Prospects for a North American Security Perimeters: Coordination and Harmonization of United States and Canadian Immigration and Refugee Laws, The

Steve de Eyre

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THE PROSPECTS FOR A NORTH AMERICAN SECURITY PERIMETER:

Coordination and Harmonization of United States and Canadian Immigration and Refugee Laws

Steve de Eyre†

PART I: INTRODUCTION

Throughout the twentieth century, the border between Canada and the United States of America was commonly referred to, with great pride, as the world’s longest undefended border. After September 11, 2001, the term undefended quickly became a dirty word in Ottawa and Washington, as the Americans began to view their northern border as a vulnerability. The September 11 attacks led to a profound increase in security measures and border controls in the United States and, as a consequence, Canada. The initial response of the United States in the immediate aftermath of the attacks resulted in extensive delays along the Canada-United States border. Realizing the costs of such delays, leaders from both countries issued a joint “Smart Border” plan, which has acted as the blueprint for bilateral cooperation at the border in the subsequent years. The reality of the effectiveness of border controls, and debate over what should be the primary objective of such controls, has led to renewed discussion on the concept of a North American security perimeter. This plan would essentially eliminate barriers to the movement of people and goods across the shared border, and focus instead on enforcement and prevention at continental points of entry.

Moving towards a North American security perimeter would have far reaching implications in numerous policy areas for Canada and the United States, including security, law enforcement, trade and commerce, and immigration and refugee policies. Pursuing such a far-reaching plan would require significant political willpower by North American leaders, which has yet to be espoused by politicians on either side of the border. Nevertheless,

† J.D., Case Western Reserve University School of Law, 2010; B.A. (Honours), Bishop’s University, 2005. I thank my wife Emily, my Mother, and my Uncle Paul for their support over the past three years.

ad-hoc agreements have been implemented in areas of defense, law enforce-
ment, and immigration that have emphasized a continental approach to mutu-
al problems. These binational agreements and institutions continue to grow in size and scope, and serve as a realistic and effective alternative in lieu of a formal security perimeter.

This note will discuss and compare the immigration and refugee policies of Canada and the United States, identifying where diverging policies exist that would require coordination or harmonization within a perimeter agreement. Part II of this note will begin with a discussion of the history and development of the North American security perimeter concept, including previous incremental efforts to this end, and the main contentions of proponents and opponents of such a plan. Canadian and United States immigration and refugee policies will then be analyzed, outlining the laws, policy objectives, and structural framework of each country’s immigration system. Part III will analyze the legal issues raised through potential harmonization of the two countries’ immigration and refugee policies. The main areas where these policies diverge will be highlighted, and the European Schengen Agreement will be evaluated as a possible model for resolving these incongruities. Finally, related political and policy considerations that might preclude a movement towards harmonization will be discussed.

PART II: FACTUAL BACKGROUND

A. THE HISTORY OF NORTH AMERICAN PERIMETER SECURITY AND DEFENSE

The general concept of North American perimeter security has existed in varying forms for almost 200 years, tracing its roots back to United States President James Monroe’s 1823 unilateral declaration that “the American continents . . . are henceforth not to be considered as subjects for future coloniza-
tion by any European powers.” In 1938, under the threat of Nazi Ger-
many and Imperial Japan, President Franklin Roosevelt and Prime Minister William Lyon Mackenzie King formulated the principles that defined how their two nations would address common security threats for the remainder of the twentieth century. In a speech given at Queen’s University in Kingston, Ontario, Roosevelt declared that even the neutral American people “would

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not stand idly by” if Canada was attacked. The Prime Minister responded two days later with a declaration that “enemy forces should not be able to pursue their way either by land, sea, or air to the United States across Canadian Territory.” Shortly after, in 1940, the Permanent Joint Board on Defense was established to serve as a binational advisory board on North American continental defense. Later that decade, the principles espoused by President Roosevelt and Prime Minister King were enshrined in Article V of the North Atlantic Treaty (NATO), voicing that “an armed attack against one or more [NATO country] in Europe or North America shall be considered an attack against them all.” The 1950s witnessed the signing of The North American Aerospace Defense (NORAD) agreement between the United States and Canada, creating a common perimeter around the two countries to defend against the threat of a Soviet attack. These agreements, though short of establishing a fully-integrated North American security perimeter, were effective in addressing the security threats faced by North America in the twentieth century.

In March 2001, largely in response to the arrest of Ahmed Ressam, the “millennium bomber,” former United States Ambassador to Canada Gordon Giffin boldly suggested that visionary steps must be taken to stem the flow of terrorism and cross-border crime, and that a perimeter approach to border management be considered. Shortly afterwards, the September 11, 2001 terrorist attacks brought the issue of improving North American security to the forefront, as the immediate United States response to the attacks had grounded air traffic and brought land crossings to a virtual halt. Less than a week after the attacks, former United States Ambassador to Canada Paul Cellucci said that “if the United States had policies on immigration and refugee status that were more common we could establish this perimeter to protect the United States and Canada, and I think that is where [the United States and Canada] should be headed.”

