

# **The Immigration and Citizenship Law Dichotomy in Globalizing Times**

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My paper today aims to do two things. First, I present an analysis of the relationship between immigration law and citizenship law and of the consequences of that dichotomy for both citizenship and women.<sup>1</sup> Second, I consider how trends which characterize immigration and citizenship laws in contemporary globalizing times will be interpreted within this dichotomy and will themselves affect both citizenship and women. In particular, I am interested in the dual immigration law trends of a global “crack down” on illegal migration and a increased emphasis on recruiting the “best and the brightest” as new immigrants; as well as in the trend in citizenship law towards a more open reading of citizenship which fosters dual and indeed plural legal and conceptual categories. My conclusions are that under the pressure of globalizing forces the dichotomous relationship between immigration and citizenship law functions to obscure the effects that contemporary changes in both immigration regimes and citizenship regimes have on women. Attention to the gendered effects of these changes underscores the paradoxical effects of globalization, in which both inclusion and exclusion are enhanced.

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<sup>1</sup> This section of the paper draws on my article “Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics” (2000) 24 *Melbourne University Law Review* 280, as influenced by my more recent thinking on this issue.

## **Immigration Law and Citizenship Law**

My use of the idea of a dichotomy between immigration law and citizenship law is a way of articulating in lawyer's language some of the central concerns of citizenship theory. In other words, this explains how my inquiry into the workings of immigration law ends up engaging the vital questions of citizenship theory: questions about membership and belonging, boundaries and borders.

The essence of the immigration law – citizenship law pairing is that the bodily preoccupations of immigration law function to reserve to citizenship law the liberal discourses of equality and universality. The revitalization of citizenship scholarship which began about two decades ago addressed important themes within citizenship discourse such as its location within the public sphere, its emphasis on independence and individuality, and its tendency towards suppression of difference. All of these features of the analysis, when translated into legal terms, are about citizenship law, and the legal entitlements of citizenship.<sup>2</sup>

More recent scholarly inquiry that builds on these insights has extended the debate considerably by shifting the parameters of membership to include some who are not legal citizens within the broad realm of membership and rights which are typically associated with citizenship discourse alone.<sup>3</sup> This trend

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<sup>2</sup> Kim Rubenstein's book *Australian Citizenship Law in Context*, Sydney, Law Book Company, 2002, makes an important contribution to understanding the difference between these two concepts.

<sup>3</sup> For example, Alexander Aleinikoff makes an argument for a new legal status of "denizens" in *Semblances of Sovereignty: The Constitution, the State and American Citizenship* Harvard University Press, Cambridge, 2002. Seyla Benhabib argues that the elements of citizenship are

signifies an inroad into the rigidly demarked dichotomy between citizenship law and immigration law. Nonetheless, the citizen and non-citizen distinction remains vital for these analyses and its importance is underscored by this attention to it.

In nations with developed immigration programs (especially settler societies such as Australia, Canada, the United States or New Zealand, which have built part of their national mythology around being “nations of immigration”) migration law rather than citizenship law is the effective hurdle to membership. This is the case not only because the distinctions between citizens and permanent residents are generally less important now than in the past, but also because once newcomers are accepted as migrants, the hurdle for full membership in the form of citizenship is a low one. Typically, a certain number of years residency must be accumulated, a minimal knowledge of the “national” language, a pledge to defend the nation and respect its laws must be undertaken, and one must be of good character, a hurdle which may become more significant in these ominous times. In general, applying for citizenship is cheaper, easier and quicker, with a greater likelihood of success, than applying for permanent immigration status. Applicants for permanent residency are subject to medical examinations and more rigorous character assessments. Depending on their application category, their financial or personal affairs are scrutinized. They are confronted with legal regimes where, generally speaking, the state agents have more powers than the police and individuals have fewer

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being disaggregated in a way that separates social membership from political membership and thus creates a space for membership without citizenship; see *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press, Princeton and Oxford, 2002.

rights protections than criminal accuseds. Refugees or asylum seekers, who may be granted permanent residency without the same type of “qualifications” are subject to an inquiry of their personal circumstances which may, at times, be even more intrusive.<sup>4</sup> The group of permanent residents that is eligible to become new citizens is a group recruited and constituted by immigration law.

