 and June 1997 when the centre-left Liberal Party was in Government and the Bloc Québécois, a left-wing minority party, was in Opposition.

went under the title of the Reform Party of Canada, the Canadian Alliance and the Conservative Party of Canada. Of course, given the different ideological backgrounds of these parties, it can be expected that they will deal with the conflict of their aspirations in crucially different ways. As such, the case studies in this thesis will chart the course of each Government and its Opposition from the date of their induction (October 1993 in Canada and March 1996 in Australia) to the end of 2005, a cut-off point determined by the commencement of this research in early 2006. This time period—as we shall see—also coincides with a particularly eventful period in asylum politics, a period of very high numbers of asylum claims and a major shift in the international security context after 11th September 2001.

Part One of this thesis will draw on existing literature and political theory to make a broad sketch of the factors that can compel a political agent to aspire to provide asylum and to regulate entrance. It will then relate these to the asylum situation over the last sixty years, revealing the way in which the global situation has increasingly brought these aspirations into conflict. In doing so, Part One is a background to the issues and theoretical concepts that are relevant to the politics of asylum, providing a wider context within which to understand the behaviour of major political parties in the case studies that follow.

Parts Two and Three of this thesis provide empirical surveys of the politics of asylum in Canada and Australia respectively. Each case study will take the same structure, being divided into four sections. The first section provides a brief historical overview of the asylum and immigration systems of each country, describing the legislation and

institutions that each Government inherited when it came to power. The second section provides a survey of the asylum policies that each Government implemented through legislation and regulation before the end of 2005. The third section will examine parliamentary debates over this period to describe the justifications that Government members offered for their policies. This section firstly identifies those remarks that reflected an aspiration to provide asylum; secondly identifies those that reflected an aspiration to regulate entrance; and finally identifies those that justified the balance struck between the two. The fourth section, using the same format as the analysis of Government rhetoric, examines the rhetoric of Opposition parties, identifying their criticisms of Government policy and their own proposals for policy alternatives, itself a dimension of political rhetoric.

Finally, Part Four of this thesis provides a comparative discussion of the cases of Canada and Australia, drawing out the common trends and distinctions that are discernible in the rhetoric and policies of their governments and opposition parties, and between the majority parties of the political left and right. In light of these findings, this thesis then draws conclusions about the normative implications of policy trends for the global asylum regime.

Part One: The Aspirational Model of Asylum Politics: A Theoretical Framework

1.1 The Aspiration to Provide Asylum to Refugees

The aspiration to provide asylum is the description that this thesis gives to the range of factors that cause political agents to accept refugees onto their territory. That Western governments continue to maintain their asylum systems, in spite of the costs and controversy they attract, is a testament to the strength and persistence of this aspiration. This section will examine the factors that are typically thought to motivate the aspiration to provide asylum: moral theory, human rights theory, and the norms, laws and institutions that constitute the refugee regime. Additionally, this section will make the less familiar argument that, by adhering to the norms and morals that support asylum, a government is acting in its own—as well as the nation's—interests.

The Moral Foundations of Asylum

Moral grounds for some form of hospitality to refugees can be found in an array of religious and philosophical traditions (Buchanan et al. 2003). At the root of the principle of asylum is the fundamental virtue of providing assistance to those who are

in need of it. Relevantly for Western nations, this notion of *asylum as charity* is promoted implicitly and explicitly within Judeo-Christianity, the religious tradition from which most Western nations have inherited their moral foundations (MacEoin 1985; Steiner 2000: 10–11). Yet, moral justifications for asylum can also be derived from a range of secular theoretical perspectives, notably those of liberalism and utilitarianism. In *The Ethics and Politics of Asylum* (2004), Matthew J. Gibney identifies the virtue of *impartialism* as the common ethical thread of these theories, the view that all parties ought to be given equal consideration in matters of justice. On entrance policy specifically, Gibney argues that the impartialist perspective holds ‘an ideal of states as cosmopolitan moral agents, and sees states as morally required to take into equal account the interests or rights of citizens and foreigners in entrance decisions’ (ibid.: 59). As such, ethical accounts derived from liberalism and utilitarianism generally gravitate toward an ideal of open borders, where transnational migration is impeded by little or no regulation.

Within the broad paradigm of thought that fits under the heading of liberalism, this right to free movement can be derived from a range of starting points. Immanuel Kant, for instance, derived his ‘cosmopolitan right’ to free movement, from an observation of geographical fact: ‘Since the earth is a globe, [people] cannot disperse over an infinite area, but must necessarily tolerate one another’s company’ (Kant [1795] 1970: 106).⁹ Libertarianism, on the other hand, is opposed to border control because it defies the libertarian view of property rights, a view where territory can only be properly owned

⁹ From this factual observation, Kant reasoned an obligation of ‘universal hospitality’ to displaced peoples. However, the ‘right of resort’ he proposed was only temporary: permanent residence was an agreement to which the receiving state was not morally or legally obliged (Kant [1795] 1970: 105–8). For discussion of Kant and the ethics of asylum, see Seyla Benhabib (2004: 25–48).

by individuals, not nations or states. According to libertarianism, only individuals can prohibit the entrance of others onto territory that they have justly acquired, and any regulation of national borders goes well beyond the scant duties of the minimal state (Carens 1987: 252–4; Kukathas 2003). This liberal insistence on free movement is reinforced by the various contradictions that arise from the regulation of borders. Why, for instance, should the free movement of people be restricted at the same time that the free movement of capital and information is so widely encouraged (Goodin 1992: 12–3)? Furthermore, how can the right to leave freely a country be supported by liberal states when the right to enter freely another is not (Dummett 1992: 173)? These contradictions expose the incompatibility of border control with liberal ideals.

An open border policy can also be founded on consequentialist liberal theories that aspire to a pre-conceived pattern of social justice, such as egalitarianism. Some liberal theorists have proposed the ‘globalization’ of John Rawls’s (1972) theory of justice, expanding the principle of ‘justice as fairness’ beyond the state and applying it to the global community (Pogge 1989). By this liberal egalitarian account, the freedom to move between states is an important dimension of global justice: it provides an opportunity for people to escape the poverty or oppression they were born into through no fault of their own (Carens 1987: 254–62; Kukathas 2003). Thus, the restriction of entrance does not merely infringe on a person’s right to move freely, it infringes on their right to pursue social and economic equality.

Utilitarianism also employs a consequentialist approach toward matters of justice, arguing that the aim of moral behaviour is to create the greatest level of happiness for the greatest number of people. Accordingly, the ideal outcome of any transaction is that

which maximizes well-being. If one applies the moral logic of utilitarianism to the question of contemporary global migration, one finds little justification for the levels of regulation that Western nations presently enforce. Given the current levels of international economic, social and political inequality (Pogge 2002), the West is in no position to deny access to those who come searching for what it has in relative abundance. If it can provide security, rights, employment, social welfare or statehood to those who lack it in their own nations, then it has an obligation to do so. In respect of refugees, utilitarians have a natural bias toward their rights because their urgent humanitarian needs trump the social and economic concerns of a receiving community (Singer et al. 1988; Carens 1987: 263–4).

This said, impartialists generally do recognize a limit to open borders. According to the utilitarian calculus, the regulation of entrance is justified when the costs of unlimited entry outweigh the benefits, when, for instance, continued immigration threatens to permanently damage the ecosystem or create intolerance in the community (Singer et al 1988: 127–8). Similarly, liberals would find regulation justified when, on balance, immigration infringed on more rights than it served. For instance, in his liberal defence of open borders, Michael Dummett (2001: 14–7) recognized that border control would be justified if the host culture was in danger of being ‘submerged’ as this would infringe on the rights of individuals to maintain their traditions and values. Gibney (2004: 83) argues that regulation would be justified ‘only in order to protect the institutions and values of the liberal democratic state’, defining these as systems of civil and political rights as well as any welfare apparatus that advances social justice. What liberals and utilitarians share is a belief that the ‘*only* good reasons for restricting the

entry of outsiders into a particular state are reasons that could be justified to *all* members and non-members alike' [author's emphasis] (Gibney 2004: 64). The reason that impartialists argue for less border control is precisely because Western nation-states—being economically prosperous, relatively underpopulated and culturally flexible—are a long way from this critical juncture, capable of absorbing many more immigrants before there is a plausible threat to their structural or cultural existence (Dummett 2001).

Obviously, the impartialist prescription for open borders goes much further than what is minimally required to justify the provision of asylum to refugees. In its ideal form, impartialism offers moral justifications for the unregulated entrance of *all* immigrants, not merely those that have been forcibly displaced. As an aspiration, this is not likely to be seriously entertained by many political agents, especially an elected government that depends upon the continued support of its voters. The impartialist ideal is so inclusive that its implementation would almost certainly cause far greater levels of immigration into Western nations, possibly resulting in substantial changes to the cultural make-up of their communities and a sacrifice of the material well-being of citizens. If a policy of open borders did have any support among Western voters, it would not be very significant, and it would certainly not be enough to counter those who opposed it.

Yet, even if the impartialist ideal is unrealistic as a political project, it still contributes to the conviction that states and their governments do not have an absolute and inviolable right to determine who does and does not enter. Any political community with liberal inclinations is philosophically disposed to recognize that *in certain circumstances* a government has no ethical justification to restrict entrance. These

circumstances are most clearly defined by the international refugee regime and, more broadly, the human rights regime. It is here that specific and tangible guidelines are spelt out regarding the obligations of states to refugees.

Asylum and the Human Rights Regime

The human rights regime is the political manifestation of a particular philosophical approach toward morality.¹⁰ Very simply, human rights are ‘the rights that one has simply because one is human’ (Donnelly 1998: 18). While there is philosophical disagreement over precisely what are the minimum requirements for a dignified human existence, it is generally recognized that this includes those things that ensure a person’s security, subsistence and liberty (Shue 1980). Because all individuals are seen to have equal entitlement to these things, human rights are a universal—and thus an inherently impartial—concept. Ideally, the obligations that stem from these entitlements are also universal: everyone has a duty to protect everyone else’s rights, irrespective of the boundaries or distances that lie between them. While no person or institution is seen to be exempt from these duties, human rights obligations are typically thought to fall upon states because states are the most powerful potential instrument for their protection—as well as their violation.

Part of what has made human rights so compelling is that, in the aftermath of the Second World War, they were adopted into international law. Human rights became

¹⁰ While some argue that the concept of human rights is universal (Chun 2001: 21), the more prevalent view is that human rights are the outcome of Western philosophical traditions, especially the tradition of natural rights (Donnelly 1989).

more than just abstract moral principles; they became a set of legal conventions, guidelines and rules. The most important of these is the 1948 Universal Declaration of Human Rights, a list of civil, political, social and economic rights which states agree to uphold and promote by endorsing one of its United General Assembly Resolutions. Unlike domestic law, however, international human rights laws do not generally have any coercive power: there is no equivalent system of law enforcement at the international level to guide the behaviour of states. What human rights rules do possess is normative force—they are part of what is known in legal parlance as the *opinio juris*, meaning that governments obey those rules not because are forced to but because ‘breaches are so prone to outrage world opinion’ (Robertson 1999: 80). In other words, it is *in the interests of governments* to be seen to respect international norms and their moral bases because it is *in the national interest* to avoid censure from the international community. As such, governments keep any transgressions of human rights law ‘hidden or, if exposed, defended on legal technicalities’ (ibid.), or, more positively, they simply avoid breaching human rights altogether.

The right to seek asylum is identified as a human right by Article 14 (1) of the Universal Declaration of Human Rights: ‘Everyone has the right to seek and enjoy in other countries asylum from persecution.’ In a normative sense, ratifying states are obliged to recognize asylum simply because it is a right—its mere existence justifies its obligation. Yet asylum also has an important instrumental function: it is one solution to the problem of how governments can provide rights and freedoms to non-citizens that lack them. The asylum regime can be considered as an alternative to direct humanitarian action, ‘a subsidiary system of human rights protection’ (Nathwani 2000:

364). When a government is unable or unwilling to intervene on behalf of non-citizens whose rights are being abused or neglected in a foreign country, that government can still provide refuge to those who escape or are expelled. It can do so *actively* by relocating mandated refugees from countries of first asylum through official resettlement programmes, typically organized in conjunction with the United Nations High Commissioner for Refugees. Alternatively, a government can provide asylum *passively* by accepting claims of refugee status from people who are within their territory, people who are termed ‘asylum seekers’.

In comparison to impartialism, the human rights regime has a narrower, more specific view on entrance. It demands that if an individual’s human rights are being violated or neglected, then they ought to be exempt from the usual systems of regulation. To apply selection criteria to a refugee is to fail to take their humanitarian needs seriously. Unlike impartialism, the human rights regime has nothing to say about the rights of entrance for those whose rights are not in jeopardy: it does not necessitate an obligation of unregulated entrance for *all* immigrants. As such, a human rights approach to asylum is a more realistic framework for a political aspiration to provide asylum. Moreover, given the remarkable penetration of human rights ideas into political decision-making around the globe over the last sixty years (Donnelly 1998: 3–17), it might be expected that asylum will be conceived in these terms. In light of this, it is time to turn to the asylum regime specifically.

The International Asylum Regime

On 1st January 1951, the United Nations High Commissioner for Refugees (henceforth, the UNHCR) opened its offices with a mandate to ameliorate the situation of those who had been displaced throughout Europe by World War Two. To achieve this, the UNHCR developed the United Nations Convention Relating to Status of Refugees, the principal legal framework for the asylum regime.¹¹ With its adoption by the United Nations on 28th July 1951, there was, for the first time, a legal document that set out the minimum level of treatment that a refugee ought to expect from a state—in other words, a list of refugee rights and corresponding duties for signatory states. Very broadly, the 1951 Refugee Convention (as it will henceforth be known) declared that any refugee within a foreign country ought to have the same level of access to public goods and personal freedoms as citizens or, at the very least, other aliens.

Certain articles within the 1951 Refugee Convention are especially relevant to the practice of asylum. One particularly important principle is that of *non-refoulement*:

‘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...’ (1951 Refugee Convention: Article 33[1]).

As an international norm, *non-refoulement* enjoys wide recognition and is the most significant legal constraint to state sovereignty in entrance decisions (Gibney 2004: 55).

It is also the practical basis of the asylum regime because as long as governments wish

¹¹ There are other asylum-related principles in the 1948 Universal Declaration of Human Rights and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

to adhere to the norm of *non-refoulement*, they will treat the claim of each asylum seeker seriously. Otherwise, they run the risk of returning a refugee to harm's way. This is why gaining access to a nation's territory is of utmost importance to asylum seekers, even if it means using irregular routes of entrance. Only by making an asylum claim on a nation's territory does an asylum seeker oblige its government to consider their case and provide them with protection for at least as long as it takes to make a decision.

Another important principle within the 1951 Refugee Convention is its absolution of asylum seekers whose entrance or presence in a state is irregular:

'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 [A]rticle 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' (1951 Refugee Convention: Article 31[1]).

In practical terms, this provision gives asylum seekers the benefit of the doubt, offering absolution to refugees who have arrived irregularly and transgressed domestic immigration laws in the process. As long as their asylum claim is genuine, the 1951 Refugee Convention declares that their entrance or presence should not be considered 'illegal', that their infractions are justified by their humanitarian need. It is on account of this that the term 'irregular' is more suitable to describe the anomalous modes of immigration that asylum seekers frequently resort to.

The final aspect of the 1951 Refugee Convention to be examined is the refugee definition. This sets out the legal criteria that determine whether an asylum claimant's situation meets the standard of refugee status. It declares that:

‘the term “refugee” shall apply to any person who... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...’ (1951 Refugee Convention: Article 1A).

This definition reveals the 1951 Refugee Convention's concern for the political and civil rights of individuals. In this sense, the refugee definition is very much a product of its times, a response to the unique situation following World War Two. Indeed, in its original formulation, the refugee definition was strictly limited to post-war displacement, applicable only to those who were displaced before 1st January 1951, and binding beyond Europe only by the discretion of the signatory state.¹² Those who drafted the 1951 Refugee Convention were apparently concerned that governments would refuse to ratify if it obliged them to future refugee crises, particularly because there was no clear idea of their size or nature (Wilkinson 2004: 8). Thus, the original refugee definition reflects an aspiration to provide asylum *only* to those displaced by the Second World War—nothing more.

These temporal and geographical limitations were annulled with the adoption of the 1967 Protocol Relating to Status of Refugees. Nevertheless, the refugee definition still

¹² See Article 1B [1] of the 1951 Refugee Convention.

betrays its post-war origins. In particular, the refugee definition specifies *persecution* as the only legitimate cause of refugee status, further specifying *race, religion, nationality, membership of a particular social group or political opinion* as the only relevant grounds of persecution. By being so precise, the refugee definition does strongly compel governments to assist those claimants that meet these particular criteria. Controversially, however, the refugee definition's specificity means that it fails to include victims of other forms of persecution and displacement, such as those fleeing natural or environmental disasters, gender or sexual discrimination, famine, destitution or the indiscriminate path of war. The widespread use of the term 'refugee' to describe New Orleans residents who were displaced throughout the United States by Hurricane Katrina in 2005 demonstrates the gulf that exists between the legal and the popular definitions of what it is to be a refugee.¹³

Interestingly, then, the refugee definition proposes a much narrower grounds for entrance than what one would expect from a rights-based conception of asylum, failing to include individuals whose rights to security, liberty and subsistence are undeniably under threat. As the basis for an aspiration to provide asylum, a strict interpretation of the refugee definition sets the bar for asylum provision surprisingly high—indeed, higher than what Western nations appear to practice. As noted at the outset of this thesis, almost a third of all asylum claimants granted protection in industrialized countries are allowed to stay under 'humanitarian' categories *despite their failure to meet the 1951 Refugee Convention's criteria for refugee status* (UNHCR 2006b: 39; *ibid.* 2007: 49). While persecutions related to gender and sexuality are not explicitly

¹³ See, for instance, this headline from the *New Zealand Herald* (2005): 'Texas struggles to cope as refugees hit 250,000'.

recognized by the 1951 Refugee Convention, claims for protection on these grounds are frequently—although not invariably—accepted by Western governments.¹⁴ Perhaps even most surprising is that, among OECD nations, the removal rate of asylum seekers who fail to gain refugee status or any other entrance category is in the range of only ten to twenty per cent. It is thought that somewhere between fifty and seventy per cent of failed asylum seekers remain in the country where their application was declined (Gibney and Hansen 2003: 4). Clearly, there are other factors guiding the behaviour of governments, encouraging them to exercise a more inclusive conception of asylum than what is required by the refugee definition. It is time to look at the normative agents whose ‘outrage’ a government skirts by respecting the principles of asylum.

Asylum and its Advocates

In the search for normative agents, there is an implicit assumption that a state will only ever relinquish its sovereignty over entrance if it is somehow forced to do so. Of course, we have seen that there are strong moral reasons to sacrifice sovereignty for the sake of refugees, but it is hard to reconcile such self-motivated moral behaviour with traditional conceptions of the state as a rational, materialistic and self-interested agent.¹⁵ Thus, in asking who might compel a state into going beyond its minimal legal requirements to asylum claimants, the most obvious suspects are those normative

¹⁴ For further discussion of issues relating to the recognition of grounds for asylum relating to gender and sexuality, see Crawley (2000), McGhee (2001) and Oxford (2005).

¹⁵ Such is the perception of the state as advanced by political realism and largely taken for granted by liberalism (Crawford 2000: 116–8).

agents in the international sphere that have the power to influence the considerations of a state. Of those that might be suspected of having a positive influence on asylum provision are other sovereign states, non-governmental organizations (NGOs) and international governmental organizations (IGOs).

The influence of other states is especially relevant where an internationally co-ordinated response to refugee issues is being sought, either to stop asylum seekers being deflected from restrictive states onto more liberal neighbours,¹⁶ or to ‘share the burden’ of a refugee crisis that the international community is unwilling to ignore.¹⁷ Non-governmental organizations—such as Amnesty International, Oxfam, Médecins sans Frontières, and the Red Cross—play an influential role in refugee politics, either operationally as providers of humanitarian aid or, more relevant for this thesis, as advocates for refugee issues (Terry 2002). The most prominent external normative agent, however, is the Office for the United Nations High Commissioner for Refugees, an international governmental organization. Throughout its existence, the UNHCR has consistently encouraged governments to take an inclusive approach to asylum, offering prescriptions on how the 1951 Refugee Convention ought to be interpreted; it has, for instance, argued that gender-related persecution ought to be recognized under the refugee definition’s ‘membership of a particular social group’ (UNHCR 2002a). Moreover, the UNHCR has widened its own sphere of activities throughout the 1990s

¹⁶ For instance, the Federal Republic of Germany’s strong support for the 1990 Schengen Accord (which harmonized Western European border policies) was largely motivated by the deflection of asylum seekers from its more restrictive neighbours (Gibney 2004: 99, 101–2).

¹⁷ For instance, Australia and the United States subjected a reluctant New Zealand to normative pressure to ‘share the burden’ of South East Asian refugees in the late 1970s (Hau Liev 1995: 101–2).

into countries of refugee origin, working directly with internally displaced persons and thus beyond its traditional mandate (Loescher 2003: 11–3).

Yet a ‘top-down’ explanation, where international forces are seen to constrain and guide the behaviour of states, does not encompass the range of normative agents that might influence a state’s behaviour. It is necessary to consider the influence of normative agents *within* a state, domestic political actors that compel a state to sacrifice its sovereignty in the realm of asylum. Of course, if one concedes that internal agents do influence a state’s behaviour, then a more complicated picture of state involvement in asylum emerges. It suggests that international norms are not simply forced on states from above and beyond: to some extent, states *choose* to abide by norms. Indeed, on the issue of the West’s surprisingly low removal rates of immigrants without permits, Christian Joppke (1998: 270) has argued that ‘Not globally limited, but self-limited sovereignty explains why states accept unwanted immigrants.’ The pressure to take an expansive view of asylum comes not only from external political entities, it comes from a state’s own constituent parts: its political institutions and civil society.

Domestic courts play an especially important role in determining how human rights law is to be interpreted by the state, and by incorporating international legal norms into domestic law and legal practice (Gibney et al. 2003a: 10–1). The increased recognition of sexual persecution in asylum decisions in the West, for instance, has been driven by domestic courts, particularly through the adoption of legal precedents set by the courts of other Western nations (McGhee 2003). Ethnic lobby groups, humanitarian organizations, civil society groups, refugee advocates and the media can encourage the state to provide asylum by exerting direct pressure on governments and political parties.

In regards to immigration policy generally, business lobby groups and modern-day trade unions (Avci et al 2000; Haus 1995) have generally supported looser entrance policies (or, at least, opposed restrictive ones) in their attempts to liberalize transnational labour markets. All of these groups use their political influence to steer governments towards policies that meet their own ideals.

Yet, if we are to take seriously the moral force and persuasiveness of asylum, then we also need to recognize that liberal democratic governments must have their own motives to provide asylum. As we have seen, ideological justifications for asylum can be derived from both ends of the liberal spectrum, from libertarianism and liberal egalitarianism, so a Western government that refused to recognize asylum in some shape or form would run the risk of negating its liberal credentials. Thus, liberal democratic governments are not merely slaves to the norm of asylum, but willing participants in its provision.

In light of the harsh treatment of asylum seekers by liberal governments in recent years, this statement might seem contrary to the evidence. It might seem that the norm of asylum is something that governments have reluctantly acquiesced to and are now trying to extricate themselves from. Yet circumstantial evidence suggests that an aspiration to provide asylum is not only held by majority political parties, but by parties across the political spectrum. After surveying the parliamentary debates of Britain, Switzerland and Germany, Steiner (2000: 134) found that ‘not a single parliamentarian in any of these debates spoke against refugees or against the principle of asylum’, a finding that is reinforced by this study of the parliamentary debates of Canada and Australia. Even a notoriously restrictive party such as Australia’s One Nation Party

recognized in its 1998 policy statement that ‘Compassion must be extended to genuine refugees’ (One Nation 1998).¹⁸ Certainly, One Nation had a narrow conception of what this obligation entailed, declaring, for instance, that ‘temporary refuge need not extend to long-term permanent settlement’ (ibid.); yet its recognition of asylum demonstrates just how widely accepted it is throughout Western political communities.

It seems that humanitarian ideals, such as the provision of asylum, are not merely abstract concepts that lie beyond domestic concerns: they are part of a liberal community’s political fabric. As Peter Nyers (2006: 124) has put it, ‘a humanitarianism that presumes to possess an autonomous existence, separate and distinct from the vicissitudes of political life, is—and always has been—an impossibility.’ These norms and ethical ideals exist—in some shape or form—within politicians, voters, civil servants and society at large. Consequently, a political party that was seen to be openly dismissive or hostile to a widely recognized human right, such as asylum, would risk attracting widespread contempt from its own members of parliament and its electorate. In this sense, a party’s support for human rights is self-interested: it is necessary for survival in a liberal democratic political system. As long as the principle of asylum resonates widely within a given community, as long as it is deemed to be a virtuous and plausible objective, a political party must convince its electorate that it aspires to provide asylum.

Of course, precisely what this aspiration entails is bound to differ substantially between parties. Some will aspire to a high standard of asylum provision, some (such as the One Nation Party) will aspire to a low standard, and others will fall somewhere in

¹⁸ For an excellent summary of One Nation and its attitude towards immigrants and asylum seekers, see Jupp (2002: 123–40).

between. Political ideology can be expected to play a role in this, as can the circumstances of a nation's asylum situation. Yet such partisan differences can be justified—as are most policy differences—through the medium of political rhetoric; parties can argue that *their* aspiration to provide asylum is the more plausible, effective or appropriate. Whatever the details, it is the act of aspiration that is most important; and, on this, a party will be judged by its statements of commitment and, where relevant, the policies it has implemented.

1.2: The Aspiration to Regulate Entrance

The aspiration to regulate entrance is the description that this thesis gives to the range of material and non-material factors that contribute to a government's ambition have control over who does and does not enter its national community. This section will begin with a discussion of how such an aspiration is encouraged by representative democracy, the dominant political system of the West, and compels a government to protect the interests of citizens. In the following discussion of threats that asylum is seen to pose to a nation's interests, it will become clear that regulation also has some support from international norms and moral considerations, especially those of communitarian conceptions of justice. Finally, this section will look at how asylum potentially imposes on this aspiration to regulate entrance.

Entrance and the Interests of the Electorate

At the root of a government's aspiration to regulate entrance is the notion that one of the state's roles is to protect the interests of its citizens. For Western nations, this role is institutionalized through the dynamics of representative democracy, operating within the boundaries of the nation-state. In such a system, the formation of government is largely determined by voters' perceptions of which political parties best represent their interests. In most liberal democracies (including Australia and Canada), where the right to vote is limited to citizens,¹⁹ political parties are driven to appeal to their interests. Meanwhile, there is no equivalent motive for a political party to appeal to the interests of those who are ineligible to vote. An electoral strategy pitched at the interests of foreigners would offer no immediate electoral advantage and potentially alienate its existing supporters. As such, a representative democracy naturally encourages *partiality* in a government's attitude toward entrance policy. This is, of course, an alternative to impartialism and considers that states have 'a right to self-determination which justifies priority for the interests of citizens over those of refugees in entrance decisions' (Gibney 2004: 23).

This illuminates a fundamental tension within the liberal democratic nation-state. While liberalism leans towards an ideal of impartiality, democracy is innately self-interested when it is circumscribed by national borders. Benhabib (2004: 19) has

¹⁹ While citizenship is usually required to be eligible to vote, this is not always the case. New Zealand, for instance, allows permanent residents to vote. Nonetheless, asylum seekers are still excluded from the democratic process because they will not gain permanent residency until their refugee status has been approved.

described this as ‘an irresolvable contradiction... between the expansive and inclusionary principles of moral and political universalism, as anchored in universal human rights, and the particularistic and exclusionary conceptions of democratic closure.’ This does not, however, mean that impartiality is wholly incompatible with democratic sovereignty. Universalist ethical ideals, such as human rights, do exist within liberal communities, carried along by the moral beliefs of its members. Indeed, the democratic political arena provides a discursive space for these beliefs to be expressed, propagated and defined. In this spirit, Benhabib (2004: 19) has advanced the concept of ‘democratic iterations’, which she describes as ‘complex processes of public argument, deliberation, and learning through which universalist right claims are contested and contextualized, invoked and revoked, throughout legal and political institutions as well as in the public sphere of liberal democracies.’ Through such discursive mechanisms, a universal right can gain popular appeal and a government will serve the moral interests of its citizens by respecting it. In such instances, the gap between liberalism and democracy can be bridged.

So, partialism is not inherently hostile to the idea that states have obligations to refugees, nor does it assume that humanitarian considerations are irrelevant in entrance decisions. What partialism does do is refuse to accord gratuitously universalist rights claims any special status over and above the interests of citizens. Within the democratic arena, humanitarian ideals, such as unregulated entrance for refugees, must compete on an equal footing against other material and non-material factors that might affect the interests of citizens. Unfortunately for refugees, these factors may be considered more urgent or pressing for the community than its compliance to moral ideals. It is time to

examine the factors that academic literature has identified that encourage restrictive entrance decisions by liberal democratic governments.

The Regulation of Entrance

The most fundamental reason for regulation is simply to control the absolute scale of immigration, typically achieved through the bureaucratic enforcement of an annual quota. Given the vast demand for membership in the prosperous nations of the West, there are legitimate reasons for a limit to immigration. After all, it is quite possible that unregulated entrance would lead to the receiving state being overwhelmed, putting undue pressure on its infrastructure and public services, or threatening the existence of the host culture. It will be recalled that even impartialists recognize exceptions to the ideal of open borders, viewing regulation as permissible only when it can be justified to citizens and non-citizens alike. The structural or cultural collapse of the receiving community would meet this criterion because it would spell the end for the benefits that had attracted immigrants in the first place. Partialism, on the other hand, which prioritizes the interests of citizens, sets a much lower level for regulation. The concern is not cultural or structural collapse *per se*, it is *any* adverse effect on the culture or infrastructure of the receiving nation. At its crudest, partialism sees the restriction of entrance as justified simply if it is supported by the majority of citizens. While some partialists have averred from such a strong position, arguing that it is necessary to look past reactionary pressures to the latent values and ‘shared understandings’ of a

community (Walzer 1983, cited in Gibney 2004: 32–5), the fact remains that, in its ideal form, partiality is precisely this insular and self-justifying. So, while there is some consensus between impartialists and partialists that regulation can be ethically justifiable, there is a vast difference in the circumstances where they deem it to be appropriate. In this sense, the aspiration to regulate entrance—like the aspiration to provide asylum—is widely held within the liberal political community but prone to great variation in its shape, form and implications.