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4 Id.
5 Id.
8 Noble, supra note 2.
On December 12, 2001, former Canadian Deputy Prime Minister John Manley and former Department of Homeland Security Secretary Tom Ridge met at the Detroit-Windsor Ambassador Bridge to sign the Smart Border Declaration, a thirty-point binational action plan to revamp Canada-United States border strategy in an effort to alleviate the post-September 11 congestion. The Declaration's thirty points were based on four pillars: (1) the secure flow of people; (2) the secure flow of goods; (3) secure infrastructure; and (4) information sharing and coordination in the enforcement of these objectives. Also in December 2001, the Canadian House of Commons Committee on Foreign Affairs and International Trade recommended that the government study the implications of establishing a security perimeter around North America; however, the reply of Jean Chrétien's government was viewed as being "ambivalent," and the recommendation was avoided by saying that the government was "committed to examining any options for improving operation while providing appropriate security at the border." In addressing the potential for further North American security integration though a perimeter agreement, several options have been identified. Professor Stéphane Roussel presented four options in a 2002 paper prepared for the Canadian Institute of Strategic Studies. The first, most comprehensive approach, is a "Formal Security Perimeter," a comprehensive treaty between Canada and the United States, modeled after the European Union's Schengen Agreement, the Permanent Joint Board of Defense, and the International Joint Commission. The second option is an "Informal/Limited Security Perimeter," a sectoral memorandum of understanding between agencies without a formal treaty. Roussel views this as the most likely scenario as it is the way in which most Canada-United States relations are currently conducted, as evidenced by the Smart Border Declaration. The third option is a "Multilateral Security Perimeter," which would encompass Mexico and possible additional nations, and could be either a formal or informal agreement. The final option is a "Unilateral Approach," with each country establishing its own security protocols, which, at least in the case of Canada, would have to be robust enough to reassure the United States. To an extent,

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13 Noble, supra note 2, at 464.
15 Id.
16 Id.
17 Id.
18 Id.
this is an approach also being taken by the Canadian Government through the immigration and security reforms implemented after September 11.

Roussel's first option, a "Formal Security Perimeter," was further advocated in January 2003 by the Canadian Counsel of Chief Executives (CCCE) through its North American Security and Prosperity Initiative. The report advocated the need to "transform the internal border into a shared checkpoint within the Canada-United States economic space" with a twofold objective of "shift[ing] the burden of protecting our countries against global threats away from the internal border to the approaches to North America, and to eliminate unnecessary regulatory, procedural, and infrastructural barriers at our internal border." Such an ambitious plan would require extensive harmonization of Canadian and United States policies in numerous areas, not the least of which would be immigration and refugee policies.

B. IMMIGRATION AND REFUGEE POLICIES OF CANADA AND THE UNITED STATES

Immigration was the cornerstone of development in Canada and the United States. Both countries are multicultural societies with immigration policies that are among the most liberal in the world. In general, these immigration policies have sought to enhance and expand populations, geographical frontiers, and labor markets; reunite families; protect the prosecuted and displaced; and permit temporary workers to supplement labor shortages. The policies differ when examining the overall social and economic priorities each country seeks to advance through the administration of their immigration and refugee policies.

Canada's immigration policy is focused on attracting young, highly skilled immigrants through an emphasis on skills and education. In 2008, 63.9% of all immigrants to Canada were economic immigrants, while only 22.5% were family class immigrants. Canadian economic immigrants are chosen through a point system that selects immigrants based on their age,

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education, language, occupation, and experience. Conversely, United States immigration policy is centered strongly around family reunification. In 2008, family class immigrants totaled 64.7% of all new permanent residents admitted to the United States, while only 15% were admitted based on “employment based preferences.”

<table>
<thead>
<tr>
<th>IMMIGRANT CLASS</th>
<th>CANADA</th>
<th>UNITED STATES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family</td>
<td>26.5%</td>
<td>64.7%</td>
</tr>
<tr>
<td>Economic</td>
<td>60.3%</td>
<td>15%</td>
</tr>
<tr>
<td>Refugee</td>
<td>8.8%</td>
<td>15%</td>
</tr>
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</table>

Though some observers predicted that these divergent policies would begin to converge in the 2000s, the immigration statistics from the past five years have not supported these predictions. One possible explanation for this is that United States legislators are weary of having to defend a Canadian-style “designer immigration” system that goes against the frontier image of the “huddled masses” embraced by Lady Liberty. Both systems, however, have their flaws: while the United States system is at times accused of creating an overworked and undereducated immigrant class, the Canadian System is criticized for resulting in an overeducated and underemployed class.

This section will discuss the history and sources of both Canadian and United States immigration and refugee law, and will then analyze how incongruity in these policies would have to be resolved in a security perimeter agreement.

24 Newman, supra note 22.
25 Rekai, supra note 21.
27 CIC, supra note 23; DHS, supra note 26.
28 See PASTOR, supra note 20.
29 CIC, supra note 23; DHS, supra note 26.
30 Rekai, supra note 21.
31 Id.
1. History and Sources of Canadian Immigration and Refugee Law

The two documents of the Canadian Constitution, the British North America Act of 1867 and the Canadian Charter of Rights and Freedoms (Charter) together provide the basis for immigration and refugee law in Canada, and the federal/provincial division of power. Overall, the federal government enjoys supremacy on migration issues. Section 91 of the British North America Act, which sets out the powers of the federal Parliament, states that "naturalization and aliens" fall under the control of Parliament. However, section 95, Agriculture and Immigration, creates a sphere of concurrent federal/provincial jurisdiction: the provincial legislatures may regulate "immigration into the province," while the federal parliament may enact legislation in relation "to [i]mmigration into all or any of the Provinces." However, under the doctrine of paramountcy, federal laws take precedence over an inconsistent provincial law, which means that provincial immigration statutes will only be valid so long as they are "not repugnant to any Act of the Parliament of Canada." The Charter, enacted in 1982, enshrined the fundamental rights and freedoms of individuals in Canada. Notably, most Charter rights do not distinguish between citizens and non-citizens, rather referring to "everyone" or "every individual." The exceptions to this are when dealing with democratic (voting) rights and mobility (residence) rights. Section 7 of the Charter grants "[e]veryone . . . the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In 1985, applying Section 7 of the Charter to the rights of a refugee claimant, the Canadian Supreme Court held in Singh v. Canada that the Immigration Act was inconsistent with the Charter as it "did not accord the appellants an adequate opportunity to present their case and to know the case that had to be met." Most notably in this interpretation, the

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34 Constitution Act, supra note 32, § 91, cl. 25.
35 Id. § 95.
36 MARTIN JONES & SASHA BAGLAY, REFUGEE LAW 32 (Irwin Law 2007).
37 Id.
38 Charter, supra note 33, § 3.
39 Id. § 6.
40 Id. § 7.
41 Singh v. Canada (Minister of Employment & Immigration), [1985] 1 S.C.R. 177 (Can.); JONES, supra note 36, at 38.
Court held that “everyone,” as used in Section 7, includes illegal immigrants to Canada.\(^{42}\)

In 2001, the Canadian government enacted the *Immigration and Refugee Protection Act*\(^{43}\) ("IRPA"), which was the first complete revision of Canadian immigration and refugee legislation in almost a quarter-century.\(^{44}\) The IRPA is “framework legislation,” thus it has since been complimented by vast volumes of regulations including definitions, procedures, and decision making factors.