What this means for women is both important and complicated. Immigration laws aim to discriminate – to determine who will be admitted and who will be excluded. The criteria that immigration laws enshrine read as a code of national values, determining who some “we” group will accept as potential future members. These messages of acceptance are gendered in ways that parallel the central concerns of feminist analyses of citizenship. In most nations with developed immigration programs the categories of admission include those admitted because of family reunification, those admitted because of their value to the economy and those admitted for humanitarian reasons.<sup>5</sup>

Family reunification is by far the largest admission category in the United States and was the largest category in Canada and Australia until the mid-1990s when those two nations led the worldwide move to tailoring immigration requirements to fit immediate market need. In the family category, women predominate.

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<sup>4</sup> This point is well made by Audrey Kobayahi in "Challenging the National Dream: Gender Persecution and Canadian immigration Law" in Fitzpatrick P (ed) *Nationalism, Racism and the Rule of Law*, Dartmouth Press Aldershot U.K. and Brookfield U.S.A, 1995

<sup>5</sup> Some nations include a fourth category, those who are admitted because of cultural membership ties. This group includes Germany and Israel. See also my , “Beyond Justice: The Consequences of Liberalism for Immigration Law” (1997) 10 *Canadian Journal of Law and Jurisprudence* 323.

Family Class Migration to Australia: 1994 to 1999<sup>6</sup>

	Female	Male	Percentage Female
1998-99	13, 266	8, 235	61.7
1997-98	12, 732	8, 410	60.2
1996-97	16, 929	11, 297	60.0
1995-96	23, 948	14, 407	62.4
1994-95	17, 987	11, 153	61.3

Family Class Migration to Canada: 1999 to 2001 (principal applicants)

	Female	Male	Percentage Female
1999	24,850	15,072	62.2
2000	26,964	16,726	61.7
2001	28,840	18,463	60.9

Family Sponsored + Immediate Relatives Categories: USA 1996<sup>7</sup>

	Female	Male	Percentage Female
1996	340,227	256,025	57
1995	261,846	198,519	58.9
1994	262,210	201,389	56.5

<sup>6</sup> Gendered statistics in Australia are only available when purchased. I am using the figures from my earlier paper. Trends are unlikely to change as criteria have not significantly changed.

<sup>7</sup> US Bureau of Citizenship and Immigration Services statistics from "Immigration to the US in Fiscal Year 19XX". Online reports are available for 1994, 1995 and 1996. From 1997 to 2001 the corresponding documents entitled *Statistical Yearbook* report immigrants admitted by age and sex but not cross referenced with category.

The story told by these numbers is broadly similar in each of the three nations: family reunification immigration includes a significant proportion of wife import. That is, under the heading of family reunification immigration women arrive as migrants in a on the basis of their legally defined relationship of dependence. In Australia and Canada, this is further reinforced through the mechanism of sponsorship agreements, whereby the sponsoring partner must undertake to ensure that the sponsoree will not accept various welfare state payments from the government for a set number of years.

The economic migration categories are tailored in an attempt to ensure that those granted admission will find good jobs immediately and begin contributing to the economy upon arrival. Whether the indicator used is guaranteed job placement, particular skills, experience, education, or personal wealth, the category is tailored to indicate a preference for men. Gendered disparities on these indicators persist in the wealthy nations which are sought after immigration destinations. In migrant sending nations, such disparities are often more pronounced. The economic indicators which are preferred for their “neutrality,” of course reflect gendered and racialized dimensions of privilege. Some nations even label these skilled migrants as “independents,” signifying overtly the parallel with the citizenship discourse emphasis on individuality and autonomy.

Primary Applicants in Skilled Categories Australia 1994-99

	1998-99	1997-98	1996-97	1995-96	1994-95
Female	3, 610	3, 220	2, 023	2, 224	2, 539
Male	7, 556	7, 042	5, 842	5, 995	6, 541
Total	11, 166	10, 262	7, 865	8, 219	9, 080

Primary Applicants in Economic Classes,<sup>8</sup> Canada 1999 – 2001

	Female	Male	Percentage Female
1999	11,134	34,041	24.65
2000	13,108	42,835	23.43
2001	15,075	47,867	23.95

All admissions, Employment + Diversity, United States 1996<sup>9</sup>

	Female	Male
1996	85,253	91,032
1995	63,389	69,186
1994	79,571	84,762

Humanitarian migration is also gendered. In the international population of refugees and other persons of concern to the United Nations High Commissioner for Refugees, women outnumber men considerably. Despite this,

<sup>8</sup> These total group together business classes and skilled worker classes.