Aside from the absolute level of immigration, regulation is also used to influence *aspects* of an immigration flow, to determine the make-up of an annual quota. In this constitutive role, immigrant groups and individual entrants are determined to be either a source of possible opportunity or of potential threat. Subsequently, systems of regulation are developed to facilitate the entrance of the former while preventing the entrance of the latter.

The facilitation of desirable immigrants is critical for Western nations whose economies rely heavily on foreigner-born workers to meet their labour demands (Cornelius et al. 2004). With such a vast pool of potential immigrants in the developing world, Western nations can afford to be highly selective in who fills their annual immigration quotas, prioritizing the entrance of the ‘best and the brightest’ (Dauvergne 2003: 10–11). This is achieved by selection criteria for entrance permits, typically through ‘point systems’, which favour those with occupational experience, appropriate language skills, academic qualifications and good health. The object of such regulations is to make immigration as profitable as possible, facilitating the entrance of immigrants

who can make a significant contribution to the nation's financial pool without needing to draw on it for assistance.

More characteristically, though, regulation is a restrictive force, a means by which certain individuals or groups are prohibited from entering a national community. This restrictive approach to entrance, where immigrants are treated as a threat rather than a opportunity, fits neatly with traditional accounts of state sovereignty, where entrance policy is held to be instrumental to a state's control over territory and its 'capacity to govern a particular space' (Dauvergne 2004: 593). Even the 1951 Refugee Convention recognizes the need for a minimum level of sovereignty and, accordingly, it includes a number of discretionary provisions for signatory states. Most importantly, Article 1F states that its obligations 'shall not apply to any person with respect to whom there are serious reasons for considering that... he has committed a crime against peace, a war crime, or a crime against humanity... a serious non-political crime outside the country of refuge... [or is] guilty of acts contrary to the purposes and principles of the United Nations.' Further articles declare that provisional measures can be enforced to protect a nation's security 'in time of war or other grave and exceptional circumstances' (ibid.: Article 9); and that a refugee may be expelled 'on grounds of national security or public order', provided that this 'is a decision reached in accordance with due process of law' (ibid.: Article 32).²⁰ Thus the 1951 Refugee Convention is not a *carte blanche* obligation to accept each and every person who arrives and claims refugee status. It promotes norms of regulation as well as asylum provision.

²⁰ In relation to expulsion, see also Article 33[2] of the 1951 Refugee Convention which qualifies the principle of *non-refoulement* on these grounds; and Article 2 which sets out the duties for refugees within countries of asylum.

Compared with state practices of the past and present, however, the 1951 Refugee Convention's grounds for exclusion are narrow. Through their prohibitive border policies, governments regulate against a far broader array of contingencies. In addition to restricting those who might pose a threat to national security or the community, such as members of terrorist organizations or transnational criminal organizations, systems of regulation can be used to deny entrance to individuals with criminal convictions and those who threaten a nation's biosecurity, especially by carrying contagious diseases. Regulation can protect a state's welfare system by denying access to those with medical conditions that require expensive treatment or who might otherwise gain access to public resources, such as social welfare benefits. It can restrict access to the many prospective economic immigrants who are unable to secure a legitimate entry permit into a developed country. Regulation can be used to limit the entrance of individuals or groups whose political activities are deemed to be a threat to the receiving nation, or who are fleeing from regimes with which it is allied. And, finally, a system of regulation can exercise discretion on cultural grounds, limiting cultural diversity and thereby minimizing its anticipated effects. This last point deserves further mention.

Justifications for cultural regulation have found their most cogent basis in communitarian theory²¹—two of its claims are worth noting here. The first of these is that a cultural community has the right to be protected because culture is a core component of its members' identities (Sandel 1982; Walzer 1983; MacIntyre 1984; Taylor 1985). Communitarians argue that human beings are, in large part, products of their social surroundings, and therefore they need to be able to operate within the culture that shaped them. This 'social embeddedness' is overlooked by liberal theorists

²¹ For an overview of communitarian theory and its contemporary variations, see Miller (2000: 97–109).

who generally take an abstract and atomized view of humanity, a view that communitarians consider to be unrealistic and potentially harmful. The second communitarian claim is that political projects that advance the common good, such as a generous welfare system, require a strong sense of national solidarity, of shared destiny, to maintain public support. Cultural diversity threatens the solidarity of a national community and thereby undermines the capacity to implement public projects, such as the redistribution of wealth (Miller 2000: 24–40). Working from these two claims, a partialist defence of regulation can be developed, a justification for restricting the entrance of groups and individuals who are culturally dissimilar and unlikely to assimilate. Whether or not one finds the claims of communitarianism compelling,²² it is important to recognize that these are substantive ethical arguments. The liberal ideal, where ‘the right of a community to fashion its own entrance policy is circumscribed morally by the right of all individuals to reside wherever they wish’ (Gibney 2004: 60), is not the only ethical approach on entrance. The particularist moral claims of communitarianism further demonstrates the insufficiency of the ‘tug-of-war’ model of asylum in which morality is assumed to be the exclusive domain of universalist approaches.

²² For a critical commentary on the communitarian account of entrance, see Gibney (2004: 35–58). For discussion of the broader debate between communitarian and liberalism, see Kukathas et al. (1990).

The Implications of Regulation for Asylum Seeking

So, what does all this mean for asylum seekers? The problem with asylum seeking is that it potentially frustrates a government's aspiration to regulate according to these sorts of criteria. Asylum seekers arrive on a state's territory by whatever means they can and declare refugee status, thereby invoking a moral and legal right to have their status determined according to the terms of the 1951 Refugee Convention, irrespective of the government's preferred entrance criteria. The greatest threat to regulation are those asylum seekers whom arrive by irregular means: using fraudulent documents, providing false information or evading border authorities entirely. When such irregular entrants make a claim of refugee status, they subject themselves to some aspects of regulation (such as security and identity checks, and verification of their refugee status) but this occurs only *after* their entrance, meaning that they have still successfully evaded other preferential criteria, such as a government's economic, cultural and political preferences. To a lesser extent, asylum seekers who arrive by regular avenues (such as a work, student or visitor's permit) also undermine a government's control over membership because, while they have been granted temporary entrance under a specific set of criteria, by demanding the right to stay as refugees these asylum claimants have succeeded in evading the criteria that a government usually applies to permanent residents. Unlike regular immigrants and mandated refugees, who are subjected to the government's usual criteria for entrance, asylum seekers are effectively exempting themselves from regulation by virtue of their potential refugee status.

It is precisely this evasion of regulation that makes asylum seekers so controversial. By its very nature, asylum seeking is irreconcilable with the bureaucratic imperative for an immigration flow that is finely engineered to fulfil a government's policy objectives. Moreover, asylum seeking is susceptible to misuse by individuals who do not meet the criteria for refugee status. By lodging a claim, such individuals succeed in gaining access to a community until their initial applications and any subsequent appeals have been processed. Most recent figures show that, in 2006, only 28 per cent of asylum claimants around the globe were recognized as refugees, although the total proportion who were given official protection was 39 per cent (UNHCR: 2007: 49).²³ Obviously, if these unsuccessful asylum claimants had been tested prior to their arrival, then governments could have avoided much of the costs and controversy that their entrance necessitated.

While asylum does present demonstrable challenges for receiving states, some of the threats described are a matter for debate. Certainly, the transformation of asylum into a security issue is contentious (Huysmans 1993); various commentators have argued that the perception of asylum seekers—or even immigrants—as a threat to national security in the post-9/11 era is vastly exaggerated (Gibney 2002; Turk 2003; van Selm 2003). Cultural justifications for regulation are also controversial. For instance, Michael Dummett (2001: 14–21) has argued that the communitarian perspective underestimates the existing heterogeneity of Western cultures and their demonstrated capacity for accommodating cultural diversity. In regard to the potential effects of asylum seekers

²³ There is an absence of empirical research on the level of misjudgement in refugee status determination decisions. Unfortunately, there is no easy way to amend this. Thus it is important to keep in mind that statistical summaries of asylum decisions, such as that given above, tend to conceal how many genuine refugees were rejected, how many people in refugee-like situations were ignored, and how many false claims were approved.

and immigrants on the welfare state, a recent survey of Western nations failed to find any empirical support for the claim that greater cultural diversity results in declining investment into welfare resources (Banting and Kymlicka 2006).

To some extent, however, this is beside the point. Regardless of whether a threat is real or imagined, urgent or hypothetical, tolerable or not, the perception of that threat can still motivate a government to develop a policy response. In this sense, entrance policy is often speculative, creating tangible border controls out of intangible perceptions, just as speculation in the share market yields measurable economic fluctuations. The major driving force behind this process is the dynamics of electoral politics. After all, in their pursuit of power, democratic governments are greedily sensitive to the whims and wants of voters, regardless of whether these are a product of misunderstanding or misinformation. The perceptions (or misperceptions) of imminent danger that exist in the public sphere are a potential source of votes to be courted and encouraged by political tacticians. Even when a threat is agreed to be distant, an unregulated stream of immigrants can be held as evidence that a government is incapable of imposing control in the event of that threat becoming imminent. Thus, a government's aspiration to regulate entrance is as much to do with the threat of what *might* happen as it is to do with what *is* happening.

1.3: A Conflict of Aspirations

So far then, Part One has explored the aspirations to provide asylum and to regulate entrance, revealing the material and non-material factors that motivate them. This concluded with a description how the ideal of asylum, which allows refugees unregulated entrance into a nation, can potentially impose on a government's aspiration to regulate entrance. It is time to describe the changing global context which has brought these aspirations into ever greater conflict in developed Western nations.

The Politics of Asylum since the Mid-Twentieth Century

For its first few decades, the international asylum regime imposed very little upon the West's capacity to regulate entrance. The few asylum seekers that arrived from communist nations slipped neatly into the bipolar dynamic of Cold War politics: their movement from East to West, from communism to capitalism, signified to Western minds a stark rejection of socialist values, conveniently reinforcing the West's propaganda about its own superior quality of life. Indeed, the United States Government considered refugees so strategically important that they limited their financial contributions to the UNHCR, reluctant to grant it too great an influence in such an important strategic sphere (Loescher 2003: 7–9). In serving the strategic interests of Western states, asylum was understood in terms of political realism, conceived as a further dimension to the greater conflict between the world's

superpowers (Meyers 2000: 1264). Additionally, circumstantial factors meant that asylum seekers were rarely at odds with the West's regulatory preferences. The tight exit restrictions enforced by states in the Eastern Bloc meant that the number of asylum applicants was relatively small and easily manageable—with the exception of the occasional exodus, from Hungary in 1956 and Czechoslovakia in 1968. Strong post-war economic growth in the West ensured that those asylum seekers who did arrive—generally skilled and well-educated—were easily absorbed into the labour market. Finally, most refugees were Eastern European and so less threatening to the host community than arrivals from less familiar cultures. Given the insignificant costs of asylum and its tangible benefits, asylum was relatively uncontroversial throughout much of the Cold War.

In spite of this, the asylum regime fell far short of being a normative ideal (Crisp 2003). In keeping with the *realpolitik* of the times, refugees escaping from regimes that were allied to the West were not at all welcome. For instance, the United States generally did not recognize refugees who arrived from non-communist regimes outside of the Middle East—particularly, those asylum claimants that fled the right-wing dictatorships of Central and South American (Ferris 1987: 126; Gibney 2004: 132). And, for the many refugees in Asia and Africa, lodging an asylum claim in the West was practically impossible—it was simply too far away. Thus, while the actions of receiving states often coincided with humanitarian ideals, this was a matter of convenience rather than design, reflecting the peculiar circumstances of the era rather than an unusually strong commitment toward asylum.

The asylum situation began to change in the late 1970s. Developments in transport and communication diminished the hurdles to intercontinental travel, making it more feasible to look further afield for asylum than one's neighbouring country, a nation that may not have had the resources or the inclination to provide protection to refugees. Yet, not only were the means of migration changing, so was the nature of demand. The number of refugees was growing around the world, largely due to civil conflict. In 1970, the global population of refugees was under two and a half million; a decade later it was almost nine million and by 1990 well over seventeen million (UNHCR 2000: 310). Other types of migrant were also on the rise, especially economic migrants, enticed or compelled to move by the intensification of global economic inequality. For some, this was a matter of finding better employment opportunities and a higher standard of living, a driving force that was exacerbated by the global media's lush representation of Western lifestyles. For others, migration was a potential escape from life-threatening poverty, chronic unemployment and famine, situations that made these 'economic refugees' morally and practically difficult to differentiate from political refugees. Yet, for all these would-be migrants, there were only limited opportunities for acceptance through the regular immigration systems of Western nations, systems that gave priority to those with occupational skills, education and family already in the destination country. As a result, the asylum system became the only plausible means of entrance for those excluded by the West's regulations. Throughout the 1970s, Western Europe received no more than 13,000 asylum claims a year. By 1985, this had risen to 170,000 and, by 1992, to 690,000. North American applications also grew, from 28,000 in 1985 to 173,000 in 1995 (UNHCR 1997: 148).

So, by the 1990s, a situation had emerged that was markedly different from preceding decades. With the Cold War over, the strategic and ideological impetus for asylum provision had evaporated. The status of asylum seekers had become increasingly ambiguous, requiring Western governments to develop specific legal institutions to determine the veracity of claim of refugee status. Given the difficulty of determining these claims, as well as the growing number of asylum claimants, these institutions came under immense administrative pressure, accumulating backlogs that proved difficult to reduce. For instance, Germany, which received an exceptionally large number of asylum claims due to constraints in its constitution, had an average processing time of three years for refugee status determinations in the early 1990s (Gibney 2004: 97). Judicial appeals further exasperated attempts by governments to shorten the refugee determination process.

To complicate matters further, asylum seekers have increasingly resorted to irregular methods of entry, using false information or fraudulent documentation to pass through border systems, or evading border authorities altogether. A British Home Office research paper concluded that there was ‘strong circumstantial evidence’ to show that this shift was exacerbated by the restrictive entrance policies of Western nations (Zetter et al. 2003: 130). These irregular routes of entry typically involve the services of people smugglers: transnational criminal organizations and vigilantes who, for a monetary sum, assist border crossings, sometimes by perilous means. The hazards of irregular immigration was tragically illustrated when a boat, known as SIEV X,²⁴ went down *en route* to Australia in October 2001, taking with it 353 people (Marr et al. 2003: 224–38). Another less visible danger is that of being subsumed into human trafficking

²⁴ SIEV is an Australian Naval acronym for Suspect Illegal Entrance Vessel.

routes, diverted into sexual slavery or forced labour through debt bondage (Gibney 2000). The shift of emphasis towards people smuggling has also served to further weaken public sympathy for asylum seekers, bringing them into close association with criminal activities. This negative image has been reinforced by the popular political usage of the term ‘illegal’ to describe irregular entrants, a term which is notably lacking in neutrality (Dauvergne 2004). Moreover, the occurrence of unregulated immigration became even more intolerable to an already anxious polity after the attacks on the World Trade Centre on 11th September 2001.

In sum, changes to the international environment have brought the practice of asylum seeking into heightened conflict with the regulation of entrance. By sidestepping a nation’s usual entrance procedures, the activity of asylum seeking exposes a community to the perceived threats of an unregulated inflow of foreigners. The overwhelming policy response of Western nations has been to restrict and discourage asylum seekers through a range of restrictive policy measures, a survey of which will now be offered.

Restricting Asylum: Western Policy Responses to the Asylum Crisis

Faced with overburdened asylum systems and growing public discontent over immigration, Western governments have sought to regulate access to their asylum systems by introducing a range of restrictive policies. Gibney and Hansen (2003: 5–13) have organized these policies into four categories according to the principal objective of

each: strategies of border control, strategies of deterrence, reducing the length of stay, and improving the refugee regime's efficacy

The first category consists of what are essentially border control measures. Restricting the entry of asylum seekers is a foolproof way of reducing the pressures and expenses of the asylum system. To make an asylum claim, an asylum seeker must first reach the territory of the country he or she wishes to claim asylum in. Only once a claim is lodged within its territory is a nation bound to treat the asylum seeker with all the protections he or she would have under the United Nations Refugee Convention. Consequently, it is far easier—legally and politically—to keep asylum seekers from arriving than it is to remove them after the fact. Legally, a government avoids the rule of *non-refoulement* if the asylum seeker cannot lodge a claim. And, politically, a government can subsume such measures under efforts to reduce 'illegal immigration' and people smuggling, issues that have unambiguous public and political support. A major part of bolstering border control involves strengthening the traditional instruments of border security: the borders and ports of entry, and the immigration officers and customs inspectors that manage them. However, it also includes methods that redefine national boundaries. Some asylum policies have, in effect, extended their border controls beyond traditional national boundaries to the places asylum seekers are arriving from. Pre-inspection regimes such as 'advance passenger processing' (APP) systems have provided an opportunity to detect potential asylum seekers before they board their carrier. Carrier sanctions have allowed governments to impose fines on any sea, air or land carrier that brings a person into a country without the proper documentation, compelling carriers to be vigilant about whom they allow to board. Visa

regimes prohibit the visa-free entrance of nationals of certain countries, typically any country from which it is suspected that there would be a large number of asylum seekers, overstayers or workers without appropriate permits. Finally, some governments have undertaken proactive strategies of interdiction, arresting the progress of asylum seekers before they reach a nation's territory. Governments have even redefined their national borders by disclaiming parts of their territory, designating their airports as 'international zones' or, as we shall see in the case of Australia, excising sections of its territory from its migration zone.

The second category consists of strategies of deterrence, measures that will discourage asylum seekers from even trying to enter a state as an asylum seeker. There is some overlap here with the former category—after all, a successful border control strategy will have a deterrent effect on prospective asylum seekers or those that traffic them. Specifically deterrent measures, however, aim to make 'the costs of entry so high (or the benefits so low) that arrival is not attempted' (Gibney et al. 2003b: 7). The most controversial of these is the mandatory detention of asylum seekers. Obviously, the punitive quality of detention is a pointed disincentive, yet detention also discourages asylum seekers in a less obvious manner: it isolates them from the affluent and liberal community that they were seeking to join. In a similar vein, governments have imposed restrictions on where asylum claimants can live, limited their ability to work and limited their access to welfare, all strategies that reduce the ostensible benefits of asylum. Whether or not such strategies are successful in deterring asylum claimants is a matter of controversy. Nathwani (2000) has argued that, for someone escaping persecution or life-threatening poverty, the costs of entry into the developed world are

unlikely to outweigh the costs of remaining in the developing world. If this criticism is justified, then a strategy of deterrence will simply prolong the hardship of asylum claimants without making any major improvement to the regulation of entrance.

The third category of restrictive measures involves reducing the length of the asylum seeker's stay. Having a rapid turnaround system is important for governments because the longer an asylum applicant remains in the community, the more socially embedded he or she will become and, consequently, it will be more morally, politically and legally difficult to remove her or him. An asylum seeker's stay can be reduced by speeding up the refugee status determination process; by giving successful claimants temporary rather than permanent residence; or by excluding them from the asylum system on technical grounds, such as arriving via a safe country where they might have otherwise lodged their claim. Moreover, a government can enforce a swift deportation for those individuals whose asylum claims have failed or whose refugee status has changed in light of improvements to the situation in their home country.

The final category of policy measures includes those that improve the efficacy of the refugee regime as a whole, encouraging a more manageable and orderly system. The creation of domestic legal bodies to administer the determination of refugee status has been an important development, allowing for a strategy of restriction that discriminates between entrants in urgent danger and those entering for less pressing reasons. There has also been a growing interest among some governments, such as the British government, to implement refugee resettlement programmes. Of course, by relocating pre-screened refugees directly from camps in countries of first asylum, a government has a far greater level of regulatory control over its humanitarian intake (a fact which

may explain renewed interest in refugee resettlement). Traditionally, the only nations to operate such programmes have been the United States, Canada, Australia, New Zealand and—to a lesser extent—the Netherlands and the Nordic countries. Finally, this category includes the various unilateral and multilateral operations to diminish the global refugee population and the causes of refugee flows; and to tackle human trafficking, people smuggling and other forms of irregular migration.

From a normative perspective, these are among the more positive developments for the asylum regime. Yet the consequences of such policies for asylum seekers are rarely straight-forward. For example, the current drive to combat people-smuggling does restrict an activity that exposes asylum seekers to great danger, yet it also closes off the only realistic route to the West for many asylum seekers. Similarly, refugee resettlement programmes, while themselves morally commendable, may be used as a justification to limit the entrance of asylum seekers, thereby reducing a nation's overall intake of refugees (this argument will be properly addressed later). In short, the consequences of an asylum policy are multi-faceted and so, to fully comprehend their implications, policies ought to be examined in the widest possible context.

The Subordination of Asylum to Regulation

These policies, in one way or another, have served to limit the access of asylum seekers and other irregular immigrants into the West and thus strengthen the regulation of entrance. Regulation creates a semi-permeable barrier, restricting immigration to that

which occurs on the West's own terms. In the words of one commentator, these border controls have enabled developed nations to 'quarantine' the developing world and its 'Pandora's box of insoluble problems... so as not to sink into its quicksands or be contaminated by its problems' (Hassner 1998: 278).

Whether these policies have actually succeeded in reducing asylum claims or irregular immigration is difficult to determine. Statistics show a drastic reduction in asylum claims in the industrialized world, dropping by half between 2001 and 2006 (UNHCR 2006). This decline is shadowed by a reduction in the global refugee population: after reaching a record of over 18 million in 1992, the global refugee population has experienced an overall decline to 10 million refugees in 2006 (UNHCR 2008). Yet the UNHCR has argued that the drop in asylum applications is due to a combination of improved conditions in some of the major countries of origin of asylum seekers and the West's asylum restrictive policies (UNHCR 2006). While this is not the place to address this question fully,²⁵ it is worth noting that, regardless of their effect on the number of asylum claimants, these policies have undoubtedly had an adverse effect on the quality of asylum provision for refugees, reducing the likelihood of having a favourable refugee status decision and curtailing their rights and benefits as residents within the West. The push to prohibit and discourage so-called 'bogus asylum seekers' has come at a serious cost to refugees seeking protection. This circumstantial evidence shows that the asylum regime has been disempowered at the expense of a more impenetrable regime of regulation, a clear sign that the aspiration to provide asylum has been subordinated to the regulation of entrance.

²⁵ For further discussion, see Gibney and Hansen (2003: 14–7).

In spite of this decline in the relative quality and quantity of asylum provision, there is little sign that the asylum regime is being abandoned. Western governments have continued to invest significant resources into the maintenance of their asylum systems, in spite of their political controversy. In the United Kingdom, for instance, the cost of social support for asylum seekers in 2000 was estimated at £835 million and, when the cost of refugee status determination was included, the total was closer to £2 billion (Gibney and Hansen 2003: 4). Certainly, Western governments are looking to reduce these costs, yet their very size is a testament to the strength of support for asylum within those nations.

Indeed, as argued earlier, if there were any reason to believe that a liberal democratic government was properly abandoning its aspiration to provide asylum, it would be likely to offend liberal voters and lose their electoral support; to lose the support of a party's own liberal members; and to attract criticism from a range of intra- and international normative agents. Thus, liberal democratic governments have not sought to abandon asylum but to adjust the balance between regulation and asylum provision, giving greater weight to the former at the expense of the latter's inclusivity. By curbing asylum seeking, Western governments are inhibiting the circumstances that brought their aspirations into heightened conflict. Ideally, this greater degree of regulation will channel prospective asylum seekers into entrance routes that are regulated and, therefore, of lesser threat to the interests of citizens. This increases the prospect of a global asylum regime that conforms to the demands of regulation.

Yet, even by subordinating asylum to regulation, a government is still leaving itself vulnerable to a liberal backlash. After all, the restriction of asylum seekers is a

substantial compromise to humanitarian ideals, where a refugee's need for protection ought to trump all other considerations. Indeed, if all the world's governments were to follow the lead of those in the West, it would become increasingly difficult for people to ever leave a nation in which they were endangered. In this sense, the restriction of asylum seekers creates a new conflict, a conflict between a government's actions and its aspiration to provide asylum. The enforcement of restrictive policies will appear to contradict a government's declaration of support for the state's obligations to refugees. If a government wishes to avoid the fallout of its apparently 'illiberal' practices, it will have to find a way to reconcile this conflict also, to defuse the unease that its policies provoke amongst liberal sectors of the national community. As the investigations of the parliamentary debates in Canada and Australia show, political rhetoric plays an important role in this, framing the asylum issue in such a way that its restrictions appear to be justified. Precisely what justifications politicians put forward is the principal focus of the surveys of political rhetoric that take up Parts Two and Three of this thesis. Yet, before turning to these, it is necessary to introduce a sub-plot to this move towards restriction: the role of political ideology.

Asylum Seeking and Political Ideology: Attitudes of the Political Left and Right

Given that this is principally a study of parliamentary debates, it is important to consider the ramifications of ideological difference within a parliament. It can be expected that the political left and right, with their differences in worldview, will have

conflicting approaches to the politics of asylum. This is not to say that discord is going to be the standard: a government and its opposition, both emerging out of the liberal democratic political environment, are going to share far more philosophical foundations than they are likely to let on. Yet the egalitarian spirit of the left and the deep-founded conservatism of the right are likely to lead to important differences in their aspirations to provide asylum and regulate entrance, and the balance they strike between them.

Since their emergence during the time of the French Revolution, the left and right have shown themselves to be surprisingly variable in the specific political positions that they have adopted. Nonetheless, stable traits can be identified (Bobbio [1994] 1996). The cornerstone of the political left is its support for reform toward greater equality in the political, economic and social spheres (Putnam 1973: 213–4; Inglehart 1977: 185). Because liberalism is an effective instrument for achieving this objective, the political left is often associated with liberal values—for instance, the contemporary left’s support for social and political liberty is related to its pursuit of equality in these areas (Rathbun 2004: 16–7). This commitment to liberalism is not a given, however; it is circumstantial and, as such, left-wing support for liberalism depends upon the expected outcomes. Communism is the clearest example of this, an instance where the left widely curtailed a range of freedoms to pursue economic equality, giving the left-wing a reputation in the twentieth century for regulation rather than liberalism. Nonetheless, even if the left’s association with liberalism is contingent, its commitment to equality is not. By this virtue, left-wing parties are naturally more inclusive than those of the right, morally driven to encourage equality at all levels, not just within the borders of the nation-state. This broader sense of political community also encourages the left to see

its national interests as shared amongst other members of the international community, making it more receptive to the notion of international society and multilateralism (ibid.: 18–21). In respect to asylum, therefore, one would expect left-wing parties to be more sympathetic to liberal egalitarian accounts of the ethical virtue of asylum, more receptive to humanitarian norms, and less likely to be threatened by cultural diversity because of its broader notion of community.

The fundamental ambition of right-wing parties, on the other hand, is to maintain the existing hierarchical order (Putnam 1973: 213–4; Inglehart 1977: 185). In the social and political realms, this usually translates into stressing obedience to the state and, in some cases, the family and the church; and enforcing traditional moral norms through policies of tough criminal justice. Insofar as cultural diversity threatens to unseat the dominance of the ruling community and its traditional values, the right-wing will be the natural home to political unease over diversity. Additionally, members of the political right ‘are more likely to agree that both individuals and states respond to threats and punishment’ (Rathbun 2004: 22), and therefore more likely see the value of prohibitive regulations, even where these are punitive in nature. Finally, given that the right-wing generally limits its ‘conception of the national interest abroad so as to take into account primarily the needs of the national community’ (ibid.: 21), it is less likely to consider the issue of asylum in relation to the context of vast global inequality in social, economic and political rights.

In sum, it can be anticipated that, in relation to the political left, the right will have a broader aspiration to regulate entrance because it is more sensitive toward threats to the status quo. Indeed, public unease over immigration has played a significant role in the

rise of the ‘radical right’ throughout liberal democratic states, mobilizing substantial minority support from more conservative voters (Norris 2005: 44–6, 166–9). These parties are generally defined by their support for cultural protectionism, an objective that they propose to advance through the repatriation of immigrants, the tightening of borders against ‘foreigners’, and economic protectionism (ibid.: 23–5). Norris suggests that there is evidence that centre-right parties in France, Austria, the Netherlands, New Zealand, Norway and Denmark have responded to the electoral successes of these minority parties by shifting their own policy platforms further toward the right (ibid.: 263–9).²⁶ In respect to refugees specifically, the contemporary right is likely to have a narrower aspiration to provide asylum because it lacks the inclination to actively pursue egalitarian objectives at the domestic or international levels, and is more prone to advocating unilateralism in the international sphere.

Given these differences, it is tempting to wonder whether the politics of asylum will be waged along partisan lines, with the left opposing the right’s support for the restriction of asylum seekers. Yet such a prediction is clearly insufficient given that the move towards restriction is common to all liberal democratic nations, those governed by the left as well as the right. The prioritization of regulation is clearly a bipartisan trend but this does not shut out the possibility that the right will advocate a strong form of regulation while the left simply supports a weaker form. For the right, with its large assortment of reasons to regulate entrance and its smaller assortment of reasons to provide asylum, the balance can be expected to tip further towards regulation.

²⁶ As Part Three of this thesis will demonstrate, there is evidence to suggest that this occurred in Australia too. The centre-right Liberal Government adopted a notably more conservative position on cultural issues in response to the success of the radical right One Nation Party in the 1998 federal election.

Yet, even a cursory examination of the historical entrance policies of the left and right ought to make one wary of drawing assumptions that are too broad. The left and right vary their positions on entrance depending on how its outcomes are expected to affect their rudimentary ambitions of equality and conservatism respectively. Thus, the entrance policies of the left and right are instrumental rather than inevitable, shifting with the global situation rather than remaining static. Thus, it would be wrong to consider the regulation of entrance an intrinsically right-wing issue. Indeed, throughout the twentieth century, it was left-wing parties that were associated with restrictive immigration policies, largely due to the political influence of trade unions, traditionally a major lobbying influence on the left. It was feared that imported workers would accept lower standards of employment, flood the labour pool and depreciate wages, thus frustrating the trade unions' efforts for their members (Kukathas 2003: 574; Higham 1988: 305–7). Right-wing parties, on the other hand, were associated with the deregulation of immigration, applying libertarian principles to entrance policy throughout the twentieth century, and encouraging the importation of foreign labour to undermine the demands of trade unions.