2. History and Sources of United States Immigration and Refugee Law

Article I, Section 8, Clause 4 of the United States Constitution empowers Congress to "establish an uniform rule of naturalization."\(^{45}\) In the 1849 *Pas-senger Cases*, the United States Supreme Court held that the regulation of immigration was a power of the federal government, and not the states.\(^{46}\) The Supreme Court views control over the nation’s borders as an implicit federal power, essential to the establishment and preservation of national sovereignty.\(^{47}\) While there is no express language vesting the power to regulate immigration or citizenship in either the Congress or the Executive Branch, the United States Supreme Court has held that “over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”\(^{48}\)

In 1952, Congress first compiled all of the existing, ad-hoc immigration laws into a single statute, the Immigration and Nationality Act of 1952 (INA).\(^{49}\) The aim of this original act was to combine quality control exclusions with a race-based national origins quota.\(^{50}\) The INA remains the basic statute for current United States immigration, although Congress has enacted numerous significant amendments to the Act. In 1965, the controversial national origin quotas were removed and replaced with per-country quotas, and the preference for family members of United States citizens was made a priority in the immigrant selection system.\(^{51}\) The Immigration Act of 1990 increased legal immigration quotas by thirty-five percent, permitting more family sponsored immigration and encouraging employment-based immigra-

\(^{42}\) PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 1067 (Carswell, 4th ed., 1997).

\(^{43}\) Immigration and Refugee Protection Act, 2001 S.C., ch. 27 (Can.) [hereinafter IRPA].

\(^{44}\) JONES, supra note 36, at 42.

\(^{45}\) U.S. CONST. art. I, § 8, cl. 4.


\(^{47}\) Stephen W. Yale-Loehr, BASIC IMMIGRATION LAW 7 (Prac. L. Inst. 2007).


\(^{50}\) Yale-Loehr, supra note 47.

\(^{51}\) Id.
tion. After September 11, Congress enacted the USA PATRIOT Act, which toughened security clearances and background checks for both nonimmigrant and immigrant classes, and increased the government’s ability to track foreign nationals in the United States. Most immigration functions were moved from the Department of Justice to the Department of Homeland Security (DHS), with the immigration functions at DHS now spread among three bureaus: United States Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP).

PART III: LEGAL DISCUSSION

A. DIVERGING POLICIES TO BE ADDRESSED

1. Refugee and Asylum Policies

The main issue of contention when comparing United States and Canadian refugee and asylum policies is the argument of some United States observers that Canada is “soft” on refugees and asylees, which creates a haven or “launching pad” for terrorists. The events of September 11 further amplified this criticism, bringing claims that Canada’s refugee determination system is “out of step with what appears to be a convergence of policies and practices in the developed world,” and that it is “the most generous refugee system in the world.”

While several limited incidents may give some credence to these assertions, it is important to note that both the Canadian and United States systems produce outcomes with similar results: Canada has a forty-one percent refugee acceptance rate; the United States accepts thirty-seven percent. Nevertheless, several aspects of Canadian refugee policy are frequently lambasted by critics on both sides of the border: the high rates of approval, a generous social welfare system, infrequent prosecution, and lax deportation procedures.

52 Id.
53 Id.
55 Id.
56 Noble, supra note 2, at 510 (stating that “[A] former American Immigration official at the April 1-2 [2005] Conference pointed out that the U.S. rate is much higher: when the stage two acceptances are included, it is about 60 percent.”).
57 Rudolph, supra note 54.
Both nations have a multi-tiered adjudication process for refugee claimants which are hindered by delays and bureaucracy.\(^5^8\) However, one source of contention is the Canadian government’s ability to track claimants after they have landed.\(^5^9\) Approximately twenty to thirty thousand refugees enter Canada each year,\(^6^0\) and unlike the United States (and most other Western nations), Canada does not detain refugee claimants until their status can be determined.\(^6^1\) Under Canadian law, refugees who are not detained are allowed to move freely until their court appearance, and thousands never show up for their court appearances.\(^6^2\) Canadian law does permit interim detention of claimants who are considered threats to the public or flight risks, but due to a lack of resources and detention facilities, few detention orders are given.\(^6^3\)

A major difference between the status of refugees in Canada and the United States is the access to social entitlement programs or employment while their cases are pending. In Canada, there are very few barriers to working or receiving government benefits while claims are pending,\(^6^4\) and the Canadian Supreme Court has held that “every alien, regardless of origin, personal history or criminal record, once having set foot on Canadian soil has the right under the Canadian Charter of Rights and Freedoms to claim refugee status. Having done so, the claimant has all the privileges of citizenship except the right to vote.”\(^6^5\) Conversely, in the United States, Congress amended the INA in 1996 to allow refugees to be detained while their claims are pending adjudication, and to bar them from working for at least six months after making their claim.\(^6^6\) The amendment also created an “expedited removal” system to allow for the detention and/or removal of claimants who do not have proper documentation.\(^6^7\)

In the minds of many United States security officials and policy makers, Canada’s perceived softness on refugee claimants has created conditions conducive for the infiltration of foreign terrorists.\(^6^8\) The Canadian Security Intelligence Service (CSIS) has confirmed the presence of over fifty terrorist

