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Gendered Border Crossings

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11 Gendered border crossings

Efrat Arbel

In December 2004, the *Safe Third Country Agreement* (STCA) between Canada and the United States came into effect.[1] The STCA is a bilateral agreement designed to promote the orderly handling of refugee claims across the United States–Canada border. Its effect is to bar asylum seekers who are either in the United States, or travelling through the United States, from making refugee claims in Canada at the land border (and vice versa), subject to certain exceptions.

Soon after the STCA went into force, a coalition comprising the Canadian Council for Refugees, Amnesty International, the Canadian Council of Churches, and a plaintiff identified as John Doe, challenged its validity before the Federal Court of Canada (*Canadian Council for Refugees et al. v Canada* [*CCR v Canada*] 2007). The applicants sought a declaration that the designation of the United States as a 'safe third country' and the resulting ineligibility triggered by the STCA were invalid and unlawful. The concern with the STCA's adverse impact on women lay at the heart of this legal challenge.[2] The applicants argued that since the United States asylum system failed to ensure protection for many women with well-founded fears of persecution, the effect of the STCA would be to endanger women by leaving them stranded in the United States without access to refugee protection in Canada (Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe 2006, [48–50]). The applicants further argued that the STCA and its associated regulations violated section 15 (equality) and section 7 (life, liberty, and security of person) of the *Canadian Charter of Rights and Freedoms* and should be struck down.

In November 2007, in a lengthy decision authored by Mr Justice Phelan, the Federal Court of Canada found the STCA unconstitutional and

1 Safe Third Country Agreement (2004), Agreement between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 5 December 2002 (entered into force 29 December 2004).

2 For discussion of the STCA's adverse impact on women asylum seekers, see also Akibo-Betts 2005, Arnett 2005.

declared it to have no force and effect (*CCR v Canada* 2007 [338]).[3] Justice Phelan listed a series of issues that individually and collectively undermined the claim that the United States complied with its *non-refoulement* obligations as outlined in Article 33 of the United Nations Convention Relating to the Status of Refugees ([239–40]). He concluded that the United States' 'non-compliance with Article 33 are sufficiently serious and fundamental to refugee protection that it was unreasonable for the [Governor-in-Council] to conclude that the U.S. is a "safe country"' [240]. In his analysis of the deficiencies of the United States regime, Justice Phelan emphasized the 'vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country' ([239]). He held that United States law did not recognize gender-related persecution in a manner consistent with Canadian law, and that, as a result, women asylum seekers in the United States could be at risk of *refoulement* ([198, 203, 206]). In assessing the STCA's constitutionality, the question of the United States' treatment of gender-related asylum claims also proved significant. The applicants argued that because the United States failed to ensure adequate protection for women asylum seekers, women were disproportionately impacted by the STCA in ways that contravened the *Charter of Rights and Freedoms*' equality guarantee ([315]). Justice Phelan allowed this claim. He found that the STCA could not pass constitutional muster, in part because '[w]omen and certain nationals are affected more harshly than other refugee claimants covered by the STCA' ([323]).

In June 2008, the Federal Court of Appeal overturned this decision and restored the STCA's validity (*Canada v Canadian Council for Refugees et al.* [*Canada v CCR*] 2008). The Court of Appeal decision focused largely on the discretionary authority of Canada's Governor-in-Council, and overturned Justice Phelan's findings on these grounds. A majority of the Court

3 Section 15(1) of the *Canadian Charter of Rights and Freedoms* provides:

> every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Justice Phelan also found that the STCA violated s.7 of the *Charter*, which guarantees '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'. He determined that these violations could not be 'demonstrably justified in a free and democratic society', as required by section 1 of the *Charter*. Section 1 of the *Charter*, often referred to as its limiting provision, guarantees the rights and freedoms set out in the *Charter* 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. In order to demonstrate a *Charter* violation, a claimant must not only point to a rights violation that contravenes one of the *Charter*'s stated guarantees, but also, that this violation cannot be demonstrably justified under s.1 of the *Charter*. Having found violations of s.7 and s.15 that could not be 'saved' by s.1, Justice Phelan declared the STCA unconstitutional.