Of course, these historical trends may have little relevance for an analysis of asylum policy in the twenty-first century. Certainly, recent evidence shows that trade unions in the United States and Britain have opposed restrictive entrance policies throughout the 1990s because foreign-born workers have come to be a significant source of membership, as well as an important potential source of future members (Haus 1995; Avci et al. 2000). Moreover, it should be recalled that it was a left-wing Democratic President, Harry S. Truman, who fought off strong domestic opposition in the early

1950s to develop a refugee resettlement program that would dwarf those of other Western nations (Gibney 2004: 132–146). What the longitudinal variations in the entrance policies of the left and right demonstrate is the dangers of drawing broad assumptions about party positions on the politics of asylum, especially in an era where the global migration context is changing so swiftly and dramatically. Just as it is necessary to be mindful of oversimplifying the politics of asylum at the state level, there is a danger of oversimplifying party politics too.

2: The Politics of Asylum in Canada

Part Two of this thesis is an analysis of the asylum policies and related rhetoric of Canada's major political parties during the Chrétien Government, covering the period from late 1993 to the end of 2005. This case study will be divided into four sections. The first section will provide a brief historical overview of the asylum and immigration systems of Canada, describing the system that the Chrétien Government inherited when it came to power. The second section will offer a survey of the asylum policies that the Chrétien Government implemented through legislation and regulation before the end of 2005. The third section will examine parliamentary debates over this period to sample the justifications that Liberal Government members offered for their policies. This section will firstly identify those remarks which reflect an aspiration to provide asylum, secondly identify those that reflect an aspiration to regulate entrance, and finally identify those that justify the balance struck between the two. The fourth section, using the same format as the analysis of Government rhetoric, will examine the rhetoric of the Opposition parties, examining their criticisms of Government policy and their own proposals for policy alternatives, itself a dimension of political rhetoric.

2.1: The Canadian Immigration Regime: A Historical Overview

Regulation has determined the make-up of Canadian immigration flows since the nation's foundations in the sixteenth century. Until the mid-twentieth century, a 'traditional source' policy was used to deter the entrance of immigrants whose ethnicities were deemed too dissimilar to Canada's colonial founding races: the British and the French (Li 2003: 18–9). Racial discrimination in entrance was abandoned only in the latter half of the twentieth century in response to normative and economic pressures. Successive Canadian governments responded to the normative objections of liberal organizations and interest groups inside and outside of Canada, as well as a concern that the traditional source policy was jeopardizing its strengthening relationships with governments in Asia, Africa and the Caribbean (Dirks 1995: 10). Most importantly, though, the traditional source policy limited Canada's ability to meet its labour requirements in the prosperous post-war period where the pool of potential European immigrants was being rapidly absorbed into Europe's recovering economies and the labour forces of other immigrant nations, the United States especially (Li 2003: 24–5). Canada needed to look further afield for sources of labour and its racial biases were therefore an obstacle to its economic interests. While regulation of entrance would remain an aspiration of the Canadian state, it needed to be adjusted to suit the changing global context.

Canadian entrance policy was liberalized throughout the 1960s by a series of regulatory amendments to the 1952 Immigration Act. The most significant of these was

the introduction of a points system in 1967 which would determine entrance on economic criteria alone. Immigrants would be judged on their education, age, occupational skills, language capabilities in English and French, and the level of kinship with existing Canadian residents—not their ethnicity or country of origin (Li 2003: 22–6; Mackey 1999: 52–3; Dirks 1995: 11). This had a significant effect on the make-up of Canada’s immigrant intake. In the period 1956–1967, 79.1 per cent of immigrants arrived from Europe and Britain while only five per cent arrived from Asia. In the period 1968–1978, this had shifted to 44.2 per cent and 21.1 per cent respectively; and from 1979–2000 only 22.5 per cent of immigrants arrived from Europe while 53.8 per cent arrived from Asia (Li 2003: 32). Thus, racial considerations were eclipsed by economic concerns as the major determinant of entrance regulation.

Another important influence in Canadian entrance policy was its self-conception as an intrinsically generous and tolerant society, something Mackey (1999: 24) has described as ‘the central foundational myth of Canadian nationhood and identity’. In large part, this has emerged out of Canada’s preservation of distinct British and French communities. Crucially, Canada’s pluralism has differentiated it from the United States, where immigrants were encouraged to assimilate into a unified society, allowing Canada to construct a national identity that was independent and distinctive from its powerful southern neighbour (*ibid.*: 30–2). In the mid-1960s, this ‘heritage of tolerance’ was crystallized in the centre-left Liberal Government’s adoption of a policy of biculturalism, a policy that was adjusted to ‘Multiculturalism within a Bilingual Framework’ after attracting protest from other established ethnic minorities who were not recognized by this dualist framework. Adopted officially on 8th October 1971 by the

government of Pierre Trudeau, the new policy succeeded in facilitating the social inclusion of Canada's growing minority groups; undercutting the Québécois separatist movement by framing it as one of many cultural communities within Canada; and reinforcing the distinction between Canada's cultural diversity and the United States' cultural 'melting pot' (ibid.: 50–65).

To reflect these changes in Canada's sociopolitical context, the Liberal Government introduced the 1976 Immigration Act, described by one commentator as 'the most liberal piece of legislation ever to become law in Canada' (Dirks 1995: 14). In replacing the 1952 Immigration Act, this new legislation brought an official end to racial biases in entrance policy and, for the first time in Canada's entrance policy, recognized refugees as a distinct category of immigrant. Prior to the establishment of this category, refugees could only enter Canada through its normal immigration channels, where consideration was rarely given to their special circumstances; or by *ad hoc* resettlements programmes adopted by governments to address specific refugee crises. With the inclusion of a formal refugee class, however, Canada had committed itself to a permanent programme of asylum provision (ibid.: 20–3, 280–1).

The legislation provided guidelines for two modes of entry for refugees. The first was entry through official resettlement programmes where mandated refugees would be accepted from countries of first asylum. The second mode of entry dealt specifically with asylum seekers. Prior to the 1976 Immigration Act, the few asylum claims that were made each year were assessed by an *ad hoc* committee advised by the Minister of Immigration. The 1976 Immigration Act formalized this committee as the Refugee Status Advisory Committee, assigning it the role of verifying the authenticity of asylum

claims and avoiding the *refoulement* of wrongly failed refugee claimants. To reduce the incidence of the latter, two levels of appeal were established. First, a written appeal could be made to the Immigration Appeals Board. Second, an appeal could be made to the Federal Court if the complaint referred to matters of law or interpretation (ibid. 1984: 285–9; 1995: 79). These generous provisions, introduced to ‘eradicate the rigid and uncompassionate features of former immigration programs’ (ibid.: 26), were well-received amongst immigration-related interest groups, yet concerns were raised by immigration officials that such loose regulations would encourage exploitation of the system.

The system’s shortcomings became quickly apparent. Drafters of the 1976 Immigration Act had presumed that the normal route of entry would be through refugee resettlement programmes, anticipating no more than a few hundred asylum seekers a year (ibid.: 79–80). Yet Canada, like most other Western nations, experienced a steep rise in asylum claims in the following years: from 3,450 in 1981 to 6,100 in 1983, to 25,000 in 1987 (Dolin et al. 2002). Within two years of operation, a backlog of refugee claimants developed that, despite attempts to modify the system, grew unabated over the following years. By 1986, the backlog was over 18,000 claimants and rose to almost 50,000 by May 1987. Popular support dwindled so that by 1987 only 42 per cent of the public supported existing levels of immigration (Dirks 1995: 15, 83–9).

Additionally, a landmark case in 1985 redefined Canada’s responsibilities towards asylum claimants through its so-called ‘Singh decision’. Lawyers representing a group of failed refugee claimants successfully argued in the Supreme Court of Canada that the lack of an oral appeal for Refugee Status Advisory Committee decisions was contrary

to the principles of fundamental justice in the Canadian Charter of Rights and Freedoms, a bill of rights written into the Constitution of Canada. The Supreme Court concluded that the Canadian Charter was applicable to *all people physically within Canadian territory*, including refugee claimants who did not, as yet, have any formal status of citizenship (Dolin et al. 2002). Essentially, the domestic courts were pressuring the government to take an impartial approach to legal rights, in spite of reluctant immigration officials who feared that oral hearings would only worsen the asylum system's backlog (Dirks 1995: 80).

A watershed moment was the arrival of a boatload of Tamil refugee claimants in the summer of 1986, creating a surge of public anxiety. This event, combined with the immigration system's continuing inefficiency, propelled the centre-right Progressive Conservative Government to introduce a number of changes through Bill C-55, the Refugee Reform Act, which came into force in 1989 (García y Grieco 1994: 127–8). This legislation replaced the Refugee Status Advisory Committee with the Immigration and Refugee Board, a quasi-judicial tribunal that had a two-tiered refugee status determination process. Firstly, on arrival, two officials would assess an asylum seeker's eligibility for entrance into Canada, prohibiting entry to those who were found to have a serious criminal conviction, or had refugee status or residency in a safe third country. Secondly, if the asylum seeker passed this first tier, they could enter Canada to make a refugee status claim with the Immigration and Refugee Board. This claim would be assessed by a two-person panel and could only be rejected by unanimous decision.

The Refugee Reform Act also introduced legislation that would allow the Government to enforce a safe third country policy for asylum claimants who had

lodged an appeal with the Federal Court. Thus, if an asylum claimant had arrived from what was deemed to be a 'safe' country, they would be sent back there to await the Federal Court's decision. Despite opposition from the Liberal Party, the Refugee Reform Act was passed through the House in July 1988. Yet just days before the legislation came into force, the Progressive Conservative Government announced that it would not implement the safe third country policy (Dirks 1995: 89–94). The relevant legislation remained, however, and the feasibility of a safe third country policy was investigated several times over the following years (Lacroix 2004: 150–1).

Finally, in regards to regulated refugee resettlement, Canada had a well-established programme by the early 1990s which has remained largely unchanged ever since. This includes a refugee resettlement programme (which generally takes about 7,500 refugees), a programme of private-sponsored refugees (which generally takes about 3,000 refugees), and a family reunion category for the spouses and dependants of refugees in Canada (which has ranged between 3,000 and 6,000 over the last decade).²⁷

In sum, by the time of the 1993 general election, Canadian entrance policy was fairly amenable to asylum seekers, with asylum claimants allowed to enter the Canadian community to pursue their refugee status claims provided they had passed a preliminary security and identity screening. This relative ease of entrance, however, compromised Canada's regulatory control, allowing more asylum claims than its existing institutions were capable of processing swiftly and raising the prospect of the asylum system being used by people for whom it was not intended.

²⁷ Figures come from the Citizenship and Immigration Canada website, accessed on 20th April 2008: <http://www.cic.gc.ca/english/resources/statistics/facts2006/overview/01.asp>

2.2: The Asylum Policy of the Canadian Liberal Government: 1993–2005

The general election of October 1993 resulted in a spectacular defeat for the Progressive Conservative Government, plummeting from 169 seats in the House of Commons to only two. Led by Jean Chrétien, the Liberal Party won a strong majority Government, a position it would hold for the next thirteen years. Replacing the Progressive Conservative Party as the major right-wing party was the Reform Party of Canada, a more conservative radical right party that had been founded only six years earlier. It would re-invent itself twice in the period covered by this research, becoming the Canadian Alliance in March 2000 and the Conservative Party of Canada in December 2003.

On 28th February 1995, the Liberal Government enforced a ‘right of landing fee’, a charge of nearly \$1000 to all new applicants for permanent residency. Ostensibly, this policy was introduced to cover the costs of their application and thereby offset the overall cost of the asylum system. The policy attracted criticism from parties of the left and right, as well as non-governmental organizations, for its uneven impact on immigrants from the poorer nations. Refugees were eventually excluded from paying the ‘right of landing fee’ in February 2000 (Canadian Council for Refugees 2000).

The other major policy initiative, Bill C-44, was born out of very specific events the year before. This legislative amendment to the Immigration Act 1976 came as a reaction to the shooting of Georgina ‘Vivi’ Leimonis, a twenty-three year-old female hairdresser, during the robbery of Toronto’s Just Desserts Café in April 1994. The

killing caused extraordinary outrage amongst the Canadian public, in large part because of the victim being young, ‘attractive’, white and middle-class. When it was discovered that the four perpetrators were Jamaican citizens (although all had lived in Canada since children) and that one was already subject to a deportation order, scrutiny swung towards the immigration system (Henry et al. 2000: 123–60).

Bill C-44, commonly known as the ‘Just Desserts Bill’, restricted access to the asylum and immigration systems in three ways. First, the asylum claims of any individual convicted of a major crime²⁸ in Canada would be rendered invalid and limitations would be imposed upon their access to procedures and appeals that would hinder their removal. Second, an individual’s asylum claim could be invalidated retrospectively if their criminal record came to light only after their entry decision was made. Third, individuals subject to security certificates would be disallowed access to appeals with the Immigration Appeal Division. Additionally, Bill C-44 provided customs officers with the right to withhold fraudulent documents that could be used to circumvent the provisions of the 1976 Immigration Act (Statutes of Canada 1995: ch. 15). All these measures improved the Liberal Government’s ability to restrict the membership of non-citizens who had been convicted of crimes, withdrawing the means by which they could extend their stay.

For the remainder of its first two terms, the Liberal Government implemented little in the way of asylum policy. Nonetheless, serious challenges faced the Canadian asylum

²⁸ Bill C-44 used 10 years imprisonment as a guideline for serious crime, a sentence applicable to murder, rape and assault. However, ministerial discretion was also in place so that any anomalies (such as the ten year sentence given to those convicted of writing a fraudulent cheque worth more than \$1000) could be exempted.

system. Asylum claims were on the rise, from 10,059 in 1998 to 12,993 in 2000.²⁹ Research published in 1998 showed that it took an average of seven months for a refugee claimant to receive a hearing with the Immigration and Refugee Board and another twenty-two months for a permanent residency application to be processed (Renaud and Gingras 1998, cited in Lacroix 2002: 152). A 2001 report noted that the backlog of unheard refugee status claims at the Immigration and Refugee Board had risen to about 32,000. Of these claims, some 15 per cent were abandoned and, because Canadian border officials did not register the identities of those departing the country, there was no way to determine the whereabouts of these persons (Standing Senate Committee on Social Affairs, Science and Technology 2001).

Rather than introduce piecemeal legislation to target these problems, the Liberal Government prepared for a major overhaul of its immigration legislation, initiating various investigations into prospective solutions. In 1997, the Government formed a three-person panel to review and report on all aspects of Canadian immigration policy. Another report, *Not Just Numbers*, was published by the House of Commons' Standing Committee on Citizenship and Immigration in June 1998. The arrival of about 600 'boat people' from China's Fujian province to the coast of British Columbia in July and August 1999 motivated the Liberal Government to order another report, *Refugee Protection and Border Security: Striking a Balance*, published in March 2000, which formed the lineaments of the Immigration and Refugee Protection Act 2001.

The Immigration and Refugee Protection Act 2001 was first introduced to the House of Commons in the form of Bill C-31 on 1st May 2000. As well as adopting the

²⁹ Figures come from the Citizenship and Immigration Canada website, accessed on 20th April 2008: <http://www.cic.gc.ca/english/resources/statistics/facts2006/overview/01.asp>

recommendations of the Government's reports, Bill C-31 absorbed the existing 1976 Immigration Act and its more than thirty amendments (Li 2003: 26). The legislation was passed by the House of Commons on 6th June 2000 but, before it could be approved by the Senate, the Liberal Government called a general election and Bill C-31 died on the Senate's Order Paper. Upon the Liberal Government's election for a third term, the legislation was re-introduced to the House of Commons in the slightly revised form of Bill C-11 on 26th February 2001. Bill C-11 passed through the requisite legislative stages and received the Royal Assent on 1st November 2001. The Immigration and Refugee Protection Act 2001 came into force on the 28th June 2002.

The most significant change brought by the new legislation was the reduction of the Immigration and Refugee Board from two persons to one. It was hoped that this would streamline the refugee status determination process by reducing the time and labour required to authenticate each claim. This measure directly targeted Canada's voluminous backlog of claims.

The Immigration and Refugee Protection Act 2001 also introduced a range of measures aimed at deterring irregular immigration. Existing penalties for people smuggling were raised to a maximum one million dollar fine and/or a sentence of life in prison if caught smuggling ten or more people (Immigration and Refugee Protection Act 2001: 117[3]); and provisions were introduced whereby property and proceeds gained through people-smuggling could be withheld by the state (Immigration and Refugee Protection Act 2001: 130). The Immigration and Refugee Protection Act 2001 also tightened provisions for the detention of refugee claimants whose identification

could not be satisfactorily ascertained (Immigration and Refugee Protection Act 2001: 55[2b]), a measure aimed at discouraging the smuggled rather than the smugglers.

A large proportion of the Immigration and Refugee Protection Act 2001 was simply a reiteration of existing legislation and regulations—for instance, retaining the provisions for a safe third country policy (Immigration and Refugee Protection Act 2001: 103). Yet the new act also clarified and simplified much of this older legislation—especially the grounds for inadmissibility—so that the decision-making process was no longer frustrated by ambiguous legal interpretations (Immigration and Refugee Protection Act 2001: 33–43). Some grounds for inadmissibility were even expanded. For instance, the legislation continued to allow entry to be denied to individuals who were involved in an organized criminal organization, but extended this definition to include those who were involved in people smuggling, trafficking in persons and money laundering. The Immigration and Refugee Protection Act 2001 also allowed the inadmission or expulsion of those found guilty of non-compliance with its rules, a catch-all principle to diminish general misuse of the immigration system.

Yet not all of the measures in the Immigration and Refugee Protection Act 2001 were restrictive. In response to long-standing complaints by refugee advocates, the legislation included provisions for the creation of a Refugee Appeal Division (Dolin et al. 2002). As it stood, the only form of review for an Immigration and Refugee Board decision was through the Federal Court where, controversially, asylum claimants had to have the Federal Court's permission before they could lodge an appeal. The Refugee Appeal Division would provide an open forum for appeals of Immigration and Refugee Board decisions and diminish the need to appeal to the Federal Court. The

Government's inclusion of these measures was viewed as something of a trade-off by refugee advocates, a compensation for the harsh regulations being passed (ibid.).

By all accounts, however, the legislation was considered a move towards restriction. The influential Canadian Council for Refugees (2001: 2) argued that Bill C-11's 'heavy enforcement emphasis... promotes negative stereotypes about refugees and immigrants and caters to xenophobia and racism within Canadian society.' Perhaps the strongest sign of the Liberal Party's partialism was the criticism it attracted from the left-wing minority parties, the Bloc Québécois and the New Democratic Party, both of which voted against the legislation for being too restrictive. Members of left-wing parties also accused the Liberals of pandering to right-wing sentiments;³⁰ Bloc Québécois members argued that the Liberal Government was 'reinforcing prejudice against refugees and immigrants.'³¹ Similarly, New Democratic Party members argued that by focusing on criminal issues within the immigration system, the Liberal Government was creating an atmosphere that was inimical to refugees and immigrants.³² Bloc Québécois members argued that the Liberal Government was relenting to the security concerns of the United States, responding to the comments of American officials that Canada had become a 'Club Med for terrorists'.³³

The right-wing Opposition, by then known as the Canadian Alliance,³⁴ supported the legislation's restrictive qualities yet voted against it for not being restrictive enough.³⁵

³⁰ For instance, see Bloc Québécois member Bernard Bigras in *Hansard* (1/5/2000: 1335) and New Democratic Party member Judy Wasylycia-Leis (13/6/2001: 1630).

³¹ Bernard Bigras in *Hansard* (1/5/2000: 1335). See also Daniel Turp (1/5/2000: 1715) and Madeleine Dalphond-Guiral (26/2/2001: 1635; 13/6/2001: 1605).

³² For instance, see Judy Wasylycia-Leis in *Hansard* (26/2/2001: 1650–5; 13/6/2001: 1625) and Pat Martin (1/6/2001: 1230).

³³ Madeleine Dalphond-Guiral in *Hansard* (26/2/2001: 1615). See also Pierre Paquette (4/6/2001: 1240).

³⁴ In early 2000, the Reform Party of Canada, then the Official Opposition, initiated a merger with the remains of the Progressive Conservative Party in an attempt to create a stronger, more formidable

Yet the Government, which had a majority in the House of Commons, passed the legislation in spite of the widespread opposition. Interestingly, however, Bill C-31, the earlier version of the legislation, was substantially *more* restrictive than Bill C-11, the version that was ultimately adopted. The differences in these bills demonstrate that, while the Liberal Government had ultimately prioritized regulation over asylum, it was still concerned to diminish the extent to which its strengthened regulations would impose on refugees. The Minister of Immigration, Elinor Caplan, listed these changes when she introduced the more liberal Bill C-11 in February 2001,³⁶ of which the following were specifically relevant to Canada's asylum system:

- Bill C-11 exempted family reunion class immigrants and refugee claimants, and the dependants of these individuals, from being denied entrance on the grounds that they might put an excessive demand on the health system.
- Bill C-11 clarified that minors making an undocumented arrival should only be detained as a 'last resort'.
- Bill C-11 required that a 'ministerial danger opinion' be given to all refugee status applicants whose claims were denied due to their previous conviction of a serious crime. This provision reduced the chances of genuine refugees being denied entry because of an unfair or unjust conviction.

opposition party. While many Progressive Conservative members changed sides, others, objecting to the Reform Party's history of social conservatism, chose to ignore the merger and remain representatives of the Progressive Conservative Party. Nonetheless, in recognition of this shift, the Reform Party changed its name to the Canadian Reform Conservative Alliance or, more commonly, the Canadian Alliance.

³⁵ See Stockwell Day in *Hansard* (13/6/2001: 1540–1600).

³⁶ *Hansard* (26/2/2001: 1530–35).

- Bill C-11 stated that individuals refused admission into the refugee resettlement programme by a Canadian immigration officer would still be allowed to apply for refugee status from within Canada.
- Bill C-11 reinstated oral—rather than written—hearings for appeals against the revocation of permanent residence status.
- Bill C-11 allowed representatives of the United Nations High Commissioner for Refugees to observe Immigration and Refugee Board hearings and participate as an intervener in refugee appeal cases.

The attacks on the United States on 11th September 2001 occurred after the Immigration and Refugee Protection Act 2001 had passed through the House of Commons but before it had come into force. Given that Canada shared with the United States the world's longest common border, America's sudden sense of vulnerability had major political ramifications for its neighbour. This had already been demonstrated by Ahmed Ressam, the so-called 'Millenium bomber', who had been intercepted entering the United States from Canada on 14th December 1999 with a car full of explosives.³⁷ Nonetheless, in the face of strong criticism from the Opposition, the Liberal Government refused to introduce new legislation, maintaining that the Immigration and Refugee Protection Act 2001 was sufficiently restrictive, providing adequate grounds for inadmissibility and arrest, and restriction to appeal processes.³⁸ It did, however, strengthen its general security policies, a move which undoubtedly had an effect on irregular asylum seekers. For instance, the Government doubled its funding for

³⁷ Ressam had arrived in Canada in 1994 as an asylum claimant, leaving in 1998 when his refugee status claim was denied. He entered Canada again in 1999 under an assumed name (Gunaratna 2002: 110–1).

³⁸ See Elinor Caplan in *Hansard* (17/10/2001: 1420; 23/10/2001: 1040–5).

interdiction officers posted at overseas airports at the end of 2001 (Canadian Council for Refugees 2005: 7). These officers could prohibit passengers from boarding flights if their identity or their intentions seemed suspicious. While the target of this policy was terrorists, this policy would have undoubtedly affected asylum seekers who were unlikely to have a prearranged visa and may have relied on inadequate identification.

For the most part, the Immigration and Refugee Protection Act 2001 came into force on 28th June 2002. The part that was not enforced was the legislation relating to the creation of a Refugee Appeal Division. When the Minister of Citizenship and Immigration, Denis Coderre, announced in April 2002 that the Refugee Appeal Division would not be enacted, the Government received enough criticism that, by late May, he had promised to implement it within a year. This never happened. Despite continuing criticism, the Refugee Appeal Division had still not been implemented when the Liberal Party lost control of Government in January 2006.

In 2004, the Liberal Government finally succeeded in securing the support of their American counterparts for a mutual safe third country policy between Canada and the United States. The Safe Third Country Agreement, implemented on 29th December 2004, meant that asylum claimants could no longer arrive from one country to make an asylum claim in the other. The asylum claimant would be returned to make their claim in the country they first entered. While Canada, consistent with global trends, experienced an overall decline of asylum claims after 2001, the decline of asylum claims made on its land border with the United States lowered drastically after the Safe Third Country Agreement was formalized, dropping by 51 per cent between 2004 and

2005 (Canadian Council for Refugees 2005: ii). As a restrictive measure, the safe third country policy proved itself to be enormously effective.

The only other piece of legislation of any relevance to asylum policy was Bill C-49, introduced to the House on the 12th May 2005, which amended the Criminal Code to include human trafficking as a crime, thereby expanding the punitive abilities of the state. The legislation was supported by all parties, demonstrating the widespread disapproval of human trafficking by the liberal political community.³⁹

In sum, then, it appears that the provision of asylum, while maintained and reinforced by the Liberal Government of Jean Chrétien, was subordinated to the regulation of entrance. Over his government's period, general border control was boosted in the wake of 11th September 2001, making it more difficult for asylum seekers to arrive irregularly. Strategies of deterrence were enforced to discourage irregular immigration, including increased punitive measures for people-smugglers to expanded provisions of detention for irregular arrivals. Measures were introduced to hasten the removal of certain entrants, particularly those who had arrived via a safe third country and those who had criminal convictions. Finally, the Liberal Government made adjustments to its asylum system, reducing the refugee status determination panel from two persons to one in order to make it more efficient. The Government's refusal to implement its Refugee Appeal Division further demonstrates its reluctance to strengthen the provision of asylum where it might undermine its regulatory powers.

2.3: The Rhetoric of the Canadian Liberal Government

³⁹ See *Hansard* (26/9/2005: 1205–1355).

The Aspiration to Provide Asylum

Despite the subordination of asylum provision to the regulation of entrance in Liberal Government policy, the Liberals had little intention of being mistaken as hostile or even ambivalent toward immigration or refugees. Throughout the period covered, Liberal members explicitly argued that the state had an ‘obligation’⁴⁰ or a ‘responsibility’⁴¹ towards refugees. This duty was often conceived in terms of legal duty—both to domestic⁴² and international law.⁴³ Elinor Caplan, the Minister for Immigration and Citizenship, in differentiating the Government from the Opposition, argued that the Liberal Party had a respect for the law that the Canadian Alliance did not:

‘We are not going to scrap the Charter [the Canadian Charter of Rights and Freedoms]. We are not going to embarrass Canada internationally by ripping up the Geneva Convention. We are going to live up to our legal obligations and ensure that anyone who comes to us making a serious claim and asking for protection under our Refugee Protection Act will receive the due process of the law.’⁴⁴

Caplan’s comments also reveal her recognition of the normative pressure that lay behind such duties, the Government’s self-interested concern not to tarnish Canada’s international reputation by being seen not to respect humanitarian norms.

⁴⁰ See Steve Mahoney in *Hansard* (1/5/2000: 1815).

⁴¹ See Raymonde Folco in *Hansard* 1/5/2000: 1545).

⁴² See Elinor Caplan in *Hansard* (20/10/1999: 1440).

⁴³ See Maria Minna in *Hansard* (13/5/1996: 1155).

⁴⁴ Elinor Caplan in *Hansard* (14/6/2000: 1440). See also Elinor Caplan (1/5/2000: 1835).

There are times, however, early on in their tenure, when Liberal Party members expressed a notably inclusive conception of asylum, one that clearly went beyond the strict demands of international law. Stan Dromisky, the Liberal Member for Thunder Bay–Atikokan, opposed a Reform Party motion to withdraw social welfare for failed refugee claimants by arguing that:

‘There are some people who do not fit the strict [1951 Refugee] Convention refugee definition but who still deserve to have their cases examined as a humanitarian consideration. It would be distinctly un-Canadian to punish these people who have already experienced great suffering. [...] We have a moral obligation to see that does not happen.’⁴⁵

Note that Dromisky is not only arguing that the Government has a ‘moral obligation’ to unsuccessful asylum seekers, he is also identifying a duty to represent the humanitarian concerns of the Canadian people, to refrain from acting in an inhumane or otherwise ‘un-Canadian’ manner. In this respect, Liberal Government members justified the provision of asylum by invoking aspects of the Canadian national identity, arguing that any digression from Canada’s traditional generosity to refugees and immigrants would be unacceptable to its citizens. As such, comments such as the following, by Elinor Caplan, were commonplace in Government rhetoric: ‘Canadians want a new Immigration and Refugee Protection Act that... continues our tradition of welcoming newcomers. We must continue the humanitarian traditions of openness and compassion that have made this country so proud.’⁴⁶

⁴⁵ Stan Dromisky in *Hansard* (3/3/1997: 1150–5).

⁴⁶ Elinor Caplan in *Hansard* (13/6/2001: 1515). See also Jerry Pickard (1/5/2000: 1610).

Not all arguments in favour of asylum relied on claims of altruism: asylum was also defended within a context of material self-interest. In 1995, when the nation was in the midst of an economic recession and thus sensitive to the financial cost of asylum provision, Government members defended asylum by arguing that refugees were not, perforce, an economic liability and ‘have contributed substantially to this economy.’⁴⁷ More generally, the Liberal Government emphasized the importance of maintaining an entrance policy that was liberal enough to facilitate the entrance of skilled immigrants. In this respect, Joseph Volpe, the Liberal Member for Eglinton–Lawrence, described the Canadian immigration intake as ‘self-serving generosity’.⁴⁸

In sum, Liberal Party rhetoric reflects an aspiration to provide asylum and, more broadly, to accept immigrants into Canada. This aspiration was supported in terms of rights, legal norms, morality, public support, national identity and even economic benefit. So, while there was a policy shift towards the restriction of asylum seekers, Liberal members were still boldly declaring their continued commitment to their obligations toward refugees. The Canadian move towards regulation is complex—it is not simply a self-interested rejection of liberal morals and international norms.