\(^5^8\) Rekai, *supra* note 21, at 13.
\(^5^9\) Id.
\(^6^0\) CIC, *supra* note 23.
\(^6^2\) Id.
\(^6^3\) Rekai, *supra* note 21, at 13.
\(^6^4\) Rudolph, *supra* note 54.
\(^6^5\) Singh, 1 S.C.R. 177.
\(^6^7\) Id.
\(^6^8\) Rudolph, *supra* note 54, at 445.
organizations operating in Canada, including Hezbollah, Hamas, al Qaeda, and the Irish Republican Army. A study by the United States Library of Congress designated Canada as a nation “hospitable to organized crime and terrorism,” citing a 1999 CSIS report entitled *Exploitation of Canada’s Immigration System: An Overview of Security Intelligence Concerns*, which stated that “terrorists appear to use Canadian residence as a safe haven, a means to raise funds, to plan or support overseas activities or as a way to obtain Canadian travel documents which make global travel easier.”

After September 11, Canada adopted policies to tighten their refugee claimant process through the *Immigration and Refugee Protection Act*, which made it more difficult for terrorists and international criminals to gain entry to or stay in Canada. Reforms implemented in the Act include immediate screening by CSIS upon arrival in Canada; the establishment of nine factors, including misrepresentation of identity and connections with a terrorist or criminal group, as grounds for denial of entry into Canada; greater penalties for immigration offenses; limits on the appeal rights of claimants identified for deportation for criminal offenses; and increased authority to arrest foreign nationals suspected of terrorism. Nevertheless, while security has been given increased importance in the administration of refugee law, the primary objective remains “upholding Canada’s liberal humanitarian tradition, including protection for refugees and for those fleeing persecution requiring asylum.” This was noted in the Library of Congress study, lamenting that “the 2002 bill designed to make Canada’s immigration laws less favorable to terrorists and international criminals is entitled the Immigration and Refugee Protection Act [which] serves as an indication of the prevailing concern for or priority placed upon civil liberties in Canada.”

In July 2002, the governments of Canada and the United States signed a Safe Third-Country Agreement, which came into effect on December 29, 2004. Under the Agreement, refugee claimants must make a claim in the first country they arrive in unless they qualify for an exception to the Agreement. The stated objectives of the Agreement are to “enhance the orderly handling of refugee claims, strengthen public confidence in the integrity of our respective refugee systems, help reduce abuse of both countries’ asylum

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69 Id.
71 IRPA, supra note 43.
72 Id.
73 Rudolph, supra note 54.
programs, and share the responsibility of providing protection to those in need.”

The submission of dual refugee claims to both countries had been cited as a drain on the resources of both countries, hampering their ability to adequately evaluate all claimants. This agreement was more important to Canada than to the United States, as the flow of immigrants entering the United States from Canada and claiming asylum is quite small, while the number of refugee and asylum claims made by those entering Canada from the United States is substantial.

In the joint “first year” review of the Safe Third Country Agreement issued by both governments, it was stated that:

[T]he implementation of the Agreement [was] positive. Since the Agreement came into force, asylum seekers have been provided with access to a full and fair refugee status determination process in one country or the other. Implementation of the Agreement has been in full compliance with international refugee protection principles and in accordance with international human rights instruments. By establishing clear and consistent criteria for the allocation of responsibility for adjudicating asylum applications, Canada and the United States have instituted an effective mechanism to share responsibility for providing protection to refugees in North America. Both governments are effectively adjudicating exceptions. By putting in place an orderly process, the Agreement has served to reduce the potential for misuse. Reduction of the potential for misuse should strengthen public confidence in the integrity of asylum systems in both countries.

While there are a number of significant divergences in immigration and refugee policy between Canada and the United States, in addition to strong skepticism of Canadian procedures by United States officials and observers, the cooperation demonstrated through the Safe Third Country Agreement is an excellent example of the potential for convergence on immigration policy issues between the two nations. Even if not achieving a comprehensive North American security perimeter, the alignment of these policies will help

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78 STC Agreement, supra note 75.
elevate the need for further thickening of the border prefaced on simple mistrust of a neighbor’s policies.

2. Visitors, Temporary Entrants, and Visa Waiver Countries

The admission and monitoring of tourists, international students, business people, and other temporary entrants or visitors is often cited as the weakest link in immigration and border security. One observer offered the following comparison between entry as a visitor, and entry as an immigrant or refugee:

Entry into either country as a refugee or asylee involves interviews, fingerprints, photographs, hearings, background checks and possible lengthy detention. The applicant being processed for permanent-resident status through a Canadian visa office abroad must wait between one and seven years for paper screening, medicals and security and criminal record checks to be completed before arriving in Canada. Similar waits face the applicant for a United States green card. It is becoming less likely that future terrorists will subject themselves to this kind of scrutiny and delay, particularly when there are easier options for entry. For those who require visitor visas, the average designated time for a consular officer to examine and assess an application can be measured in minutes; the average interview with a visa-exempt traveler arriving at a Canadian or United States airport or land crossing can be measured in seconds.

The Smart Border Declaration contained a commitment to “initiate joint review of respective visa waiver lists and share look-out lists at visa issuing offices”; however, the list of countries with visa waiver exceptions is grossly uneven, with Canada granting waivers to nationals of sixty-five countries, while the United States grants waivers to only thirty-six countries. (See Table 2).