<sup>9</sup> As primary and dependent applicant numbers are not available, these statistics reveal very little.

however, admission figures for refugees and asylum seekers<sup>10</sup> in the United States, Canada and Australia reflect numbers which are closer to gender parity. There are overlapping explanations for this: men may be less likely to survive the circumstances which create refugees and thus are less likely to end up in refugee camps around the world; men are more able or willing to make the often dangerous journey to a prosperous nation; men may be more successful at attaining refugee status because the focus of the definition fits men's experiences more easily than women's. Whatever the explanation for a particular case or series of cases, the result is that proportionately more men than women benefit from the particular type of "solution" to refugee status that is represented by resettlement in a prosperous nation.

Australia, Humanitarian Admissions all subclasses, all categories of applicant

	1998-99	1997-98	1996-97	1995-96	1994-95
Female	4, 364	3, 157	3, 310	4, 742	4, 518
Male	4, 426	4, 400	5, 087	6, 927	7, 110

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<sup>10</sup> These categories contain only some of those admitted permanently on the basis of humanitarian considerations. Others include those who do not fit within the internationally agreed upon refugee definition but who are in refugee-like situations as well as people admitted under various categories of humanitarian exception to the immigration rules which exist in each of these countries.

Canada, Refugee Admissions, Principal Applicants

	Female	Male	Percentage Female
1999	3,900	8,154	32.35
2000	4,833	9,803	33.02
2001	4,443	8,986	33.09

Refugee and Asylee Adjustments, United States

	Female	Male	Percentage Female
1996	61,178	67,386	47.58
1995	55,630	59,020	48.5
1994	59,633	61,790	49.1

As migrants in each of these categories, women's and men's experiences are distinct. The distinctions reflect fault lines of privilege and dependence that are familiar to citizenship theorists. Many women arrive as new migrants because of their relationships of dependence: either as new marriage partners or as defined dependents of skilled migrants. While the legal categories that condition their admittance cannot of course determine their personal outcomes, they do convey to these women and others important messages about how and why they are valued by the nation. These migrants are the pool of new citizens. The universal values of membership as citizenship are made available to women on the basis of their gendered experiences as the subjects of immigration law. Access to the citizenship debate about participation, representation, and equality

is conditioned for these people on their prior acceptance through the much more rigorous and personal screening of immigration law.

At the outset of the 21<sup>st</sup> century, some characteristics of immigration law are shifting. I will now turn to considering how the shifting agenda of global immigration laws affects the immigration law – citizenship law dichotomy.

### **Global “Crack Down”**

We are in the midst of a worldwide crack down on illegal migration. The United States has been a leader in this area, with the *Illegal Immigration Reform and Immigrant Responsibility Act*, the increased spending on enforcement along the Mexican border, and most recently a commitment to entry and exit controls. The 1999 British *Immigration and Asylum Act* targeted unfounded asylum applications, by fast tracking “out” of the asylum system but not into it, reducing rights for asylum seekers and introducing new identity controls. More recently, the British have stringently curtailed the provision of welfare state benefits for asylum seekers.<sup>11</sup> Germany changed the form of its constitutional right to seek asylum in 1993 and in 1998 it introduced new law reducing benefits for asylum seekers. France has reduced asylum seeker benefits within the past decade. The EU is currently working on developing a common policy on illegal immigration to give effect to the Treaty of Amsterdam commitments in this direction. Since 1999 Australia has removed the possibility of permanent status from some refugees, has declared some of its own territory to “beyond its

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<sup>11</sup> Under Section 55 of the *Nationality, Immigration and Asylum Act 2002*, which came into effect on 8 January 2003.

borders” for the purpose of asylum claims, and introduced a comprehensive privative clause into its legislation, aimed at curtailing the role of the courts in immigration decision-making.<sup>12</sup> Canada has introduced a mandatory requirement that its refugee decision makers take into account whether a claimant has adequate documentation and has ratcheted up front-end screening on various inadmissibility criteria.<sup>13</sup> Very few of these changes are attributable to the post-September 11 migration panic. It is instead the case that those events have added impetus and political appeal to trends which were well established by the close of the twentieth century.