The Aspiration to Regulate Entrance

⁴⁷ Harbance Singh Dhaliwal in *Hansard* (19/9/1995: 1745). See also Anna Terrana (19/9/1995: 1710).

⁴⁸ Joseph Volpe in *Hansard* (27/2/2001: 1145). See also Raymonde Folco (1/5/2000: 1555).

Despite the Liberal Government's strong rhetorical commitment to the rights of refugees, this commitment had its limits, a fact that is clearly demonstrated by the restrictive trends in Canadian asylum policy. These limits were clearly expressed in the rhetoric of Raymonde Falco, the Liberal Member for Laval West, during the debates over the Immigration and Refugee Protection Act 2001: 'We must not forget that, as a government, our first responsibility is to Canadians and to the standard of living they want to have.'⁴⁹ This claim, which is unambiguously partialist, is at the root of the Liberal Government's move towards regulation.

The threat to the interests of Canadian citizens that was mentioned most prominently in parliamentary debates over entrance policy was crime committed by non-citizens. Liberal members argued that not only did such entrants incur unacceptable costs on the Canadian community, they tainted the reputation of other immigrants and refugees.⁵⁰ Related to these concerns about crime were more specific concerns regarding people-smuggling and fraudulent asylum claims,⁵¹ as well as a growing concern over terrorism. In discussing such threats, Liberal members frequently qualified their remarks, emphasizing that the problems were caused by a minority of entrants⁵² and carefully rejecting any *prima facie* connection between refugees and criminality.⁵³ This is illustrated in the following statement by Anna Terrana, the Liberal Member for Vancouver East, in defence of the regulations in the Bill C-55, the Just Desserts Bill of 1995:

⁴⁹ Raymonde Falco in *Hansard* (1/5/2000: 1555).

⁵⁰ See Sergio Marchi in *Hansard* (19/9/1995: 1205) and Rey D. Pagtakhan (19/9/1995: 1755).

⁵¹ See Anna Terrana in *Hansard* (19/9/1995: 1710).

⁵² For instance, see Sergio Marchi in *Hansard* (6/2/1995: 1205–15), Raymonde Falco (1/6/2000: 1525), Elinor Caplan (13/6/2001: 1520) and Steve Mahoney (4/6/2001: 1600).

⁵³ For instance, see Sergio Marchi in *Hansard* (6/2/1995: 1205–15); Singh Dhaliwal (19/9/1995: 1655), Andrew Telegdi (16/2/1999: 1025) and Steve Mahoney (4/6/2001: 1600).

‘We are not a government that will punish the innocent just to get at the guilty. We have no intention of making people who really deserve Canada's protection pay for the actions of a small criminal element. [...] We will fight with our every breath to prevent the word “immigrant” from becoming a synonym of the word “criminal”.’⁵⁴

Five years later, supporting the legislation that would become the Immigration and Refugee Protection Act 2001, the Liberal Government adopted a tone that was distinctly more restrictive. Elinor Caplan, the Minister of Citizenship and Immigration, introduced Bill C-31 in 2000 as ‘a tough bill’ with ‘severe new penalties for people smuggling and those caught trafficking in humans.’⁵⁵ Introducing Bill C-11 the following year, Caplan claimed that it ‘remains a tough bill’, emphasizing that it would be ‘tough on criminal abuse of our immigration and refugee protection systems’⁵⁶ and ‘tough on criminals, terrorists and those who are threats to our security in Canada.’⁵⁷ The legislation was explicitly described as a response to contemporary global challenges, such as transnational crime and the changing trends of immigration.⁵⁸

With its focus on criminal threat, the Government had a ready justification for most regulations. The Government could justify a controversial policy, such as tightening access to immigration-related appeals, by making a less controversial claim: that serious criminals had to be removed as quickly as possible.⁵⁹ Such an argument stepped around the issue of diminished rights for non-citizens by focusing on the protections it

⁵⁴ Anna Terrana in *Hansard* (19/9/1995: 1710).

⁵⁵ Elinor Caplan in *Hansard* (1/5/2000: 1200).

⁵⁶ Ibid. (26/2/2001: 1525).

⁵⁷ Ibid. (13/6/2001: 1515).

⁵⁸ For instance, see Raymonde Falco in *Hansard* (1/5/2000: 1555), Jerry Pickard (1/5/2000: 1610) and Steve Mahoney (1/5/2000: 1755–1800).

⁵⁹ For instance, see Elinor Caplan in *Hansard* (13/6/2001: 1540) and Steve Mahoney (4/6/2001: 1605).

provided citizens. The focus on criminality, on unlawfulness, also allowed the Government to justify its ‘tough’ policies by arguing, as did Raymonde Falco, that ‘this bill perpetuates a great Canadian tradition, which is to maintain a society governed by the rule of law.’⁶⁰

By the time the Immigration and Refugee Protection Act legislation was being debated, the Government also appeared to be less sensitive to the ethical implications of its policies. This is illustrated in debates over how the expansion of grounds for deportation would affect long-time permanent residents who were eligible for citizenship but had not yet applied for it. During debates on the Just Desserts Bill in 1995, for instance, Gar Knutson, the Liberal Member for Elgin–Middlesex–London, raised concerns over the legislation’s implications for permanent residents who were convicted of a serious crime: ‘Are we going to take people who have virtually lived here all their lives... and deport them simply because they have not become Canadian citizens?’⁶¹ Similarly, Harbance Singh Dhaliwal, the Liberal Member for Vancouver South, opposed the notion that entry should be dependent on a clean criminal record, citing a case where a man had been deported after he was convicted for assault: ‘Should we say because this person assaulted someone he should never be allowed to come to this country to join his wife and two children?’⁶² By the time of the Immigration and Refugee Protection Act 2001, however, such self-reflection had disappeared from Government rhetoric. Steve Mahoney, the Liberal Member for Mississauga West, argued that if long-term permanent residents had failed to apply for citizenship, then

⁶⁰ *Hansard* (27/2/2001: 1055).

⁶¹ Gar Knutson in *Hansard* (6/2/1995: 1330).

⁶² Harbance Singh Dhaliwal in *Hansard* (19/9/1995: 1745).

that was their own problem.⁶³ Indeed, when the centre-right Canadian Alliance advanced amendments to exclude long-time permanent residents from deportation proceedings after acts of serious crime, Mahoney remarked, ‘Why the Opposition continues to foster the idea that somehow we should provide greater rights and protection for convicted criminals or potential terrorists in this country is truly mind-boggling.’⁶⁴ Such a statement shows the Government seizing an opportunity to position itself as the staunchest protector of citizen’s interests, going even further than the right-wing Opposition to exclude unlawful non-citizens from the national community.

A Conflict of Aspirations

So how did the Liberal Government straddle its strongly stated aspirations to provide asylum and regulate entrance? More specifically, how did it manage the conflict that arose out of their incompatibility: the fact that a crackdown on irregular entrance would invariably result in the restriction of asylum seekers? Certainly, this incompatibility was not missed by the left-wing minority parties, the New Democratic Party and the Bloc Québécois, both of which criticized the Immigration and Refugee Protection Act 2001 legislation for reacting to a minority of criminal entrants and thereby imposing undue restrictions on other immigrants.⁶⁵ Judy Wasylycia-Leis of the New Democratic Party even implied that the legislation amounted to a renunciation of the Liberal

⁶³ *Hansard* (4/6/2001: 1220).

⁶⁴ *Hansard* (4/6/2001: 1605). See also Elinor Caplan (13/6/2001: 1540).

⁶⁵ For instance, see Bloc Québécois member Bernard Bigras in *Hansard* (26/2/2001: 1825); and New Democratic Party members Libby Davies (27/2/2001: 1100; 27/2/2001: 1045) and Pat Martin (1/6/2000: 1540).

Government's moral traditions, arguing that 'we are looking at probably one of the most restrictive and punitive pieces of legislation that parliament has seen in a long time. It is certainly out of character in terms of Canadians' expectations with respect to Liberals in this country.'⁶⁶ In short, the Government's restriction of asylum policy put the Liberal Party in danger of being seen to renounce certain liberal values.

To defuse this apparent conflict between its restrictive actions and its liberal aspirations, the Liberal Government employed a rhetorical frame of 'balance' in its first two terms. This is unsurprising given the position of political centrism that the Liberal Party inhabited. To the Liberal Party's right were parties that put greater emphasis on the regulation of entrance; to its left were parties that put greater emphasis on the provision of asylum. The Government clearly saw some value in both positions yet it was out-gunned in both, unwilling to take a stance as restrictive as the right-wing Opposition's or as inclusive as that of the minority parties of the left. This left the Government open to criticism from either direction. Anna Terrana observed of her party's critics that 'On the one side we are becoming heartless by going too far and on the other side we are not doing enough'.⁶⁷ Consequently, Liberal members argued that their policy approach aimed to find a middle ground, striving to control the undesirable aspects of immigration without leaning excessively towards restriction.⁶⁸ Sergio Marchi, for instance, Minister of Citizenship and Immigration between 1994 and 1996, proposed that 'A balanced, realistic middle course is often the wisest course, for it takes us away from the rocks of extremism and reaction while steering us clear of the dead

⁶⁶ Judy Wasylycia-Leis in *Hansard* (13/6/2001: 1625).

⁶⁷ Anna Terrana in *Hansard* (19/9/1995: 1700).

⁶⁸ For instance, see Martin Cauchon in *Hansard* (19/9/1995: 1635), Anna Terrana (19/9/1995: 1700), Rey D. Pagtakhan (19/9/1995 1755) and Jerry Pickard (3/3/1997: 1125).

waters of those who would do nothing.’⁶⁹ This ‘balanced’ approach also conveniently reinforced the Liberal Government’s frequent boast that, ‘as everyone knows, our refugee determination process is one of the most generous in the world.’⁷⁰ If the Government had advocated a major change in the direction of entrance policy, as did the Opposition and other minority parties, it would have amounted to an admission that the asylum system was not as enviable as the Government liked to suggest it was.

This metaphor of ‘balance’ evolved in later years, culminating in the ‘front door/back door’ analogy that Elinor Caplan, then Minister of Citizenship and Immigration, pioneered to support the Immigration and Refugee Protection Act 2001:

‘Closing the back door to those who would abuse our system will allow us to open the front door more widely, both to genuine refugees and to the immigrants Canada will need to grow and prosper in the future.’⁷¹

This analogy made a clear rhetorical division between the means of entrance that were acceptable—regular immigration—and the means of entrance that were not—irregular immigration. So while Caplan could claim to be ‘tough’ on those who exploited the immigration and refugee systems, the legislation ‘would not be tough on the immigrants and refugees who built this country in the past or who would help us build it in the future.’⁷²

Of course, in reality, no such clear division existed: this was simply a rhetorical device. Some genuine refugees were likely to arrive through the ‘back door’, just as

⁶⁹ Sergio Marchi in *Hansard* (6/2/1995: 1205).

⁷⁰ Lucienne Robillard in *Hansard* (18/11/1998: 1455). See also Jerry Pickard (3/3/1997: 1125-30).

⁷¹ Elinor Caplan in *Hansard* (1/5/2001: 1210). See also *ibid.* (26/2/2001: 1520), Jerry Pickard (1/5/2000: 1615) and Steve Mahoney (30/5/2001: 1705).

⁷² Elinor Caplan in *Hansard* (13/6/2001: 1515).

some undesirable entrants (such as terrorists or criminals) were likely to arrive through the ‘front’. Various statements by members of the Liberal Government show that they recognized as much. At one point, Elinor Caplan clearly rejected suggestions from the Opposition that an entrant’s refugee status claim was unjustified if their means of entrance was irregular: ‘We cannot assume that everyone who comes undocumented is not a genuine refugee.’⁷³ As already mentioned, members of the Liberal Government also explicitly rejected any connection between refugees and criminality.

Nonetheless, the ‘front door/back door’ analogy gives the impression of a clear division between regular and irregular immigration, and explicitly singles out the latter as a form of abuse of the asylum system. To some extent, then, the Government’s insistence on regulation amounted to a form of bureaucratic pride in its own efficacy. As Sergio Marchi remarked in 1995, ‘When drug dealers or other thugs slip through the cracks of the enforcement or screening net, they discredit a program that has made Canada the envy of the world.’⁷⁴ More importantly, though, the ‘back door/front door’ analogy implies that irregular immigration imposes on the Government’s ability to facilitate the entrance of genuine refugees and skilled immigrants through regular routes. Thus, the analogy does more than just deflect accusations that the Government’s ‘tough’ legislation is compromising its aspiration to provide asylum: it frames regulation to make it appear to be integral to the provision of asylum. This was implicit in the Liberal Government’s frequent claim that an orderly and regulated immigration system was necessary to retain public support, without which it would be impossible to

⁷³ Elinor Caplan in *Hansard* (1/5/2000: 1835).

⁷⁴ *Hansard* (19/9/1995: 1205).

facilitate asylum provision or fulfil the nation's humanitarian obligations.⁷⁵ This somewhat circular argument ultimately rests on the premise that, to protect the interests of non-citizens, it is necessary to first protect the interests of citizens. The fact that all other parties—even the minority parties of the left⁷⁶—recognized this general principle demonstrates its prevalence in perceptions of asylum politics.

In sum, the Liberal Government framed the politics of asylum in such a way that the increasing restriction of asylum seekers appeared to be beneficial to immigration and refugee resettlement in Canada. The Liberal Government clearly had no desire to be seen as overtly hostile to asylum seekers, a point that is demonstrated by repeated statements of commitment to refugee obligations. Indeed, this diagnosis is reinforced by Liberal Government policy, particularly its moderation of the Immigration and Refugee Protection Act 2001 legislation in light of strong left-wing criticism. Thus, rather than merely impose greater levels of regulation on entrance policy, the Liberal Government worked to reconcile its restrictive policy initiatives with its aspiration to provide asylum.

2.4: The Canadian Opposition: Rhetoric and Policy Proposals

⁷⁵ For instance, see Jean Augustine in *Hansard* (19/9/1995: 1550), Rey D. Pagtakhan (19/9/1995: 1755), John McKay (1/5/2000: 1655) and Elinor Caplan (13/6/2001: 1530).

⁷⁶ For New Democratic Party members, see John Solomon in *Hansard* (1/5/2000: 1350; 1/5/2000: 1515) and Peter Mancini (1/5/2000: 1820). For Bloc Québécois members, see Daniel Turp (1/5/2000: 1720) and Bernard Bigras (1/5/2000: 1335).

An Aspiration to Provide Asylum

Before analysing the right-wing Opposition, it is necessary to briefly cover its turbulent political history between 1993 and 2005. Canada's major right-wing party began as a minority party, the Reform Party of Canada, founded in 1987 by Preston Manning, a lay fundamentalist Baptist preacher. Its ideology was essentially 'radical right', combining populist politics with unmistakably conservative values. The Reform Party advocated a *laissez-faire* approach to the national economy, thus representing fiscal conservatism at a time when the centre-right Progressive Conservative Government was implementing relatively high levels of taxation and public spending. In relation to the Progressive Conservative Party, the Reform Party's voters also had a more conservative stance on moral issues such as abortion and gay rights, and, to a lesser extent, on social issues such as immigration, Québécois separatism and crime (Lusztig et al. 2005).

After the Progressive Conservative's spectacular defeat in the 1993 general election, the Reform Party became the dominant right-wing party in Canadian parliament. It did not, however, become the Official Opposition Party: that honour went to the Bloc Québécois, a party dedicated to Québécois sovereignty, which had two more seats than the Reform Party. Because the left-leaning Bloc Québécois and centre-left Liberal Government were in broad ideological agreement on social and economic issues, this thesis will follow Reform Party rhetoric between 1993 and 1997, even though it technically did not hold the role of Opposition at the time. It was not until the following election in June 1997 that the Reform Party edged ahead of the Bloc Québécois to

become the Official Opposition, a role it would hold for the remainder of the period covered by this research.

As it matured into a major political party, the Reform Party shrunk away from its radical conservatism. In part, this was a deliberate strategic move to encourage a merger with the remnants of Progressive Conservative Party, Canada's historical right-wing majority party, which never recovered from its electoral collapse in the 1993 general election. A partial merger occurred in March 2000 and the Reform Party duly changed its name to the Canadian Reform Conservative Alliance or, more commonly, the Canadian Alliance. While many Progressive Conservative members did change sides, others, objecting to the Reform Party's history of social conservatism, chose to carry on as representatives of the Progressive Conservative Party. A complete merger was achieved only in December 2003—although some high profile Progressive Conservatives, still uneasy with the party's socially conservative agenda, preferred to cross the floor and join the Liberal Party instead. Nonetheless, the newly-formed Conservative Party of Canada managed to mobilize centre-right voters and ultimately won the January 2006 election, bringing nearly thirteen years of Liberal Government to an end.

There can be little doubt that the right-wing Opposition, in its various manifestations, supported a more exclusive and impenetrable system of regulation. This is illustrated by the fact that it voted against all the Government's major asylum-related legislation on the grounds that its policies were insufficiently restrictive.⁷⁷ Nonetheless, Opposition

⁷⁷ For the Opposition's justification for rejecting Bill C-11, see Stockwell Day in *Hansard* (13/6/2001: 1540–1600). For its rejection of Bill C-44, see Art Hanger (6/2/1995: 1250–1325).

members were eager to dispel any notion that they were in any way hostile or ambivalent towards refugees or immigrants. Opposition members frequently affirmed their support for continued immigration⁷⁸ and the provision of asylum.⁷⁹ Their support for the latter was justified in terms of rights;⁸⁰ Canada's ratification of the 1951 Refugee Convention;⁸¹ and the fact that the continued provision of asylum represented the will of the Canadian public, exemplified by a remark from Art Hanger, then the Reform Party Member for Calgary Northeast, that 'Canadians welcome the opportunity to provide a new home to those who through no fault of their own are persecuted or displaced by political events and turmoil'.⁸²

Furthermore, the Opposition Party contested any insinuation that their support was anything other than genuine,⁸³ vigorously opposing accusations from the left-wing parties that they were 'anti-immigrant', 'racist' or 'xenophobic'.⁸⁴ For instance, Art Hanger argued that 'It is time to get beyond the we-are-for-immigration-but-you-are-not rhetoric. We are all for immigration.'⁸⁵ Indeed, there is no good reason to assume that the Opposition's support for regulation was driven by racism or xenophobia, especially given that some of its members—such as Inky Mark, Gurmant Grewal, Rahim Jaffer and Deepak Obhrai—came from non-European backgrounds.

⁷⁸ For instance, see Leon E. Benoit in *Hansard* (1/5/2000: 1230), Ken Epp (1/6/2000: 1615), Inky Mark (26/2/2001: 1540–5) and Stockwell Day (13/6/2001: 1545).

⁷⁹ For instance, see Art Hanger in *Hansard* (13/5/1996: 1105), Leon E. Benoit (1/5/2000: 1220), Deepak Obhrai (9/5/2000: 1715), Rahim Jaffer (1/6/2000: 1525), Gary Lunn (1/6/2000: 1600), Paul Forseth (27/2/2001: 1105) and Werner Schmidt (23/10/2001: 1355).

⁸⁰ For instance, Deepak Obhrai remarked in *Hansard* (9/5/2000: 1715) that, 'Nobody denies that a refugee has the right to flee persecution and come to our country.'

⁸¹ Gary Lunn in *Hansard* (1/6/2000: 1605).

⁸² Art Hanger in *Hansard* (3/3/1997: 1105). See also *ibid.* (13/5/1996: 1105), Leon Benoit (1/5/2000: 1220), and Gary Lunn (1/6/2000: 1600).

⁸³ For instance, see Grant McNally in *Hansard* (5/2/1999: 1325), Art Hanger (23/3/2000: 1730–5), Inky Mark (26/2/2001: 1540–5), Paul Forseth (27/2/2001: 1110) and Randy White (27/2/2001: 1245–50).

⁸⁴ For instance, see New Democratic Party member Pat Martin in *Hansard* (23/3/2000: 1730; 26/2/2001: 1705; 1/6/2001: 1230).

⁸⁵ *Hansard* (6/2/1995: 1300).

These inclusive sentiments were not merely rhetorical. Opposition members sometimes took the moral high ground on specific immigration issues, criticizing the Government for the harshness of its actions. In 1999, for instance, the Reform Party took the side of Dr. Sharif Karimzada, a former Afghani diplomat whose refugee status had been revoked and was being threatened with deportation back to Afghanistan.⁸⁶ In another case, Deepak Obhrai, the Reform Party Member for Calgary East, lodged private member's bills in October 1997 and in May 1999 to abandon the 'right of landing fee', the \$1000 application fee for permanent residents that the Liberal Government had introduced in early 1995.⁸⁷ Obhrai argued that 'the right of landing fee is a discriminatory head tax which penalizes genuine refugees seeking protection in Canada. It is ludicrous to offer them financial assistance through resettlement on the one hand and then force them to go into debt in order to pay this head tax on the other.'⁸⁸ This stance led to an unlikely coalition of the Opposition with the minority parties of the left⁸⁹ yet the Liberal Government used its majority in the House of Commons to reject both of the motions. Nonetheless, the Opposition continued to criticize the 'right of landing tax' in coming years.⁹⁰

In sum, then, the Opposition clearly had an aspiration to continue providing asylum to refugees, an aspiration based upon the Opposition's recognition of human rights, international law and the public's support for refugees. This demonstrates that the Canadian centre-right was also unwilling to abandon asylum provision, despite the fact

⁸⁶ See Grant McNally in *Hansard* (25/3/1999: 1455).

⁸⁷ *Hansard* (7/10/1997: 1010).

⁸⁸ *Hansard* (14/5/1999: 1150).

⁸⁹ For instance, see New Democratic Party member Alexa McDonough in *Hansard* (11/5/1999: 1425; 12/5/1999: 1430; 14/5/1999: 1125).

⁹⁰ See Stockwell Day in *Hansard* (13/6/2001: 1550).

that—as we are about to see—it advocated greater levels of restriction towards asylum seekers.

An Aspiration to Regulate Entrance

When it came to the regulation of entrance, the Opposition's rhetoric identified a far broader and more urgent range of threats to Canada than did the Liberal Government's. In the earlier part of the period covered by this research, the Opposition Party's support for greater regulation was partly justified by economic considerations. This stance needs to be understood in the context of economic recession and high unemployment that Canada experienced from the late-1980s to mid-1990s. Opposition members warned that unsuccessful asylum claimants created a 'tremendous burden to Canadian taxpayers',⁹¹ and advanced a private member's bill on 3rd March 1997 to withdraw social welfare benefits to those who remained in the country to appeal their unsuccessful claims, a motion that was rejected by all other parties.⁹² It was also suggested that the annual immigration quota be reduced to relieve pressure on the immigration system and limit the number of unwanted entrants.⁹³ Advocacy for this latter policy evaporated with the economic upturn in the late 1990s; indeed, by 2000, the Opposition Party was expressing its contentment with the existing quota.⁹⁴ Yet its members continued to emphasize the importance of regulating entrance to maximize

⁹¹ Art Hanger in *Hansard* (3/3/1997: 1105–20). See also *ibid.* (6/2/1995: 1250; 13/5/1996: 1110; 3/3/1997: 1105–20), Randy White (19/9/1995: 1655) and Jim Hart (19/9/1995: 1725).

⁹² See Art Hanger in *Hansard* (3/3/1997: 1105).

⁹³ For instance, see *ibid.* (6/2/1995: 1300, 1320) and Jim Silye (19/9/1994: 1720; 19/9/1995: 1810).

⁹⁴ For instance, see Leon Benoit in *Hansard* (1/5/2000: 1225).

the potential economic value of immigration into Canada.⁹⁵ Not only did this mean prioritizing entrants who were economically lucrative,⁹⁶ it also meant restricting those whose entrance incurred costs or minimal benefits: entrants with health issues such as HIV infections,⁹⁷ unauthorized entrants⁹⁸ and ‘economic refugees’.⁹⁹

The Opposition Party shared the Liberal Government’s concerns regarding non-citizens with criminal convictions. Generally, however, Opposition members were more uncompromising in their policy suggestions, suggesting, for instance, that entry for refugees and immigrants be made strictly conditional on a clean criminal record.¹⁰⁰ While the Opposition Party did insist that the immigration system’s problems were created by a minority of individuals,¹⁰¹ its members were liable to muddy the waters, even if inadvertently, by drawing associations that seriously misrepresented the status of asylum seekers. For example, during a debate on transnational crime, Leon Benoit, then the Reform Party Member for Lakeland, argued that ‘international drug cartels have targeted our refugee system as an easy mark to get their dealers on to our streets. Last week Vancouver police arrested 72 drug dealers, most of whom were *refugee claimants*. [emphasis added]’¹⁰² Only minutes later, Grant McNally, the Reform Party Member for Dewdney–Alouette, added that ‘Refugees are abusing this system and

⁹⁵ For instance, see Jim Hart in *Hansard* (19/9/1994: 1730), Art Hanger (6/2/1995: 1320), Leon E. Benoit (1/5/2000: 1255; 27/2/2001: 1255–1305) and Inky Mark (26/2/2001: 1545).

⁹⁶ For instance, see Paul Forseth in *Hansard* (27/2/2001: 1105), Paul Forseth (27/2/2001: 1115), Keith Martin (27/2/2001: 1130) and Stockwell Day (13/6/2001: 1550).

⁹⁷ For instance, see Art Hanger in *Hansard* (15/4/1994: 1145) and Inky Mark (26/2/2001: 1550).

⁹⁸ For instance, see Paul Forseth in *Hansard* (27/2/2001: 1105), Deepak Obhrai (4/6/2001: 1150–1200) and Chuck Cadman (27/2/2002: 1730–5).

⁹⁹ Keith Martin in *Hansard* (27/2/2001: 1130).

¹⁰⁰ For instance, see Art Hanger in *Hansard* (13/5/1996: 1105) and Jim Hart (19/9/1995: 1730–5).

¹⁰¹ Grant McNally in *Hansard* (5/2/1999: 1325).

¹⁰² *Hansard* (21/10/1998: 1435).

dealing drugs on our streets',¹⁰³ a far broader allegation that switches the blame from fraudulent refugee claimants to refugees themselves.

After 11th September 2001, the threat of criminal infiltration of the community was augmented by concerns about terrorism. Opposition members argued that the Government's liberal entrance policy endangered the national security of Canada¹⁰⁴ and increased the likelihood of Canada being used by terrorists as a way-point for attacking the United States.¹⁰⁵ This latter threat, the Opposition Party warned, had major economic ramifications because any tightening of the United States-Canada border would impede the vast commercial trade between their economies.¹⁰⁶ As such, the Opposition proposed a continental security perimeter, advanced as a motion on 23rd October 2001. This policy would be comprised of a safe third country policy that rejected asylum applications from individuals who had come from or passed through the United States and member states of the European Union;¹⁰⁷ a policy of mandatory detention for all undocumented arrivals;¹⁰⁸ the transformation of Canadian customs from a tax collection agency to a law enforcement agency;¹⁰⁹ and the enhancement of traditional border control capabilities, including the securitization immigration and customs officials.¹¹⁰ These measures, the Opposition argued, would allow full

¹⁰³ *Hansard* (21/10/1998: 1435).

¹⁰⁴ See Stockwell Day in *Hansard* (17/9/2001: 1040–50).

¹⁰⁵ For instance, see Gary Lunn in *Hansard* (1/6/2000: 1600), Paul Forseth (23/10/2001: 1445), Vic Toews (23/10/2001: 1510), David Anderson (23/10/2001: 1515), Ted White (23/10/2001: 1705), John Reynolds (29/4/2002: 1415) and Val Meredith (7/11/2002: 1445).

¹⁰⁶ For instance, see Stockwell Day in *Hansard* (23/10/2001: 1005) and Charlie Penson (23/10/2001: 1600–10).

¹⁰⁷ For instance, see Stockwell Day in *Hansard* (23/10/2001: 1010), Lynne Yelich (23/10/2001: 1450) and Chuck Cadman (23/10/2001: 1340).

¹⁰⁸ For instance, see Stockwell Day in *Hansard* (23/10/2001: 1010), Chuck Cadman (23/10/2001: 1340) and Paul Forseth (23/10/2001: 1220).

¹⁰⁹ See Stockwell Day in *Hansard* (23/10/2001: 1010).

¹¹⁰ See *ibid.* (23/10/2001: 1010, 1035) and Paul Forseth (23/10/2001: 1225).

regulation of entrance into the country and thus boost Canadian sovereignty.¹¹¹ While the Opposition Party Leader, Stockwell Day, was careful not to suggest that all refugee claimants were terrorists',¹¹² he nonetheless indirectly associated the asylum system with the entrance of terrorists, describing the 'common *modus operandi*' for terrorists as this:

'[F]irst they would claim refugee status, allowing the claimant to remain in Canada while their case worked its way through the system, which as we all know can take years. Then they would apply for benefits in Canada, welfare and health cards that provided an income stream while they got established. Next they would link with other criminals and terrorists to commit petty theft, economic fraud and other supposedly invisible crime. Then they would launder the money through legitimate businesses which then could be used to finance terrorist operations in Canada or abroad.'¹¹³

Thus, while Day denied that refugee status claimants were typically terrorists, he did imply that the typical terrorist was a refugee status claimant, and thereby drew a strong link between terrorism and asylum seeking.

On the issue of national culture, the Opposition took a position that was wholly independent from the Government's pluralism, openly questioning the merits of multiculturalism. Inky Mark, for instance, advocating the importance of integration, remarked that 'We should always see ourselves as Canadians first before our country of origin. Otherwise we will become a patchwork of ethnic communities, which will

¹¹¹ For instance, see Stockwell Day in *Hansard* (23/10/2001: 1005) and Ted White (23/10/2001: 1255).

¹¹² *Hansard* (23/10/2001: 1020). See also Chuck Cadman (27/2/2002: 1735).