79 Rekai, supra note 21, at 15.
80 Id.
81 Smart Border Action Declaration, supra note 21.
**TABLE 2:**  
*Visa Exempt Countries, 2009*³

<table>
<thead>
<tr>
<th>Canada Visitor Visa Exemptions</th>
<th>United States Visa Waiver Program</th>
<th>Canada Visitor Visa Exemptions</th>
<th>United States Visa Waiver Program</th>
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<tr>
<td>Andorra</td>
<td>Andorra</td>
<td>Latvia (Republic of)</td>
<td>Latvia (Republic of)</td>
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<tr>
<td>Italy</td>
<td>Italy</td>
<td>Turks and Caicos Islands*</td>
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<tr>
<td>Japan</td>
<td>Japan</td>
<td>United Kingdom</td>
<td>United Kingdom</td>
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<tr>
<td>Korea (Republic of)</td>
<td>Korea (Republic of)</td>
<td>Western Samoa</td>
<td></td>
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</tbody>
</table>

*Citizens of British dependent territories who derive their citizenship through birth, descent, registration or naturalization in one of the British dependent territories.

³Persons holding a British National (Overseas) Passport issued by the Government of the United Kingdom to persons born, naturalized or registered in Hong Kong.

³Persons holding a valid and subsisting Special Administrative Region passport issued by the Government of the Hong Kong Special Administrative Region of the People’s Republic of China.

³³*Id.*
Within a security perimeter agreement, the list of visa exempt countries is one issue that must be harmonized. After September 11, Congress considered the idea of eliminating the Visa Waiver Program in its entirety. Therefore, it is unlikely to expect that the United States will readily consider expanding its list to encompass those countries afforded exemptions when traveling to Canada. Many of the discrepancies are due to Canada’s colonial ties to the British Commonwealth, and some commentators do not believe that it would be politically feasible for Canada to require visas of fellow Commonwealth members or the rich Hong Kong Chinese investors that it recruited to immigrate in the 1990s.

3. Travel Document Requirements

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) required the Departments of Homeland Security and State to develop and implement a plan to require all travelers (including United States citizens) to present a passport or other secure document or combination of documents that denotes identity and citizenship when entering or re-entering the United States. Specifically, this new regulation was applied to North American Travelers (including Canadian and Caribbean citizens), who had previously not been subject to a passport requirement. Now known as the Western Hemisphere Travel Initiative (WHTI), this directive was implemented separately for air-travel and land-travel. Since January 23, 2007, a passport (or other approved document, such as a NEXUS card) has been required for all passengers, including Canadians, traveling by air into the United States. As of June 1, 2009, WHTI also requires such documentation for passengers arriving by land or sea.

Canada has not yet adopted similar requirements for North American travelers, allowing alternate documents to be used for establishing citizenship (such as a birth certificate). However, as the WHTI applies to United States citizens, this has effectively imposed a passport requirement for all United States citizens traveling to Canada, as they are required to show their passport upon their return to the United States. Apart from visa waiver lists, Canadian and United States documentation requirements for the entry

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84 Koslowski, supra note 11, at 543.
85 Id.
89 See Visa Waiver Program, supra note 82 (discussing visa waiver list discrepancies);
of non-North American citizens are quite similar: generally requiring a passport and a temporary entrant visa for admittance. Harmonizing these documentation requirements would likely present little difficulty. The passport requirement for Canadian and United States citizens crossing the shared border would by definition be removed. The two governments would have to resolve the issue of whether a passport would be required for Canadian and United States citizens returning to North America from third-countries. However, because the great majority of these countries require a passport for entry, this would not impose any significant burden on returning travelers, and consequently the issue could likely be easily resolved.

4. The Cuba Problem

Canada and the United States have extremely divergent policies towards the island nation of Cuba. Since the early 1960s, United States-Cuban relations have been severely limited by the broad embargo imposed by President Eisenhower, which was reinforced by President Kennedy in 1964. This embargo prohibits virtually all commerce with Cuba, including the moving of financial assets, trade of goods and services, and non-approved travel by United States citizens. The embargo was strengthened in 1996 by the Helms-Burton Act, which applied the embargo extraterritorially to foreign companies trading with Cuba. In stark contrast to the policies of the United States, Canada imposes no restrictions on travel or commerce with Cuba, and, to the contrary, enjoys a strong relationship with the island: several Canadian Prime Ministers had close relationships with former Cuban President Fidel Castro, and Cuba is a top tourist destination for Canadian travelers. These divergent policies would have to be resolved in a perimeter agreement; from an immigration standpoint, it would be extremely difficult to maintain a travel embargo for United States citizens while numerous vacation flights to Havana are available daily from Canadian cities. In April 2009, President Barack Obama signaled the start of a stark shift in United States-Cuban policy, which may begin to resolve this divergence in policy. At the 2009 Summit of the Americas meeting, President Obama stated that “the United States seeks a new beginning with Cuba,” and signaled his willingness to engage the Castro Government on a wide array of issues. The

Visitor Visa Exemptions, supra note 82 (also discussing visa waiver list discrepancies).
90 See CBSA, supra note 88.
92 Id.
94 Sheryl Gay Stolberg & Alexei Barrionuevo, Obama Says U.S. Will Pursue Thaw With
previous week, Obama lifted travel and economic restrictions for Cuban-Americans, and his administration has initiated informal meetings between the State Department and Cuban diplomats in the United States, with the intention of opening formal talks on issues of migration, drug trafficking, and regional security matters. These steps point towards an eventual convergence of United States and Canadian polices on Cuba; within a perimeter agreement, it now seems likely that the United States would soften its stance on Cuba so as to more closely reflect the Canadian approach.

B. A POSSIBLE MODEL: THE EUROPEAN SCHENGEN AGREEMENT

In the 1980s, the European Union established its own security perimeter, known as the Schengen Area (named after the town in Luxembourg where the original agreement was signed). The first agreement, enacted in 1985, was between five countries: France, Germany, Belgium, Luxembourg, and the Netherlands. This was supplanted in 1990 by the broader Schengen Acquis (“Schengen Agreement”), which came into effect in 1995 across most of the European Union. The Schengen Agreement abolished checks at internal borders of the signatory states, creating a single external border where immigration checks were performed in accordance with jointly-established procedures. Rules regarding visas, right of asylum, and checks at external borders were harmonized to permit the free movement of persons within the signatory states.