determined it was 'not open to the Applications judge to hold on any of the alleged grounds ... that the Safe Third Country Agreement between Canada and the U.S. was illegal' ([82]). The Court further held that Justice Phelan had identified the wrong standard of review, and erred in finding that 'actual' compliance or compliance 'in absolute terms' was a condition precedent to the exercise of the Governor-in-Council's delegated authority (*Canada v CCR* 2008, [59–63, 80–2, 92]). It found instead that proof of actual compliance was 'irrelevant', since this was 'not the issue that the Applications judge was called upon to decide' ([80]). The Federal Court of Appeal also overturned Mr Justice Phelan's *Charter* findings, and held that the *Charter* could not apply in the case ([102–3]). The two courts also differed in their treatment of the STCA's gendered impact: while the analysis of the STCA's adverse gender impact lay at the heart of the Federal Court decision, it all but disappeared in the Federal Court of Appeal's decision. In the 71-page judgment issued by the Court of Appeal, the words 'gender' and 'women' each appear only once in the court's summary of the claims before it, and not at all in its analysis of the legal issues in dispute. In retrospect, that the focus of the STCA's gendered impact all but disappeared from the Federal Court of Appeal's decision can be seen as a harbinger. The Supreme Court of Canada denied leave to appeal, and thus the STCA remains in operation (*Canadian Council for Refugees et al. v Canada* 2009).

Since the STCA's mandated monitoring provisions focus narrowly on whether the STCA is being applied according to its terms, not on how the STCA, when correctly applied, impacts asylum seekers, not much information is available about its effects, let alone about its effects on women (STCA Art. 8(3); Canadian Council for Refugees 2005, 30). The official data recorded by the Canada Border Services Agency paints an incomplete picture: it shows only that fewer women are making asylum claims at the United States–Canada border post-STCA, but says little about what happens to them beyond this fact. In a recent report I co-authored with Alletta Brenner, *Bordering on Failure: Canada–U.S. Border Policy and the Politics of Refugee Exclusion*, we examined a series of Canadian border measures including the STCA, and analysed their effects on asylum seekers (Arbel and Brenner 2013). The report was released by the Harvard Immigration and Refugee Clinic in November 2013, and overseen by its director Deborah Anker. The findings presented in the report were based on research and data collected through fact-finding investigations at major ports of entry along the United States–Canada border and adjacent city centres. In the course of these investigations, we interviewed representatives from non-governmental organizations, faith group workers, and refugee shelters, as well as practitioners and attorneys on both sides of the border. We asked questions about how the STCA impacts women, but were able to collect very little information about its gendered impact. As a result, we did not specifically address the STCA's impact upon women in the report.

Nine years after its implementation, this chapter examines the STCA's effects while returning to the question: *what about gender*?[4] How have initial concerns about the STCA's adverse gender impact mapped on to the current, much-altered landscape of Canadian refugee law? I begin by charting an overview of the STCA's operation and effect to provide context for discussion. I then revisit the central findings made in the *Bordering on Failure* report, paying attention to its effects on women in an effort to read gender into its absence.[5] I argue that while the findings made in *Bordering on Failure* suggests the STCA may be impacting women in adverse ways, these effects are difficult to identify with any precision. I further argue that it is in this respect that the gendered impact of the STCA is most acutely felt: its gendered contours are increasingly disappearing from view.

The safe third country agreement: an overview

The STCA's history begins long before its implementation in 2004. Canada and the United States engaged in negotiations towards a safe third country agreement in the 1990s, but adjourned when these negotiations did not produce an agreement (*CCR v Canada* 2007, [8]). The parties resumed discussions in the aftermath of the 11 September 2001 attacks on the United States, fuelled in large part by a growing concern with national security. Within three months of the attacks, Canada and the United States issued the Smart Border Declaration and Action Plan, designed to enhance security along the United States–Canada border (Public Safety Canada 2001). The Declaration and Action Plan establish common standards of biometric information and increased visa policy coordination, permit extensive sharing of information on high-risk travellers, and also establish the *Agreement between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, known as the *Safe Third Country Agreement* or STCA (Public Safety Canada 2001). The final agreement came into effect 29 December 2004 (Citizenship and Immigration Canada 2012).

The STCA requires asylum seekers to advance refugee claims in the first country of their arrival: either Canada or the United States. As noted above, its effect is to bar asylum seekers who are in the United States, or travelling through the United States, from making refugee claims in Canada at the land border, and vice versa. Article 4(1) empowers both

4 Since the introduction of the *Gender Guidelines* in 1993, the category 'gender' has been asserted in Canadian refugee law as synonymous with 'women'. I trouble the conflation of these two categories elsewhere, but for the purposes of the current analysis, use the two categories interchangeably.