¹¹³ Stockwell Day in *Hansard* (23/10/2001: 1020).

weaken our resolve as a nation.’¹¹⁴ As such, Opposition members were critical of the apparent ease with which membership to the Canadian community could be gained; they spoke of citizenship as a ‘privilege’, as something that ‘should not be given out lightly.’¹¹⁵ In providing a context for their criticisms of contemporary immigration, reconciling this with Canada’s identity as an immigrant nation, Opposition members were apt to mythologize Canada’s past, speaking of historical immigration as free of crime and controversy.¹¹⁶

Opposition members also criticized legal institutions and legal norms as a constraint on the nation’s ability to regulate entrance. Domestic legal institutions were singled out for criticism—for instance, the Canadian Courts were attacked for their leniency toward non-citizens.¹¹⁷ The Immigration Refugee Board was also targeted, with the Opposition even introducing a private member’s bill in May 1996 to propose that it be disbanded.¹¹⁸ In part, this position was justified by the argument that the Immigration Refugee Board applied an excessively broad interpretation of the refugee definition, an interpretation that went beyond what the 1951 Refugee Convention definition required of them.¹¹⁹ The leniency of legal institutions was blamed on ‘special interests from the immigration industry, [who were] perpetuating a system which drains public moneys for its own gain’,¹²⁰ a thinly veiled reference to lawyers and firms that worked on immigration-related cases and appeals.

¹¹⁴ Inky Mark in *Hansard* (26/2/2001: 1540).

¹¹⁵ Deepak Obhrai in *Hansard* (5/6/1998: 1130). See also Grant McNally (16/2/1999: 1030).

¹¹⁶ For instance, see Leon Benoit in *Hansard* (1/5/2000: 1230; 27/2/2001: 1255) and Roy Bailey (1/6/2000: 1550–1600).

¹¹⁷ For instance, see Deepak Obhrai in *Hansard* (5/6/1998: 1130), Grant McNally (26/5/1999: 1440) and Chuck Cadman (27/2/2002: 1740).

¹¹⁸ See Art Hanger in *Hansard* (13/5/1996: 1105–20; 6/2/1995: 1250, 1320).

¹¹⁹ Ibid. (13/5/1996 1110). For further information, see Dolin et al. (2002).

¹²⁰ Art Hanger in *Hansard* (13/5/1996: 1110).

Criticism was also directed at domestic legal norms—in particular, the Government’s commitment to the Singh decision, which afforded non-citizens and citizens equal consideration under the Canadian Charter of Rights and Freedoms.¹²¹ Referring to the clause in the Immigration and Refugee Protection Act legislation that affirmed the Canadian Charter’s full relevance to unauthorized entrants into Canada, Gary Lunn, the Canadian Alliance Member for Saanich–Gulf Islands, argued that ‘It is an utter disgrace and an abuse of power... They could be convicted criminals, terrorists, or queue jumpers.’¹²² In respect to international norms, the Leader of the Opposition, Stockwell Day, complained that the Immigration and Refugee Protection Act 2001 legislation’s commitment to offer safe haven to all individuals under threat of persecution was too expansive and would impede the removal of ‘undesirables’, among whom he listed ‘international terrorists, murderers, members of organized crime, sex offenders and child abusers.’¹²³

Yet the Opposition Party was not always resisting legal norms—these norms were also used to justify the regulation of entrance. Opposition members argued that, by giving non-citizens equal rights of appeal in accordance with the Singh decision, Canada was operating outside of international norms.¹²⁴ In support of a safe third country policy, Opposition members argued that such a policy was consistent with the norms of other liberal democratic nations,¹²⁵ as well as being permissible within the

¹²¹ For instance, see Leon Benoit in *Hansard* (1/5/2000: 1250), Reed Alley (9/5/2000: 1620), Rahim Jaffer (1/6/2000: 1355), Lee Morrison (1/6/2000: 1545), Gary Lunn (1/6/2000: 1605), Inky Mark (26/2/2001: 1610) and Randy White (27/2/2001: 1250).

¹²² *Hansard* (1/6/2000: 1605).

¹²³ *Hansard* (13/6/2001: 1550).

¹²⁴ For instance, see Stockwell Day in *Hansard* (13/6/2001: 1550) and Keith Martin (27/2/2001: 1130).

¹²⁵ See Paul Forseth in *Hansard* (27/2/2002: 1820).

guidelines of the United Nations.¹²⁶ Opposition members even argued in favour of a more stringent application of the United Nations' refugee definition, arguing that it would reduce the number of people that were presently accepted by the Canadian legal system.¹²⁷

The Opposition Party also blamed the immigration system's faults on the prevalence of liberal idealism in political decision-making, using asylum policy as part of a broader ideological dispute between the major parties. Referring to the 1976 Immigration Act, Jim Hart, the Reform Party Member for Okanagan–Similkameen–Merritt, remarked that 'Since that Liberal heyday of the seventies when Trudeau and his obedient officials opened the floodgates to immigration—based not on the needs of the country, not on selectivity or high standards, but on some seemingly intangible set of feel good principles—Canada has been on a backward slide.'¹²⁸ In the wake of 11 September 2001, the Leader of the Opposition, Stockwell Day, identified the immigration system as a threat to Canadian national security, concluding that a fundamental cause of its laxity was 'the federal Liberal notion that all people are basically good and that there are no mean and nasty people out there.'¹²⁹ Thus, the Opposition assumed for itself the more 'realistic' perception of security issues and, in doing so, categorized the Government's idealism as dangerously naive.

In relation to the Liberal Government, then, the Opposition Party identified a wider and more urgent range of threats to Canadian interests under the existing system of

¹²⁶ See John Duncan in *Hansard* (1/6/2000: 1630), Ted White (23/10/2001: 1315) and John Reynolds (30/4/2002: 1415).

¹²⁷ For instance, see Inky Mark in *Hansard* (26/2/2001: 1545, 1610) and Leon Benoit (27/2/2001: 1325; 4/6/2001: 1610).

¹²⁸ *Hansard* (19/9/1995: 1730).

¹²⁹ *Hansard* (23/10/2001: 1030). See also Richard Harris (23/10/2001: 1555).

regulation, identifying threats to the economy, cultural community, national security and the asylum system.

A Conflict of Aspirations

Overall, then the policy proposals and rhetoric of the right-wing Opposition was distinctly more restrictive than the Liberal Party's. Nonetheless, with its strong commitment to the continued provision of asylum, the Opposition was not so different from the Government insofar as it had the same dual aspirations to regulate entrance and provide asylum. Perhaps unsurprisingly then, Opposition rhetoric was sometimes indistinguishable from the Government's—consider, for example, this remark by Gurmant Grewal, the Canadian Alliance Member for Surrey Central, that 'The system should work for the legitimate, genuine people who want to come to Canada, not for those who are criminals or who would enter through the back door and abuse the system.'¹³⁰ In discussing the Immigration and Refugee Protection Act legislation, Leon Benoit, the Opposition Critic for Citizenship and Immigration, expressed his approval of the Government's objective of 'closing the backdoor to open the front door', even suggesting that the tough stance embodied by Bill C-31 'sounds a lot like the message that the Canadian Alliance Party has been presenting for some time now.'¹³¹ The Opposition's refusal to vote in favour of the Immigration and Refugee Protection Act legislation was an expression of dissatisfaction with the legislation rather than an

¹³⁰ *Hansard* (1/5/2000: 1640).

¹³¹ *Hansard* (1/5/2000: 1220).

outright objection to its goals, a symbolic gesture that ultimately posed no significant political obstacle to its transition into law.

In support of a more regulated system of entrance, Opposition members advocated a variety of potential policy measures: a system of safe third country policies with other developed nations, to be enforced unilaterally if necessary;¹³² the mandatory detention of entrants until their identities and refugee status were determined;¹³³ the hasty removal of asylum claimants whose applications were unsuccessful;¹³⁴ and a more coordinated, multilateral solution to the problem of international organized crime.¹³⁵ Opposition members also argued that, just as records were kept on the identities of arrivals into the country, records should be kept on those that had departed,¹³⁶ a measure that would help to determine how many asylum claimants, whose whereabouts were unknown, were still within the country. Among the other proposals was the suggestion of Ken Epp, the Canadian Alliance Member for Edmonton–Sherwood Park, that propaganda be used to dissuade illegal immigrants from attempting to reach Canada;¹³⁷ and the suggestion by Rob Anders, the Canadian Alliance Member for Calgary West, that a bond be posted by temporary entrants that would be forfeited if he or she failed to leave in accordance with their permit.¹³⁸ Finally, the Opposition argued that an impenetrable system of regulation was important for the deterrent effect it had

¹³² See Art Hanger in *Hansard* (13/5/1996 1110); Ted White (18/2/2000: 1100); Leon Benoit (1/5/2000: 1540); Ted White (9/5/2000: 1635); Gary Lunn (1/6/2000: 1610); Chuck Cadman (27/2/2002: 1730–40); John Reynolds (30/4/2002: 1415; 30/4/2002: 1455); Paul Forseth (27/2/2002: 1820); Diane Ablonczy (30/4/2002: 1415; 30/4/2002: 1435).

¹³³ See Leon Benoit in *Hansard* (20/10/1999: 1435); and Gary Lunn (1/6/2000: 1610).

¹³⁴ For instance, see Reed Alley in *Hansard* (9/5/2000: 1620), Gary Lunn (1/6/2000: 1610), Ken Epp (1/6/2000: 1620) and Paul Forseth (1/6/2000: 1640).

¹³⁵ For instance, see Reed Alley in *Hansard* (9/5/2000: 1620), Paul Forseth (27/2/2001: 1115) and Keith Martin (27/2/2001: 1130–5, 1150).

¹³⁶ For instance, see Inky Mark in *Hansard* (26/2/2001: 1610) and Stockwell Day (13/6/2001: 1555).

¹³⁷ *Hansard* (1/6/2000: 1620).

¹³⁸ *Hansard* (9/5/2000: 1640).

on unwanted entrants. Members argued that a lax entrance policy served to encourage further abuse of immigration systems.¹³⁹

Not only was the Opposition more restrictive in its policy proposals, it was also less compromising in their enforcement. On the issue of a safe third country policy with the United States, for instance, Diane Ablonczy, the Canadian Alliance Member for Calgary–Nose Hill, advocated its unilateral enforcement. When the Liberal Government claimed to be engaged in ongoing bilateral negotiations,¹⁴⁰ Ablonczy remarked that, ‘as a sovereign country... it is up to us who we decide to let across our border. It is not up to us to beg the United States to let us refuse refugee claimants from its country.’¹⁴¹

From the perspective of this thesis, however, the most interesting aspect of Opposition policy was its frequent and continued insistence that it would prefer to resettle mandated refugees from countries of first asylum rather than providing asylum to individuals who had applied from within Canadian territory.¹⁴² This policy prescription appears to emerge from a set of political calculations that are similar to those of the Liberal Government. Like Liberal members, Opposition politicians argued that the misuse of the asylum system diminished public support for refugee resettlement,¹⁴³ thus a more effective system of regulation would create a more

¹³⁹ For instance, see Gary Lunn (1/6/2000: 1600), John Duncan (1/6/2000: 1630), Reed Alley (9/5/2000: 1620), Inky Mark (26/2/2001: 1555–1600) and Vic Toews (23/10/2001: 1510).

¹⁴⁰ See Mark Assad in *Hansard* (27/2/2002: 1740–50).

¹⁴¹ *Hansard* (30/4/2002: 1415, 1435).

¹⁴² For instance, see Art Hanger in *Hansard* (6/2/1995: 1320; 3/3/1997: 1120), Val Meredith (13/5/1996: 1150), Leon Benoit (1/5/2000: 1255; 27/2/2001: 1255–1300; 4/6/2001: 1610), Keith Martin (27/2/2001: 1140), Grant McNally (27/2/2001: 1330), Stockwell Day (30/10/2001: 1415), Ted White (23/10/2001: 1200, 1330; 30/4/2002: 1430–35), Chuck Cadman (27/2/2002: 1735), Rahim Jaffer (30/4/2002: 1450), Ken Epp (30/4/2002: 1450) and Diane Ablonczy (27/1/2003: 1440).

¹⁴³ For instance, see Val Meredith in *Hansard* (29/10/1996: 1055), Reed Alley (9/5/2000: 1620), Deepak Obhrai (9/5/2000: 1720) and Chuck Cadman (27/2/2002: 1730).

favourable public attitude for continued asylum provision. This was implicitly tied to the Opposition Party's appeals to populism, its claims that support for regulation was representative of the will of the Canadian people.¹⁴⁴ The logical conclusion to this argumentation is that, if a government decided not to recognize asylum claims on its territory it would be free to impose whatever regulations it deemed necessary; yet it would also be free to administer a programme of resettlement for mandated refugees that conformed to the demands of regulation and thus enjoyed wide public support. The aspiration to regulate entrance would be fully satisfied, and the aspiration to provide asylum would be satisfied by a controlled programme of refugee resettlement. This is a leap that the Liberal Government never quite made, yet it is implicit nonetheless in the policies it enforced to tighten Canada's borders against irregular immigration.

¹⁴⁴ For instance, see Jim Hart in *Hansard* (19/9/1995: 1730).

3: The Politics of Asylum in Australia

This survey of the asylum policies and related rhetoric of the major political parties during the Howard Government will take the same structure as the preceding survey of Canadian policy. Firstly, it will begin with a historical overview of Australia's asylum and immigration systems, then survey the asylum policies that the Howard Government implemented through legislation and regulation between 1996 and the end of 2005. The third and four sections will be surveys of the rhetoric of the Liberal Party of Australia and the Australian Labor Party respectively, identifying each party's aspiration to provide asylum, its aspiration to regulate entrance, and its justifications for the balance struck between the two.

3.1: The Australian Immigration Regime: A Historical Overview

The origins of Australia's refugee resettlement schemes can be found in the Displaced Persons Program that operated between 1947 and 1953. In the post-war period, Australia aspired to boost its population to meet two immigration objectives: first, to satisfy the labour requirements of a prosperous post-war economy and, second, to provide a form of defence from its populous Asian neighbours. The slogan 'populate or

perish' was used successfully by Joseph Chifley's Labor Government (1945–1949) to capture the issue's political urgency and its pertinence to Australia's national interests (Grattan 1993: 128–9). To address these primary concerns, the Labor Government resettled thousands of people from European refugee camps, a policy which coincided with the subsidiary concern of fulfilling Australia's humanitarian obligations. An essential part of the Displaced Person's Program was a mandatory two-year work contract as a labourer in a prescribed location, notably the Snowy Mountains Hydroelectric Scheme. Given its clear benefits to the Australian nation, the Displaced Person's Program attracted little public controversy (Kabala 1993: 16–7).

In the following decades, successive governments accepted refugees in an *ad hoc* fashion, responding to major refugee crises when they occurred and political circumstances demanded it. These included Hungarian refugees in 1956 and again in 1972, Czechoslovakians in 1968, Russian Christians from China, and Jews from the Soviet Union (Jupp 2002: 180). The sum of this resettlement was vast, accounting for 250,000 refugees by 1960; but preferential selection meant that refugees were only admitted if they were of an 'acceptable' ethnicity and sufficient economic utility (Neumann 2004: 36–7).

In the 1970s, however, the Australian government was presented with a very different situation. Insecurity within the South East Asian region led to refugees pouring out of Vietnam, Laos and Cambodia into camps in neighbouring countries and, eventually, across the Torres Strait to the Australian coastline. Unlike other refugees, who arrived through official routes from faraway places, these refugees were arriving, unannounced, directly onto Australian territory. The arrival of these so-called 'boat-people' was met

with great controversy in Australia, stimulating latent fears about an imminent invasion from the north. Gough Whitlam's Labor Government (1972–1975) was unsympathetic toward refugees escaping South Vietnam, concerned about the political effects of an influx of emotional anti-communists who were ideologically disposed against their government (Grattan 1993: 130–1; Mares 2001: 67). The Liberal Government of Malcolm Fraser (1975–1983) took a more proactive approach, spearheading discussions with the UNHCR and the United States that led to the development of an 'orderly departure program' with Vietnam in 1979. The programme's ambition was to reduce irregular immigration by providing refugees with official avenues to gain asylum in the West.

The strategy worked. By 1981, the stream of boats arriving had dried up and some 50,000 Indochinese had been relocated to Australia through official channels (Gibney 2004: 179). The Labor Party, which had initially sided with Australian trade unions to oppose the programme, abandoned this position in 1980 and gave the Liberal Government its support (Rubenstein 1993: 148–9). Thus, the programme was maintained and a quota was established to resettle some 10,000 refugees annually, many of whom were accepted on the grounds of pre-existing connections within Australia or sponsorship by relatives. Most of these came from Indochina although there were also entrants from other troubled nations, significantly Lebanon, Chile, and Yugoslavia. Additionally, a Special Assistance Category was created in 1991 to accommodate the claims of people who did not meet existing criteria but were in great enough danger to warrant special consideration by the Immigration Minister (Stevens 2002: 867). Thus, between 1945 and the early 1990s, more than half a million refugees

and displaced persons had been accepted into Australia, including some 137,000 Indo-Chinese refugees (Robinson 1998, cited in Gibney 2004: 166).

Yet the arrival of nine boatloads of Cambodian, Chinese and Vietnamese nationals on Australia's northern coast between November 1989 and December 1991, most of whom claimed refugee status, tested the tolerance of political authorities. Given that the orderly departure program and the subsequent resettlement quotas were supposed to have solved this problem, their arrival was not welcome to the public or politicians. Furthermore, it complicated the Cambodian peace process in which Australia was then involved, one aspect of which was the repatriation of Cambodians from Thai refugee camps (Stevens 2002: 876). Paul Keating's Labor Government (1991–1996) decided to take a tough stance on irregular immigration in the hope of discouraging further arrivals (Grattan 1993: 135–6). Up until this point, asylum claimants were typically lodged in open migrant hostels while they waited for their refugee status claims to be determined.¹⁴⁵ Penal detention was only ever been enforced on those whose identities could not be ascertained or those who were being deported (Jupp 2002: 189). But this situation was abandoned in 1992 when fifteen Cambodian asylum claimants, detained for almost two years because of their uncertain identity, attempted to acquire bail through the Federal Court. In response, the Labour government introduced a policy of mandatory detention for *all* asylum claimants, enforcing it retrospectively to include the bail applicants. The relevant legislation, the Migration Amendment Act 1992, stated that 'it is *in the national interest* that each non-citizen who is a designated person should be kept in custody until he or she leaves Australia or is given an entry permit'

¹⁴⁵ In some cases, this determination process took four years, partly due to the flood of refugee status claims lodged in the wake of the Tiananmen Square protests in 1989 and partly the asylum system's general administrative inefficacy (Stevens 2002: 876–7).

[emphasis added] (s. 54J, cited in Cronin 1993: 101). As such, an asylum seeker would be detained until their refugee status had been approved or they left the country. From here on in, detention was the norm for any asylum seeker arriving without authorization.

Other considerations have had an important influence on Australian entrance policy. The adoption of economic rationalism in policymaking by the Liberal Government in the late 1970s encouraged the regulation of immigration to facilitate the entrance of skilled immigrants. While economic considerations had long dominated Australian entrance policy, responding specifically to labour shortages and surpluses, this new attitude introduced neo-liberal ideals to entrance policy. The major features of this policy were isolating the immigration system from the influence of special interest groups, especially ethnic lobby groups; introducing ‘user-pays’ principles to the immigration system; and enhancing the economic benefits of immigration by employing strict preferential selection criteria and withdrawing forms of social welfare to non-citizens (Jupp 2004: 141–61).

Another principle that emerged in the 1970s, but embraced as unequivocally, was the principle of multiculturalism. This notion was first introduced in the 1970s as an alternative to the long-held ‘traditional source’ policy that had regulated Australian immigration in accordance to an ideal of replicating British culture. Thus, if immigrants from Britain could not meet labour demands, preference was then given to those from ethnically similar European nations. The policy was implemented by a dictation test, the rumour of which discouraged most non-Europeans from attempting to immigrate; and the refusal to officially naturalize any immigrants of non-European descent (Jupp

2002: 8–9). These practices—in addition to the neglect and forced assimilation of the Aboriginal population—came to be known as the White Australia policy. Whitlam’s Labor Government officially abandoned this policy in 1972, paving the way for a broader conception of Australian culture (Grattan 1993: 129–31). It was left to the following administration, Malcolm Fraser’s Liberal Government, to introduce multiculturalism in 1977 by way of an Australian Ethnic Affairs Council report. The approach was tagged ‘cultural pluralism’ and defined thus: ‘What we believe Australia should be working towards is not a oneness, but a unity, not a similarity, but a composite, not a melting pot but a voluntary bond of dissimilar people sharing a common political and institutional structure.’ (cited in Jupp 2002: 86). In 1979, the Australian Institute of Multicultural Affairs was established to promote the new agenda. Yet, with the departure of Fraser in 1983, conservative discontent over the notion of multiculturalism blossomed in the Liberal Party, thwarting any attempts to solidify it into legislation. Two very public controversies served to inflame the issue further. The first involved Professor Geoffrey Blainey, a historian and public commentator, who famously decried Asian immigration and multiculturalism in 1984 and, in the process, catalysed conservatives, bringing about their resurgence in the public arena (Rubenstein 1993: 151–2). The second involved then-Liberal leader John Howard who broke with official bipartisan consensus over multiculturalism in his speech to the party in 1988. He criticized Asian immigration and advocated a One Australia policy, an assimilationist notion that demanded loyalty to Australian traditions and values over any other. The media treated his stance unfavourably and Howard’s support dropped swiftly in the polls, precipitating his replacement as Leader the following year

(Rubenstein 1993: 152–5). Nonetheless, the conservative critique of multiculturalism persisted in the public arena, albeit less vociferously, demanding an Australian culture that was homogenous and built upon shared values. For its part, the Labor Government, under Bob Hawke and Paul Keating, resisted such sentiments throughout the 1980s and 1990s, emphasizing the importance of pluralist national values in their official policy formulations (Jupp 2002: 110–3).

Finally, Australian entrance policy has also been influenced by the principle of bipartisanship that exists between the two major parties on immigration issues. Following the Labor Government's defeat in 1975, the succeeding Liberal Government continued with a very similar approach in respect to immigration, boosting the annual quota and distancing the nation from the legacy of the White Australia policy. The Australian Labor Party, for its part, lodged its support for the Liberals' entrance policy, raising only mild objections to the high immigration intake for the pressure it put on the unemployed (Grattan 1993: 131). By 1981, bipartisanship was formalized as an official policy for both parties and since then it has been a norm that is expected of one another (McAllister 1993).

In sum, then, Australia has a history of substantial asylum provision. Strategic and economic self-interest has had a significant role in motivating the provision of asylum and, perhaps, can help to account for its notable scale. Yet Australia has also demonstrated its strong willingness to regulate entrance, to enforce a traditional source policy through its White Australia policy and, in the 1990s, to enforce a policy of mandatory detention for asylum claimants.

3.2: The Asylum Policy of the Australian Liberal Government: 1996–2005

John Howard returned to the Liberal Party leadership in early 1995 and won the general election of March 1996, forming a majority coalition in the House of Representatives with the conservative National Party of Australia. The Australian Labor Party, after thirteen years in power, took its place in Opposition, the role of Party Leader assumed by Kim Beazley. Labor's representation in the Senate, however, was comparatively stronger, so much so that the Government could be overpowered in the Senate if the Australian Labor Party could win the support of senators from the Democratic Party and the Green Party, and the two independents, Brian Harradine and Mal Colston. This put limits on the Liberal Government's legislative powers: no new legislation could be adopted without Senate approval. In such cases, the Government could abandon the bill, revise it, or, if the bill was blocked repeatedly, the Government could call for a double dissolution, requiring the re-election of both the Senate and the House of Representatives.

During the Liberal Government's first term, the number of irregular arrivals by boat was minimal. Between 1995 and 1998, a total of 1,434 people arrived by boat, mostly Chinese and Sino-Vietnamese, of which 170 were accepted as refugees and 1,246 were expelled (Manne 2004: 5). Nonetheless, in June 1996, the newly-appointed Minister for Immigration and Multicultural Affairs, Phillip Ruddock, singled out the asylum system

as an area of likely reform, particularly the judicial review of immigration-related decisions.¹⁴⁶

The following year, policies were introduced to address these issues on three fronts. The first sought to regulate the migration advice industry, reining in legal advisors who were encouraging immigrants to lodge an appeal if their initial applications had failed or their permits had expired—even if the appeal had little chance of being recognized.¹⁴⁷ The legislation was passed with Opposition support.¹⁴⁸

The second involved the outsourcing of management for Australian detention facilities, a role that had previously been the Government's. Control was handed over to Australasian Correctional Management, a private company owned by the Wackenhut Corporation. This move was consistent with the Government's commitment to economic rationalism and, in particular, its ambition to cut public costs.¹⁴⁹

The third legislative solution was the Migration Legislation Amendment Act (No. 4) 1997, introduced to Parliament on 25th June 1997. The major goal of the legislation was to make the immigration system more efficient by limiting opportunities for judicial review. Most significantly, the two-tiered procedure of review for immigration decisions was reduced to a single review by an independent body. On asylum policy specifically, a \$1,000 fee was introduced for refugee status claimants who appealed their decisions and failed, a means of discouraging individuals from lodging false

¹⁴⁶ *Hansard* (24/6/1996: 2555–6).

¹⁴⁷ Principally, this was achieved through the Appropriation Act (No. 1) 1997–98, introduced on the 28th May 1997, and the Migration Legislation Amendment Act (No. 3) 1997, introduced on the 3rd June 1997.

¹⁴⁸ For instance, see Duncan Kerr in *Hansard* (21/10/1999: 12122–9).

¹⁴⁹ A minor scandal was created in late 2000 when the company's founder, George Wackenhut, applauded the punitive turn taken by the Australian Government in a documentary aired on Australian television, commenting that, 'They're really starting to punish people, as they should have all along. This year we are going to make \$US400 million' (Lagan 2000).

claims to extend their stay. This punitive measure was criticized by a range of non-governmental organizations, ethnic lobby groups and refugee advocates.¹⁵⁰ Finally, Ruddock announced the Liberal Government's plans to withdraw the right of judicial review for immigration cases entirely—including appeals on humanitarian and refugee grounds.¹⁵¹ The Shadow Minister for Immigration, Martin Ferguson, announced that the Australian Labor Party would support the legislation that was on the table, citing the Opposition's commitment to bipartisanship in immigration matters;¹⁵² yet, on the possibility of a future withdrawal of judicial reviews, Ferguson warned, 'We oppose the wholesale elimination of judicial review as wrong in principle and the thin edge of the wedge for other administrative review matters—that, to the Labor Opposition, is exceptionally important.'¹⁵³

Despite this warning, the Liberal Government developed its Migration Legislation Amendment (Judicial Review) Bill 1998, bypassing the House of Representatives and delivering it directly to the Senate on 2nd December 1998. This legislation sought to withdraw the right to judicial review for immigration-related appeals. The Australian Labor Party opposed the bill on the grounds that it was constitutionally questionable, undermined the role of the Courts, and possibly breached international obligations to provide equal access to legal institutions. Support from other senators outside the Labor Party was mobilized and the Opposition coalition overpowered the Government, rejecting the new legislation. Con Sciacca, the new Shadow Minister for Immigration (1998–2001), remarked that 'the Opposition is in agreement with the Government that

¹⁵⁰ Andrew Theophanous in *Hansard* (31/5/1999: 5497).

¹⁵¹ *Hansard* (25/6/1997: 6281–4).

¹⁵² *Hansard* (3/9/1997: 7622–3).

¹⁵³ *Hansard* (3/9/1997: 7623).

something has to be done to stop the rotting of the system by unscrupulous lawyers and migration agents... [but] taking away the right to judicial review was not the sensible and correct course of action.’ (Bills Digest 1998).¹⁵⁴

The salience of the asylum issue, in spite of the relatively small numbers of asylum seekers, was reinforced by the parliamentary presence of the radical right, One Nation Party.¹⁵⁵ One Nation was created around Pauline Hanson, the Member for Oxley, who had won the electorate as an independent in 1996.¹⁵⁶ Typical of radical right parties, One Nation was populist, nationalist and hostile to immigration, advocating a ‘zero net’ policy that would only allow enough immigrants to keep the general population stable. She denounced the principle of multiculturalism unequivocally, claiming, ‘It is not for us to change, but for them to assimilate.’¹⁵⁷ On the issue of racism, an accusation which Hanson was often denying, Jupp (2002: 138) has described One Nation as ‘not overtly racist, [yet] much of its appeal was to racist sentiments.’ In regard to the provision of asylum, however, even One Nation lodged its commitment: ‘Compassion must be extended to genuine refugees but temporary refuge need not extend to long-term permanent settlement in Australia’ (One Nation 1998). While it recognized a need for asylum provision, it limited this to ‘temporary refuge’, a principle which would allow it greater regulatory control over membership to the Australian national community (and a principle which, as we shall see, was later adopted by the Liberal Party).

¹⁵⁴ Bills Digest No. 90. Migration Legislation Amendment (Judicial Review) Bill 1998. Accessed at: <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd090.htm>

¹⁵⁵ For an excellent summary of One Nation and its politics, see Jupp (2002: 123–40).

¹⁵⁶ She had initially run for the electorate of Oxley as a Liberal Party member but was disendorsed after criticizing special services for Aborigines. See Jupp (2002: 123–40).

¹⁵⁷ *Hansard* (3/9/1997: 7641). The party’s official policy statement was ‘One Nation understands the desire for migrants to maintain their culture in Australia. But, the desire Australians have to maintain their culture, history and traditions must take precedence.’ (One Nation 1998).

The Liberal Party advanced on this conservative constituency after One Nation's surprise success in the 1998 Queensland state elections where it took nearly 23 per cent of the vote. In the lead-up to the general election, the Liberal Government took a stronger line on immigration and Aboriginal issues and succeeded in absorbing most of One Nation's electoral support. As a result, Pauline Hanson was knocked out of Parliament, One Nation was left only with its one Senate seat, and the Liberal Party retained its hold on government. Yet, while its parliamentary presence was brief, its political effects have been more substantial. Jupp (2002: 139) has argued that the popularity of One Nation legitimized a conservative reactionary view within Australian society that was nationalist, assimilationist, anti-intellectual and prevalent enough to secure valuable parliamentary seats: '[One Nation] created the belief that there was a large constituency of "Aussie battlers" whose prejudices had to be treated seriously' (ibid.).