This global crack down on illegal migration affects women in several ways. As crossing borders without legal authorization becomes harder, the market for smuggling and trafficking becomes more lucrative, as well as more dangerous. Expense creates a greater barrier for women than for men. Even if migrating illegally is not a social good, it nonetheless has some markings of privilege. Some who migrate illegally do improve their life circumstances. Some who migrate illegally are eventually able to attain membership rights and even full citizenship in prosperous nations. The increased danger of smuggling in a crack down atmosphere also affects women independently of cost. In Australia, for example, where one of the crack down measures has been to remove family reunification rights for some categories of refugees, an immediate result has been more women and children making the boat journey across the East Timor

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<sup>12</sup> *Migration Legislation Amendment Act (No.1) 2001.*

<sup>13</sup> *Immigration and Refugee Protection Act, S.C. 2001, c. 27, s.106.*

Sea. In this scenario, where women had previously been protected by paternalistic stereotype, a change of government policy has generated a brutal formal equality of circumstance.

Trafficking, or at least our tracking of and concern with it, is also on the increase. The victims or subjects of trafficking are overwhelmingly women and children, especially girls. Crack down regimes raise the stakes in this business. Like any market system the costs are passed on, perhaps to the ultimate “consumers” but certainly to subjects, in the form of higher risks and higher prices of freedom. The line between smuggling and trafficking is often not clear. For women with fewer options of moving, trafficking or the risk of being trafficked may be made more attractive by global crack down measures. While legal sanctions against trafficking are increasing globally, there is little evidence yet to suggest that trafficking itself is being reduced. Many forms of legal crack down also serve to increase incentives for women to cooperate with traffickers, if the ultimate result of the law is being returned to a place they endured this horror to leave. The form of illegal migration remains available and highly gendered.

Beyond the effects of smuggling and trafficking, the current international moral panic about illegal migration has subtly gendered effects because of the way the category of “illegal” is constructed legally and the way it is conjured conjured in our collective imaginations. While technically anyone present in a nation-state without citizenship or authorization has transgressed immigration laws, the label “illegal” draws from but does not conform to the law. The “illegals” of our imagination, against whom the current wave of law reform is directed, are

not backpacking students who overstay their visas or business people who fall just outside the NAFTA categories. They are instead racialized and destitute. They fill the most dismal sweatshops and sexshops. They come seeking the benefits of our great wealth and generosity, our right to bestow but not their right to claim. The discourse of illegal migration is filled with images of those who have and those who have not, of desperate transgressors, of the deserving and the undeserving, of “good” or “bad” illegals. Gender insinuates itself into this discourse. Not in a way that disadvantages women directly, but by creating a space in which being victimized and powerless can purify one’s status as transgressor. There is detriment to anyone for whom this is the image that is rewarded. It is the “good illegals” who can aspire to citizenship.

### **Recruiting the Best and the Brightest**

There is not, however, a worldwide crack down on all migration. Countries like Canada and Australia have been at the forefront of defining a worldwide competition for the best and the brightest of migrants. Those with particular skills, experience, education and money are being recruited and welcomed. Some of this migration is defined as permanent and some as temporary, but those categories are less and less relevant, particularly given the lowered thresholds for citizenship in the nations which have developed these programs. Best and brightest migration has serious equity implications for the global brain drain, particularly as it is being more and more closely linked to international

university education, but for my purposes today I want to focus only other aspects of this phenomenon.

