Travel Plans: Border Crossings and the Rights of Transnational Migrants

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We are the people you never see.[1]

[Y]ou begin to give up the very idea of belonging. Suddenly, this thing, this belonging, it seems like some long, dirty lie.[2]

Come on, mohajir! Immigrant. . . . Pack-up double quick and be off to what gutter you choose.[3]

I. INTRODUCTION

Dirty Pretty Things, a compelling, cross-cultural thriller from the United Kingdom, tells the complex stories of illegals, semi-illegals, and the other side of London life. These lives are far from the story of the good old English chap, the ritz and glitz of Oxford Street, the grandeur and chimes of Big Ben, and the formal sterility of Buckingham palace. It is the story of foreigners forced to make a living in the shadows of the British capital—the busboys, taxi drivers, chambermaids, porters, hookers, and hospital orderlies who feed, clean, and sexually service the rich and powerful, keeping London looking pretty, or at least glisteningly sterile. The film foregrounds the stories of Okwe, a Nigerian doctor who has been run out of his homeland and is an undocumented worker, and Senay, a Muslim Turkish chambermaid, granted asylum, but without the right to work. Both have taken up employment in a West London hotel run by a Spaniard, Señor "Sneaky." It is the sort of place where mundane underground businesses like drug dealing, sex work, and more sinister ones—like organ trafficking—take place. Senay dreams of go-

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1. DIRTY PRETTY THINGS (BBC 2002).
2. ZADIE SMITH, WHITE TEETH 337 (2000).
3. SALMAN RUSHDIE, SHAME 89 (1983).

ing to New York, a city of fantasy and wonder, and is willing to sell her body and possibly even her kidneys to provide her with the means to pursue her dream. Okwe just wants to get back home to his wife and daughter.

The film represents the plight of a besieged community of illegal immigrants from a variety of countries, and delves into the complexities of the existence of the subaltern life and the life of the "Other" who has crossed borders, willing to take on the considerable risks that accompany such movements, especially movements that are illegal, stigmatized, and even criminalized. The film serves as a point of entry into the central issue addressed in this Article: how the transnational migrant subject is addressed through a spectrum of legal rules and criteria designed to question her legitimacy at the point of crossing borders. I expose how the complexities and layering of migrant existence are rolled and flattened through a regulatory apparatus that fails to engage with the broader transnational processes that produce the global demand for migrants. International and domestic laws are serving as sites where the emergence of the transnational migrant on the global stage is being resisted and her human rights compromised. These legal interventions are constructed along frameworks rooted in the boundaries of difference, the sovereignty of the nation-state, and the myth of the liberal subject, which all fail to address the challenges posed by the transnational migrant.

I discuss three responses to the transnational migrant that characterize some of the legal interventions. The first response is reinforcing difference through categories such as gender and race, which regard these traits as immutable and unalterable and subject them to subordinating and paternalistic legal regulations. The second response involves the assimilation of the Other, which forces conformity to cultural and social norms partly through the performance of a "cultural strip." Finally, there is the perception of the transnational migrant as a threat—a dangerous and contaminating force—to be excluded either through incarceration or elimination. These three approaches are reflected in the three situations that I set out in this Article.

First, I briefly examine how difference is reinforced in my discussion of the legal regulation of women who migrate for work, including sex work. Second, I examine the assimilationist move in the context of the legal responses to transnational migrants in countries that have adopted new emotional, cultural, and citizenship criteria to determine eligibility for citizenship and immigrant status. I discuss the recent initiatives in the U.K. and how these expose a neo-colonial anxiety about the Other and a desire to prevent the erosion of the social and cultural cohesion on which such societies are ostensibly built. In the third example, I examine how the global response to terrorism in and through the "War on Terror," which promotes fear of the Other, has impacted Australia's legal response to refugees and asylum-seekers fleeing persecution and conflict.

The diverse responses to the transnational migrant subject are not clear-cut and distinct measures: they frequently overlap. These subjects are at times represented as victims and at times as perpetrators capable of the most terri-

fying violence. The common element in the examples I discuss is the attempt to examine and respond to border crossings by transnational subjects along the rigid binaries of "us" and "them," and domination and subordination. These binaries undermine the human rights of the transnational migrant subject and fail to address the complex, fragmented, and blurred realities of our transnational world.

II. THE "OTHER" SIDE OF UNIVERSALITY

There is already considerable scholarship setting out how law's claim to truth resides in the ideal rather than the actual practice of law.[4] Although law continues to fall short of its ideal, it continues to situate itself as an authoritative discourse, its authority derived in part through scientific legal method and rigor, and its projection as a unified discipline with an internally coherent logic that is transcendent and divorced from the world.[5] In this section, I examine how the legal responses to the transnational migrant reflect a theoretical tension between assumptions about law as an objective, external, neutral truth, and the exclusionary potential of legal discourse. I illustrate how legal discourse actually constitutes the transnational migrant subject and justifies her exclusion from certain rights and benefits. In developing this argument, I borrow from the insights of postcolonial theory and the subaltern studies project.[6]

Throughout this Article I use the term transnational migrant subject, which refers quite specifically to the subject who crosses borders and occupies a subaltern position. The subaltern studies project regards hegemonic history as part of modernity's power/knowledge complex, which in the context of colonialism was deeply implicated in the "general epistemic violence of imperialism."[7] It reads the official archive against the grain and focuses on "listening to the small voice of history," including the voices of peasants, women, and even religious, sexual, and racial minorities.[8] In the context of the transnational migrant subject, the subaltern project challenges the traditional assumptions about universality, neutrality, and objectivity on which legal

4. CAROL SMART, FEMINISM AND THE POWER OF LAW 11 (1989). Legal realists as well as critical legal scholars of the 20th century have made critiques about the difference between the promise of law and its actual application.

5. *Id.* at 12–13.

6. For an elaboration of the postcolonial project and law, see Eve Darian-Smith & Peter Fitzpatrick, *Laws of the Postcolonial: An Insistent Introduction*, *in* LAWS OF THE POSTCOLONIAL 1, 1–2 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999); Dianne Otto, *Postcolonialism, and Law?: Guest Editor's Introduction*, THIRD WORLD LEGAL STUD. vii (1998–99); RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM (forthcoming 2005) (manuscript at ch. 2, on file with author).

7. Gayatri Chakravorty Spivak, *Three Women's Texts and a Critique of Imperialism*, 12 CRITICAL INQUIRY 242, 251 (1985); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337–38 (1996).

8. *See generally* Ranajit Guha, *The Small Voice of History*, *in* SUBALTERN STUD. IX, at 1 (S. Amin & D. Chakrabarty eds., 1996).

concepts are based, exposing how law produces exclusions and contributes to the construction of the transnational migrant subject's subaltern location.

Subaltern studies and postcolonial scholarship have exposed how the identity of the West and the European has been constructed in opposition to an Other. In the context of the transnational migrant subject, this opposition exposes an incommensurable tension between the West's claims to universality and inclusion, which continue to inform traditional assumptions about law, and the politics of exclusion of the Other from the project of universality.[9] These exclusions, whether based on gender, sexual status, race, ethnicity, or religion, are constructed along what are perceived to be "real differences." The law produces the binaries of "us and them," "here and there," and "civilized and uncivilized" by representing the migrant subject as distinct and different. These distinctions become the lynchpin for determining who to include and who to exclude when it comes to formulating legal responses to those who cross borders.

Modernity posits a set of claims to universal truth about equality, citizenship, and representation in law. Yet these universal concepts have continuously been exposed as resting on exclusions, as in the context of slavery, apartheid, empire, and gender discrimination. For example, in the context of empire, colonialism has been coterminous with modernity.

While Europe was developing ideas of political freedom, particularly in France, Britain, and Holland, it simultaneously amassed vast empires where such freedoms were either absent or severely attenuated for the majority of native inhabitants.[10] There were two primary ways in which it was possible to legitimize this relationship and reconcile the freedoms associated with liberalism with the exclusionary impact of colonialism. First, reconciliation involved linking the capacity to reason with adherence to some notion of a universal natural law, applicable to all.[11] These norms were premised on European practices to which the colonial subjects had to conform if they were to avoid sanctions and achieve full membership.

The second way in which to reconcile domination with freedom and equality was through the discourse of difference, in which the eligibility and capacity for freedom and progress was biologically determined, and colonial subjugation legitimized as the natural subordination of lesser races to higher ones.[12]

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9. Darian-Smith & Fitzpatrick, *supra* note 6, at 1–2.

10. UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH CENTURY BRITISH LIBERAL THOUGHT 46–54 (1999). Mehta argues that imperialism stemmed from liberal assumptions about reason and historical progress. He unpacks the inclusionary potential of liberal theory and the exclusionary effects of liberal practices. *Id.* at 46. He illustrates this argument through an examination of the colonial encounter with India, and finds that British liberals justified the denial of rights and benefits to the colonial subject on the grounds that such unfamiliar cultures were infantile and backward.

11. Ratna Kapur & Tayyab Mahmud, *Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary on Power, Culture and Sexuality in Franco's Spain*, 33 U. MICH. J.L. REFORM 995, 1012–14 (2000); *see also* MEHTA, *supra* note 10, at 102.

12. *See* Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999); *see also* MEHTA, *supra* note 10, at 64–71.

The purportedly universal rights of man could be denied to those not considered to be men or even human. Liberal discourses of rights, inclusion, and equality could be reconciled with the colonial policies of exclusion and discrimination only by presuming absolute differences between different types of individuals.[13]

A similar logic justified the continued subordination of women, where women were understood as different from men—specifically, as weaker, subordinate, and in need of protection.[14] Curiously, in the colonial relationship, gender difference was conflated with cultural backwardness, where the native treatment of women was used in part as a justification for colonial intervention and the civilizing mission.[15] The British Empire was quite consistently able to position itself as the defender of women's rights in the colonial context without fundamentally changing its own position on gender difference and the representation of women as the weak and subordinate sex. The British continued to take the existence of gender differences as natural and inevitable. And difference was partly constructed through the capacity to consent and the capacity to reason. The Other was deemed unfathomable, inscrutable, distant, and removed, demonstrating that this subject was civilizationally backward and savage or infantile.[16] Colonial subjugation became one way to rectify past deficiencies, and the civilizing mission of imperialism became justified in societies perceived as stagnant and mired in the stranglehold of custom. The Empire was the "engine that tows societies stalled in their past into contemporary time and history."[17] It was a necessary precondition to progress.

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13. MEHTA, *supra* note 10, at 69–70.

14. *See generally* Joan Scott, *Deconstructing Equality Versus Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33 (1988); *see also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); LYNNE FORD, WOMEN AND POLITICS: THE PURSUIT OF EQUALITY (2002).