During the Liberal Government's second term (1998–2001), a new wave of asylum seekers began arriving on Australia's northern coastline that was much larger than before. Between July 1999 and February 2000, there were 3,484 unauthorized arrivals by boat and another 1,148 by air.¹⁵⁸ While not all of these arrivals claimed asylum, the Government still received 2,032 asylum applications in the period from January 1999 to the end of February 2000.¹⁵⁹ The other notable feature of these asylum seekers were their origins. Some 57 per cent were Iraqis, 32 per cent Afghani and the rest mainly Iranian, Sri Lankan, Turkish, Kuwaiti, Bangladeshi, Somali and Algerian asylum

¹⁵⁸ Department of Immigration and Multicultural and Indigenous Affairs figures, cited in *Hansard* (9/5/2000: 16110).

¹⁵⁹ Ibid. (9/5/2000: 16113).

seekers.¹⁶⁰ This was a huge shift from the largely South East Asian asylum seekers of the past. Furthermore, the majority of these asylum seekers were successful in their claims of refugee status which, Ruddock remarked, made them ‘unlike those we have seen before who have not been able to sustain asylum claims’.¹⁶¹

The first adjustment to asylum policy after the 1998 election was to strengthen traditional border control capabilities. Working from the recommendations of the Coastal Surveillance Task Force report, the Border Protection Legislation Amendment Act 1999, introduced on 22nd September 1999, announced a \$124 million package, delivered over four years, to boost the resources of Australia’s coastal surveillance facility, the Coastwatch, and increase the powers of Customs officers.¹⁶² The legislation received Opposition support.

Yet, with the number of irregular arrivals growing rapidly, the Liberal Government announced on October 13th 1999 that it would enforce a number of markedly restrictive policy measures, implemented through regulation rather than legislation.¹⁶³ The first was the introduction of a safe third country policy. Henceforth, asylum applications would not be accepted from any person who had arrived from a country where they were not thought to be in immediate danger. The second measure provided legislation for gathering fingerprints and other biometric data, such as DNA testing, face, palm or retinal recognition and voice testing, to ascertain the identity of the asylum seeker. The third measure was the introduction of the temporary protection visa, a policy that had

¹⁶⁰ Ibid.

¹⁶¹ *Hansard* (13/10/1999: 11475).

¹⁶² The legislation allowed Customs officers to carry arms, extended their ability to board, search, detain and destroy boats, ships and aircraft, and to search and detain people suspected of committing criminal offences.

¹⁶³ See Philip Ruddock (1999) and in *Hansard* (13/10/1999: 11475).

been at the core of One Nation Party proposals (Jupp 2002: 192). Thus, once a refugee status claim had been accepted, the claimant would be given a three year entrance permit and, once this period had passed, their circumstances would be reassessed and they would be either removed or given a new temporary protection visa. While these measures were introduced through regulations and so did not need parliamentary support, the Labor Opposition nonetheless announced that it was in favour of the Government's policies,¹⁶⁴ smoothing out some minor quibbles through bipartisan discussions.¹⁶⁵

The Labor Opposition continued to support Liberal Government policy in the following months, expressing its approval of the Government's restrictions on the rights of temporary protection visa-holders to choose where they would live;¹⁶⁶ and the Government's novel initiative of disseminating videos throughout the Middle East that depicted the route of irregular migration to Australia as extremely hazardous, populated by snakes, crocodiles and sharks (Australian Broadcasting Corporation 2000).

The Labor Party also, by and large, supported the Government's administration of the mandatory detention policy, even in the face of growing public controversy.¹⁶⁷ By the end of the decade, Australia's detention facilities and its refugee status determination systems were straining to contain the large numbers of recent asylum claimants. To accommodate new detainees, extra facilities were constructed, most notoriously the detention centre in Woomera, South Australia. Opened in November 1999 (Jupp 2002:

¹⁶⁴ For instance, see Martin Ferguson in *Hansard* (22/11/1999: 12314), Duncan Kerr (25/11/1999: 12731–2) and Con Sciacca (25/11/1999: 12733).

¹⁶⁵ Duncan Kerr in *Hansard* (25/11/1999: 12731–2).

¹⁶⁶ Specifically, the Liberal Party prohibited temporary protection visa-holders from settling in New South Wales, arguing that it needed to encourage new immigrants to settle in regional areas and ameliorate labour shortages there. Philip Ruddock in *Hansard* (26/3/2001: 25622).

¹⁶⁷ For instance, see Con Sciacca in *Hansard* (27/2/2001: 24491; 22/8/2001: 30027), John Murphy (23/8/2001: 30126) and Janice Crosio (23/8/2001: 30129).

194), Woomera came to be a focal point for public consternation over detention. Yet the overcrowding of facilities was more easily solved than the growing symptoms of unrest: riots, escapes, hunger strikes and other forms of protest. In response, the Liberal Government introduced the Migration Legislation Amendment (Immigration Detainees) Act 2001 on 27th June 2001, which allowed officers to perform strip searches on all detainees—men and women, including those as young as ten years old. The Government argued that this policy was required to combat the concealment of weapons in detention centres. Initially, the Labor Party rejected the initial bill; yet, when the Government adopted Opposition amendments that further specified the grounds of suspicion, the Opposition gave its support for the legislation.¹⁶⁸

Only on one issue did the Labor Opposition refuse to acquiesce to the principle of bipartisanship: the withdrawal of judicial reviews. On 14th March 2000, Philip Ruddock introduced the Migration Legislation Amendment Bill (No. 2) 2000 which would have prevented class actions in the Federal and the High Court, and introduced absolute time limits for High Court appeal applications. The Australian Labor Party opposed the legislation¹⁶⁹ and the Liberal Government, who could not pass it through the Senate without Opposition support, abandoned the bill.

By 2001, with asylum seekers still arriving in substantial numbers, it was clear that the Liberal Government's policies were failing to control entrance. This put the Liberal Party in an awkward situation with a general election due that year. Already trailing in the polls due to its unpopular goods and services tax (Jupp 2002: 37), the Liberals were forced to look for new solutions. In March 2001, Philip Ruddock announced that the

¹⁶⁸ Con Sciacca in *Hansard* (22/8/2001: 30020).

¹⁶⁹ *Ibid.* (6/2/2001: 23913–4).

refugee resettlement program would be frozen. He argued that Australia's annual refugee quota would be surpassed that year because of the additional refugees arriving irregularly, and the only way to stay within the quota was to halt resettlement until immigration officials knew what the annual total would be.¹⁷⁰

The asylum crisis reached its climax in late August 2001. Already in the first three weeks of that month, six boats carrying a total of 1,200 people had arrived in Australia (Manne 2004: 12). The possibility of employing military deterrence had been mooted in earlier months (Marr and Wilkinson 2003: 46) but no firm commitment was made until the 26th August, 2001, when the MV *Tampa*, a Norwegian container ship passing through the Torres Strait, picked up 433 asylum seekers from a sinking boat and headed for Christmas Island, an Australian dependency. The Government refused the *Tampa* permission to enter Australian waters but the captain, concerned for the health of the asylum seekers, disobeyed. Australian defence troops boarded the *Tampa* and took the passengers into military custody on the naval ship, HMAS *Manoora* (Marr and Wilkinson 2003; Betts 2001: 38–40).

To facilitate these and future asylum seekers, the Government implemented its so-called Pacific Solution, a conglomeration of inter-related measures. A policy of military interdiction—known as Operation Relex—was enforced to halt the arrival of subsequent boats. The boats that were too unseaworthy to be turned back to Indonesia were taken under Australian military control and their occupants taken into custody. To accommodate these asylum seekers, the Australian Government arranged facilitation centres to be built on Papua New Guinea and Nauru. In this way, these asylum seekers never entered Australian territory where they could lodge an asylum claim. Once

¹⁷⁰ *Hansard* (7/3/2000: 14045).

delivered to these offshore centres, their claims were processed by the UNHCR. For those that meet refugee status criteria, their resettlement as mandated refugees was organized in conjunction with other nations. The practical advantage of this arrangement, the Government argued, was that the UNHCR generally had a lower rate of acceptance than the Australian legal system and so fewer asylum claimants would eventually require resettlement.¹⁷¹ The final aspect of the Pacific Solution was the excision of a number of islands from Australian territory, including Christmas Island, Ashmore reef and the Cocos Islands. Any asylum seeker arriving on these territories could no longer make a legitimate asylum claim to the Australian authorities (Jupp 2002: 194–6).

The Pacific Solution was decisive, uncompromising and enormously popular. An A. C. Nielsen poll for *The Age* found that 77 per cent of respondents supported the government's decision to refuse entry to the asylum seekers; and 74 per cent approved of Howard's overall handling of the situation (Betts 2001: 41–2). After initially opposing the initial bill and blocking it in the Senate (Marr and Wilkinson 2003: 89–101), the Labor Party voted in favour of the Border Protection Act on 18th September 2001.¹⁷² The Labor Party's change of position was precipitated by widespread public hostility towards its position, the heightened security fears in the wake of the World Trade Centre attacks in New York only a week earlier, and the implications of all this for the upcoming November election.

¹⁷¹ For instance, see Philip Ruddock in *Hansard* (18/9/2001: 30846; 20/6/2002: 4066), Geoffrey Prosser (20/9/2001: 31119), Christopher Pyne (20/9/2001: 31114), Alan Cadman (20/6/2002: 4033) and Barry Haase (31/3/2004: 27687).

¹⁷² The legislation for the Pacific Solution was contained variously within the Border Protection (Validation and Enforcement Powers) Act 2001, Migration Amendment (Excision from Migration Zone) Act 2001 and the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001.

Taking advantage of the political environment it found itself in, the Liberal Government pushed other restrictive bills through the House of Representatives, not specifically related to the administration of the Pacific Solution. The Migration Legislation Amendment Act (No. 6) 2001 constrained legal interpretations of the refugee status in two ways. First, it allowed an asylum application to be presumed false if the applicant had fraudulent identification or none at all. Second, it narrowed the interpretation of refugee status by limiting its focus specifically to ‘persecution’. These measures ensured that Australian legal authorities were not admitting more refugees than they were obliged to.¹⁷³ Again, this legislation was supported by the Australian Labor Party.¹⁷⁴

The Liberals also introduced the Migration Legislation Amendment (Judicial Review) Act 2001, a rehash of the Liberals’ earlier attempts to limit the access of immigration issues to judicial review. While not a complete withdrawal of appeal rights, the legislation limited access for immigration-related cases. In spite of its persistent resistance to such legislation, the Opposition voted in favour, swayed by the hostile public atmosphere.

The Liberal Government easily won itself a third term in the general election on 10th November, 2001, its victory assured by its uncompromising stance on entrance policy and the Labor Party’s indecisiveness. With the Pacific Solution in place, the number of asylum seekers arriving by boat to Australia reduced drastically. In the 2001–2002 financial year, Department of Immigration figures show 3,649 people arriving on 23 boats. Between 2002 and 2005, however, the only arrivals were 82 people on three

¹⁷³ Philip Ruddock in *Hansard* (28/8/2001: 30420–4).

¹⁷⁴ Con Sciacca in *Hansard* (20/9/2001: 31102–5).

boats in the 2003–2004 financial year (DIMIA 2005: 29). Indeed, in March 2004, the Liberal Government announced that it would boost the annual humanitarian quota from 12,000 to 13,000, an adjustment that it attributed to ‘strong border protection and a strong economy’.¹⁷⁵ Furthermore, the Government was able to ‘mothball’ the controversial Woomera detention centre, putting it on standby in case of a future surge in asylum claimants (Ruddock 2003). From a purely administrative point of view, then, the Pacific Solution was a success, imposing a high level of regulation of entrance into Australia and relieving the pressure on Australia’s refugee determination system and detention centres.

Nonetheless, the Liberals continued to introduce restrictive policies, building upon the existing system of regulation to tighten its controls and extend its reach. Most of these were fairly minor matters, addressing loopholes in the Pacific Solution. The legislation that was particularly relevant to asylum included:

- The Migration Legislation Amendment (Procedural Fairness) Act 2002, introduced on 13th March 2002, proposed adjustments to the judicial review of immigration-related cases, emphasizing that the focus should be on procedural aspects of decisions, not common law rules.
- The Migration Legislation Amendment (Transitional Movement) Act 2002, also introduced on 13th March 2002, sought to prohibit offshore detainees from lodging asylum claims if they were transported to the Australian mainland. For instance, if a detainee from Nauru was taken to mainland Australia for medical reasons or for

¹⁷⁵ Amanda Vanstone in *Hansard (Senate)* (23/3/2004: 21657).

facilitating their relocation, they would enter as a ‘transitory person’ and, as such, had no right to lodge a refugee status claim.

- The Migration Legislation Amendment (Protected Information) Act 2002, introduced on 12th December 2002, limited what information the Minister of Immigration was compelled to disclose regarding immigration decisions under his discretion.
- When the controversial \$1,000 fee for failed immigration appeals came up for renewal on the 26th May 2003, the fee was not only renewed but raised to \$1,400 to account for its relative drop in value.
- The Migration Amendment (Judicial Review) Act 2004, introduced on 25th March 2004, expanded the provisions that limited access to judicial review.

While this legislation all received the Labor Party’s support,¹⁷⁶ other proposed measures did not fare so well. Once again, the Labor Party had a strong presence in the Senate and, with the support of the left-wing minority parties, could block Government legislation, as it did when the Liberal Government attempted to excise further Australian territory. On June 7th 2002, the Liberal Government sought to excise further territory, some 3,000 islands, by regulation, thus avoiding the usual legislative process. This move was blocked by the Senate. The Liberal Party responded by reintroducing the same measures in the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 on 20th June 2003 and using its majority in the House to force it through. To the Government’s chagrin, the bill was rejected by the Senate again in

¹⁷⁶ See Julia Gillard in *Hansard* (28/5/2003: 15318–24; 26/6/2002: 4398–4404), Simon Crean (14/3/2002: 1307–14) and Stephen Smith (31/3/2004: 27679)

December 2002. The bill was introduced yet again on 26th March 2003 as the Migration Legislation Amendment (Further Border Protection Measures) Bill 2002 [No. 2] and was again rejected on 16th June 2003. Given the repeated rejection of its legislation, the Liberal Party were within their constitutional rights to call for the dissolution of both houses, a course of action they chose not to pursue.

In 2003, the Liberal Government also faced strong opposition for its Migration Amendment (Duration of Detention) Bill 2003. This bill sought to prohibit the courts from ordering an interim order for the release of an immigration detainee. The Australian Labor Party opposed the bill and, when it was reintroduced the following year, opposed it yet again.¹⁷⁷

The Opposition's harder approach was no doubt encouraged by the staunch criticism that the Pacific Solution had attracted from the UNHCR (2003) and various non-governmental organizations, notably Oxfam (2002a, 2002b), Human Rights Watch (2002) and Amnesty International (2002a, 2002b), as well as from the Green Party¹⁷⁸ and the well-respected Independent Member for Calare, Peter Andren.¹⁷⁹ Most importantly, though, there was also greater discontent amongst the public, largely due to the growing recognition that the asylum issue had, to some extent, been misrepresented by the Liberal Government. This was revealed spectacularly by the so-called 'children overboard affair'. This referred to an event, described by John Howard and other high-ranking Liberals in the lead-up to the 2001 election, where asylum seekers had apparently thrown their children overboard as they were being interdicted

¹⁷⁷ Stephen Smith in *Hansard* (3/3/2004: 25800–6).

¹⁷⁸ For instance, see Michael Organ in *Hansard* (26/6/2003: 17790–4; 3/3/2004: 25809–10; 31/3/2004: 27687–9).

¹⁷⁹ *Hansard* (14/3/2002: 1332–4; 20/6/2002: 4053–4; 18/3/2003: 12574; 3/3/2004: 25827; 21/6/2005: 81).

by a Royal Australian Navy vessel (Marr and Wilkinson 2003: 184–193). A subsequent Senate inquiry found that this incident did not happen, that the intelligence that the Liberals had drawn on was false and, furthermore, that it was known to be false by the Government.

On this front, the most interesting development came from a group of moderates within the Liberal Party who set out to liberalize the administration of detention. Petro Georgiou, the Liberal Member for Kooyong and long-time advocate for multiculturalism,¹⁸⁰ was the driving force behind this schism and began working on a private member's bill to address perceived deficiencies within the administration of detention, particularly its potentially harmful effects on detainees. This internal pressure forced Howard to adopt a shift in policy. The Migration Amendment (Detention Arrangements) Act 2005, introduced on 21st June 2005, sought to make detention procedures more flexible, allowing the Minister of Immigration the discretion to release children and their families into community care. The Migration And Ombudsman Legislation Amendment Act 2005, introduced on 15th December 2005, imposed time limits on the processing of asylum claims. It introduced a three month limit for the completion of primary refugee status determinations and for decision reviews with the Refugee Review Tribunal.

¹⁸⁰ Petro Georgiou had been a major influence on the 1978 Galbally report, the foundational document of Australian multiculturalism, and was the first director of the Australian Institute of Multicultural Affairs (Jupp 2002: 87, 89).

3.3: The Rhetoric of the Australian Liberal Government

An Aspiration to Provide Asylum

The story of asylum politics under John Howard's Liberal Government is one of vigorous regulation, with restrictive policies targeted not merely at irregular immigrants but explicitly at asylum seekers among whom there was known to be a high proportion of refugees. Nonetheless, the declarations of support for the provision of asylum were frequent and ongoing (as exemplified by the numerous—yet by no means exhaustive—*Hansard* references cited in the footnotes). In his first major address on asylum, Philip Ruddock remarked, 'I want to affirm that this government maintains, as have governments before, a strong commitment to assisting bona fide refugees',¹⁸¹ a sentiment that was reiterated by Ruddock and other Liberal members in the subsequent years.¹⁸² Liberal members frequently described the Australian refugee system as one of the most generous in the world,¹⁸³ and described it as demonstrative of the Australian national identity and its commitment to the notion of the 'fair go'.¹⁸⁴ Members also noted that the Liberal Party had a tradition of assisting refugees, frequently citing the resettlement of South East Asian refugees,¹⁸⁵ and affirmed the Government's

¹⁸¹ Philip Ruddock in *Hansard* (24/6/1996: 2555).

¹⁸² For instance, see Philip Ruddock (19/3/1997: 2431; 3/12/2002: 9461), Bruce Billson (3/9/1997: 7642; 24/9/1997: 8287), Christopher Pyne (21/10/1999: 12136), Kathy Sullivan (25/11/1999: 12735), Alby Schultz (24/6/2002: 4231) and Patrick Secker (21/6/2005: 84).

¹⁸³ For instance, see Philip Ruddock in *Hansard* (7/3/2000: 14024; 10/10/2000: 21164; 7/2/2001: 24095; 18/9/2001: 30871), Alan Cadman (23/8/2001: 30105–6), Danna Vale (23/8/2001: 30111), Gary Hardgrave (20/9/2001: 31106) and Patrick Secker (20/9/2001: 31282).

¹⁸⁴ For instance, see Philip Barresi in *Hansard* (21/10/1999: 12142) and Alan Cadman (23/8/2001: 30106). A 'fair go' can be defined as 'fair, equitable and just conditions' (Johansen 1988: 121).

¹⁸⁵ Alan Cadman in *Hansard* (23/8/2001: 30106).

commitment to specific legal norms, the norm of *non-refoulement* in particular.¹⁸⁶ In the face of growing domestic and international unease over the Pacific Solution and its detention procedures, the Liberal Government's defence of its commitment to asylum provision grew even keener. In 2005, Peter McGauran, then Minister for Citizenship and Multicultural Affairs, responded to Opposition criticism by declaring, '[D]o not give me this "I am ashamed to be Australian" stuff... That is just moral proselytising; that is just self-righteous reinforcement. Australia has one of the proudest records with regard to refugees anywhere in the world, bar none.'¹⁸⁷ In spite of its restrictive policies toward asylum seekers, the Liberal Government was desperate to project an attitude of humanitarian concern for refugees.

More generally, Liberal members affirmed their support for immigration and its contribution to the Australian nation.¹⁸⁸ Liberal members were very careful to distinguish their position from that of extremists, a position where border control was seen to justify any response: 'Despite what some people say, we cannot tow boats back to sea.'¹⁸⁹ In response to the accusations of racism that were sometimes levelled by the Opposition members,¹⁹⁰ Philip Ruddock once remarked of his party, 'We have a non-racial approach. If people breach our law, we deal with them and it does not matter where they are from'.¹⁹¹

In sum, through its political rhetoric, the Liberal Government projected an aspiration to provide asylum. In light of its strongly restrictive and punitive policies, it is tempting

¹⁸⁶ Philip Ruddock in *Hansard* (24/9/1997: 8301; 20/6/2002: 4020).

¹⁸⁷ Peter McGauran in *Hansard* (22/6/2005: 22).

¹⁸⁸ For instance, see Tony Smith in *Hansard* (3/9/1997: 7624), Petro Georgiou (3/9/1997: 7636), Teresa Gambaro (3/9/1997: 7646, 7649) and Christopher Pyne (20/9/2001: 31112–3).

¹⁸⁹ Philip Ruddock in *Hansard* (27/2/2001: 24485).

¹⁹⁰ For instance, see Con Sciacca in *Hansard* (25/11/1999: 12732–3; 6/3/2000: 13980; 22/8/2001: 30021; 19/9/2001: 30959), Tanya Plibersek (23/8/2001: 30104), and Frank Mossfield (20/9/2001: 31124).

¹⁹¹ *Hansard* (6/6/2001: 27498). See also *ibid.* (6/3/2000: 13929).

to view this stated aspiration with some suspicion, to wonder if the Government is not making a rhetorical display of humanitarian concern to disguise its genuine absence of empathy. Ultimately, this thesis will argue that the Liberal Government's attitude is not that simple, but first it is necessary survey the Liberal aspiration to regulate entrance.

An Aspiration to Regulate Entrance

The essence of the Liberal Government view on entrance was carefully articulated by John Howard when he introduced the Border Protection Act to the House of Commons on 29th August 2001, at the height of the *Tampa* crisis:

'This Bill... is essential to the maintenance of Australian sovereignty, including our sovereign right to determine who will enter and reside in Australia.'¹⁹²

The Government's commitment to the principle of national sovereignty was reiterated by other members,¹⁹³ as was the notion of border control being fundamental to Australia's national interests.¹⁹⁴ In doing so, the issue of irregular immigration was effectively securitized, bringing border control into close association with military control of territory: 'Our national interests are not merely a matter of protecting our

¹⁹² John Howard in *Hansard* (29/8/2001: 30570).

¹⁹³ For instance, see Philip Ruddock (22/9/1999: 10148; 18/9/2001: 30869, 30871, 30873; 20/6/2002: 4018, 4056, 4068), Geoff Prosser (19/9/2001: 30983; 20/9/2001: 31119) and Peter Lindsay (20/6/2002: 4027–8).

¹⁹⁴ For instance, see Kathy Sullivan in *Hansard* (25/11/1999: 12735), Philip Ruddock (18/9/2001: 30873), Geoff Prosser (19/9/2001: 30984), Alan Cadman (20/6/2002: 4032) and Barry Haase (20/6/2002: 4040).

nation from foreign invasion, but of ensuring that our borders are secure enough to protect the integrity of our immigration laws.’¹⁹⁵ This rhetorical association between migratory and military defence culminated, of course, in Operation Relex, the deployment of the Royal Australian Navy to stem irregular immigration. In sum, then, the overriding justification for the regulation of entrance was the self-evident ‘fact’ of national sovereignty, stated baldly here by Philip Ruddock: ‘It is clearly up to Australia to determine who can cross our borders, who can stay in Australia, and under what conditions such people can remain.’¹⁹⁶

Yet this claim to protect national sovereignty did more than merely justify the Pacific Solution’s drastic measures: it pilloried the Labor Party. If Labor chose to take a stand against the legislation—which it initially did—the stage was set so that its stance appeared to relinquish national sovereignty, to go against the interests of Australian citizens. This strategy was remarkably successful: the public backlash against Labor’s opposition of the Border Protection Act was so fierce that Labor Party leaders demurred from any further dissent from the Government’s entrance policy (Marr and Wilkinson 2003: 99–100). Clearly, then, there were powerful electoral considerations that motivated the Government’s strengthening of regulation. Border control was a ‘wedge’ issue that the Government used to distinguish itself from the Opposition. The Liberals created a bipolarity out of what had been a bipartisan issue and situated itself on the side of the interests of citizens or ‘mainstream Australia’,¹⁹⁷ thus forcing the Opposition to take the side of the ‘illegals’. To reinforce this strategy, Liberal members would

¹⁹⁵ Philip Barresi in *Hansard* (21/10/1999: 12141).

¹⁹⁶ *Hansard* (18/9/2001: 30872).

¹⁹⁷ For instance, see Peter Lindsay in *Hansard* (14/3/2002: 1314–5), Alexander Downer (18/6/2002: 3606), Philip Ruddock (20/6/2002: 4019–20), Alan Cadman (20/6/2002: 4031–2) and Bob Baldwin (20/6/2002: 4048).

portray the Labor Party as ‘soft’¹⁹⁸ while reserving for themselves the label of ‘tough’¹⁹⁹ on irregular immigration. Existing problems with the immigration system were blamed on the defective policies of past Labor Governments²⁰⁰ and the current Labor Party’s resistance to particular legislation, especially the withdrawal of judicial reviews.²⁰¹ And when the Labor Party did support Government policy, as it eventually did on the Pacific Solution, Liberal members claimed that the Opposition was merely relenting to public pressure.²⁰² Liberal members even argued that the Labor Party’s commitment to bipartisanship was an instance of electoral opportunism, a way of disguising its fundamentally ‘soft’ stance on immigration.²⁰³ In this way, the Liberal Government projected an electorally damaging perception of the Labor Opposition, a party whose ‘priorities are in favour of queue jumpers having more rights than the Australian people’.²⁰⁴

Of course, this strategy would have never worked if the Liberal Government did not have the public support it did. In this respect, the aspiration to regulate entrance was very much a function of representative democracy, an act of identifying public concerns over irregular immigration and articulating them in party rhetoric or enforcing them through policy. As such, Philip Ruddock argued that ‘we—the Government of Australia representing the people of Australia—must have the capacity to manage the movement

¹⁹⁸ For instance, see Christopher Pyne in *Hansard* (20/9/2001: 31114) and Alan Cadman (20/9/2001: 31126).

¹⁹⁹ For instance, see Philip Ruddock in *Hansard* (27/2/2001: 24485) and Geoffrey Prosser (19/9/2001: 30984).

²⁰⁰ For instance, see Christopher Pyne in *Hansard* (20/9/2001: 31114).

²⁰¹ On this issue, Ruddock remarked in *Hansard* (31/8/2000: 19875) that ‘the Labor Party is part of the problem, not the solution’.

²⁰² For instance, see Alan Cadman in *Hansard* (20/9/2001: 31126).

²⁰³ For instance, see John Howard in *Hansard* (14/2/2002: 271), Alexander Downer (21/2/2002: 731; 18/6/2002: 3606) and De-Anne Kelly (20/6/2002: 4044).

²⁰⁴ Geoffrey Prosser in *Hansard* (20/9/2001: 31121–2).

of people across our borders in an orderly and efficient manner.’²⁰⁵ John Howard put this point more strongly: ‘One of the great enduring responsibilities of a government is to protect the integrity of its borders.’²⁰⁶ In this regard, what aspects of irregular immigration did the Liberal Government, on behalf of Australian citizens, identify as a threat to their interests?

In its first term, the Liberal Government’s core concern was that the asylum system was being used by non-citizens to gain entrance to Australia even though the ‘great majority are not able to found a claim which engages our protection obligations.’²⁰⁷ It was claimed frequently by Liberal members that, to prolong their stay in Australia, these failed asylum applicants then lodged multiple appeals, even when they had little hope of succeeding in them.²⁰⁸ With asylum-related reviews and appeals making up about sixty per cent of all immigration-related cases before the courts in 1996, Ruddock argued that an unacceptable proportion of the Immigration Department’s workload and budget was being spent on fraudulent asylum claims.²⁰⁹ The actual motives for these individuals, he argued, was economic; Ruddock once claimed that ‘People are turning up at my department and asking for a “thirty dollar work visa”, the name by which we understand the protection visa is now becoming known.’²¹⁰

In following years, Liberal members cited other reasons for restricting access to irregular immigrants. They warned of the financial burden that the refugee

²⁰⁵ *Hansard* (20/6/2002: 4019–20). See also Barry Haase (20/6/2002: 4040).

²⁰⁶ *Hansard* (29/8/2001: 30570).

²⁰⁷ *Hansard* (24/6/1996: 2556).

²⁰⁸ For instance, see Philip Ruddock in *Hansard* (25/6/1997: 6284, 19/6/1997: 5858, 3/9/1997: 7615, 22/3/1998: 3915), Bruce Billson (24/9/1997: 8287), Graeme McDougall (3/9/1997: 7631) and Petro Georgiou (3/9/1997: 7636–7).

²⁰⁹ *Hansard* (24/6/1996: 2556). See also *ibid.* (19/3/1997: 2431), Graeme McDougall (3/9/1997: 7631) and Tony Smith (3/9/1997: 7625–6).

²¹⁰ *Hansard* (19/6/1997: 5857). See also *ibid.* (3/9/1997: 7650).

determination process imposed upon Australian taxpayers²¹¹ and the pressure that asylum seekers may potentially put on the public health system.²¹² Liberal members accused asylum seekers of exploiting aspects of the Australian national character, such as its ‘generosity’ and ‘tolerance’.²¹³ For instance, Kathy Sullivan, the Liberal Member for Moncrieff, remarked that ‘Generous people do not like to feel they are being used, and there is a growing feeling that these people are using Australia.’²¹⁴

Regulation was also cited as a necessary element of a functional policy of cultural diversity: ‘We are one of the most tolerant, diverse societies in the world because we have been able to manage our borders and our [immigration] programs successfully over a long period of time.’²¹⁵ Given the Liberal Government’s general preference for the assimilation of new immigrants, especially under John Howard’s leadership, this remark implies a need for prioritizing entrants that were able or willing to adopt Australian values: ‘First and foremost you must be good Australians—that is the challenge to all those who come here’.²¹⁶

In the wake of 11th September 2001, the Liberal Government could include the threat of terrorist infiltration among its justifications for regulation, a threat made all the keener by Australia’s close alliance to the United States and its staunch support for subsequent military campaigns in Afghanistan and Iraq. This was notoriously insinuated by Peter Reith, the Minister of Defence, in a radio interview two days after the World Trade Center attacks where he remarked that irregular routes of immigration

²¹¹ For instance, see Philip Barresi in *Hansard* (21/10/1999: 12143) and Philip Ruddock (27/2/2001: 24485).