The Schengen Agreement has been cited as a model for a possible North American security perimeter. In Europe in the 1980s, countries were fac-
ing many of the same issues confronting the Canada-United States relationship today: extensive back-ups at land crossings for trucks and personal vehicles and complicated passport and visa requirements for tourists. Envisioning the application of the European system in North America, Frank McMahon of the Fraser Institute wrote, "[i]magine the boost to Canadian business if goods could move across the Canada-U.S. border as quickly as they can the German-French border. Imagine the convenience for individual Canadians crossing the border." The impact of such a broad system would indeed provide an exceptional boost to trade and tourism across the Canada-United States border; however, the dynamics of this relationship differ in many ways from that in Europe. It is important to closely analyze the specifics of the Schengen Agreement, specifically with regard to immigration and refugee procedures, to determine its applicability in the North American context.

In addition to the aforementioned abolition of checks at common borders and the establishment of uniform procedures for those arriving at external borders, the Schengen Agreement implemented the following measures: harmonization of the conditions of entry and visas for short stays; the development of rules governing the responsibility for examining applications from asylum seekers; the introduction of cross-border rights and surveillance and hot pursuit for police forces; the establishment of a faster extradition system; and the creation of the Schengen Information System (a computer system linking the police stations of member countries).

1. Visa Harmonization

The harmonization of visa policies is the accomplishment of Schengen most applicable to the prospect of a North American security perimeter. The Schengen Agreement sets forth that "[t]he contracting parties undertake to adopt a common policy on the movement of persons, and, in particular, on the arrangement for visas. They shall assist each other to that end. The contracting parties undertake to pursue through common consent the harmonization of their policies on visas." The agreement goes further in establishing


103 See Koslowski, supra note 11, at 541.


105 Schengen Summary, supra note 97.


https://scholarlycommons.law.case.edu/cuslj/vol35/iss1/9
The Member States have adopted a standard list of countries whose nationals do not require a visa to enter the Schengen Area based on similar considerations used by Canada or the United States in their respective “visa waiver” lists: migratory flows, security threats, and established international relations. The principles for issuing the Schengen Visa are that (1) no third country national can have access to the Union territory if he or she constitutes a risk to the security of any Member State; (2) there is an assumption of admissibility regarding an individual in possession of a short-term visa delivered by one of the other participating States; and (3) once within the common territory, the individual is allowed to travel in the whole territory for a three-month period without any additional control at the internal borders of the participating states.

In North America, such commitments would require both Canada and the United States to yield a considerable amount of sovereignty in order to align their visa waiver policies. Nevertheless, the ability of the European Union Member Nations to agree upon a common waiver list, particularly between those nations of opposing Cold War factions, is proof that compromise is possible.

2. Asylum Claims

The Schengen Agreement also established common guidelines for accepting and processing applications for asylum. The Agreement states that “[t]he contracting parties undertake to process any application for asylum lodged by an alien within any one of their territories,” but contains an exception that this obligation “shall not bind a contracting party to authorizing all asylum seekers to enter or remain within its territory.” Thus, Member Parties retain the right to establish their own criteria for evaluating asylum claims, while agreeing to a common application procedure. They are bound to “respecting the finality and the objectives of the Geneva Convention,” and have agreed on a set of principles similar to the Safe Third Country Agreement between Canada and the United States. Only one Member Party may

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107 Id. art. 10, cl. 1.
10 See supra Part III.A.2 (discussing disparities in visa waiver policies).
11 Schengen Acquis, supra note 106, at Ch. 7, § 2, art. 29, cl. 1-2.
112 Id. art. 28.
113 See supra Part III.A.1 (discussing refugee and immigration policies).
be responsible for an asylum application, and agreed upon criteria are used to determine which country is responsible\textsuperscript{14} (note that in the Safe Third Country Agreement, this would generally be determined by the place of landing).\textsuperscript{15}

While the framework used in the Schengen Agreement may be applicable in the North American context, it does not address the divisive issue in North American refugee and asylum policies: Canada’s (lack of) tracking and/or detainment of claimants after they have landed and deportation procedures for those deemed inadmissible. The asylum framework in the Schengen Agreement would do little to appease American concerns over the security threat posed by some claimants.

3. Policing and Enforcement

In the area of police cooperation and enforcement, the Schengen Agreement sets forth a number of procedures that allow for effective cross border enforcement with only minimal infringement on the sovereignty of Member Parties. The Members “undertake to ensure that their police authorities shall, in compliance with national law and within the scope of their powers, assist each other for the purposes of preventing and detecting criminal offenses.”\textsuperscript{16} Provisions are included to allow the cross-border surveillance of a criminal suspect involved with certain crimes (generally what would be considered a felony in the United States)\textsuperscript{17} when appropriate requests are made to the foreign state’s police force.\textsuperscript{18} Officers conducting cross-border surveillance are allowed to carry their service weapons for use in “case of legitimate self-defense,” but are prohibited from entering private homes or businesses, and do not have arrest powers.\textsuperscript{19} Specific provisions are included that waive the approval requirements in cases of hot pursuit, allowing the originating police force to carry a pursuit across a border until the local authorities are able to intercept and carry on the chase.\textsuperscript{20}

The law enforcement protocols established in the Schengen Agreement could be used as guidance in establishing a formal cross-border policing agreement between Canada and the United States, or as an expansion of the Integrated Border Enforcement Teams (IBET) and Shiprider programs al-