15. KATHERINE MAYO, MOTHER INDIA: SELECTIONS FROM THE CONTROVERSIAL 1927 TEXT 3–4 (Mrinalini Sinha ed., 2000) (claiming that imperial intervention was justified on grounds that the native woman must be rescued from her plight and the harms of a backward and barbaric culture). *See generally* TANIKA SARKAR, HINDU WIFE, HINDU NATION: COMMUNITY, RELIGION, AND CULTURAL NATIONALISM (2001). Sarkar posits that Hindu ideas and traditions were in part products of the colonial encounter, which influenced the development of ideas and traditions that have shaped hegemonic and dominant conceptions of Indian womanhood, domesticity, wifeliness, mothering, and India as a Hindu nation. The Hindu nationalists embraced the very aspects of the tradition that the colonial power argued were symbols of India's backwardness and a justification for the continued colonial rule.

16. MEHTA, *supra* note 10, at 68–73; JOHANNES FABIAN, TIME AND ITS OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECTS (1983) (discussing how the anthropologist engages with her subject as existing at a different time from herself, in some mythical, and hence primitive past); ROBERT YOUNG, WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST 21–27 (1990) (arguing that the notion of the Other as savage and primitive is partly contingent on the way in which history is recited. Young critiques various Marxist accounts of a single world history, which have represented the "Third World" as unassimilable, constituting a surplus to the narrative of the "West." Decolonizing history is a part of the project of deconstructing the "West" and understanding how the truth about the Other comes to be produced.).

17. MEHTA, *supra* note 10, at 82.

Law became one site at which to deal with difference and legitimize the pursuit of the civilizing mission.[18] The native was entitled to certain rights and benefits to the extent that he could reinvent himself as an Englishman and successfully perform the mime.[19] Otherwise, "backwardness" and lack of "civilizational maturity" were regarded as limitations. They were deficiencies to be tolerated, even if they could not be altered, or to be eliminated if they posed too great a threat.[20] Furthermore, this deficiency was in part emphasized through a focus on the natives' treatment of their own women, even as the colonial powers themselves accepted gender difference as intrinsic and immutable.

Thus, while there was an assumption that certain political ideals—liberty, equality, and fraternity—were universal, these ideals seemed to stumble and falter at the moment of their encounter with the unfamiliar, the Other. One response to a world where there were so many different ways of organizing social and political life was simple: colonialism. Today, assumptions that underscore these "universal" values meet with some of the same difficulties as they encounter difference and unfamiliarity in a postcolonial and increasingly transmigratory, transnational world.[21] Universality is always accompanied by what Denise da Silva evocatively describes as "the other side of universality."[22] This "moral and legal *no man's land*, where universality finds its *spatial* limit," is built upon the foundation of difference.[23]

These responses to the Other are still present in the contemporary moment in the context of the legal treatment of the transnational migrant subject. I examine these responses through a sampling of legal interventions and unpack the assumptions about the Other and difference on which they are based. The discussion exposes the failure to recognize the global movement of people as a part of the globalization process, and how legal interventions, which continue to operate along the dichotomies of "here and there" and "us and

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18. *See* WILHEM GREWE, THE EPOCHS OF INTERNATIONAL LAW 457 (Michael Byers trans., 2000):
> The principal, practical effect of the linkage of international law to the standards of civilization was the system of "capitulations" or, in other words, the "unequal" treaties by which the civilized nations reserved a special jurisdiction . . . over their own nationals, whom they did not wish to have subjected to the legal order and justice system of a half-civilized or uncivilized country.

19. See discussion of mimicry in HOMI BHABHA, THE LOCATION OF CULTURE (1994). Bhabha argues that while colonial mimicry represents the desire of the native to be reformed and recognizable, it also reveals a certain transgressive recalcitrance since the difference continues to pose an imminent threat to "both 'normalized' knowledge and disciplinary power." *Id.* at 85–86. Colonial mimicry is thus characterized by ambivalence.

20. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 3, 3–5 (1999); *see generally* HELEN FEIN, IMPERIAL CRIME AND PUNISHMENT: THE MASSACRE AT JALLIANWALA BAGH AND BRITISH JUDGMENT, 1919–1920 (1977); SAVITA NARAIN, THE HISTORIOGRAPHY OF THE JALLIANWALLA BAGH MASSACRE, 1919 (1998).

21. Tayyab Mahmud, *Migration, Identity and the Colonial Encounter*, 76 OR. L. REV. 633, 634 (1997).

22. Denise Ferreira da Silva, *Toward a Critique of the Socio-Logos of Justice: The Analytics of Raciality and the Production of Universality*, 7 SOC. IDENTITIES 421, 421 (2001).

23. *Id.* at 422.

them," are actually contributing to the production of a clandestine migrant mobility regime.

A. Re-entrenching the Native Subject

Over the past several years, sex workers (male, female, and transgendered), their families, and their support communities have crossed international borders and converged on different cities in India to celebrate the International Sex Workers' Rights Day on March 3.[24] At the epicenter of their debates and protests has been a challenge to the anti-trafficking initiatives being promoted by Western and South Asian countries, feminists, and human rights groups.[25] These communities argue that such measures have resulted in targeting of migration from the south, promotion of a highly conservative moral agenda, and a denial to sex workers and other migrants of their right to work, family, and mobility.[26] I discuss how anti-trafficking initiatives assume that persons in situations of trafficking, especially women, are "victims" incapable of choosing to cross borders, and how they fail to address the push factors that compel such "unsafe" movements.[27] Instead, these responses focus on border

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24. ROSHNI BASU, REPORT ON THE "SHANTI UTSAV," *at* http://www.kit.nl/gcg/assets/images/mela_report.doc (last visited Dec. 15, 2004). The Durbar Mahila Samanwaya Committee (DMSC), more widely known as the Sonagachi Project, is an organized sex workers' rights movement based in Calcutta and consisting of over 60,000 sex workers. By gathering and organizing information, it has been able to reduce the transmission of HIV as well as the trafficking of minors within sex work. The anti-trafficking initiatives rely on the participation of residents in red light areas in monitoring the entry of minors into the area and assisting in the return of any who try to enter. For DMSC's general principles, see *Sex-workers Manifesto* (theme paper of the First National Conference of Sex Workers in India, Nov. 14–16, 1997), *available at* http://www.walnet.org/csis/groups/nswp/conferences/manifesto.html. The Sex Workers' Forum in Kerala, a southern state in India, organized the third Sex Workers' Conference of January 17–19, 2003 under the theme "The Festival of Pleasure." The conference addressed the problems of sex workers and the violations of their rights. *Festival of Pleasure: Your Questions, Our Answers*, *at* http://www.heart-intl.net/HEpatitis,%20AIDS,%20Research%20Trust/International%20Studies/Complete/Festival%20of%20Pleasre-India.htm (last updated Apr. 24, 2003).

25. *See, e.g.*, Lisa Batiwalla, Infochange India News & Features, *Women's Groups, Feminists Often Ignore Sex Workers' Rights*, *at* http://www.infochangeindia.org/WomenItop.jsp?recordno=3437&section_idv=1#3386 (Sept. 6, 2004).

26. *See, e.g.*, Laxmi Murthy, *Our Rights are Human Rights*, 1:4 VAMPNEWS (Apr. 2004), *available at* http://www.vampnews.org/vol01no04/world.html. Some of these concerns are expressed in TALES OF THE NIGHT FAIRIES (Centre for Feminist Legal Research & Mamacash 2002), directed by Shohini Ghosh, which documents the Sonagachi Project. The film cuts between shots of the Sex Workers Millennium Carnival held in Calcutta in 2001, the stories the sex workers tell about their work and lives, the violation of their rights, and the double standards on issues of sexuality.

The empowered representations of the sex workers in Ghosh's film stand in sharp contrast to the images of victimization and violence represented in the more highly publicized documentaries of the sex workers in Calcutta by Andrew Levine, THE DAY MY GOD DIED (PBS 2003), and by Ross Kauffman and Zana Briski, BORN INTO BROTHELS (HBO/Cinemax Documentary Films 2003). Neither film addresses the fact that Calcutta is a city where the red-light district is a safe refuge for its sex workers and their trade. These sex workers and their activist comrades have set up—however rudimentary—financial institutions, health clinics, sex education schools, and blood banks for the surrounding community. Levine and Briski's films portray these women and their families as exploited subjects, who have been "saved" either by the benevolence of the Christian white man or the film makers themselves.

27. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002).

controls and the prosecution of "traffickers," who range from transport agents to the "victims'" families who consent to the movement. They are designed to discourage women's mobility and to stigmatize her (Third World) family, conveying a simple message: Keep the "native" at home. The anti-trafficking initiatives reproduce assumptions about women as passive, incapable of decision-making, and in need of protection. They also fail to address the concerns of anti-trafficking advocates, as they are frequently used merely as a façade to deter the entry of certain categories of migrants or to clean up establishments within the sex industry.[28] The anti-trafficking framework has not succeeded in detaching itself from these hidden agendas, and consequently it has proven to do little good for the trafficked person and great harm to migrants and women in the sex industry.[29]

Statistics in the area of trafficking are unavailable primarily due to the imprecise nature of the term "trafficking," the lack of systematic research in this area, and the clandestine nature of the activity.[30] In addition, statistics

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28. Some examples include the recent amendments to the Swedish prostitution laws, which criminalize the purchasing of sexual services in the name of combating trafficking. Act Prohibiting the Purchase of Sexual Services (1998:408) (Swed.); *see also* SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002, *available at* www.saarc-sec.org/old/freepubs/conv-traffiking.pdf; REPORT OF THE INTERNATIONAL LAW ASSOCIATION: NEW DELHI CONFERENCE COMMITTEE ON FEMINISM AND INTERNATIONAL LAW (2002).

29. *See, e.g.*, EMPOWER CHIANG MAI, REPORT ON THE HUMAN RIGHTS VIOLATIONS WOMEN ARE SUBJECTED TO WHEN "RESCUED" BY ANTI-TRAFFICKING GROUPS WHO EMPLOY METHODS USING DECEPTION, FORCE AND COERCION (June 2003); Statement from the Network of Sex Work Projects, The Anti-Sex Work Anti-Trafficking Agenda: A Threat to Sex Workers' Health and Human Rights, at the XIV International Conference on AIDS, Barcelona, Spain (July 2004), *available at* http://www.nswp.org/nswp/conferences/xivaids/nswp-0207.html; Melissa Ditmore & Marjan Wijers, *The Negotiations on the U.N. Protocol on Trafficking in Persons*, 4 NEMESIS 79 (2003); Sunera Thobani, *Benevolent State, Law-Breaking Smugglers, and Deportable and Expendable Women: An Analysis of the Canadian State's Strategy to Address Trafficking in Women*, 19:4 Refuge 24 (2001); Jo Doezema, *Forced to Choose: Beyond the Voluntary vs. Forced Prostitution Dichotomy*, *in* GLOBAL SEX WORKERS: RIGHTS, RESISTANCE AND REDEFINITION 34, 44–46 (Kamala Kempadoo & Jo Doezema eds., 1998) [hereinafter GLOBAL SEX WORKERS].