²¹² For instance, see Christopher Pyne in *Hansard* (21/10/1999: 12136).

²¹³ For instance, see Joanna Gash in *Hansard* (22/6/2005: 16).

²¹⁴ Kathy Sullivan in *Hansard* (25/11/1999: 12735).

²¹⁵ Philip Ruddock in *Hansard* (29/5/2002: 2612).

²¹⁶ Gary Hardgrave in *Hansard* (6/3/2000: 13987).

‘can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities’ (Marr and Wilkinson 2003: 151). Henceforth, ‘security’ and ‘terrorism’ joined the list of bywords that Liberal members employed in Parliament to reinforce the self-evident need for regulation.²¹⁷

The Liberal Party also justified its restrictive policies by framing them as part of the necessary struggle against the practice of people smuggling.²¹⁸ In this respect, Liberal members compared Australia’s policies to similar trends in other liberal democratic countries, noting ‘that many governments around the world are determined to make a contribution... to destroying this whole process of people-smuggling’.²¹⁹ While Philip Ruddock did once admit that there were genuine refugees amongst the people being smuggled, he maintained that the refugee status determination procedure would identify them.²²⁰ Furthermore, Liberal members railed against the possibility of a favourable interpretation of people-smuggling, arguing, for instance, that ‘these traders are no modern-day Oskar Schindlers. They do not assist the underprivileged to find a new life in our prosperous land. Rather, they take advantage of the dreamers and try to dump them here—for profit.’²²¹ Thus, the issue of people-smuggling was described in absolute and uncomplicated terms, a practice that was intrinsically unethical and therefore to be thwarted.

²¹⁷ For instance, see Geoffrey Prosser (19/9/2001: 30983), Philip Ruddock (4/6/2002: 3025), and Russell Broadbent (21/6/2005: 79).

²¹⁸ For instance, see Philip Ruddock in *Hansard* (22/9/1999: 10147; 18/9/2001: 30870), Christopher Pyne (21/10/1999: 12134–7; 20/9/2001: 31113–4) and Bruce Baird (21/10/1999: 12145).

²¹⁹ Alexander Downer in *Hansard* (21/2/2002: 730). See also Philip Ruddock (22/9/1999: 10148; 4/6/2002: 3025) and Christopher Pyne (21/10/1999: 12136).

²²⁰ *Hansard* (22/9/1999: 10150).

²²¹ Philip Barresi in *Hansard* (21/10/1999: 12143). See also Christopher Pyne in *Hansard* (21/10/1999: 12135).

These, then, are some of the issues of national interest that the Liberal Government claimed motivated its regulation of entrance: misuse of the asylum system, depletion of public resources, national security, and the international struggle against people-smuggling. By tackling these issues, the Government claimed that it was developing ‘an immigration program which closely resembles the aspirations of most Australians.’²²²

Yet, there were also instrumental justifications for regulation: measures that the Government argued were necessary to address specific flaws and weaknesses in entrance policy. One such reason for regulation was that Australia’s legal institutions used an excessively inclusive interpretation of the 1951 Refugee Convention definition. Indeed, Ruddock even took to describing Australia’s refugee status determination system as the ‘convention-plus model’.²²³ The offshore refugee status determination centres on Nauru and Papua New Guinea were the political manifestations of this view. The Liberal Member for Forrest, Geoffrey Prosser, noted that UNHCR approval rates were far lower than Australia’s, claiming that the UNHCR approved the refugee status of 14 per cent of Afghans in Indonesia, whereas 84 per cent of Afghans who arrived in Australia were approved.²²⁴ So, by handing the refugee status determination process over to the UNHCR, the Liberal Government hoped to get lower approval rates for its intercepted asylum seekers and thereby be responsible for fewer refugees. Liberal members even used the UNHCR’s integrity to justify their push for tightened access to appeals. Barry Haase, the Liberal Member for Kalgoorlie, argued, ‘I for one believe

²²² Alan Cadman in *Hansard* (7/3/2000: 14043). See also Philip Ruddock (18/9/2001: 30846, 30870).

²²³ *Hansard* (20/6/2002: 4066).

²²⁴ *Hansard* (20/9/2001: 31119). See also Christopher Pyne (20/9/2001: 31114), Geoffrey Prosser (20/9/2001: 31119) and Alan Cadman (20/6/2002: 4033).

that the UNHCR does a good job and its decisions ought to be final',²²⁵ an implication that any appeal of a UNHCR decision would amount to a slur on its reputation. This strand of Liberal Government rhetoric can be seen as part of its wider campaign to reduce the influence of the Courts in entrance policy, an ambition that was most clearly reflected in its attempts to limit judicial reviews.

Finally, the Liberal Government supported strict regulation of entrance because, they argued, that such an approach had a deterrent effect on asylum seekers.²²⁶ Not only would tough regulations physically restrict people from entering, it would also discourage them from trying. Speaking on restrictive policies introduced in 1999, Teresa Gambaro, the Member for Petrie, remarked that, 'These changes send a message to other people considering illegal travel to Australia that we are certainly not a soft touch, and that queue jumpers will be dealt with very harshly indeed'.²²⁷ Not only did these measures deter through their punitive nature, they also 'reduce the attractiveness of Australia as a destination'.²²⁸ Mandatory detention was seen to play an especially important role in deterrence. Certainly, Liberal members argued that detention was necessary as an administrative procedure, a way of isolating asylum claimants from the community until the necessary checks for security, identity and refugee status had been completed.²²⁹ But, after the implementation of the Pacific Solution, Liberal members also argued that mandatory detention 'is a deterrent and it has worked',²³⁰ and therefore

²²⁵ *Hansard* (31/3/2004: 27687).

²²⁶ Philip Ruddock in *Hansard* (4/6/2002: 3025; 20/6/2002: 4017).

²²⁷ *Hansard* (6/3/2000: 13996).

²²⁸ Philip Ruddock in *Hansard* (13/10/1999: 11475). See also *ibid.* (22/9/1999: 10148, 10150; 23/11/1999: 12361), Christine Gallus (21/10/1999: 12129) and Philip Barresi (21/10/1999: 12143).

²²⁹ For instance, see Philip Ruddock in *Hansard* (23/11/1999: 12361; 4/6/2002: 3025; 26/6/2003: 17811) and Geoffrey Prosser (3/3/2004: 25807).

²³⁰ Patrick Secker in *Hansard* (21/6/2005: 85).

ought to remain ‘the cornerstone of our national policy.’²³¹ More broadly, Philip Ruddock argued that any softening of the Government’s overall policy framework on entrance was akin to giving people smugglers ‘a green light to attempt to recommence their operations.’²³²

This, then, sums up the factors that motivated the Liberal Government’s aspiration to regulate entrance. Regulation was seen as a crucial dimension of deterrence, for reining in domestic legal institutions, and for protecting the interests of citizens. It is necessary, however, to explore this final point further. To view the Government as a passive actor, a puppet pulled by the whims of its electorate, is to underestimate its agency, its influence on the political and moral context in which the asylum issue was understood by the public. In particular, the way in which the Government reconciled its regulation of entrance with its humanitarian obligations played a crucial role in the public’s perception of asylum seekers.

A Conflict of Aspirations

The conflict between the aspirations to regulate entrance and provide asylum was clearly expressed in the rhetoric of the Liberal Government. On 18th August 2001, less than a fortnight before the *Tampa* crisis broke, Howard observed in a radio interview that:

²³¹ Joanna Gash in *Hansard* (22/6/2005: 16–7). See also Patrick Secker (21/6/2005: 85).

²³² *Hansard* (20/6/2002: 4017). See also *ibid.* (4/6/2002: 3025).

‘We are a humanitarian country. We don’t turn people back into the sea, we don’t turn unseaworthy boats which are likely to capsize and the people on them be drowned. We can’t behave in that manner. People say, “Well send them back from where they came”; the country from which they came won’t have them back. Many of them are frightened to go back to those countries and we are faced with this awful dilemma of, on the one hand, trying to behave like a humanitarian decent country; on the other hand, making certain that we don’t become just an easy touch for illegal immigrants’ (Marr and Wilkinson 2003: 47).

It was indeed an ‘awful dilemma’²³³ and, with an already difficult election only months away, the Government could not afford to let it run on. If the Liberal Government wanted to retain power, it had to take a stand one way or the other.

Ultimately, Howard chose not to be an ‘easy touch’ and prioritized the regulation of entrance over other considerations. This was subsequently reinforced by remarks from other Liberal members, such as Russell Broadbent, the Liberal Member for McMillan, who argued that ‘The Australian government has a moral obligation to treat all refugees and asylum claimants in a humane and compassionate manner, but it also has an *overriding obligation* to the Australian people to ensure the integrity of our borders and the safety of our citizens’ [emphasis added].²³⁴ More specifically, Philip Ruddock once remarked that ‘international obligations do not give people any right to demand residence in Australia.’²³⁵ Even the announcement, in 2005, of a liberalization of detention policy was justified in the context of enhanced regulation. Petro Georgiou, the Liberal moderate who drove the new policy direction, framed it in terms of the Pacific Solution’s successes, arguing that the newly regulated environment ‘creates an

²³³ John Howard in *Hansard* (27/8/2001: 30235).

²³⁴ *Hansard* (21/6/2005: 79). See also Philip Ruddock (20/6/2002: 4020) and Alan Cadman (20/6/2002: 4032).

²³⁵ *Hansard* (20/6/2002: 4020).

opportunity and an obligation... to ensure that our actions effectively protect our borders, prevent abuse, and are humane and just to those affected by them.²³⁶ Thus, the satisfaction of the demands of regulation *allowed* greater accord to be given to the ideals of asylum. Peter McGuaran, the Minister of Citizenship and Multicultural Affairs, was adamant that regulation would not be sacrificed, declaring, ‘The broad framework of the government’s approach is unaltered.’²³⁷

Clearly, the Liberal Government saw the obligation to provide asylum as subordinate to the regulation of its borders. Yet this delivered the party into a new conflict, a conflict between its liberal aspirations and its restrictive actions. On the one hand, the Liberal Government declared a commitment to the principle of asylum, and its moral and legal obligations to refugees; on the other hand, the Government enforced policies that explicitly denied asylum to refugees and, in achieving this end, subjected them to deliberately distressing and punitive measures. Such a lapse might have been forgivable to voters at the far end of the conservative spectrum, but it is hard to imagine it being tolerated by the broad base of electoral support on which any majority party relies. The Liberal Government needed to find a way of defusing the conflict between its actions and its aspirations, and political rhetoric proved to be an important tool in achieving this.

In its first term, the conflict between aspirations was not so severe. As already mentioned, the move towards regulation was motivated by the high level of misuse of the asylum system by people for whom it was not intended. It could be said, therefore, that the tightening of entrance regulations targeted fraudulent asylum claimants who

²³⁶ *Hansard* (21/6/2005: 63).

²³⁷ *Hansard* (21/6/2005: 55).

were entering irregularly, not genuine refugees (although the latter were invariably affected). Indeed, the restriction of irregular immigrants was frequently justified on the grounds that that fraudulent asylum claimants were utilizing resources that would have otherwise gone to genuine refugees: 'It is a situation which distorts our priorities and limits our ability to help those who are most vulnerable.'²³⁸ Crucially, such an argument cast a positive moral light upon regulation, making it acceptable to moderate voters, as well as appealing to more radical voters (such as One Nation supporters) who were intolerant towards immigration.

In 1999, however, the number of irregular immigrants increased drastically and, more problematically, most of their asylum claims were successful. The Liberal Government could no longer justify restrictions by arguing that the asylum system was being misused by economic immigrants. Instead, the Government developed the argument that the asylum system was intended strictly for refugees who arrived by regular means and not those who arrived irregularly. Philip Ruddock argued that refugees who entered irregularly were not in desperate need of protection, that they 'have been living in security and safety for a number of years in [safe] third countries, and are now seeking to get to the front of the queue for asylum places in Australia'.²³⁹ So, while it was accepted that the new influx of asylum seekers were mostly genuine refugees, the asylum system was nonetheless being 'exploited by those who do have alternatives... while those who have no alternatives miss out.'²⁴⁰

²³⁸ *Hansard* (24/6/1996: 2555). See also Philip Ruddock in *Hansard* (19/3/1997: 2431, 24/9/1997: 8304, 2/4/1998: 2396), and Bruce Billson (24/9/1997: 8288). Philip Ruddock (*Hansard* 3/6/1997: 4780) did once concede that refugees were driven to illegal methods of immigration by their desperate circumstances.

²³⁹ Philip Ruddock in *Hansard* (13/10/1999: 11475).

²⁴⁰ *Hansard* (13/10/1999: 11475).

The Liberal Government's adjustments to its refugee resettlement programme—freezing the resettlement of mandated refugees in 2001 when the number of irregular entrants was high and expanding the annual humanitarian quota in 2004 when the irregular entrance was effectively stemmed—were administrative manifestations of this attitude. These fluctuations appear to support the Liberal Government's argument that irregular immigrants take the place of refugees through regulated resettlement. However, it must be noted that such an interpretation neatly overlooks the fact that the scale of the annual quota is self-imposed, as is the inclusion of asylum seekers at the expense of mandated refugees.

Thus the Government advanced a moral argument that asylum seekers were undermining its efforts to assist refugees who were in greater need of assistance.²⁴¹ The fact that there were genuine refugees amongst those being restricted, Liberal members argued, was overshadowed by the greater injustice that more deserving refugees were having their places taken.²⁴² This argument was expanded into the international context to explain identify the flaws of the asylum regime. Philip Ruddock argued that Western states were being forced to divert funds from humanitarian projects into their asylum systems, concluding that 'we have lost our sense of priority.'²⁴³ This line of argument culminated in Ruddock's suggestion that the 1951 Refugee Convention was in need of

²⁴¹ See Christopher Pyne in *Hansard* (21/10/1999: 12136; 2/4/2001: 26184), Philip Barresi (21/10/1999: 12142), Kathy Sullivan (25/11/1999: 12735), Peter Lindsay (6/2/2001: 23916), Philip Ruddock (19/6/2001: 27864, 3/12/2002: 9462), Bruce Billson (19/9/2001: 30962–3) and Gary Hardgrave (20/9/2001: 31107).

²⁴² For instance, Philip Ruddock remarked in *Hansard* (10/10/2000: 21164) that 'One ought not to use the fact that amongst some asylum seekers there are refugees to disguise the obscene—and I use that word deliberately—misuse of resources in developed countries like Australia to deal with asylum claims in comparison to the needs of people who are refugees around the world.' See also *ibid.* (20/6/2002: 4019; 3/12/2002: 9462), Alby Schultz (24/6/2002: 4232), Gary Hardgrave (1/4/2004: 27953) and Patrick Secker (2/6/2005: 93).

²⁴³ *Hansard* (6/6/2001: 27497). See also *ibid.* (10/10/2000: 21164–5).

reform: 'It has lost its focus and is not assisting those in greatest need.'²⁴⁴ In support of the Liberal Government's approach, Millbank (2003: 25) has argued that 'by breaking the nexus between migration and asylum that has rendered the asylum system unworkable, Australia's *Tampa* and Pacific Solution have provided a direction-setting circuit breaker in the evolution towards a more rational and equitable international refugee system.'

In sum, regulation was portrayed as beneficial to the efficacy of asylum provision in Australia and other Western nations. Crucially, by contextualizing regulation in this way, by providing it with a consequentialist ethical framework, the Liberal Government gave its restrictive actions an air of respectability, diminishing the chances of isolating its liberal voters, lobby groups, or its own Members of Parliament. Rather than signal an abandonment of asylum or humanitarian values, the restriction of asylum seekers reflects the Government's resolve that asylum would be provided only on its own strict terms.

To enhance the idea that asylum seekers were less deserving of asylum than other refugees, the Government took a markedly aggressive stance in its rhetoric to undermine the integrity of all asylum seekers. Asylum seekers were frequently characterized as opportunists who came to Australia as a matter of choice rather than necessity,²⁴⁵ typically driven by material incentives.²⁴⁶ In doing so, it was suggested that these asylum seekers had given up relative security in other safe third countries.²⁴⁷

²⁴⁴ *Hansard* (7/2/2001: 24095–6).

²⁴⁵ For instance, see Philip Ruddock in *Hansard* (2/4/1998: 2396; 24/11/1999: 12522; 18/9/2001: 30869, 30872), Kathy Sullivan (25/11/1999: 12735), Gary Hardgrave (20/9/2001: 31108) and Geoffrey Prosser (20/9/2001: 31119).

²⁴⁶ For instance, see Philip Ruddock in *Hansard* (22/9/1999: 10150).

²⁴⁷ For instance, see *ibid.* (13/10/1999: 11475).

The perception of asylum seekers as relatively advantaged was explicitly contrasted with the situation of those in countries of first asylum: ‘The people in those camps are in an awful situation—and we have seen them on television. The boat people are virile, well-fed young men with enough money to pay their way into Australia.’²⁴⁸ Government members even took to invoking these ideas in slang by employing terms such as ‘queue jumper’ and ‘forum shopper’ to describe asylum seekers.²⁴⁹ What made these arguments particularly effective was that they cast aspersions on the moral legitimacy of an asylum seeker’s actions without denying the legitimacy of their refugee status claim.

Asylum seekers were frequently discredited in other ways too. Government members argued that the status of asylum seekers was ‘illegal’;²⁵⁰ that no genuine refugee would be without proper identification;²⁵¹ and that no genuine refugee could afford the services of a people smuggler.²⁵² The veracity of such claims is controversial,²⁵³ relying largely on the ambiguities on the legal status of asylum seekers. Moreover, it appears that the Government was not beyond fictionalizing or exaggerating events. This was illustrated definitively by the ‘children overboard affair’, but also other remarks that have since proven to be false, such as Philip Ruddock’s notorious statement to journalists on 17th November 1999 that intelligence had predicted some 10,000 people

²⁴⁸ Alan Cadman in *Hansard* (20/9/2001: 31128). See also Christopher Pyne in *Hansard* (20/9/2001: 31112–5).

²⁴⁹ For instance, see Philip Ruddock in *Hansard* (22/11/1999: 12318).

²⁵⁰ For instance, see Alan Cadman in *Hansard* (23/8/2001: 30104). See Dauvergne (2004).

²⁵¹ For instance, see Alan Cadman in *Hansard* (23/8/2001: 30106) and Philip Ruddock (25/11/1999: 12734).

²⁵² For instance, see Danna Vale in *Hansard* (23/8/2001: 30112) and Bruce Billson (19/9/2001: 30963).

²⁵³ As mentioned in Part One of this thesis, Article 31[1] of the 1951 Refugee Convention absolves refugees of irregular entrance. Moreover, the 1951 Refugee Convention criteria for refugee status does not require a refugee to possess identification, nor should it take their financial resources into consideration.

were planning to travel to Australia from the Middle East: ‘The fact is the information that is available to us suggests that whole villages are packing up’ (cited in MacDonald 1999).

In all, these aspersions contributed to the public perception that asylum seekers were less deserving of asylum than other refugees, giving legitimacy to the claim that regulation would improve Australia’s capacity to implement a more just distribution of asylum. By reconciling its restrictive actions with its aspiration to provide asylum, the Liberal Government made its policies acceptable to the broader liberal electorate, to mainstream voters who were more sympathetic to the plight of refugees than the average One Nation supporter.

3.4: The Australian Opposition: Rhetoric and Policy Proposals

An Aspiration to Provide Asylum

Labor members frequently affirmed their party’s commitment to immigration²⁵⁴ and the provision of asylum specifically.²⁵⁵ Members spoke variously of Australia’s ‘proud history of helping refugees’,²⁵⁶ its ‘international reputation for its humanitarian

²⁵⁴ For instance, see Steven Dargavel in *Hansard* (28/5/1997: 4247), Martin Ferguson (3/9/1997: 7621–2; 7656, 2/10/1997: 9129), Con Sciacca (6/3/2000: 13979) and Roger Price (20/9/2001: 31116).

²⁵⁵ For instance, see Andrew Theophanous in *Hansard* (22/11/1999: 12302), Con Sciacca (6/3/2000: 13976), Colin Hollis (18/6/2001: 27684, 23/8/2001: 30136), Gavan O’Connor (23/8/2001: 30110–1), Bernie Ripoll (23/8/2001: 30122), John Murphy (23/8/2001: 30129), Jill Hall (14/3/2002: 1328) and Frank Mossfield (14/3/2002: 1331).

²⁵⁶ Martin Ferguson in *Hansard* (2/10/1997: 9129).

treatment of refugees'²⁵⁷, and its commitment to the 'fair go'.²⁵⁸ Essentially, the Labor Party expressed this aspiration in a way that was reminiscent of the Liberal Government, drawing largely on aspects of the Australian character to justify its commitment to asylum.²⁵⁹

Yet, on two issues, the Labor Party staked out notably more inclusive attitudes than the Liberal Government. The first of these was multiculturalism. On this issue, the Labor Party's took a markedly more pluralist position than the Government. Labor members tended to emphasize Australia's success in accommodating cultural difference²⁶⁰ and criticized the Liberals for their failure to embrace pluralism.²⁶¹ On account of these differences, the Labor Party sometimes took the moral high ground over the Liberal Party, labelling its harsh treatment of asylum seekers as an expression of racist sentiments²⁶² and attacking Philip Ruddock for wearing his Amnesty International badge in the House.²⁶³

The second issue where Labor took a more inclusive stance was on the matter of judicial reviews. In contrast to the Government, which wanted to diminish access for immigration-related cases, the Labor Party's position was decidedly egalitarian,

²⁵⁷ Andrew Theophanous in *Hansard* (22/11/1999: 12302). See also Colin Hollis (18/6/2001: 27683–4) and Gavan O'Connor (23/8/2001: 30109).

²⁵⁸ For instance, see Martin Ferguson (3/9/1997: 7622), Gavan O'Connor (23/8/2001: 30110–1) and John Murphy (23/8/2001: 30129).

²⁵⁹ For instance, Bernie Ripoll remarked in *Hansard* (23/8/2001: 30122) that 'the issue of human rights is something that we believe in passionately. It is something cultural about Australia... It is not just about the rule of law or our obligations; it is much more than that.'

²⁶⁰ For instance, see Con Sciacca in *Hansard* (6/3/2000: 13979), Christian Zahra (6/3/2000: 13992–3), Colin Hollis (23/8/2001: 30136), Frank Mossfield (20/9/2001: 31124) and Martin Ferguson (3/9/1997: 7621).

²⁶¹ For instance, see Anthony Albanese in *Hansard* (26/6/2000: 18276), Dick Adams (7/2/2001: 24041) and Frank Mossfield (20/9/2001: 31124).

²⁶² For instance, see Julia Gillard in *Hansard* (12/2/2002: 272; 20/6/2002: 4029), Laurie Ferguson (13/3/2002: 1279) and Carmen Lawrence (14/3/2002: 1344–5).

²⁶³ For instance, see Anthony Albanese in *Hansard* (10/11/2005: 147) and Julia Irwin (26/6/2003: 17806).

characteristic of left-leaning politics: ‘It does not matter whether you are an asylum seeker or whether you are an ordinary citizen of this country... Once you are here, you are entitled to your day in court.’²⁶⁴ The Labor Party was resolute on this issue, willing to sacrifice its otherwise strong commitment to bipartisanship,²⁶⁵ even declaring that this issue revealed ‘the fundamental differences between our two parties’.²⁶⁶ Con Sciacca, the Shadow Minister for Immigration, was certainly not unsympathetic to the Government’s complaints about misuse of the asylum system, but he argued that a blanket withdrawal of legal rights was equivalent to ‘throw[ing] out the baby with the bath water.’²⁶⁷ When the Labor Party did finally acquiesce to a limitation of access to judicial reviews, driven to retreat by the *Tampa* affair, Sciacca was openly reluctant. After offering his party’s support for the legislation, he added, ‘We do so, though, without in any sense or form being of the view that this is the answer to the problem.’²⁶⁸ He continued with unmistakable bitterness, scolding Philip Ruddock and John Howard for the harmful consequences of their electoral opportunism: ‘There is no question why you were hairy-chested about the *Tampa* and everything else... You took certain actions because you knew that would be popular, and it has worked your way electorally. Let us see what happens in five or 10 years. Let us see how you go down in history.’²⁶⁹ In this instance, then, political calculations were allowed to override the Labor Party’s ideological and ethical inclinations, yet there were apparently no deliberate changes to Labor’s aspirations for ideal immigration practices. This illustrates the resistance of

²⁶⁴ Con Sciacca in *Hansard* (6/2/2001: 23913–4). See also Martin Ferguson (3/9/1997: 7623).

²⁶⁵ Con Sciacca in *Hansard* (6/2/2001: 23910).

²⁶⁶ *Ibid.* (6/2/2001: 23910).

²⁶⁷ *Ibid.* (6/2/2001: 23913). See also *ibid.* (28/6/1999: 7599).

²⁶⁸ *Ibid.* (27/9/2001: 31648).

²⁶⁹ *Ibid.* (27/9/2001: 31650–1).

aspirations in the face of incompatible policy; it is a demonstration of how complex and contradictory the motives of a political actor can be.

The Aspiration to Regulate Entrance

In spite of its more inclusive aspirations for asylum provision, the Labor Party's official position on regulation was remarkably similar to the Liberal Government's, as demonstrated by its broad support for Government policy. Labor rhetoric reinforces this close association, as in this comments by Martin Ferguson in 1999, then Shadow Minister of Immigration:

‘The choice we have to make at this time is who is determining Australia's immigration policy. Is it the community through our democratically elected representatives or, alternatively, are we as a community going to vacate the field and allow crooks, gangsters and those responsible for people-smuggling to determine Australia's immigration policy?’²⁷⁰

This remark parallels Liberal Government rhetoric in advancing a bipolar view of entrance: prioritizing the interests of Australian citizens while at the same time focusing on the criminality of those organizing irregular entrance and, in doing so, overlooking the humanitarian need of many who travelled by it. Generally, then, the Labor Party supported the Government's aspiration to restrict irregular immigration, its members arguing that measures were needed ‘to combat the flow of illegal immigrants and to

²⁷⁰ Martin Ferguson in *Hansard* (22/11/1999: 12315). See also Janice Crosio (23/8/2001: 30129) and Con Sciacca (20/9/2001: 31104).

deal genuinely with the problem of queue jumping and non-genuine refugees seeking asylum.’²⁷¹ The Opposition’s criticisms were reserved for the administration or efficacy of regulatory policies rather than the object of regulation.²⁷² For instance, the Labor Party continued to offer unequivocal support for the principle of mandatory detention,²⁷³ limiting its criticisms to issues such as the detention of children, the outsourcing of detention-centre management to a private security company, and the restriction of media access to detention centres.²⁷⁴ Labor members were also keen to point out that the range of restrictive measures introduced by the Liberals in 1999 and 2000 had failed to cease irregular immigration.²⁷⁵

Perhaps the most remarkable aspect of Labor Party rhetoric was its adoption of rhetoric to undermine the integrity of asylum seekers. There are times when Labor rhetoric is virtually indistinguishable from the Government’s, as in these remarks by Con Sciacca from 2000:

‘As illegal immigration has soared in comparison with previous years, so has the meritorious nature of many of these asylum seekers’ claims, and the term “queue jumper” has emerged, bringing with it a sinister meaning instantly recognisable as an un-Australian act, an action that goes against the very nature of our sense of fair play. To his credit, the Minister for Immigration

²⁷¹ Martin Ferguson in *Hansard* (22/11/1999: 12314). See also Con Sciacca (25/11/1999: 12733).

²⁷² For instance, see Duncan Kerr in *Hansard* (21/10/1999: 12122–8; 25/11/1999: 12731–2), Martin Ferguson (22/11/1999: 12314) and Con Sciacca (19/9/2001: 30960).

²⁷³ For instance, see Con Sciacca in *Hansard* (28/6/1999: 7598; 27/2/2001: 24491; 22/8/2001: 30020, 30027), John Murphy (23/8/2001: 30126) and Janice Crosio (23/8/2001: 30129).

²⁷⁴ For instance, see Michael Danby in *Hansard* (7/2/2001: 24034–5), Bernie Ripoll (6/6/2001: 27492), Janice Crosio (23/8/2001: 30132), John Murphy (23/8/2001: 30127) and Simon Crean (14/3/2002: 1312).

²⁷⁵ For instance, see Con Sciacca in *Hansard* (22/8/2001: 30024), Janice Crosio (23/8/2001: 30131) and Jann McFarlane (26/9/2001: 31480).

has devoted much energy to addressing this problem with the full cooperation of the Opposition.²⁷⁶

As such, some Labor members not only failed to contest the Government's controversial claims, they reinforced them through their complaints that 'People who are free enough and wealthy enough to pay a people smuggler are virtually rewriting our immigration laws.'²⁷⁷ Labor members worked to promote the image that 'The Labor Party is as tough as, if not tougher than, the Government when it comes to illegal immigrants.'²⁷⁸

In part, Labor's failure to put up a broader opposition can be explained by its historical commitment to bipartisanship, a commitment that was frequently cited by Labor members.²⁷⁹ In the wake of the *Tampa* affair, when the Labor Party was eager to combat its reputation as 'soft' on immigration, bipartisanship became a somewhat ambiguous rallying point, as this remark by Con Sciacca illustrates: '[...W]e have, in effect, a 100 per cent record of straight-out bipartisanship on these issues. That does not mean to say that we believe that everything they have done is correct. But, as I said, we have made this decision that we will support them, and we have supported them.'²⁸⁰ This unwavering commitment to bipartisanship can, in part, be explained by Labor's 'small target strategy' under the leadership of Kim Beazley (2003: 231-62). Rather than

²⁷⁶ *Hansard* (22/6/2000: 18063).