\textsuperscript{14} Schengen Acquis, supra note 106, at Ch. 7, §2, art. 29, cl. 3; Ch. 7, §2, art. 30, cl. 1 (a)-(g).
\textsuperscript{15} STC Agreement, supra note 75.
\textsuperscript{16} Schengen Acquis, supra note 106, at Title III, Ch. 1, art. 39. cl. 1.
\textsuperscript{17} Id. art. 40, cl. 7.
\textsuperscript{18} Id. art. 40, cl. 1.
\textsuperscript{19} Id. art. 40, cl. 3(d)-(f).
\textsuperscript{20} Id. art. 41, cl. 1.
There are, however, significant legal and constitutional obstacles to be overcome in both countries before a similar agreement could be implemented between Canada and the United States. An example of the political volatility of these issues was evident by the breakdown of talks in 2007 over the United States land preclearance project in Fort Erie, Ontario. Officials from Canada and the United States were unable to commit to an agreement on numerous issues relating to the law enforcement authority of the United States Customs and Border Protection officers, including arrest authority, mutually agreeable fingerprinting processes, the sharing of information, and the applicability of the Charter to United States officers. It is important to note, however, that the parties were able to reach an agreement regarding the arming of United States officers, as the Canadian government had recently implemented plans to begin arming Canadian border officers. The divisive issue for the United States was the subordination of United States law enforcement personnel and authorities to Canadian law, while Canada refused to cede to United States demands for fingerprinting abilities. While this failure is demonstrative of the challenges facing cross-border law enforcement in North America, the success of programs such as IBET and Shiprider may lead to an alternate approach to implement a Schengen-style cross-border enforcement agreement.

The Schengen Agreement and its success in Europe give some credence to the proponents of adopting a similar system in North America. However, while the European Union may serve as a model for a North American security perimeter, the geographical, economic, and political dynamics of North America, and the position of the United States within the continent and throughout the world create a starkly different relationship dynamic than those found in the European Union. The United States acts as a global and continental hegemon; within the European countries, no one country is so dominant that the rest of the continent has to do business with it on its terms.

121 See discussion infra Part III.C.2.
123 Id. at 9.
C. OTHER POLITICAL AND PRACTICAL IMPEDIMENTS TO THE ESTABLISHMENT OF A NORTH AMERICAN PERIMETER

In addition to divergent immigration and refugee policies, additional practical and political obstacles exist which are directly and indirectly related to immigration and refugee policy concerns within a North American security perimeter.

1. Sovereignty Concerns

As with most aspects of Canadian-American relations, the issue of sovereignty heavily underlines the debate. Canadian government officials and academics are extremely sensitive to the power differential that exists in the Canadian-American relationship; they worry that the United States' role as regional hegemon creates an expectation that Canada (and other weaker nations) should fall in line with United States interests in terms of security and border management.126 The political, military, and economic asymmetry between the United States and Canada gives Washington significant leverage to set the policy agenda, with little room left for autonomous policy choices.127 In this sense, Canada and Mexico have been analogized as "two scared mice next to a neurotic elephant: they are more worried about the elephant's reaction to terrorism than terrorism itself. In the effort to pragmatically cope with this unstable and unpredictable new policy environment, the two mice are trying to convince the elephant that they are part of the solution rather than part of the problem."128

Professor Christopher Rudolph points out that "although neoclassical economic principles adopted in the contemporary Bretton Woods era have prompted many 'trading states' to willingly cede some degree of sovereignty in terms of cross-border flows in order to obtain the economic benefits of such mobility, this has generally not been applied in the realm of international migration."129 However, critics have pointed to the absence of any clear Canadian initiatives or counterproposals for improving border security and fighting terrorism in North America as evidence that the bilateral cooperation since September 11 may just be a combination of United States unilaterality and Canadian submission to the United States agenda.130

While the Canadian government may seem preoccupied with asserting its sovereignty in negotiations on border and immigration reform, the Canadian

126 Rudolph, supra note 54, at 449.
127 Andreas, supra note 1, at 28-29.
128 Id.
129 Rudolph, supra note 54, at 449.
130 Id.
public may not be as sensitive about sovereignty as their leaders are. In a poll taken shortly after September 11, eighty-five percent of all Canadians were in favor of “making the types of changes that would be required to create a joint North American security perimeter.” Furthermore, eighty-one percent thought that Canada and the United States “should adopt common entry controls, eliminating differences in the way they treat refugee claimants, illegal immigrants, and undocumented workers.” While the hysteria that followed in the aftermath of September 11 may have influenced these results, the strong opinions voiced show that the Canadian public is not as preoccupied as their leaders with the loss of sovereignty that may occur in a perimeter agreement.

2. Jurisdictional and Enforcement Issues

Should a North American security perimeter become a reality, part of the agreement will have to include guidelines establishing the powers of law enforcement authorities in the foreign jurisdiction. Protocols for arrest powers, search powers, surveillance, as well as extradition would be necessary, lest one country become a safe-haven for crimes committed in the other. There are currently-existing models for how this could work, most notably the Integrated Border Enforcement Teams (IBET) and the Shiprider program. The IBETs are multi-faceted law enforcement teams comprised of both Canadian and United States officials from the Royal Canadian Mounted Police (RCMP), Canada Border Services Agency, United States Customs and Border Protection/Office of Border Patrol, United States Bureau of Immigration and Customs Enforcement, and the United States Coast Guard (USCG). The Shiprider program is a joint program between the RCMP and the USCG, which places armed officers from both countries on one vessel, allowing them to seamlessly cross shared waters, remaining fully empowered to enforce the law. This program was run as a two-month pilot project in August and September of 2007, and was made permanent in March 2008.

132 Id.
"Coordination and Information Sharing in the Enforcement of [the stated] Objectives" was one of the four main pillars of the Smart Border Declaration.\footnote{Smart Border Action Declaration, supra note 12.} Included under this heading were plans to do the following: expand IBET; strengthen existing cross-border crime forums and Project North Star, a drug interdiction program started in the 1980s; establish joint teams to analyze intelligence; and implement a joint RCMP-Federal Bureau of Investigation fingerprint database. In a perimeter agreement, these existing cross-border enforcement arrangements could be used as the blueprint in establishing a force, comprised of United States and Canadian law enforcement officers, tasked with the specific objective of apprehending criminals seeking shelter in the neighboring country.