30. The Global Alliance Against Traffic in Women undertook a study on behalf of the U.N. Special Rapporteur on Violence Against Women, in which it stated that it was extremely difficult to find reliable statistics on the extent of trafficking that was taking place. MARJAN WIJERS & LIN LAP-CHEW, TRAFFICKING IN WOMEN, FORCED LABOUR AND SLAVERY-LIKE PRACTICES IN MARRIAGE, DOMESTIC LABOR AND PROSTITUTION 15 (1997). A searchable database on different statistics of trafficking provided by various governments is available at the UNESCO Trafficking Statistics Project database, http://www.unescobkk.org/culture/trafficking/matrix/matrix.asp (last visited Jan. 3, 2005). Accurate statistics on migration flows more generally are not readily available. This lack is due in part to the absence of any universal methodology for collecting such statistics, a lack of commitment on the part of governments to collect these statistics, the absence of a common definition amongst countries of who constitutes an international migrant, and the difficulty in collecting data given the clandestine nature of some forms of migration. *See* U.N. DEP'T OF ECO. & SOC. AFFAIRS, STATISTICS DIV., RECOMMENDATIONS ON STATISTICS OF INTERNATIONAL MIGRATION, at 12–15, U.N. Doc. ST/ESA/STAT/SER.M/58/Rev.1, U.N. Sales No. E.98.XVII.14 (1998). However, some official U.N. estimates provide information about the numbers involved in cross-border movements. The U.N.'s International Migration Report 2002 estimated that there were 175 million migrants, defined as persons outside their country of birth or citizenship for twelve months or more. About 60% of migrants were in "developed countries," including 56 million in Europe, 50 million in Asia, and 41 million in North America. During the 1990s, the number of migrants in developed countries rose by 23 million, or 28%, and immigration accounted for almost two-thirds of the population growth in industrial countries. Between 1995 and 2000, the more developed countries received nearly 12 million migrants from lesser developed countries, about 2.3 million migrants a year, including 1.4

are sometimes cited without identifying any substantiating research. For example, the Coalition Against Trafficking in Women—Asia-Pacific sets out the numbers of women trafficked in several countries, often without citing any research or source for their statistics.[31] Similarly, the 1995 Human Rights Watch report on trafficking between Nepal and India states that "[a]t least hundreds of thousands, and probably more than a million women and children are employed in Indian brothels."[32] Human Rights Watch further states in its 1993 report on trafficking between Burma and Thailand that there are an "estimated 800,000 to two million prostitutes currently working in Thailand."[33] Neither report, however, provide any sources for its statistics.

Kamala Kempadoo has stated that there are often extreme variations in the estimates of the number of women in prostitution in Asia. She questions the veracity of these figures, arguing that such discrepancies are grounds for questioning the reliability of the research.[34] Despite such criticism, in the context of sex work, prostitution, and the conflation of these activities with trafficking, standards are compromised and such figures are cited without any question.

These questionable statistics reinforce confusion about trafficking, migration, and sex work. In contemporary discourse, human trafficking has come to be interlinked with migration (mainly illegal), clandestine border crossing, and smuggling of humans. On a parallel plane, trafficking in women and girls is conflated with their sale and forced consignment to brothels as sex workers. This conflation of trafficking in persons with various manifestations of migration and mobility on the one hand, and with prostitution and sex work on the other, lies at the very core of the confusion underpinning the contemporary discourse on the global, national, and regional trafficking of women and girls.

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million a year in North America and 800,000 a year in Europe. *International Migration Report 2002*, Dept. of Econ. and Soc. Affairs, Population Div., U.N. Doc. ST/ESA/SER.A/220, U.N. Sales No. E.03.XIII.4 (2002). In 2001, the United Nations High Commissioner for Refugees estimated that of the 21.8 million people the Commission was responsible for, 12 million were refugees. *Global Refugee Trends: January–September, 2001, A Statistical Overview of Refugee Populations, New Arrivals, Durable Solutions and Refugee Status, Determination Procedures in Some 90 Countries*, Populations Data Unit, Population and Geographical Data Section, 2001 U.N.H.C.R. Statistical Y.B. 12. Several million people are missing from these estimates because they are illegal and do not appear in the official census. *Id.* at 12–15.

31. Coalition Against Trafficking in Women—Asia-Pacific, *at* http://www.catw-ap.org/ (last visited Oct. 23, 2004).

32. HUMAN RIGHTS WATCH, RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIA'S BROTHELS 1 (1995).

33. WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, A MODERN FORM OF SLAVERY: TRAFFICKING OF BURMESE WOMEN AND GIRLS INTO BROTHELS IN THAILAND 1 (1993).

34. Kamala Kempadoo, *Introduction: Globalizing Sex Workers' Rights*, *in* GLOBAL SEX WORKERS, *supra* note 29, at 1, 15 (elaborating on the inaccuracy in the statistics on the number of people who are trafficked, which often go unchallenged, as well as the uncritical acceptance of the view that the problem of trafficking has increased).

B. Conflating Migration With Trafficking

In 2000, the United Nations adopted an international definition of trafficking. The Protocol defines trafficking as follows:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[35]

The definition marks an important development insofar as it shifts toward a newer, relatively more widely acceptable and inclusive definition of trafficking. Since the definition is very recent, its impact will only be realized once it begins to be applied and tested. A striking feature of the definition is that it includes trafficking for purposes other than prostitution, such as for forced labor, forced marriage, and other slavery-like practices. There is also some acknowledgement that trafficking is a problem of human rights and not a law and order or public morality issue related to prostitution.

However, the new definition is not fully coherent and still conflates trafficking with migration and prostitution. Women move and are moved, with or without their consent, for a variety of reasons.[36] They frequently find their way into the job market as domestic helpers or sex industry workers, partly because these are the largest available enclaves in the job market of receiving countries.[37] The definition of trafficking in the Protocol fails to clearly distinguish between trafficking and voluntary consensual migration, often conflating women's migratory movement with trafficking.[38] A number of states

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35. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Annex II, Dec. 12, 2000, G.A. Res. 55/25, U.N. Doc. A/55/383 (2000) [hereinafter Trafficking Protocol].

36. *See* Doreen Indra, *Not a "Room of One's Own": Engendering Forced Migration Theory and Practice*, *in* ENGENDERED FORCED MIGRATION: THEORY AND PRACTICE 1–23 (Doreen Indra ed., 1999); *cf.* Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7 (1996).

37. *See generally* WIJERS & LAP-CHEW, *supra* note 30; Marjan Wijers, *European Union Policies on Trafficking in Women*, *in* GENDER POLICIES IN THE EUROPEAN UNION 209 (Mariagrazia Rossilli ed., 2000).

38. The issue of consent or lack of consent is important, but does not address the broader factors that contribute to the problem of trafficking. Women may choose to move due to the lack of economic opportunities in their own country as well as the fact that there is an increasing demand for cheap, exploitable labor within the context of globalization. *See* CENTRE FOR FEMINIST LEGAL RESEARCH, REPORT OF THE INTERNATIONAL SEMINAR ON CROSS BORDER MOVEMENTS AND HUMAN RIGHTS (2004). The issue of demand is not addressed by the Protocol nor is the fact that women move into domestic work and the sex industry because these are the largest enclaves available to women in the job market. There is evidence that due to the lack of safe passages for movement, women are resorting to traffickers and smugglers to facilitate their voluntary movement. Rutvica Andrijasevic, *The Difference Borders Make: (Il)legality, Migra-*

parties to the Protocol have also interpreted it, both consciously and inadvertently, as foregrounding prostitution as the main site of trafficking, relegating the issue of the consent of the "victim" to irrelevance.[39]

Additionally, the Protocol does not require states parties to provide any measures of redress, assistance, or service to individuals who have been trafficked, or to their families. In all these ways, the trafficking definition delegitimizes the woman's cross border movement.

The various tensions that characterize the anti-trafficking debates have become evident in the Protocol and its definition.[40] Equating trafficking with migration has led to simplistic and unrealistic solutions: in order to prevent trafficking, there has been a conscious or inadvertent move to prevent altogether the migration of those who are deemed vulnerable to exploitation.[41] Even when curbing migration is not a stated focus of a program, there is an inadvertent tendency to try to dissuade women and girls from moving in order to protect them from harm. Anti-trafficking measures are frequently made applicable to "women and girls," thereby failing to accord women a separate identity as adults and confer rights that flow from that status, including the right to choose to move and to control one's life and body. This language also emphasizes women's role primarily as caretakers for children and fails to consider that their roles have altered. A woman's identity as the sole supporter of dependent family members, and hence as an economic migrant in search of work, is completely overlooked by these legal initiatives. Conflating trafficking with migration reinforces the assumption that women and girls are incapable of decision making or consent, and are therefore in need of constant male or state protection. The logical consequence of such an assumption is the curtailment of a woman's right to movement or right to earn a living in the manner she chooses. Indeed, policies that appear to be

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tion and Trafficking in Italy Among Eastern European Women in Prostitution, in UPROOTINGS/REGROUNDINGS: QUESTIONS OF HOME AND MIGRATION 251, 263–64 (Sara Ahmed et al. eds., 2003).

39. For example, the Council of Europe, in its Parliamentary Assembly Recommendation 1545 of 2002, stated that "[i]n European societies, trafficking is a very complex subject which is closely linked to prostitution and hidden forms of exploitation, such as domestic slavery, catalogue marriages and sex tourism. Some 78% of women victims of trafficking are, in one way or another, exploited sexually." No citations are provided for this statistic. The practice of foregrounding sexual exploitation in the discourse on trafficking stands in contrast to another field report regarding trafficking issues in southeastern Europe by Barbara Limanowska, *Victim Referral and Assistance System and Gaps Therein in Southeastern Europe* (Nov. 18–22, 2002) (paper for the Expert Group Meeting on "Trafficking in Women and Girls," Nov. 18–22, 2002), *available at* http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/EP-Limanowska.PDF (last visited Oct. 26, 2004).

40. Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 474–76 (2003) (arguing for the need to move beyond the focus on consent and address the issues of illegal movement and illicit forms of labor).

41. A number of non-governmental organizations and women's groups have developed border interception strategies with law enforcement officials in order to prevent the migration of women who are moving under what seem like "suspicious" circumstances and place them in protective care. *See* CENTRE FOR FEMINIST LEGAL RESEARCH, *supra* note 38, at 21. Such interventions merely result in restricting women's rights or encouraging corruption. DALE HUNTINGTON, POPULATION COUNCIL, ANTI-TRAFFICKING PROGRAMS IN SOUTH ASIA: APPROPRIATE ACTIVITIES, INDICATORS AND EVALUATION METHODOLOGIES 21 (Mar. 2002), *available at* http://www.popcouncil.org/pdfs/rr/anti_trafficking_asia.pdf.

initiated for the *benefit* of women often contribute to further victimization and infantilization of female migrants.[42] The construction of women who move (or are moved) as victims of a web of criminal networks lies in tension with the counter-narrative that regards the movement of labor as part of the globalization process in which the emergence of human trafficking and smuggling networks are parallel responses to the migration phenomenon that nation-states, especially in the global North, refuse to address other than as an issue of immigration or criminality.