As Canada and Australia have moved since the mid-1990s to reserving a greater number of places to economically skilled migration over family migration, they have moved to having a greater number of men than women selected as primary applications. The United States is contemplating similar moves, but it would take massive changes for economically based migration to overtake the size of the United States' family reunification program. The size of the American economy alone creates a draw which other nations are adjusting their law and policy to imitate. Aggregate statistics about economic migration often show an approximate gender parity. This is partly because economic migrants bring their families (Many women do, of course, qualify as economic migrants). When a woman arrives as a partner of an primary economic applicant, her right to enter (and sometimes her right to remain) are conditioned by her relationship (usually with a man). While this relationship may not personally be experienced as a dependence, it is legally framed that way. A shift in emphasis towards economic migration does not, therefore, remove women from the pool of potential new citizens in a straightforward way, but it does ensure that women enter this pool because of their relationships of legal dependence. One element of both Australia's and Canada's new inducements for migration has been to ensure that the partners of economic migrants do not face labour market restrictions. This is

a recognition of some of the gendered barriers that have existed in this category of most privileged migrants, but it does not alter the basic contours of the program.

I also want to briefly mention the United States' diversity visa program. The program is imaginatively compelling and adds an interesting twist to the standard story of migration policy fulfilling national aspirations and fueling mythology. It is aimed providing potentially permanent immigration places for residents of countries with low rates of migration to the United States. The program is conducted by lottery and 6.2 million qualified entries were received for the 50,000 visas available for 2003. Spouses and children are allowed to accompany successful entrants and are not counted against the 50,000 quota.

In thinking about the diversity program, there are several observations about gender. First, the program confirms that what counts as diversity, or conversely discrimination, in immigration is not about gender. It is about racialization, which has been read since the mid 1970s as country of origin. Second, despite the lottery logic and consequent "equal playing field" appeal of the program, there are baseline criteria for entry. These are high school or equivalent education or two years of work experience in a job that requires two years of training (including on-the-job training). While these requirements are framed as minimum, they do eliminate some aspirants, and more women than men. Third, in a program structured as a lottery, significantly more visas go to men than to women (approximately 32,000 to 26,000 in 1996). This could be the result of the minimum requirements. It could also be the result of a

probabilistic calculation given that the applicant pool is in the order of magnitude of six million. In other words, it could mean nothing at all (knowing about how the pool is gendered would be more revealing).

Finally, it could also mean that women are less likely than men to want to migrate. There is some evidence to suggest that this may be generally true, and we do know that most people do not prefer, as a first life choice, to permanently leave the country they think of as home. How would this preference affect the immigration law – citizenship law dichotomy? In a world where women and men were equally appealing to migrant recruiting nations, it might mean that more men than men than women became eligible for the new citizen pool. For the equalizing, homogenizing, starting over logic of citizenship. This would be, then, one further way in which citizenship is a masculinized concept.

### **New Citizenships**

This aspect of citizenship is also important to the twenty-first century face of the immigration law – citizenship law dichotomy: changing citizenship is becoming easier. An increasing number of nations are tolerant of dual citizenship. An increasing number of individuals hold multiple passports, or in the case of the European Union, achieve the results of so doing.<sup>14</sup> While Canada and Australia are both involved in altering their citizenship laws to intensify their symbolic content, the same rounds of law reform are reducing discriminatory (including gendered) aspects of citizenship provisions and ensuring that the basic criteria for naturalization are transparent and reasonably simple.

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<sup>14</sup> Rubenstein articles

The increasing availability of citizenship is one of globalization's paradoxes. When we seek out this type of measure of inclusion, we find inclusion is on the increase. When we seek out the exclusions seen in the crack down on illegal migration and the ratcheting up of border controls, we see exclusion is also on the increase. For those who are in positions of privilege, globalizing trends enhance and increase that privilege, for those who are excluded globalization is increasing their exclusion.

In the migration law realm, one of the ways this inclusion-exclusion dynamic is achieved is through the immigration law – citizenship law dichotomy. As the formal logic of each of these legal frameworks corresponds to globalization's paradox: immigration law is about exclusion and citizenship law is about inclusion. The role that each type of law plays in constituting the border of the nation and its membership allows both of these dynamics to operate simultaneously. It also for a rhetorical shift from one logic to the other as the politics of the day require. It remains true in these globalizing times that immigration law does the dirty work of exclusion, freeing citizenship law to the lofty ideals of liberal legalism. For women, access to citizenship is, now as ever, conditioned by an intricately gendered immigration net.