3. Domestic Policies

There are numerous areas of domestic policy that are starkly different in the United States and Canada. To identify and analyze each of these would be an exhaustive undertaking; thus, for the purpose of this article, several policies will be considered to provide an illustrative example of the types of challenges presented. One such issue is the death penalty. In the United States, thirty-six states may sentence criminals to death (leaving fourteen states without the death penalty).\footnote{Death Penalty Information Center, Death Penalty Policy by State, http://www.deathpenaltyinfo.org/death-penalty-policy-state (last visited Sept. 1, 2010).} Conversely, Canada abolished the death penalty in 1976.\footnote{United States v. Burns, [2001] 1 S.C.R. 283, 295 (Can.).} While each country would still be free to set its own policies for punishment within a North American security perimeter, the issue of extradition on capital offense would have to be resolved. In 2001, the Supreme Court of Canada held that the extradition of individuals to foreign jurisdictions where they could be subject to the death penalty was in violation of the Canadian Charter of Rights and Freedoms.\footnote{Id. at 285-286.} Based on this interpretation of the Charter, if an integrated enforcement team was to be created within a security perimeter to apprehend fugitives seeking shelter in either Canada or the United States,\footnote{See supra Part III.C.2 (discussing jurisdictional and enforcement issues).} there would have to be an agreement prohibiting the extradition of United States fugitives who would face the death penalty. However, the establishment of such an agreement would no doubt serve as a great incentive to United States fugitives to "hide out" in Canada, particularly if there would be no inspection to stop them from crossing the border.

Another area of diverging domestic policy is the issue of same-sex marriage. While Canada recognizes a right to same-sex marriage at the federal
level,141 the United States, through its Defense of Marriage Act ("DOMA"), expressly prohibits such recognition for the purposes of federal law.142 The Canadian Human Rights Act prohibits discrimination based on sexual orientation,143 a statutory protection that does not exist at the federal level in the United States. Applied to the issue of immigration, the recognition of same-sex marriages would have to be resolved in order to establish common family immigration classifications, particularly with regard to the sponsoring and admission of spouses, parents, or domestic partners.

Currently, two major concerns at the Canada-United States border are drugs moving into the United States from Canada, and guns coming into Canada from the United States.144 Each country perceives their neighbor's policy to be an impermissibly lenient reversal of their own: the notion being that Canada is soft on drugs, while the United States is soft on guns. There is, of course, no simple solution to this issue in general, let alone in regards to a security perimeter. The removal of a checkpoint at the border to screen for suspicious smugglers may only worsen the flow of contraband in each direction. Even without mandatory inspections for every traveler crossing the border, each government would retain the right to conduct selective spot checks on suspicious vehicles or travelers. Furthermore, the police on both sides of the border would still have the right to search these vehicles at any point after their crossing, if allowed under their criminal law. The volatility of this issue may nevertheless serve as a major impediment to pursuing a perimeter agreement, as government leaders will be hesitant to support a measure that may severely limit their ability to control the flow of guns or drugs into their respective country.

PART IV: CONCLUSION

To face the current and real threat of terrorism in North America and, in particular, against the United States, an array of options exists. At the extremes of this spectrum, there are two choices: the first is a unilateral fortification and hardening of United States border defenses, with security trumping all other considerations, including trade and migration.145 The other option, as discussed in this note, is the bilateral harmonization and coordination of sovereignty and government institutions to create a North American security perimeter, similar to the Schengen system in the European Union.146

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141 See Civil Marriage Act, 2005 S.C., ch. 33 (Can.).
145 See Andreas, supra note 1, at 14-15.
146 Id.
In March and April of 2009, United States Department of Homeland Security Secretary Janet Napolitano began to publicly address the issue of the Canadian border, giving some insight as to where the Obama administration intends to direct its border policy. Delivering the keynote address at a conference sponsored by the Brookings Institution entitled Toward a Better Border: The United States and Canada, Secretary Napolitano surprised many onlookers by making the following comments:

[O]ne of the things that I think we need to be sensitive to is the very real feeling among the southern border states and on Mexico, that if things are being done on the Mexican border, they should also be done on the Canadian border. That we . . . shouldn’t go light on one and heavy on the other. [T]his is one NAFTA, it’s one area, it’s one continent, and there should be some parity there. 147

These comments concerned many observers of Canada-United States border issues, as it was perceived as a policy shift towards the further thickening of the border to match the protocols currently in place at the Mexico-United States border, which faces disparate problems in terms of violence, drugs, and illegal immigration. Asked to clarify her comments in a subsequent interview, Secretary Napolitano stated that “Canada is not Mexico, it doesn’t have a drug war going on, it didn’t have 6,000 homicides that were drug-related last year. Nonetheless, to the extent that terrorists have come into our country or suspected or known terrorists have entered our country across a border, it's been across the Canadian border. There are real issues there.” 48

These comments indicate that Secretary Napolitano and the Obama Administration do not envision moving towards a North American security perimeter in the foreseeable future. In her comments to the Brookings Institution, Napolitano stated that “there are very real [differences] in immigration and visa procedures. And those differences are important because it means we are not dealing in direct parallel terms between Canada and the United States about who and what is entering. And that, of course, is a security concern.” 149

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149 Napolitano, supra note 147, at 292.
Secretary Napolitano’s statements demonstrate a belief by the Obama administration that Canadian immigration and refugee policies pose a security threat to the United States, and, as a result, those statements have largely chilled the prospects of a North American security perimeter becoming a reality in the immediate future. Both nations have spent billions since September 11 on border and security infrastructure, an indication that physical inspections at the shared border will likely continue for the foreseeable future. If common immigration and refugee policies and a customs union are ever to become a reality, a major political shift must occur soon, and immediate efforts made to begin the onerous task of harmonizing the often diverging immigration policies of the two nations.