The approach that arises out of constructing women as victims delegitimizes women's movement, while the problem of trafficking—the ostensible purpose of these measures—never gets resolved. Curbing migration does not stop trafficking, it merely drives the activity further underground, making it more invisible. Borders cannot be made impermeable, and stricter immigration measures result in pushing the victims further into situations of violence and abuse. As a result, women who migrate are pushed into further dependence on an informal and illegal network of agents and rendered even more vulnerable to economic and physical abuse, exploitation, and harm.

International law has constructed a response to "trafficking" that fails to draw clear conceptual distinctions between migration and trafficking. As a result, migration becomes equated with trafficking, which also means that the number of victims of trafficking comes to include the number of those who have migrated voluntarily. This logic operates particularly in the case of adolescent and adult female migrants, rather than in the case of male migrants. As a result, surveys on trafficking in "risk-prone" and "affected" districts, such as various South Asian countries, are conducted using flawed methodology. If women or girls are absent from a village or town, they are assumed to be "missing persons" and, therefore, trafficked. It is a logic that has resulted in the viewing of all consensual migrant females as trafficked individuals.

Anti-trafficking advocates also conflate women's cross-border movements with sex work or prostitution, producing at least two contradictory responses.[43]

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42. For example, in the early 1990s, Bangladesh, India, and Indonesia imposed minimum age limits for women workers going abroad for employment. In 1998, Bangladesh banned women from going abroad as domestic workers. In 2002, the government of Bangladesh announced that it was considering removing the ban; however, to date the ban appears to have remained in effect. In 2003, the Indonesian government similarly announced the imposition of a temporary ban on female migrant workers. *See* Irene Fernandez, *Ban on Female Workers by Indonesia is Not the Solution* (Mar. 5, 2003), *at* http://www.december18.net/web/papers/view.php?paperID=672&menuID=41&lang=EN. In the same vein, although not entirely prohibiting migration by women, section 12 of the Nepal Foreign Employment Act (1985), prohibits the issuance of employment licenses to work overseas to women without the consent of the woman's guardian. *Id.* at 2042. Similarly, the government of Burma, reacting to the publication of a report by Human Rights Watch about the trafficking of Burmese women and girls into Thailand's sex industry from the eastern Shan state, imposed rules prohibiting all women in that area between the ages of 16 and 25 from traveling without a legal guardian. *See* Brenda Belak, *Migration and Trafficking of Women and Girls, in* GATHERING STRENGTH: WOMEN FROM BURMA ON THEIR RIGHTS 194, 195 (2002). Even passports are difficult to acquire for women, especially those under 25. The government states that such restrictions are intended to protect women from being coerced into working in night clubs or as commercial sex workers. *Id.* at 198.

43. One recent stark example of this conflation is the SAARC Convention on Preventing and Combat-

Collapsing the process with the purpose equates the abuse and violence that a woman may experience in the course of transport with the ultimate purpose of her journey. Many anti-trafficking measures are invariably anti-prostitution or intended to curtail sex work. Prostitution as the mutually exclusive purpose of trafficking is an untenable assumption because not all victims of trafficking are prostitutes nor have all prostitutes been trafficked. At the same time, if women are deemed to have participated in the process of trafficking, they are immediately recast as immoral subjects or criminals undeserving of legal protection.

Restrictive migration and immigration policies of countries of transit and destination have decreased the possibilities for regular, legal, and safe migration throughout the world. This phenomenon has resulted in the growth of a clandestine migrant-mobility regime in which traffickers and smugglers facilitate the movement of migrants, often providing false travel documents and identification papers for them. It is a regime born from people's desire and need to migrate produced, in part, by the demand for cheap exploitative labor across borders. The anti-trafficking legal initiatives fail to recognize and respect the rights of transnational migrant subjects such that women's agency and the rights of their families in the course of their movement are all but forgotten. These initiatives continue to address women (especially from the global South) as victims, infantilizing them as incapable of rationally choosing to migrate in a clandestine fashion, although a bevy of factors—including market demands and the lack of safe migration options—can make clandestine migration methods a rational, viable option.

Anti-trafficking initiatives also tend to criminalize women and their families by regarding families as part of the trafficking chain, failing to recognize that women move in part to seek better economic opportunities to support their families.[44] Although the women migrating on the behalf of their family can still be subject to subtle and forceful coercion from their family members, the anti-trafficking initiatives assume criminality indiscriminately for all female migrants. Furthermore, by invariably associating trafficking with sexual exploitation, women who move are implicitly suspected of crossing borders for the purposes of sex, which stigmatizes their movement. As such, women and their movement are viewed through the lenses of criminality and stigma, and the woman herself is rendered both a victim as well as an immoral subject.

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ing Trafficking in Women and Children for Prostitution, *supra* note 28. For a criticism of this conflation, see REPORT OF THE INTERNATIONAL LAW ASSOCIATION: NEW DELHI CONFERENCE COMMITTEE ON FEMINISM AND INTERNATIONAL LAW, *supra* note 28. See also Anne Gallagher's background paper cited in the annex of ADVISORY COUNCIL OF JURISTS, CONSIDERATION OF THE ISSUE OF TRAFFICKING: FINAL REPORT 89–92 (Dec. 2002), *available at* http://www.asiapacificforum.net/jurists/trafficking/Final_Report.doc (last visited Oct. 26, 2004).

44. The Trafficking Protocol has been adopted under the terms of the Convention Against Transnational Organized Crime, Nov. 15, 2000, 40 I.L.M. 335, 353 (entered into force Sept. 29, 2003).

C. Assimilation and the Cultural Strip

> Almost the same, but not quite . . . almost the same, but not white.[45]
>
> [M]ost migrants learn, and become disguises.[46]

The global flow of people across borders and within borders is generated by a plethora of reasons: the reconfiguration of the global economy, displacement and dispossession of marginalized populations, the desire to provide education to children, the awareness through consciousness-raising that there are better options elsewhere, armed conflict, and, of course, the basic human aspiration to explore the world.[47] The global patterns of economics and trade have increased the demand for low wage labor as well as the demand of poor countries for remittances from immigrants in the global North that will assist in social welfare that the state is neither able nor willing to provide.[48] The World Bank's report on Global Development Finance 2003 estimates that migrant remittances to developing countries reached almost $80 billion in 2002. Poorer countries thus have little interest in controlling outward movement, whether legal or clandestine.[49]

There are several human rights documents and provisions in international and human rights law that address some of the harms and abuses to which migrants may be exposed, such as slavery, forced labor, and debt bondage.[50] The recently ratified International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("CMW") is the first international convention to address the issue of irregular or illegal migration from a rights perspective. It affords some recognition and substantial rights to migrants and undocumented workers.[51] The primary purpose of

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45. BHABHA, *supra* note 19, at 86.

46. SALMAN RUSHDIE, IMAGINARY HOMELANDS 49 (1988).

47. *See* MYRON WEINER, THE GLOBAL MIGRATION CRISIS: CHALLENGE TO STATES AND TO HUMAN RIGHTS 21–44 (1995) (providing an overview of the causes and consequences of international global migration, including the challenges that it brings to the meaning of sovereignty, security and social justice); *see also* James Hollifield, *Migration, Trade and the Nation-State: The Myth of Globalization*, 3 UCLA J. INT'L & FOREIGN AFF. 595 (1998) (arguing that migration and trade are inextricably linked).

48. *See generally* Kerry Rittich, *Transformed Pursuits: The Quest for Equality in Globalized Markets*, HARV. HUM. RTS. J. 231, 241–42 (2000).

49. *See* Claudia M. Buch et al., Kiel Inst. for World Econ., *Worker Remittances and Capital Flows* (2002), *at* http://www.uni-kiel.de/ifw/pub/kap/2002/kap1130.pdf. Buch argues that worker remittances constitute an important method for transferring resources from developed to developing countries. Worker remittances are ranked as the second largest source, next to foreign direct investment, of external funding for developing countries.

50. *See* Supplementary Convention on the Elaboration of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3; *see also* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 8, 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976); *see also* International Covenant on Economic Social and Cultural Rights, *opened for signature* Dec. 16, 1966, arts. 6, 11, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

51. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49A, at 261, U.N. Doc. A/45/49 (1990) (entered into force July 1, 2003) [hereinafter CMW].

the Convention is to protect the human rights of legal and illegal migrants and their families, and to ensure there is no arbitrary interference with their rights to liberty and security.[52] The CMW imposes positive obligations on the state to provide housing and other benefits to migrants, both documented and undocumented.[53] Despite the rights provided under the CMW, it suffers from a number of shortcomings, such as a failure to address the obstacles posed by immigration laws and restrictions.[54] Additionally, as of this writing, the treaty has not been ratified by a single country in the global North.

At the same time, there is a resistance on the part of states to address the transnational migrant within the framework of international and human rights law. The primary response of states to the global movement of people has been to enact new citizenship and nationality laws to enable transnational migrants to be part of the universal project of rights and acquire legitimacy through the process of assimilation. However, these initiatives are also being promoted alongside tighter immigration laws and procedures that address immigrant-status migrants and increased border control mechanisms that target those who refuse to assimilate.

Transnational movements are challenging nation-states and their borders, and reconfiguring the map of national, political, and cultural identity. The need to secure the sovereign nation-state and the sovereign subject results in an unwillingness to countenance such a challenge. New laws enacted to defend and consolidate the cultural, social, and national cohesion of individual states—through a combination of assimilating criteria and exclusionary cultural boundaries—reveal continuing neo-colonial anxieties about the Other.

The U.K. Government's response to this neo-colonial anxiety, as well as to the racial tensions that gripped the country in the summer of 2001, is the government's new policy on immigration and citizenship set out in its White Paper entitled *Secure Borders, Safe Haven*.[55] Consistent with the policy of pursuing tighter immigration measures rather than addressing the anxieties and

52. *Id.* arts. 8–35.

53. *Id.* arts. 64–71.

54. A comprehensive critique of the CMW is beyond the scope of this Article. As it is a relatively new Convention that only recently came into force, it has not been subjected to extensive analysis and review. What is evident, however, is that sending countries have a greater incentive to ratify the document than receiving countries. The Convention represents a major positive shift towards acknowledging the trend of increasing migrations. However, there are still some substantial limitations and problems with the definitions as well as substantive provisions of the Convention. The major shortcoming is that the Convention fails to consider the issue of migration from the perspective of the migrant and restricts the rights of migrant workers, especially female migrants.