²⁷⁷ Janice Crosio in *Hansard* (23/8/2001: 30130). See also Martin Ferguson (22/11/1999: 12316) and Con Sciacca (20/9/2001: 31104).

²⁷⁸ Con Sciacca in *Hansard* (28/6/1999: 7599).

²⁷⁹ For instance, see Martin Ferguson in *Hansard* (3/9/1997: 7623; 22/11/1999: 12314), Duncan Kerr (25/11/1999: 12731-2), Con Sciacca (25/11/1999: 12733; 19/9/2001: 30954; 27/9/2001: 31649) and Frank Mossfield (20/9/2001: 31122-3).

²⁸⁰ *Hansard* (27/9/2001: 31649)

develop comprehensive alternatives to Liberal policy, the Labor Party focused its attentions on specific issues where the public was notably frustrated with the Government. Thus, policies that did not incur widespread public disapproval, such as restrictive entrance policies, were not deemed to warrant substantive policy alternatives. Once, when Ruddock responded to Sciacca's criticisms by asking what Labor's policy was, Sciacca replied, 'Well, I am not the Minister. The Opposition is not in government. You are the Minister. You come up with the solutions and we will have a look at them'.²⁸¹

After its failed bid for the 2001 election, Labor did distance itself from its bipartisan approach. Under the leadership of Simon Crean (2002–2003), when Labor temporarily took a more combative stance on entrance policy, the principle of bipartisanship in immigration was still held as an ideal, yet it was argued then that the Liberal Government needed to compromise *its* aspirations and policies²⁸²—no idle threat given Labor's majority in the Senate. For instance, speaking on bipartisanship for asylum policy in 2002, Julia Gillard declared, 'If the Government has a credible plan to make Australia's arrangements faster then we will support it. If you do not have one, then we will come up with one and you can support it.'²⁸³ Even when Kim Beazley returned to Labor leadership in 2005, his appointed Shadow Minister for Immigration, Laurie Ferguson, set out to dispute the view that 'there was no differentiation between the major parties' on asylum policy.²⁸⁴

²⁸¹ *Hansard* (6/2/2001: 23915).

²⁸² For instance, see Frank Mossfield in *Hansard* (14/3/2002: 1330) and Julia Gillard (20/6/2002: 4028, 4030; 26/6/2002: 4403).

²⁸³ *Hansard* (20/6/2002: 4030).

²⁸⁴ Laurie Ferguson in *Hansard* (21/6/2005: 68–9). See also *ibid.* (26/6/2002: 4416–7; 3/3/2004: 25829–33).

Nonetheless, Labor's emphasis on the regulation of entrance remained throughout these years. Echoing the Government, Labor Party members declared that an orderly and effectively regulated border regime was essential;²⁸⁵ and, in light of the World Trade Centre attacks on 11th September 2001, affirmed the importance of tight border control for national security.²⁸⁶ In sum, then, Labor's aspiration to regulate entrance was much the same as the Government's, although somewhat less restrictive after the Pacific Solution was in place.

A Conflict of Aspirations

The Labor Opposition, more so than the Liberal Government, struggled to reconcile the aspirations to provide asylum and regulate entrance. As we have seen in weighing up these aspirations, regulation generally took precedence, a bias that was demonstrated by Labor's broad support for Government policy. Yet, where there were criticisms, Labor did generally fall on the liberal side of Government policy, suggesting that it gave relatively greater consideration to the provision of asylum. It usually erred towards the cautious side of the bipartisanship, sounding out warnings in respect to a policy's potential encroachment on humanitarian values. This was most strongly manifested in the Opposition's resistance to the withdrawal of judicial reviews, but it emerged in debates over other issues. Con Sciacca, who, in his role as Shadow Minister

²⁸⁵ For instance, see Frank Mossfield in *Hansard* (14/3/2002: 1331), Simon Crean (20/6/2002: 4020), Michael Hatton (26/6/2003: 17808) Lindsay Tanner (3/3/2004: 25822–4) and Stephen Smith (1/6/2004: 29743, 29749).

²⁸⁶ For instance, see Kevin Rudd in *Hansard* (20/6/2002: 4041–2), Wayne Swan (20/6/2002: 4046) and Julia Gillard (13/5/2003: 14006).

of Immigration, represented Labor's 'official' position, warned the Liberal Government not to overreact, comparing the number of irregular entrants in Australia to the far higher numbers in other countries;²⁸⁷ and questioned whether the Government had gone too far in its treatment of detainees.²⁸⁸

A more substantive and robust criticism emerged from a minority of Labor members who broke with their party's official position and criticized the direction of bipartisan policy. Just days before the *Tampa* affair broke, Colin Hollis, speaking on the Migration Legislation Amendment (Immigration Detainees) Act 2001, remarked, 'I am ashamed that [Members of Parliament] are not coming in here and saying how outrageous and totally unacceptable it is to lock up women and children. That criticism goes to my own side as much as it goes to the other side.'²⁸⁹ Andrew Theophanous, a prominent spokesperson on immigration issues, frequently criticized Australia's entrance policy, arguing that 'the whole philosophy and approach... has been one of control, toughness and lack of compassion.'²⁹⁰ As such, these Labor moderates voiced opinions that directly contradicted the Labor Party's official position, arguing, for instance, that asylum seekers were desperate people who could not be deterred by border restrictions²⁹¹ while Con Sciacca was advocating the use of restrictive measures

²⁸⁷ *Hansard* (25/11/1999: 12732). See also *ibid.* (22/6/2000: 18063), Michael Danby (7/2/2001: 24033–4), Colin Hollis (18/6/2001: 27684; 20/9/2001: 31109; 23/8/2001: 30136), Kelly Hoare (21/6/2001: 28374) and Tanya Plibersek (23/8/2001: 30103).

²⁸⁸ *Hansard* (30/11/2000: 23172).

²⁸⁹ *Hansard* (23/8/2001: 30134).

²⁹⁰ *Hansard* (22/11/1999: 12304). See also *ibid.* (3/9/1997: 7628–9; 24/9/1997: 8284–6; 31/5/1999: 5497–8).

²⁹¹ For instance, Tanya Plibersek remarked in *Hansard* (23/8/2001: 30104) that 'It is fair to say that our detention regime is no deterrent. If the choice is to be shot, you would probably prefer to end up in a camp in Australia.' See also Andrew Theophanous in *Hansard* (22/11/1999: 12302), Gavan O'Connor (23/8/2001: 30109), Bernie Ripoll (23/8/2001: 30124–5), Craig Emerson (23/8/2001: 30139), Nicola Roxon (27/8/2001: 30294) and Roger Price (20/9/2001: 31119).

as a means of deterrence.²⁹² Another prominent concern was that the brunt of policy was bearing down upon the victims of people smugglers rather than the people smugglers themselves.²⁹³ These members criticized the ‘demonization’ and ‘criminalization’ of asylum seekers,²⁹⁴ noting that irregular routes of immigration were often the only plausible way to seek asylum in the West²⁹⁵ and drew historical parallels with Jews escaping Nazi persecution by irregular means.²⁹⁶ Finally, these Labor members criticized the association that was being drawn between terrorism and asylum seekers in the post-9/11 era.²⁹⁷

It was not that these politicians did not recognize a need for regulation. Colin Hollis was well aware of the dilemma that irregular immigration posed but had different priorities: ‘The real difficulty that we face is that, although we wish Australia to adhere to international conventions, we also do not wish to send a ‘green light’ to people smugglers in different parts of the world. The challenge is whether Australia can handle this new phenomenon of people movement in a just and humane way.’²⁹⁸ Similarly, even in 1997, Andrew Theophanous was warning that Australia’s bipartisan entrance policy was ‘shifting the balance too far towards control and not far enough towards humanitarian considerations for refugee requirements’.²⁹⁹ For these members, then, the prioritization of regulation had gone too far, imposing too greatly on the provision of asylum and, in doing so, threatening Australia’s international reputation as a

²⁹² *Hansard* (28/6/1999: 7598).

²⁹³ For instance, see Dick Adams in *Hansard* (7/2/2001: 24040) and Roger Price (7/2/2001: 24037).

²⁹⁴ Colin Hollis in *Hansard* (23/8/2001: 30136). See also *ibid.* (20/9/2001: 31110–2).

²⁹⁵ Tanya Plibersek in *Hansard* (23/8/2001: 30103).

²⁹⁶ For instance, see Roger Price in *Hansard* (22/8/2001: 30028), Duncan Kerr (19/9/2001: 30974–5) and Colin Hollis (20/9/2001: 31109).

²⁹⁷ For instance, see Colin Hollis in *Hansard* (20/9/2001: 31111), Roger Price (20/9/2001: 31117) and Allan Morris (20/9/2001: 31132).

²⁹⁸ *Hansard* (18/6/2001: 27684). See also John Murphy (23/8/2001: 30129).

²⁹⁹ *Hansard* (24/9/1997: 8286). See also *ibid.* (22/11/1999: 12302).

humanitarian nation.³⁰⁰ Consequently, in Caucus, two Labor members formally opposed their party's support for the Border Protection (Validation and Enforcement Powers) Bill 2001, the major legislative component of the Pacific Solution (Lavelle 2003: 239), demonstrating their dissatisfaction with Labor's prioritization of regulation.

In sum, then, the Labor Party largely failed to convincingly reconcile the conflict between its aspirations. In accepting bipartisanship, the Labor Party adopted the Liberal Government's position on entrance and its apparent legitimacy, proposing minor alterations so it could claim to support an improved version of the same model. During the *Tampa* affair, however, Labor Party leadership wavered. The Labor Party was unable to reconcile itself to the severity of the Government's legislation, yet unwilling to resign itself to the electoral consequences of opposing it. Thus, Labor's wavering and its internal disagreement contributed to the perception, prior to the 2001 election, that the Labor Party was supporting a position that it did not whole-heartedly believe in (Betts 2002: 39), a suspicion that caused Labor supporters with conservative views on entrance to shift their vote to the Liberal Party. Yet, exit polls of electoral booths showed that many Labor voters also drifted in the opposite direction to the left-wing minority parties: the Greens and the Australian Democrats (ibid.: 43–45). Thus, the Labor Party managed to disenfranchise supporters at either end of its constituency. The Labor Party's lack of resolve—and the Liberal Government's shrewd manipulation of it—managed to convince conservative voters that Labor's aspiration to regulate entrance fell far short of their own. On the other side, Labor's bipartisan approach to policy and its 'tough' rhetoric served to disenfranchise voters who preferred greater consideration of the aspiration to provide asylum.

³⁰⁰ For instance, see ibid., Colin Hollis (18/6/2001: 27684) and Gavan O'Connor (23/8/2001: 30109).

Part 4: Discussion

The fundamental empirical finding of this research is that in the periods covered by this thesis the governments of Canada and Australia both reinforced their regulation of entrance. Obviously this occurred to quite different degrees: Australia's shift toward greater regulation was dramatic—particularly between 1999 and 2001—while Canada's was more tentative. This difference is all the more notable considering that Canada received a relatively higher level of asylum claims than Australia. In 1999, for instance, a critical year for both nations, Australia received a total of 9,450 asylum claims (or 5 asylum claims for every 10,000 inhabitants) while Canada received 30,895 asylum claims (or 10 asylum claims for every 10,000 inhabitants) (UNHCR: 2002b). In addition these nations had quite different starting points: Australia, with its system of mandatory detention, already had a far more impenetrable regime of regulation by the mid-1990s than did Canada, where asylum claimants entered the community as soon as they passed preliminary identity and security checks.

In spite of these comparative differences, however, the centre-left government of Canada and centre-right government of Australia both enhanced their restriction of irregular immigration, demonstrating that they ultimately prioritized the demands of regulation over the ideals of asylum. Even when these governments made moves to liberalize entrance policy for asylum seekers—such as liberalizing Australia's detention procedures in 2005 or softening Canada's Immigration and Refugee Protection Act 2001 legislation—these moves were subsumed by the greater shift towards regulation,

like a downward step on an upward escalator. Furthermore, the analysis of Opposition parties reveals that they too were committed to regulation, suggesting that the restriction of irregular immigration would have occurred regardless of who was in power—albeit at different levels of intensity. In sum, the observations of this thesis support the general observation made at the outset that Western governments are converging on a trend toward more restrictive asylum policies.

The next important finding of this research is that parliamentarians in Canada and Australia—like those of Britain, Germany and Switzerland—did not speak ‘against refugees or against the principle of asylum’ (Steiner 2000: 134). Moreover, it was fairly common practice for Canadian and Australian parliamentarians to begin their speeches on asylum policy by declaring their commitment to the state’s obligation to refugees—regardless of whether they were advocating restrictive policies or not. Yet this thesis also detected a subtle rhetorical trend—most pronounced amongst the centre-right parties of Canada and Australia—for arguing that refugees who arrived by irregular means were *less deserving* of asylum than refugees who arrived by regular means. So, while parliamentarians did not oppose the *principle* of asylum, some parliamentarians did openly oppose asylum seeking as a means of actuating it.

This desert-based argument for the restriction of irregular asylum seekers, aimed to penalize those less deserving, was fundamental to how the major political parties of Canada and Australia justified their ‘tough’ policies. On the one hand, it allowed politicians to emphasize their obligations to national citizens and to ‘genuine’ refugees, and highlighted regulation as a means of satisfying the state’s obligations to both. On the other hand, it allowed politicians to devalue their obligations to asylum seekers.

Parliamentarians conflated the issue of asylum seeking with the diverse issue of irregular immigration and, in Australia especially, actively worked to undermine the legitimacy of asylum seekers. In this way, major political parties utilized political rhetoric to reconcile the conflict between the aspiration to regulate entrance and the aspiration to provide asylum. This came, however, at a serious cost to the inclusivity of the latter. While major political parties did succeed in preserving their aspiration to provide asylum, they did so by suppressing an activity that had once been widely accepted as a legitimate way for refugees to gain asylum.

It can be said that this desert-based argument for restriction came in ‘hard’ and ‘soft’ forms. While the major political parties of Canada and Australia all employed various versions of this argument, it was the centre-right parties of Canada and Australia that took the ‘hard’ approach. These parties argued that it was preferable for a government to fulfil its humanitarian obligations to refugees through resettlement programmes rather than by accepting asylum claims on its territory. The implicit benefit of this strategy was that, if a government were to provide asylum *only* to mandated refugees, it could potentially satisfy its obligations to refugees without having to compromise its aspiration to regulate entrance. Indeed, if a government felt that its aspiration to provide asylum had been fulfilled by its refugee resettlement programmes, it might consider itself ethically vindicated to enforce any regulations that it deemed appropriate, even those that restricted the irregular entrance of genuine refugees.

The Australian Liberal Government took this ‘hard’ argument one step further by arguing that a highly regulated system of refugee resettlement allowed for a more just distribution of asylum among the world’s refugees. Given that the global refugee

population drastically outnumbered the spaces for asylum that were available in the West, Liberal politicians argued that it would be fairest to prioritize those whose situation was most desperate. Essentially, they were advocating for asylum to be distributed according to the principle of *triage*. Asylum seekers were not considered to be in critical need of assistance because their ability to travel internationally was taken as evidence of their relatively greater personal and economic resources. As such, members of the Australian Liberal Government argued that it was morally preferable to bypass them and look for more needy refugees. Of course, the force of this argument was partly driven by the Government's aggressive rhetorical campaign to undermine the legitimacy of asylum seekers, exaggerating the ambiguities of their legal status and implying that their motives were mostly material. Indeed, the Australian Liberal Government even reduced its annual humanitarian quota to 'prove' that asylum seekers were taking the place of mandated refugees, a case of policy being implemented to reinforce the veracity of political rhetoric. Irrespective of these attempts to influence public perceptions, however, this basic argument does carry some ethical force. In a non-ideal world of regulated borders, where the demand for asylum is greater than the supply, a principle of *triage* is arguably an effective way of distributing asylum amongst those who need it.³⁰¹ As such, this 'hard' justification for the restriction of asylum seeking was—at least in principle—persuasive.

For its part, the Australian Labor Party largely fell into line behind the arguments of the Liberal Government of Australia. Most Labor members put up no substantive opposition to these 'hard' justifications for restriction and, in some cases, they merely reiterated Liberal rhetoric. Only a few fractious Labor members broke from their

³⁰¹ For an academic articulation of this argument, see Millbank (2003).

party's official position, objecting to the exclusion of asylum seekers from the aspiration to provide asylum. This dissent intensified between 2000 and 2001 as bipartisanship required the Labor Party to make ever greater compromises on its aspirations. Indeed, the Liberal Prime Minister, John Howard, exploited this dilemma during the *Tampa* affair, presenting policies that were too restrictive for the Labor Party to reconcile with its relatively broader humanitarian aspirations. Labor faltered, initially objecting to the policy's severity and then relinquishing weeks later, qualifying its support for the Border Protection Act 2001 by declaring that the Pacific Solution did not reflect Labor's own aspirations. The Labor Party's failure to strike a convincing balance between asylum and regulation disenfranchised voters at either end of its electorate: it lost voters to right-wing parties for not holding a convincing aspiration to regulate entrance, and it lost voters to left-wing parties for not holding a convincing aspiration to provide asylum. The sharp loss of public support for the Labor Party in the lead-up to the 2001 general election is an important cautionary tale, an illustration of the consequences of not effectively reconciling the conflict between asylum and regulation.

The centre-left Liberal Government of Canada, on the other hand, did not explicitly employ 'hard' arguments to justify its own restrictive entrance policies. Nonetheless, the idea that some refugees were more deserving than others was implicit in its 'front door/back door' analogy. This 'soft' desert-based argument for regulation proposed that, by closing the 'back door', the Government could retain and foster public support to facilitate the entrance of further refugees through the 'front door'. Of course, if the Liberal Government of Canada did ever succeed in closing the 'back door', it would

have restricted the practice of irregular asylum seeking anyway. Essentially, it would have achieved much the same outcome as the centre-right had been advocating, without ever having to go as far as refusing to accept an asylum claim.

Crucially, by arguing that the restriction of asylum seekers facilitated the entrance of more deserving refugees, the major political parties of Canada and Australia went some way in reconciling the potential conflict between their actions and their aspiration to provide asylum. By arguing that regulation improved the state's capacity to provide asylum, these politicians made the restriction of asylum seekers more palatable to a liberal audience—especially to moderate voters, members of parliament and interest groups.

Certainly, not all liberal agents were convinced by the desert-based justification for restricting asylum seekers, sensing that some restrictive measures required an unacceptable compromise to what was ideal as an aspiration to provide asylum. As such, criticisms of asylum policy in Canada and Australia were lodged by various members of parliament, minority parties, domestic lobby groups, non-governmental organizations and the UNHCR. Some of these criticisms did appear to have a normative effect. In response to criticism of Bill C-31, the earlier version of the Immigration and Refugee Protection Act 2001, the Liberal Government made adjustments to reduce its negative impact on asylum seekers.

The Australian case study demonstrates what can happen when policy measures significantly overreach the justifications that are given for them, making too great a compromise to a political party's aspirations. For instance, the Australian Labor Party's bipartisan support for Government policy disaffected moderate voters and created

dissent among its own more liberal members of parliament. Even the Liberal Party of Australia experienced dissent in 2005 when some of its more moderate parliamentarians argued that, in light of the regulatory success of the Pacific Solution, the severity of Australia's detention procedures were no longer justified.³⁰² Moreover, as it became apparent that the Liberal Party of Australia had been less than accurate in its unfavourable portrayal of asylum seekers, it faced growing volatility amongst moderate voters, demonstrating that a rhetorical solution to the reconciliation of asylum and regulation could only ever be as good as its rhetoric.

In sum, then, the case studies of Canada and Australia show that rhetoric played an important role in justifying actions that compromised a political party's aspirations. However, there were also humanitarian elements within the major political parties and within the national community that worked to protect and preserve the aspiration to provide asylum against the encroachments of restrictive policy.

The desert-based argument for the restriction of asylum seekers was not the only justification for policy trends in Canada and Australia. Major political parties also justified their restrictive policies as a way of preventing misuse of their asylum systems by people for whom they were not intended—specifically, criminals, terrorists and economic migrants. What makes such arguments of subsidiary importance, however, is that they only ever justified the restriction of specifically those people: criminals, terrorists and economic migrants who were lodging false asylum claims. To fully satisfy the aspiration to regulate entrance, it was necessary to prohibit *all* forms of

³⁰² Interestingly, there was very little internal dissent within major political parties in Canada. The prominent source of dissent within the Canadian parliament came from the minority parties—especially the Bloc Québécois and the New Democratic Party—who generally had far more input into parliamentary debates on asylum than did minority parties in Australia.

irregular entrance, even those that were vindicated on moral or normative grounds (such as asylum seeking). So, while appeals to misuse of the asylum system were useful in dealing with specific problems with the asylum system, any political party that aspired to a high level of regulatory control would need a broader justification for restriction. This is, perhaps, why the centre-right parties of Canada and Australia pioneered the ‘hard’ justifications for the restriction of all irregular entrants. With their expressed concerns over cultural diversity and their broader recognition of threats, the centre-right parties had to justify a far greater level of regulation than the centre-left.

Clearly, then, the political ideology of the governing party was influential in the level of regulation that a nation was likely to enforce. In contrast to parties of the centre-right, politicians from centre-left wing parties did not express concerns over cultural diversity, and were more likely to downplay threats to the national community, rationalizing them or putting them in a more favourable context. One notable difference between the centre-left and centre-right in Canada and Australia was the issue of legal rights for non-citizens. In Australia, the Labor Party strongly resisted the Liberal Government’s attempts to withdraw judicial reviews of refugee status decisions, going so far as to block such legislation in the Senate. In Canada, Chrétien’s Liberal Government persistently declared its commitment to the Singh decision, admonishing the centre-right Opposition for its suggestions that the Canadian Charter of Rights and Freedoms should not be applied to non-citizens on Canadian territory. On the issue of entrance decisions, centre-left parties seemed willing to give greater autonomy to domestic courts, whereas the centre-right parties of Canada and Australia exercised an ambition to constrain or disengage their powers. The centre-left’s justifications for this

position demonstrated its greater commitment to equality—in particular, equal access to legal rights—and its willingness to extend this egalitarian concern beyond the national community. Arguably, however, both of the centre-left parties surveyed in this research did eventually weaken their resistance: the Canadian Liberal Government by refraining from implementing the legislation for the Refugee Appeal Division, and the Australian Labor Party by acquiescing to Government restrictions to judicial review in the wake of the *Tampa* affair. This re-emphasizes the point that, while these parties' aspiration to regulate entrance was more reined in than the centre-right's, it was still strong enough to impose itself over their aspiration to provide asylum.

To sum up, then, the issue of regulation was a priority for all parties operating within Canada and Australia: it was beyond contention. With the political centre of gravity soundly on the side of regulation, the issue under contention was the necessary *level* of regulation. As such, centre-left parties tended to moderate the regulatory policies of the centre-right, while the centre-right tended to coax stricter regulations out of the centre-left. The sum result, of course, was an inexorable crawl toward greater regulation. While this move was perhaps a little too tentative for the right and a little too rash for the left, the policies that were passed through the Canadian and Australian parliaments generally built upon—rather than dismantled—the existing system of regulation. This move towards greater regulation was justified on the grounds that it would encourage an immigration regime that facilitated the entrance of refugees arriving by regular means. Implicitly or explicitly, major political parties advanced the notion that these refugees were more deserving of protection than asylum seekers.

Conclusions

Examining how major political parties justified the restriction of asylum seekers in Canada and Australia has helped to reveal the complexity out of which asylum policy emerges. The politics of asylum in Canada and Australia do not readily conform to the model of a ‘tug-of-war’, a conflict between the interests of a particularist state and the universalism of morality and international norms. A more appropriate model, advanced by this thesis, defines the politics of asylum as a conflict between the aspirations to regulate entrance and provide asylum, each of which is motivated by a set of material and non-material factors—among which are norms, morals and interests. Importantly, this conflict of aspirations occurs *within* political agents—within states, parliaments, political parties, individual politicians and voters. Their restrictive actions are not the outcome of a singular intention to restrict—they emerge out of a tangle of conflicting motives. Thus, rather than conceive of asylum provision as a duty that is forced upon one actor by another, it can be conceived as an activity that is self-motivated and self-defined.

Once the asylum politics of Canada and Australia are viewed in this manner, it is possible to make better sense of the relationship between asylum policy and its related political rhetoric. Major political parties do not support the restriction of asylum seekers because they do not care about their humanitarian obligations; they restrict them because it provides a solution to the conflict between two earnestly held aspirations.

Indeed, it is because political parties cannot escape their humanitarian obligations that they put so much emphasis on declaring their aspiration to provide asylum in public, as well as justifying the negative effects of their actions. It is not in the interests of any major political party operating in a representative democracy to be seen as unreasonably callous towards foreigners, especially those who claim to be refugees. Framed in the right way, however, major political parties do have significant scope for repealing ideal humanitarian practices without seriously offending the liberal conscience—or, more importantly, liberal voters. Therefore the justifications offered by major political parties are an important feature of the shift towards regulation.

Given that this research offers a clear and nuanced model of asylum politics, it is worth drawing from it some normative conclusions. Firstly, given the current global situation, it would be extremely difficult to reverse or even halt the trend toward greater regulation of entrance, in spite of its negative implications for refugees. The political impetus to regulate entrance is fuelled by powerful electoral considerations, a factor that cannot be ignored by any majority party operating in a representative democracy. Unless there was a dramatic moral shift amongst the electorates of Canada and Australia, voters will ultimately continue to prioritize their own interests and thereby compel power-seeking parties to do the same. As such, public and political debates will continue to focus on *what level* of regulatory control is appropriate, not on whether it is appropriate at all. At best, refugee advocates can hope to mitigate only the worst consequences of regulation, blocking measures that grossly impinge on the rights and well-being of asylum seekers.

On the more positive side, the governments of Canada and Australia are likely to continue to hold an aspiration to provide asylum. As long as these nations are capable and willing to accept an inflow of foreign immigrants, there will be ongoing public and political support for dedicating a proportion of places to refugees. The moral foundations of asylum are simply too powerful for a liberal community to renounce entirely. Only in a radically different global environment³⁰³ is it conceivable that Canada and Australia would cease to provide asylum—and even then they are likely to aspire to reinstate asylum in more favourable circumstances.

If regulation of entrance was ever successfully enforced, effectively ceasing the irregular arrival of asylum seekers, then there would be only two ways by which a refugee could gain asylum in Canada and Australia. Firstly, asylum could be provided to individuals whose legitimate permits had expired and who were unable to safely return home. Secondly, asylum could be provided to mandated refugees through resettlement programmes. Because these means of gaining asylum are both subject to regulatory procedures, refugees who use them do not pose a serious threat to the nation's ability to regulate its own membership. In particular, the resettlement of mandated refugees allows governments a very high level of control—they can easily adjust their selection procedures to conform to any public or political preferences. It is in this area, then, that there is potential for major change to asylum provision. Given that mandated refugees are not as politically controversial as asylum seekers, there is significant scope for refugee advocates to lobby for change to the size and nature of a nation's refugee resettlement programmes.

³⁰³ For example, two plausible scenarios are mass displacement caused by climate change, or a pandemic that can only be contained through the strict enforcement of an international quarantine.

The danger, otherwise, is that governments will determine their refugee intakes arbitrarily. After all, if nations such as Canada and Australia do have absolute control over entrance, there is a real risk that they will be influenced by considerations that, from a liberal ethical perspective, should not be allowed to override the urgent demands of refugees. By way of illustration, it is worth drawing a historical analogy. After the Second World War, immigrant nations—Canada and Australia among them—used refugee resettlement programmes as a means of satisfying their post-war labour requirements and their humanitarian obligations. In implementing these programmes, governments were highly selective, imposing economic and racial criteria to prioritize refugees who suited a nation's labour requirements and were the least culturally controversial. Priority usually went to young, able-bodied Northern Europeans. Major refugee crises elsewhere in the world—such as the exodus created by the Chinese Civil War—were almost completely ignored by Western nations (Binzegger 1979: 62–70; Beaglehole 1986: 124–6). Due to the difficulty of transcontinental travel, there was no easy way for refugees to bypass this arrangement. Consequently, this system had the effect of being highly regulated.

As contemporary regimes of regulation become more effective, the provision of asylum may once again be dominated by the strategic, economic and cultural preferences of receiving nations, and thus fail to reflect the scale and nature of the refugee problem. As it stands, the UNHCR presently recognizes 10 million refugees.³⁰⁴ Of these, fifteen Western nations accepted 71,700 refugees through resettlement programmes in 2006, almost 60 per cent of whom were taken by the United States

³⁰⁴ These refugees constitute part of the nearly 33 million 'persons of concern' recognized by the UNHCR (2008), including also 12.8 million internally displaced persons, 5.8 million stateless persons and 740,000 asylum seekers.

(UNHCR 2008). Clearly the scale of displacement is much greater than the level of relief. Moreover, a recent incident in Australia reemphasized the way in which regulation can be used to determine the make-up of a nation's refugee quota. In late 2007, the Liberal Government announced (with Labor Party support) that it would no longer be taking African refugees through its resettlement programme, purportedly due to the failure of recent Sudanese arrivals to properly integrate. In fact, the Sudanese had an excellent reputation for integration, and members of the Australian police publicly refuted the claim by Kevin Andrews, then Minister for Immigration and Citizenship, that Sudanese refugees were over-represented in crime figures (Browne 2007). Given the upcoming election, it can be argued that this was a tactical move, appealing to a misconception of African immigrants which had some traction in the Australian electorate. In an ideal world, of course, such a factor—being discriminatory and inaccurate—would not be allowed to influence policy formulation.

In conclusion, there is a danger that a regulated asylum regime, rather than being used to implement a more equitable and just distribution of asylum, can be used by a nation to physically shut itself off from humanitarian situations. From their fortress of regulation, a nation is then free to exercise its obligations on its own terms, imposing self-interested biases that may be irrational or unjust. It is important to recognize that the irregular and disorganized nature of asylum seeking creates serious difficulties for governments, problems that they cannot afford to ignore. Yet asylum seeking also serves to involve nations in the rectification of humanitarian problems beyond their borders. While these problems may not have the same political pressure, problems which they ought not to neglect.

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