5 The views expressed in this chapter are mine alone, and do not necessarily reflect the views of the Harvard Immigration and Refugee Clinical Program.

countries to summarily return to the other country third party nationals who lodge claims at ports of entry along the land border (STCA, Art. 4(1)). This clause is subject to four exceptions that permit entry to asylum seekers who have a family member in Canada, who arrive as unaccompanied minors, who have a valid visa, or whose claim raises a matter of public interest (STCA Art. 4(2)(a)–4(2)(d) and Art. 6). The STCA is otherwise applicable to all asylum seekers who file refugee claims at the land border but does not apply to asylum seekers who arrive by water or air, or who make 'inland' claims from within Canada (STCA, Art. 4; *CCR v Canada* 2007 [29]). The STCA includes safeguards to ensure that claimants are not removed to any country other than Canada or the United States until their claim is heard, to ensure they are not returned to a risk of persecution, and are not subject to 'chain *refoulement*' (STCA 2004, Art. 3(1)–3(2)).

The operational legitimacy of the STCA hinges on the assumption that the United States and Canada are equally 'safe' countries for refugees. Canada's Immigration and Refugee Protection Act (IRPA) prescribes that for a country to be designated as 'safe', it must comply with the *non-refoulement* obligations outlined in Article 33 of the United Nations Refugee Convention and Article 3 of the Convention Against Torture, both of which prohibit signatory states from returning refugees to their countries of origin to face torture or persecution (IRPA s.102(2)). The Act also requires consideration of a country's policies and practices with respect to claims under the Refugee Convention and its human rights record (IRPA s.102(2)). To date, the United States is the only country designated by Canada as a 'safe' third country under the Immigration and Refugee Protection Act (Citizenship and Immigration Canada 2012).

The STCA was ostensibly presented as a national security measure, designed to fortify the United States–Canada border in the aftermath of the 11 September 2001 attacks. As Audrey Macklin clarifies, the concern with national security 'explains why the United States would assent to an agreement that it refused to sign a few years earlier and which can only amount to a make-work project for the US asylum system' (2003, 16–17). Noting that the overarching concern with national security was the 'elephant on the table' that the STCA does not explicitly address, Macklin states:

> The subtext is security, and the unstated argument goes as follows: the integrity of asylum is weakened through its abuse by terrorists; the Canadian system is more lax and vulnerable to abuse than the US system; public support for refugees on both sides of the border is eroding because admission of asylum seekers is perceived to (or does) constitute a menace to security; *ergo*, deflecting asylum seekers into the allegedly more vigilant US system enhances security.
>
> (2003, 17)

That none of the perpetrators of the 11 September 2011 attacks entered the United States as asylum seekers or through Canada proved immaterial. The need to fortify the border in the aftermath of the attacks 'acquired the status of conventional wisdom' (Macklin 2003, 17) that fed upon and was justified through broader societal anxieties about refugees as markers of risk (Côté-Boucher 2008, 151).

Canada, in contrast, was not as preoccupied with national security as the United States. Its primary goal in implementing the STCA was to deter asylum seekers from making refugee claims in Canada. In a report dated July 2010, the United States Custom and Border Protection, Canada Border Services Agency, and Royal Canadian Mounted Police explain that while the United States sought to implement the Agreement to enhance national security, Canada sought to implement the STCA to 'limit the significant irregular northbound movement of people from the United States who wished to access the Canadian refugee determination system' (United States Custom and Border Protection, Canada Border Services Agency, and Royal Canadian Mounted Police 2010, 12). It is well established that before the STCA came into effect, more asylum seekers entered Canada from the United States to seek refugee protection than the reverse (Macklin 2005, 395). In 2001, for example, approximately 14,000 asylum seekers entered Canada from the United States (Macklin 2003, 11). During this period, and in contrast, approximately 200 asylum seekers entered the United States from Canada (Macklin 2003, 11). These figures are not surprising given Canada's geographic inaccessibility and the simple fact that many asylum seekers who wish to claim protection in Canada must first travel through the United States.

Effects of implementation

In many ways, Canada's goal of reducing the number of asylum seekers eligible to seek refugee protection in Canada has been realized. Statistics obtained from the Canada Border Services Agency (CBSA) confirm that since its implementation in December 2004, the STCA triggered a sharp decline in the number of refugee claims lodged at the United States–Canada border. These numbers diminished further after the Canadian Government removed one of the STCA's original exceptions. Before July 2009, nationals from countries on which Canada had imposed a suspension of removals were allowed entry into Canada under the STCA's 'moratorium country' exception (Citizenship and Immigration Canada 2009). On 23 July 2009, Canada removed this exception, in part, to 'reduce pressures on, and costs to, the refugee protection system' (*Canada Gazette* 2009, 1471). The CBSA statistics show that Canada has found several hundred claimants ineligible under the STCA at the land border each year, as shown in Table 11.1 (Arbel and Brenner 2013, 89):

Table 11.1 Number of people found ineligible under the STCA at the land border

Year	*Total number of people found ineligible under the STCA at the land border*	*Total number of women found ineligible under the STCA at the land border*	*Total number of men found ineligible under the STCA at the land border*
2005	299	114	185
2006	402	151	251
2007	500	208	282
2008	640	248	392
2009	763	340	423
2010	761	345	416
2011	590	245	345