55. U.K. HOME OFFICE, SECURE BORDERS, SAFE HAVEN: INTEGRATION WITH DIVERSITY IN MODERN BRITAIN 10–11 (2002) [hereinafter SECURE BORDERS, SAFE HAVEN] ("The reports into last summer's disturbances in Bradford Oldham and Burnley painted a vivid picture of fractured and divided communities, lacking a sense of common values or shared civic identity to unite around. The reports signaled the need for us to foster and renew the social fabric of our communities, and rebuild a sense of common citizenship, which embraces the different and diverse experiences of today's Britain."); *see generally* TED CANTLE, U.K. HOME OFFICE, COMMUNITY COHESION: A REPORT OF THE INDEPENDENT REVIEW TEAM (2002); *see also* OLDHAM INDEPENDENT REVIEW, PANEL REPORT (2001) (providing a general discussion and analysis of race riots and community relations in Britain).

national security issues posed by the transnational migrant within the framework of international and human rights law, the U.K. government has not ratified the CMW and asserts—though not uncontestedly—that there is inevitably a tradeoff between migrant rights and immigration controls.[56] The national immigration measures target the transnational migrant subject through new cultural, emotional, and citizenship criteria. Most of these criteria have found their way into the British Nationality, Immigration, and Asylum Act of 2002.[57]

Secure Borders, Safe Haven is based on two primary objectives. The first is to build social cohesion and a sense of British identity in "an increasingly diverse world."[58] The government considers it critical to ensure that local residents feel secure in their own identity and community and that those who want to settle in the U.K. "develop a sense of belonging, an identity and shared mutual understanding, which can be passed from one generation to another."[59] The second is to address economic considerations by ensuring that people who want to work in the United Kingdom can do so without entering the country through illegal routes.[60] These two objectives are pursued under a policy of "managing migration."[61] Managing migration seeks to integrate migrants into the British economy and society in ways in which the existing population will welcome them. The migrants are to be "managed" in their literal crossing of borders as well as in their identity construction once in the U.K. Through new nationality, citizenship, and integration policies, the migrant is reshaped in the British mold. As Home Secretary David Blunkett has asserted, the migrants should be trained to "uphold common values and understand how they can play their part in our society while upholding our status as subjects of [Her Majesty] The Queen."[62] Blunkett therefore proposes that people who want to become U.K. citizens take a compulsory English language test and an exam on the ways of British life, British society, and British institutions.[63] Migrants would also be required to take a citizenship pledge.[64] This move toward assimilation requires a "cultural strip."

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56. In a recent report by the International Development Committee of the House of Commons, the government was requested to explain why it had not ratified CMW and to provide the committee with evidence to support the assumption that there is a trade-off between migrants' rights and immigration control. *See* INTERNATIONAL DEVELOPMENT COMMITTEE, MIGRATION AND DEVELOPMENT: HOW TO MAKE MIGRATION WORK FOR POVERTY REDUCTION, SIXTH REPORT, 2004, Cm. HC 79-I, at 86.

57. Nationality, Immigration, and Asylum Act, 2002, c.41 (Eng.).

58. SECURE BORDERS, SAFE HAVEN, *supra* note 55, at 11.

59. *Id.* at 27.

60. *Id.*

61. *Id.* at 22.

62. *Id.* at 29.

63. *Id.* at 32–33.

64. *Id.* at 34–35, 111; *see* Nationality, Immigration and Asylum Act, *supra* note 57, §§ 1, 3 (pertaining to knowledge of language and society for naturalization and bringing into effect Schedule 1 of the Act, pertaining to the citizenship ceremony, oath and pledge).

As part of a "cultural strip," cultural practices that are perceived as being contrary to British tradition and values must be rooted out. For example, *Secure Borders, Safe Haven* targets "bogus marriages," defined as marriages entered into solely for the purpose of bringing friends and relatives into Britain through one of the easiest routes still permitted by U.K. immigration rules.[65] According to the definition, bogus marriages are entered into for "wrong" (not personal or romantic) reasons.[66] There is a normative bias in Blunkett's focus on "arranged" marriages that implies such arrangements are not real marriages. Moreover, while he recognizes the desire on the part of parents to choose partners of a similar cultural background for their children, he expresses the hope that eventually such parents will seek to choose such partners from within their own settled communities in Britain. He states that only certain marital norms will be acceptable in the U.K., and that polygamous or forced marriages will not be tolerated.[67] However, his proposals create a blurring of distinctions between forced marriages and arranged marriages, especially when such marriages are arranged between a U.K. citizen and a person living abroad.

Blunkett has proposed the introduction of a "probationary period" of two years for new marriages before allowing the couple to apply for settlement in the U.K.[68] During those two years the couple would have to support themselves without recourse to public funds, a hardship Blunkett claims will "not greatly inconvenience or penalize those in genuine relationships."[69] The subjection of the relationship to some form of economic hardship over the course of two years would, according to the Home Secretary's view, be unsustainable in the context of "sham marriages": "it would be harder to sustain a relationship for this longer period with a duped partner and it is more likely that, when questioned or interviewed, the lack of a genuine and subsisting relationship will become apparent."[70] These recommendations have yet to be explicitly enacted into law. They nevertheless serve as a telling illustration of some of the cultural and gendered assumptions that the government retains with respect to foreigners, assumptions that will no doubt influence the decisions of those who evaluate immigration applications.

The Blunkett proposal to introduce new regulations into the relationships of immigrant populations requires couples with a migrant spouse to demonstrate instrumental, emotional, and cultural components to prove the "au-

65. SECURE BORDERS, SAFE HAVEN, *supra* note 55, at 99–102.

66. Indeed, very recently one London newspaper columnist expressed anxiety over the ease with which even gay men assisted foreign women to get their residency in the U.K. by marrying them. Matthew Parris, *Bogus Marriages Should Be Our Target, Not Asylum-Seekers*, TIMES (London), Sept. 18, 2004, at 26. Parris further expressed a fear that the enactment of civil partnership laws in the U.K. would accentuate the problem by extending the facility of marriage for the purposes of bringing in foreign, gay men, especially from Cuba and Brazil.

67. SECURE BORDERS, SAFE HAVEN, *supra* note 55, at 99.

68. *Id.* at 100.

69. *Id.*

70. *Id.*

thenticity" of their marriages. The instrumental element measures the strength and genuineness of the marital arrangement as contingent upon the length of time a couple remains together: the longer the couple stays together, the more legitimate the arrangement. The emotional element quite specifically requires proof of love. In other words, the proposal targets marriages that may be consensual, but that are entered into for reasons other than romance or love. Yet not all such "non-genuine" arrangements are targeted. The proposal quite specifically hones in on arranged marriages, presuming that they are less genuine because they are not based on "sincere" emotions, and hence more likely to be based on impermissible motives such as immigration benefits.[71]

Finally, the cultural element is based on the idea that the practice of arranged marriages is a universal one among the people from the Indian subcontinent. Not only is this an inaccurate perception, it undermines the understanding of culture in the postcolonial context as heterogeneous, fluid, and malleable.[72] Conjugality was a contested site in the colonial encounter. Arranged marriages constituted part of the political and cultural authenticity move against the British colonial power during its period of rule over the Indian subcontinent. Hindu nationalists declared that arranged marriage was the site of pure Hindu culture beyond the reach of colonial legal intervention.[73] My argument is not intended as a defense of arranged marriages. It is to highlight how marriage has been, and continues to be, entered into for political, cultural, and material reasons, and not exclusively for emotional ones. However, in an effort to curtail illegal migration, the British White Paper has singled out a legal consensual arrangement and subjected it to an implicit standard that only normalizes marriages that are "love"-based. Arranged marriages, as a result, are draped in a cultural cloth and cast as alien, insincere, and deceptive.

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71. The U.K. is not the only country to target arranged marriages in order to distinguish "genuine" marriages and those intended for the purpose of obtaining the right to settle. Denmark has introduced a host of new criteria based on strict age and connection requirements under its family reunification policy before permitting immigrant status migrants to secure a resident permit. *See generally* Lovbekg. Nr. 685 af 24.07.2003 Lovtidende, 4357. One critical precondition that has especially sparked a great deal of controversy requires that both parties should be over the age of twenty-three in order to reduce the number of coerced marriages. Malcolm Brabant, *Denmark Cracks Down on Migrant Marriage*, BBC NEWS, June 24, 2002, *at* http://news.bbc.co.uk/1/hi/world/europe/2057594.stm (last visited Sept. 29, 2004). For a more detailed source on Danish restrictions and immigration laws, see the Danish Immigration Service's online service, *Spouses and Cohabitating* Companions, *at* http://www.udlst.dk/english/Family+Reunification/Spouses/Default.htm (last visited Jan. 3, 2005).

72. *See, e.g.*, SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA (2002). Benhabib argues that cultures are not static wholes, but riddled with contradiction and dissent, torn apart and disputed within their own boundaries. Benhabib's discussion comes in the context of how liberal democracy can co-exist with multiculturalism. For a fictionalized account of the nonessential and ever-shifting fluidity of culture, see SMITH, *supra* note 2.

73. In fact, the marriage arrangement was also cast as a more loving and spiritual union than those practiced in the West. SARKAR, *supra* note 15, at 40. Sarkar writes that the non-consensual, indissoluble, infant marriage was projected as a higher form of love that countered the "utilitarian, materialist and narrowly contractual Western arrangement."

The proposals in the White Paper disregard the fact that marriage provides institutional access to a wide array of state benefits, and the right to settle is only one of them. The proposals are based on a static and naturalized understanding of marriage, whereas individuals marry for a variety of reasons both in and outside of Britain. People "here" and "there" marry for love, economic status, title and privilege, procreative purposes, as well as for the fact that the marital arrangement is the only state-recognized arrangement that is accorded maximum legitimacy by the state and access to state benefits, rights, and privileges. People opting for arranged marriages are motivated by all or some of these considerations and cannot be assessed exclusively from the perspective of "love" and other limited normative standards.

The White Paper proposals operate along a cultural divide that reinforces cultural stereotypes about the Other as different and inferior. The Home Secretary expresses the need for future generations of immigrants to grow up "feeling British."[74] Yet this "feeling" is assumed and never examined. It signals a return to a "crude and flawed mythology of a mono-racial, culturally uniform British identity in which non-white people's presence is tolerated—and even then only conditionally."[75] The "British" identity is neither defined nor explained, but it does, according to the Home Secretary, involve a process of integration through adopting British "norms of acceptability," studying British history and culture, and embracing "our laws, our values, our institutions."[76] Part of being British includes more than simply not tolerating practices unacceptable in the United Kingdom, such as enforced marriages. It involves a more aggressive assimilation move, which seeks in part to press the Other into conforming with the prevailing sexual, marital, and cultural norms in Britain, and also to erase cultural difference. For the Home Secretary, being British involves assimilation into a society that is assumed to be advanced, civilized, and homogenous. To ensure that immigrant practices do not infiltrate or compromise "British values," the White Paper lays down the criteria for encouraging assimilation and excluding all those subaltern arrangements that do not conform to or resemble the norm—a norm that is both white and middle class. The White Paper proposals are located on a slippery slope, where the line between belongingness and non-belongingness is increasingly drawn in an insular, culturally intolerant direction.

The White Paper permits the possibility of the Other metamorphosing into someone who is familiar and recognizable: the assimilated immigrant. The goal of controlling who should and should not live in Britain is being partly secured through the proposal to regulate whom a section of society should and should not marry. The White Paper represents a return to a highly exclusivist form of cultural and national identity. It is reminiscent of a time

74. *Immigrants "Should Try to Feel British,"* BBC NEWS, Dec. 9, 2001, *at* http://news.bbc.co.uk/hi/English/uk_politics/newsid_1699000/1699847.stm.

75. Gary Younge, *Britain is Again White*, GUARDIAN (London), Feb. 18, 2002, at 13.

76. Warren Hoge, *Britain's Nonwhites Feel Un-British, Report Says*, N.Y. TIMES, Apr. 4, 2002, at A13.

when English identity felt it could command, "within [its] own discourses, the discourses of almost everybody else; not quite everybody, but almost everyone else at a certain moment in history."[77] The underlying message of the proposals is that in order to be treated the same as everyone else, to try to be like everyone else. The "everyone else" standard constitutes the unstated universal norm from which "being British" emerges.

D. Demonizing the Other

> [T]he evil, barbarity, and licentiousness of the colonized Other are what make possible the goodness, civility, and propriety of the European Self.[78]

The treatment of the transnational migrant has remained ambiguous and contested, based at times on simply a lack of knowledge or desire to know the Other, or at times on a fear that the migrant was arriving in hordes to disrupt the social cohesion of or take away jobs from the (white, Christian) global North. In the contemporary period, demographic deficits and labor demands for nannies, maids, and domestic workers—among other factors—have pressed nations into adopting policies that negotiate between national cultural purity and cohesion, and economic demands. The tensions generated by these different fears, concerns, and demands have not been addressed exclusively within the framework of administrative and ministerial decisions. There has been an explosion of actors involved in the debates on immigration, including non-governmental networks or organizations representing the rights of migrants, ethnic lobbies, and anti-immigration parties. The issue has been the centerpiece of elections and at the heart of cultural debates and struggles.

After the terrorist attacks of September 11, the new "War on Terror" commenced, and there has been a heightened anxiety about the Other, who is increasingly perceived as a threat to the security of the nation. The line of difference is being redrawn along very stark divides—friend versus enemy, the good versus the evil. After September 11, the Other has been increasingly transformed into a fanatic and a potential enemy. The failure to define either the purpose or limits of the "War on Terror" has resulted in a serious casualty: groups and communities simply not liked have become targets.[79] Additionally, the failings of the international legal definition of terrorism—flowing precisely from the disagreement over who is a terrorist and what

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77. Stuart Hall, *The Local and the Global: Globalization and Ethnicity, in* CULTURE, GLOBALIZATION AND THE WORLD SYSTEM: CONTEMPORARY CONDITIONS FOR THE REPRESENTATION OF IDENTITY 19, 19–39 (Anthony D. King ed., 1997).

78. MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 127 (2000).

79. *See* Madeline Bunting, *Intolerant Liberalism*, GUARDIAN (London), Oct. 8, 2001, *available at* http://www.guardian.co.uk/waronterror/story/0,1361,565215,00.html.

constitutes terrorism—have resulted in the unbounded, unrestrained use of the concept of the "War on Terror."[80]

The casting of the Other as a dangerous and negative force to be contained finds its most explicit expression in Australia. Asylum-seekers who have attempted to enter Australia through clandestine means have been cast as people who are attempting to blackmail the Australian government.[81] In response, the Australian government has adopted a policy that regards asylum-seekers with fear and loathing, and post–September 11, as a danger and threat to the nation.[82]

Australia is a party to the 1951 Convention Relating to the Status of Refugees.[83] Australian law defines refugees as people who are outside their country of nationality or usual country of residence and are unable or unwilling to return to or seek the protection of that country because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a particular social group, or for holding a particular political opinion.[84] Australia has declared its commitment to provide protection to refugees under the terms of the Convention and ensure that asylum-seekers within Australia are treated in accordance with internationally recognized human rights standards. These commitments include a commitment not to send people back to a country where they would be exposed to human rights violations. Under the Australian law, asylum-seekers are categorized into two

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80. TERRORISM AND POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL (Henry H. Han ed., 1993) (providing a general understanding of the state of international law and terrorism); *see also* TERRORISM AND INTERNATIONAL LAW (Rosalyn Higgins & Maurice Flory eds., 1997).

81. William Maley, *Asylum-seekers in Australia's International Relations*, 57:1 AUSTRALIAN J. INT'L AFF. 187, 192 (2003) (analyzing the relationship between notions of sovereignty and border controls and how this plays out in the legal and policy responses to asylum-seekers in Australia, representing them as 'bogus' and 'flooding' into the country); *see also* Jane Perlez, *Deep Fears Behind Australia's Immigration Policy*, N.Y. TIMES, May 8, 2002, at A3.

82. *See* Don McMaster, *Asylum-seekers and the Insecurity of a Nation*, 56 AUSTRALIAN J. INT'L AFF. 279 (2002) (discussing how the assertion of national sovereignty and a history of a white or discriminatory immigration policy have been at the core of Australia's treatment of its "Others"); *see also* Don McMaster, *Refugees: Where to Now?: White Australia to Tampa: The Politics of Fear*, 21 ACADEMY SOC. SCI. IN AUSTRALIAN DIALOGUE 3 (2002).

83. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 137, 152.

84. The definition of "refugee" incorporated into the Migration Act 1958 (Cth) (Austl.) by s36(2), which deals with the granting of protection visas, and provides that a criterion for a protection visa is that the applicant is a non-citizen "to whom . . . Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol." In September 2001 the Australian Parliament passed the Migration Legislation Amendment Act (No.6) 2001 (Cth). The amendments to the Migration Act 1958 included definitions of key Convention definition terms: persecution, particular social group, non-political crime, and serious crime. The definitions are contained in part 2, division 3, sub-division AI of the Migration Act 1958 (Cth). Persecution is defined in section 91R(1) that: (a) the Convention grounds (or "reasons") must be the "essential and significant" reason/s for persecution; (b) the persecution must involve serious harm; (c) the persecution must involve "systematic and discriminatory conduct." Section 91R(2) lists some examples of "serious harm," e.g., threat to life or liberty or "significant economic hardship that threatens the person's capacity to subsist." The definition of membership of a particular social group is refined in section 91S by stating that when the particular social group is a family, then the administrative decision maker should disregard any persecution experienced by other members of the family.

groups: those who enter legally and those who enter unlawfully.[85] Australia's Humanitarian Program offers a legitimate means of entry, and sets a quota of permitted entries from different parts of the world.[86] Those admitted under the program are referred to as "refugees" and are entitled to permanent residency, health checks, and permission to remain in the community while their applications are processed.

Persons entering Australia illegally—without proper travel documents—are categorized as "unlawful non-citizens" and confined to a detention center until their cases are reviewed. Upon review, these migrants are either granted a visa to remain in Australia, ordered to leave the country voluntarily, or deported. The mandatory detention policy was adopted in 1994 when nine detention centers were established to deal with the increasing number of persons fleeing to Australia through smuggling routes via Indonesia. There are several reasons provided for the adoption of these stringent and at times harsh new policies toward asylum-seekers.[87] One justification is that these "boat people" are not genuine asylum-seekers, but economic migrants and "queue-jumpers" seeking to enter Australia illegally. Accordingly, it is believed that these migrants are seeking asylum specifically in Australia, rather than in safe haven third countries through which they pass on their way to Australia.[88] Asylum-seekers are thus divided into "good" and "bad" refugees.[89] The good ones are selected through Australia's diplomatic missions and the Commonwealth pays for their airfare. They are immediately entitled to permanent residency and given access to assistance programs. "Bad" asylum-seekers arrive without invitation, illegally, and of their own accord. These refugees are locked up until their cases are determined.[90] There is a sense that the latter group of people is violating Australia's egalitarian values by not awaiting its turn and playing by the rules.

However, under the Refugee Convention, there is no "queue" to jump. The Convention imposes an obligation on a state party in relation to persons within its territory regardless of whether they arrived with a visa. William Maley has argued that "[t]he notion of a 'queue' is unrelated to refugee protection: instead, it reflects the wish of governments to be able to 'pick and

85. DEP'T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, FACT SHEET 61: SEEKING ASYLUM WITHIN AUSTRALIA (2004), *available at* http://www.immi.gov.au/facts/61asylum.htm (last visited Feb. 7, 2005).

86. DEP'T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, FACT SHEET 60: AUSTRALIA'S REFUGEE AND HUMANITARIAN PROGRAM (2004), *available at* http://www.immi.gov.au/facts/60refugee.htm.

87. *See* U.S. COMMITTEE FOR REFUGEES, SEA CHANGE: AUSTRALIA'S NEW APPROACH TO ASYLUM SEEKERS (2002) (providing an overview of the changes in Australia's response to asylum-seekers).

88. PETER MARES, BORDERLINE: AUSTRALIA'S TREATMENT OF REFUGEES AND ASYLUM SEEKERS 24 (2001) (stating that the Australian government's primary argument is that the "boat people" who try to enter the country unlawfully are denying legitimate refugees—who apply for asylum offshore, waiting patiently for a decision—the right to be considered for resettlement in Australia); *see also* John Menadue, *The Myth Howard Calls a Queue*, AGE (Melbourne), July 19, 2002.

89. Maley, *supra* note 81, at 196.

90. MARES, *supra* note 88, at 24.

choose' which refugees to help (the educated rather than the unskilled, the healthy rather than the disabled, the quiescent rather than the 'troublesome')."[91] Furthermore, the effectiveness of a policy of incarceration and deportation is undermined since it does not stop the flow of economic migrants who constitute a portion of the unregulated movement of people.[92] The issue of demand remains unaddressed through such initiatives, and the unregulated flow of people will continue until the issue of demand is addressed.

One of the effects of the mandatory detention policy has been the arbitrary incarceration of immigrants and their families who enter Australia through unregulated or clandestine means in detention centers, the conditions of which have been regarded as bordering on inhumane.[93] Under international standards, detention must be for exceptional reasons, temporary in nature, and not used as a form of punishment.[94] Some refugees, including children, are locked up in medium security prisons, often in remote and inhospitable locations, sometimes spending years behind razor wire fencing while their applications are processed.[95] In light of this situation, in July 2000, the Human Rights Committee stated that the Australian government should reassess its policies and legislation on mandatory detentions.[96] It specifically stated that the mandatory detention of "unlawful non-citizens," including asylum-seekers,

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91. William Maley, *A Global Refugee Crisis?*, *in* KEYNOTES: REFUGEES AND THE MYTH OF THE BORDERLESS WORLD 1, 4 (Christian Reus-Smit & Mary-Louise Hickey eds., 2002).

92. *See* Guido Friebel & Sergei Guriev, Human Trafficking and Illegal Migration (Feb. 2002), *available at* http://www.nes.ru/english/about/10th-Anniversary/papers-pdf/guriev_isnie_paper.pdf (arguing that more lenient deportation policies and amnesties towards migrants decrease illegal migration flows).