Since the STCA not only turns asylum seekers away at the border, but also discourages claimants from presenting themselves at the border, its effects are far more significant than the above numbers reveal. Statistics obtained from the Canada Border Services Agency, as reported in *Bordering on Failure*, show that the STCA has also triggered a significant reduction in the number of refugee claims lodged at the United States–Canada border, as shown in Tables 11.2 and 11.3:

Table 11.2 Pre STCA

Year	*Total number of asylum claims*	*Number of asylum claims made at United States–Canada border*
1997	24,338	6,000
1998	25,389	6,224
1999	30,124	9,556
2000	37,853	13,270
2001	44,705	14,007
2002	33,466	10,856
2003	31,897	10,938
2004	25,542	8,904

Table 11.3 Post STCA

Year	*Total number of asylum claims*	*Number of asylum claims made at United States–Canada border*
2005	19,771	4,041
2006	22,966	4,478
2007	28,529	8,191
2008	36,928	10,802
2009	33,252	6,295
2010	23,168	4,642
2011	25,355	2,563
2012	20,491	3,790

These statistics show that in the eight years before the STCA came into effect, the number of asylum claims made at the United States–Canada border each year ranged between 6,000 and 14,000. In the eight years following the STCA's implementation, save the three years when the moratorium country exception was still in effect, the number of asylum claims made at the United States–Canada border dropped to roughly 4,000 claims per year, reaching a low point in 2011, with only 2,563 claims made at the border that year.

While it is clear that the STCA reduced the total number of asylum seekers making refugee claims at the United States–Canada border, its gendered effects are far more difficult to ascertain. Upon first glance, the CBSA statistics show that while the STCA's implementation triggered a decline in overall border crossings, the proportion of male vs female claims lodged at the border remained fairly stable, as shown in Figure 11.1.

Analysing the effects of the STCA solely by reference to the ratio of male-to-female claimants risks obscuring its gendered impact. A more careful analysis shows that the STCA has triggered a decline in the overall number of claims made by women at the United States–Canada border. Before the STCA came into effect, roughly 4,000–5,700 women made refugee claims at the border each year. After the STCA came into effect – and again after the moratorium country exception was removed in

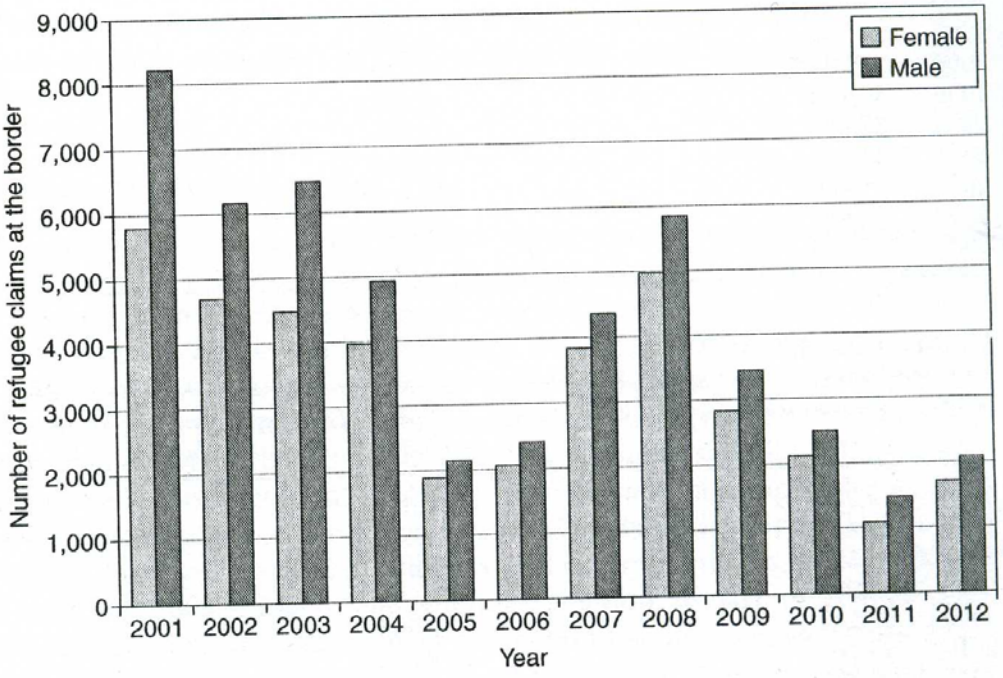

Figure 11.1 Female vs male claimants found ineligible under STCA at the Canadian border.