93. *See* Amnesty International Australia, *A Continuing Shame: The Mandatory Detention of Asylum-Seekers*, AI Index AUS/POL/REF (June 1998) (stating that the detention policy has been criticized by a number of the human rights groups including Amnesty International and by the Human Rights Committee as violating article 7 of the International Covenant on Civil and Political Rights); *see also* HEATHER TYLER, ASYLUM: VOICES BEHIND THE RAZOR WIRE (2003) (documenting the conditions of the detention centers by reproducing the voices and stories of detained inmates and attempting to humanize the Other in the process of such documentation).

94. *See Conclusion No. 44—Detention of Refugees and Asylum-Seekers, in Addendum to the Report of the United Nations High Commissioner for Refugees*, Executive Comm. of U.N. High Comm'r for Refugees, at 31, ¶ b, U.N. GAOR, 41st Sess., U.N. Doc. A/41/12/ADD.1 (1986) (stating that "in view of the hardship which it involves, detention should normally be avoided," although the conclusion does recognize the right a state has to temporarily detain an asylum-seeker in exceptional cases where detention is necessary in order to:

> verify identity, determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.)

95. *See generally* PHILIP FLOOD, REPORT OF INQUIRY INTO IMMIGRATION DETENTION PROCEDURES (2001); *see also* DEP'T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, REPORT OF AN OWN MOTION INVESTIGATION INTO THE DEP'T OF IMMIGRATION AND MULTICULTURAL AFFAIRS' IMMIGRATION DETENTION CENTRES 3, 19 (2001) *available at* http://www.ombudsman.gov.au./publications_information/Special_Reports/IDCMarch1.pdf (stating that under the prevailing conditions at immigration detention centers, refugees had fewer rights than convicted criminals in Australia, and as of June 30, 2000, there were almost 800 women and children in detention); *see also* Amnesty International, *supra* note 93.

96. *Concluding Observations of the Human Rights Committee, Australia: 24/07/2000*, Office of the High Comm'r for Hum. Rts., ¶¶ 498–528, U.N. Doc. A/55/40 (2000).

under the Migration Act raises questions about compliance with article 9.1 of the International Covenant on Civil and Political Rights. This article provides that no person shall be subjected to arbitrary detention.

The situation of the transnational migrant has been aggravated by a paranoia that hoards of asylum-seekers are threatening to enter the country, and threatening the social and cultural cohesion of Australian society.[97] More recently, in the aftermath of the September 11, 2001 attacks, there has been an amplification of voices depicting the transnational migrant subjects as potential terrorists.[98] In the interest of national security, the Australian government has enacted several pieces of legislation prioritizing border control, and security has become a further justification for Australia's detention policy.[99] More recently, under further amendments to the migration regulations, asylum-seekers arriving in an unauthorized manner are refused family reunification rights for a minimum of thirty months after they receive refugee status and are not provided with travel documents.[100] As a result, women and children might be detained even though they may have a male family member in Australia who is on a temporary protection visa ("TPV"). The policy has had two inadvertent effects. Women and children are increasingly accompanying husbands and fathers on boats for fear of otherwise being permanently separated. Secondly, if it is not possible to raise enough funds for the entire family to travel, the refugees who are on a TPV are motivated to maintain contact with criminal networks as their only hope of being reunited with their family members.[101]

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97. *See* Mungo MacCullum, *Girt by Sea: Australia, the Refugees and the Politics of Fear*, 5 Q. ESSAY 1 (2002) (outlining the politics of fear that have influenced the current policies in the context of Australian history and the process of delegitimizing asylum-seekers and treating them as criminals); *see also* McMaster, *supra* note 82.

98. Maley, *supra* note 91, at 5.

99. The initiatives permit certain Australian territories and "excised offshore places" to be removed from the migration zone for the purposes of limiting the ability of unlawful non-citizens to make a valid visa application. The Migration Amendment (Excision from Migration Zone) Act 2001 amends the definition of "excised offshore place" in section 5 of the Migration Act 1958. The note accompanying the definition is: "The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications." The new provisions also prevent any legal proceeding from being initiated against the government in respect of the entry, status, detention, and transfer of any unlawful non-citizen entering Australia and an excised offshore place. The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 introduces a new regime for people who arrive unlawfully at an offshore excised place. It includes powers to move the person to another country where claims for Australia's protection can be considered. This Act inserts sections 198(A) and 494(AA) into the Migration Act 1958. By removing any infrastructure or facilities to process claims, the intention is to discourage boats from landing at the nearest land destination or from undertaking the journey in the first place.

100. In October 1999, Australia amended the regulations to the Migration Act 1958. Migration Amendment Regulations 1999 to Migration Regulations 1994. Since October 1999, under the Migration Regulations 1994, asylum-seekers who arrive without authority are released from detention if their application is successful, but they are only entitled to receive a temporary protection visa ("TPV") for a period of three years. If they leave the country for any reason, they cannot re-enter. Every three years they must reapply for their visa and their cases are re-evaluated to determine whether or not they still face persecution. The TPV affords refugees limited access to health care, but relatively few other services.

101. Since August 2003, there have been further changes made to the migration regulations. Prior to

The policy toward "unlawful non-citizens" in Australia has treated the families of asylum-seekers as though they were criminal and dangerous, reprehensible for their condition.[102] And the detention policy is reinforced through the representation of these families as uncaring, even brutal and barbaric, as illustrated in the "Children Overboard Scandal." In October, the Australian navy fired at an Indonesian ship carrying over 300 asylum-seekers in an attempt to force the ship to leave Australian waters. The government announced that the refugees were throwing their children overboard to force the navy to rescue them and in an attempt to blackmail the government.[103] The government stated that they had photographs of this outrageous conduct proving that the actions of the refugees were premeditated.[104] This publicity incident fueled the image of the uncaring and uncivilized Other at a time when the issue of asylum-seekers was a hot election topic.[105] Howard stated that "[t]here is something to me incompatible between somebody who claims to be a refugee and somebody who would throw their own child into the sea. . . . It offends the natural instinct of protection and delivering security and safety to your children."[106] In February, well after the Howard government was safely ensconced back in power, the Prime Minister confessed that the photographs were not genuine and that he had knowledge of this fact just three days prior to the election, but chose not to divulge the information.[107]

During 2002, refugees in detention centers across the country began to protest the government's repressive policy and the appalling conditions of the centers. In February 2002, detainees at Woomera began a hunger strike, protesting the conditions in the centers, especially the situation of children and young adults.[108] Several of the detainees, including children, took up the horrifying protest method of drinking detergent and shampoo and sewing their lips together in a symbolic gesture of resistance against the oppression and imposed silence that they were experiencing in the detention centers.[109]

September 2001, those who had been granted a TPV were entitled to apply for a permanent protection visa after thirty months. This option has now been withdrawn after Migration Amendment Regulations 2003 amended the Migration Regulations 1994. TPV holders who did not apply for a permanent protection visa prior to September 21, 2001 are ineligible to do so after that date. All TPV holders, even those who entered Australia lawfully on genuine documents, are covered by the changes. A TPV holder can apply for another TPV if she or he can demonstrate that she or he is in continuing need of protection.

102. *See* HUMAN RIGHTS WATCH, BY INVITATION ONLY: AUSTRALIAN ASYLUM POLICY (2002).

103. S. Douez & M. Forbes, *Boat People "Threw Children Overboard,"* AGE (Melbourne), Oct. 8, 2001, at 1.

104. A. Cock & M. Ludlow, *Parents Throw Children Off Ship—Navy Intercepts Asylum Boat*, DAILY TELEGRAPH (Sydney), Oct. 8, 2001, at 11.

105. Patrick Barkham, *Australia Votes on How Tightly to Close the Door: Illegal Migration is at the Heart of Australia's Cliffhanger General Election Today*, GUARDIAN UNLIMITED (London), Nov. 10, 2001.

106. *PM Accuses Boatpeople of Moral Blackmail*, AAP NEWSFEED, Oct. 8, 2001.

107. Andrew Clennell, *Overboard Photos: I Knew They Were Doubtful, PM Admits*, SYDNEY MORNING HERALD, Feb. 20, 2002, at 1; Frank Walker, *Sailor Hero Betrayed as Truth Tossed Overboard*, SUN-HERALD (Sydney), Feb. 24, 2002, at 4.

108. *See* Russell Skelton, *Tales from Behind the Fence*, AGE (Melbourne), Mar. 18, 2002, at 9.

109. *See Fresh Hunt for Fleeing Refugees as Protesters Break Camp in Australia*, AGENCE FRANCE-PRESSE,

The government once again cast the refugees as uncivilized child abusers who stitched together the lips of their children.[110] One columnist supporting the government's tough policies toward illegal immigrants deplored the acts of lip stitching, stating that "[t]he test is simple: who wants as neighbors the people who have stitched shut the mouths of their children?"[111] The families' actions were characterized as a form of blackmail against the government, rather than as acts of desperation.[112]

Although this method of resistance was a particularly disturbing one, it could be interpreted, as characterized by the Australian Human Rights and Equal Opportunities Commission, as a response to the "atmosphere of despair in which [the refugee children] live."[113] The Commissioners observed that the provision of education for the children in the detention center was confined to those who were twelve years old or under, but that the quality of education was not comparable to the quality received by Australian twelve-year olds.[114] For children over twelve, little or no education was provided.[115] In April 2003, the Woomera detention center was shut down. However, the government remains steadfast in the pursuit of its refugee policy. In response to the protests over conditions at Woomera, it proposed that the children be placed in the care of foster parents while their parents remained in detention centers. The proposal is reminiscent of the notorious policy that placed Australia's aboriginal children in the care of Christian, white families who would teach them how to be real Australians.[116] The assimilationist civilizing strategy relegates the subaltern parents into the category of savage and criminal, unfit to care for their own children.

Australia's policy toward asylum-seekers has historically been problematic. A trickle of people, especially those who are non-white and non-Christian,

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Apr. 1, 2002. There were several subsequent attempts by the detainees to break out of the detention complex at Woomera with the support of local demonstrators. This act strengthened the government's resolve to take a tough stand on the arrival of illegal immigrants. *See also* Farah Farouque, *Police Hunt for 14 Detainees*, AGE (London), Apr. 1, 2002, at 2. However, the publicity and the protests did ultimately result in the closing down of the Woomera detention center.

110. *See* Patrick Barkham, *PM Calls Asylum Protest Blackmail*, GUARDIAN UNLIMITED (London), Jan. 26, 2002, at 18 (quoting the Prime Minister as stating, "[c]hildren in proper positive care of their parents don't sew their lips together, do they?"); *see also* Hugh Mackay, *Australians All Let Us Be Judged*, AGE (Melbourne), Mar. 30, 2002, at 7 (arguing that Australians must be held accountable for the wrongs that are being committed against asylum-seekers and the maltreatment of their children).

111. Heather Tyler, *Australia Unmoved by Detainees*, MIDDLE EAST TIMES, *available at* http://64.233.179.104/search?q=cache:-srBUsXfPSgJ:www.metimes.com/2K2/issue2002-4/reg/australia_unmoved_by.htm+%22heather+tyler%22+%22australia+unmoved+by+detainees%22&hl=en (last visited Jan. 6, 2005).