Table 11.4 Female vs male refugee claims made at the Canadian border

Year	*Total number of refugee claims made in Canada*	*Number of refugee claims made by women at the United States–Canada border*	*Percentage of refugee claims made by women at the United States–Canada border*
2001	44,705	5,779	12.9
2002	33,466	4,691	14.0
2003	31,897	4,479	14.0
2004	25,542	2,964	11.6
2005	19,771	1,899	9.6
2006	22,966	2,051	8.9
2007	28,529	2,823	9.9
2008	36,928	4,966	13.4
2009	33,252	2,831	8.5
2010	23,168	2,125	9.2
2011	25,355	1,092	4.3
2012	20,491	1,705	8.3

2009 – these numbers dropped to roughly 1,000–2,800 women per year, as shown in Table 11.4.[6]

The above numbers show that for all years save 2008 (when the moratorium country exception was still in effect) the number of women making refugee claims at the border declined significantly. Similarly, for all years save 2008, the percentage of claims made by women at the border was reduced – not dramatically but persistently – compared to prior to 2005. While the above figures show that far fewer women are making refugee claims at the border each year, they do not reveal what actually *happens* to these women. The findings made in *Bordering on Failure*, to which I now turn, offer further guidance in this regard.

The STCA's gendered contours

Tracing the STCA's effects on asylum seekers, *Bordering on Failure* arrives at three central findings that are relevant for the current analysis. First, the report concludes the STCA places claimants at risk *before* they approach the border, by increasing the possibility that they will be left stranded in the United States without access to fundamental protections (67–86). Second, the report concludes the STCA places claimants at risk *after* they approach the border, given that claimants who are rejected at the border and returned to the United States are often held in detention and sometimes subject to expedited removal (68–80). Third, the report concludes

6 Notably, the data received from the CBSA does not specify whether these numbers show women at the border as principal applicants or whether they reflect women arriving in family groups as well.

the STCA places claimants at risk *while* they cross the border by making the border more dangerous and disorderly away from official ports of entry, triggering a rise of illegal activities along the border, and pushing asylum seekers into the hands of human smugglers (98–101). In the discussion that follows, I use these core findings as a framework for analysis, and examine each while asking the question posed at the start of this chapter: *what about gender?*

Endangering claimants before they approach the border

As noted above, the question of whether the United States can properly be designated 'safe' for refugees was at the core of the legal challenge before the Federal Court of Canada when the STCA was first introduced. At the court of first instance, Mr Justice Phelan found that the United States did not comply with its international refugee protection obligations, in part because it failed to ensure women claimants were not *refouled* to face persecution. While some aspects of United States asylum law now extend greater protection to women claimants than at the time of this hearing (Anker, this volume), key aspects continue to present obstacles for women.

For example, the Immigration and Nationality Act imposes a one-year filing deadline[7] that requires asylum seekers to file a claim within a year of arriving in the United States unless they fall under one of the exceptions to the filing deadline (INA §208(a)(2)(B), 8 U.S.C. §1158(a)(2)(B); Anker 2013, 6: 3 1–7).[8] The one-year filing deadline has been widely criticized for being inconsistent with international refugee protection standards prescribing that asylum requests should not be excluded from consideration based on failure to fulfil formal requirements. Long before the United States implemented the one-year filing deadline, the UNHCR's Executive Committee emphasized that '[w]hile asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration' (UNHCR

7 Notably, in June 2013, the United States Senate passed a Comprehensive Immigration Reform Bill that includes provisions to repeal the one-year filing deadline (S. 744 2013). At the time of writing, the proposed legislation had not been enacted and the one-year filing deadline was still in effect.

8 Individuals barred from asylum as a result of the one-year filing deadline are still eligible to apply for withholding of removal, a lesser alternative remedy providing only basic protection against *refoulement*. Withholding is subject to a higher standard of proof under United States law, which can be difficult to meet, even for genuine refugees (Anker 2013 [1:2]). As a result, refugee claimants who are barred from asylum because of the one-year filing deadline and fail to meet the higher withholding standard may still be returned to their country of origin to face persecution, even if they have a bona fide claim to refugee protection.

Executive Committee 1979). The filing deadline has also been criticized for leading to the denial of refugee protection for legitimate claimants (Acer, Andrea, Adams, and Piyaka 2010, 1–2; Musalo and Rice 2008). In 2010, researchers at Georgetown University analysed the impact of the one-year filing deadline on affirmative asylum applications filed between 1 October 1996 (when the deadline was first implemented) and 8 June 2009 (Schrag, Schoenholtz, Ramji-Nogales, and Dombach 2010). During that period, one-third of affirmative asylum applications were filed late, and the Department of Homeland Security denied more than 15,000 asylum applications on the basis of lateness alone (679, 688, 753–4). The authors further found that the filing deadline had a disproportionately negative impact on women claimants, who were more likely than male applicants to be late filers (702, 753–4).

Indeed, the one-year filing deadline has been widely criticized for impacting women in detrimental ways. As Deborah Anker explains:

> Since many women are too terrified to reveal what they have suffered and live in hiding in the United States for years before coming forward, they are often subject to the one-year filing deadline bar, unless they can prove they meet an exception.
>
> (Anker, this volume)

(See also Massimino 2013; Schrag, Schoenholtz, Ramji-Nogales, and Dombach 2010.) Women may be adversely affected by the one-year filing deadline for a host of reasons. As outlined in a report issued by Human Rights First in 2010, some women may not know they are eligible for asylum, and may only learn of their potential eligibility after the filing deadline has passed, or may 'believe that the facts relating to their fears of persecution would lead them to be ostracized' and thus be reluctant to advance a claim soon after arriving in the United States (Acer, Andrea, Adams, and Piyaka, 2010, 32). Women who suffer psychological or physical trauma may also be reluctant to bring a claim forward, 'for fear of further persecution or scorn if the nature of their mistreatment became public knowledge' (Acer, Andrea, Adams, and Piyaka 2010, 32). The combined effect of these factors, together with misinformation about potential asylum eligibility, means that some women claimants who do not file a claim within a year of arriving in the United States are at risk of being denied protection.

The adverse gender impact of the one-year filing deadline was a key point of evidence raised before Justice Phelan in the legal challenge to the STCA (*CCR v Canada* 2007, [162–4]). Justice Phelan agreed with the 'weight of the expert evidence' that the 'higher standard for withholding combined with the one-year bar may put some refugees returned to the U.S. in danger of *refoulement*' and thus 'creates a real risk' (*CCR v Canada* 2007, [154]). He further found that 'gender claims are particularly vulnerable to the one-year bar' ([163]), given that female claimants are more

likely to delay filing for asylum, either because they suffer psychological harms or because they do not know that gender violence can ground a claim for refugee protection ([163]). While United States asylum law now extends more generous interpretations of exceptions to the one-year filing deadline (Anker, this volume), the core problems identified by Justice Phelan in 2007 with respect to the deadline's adverse gender impact continue to place women at risk.

Before the STCA came into effect, women barred from asylum as a result of the one-year filing deadline who did not qualify for withholding could seek asylum in Canada. By operation of the STCA, unless they fit within one of its remaining exceptions, these claimants are now at risk of being left stranded in the United States. Women who are denied asylum in the United States because of the one-year filing deadline, and who cannot seek refugee protection in Canada because of the STCA, have little incentive to make themselves known. Some may opt to live 'under the radar' in the United States. Others still may try to enter Canada clandestinely. As a result, their stories are rarely told, and do not form part of the official picture of the STCA and its impact on women.

Endangering claimants after they approach the border

The STCA also places asylum seekers at risk *after* they approach the border. This occurs when asylum seekers approach the border, are rejected by Canadian officials given their inability to satisfy one of the STCA's exceptions, and returned to the United States. In such scenarios, asylum seekers are at risk of being removed or detained. Indeed, *Bordering on Failure* points to a widespread use of detention for asylum seekers returned to the United States under the STCA (68).

The problems with the United States immigration detention system have been well documented. Most recently, a 2013 study released by the United States Commission on International Religious Freedoms (USCIRF) criticized the United States for inappropriate penal detention conditions and lack of access to legal counsel, despite a public commitment to reform the detention system (USCIRF 2013, 4–6). Prior to this, a 2010 report of the Inter-American Commission on Human Rights raised serious concerns about the lack of prompt court review of detention decisions in the United States immigration system and criticized the system for lacking due process safeguards (Inter-American Commission on Human Rights, 2010; see also Acer 2012; Acer and Goodman 2010). The United States immigration detention system has been widely criticized for its failure to comply with international standards of refugee protection. UNHCR's 2012 Guidelines on Detention, for example, emphasize that detained asylum seekers should be afforded procedural guarantees, including the right to 'be brought promptly before a judicial or other independent authority to have the detention decision reviewed' within 24 to 48 hours (UNHCR 2012,

27). The UNHCR Guidelines emphasize that detained asylum seekers should, at a minimum, be informed of the reasons of their detention and their right to legal counsel, be brought promptly before a judicial or other independent authority, and be entitled to regular periodic review of detention as well as contact with UNHCR (UNHCR 2012, 27). United States practice does not comply with these standards (Arbel and Brenner 2013, 71).

Once detained, asylum seekers have only limited access to legal services and community support. As a result, many encounter barriers to pursuing their claims. Studies have shown that asylum seekers held in detention are less likely to advance successful asylum claims, as compared with claimants who have not been detained. A 2008 report released by the United States Government Accountability Office, for example, reports that defensive applicants who had been detained were less likely to have their claim granted by an immigration judge as compared with those who had not been detained (United States Government Accountability Office 2008, 32). A 2009 report released by Human Rights First reports that detention impedes asylum seekers' ability to gather documentation in support of their case and secure legal representation (Acer and Chicco 2009, 7). This same study found that asylum seekers are more likely to abandon their claims while detained, because they are unable to stand detention conditions (Acer and Chicco 2009, 45). A 2010 report released by the National Immigrant Justice Centre shows more generally that many detention facilities in the United States are under-serviced by legal counsel and legal aid organizations and that asylum seekers who do obtain assistance are less likely to succeed with their defence to removal (Araujo, Berndt, McCarthy, Rapp, Roth, Cullen, and Valenzuela 2010, 3–4).

The mistreatment of immigrant detainees in United States immigration detention has been well documented, and includes physical abuse, inadequate medical care, widespread discrimination, and oppressive conditions of confinement (Foley 2011; Hamilton 2011; Rentz 2011; Tumlin, Joaquin, and Natarajan 2009). Asylum seekers held in detention can be subject to humiliating strip searches and inmate 'counts' (Tumlin, Joaquin, and Natarajan 2009, viii–x), or be subject to solitary confinement,[9] a practice that has been shown to carry significant adverse health consequences (Physicians for Human Rights and National Immigrant Justice Center, 2012,

9 Notably, on 4 September 2013, the United States Immigration and Customs Enforcement (ICE) issued a new directive calling for the regulation of the use of solitary confinement in immigration detention (ICE 2013). Advocate groups like the American Civil Liberties Union welcomed this directive as a 'much-needed step towards curtailing practice that is both inhumane and horrifyingly common', but further cautioned that it remains to be seen whether this new directive will be effectively enforced and create a robust system by which ICE can monitor the use of solitary confinement in immigration detention facilities (Takei 2013).

12–14). Asylum seekers held in detention are also vulnerable to instances of violence, including sexual violence (Rhoad 2010). The United States has also been heavily criticized for holding immigrant detainees, including asylum seekers, in jails and jail-like facilities (Epstein and Acer 2011).

Bordering on Failure suggests that given the relative absence of female-dedicated detention facilities along the United States–Canada border, women claimants returned to the United States under the STCA are more likely to be held in mixed-purpose facilities or local jails, sometimes under questionable conditions of confinement (68). Thus, while there is no indication that women rejected under the STCA are detained more frequently than men, given the United States–Canada border landscape, women are more likely to be detained under worse conditions of confinement. As one refugee practitioner interviewed in *Bordering on Failure* described, while men returned to the United States under the STCA are routinely transferred weekly to the closest detention facility, 'the women are sent to one or two far flung jails, again, mixed population, where nobody sees them again and they probably have a telephonic hearing with a judge' (68, footnote 210).[10] This statement also speaks of the very real possibility that women who are detained after being returned to the United States under the STCA may fall 'off the radar' so to speak. If they are unable to secure counsel or other means of legal assistance, they may not have an opportunity to advance their claims and tell their stories. When this occurs, the uniquely gendered character of their experience is at risk of disappearing from view.

Endangering claimants while they approach the border

Bordering on Failure also concluded that the STCA has inadvertently triggered a rise of illegal activity along the border, most notably human smuggling (100–1). Because the STCA bars asylum seekers from making claims *at* the border (unless they fit within its exceptions) but does not prevent asylum seekers from making 'inland' claims in Canada if they cross the border clandestinely, it creates incentives for unauthorized border crossing. Indeed, before the STCA came into effect, critics cautioned that 'asylum seekers who would otherwise present themselves at the Canadian border will be diverted into a clandestine flow of undocumented migrants crossing the border surreptitiously with the aid of smugglers and traffickers' (Macklin 2003, 12). Insofar as the STCA creates barriers for asylum seekers to seek refugee protection in Canada through authorized measures, critics warned, its implementation would encourage unauthorized border crossings, and leave asylum seekers more vulnerable to

10 Interview with Michele Jenness (Executive Director), Vermont Immigration and Asylum Advocates (10 August 2012) cited in Arbel and Brenner 2013, 68, footnote 210.

exploitation. In the course of parliamentary hearings in November 2002, for example, the Standing Committee on Citizenship and Immigration Canada heard testimony on the likelihood that the STCA would trigger a rise in unauthorized border crossings into Canada. Judith Kumin, former representative of the United Nations High Commissioner for Refugees in Canada, cautioned:

> Asylum seekers who know they can no longer seek admission at the border – because they are not entitled under the agreement to do so – may very well engage the services of smugglers to take them across the border illegally, in order to make a claim inland. Indeed, this is what we have seen happen in other countries that have implemented similar arrangements.
>
> (CIMM 2002a, 1605)

Alex Neve, Secretary General of Amnesty International Canada (English Speaking), similarly warned:

> As you've heard from many of us, a crude instrument of this sort simply exposes countless individuals to the risk of unlawful detention, puts women at risk of not receiving protection from very compelling harms, and is going to increase the likelihood that people are going to ... cross borders illegally. Such an instrument will only further misery and insecurity and does not seem, from our perspective, to be getting to the nub of the problem, which is how we make sure human rights abusers of all description in this world face the justice they should.
>
> (CIMM 2002b, 1715)

And indeed, since the STCA came into effect, instances of unauthorized border crossings into Canada have increased. A 2010 Evaluation Study of the Canada Border Services Agency Detention and Removals Program, for example, shows that the number of inland claims made in Canada increased from 13,178 claims in 2004 to 17,546 claims in 2009, and attributes this rise, in part, to the implementation of the STCA (CBSA 2010). The study suggests the STCA has triggered an increased number of unauthorized entries into Canada between ports of entry by migrants seeking to avoid being turned back at the border. A 2012 Threat Assessment Report issued by the Canada–U.S. Integrated Border Enforcement Team further indicates that Canada-bound human smuggling attempts between border ports of entry increased by 58 per cent in 2011 as compared with the previous years (IBET report 2012). Anecdotal data described in *Bordering on Failure* similarly indicates that asylum seekers barred by the STCA are increasingly attempting to cross the border clandestinely to seek protection, sometimes risking their lives and safety in order to do so (101–2).

While it is clear that the United States–Canada border landscape has changed – and that human smuggling and unauthorized border crossings are on the rise – it is not clear how gender maps on to this landscape. Tracing the gendered contours of unauthorized border crossings is no easy task: while scholars and advocates have increasingly turned attention to the human cost associated with unauthorized border crossing (Athwal and Bourne 2007; Carling 2007; Anderson 2010; Jimenez 2009; Spijkerboer 2007; Weber and Pickering 2011), only few have examined the gendered dimension of these border crossings (Pickering and Cochrane 2012; Pickering 2011). Explaining the challenges associated with this enterprise, Sharon Pickering and Brandy Cochrane state:

> The collection, analysis and distribution of sex-disaggregated data on migration flows, including extra-legal flows, is not systematically undertaken by any international or regional institution or agency, and the UNHCR's data remain patchy. Domestic data on women who cross borders extra-legally are also problematic because of definitional issues and the political issues associated with irregular migration. Furthermore, the act of counting, particularly of counting asylum seekers or refugees, is a morally hazardous task. As Harrell-Bond *et al.* (1992) have contended, such a count is as impossible as it is desirable – the easiest way to count refugees is to restrain them physically within confined spaces.
>
> (Pickering and Cochrane 2012, 33)

While it is plausible that the new border landscape impacts women in specifically gendered ways, due to the clandestine nature of unauthorized border crossing, and the challenges identified by Pickering and Cochrane above, these activities are difficult to monitor or even identify. As with women barred from asylum in the United States because of the one-year filing deadline and unable to access Canada because of the STCA who 'go underground', or with women returned to the United States under the STCA and held in immigration detention, the stories of women who cross the border irregularly often go untold. It is here that the gendered impact of the STCA is perhaps most acutely felt: increasingly, the uniquely gendered impact of the STCA is disappearing, visible only in the dark corners of immigration detention facilities, or in the clandestine world of unauthorized border crossings.

Conclusion

That the adverse gender consequences of the STCA are so difficult to identify raises a host of concerns. It suggests that in mapping the agenda for refugee scholarship and advocacy, the real question to be asked in examining the STCA is not *what about gender*, but rather, and much more

preliminarily, *where is gender?* This question resonates with the themes of the persistent 'unknowability' of gender in refugee law outlined in the introduction to this volume. Indeed, as the above analysis suggests, the official picture of how the STCA impacts women, as gleaned from the limited statistics collected by the CBSA, remains partial and opaque. The dearth of information makes it difficult to evaluate how initial concerns about the STCA's adverse gender impact map on to the current, much-altered landscape of Canadian refugee law. This raises a serious possibility that the new fault lines of Canadian refugee law and policy will be charted in ways that are inattentive to the specific protection needs of women, leaving many gender issues unrecognized, and others out of sight.

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