112. M. Steketee & I. Henderson, *PM Labels Lip Sewing Blackmail*, AUSTRALIAN, Jan. 26, 2001.

113. Media Statement, President Professor Alice Tay AM & Dr Sev Ozdowski, Human Rights Commissioner OAM, *Woomera Immigrations Detention Centre Report of Visit by HREOC Officers* (Feb. 6, 2002), *at* http://www.hreoc.gov.au/media_releases/2002/05_02.html.

114. *Id.*

115. *Id.*

116. *See generally* HUM. RTS. AND EQUAL OPPORTUNITY COMM'N, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997).

triggers a fear of an imminent flood.[117] This fear in the contemporary moment has been most explicitly expressed against the "Muslim."[118] Disproportionate numbers of individuals from Islamic and third world countries are placed in detention.[119] These "boat people" have been subjected to a new form of hate speech and Islamaphobia, which expresses itself in terms of a fear of a "Muslim invasion." The fear of hoards of immigrants flooding into the country is not substantiated by statistics.[120]

This fear has been constructed in part through the rhetoric of the far right, especially the One Nation Party, which was a significant force in 1998.[121] The party's fortunes have declined since then, but its rhetoric has succeeded in influencing public discourse on asylum-seekers. Since September 11, the Howard government has also been able to capitalize on this fear through recourse to the "War on Terror," which casts the Other as evil and dangerous. Howard was able to fight a successful election campaign in 2001 by portraying the cross-border movements by immigrants, refugees, and asylum-seekers into Australia as a potential terrorist threat. In the buildup to the national elections in 2001, the two main national parties resorted to the powerful rhetoric of the threats of terrorism and evil. Howard declared: "[y]ou don't know who's coming, and you don't know whether they do have terrorist links or not."[122] Howard's hard line position—that these asylum-seekers were unwelcome, to be denied entry into Australia, or to be incarcerated upon entry—won the day.

In the Australian context, the transnational migrant is undermined through two delegitimizing moves. These subjects are cast as blackmailers, using their situations of hardship to extract sympathy and material benefits from the Australian government. They are also cast as primitive and barbaric, as demonstrated in the representation of these families in the media and gov-

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117. William Maley, *Security, People-Smuggling and Australia's New Afghan Refugees*, 55:3 AUSTRALIAN J. INT'L AFF. 351 (2001).

118. *See* DEP'T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, POPULATION FLOWS: IMMIGRATION ASPECTS 26–27 (2000), *available at* http://www.immi.gov.au/statistics/publications/popflows/popflows.htm (last visited Feb. 27, 2005). In Australia, European refugees received 45.6% of the offshore Humanitarian Visa Grants, compared to the 29.4% of grants that went to refugees from the Middle East and South Asia.

119. DEP'T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, FACT SHEET 82: IMMIGRATION DETENTION IN AUSTRALIA, *available at* http://www.immi.gov.au/facts/82detention.htm (last visited Nov. 2, 2003).

120. In a recent report by the United Nations High Commissioner for Refugees, the total number of "boat people" arriving into Australia between 1999–2000 was only 4174, in sharp contrast to the number of asylum applications received in the United Kingdom, which was 97,900 in the year 2000. The number of applications received in other liberal democracies also far outnumber the ones received by Australia. In the year 2000, Germany received 78,800; the Netherlands, 43,900; Belgium, 42,690; and France, 38,590. U.N. HIGH COMM'R FOR REFUGEES, ASYLUM APPLICATIONS SUBMITTED IN EUROPE (2000).

121. Maley, *supra* note 81, at 192–93.

122. Seth Mydans, *Which Australian Candidate Has the Harder Heart*, N.Y. TIMES, Nov. 9, 2001, at A3; *see also* ANTHONY BURKE, IN FEAR OF SECURITY: AUSTRALIA'S INVASION ANXIETY (2001) (discussing the security discourse and how Australia's general security concern may have affected the country's refugee policies).

ernment statements regarding the "Children Overboard Scandal," as well as the Woomera protests. Both of these responses are based on a fear of the Other that has heavily influenced Australian policy in an increasingly borderless world, as well as on assumptions that the security of the nation-state is achieved through the denial of the transnational migrant's security. Fear and prejudice have been accentuated post–September 11, adding another layer of aversion to the Other, who is now also regarded as a threat to the security of the nation.[123]

The new "War on Terrorism" has created space for a more strident and alarming response to the global movements of people, reducing it at times to nothing more than an evil threat.[124] If terrorism is defined as a transnational crime, then by merely committing the crime of seeking illegal movement and illegal entry, many anti-immigration parties might seize upon a series of logically flawed deductions to conclude that migrants could be defined as terrorists. Such simple and faulty equations can lead to a disjuncture between the reality of the illegal migrant and the issue of terrorism. The conflation of the migrant with the terrorist is not new, but it has received greater attention since September 11. It has afforded more space for the representation of the Other as a fanatic, both dangerous and opposed to freedom.[125]

III. CONCLUSIONS: "SOMEWHERE IN BETWEEN"

The legal interventions in the lives of transnational migrants have been articulated primarily from the perspective of the host country. The perspec-

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123. Even those subjects who propose to come to Australia through legitimate means, especially from the Middle East, are discouraged through a complete "othering" of their habits, lifestyles, and relationships as distinct and incompatible with "Western" (civilized) norms and values. A kit prepared for Philip Ruddock, Australia's former Immigration Minister, for a tour in the Middle East contained a document entitled, DEP'T OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, QUESTIONS AND ANSWERS PROVIDED BY THE AUSTRALIAN MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS, PHILIP RUDDOCK (2001), which included a series of questions and answers for Middle Easterners who are considering relocating to Australia. In response to a hypothetical query, "[w]ouldn't my family have a better life," the document gives the response: "No. Even if you can bring your family to join you, your children will abandon your traditional way of life in favor of modern 'western' ways. You will lose control of your children, who will rebel and question your authority and your religious beliefs." The relationships of the Muslim or "Middle Easterner" are constructed as repressive and un-democratic, and Australia as a land only suitable to "Westerners" and a family structure that comprehends "western values" and autonomy; *see* Maley, *supra* note 117, at 364 (discussing the contents of the kit in greater detail).

124. *See* DAVID FRUM & RICHARD PERLE, AN END TO EVIL: HOW TO WIN THE WAR ON TERROR (2003).

125. *See* Bruce W. Nelan, *The Dark Side of Islam*, TIME, Oct. 4, 1993, at 62–64 ("The clash between Islamic religious and political authority is more widespread and in some places more threatening now than it was then. . . . [T]his is the dark side of Islam, which shows its face in violence and terrorism intended to overthrow modernizing, more secular regimes and harm the Western nations that support them. Its influence far outweighs its numbers. . . . [T]hese disparate cells of angry young men seem to boil up from the broad opposition growing in the largely undemocratic countries of the region, in a self-proclaimed war to force pure, undiluted Islamic law on the societies that have failed them."); *see also The Changing Face of Terrorism*, BBC NEWS, Aug. 12, 1998, *at* http://news.bbc.co.uk/1/hi/world/africa/149090.stm (statement of John Bolton, former U.S. Secretary of State: "I think the U.S. is viewed as principal target of Islamic terrorists who are trying—at a minimum—to get the U.S. in effect to withdraw from the Middle East.").

tives of the migrant subject are omitted from these interventions. However, these are the perspectives that can assist in untangling the conflations and confusions that are taking place between trafficking, migration, and terrorism in the international and domestic legal arenas. The perspective and location of the transnational migrant subject must be foregrounded—not as a terrorist, nor as a victim, but as a complex subject affected by contemporary global processes.

In all three situations discussed in the Article, the focus of the regulatory effort has been on the borders. These efforts are based on the assumption that the movement of the transnational migrant subject is a consequence of organized criminal networks and "evildoers" and their manipulative and devious maneuvers. The consequence of this assumption is that the receiving country is not in any way implicated in these movements—it is simply the passive recipient. This assumption is not universal, but the legal interventions reviewed in this Article suggest that the larger part of the responsibility lies with those who move. As a result, the transnational migrant becomes the site of accountability as well as the site for enforcement. The three examples illustrate how legal interventions tend to individualize the nature of the movement, regard it as a deliberate transgression and a threat. However, the broader global canvas against which such transnational migrations occur is not addressed. The global push and pull factors that compel movement cannot be addressed through responses that locate such movement exclusively in the individualized transnational subject.

Cross-border movements are an integral aspect of globalization and thus have become a fundamental feature of the contemporary moment. Although a new legal order has emerged to deal with, and facilitate the cross-border movement, of capital, goods, and services, there has not been a simultaneous response to deal with the concomitant cross-border movement of people and labor.[126] Instead states have sought refuge in traditional notions of nation-state identity and sovereignty to resist cross-border movements.[127] This assertion of national identity is deployed through assimilationist and essentializing policies, as well as through the production of fear of the Other as a threat to the nation's security.

Prior to September 11, there was some recognition that the cross-border movements needed to be addressed in more transnational terms. After the

126. An example of a legal order established to facilitate the movement of capital and goods is the Schengen Treaty of 1985. At one level Schengen marks an attempt to abolish borders between member states and allow the free circulation of goods, capital, and services as well as citizens. However, this move could also be read as an assimilationist one, intended to create a culturally homogenous and economically protected area. It produces an expanded notion of the national subject as a European citizen, and a national sovereign extending to the external borders of the European Union. *See* Ginette Verstraete, *Technological Frontiers and the Politics of Mobility in the European Union*, *in* UPROOTINGS/REGROUNDINGS: QUESTIONS OF HOME AND MIGRATION 226 (Sara Ahmed et al. eds., 2003); *see also* Robert Goodin, *If People Were Money*, *in* FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSITIONAL MIGRATION OF PEOPLE AND OF MONEY 6 (1992).

127. *See* HEATHER RAE, STATE IDENTITIES AND THE HOMOGENISATION OF PEOPLES (2002).

attacks on the World Trade Center, these conversations have become muted, and inversely, the targeting of the transnational migrant has become more acute.[128] After September 11, the urgency of the situation has been underscored by the "War on Terror" and the fear of imminent threats to national security.[129] Legal reforms are further alienating those who have been cast as the "new enemy."[130] The recourse to border controls and constructions of ethnic purity, cultural values, and nationalism arise out of the anxieties of dealing with difference, and serve to stigmatize, penalize, and criminalize the transnational migrant. Cross-border movements have been caught within the framework of a "war" fought along the simple binaries of good versus evil, and civilization versus barbarism. The issues of border crossing cannot be adequately addressed through such binaries. Indeed this myopic response will do little to discourage the illegal crossing of borders or the determination of those who want to move. These responses push us further away from addressing the complexity of cross-border movements and the equally complex legal and political responses required to address the issues raised by such movements.

In order to address the issue of cross-border movements, we cannot simply remain confined to the domestic arena, where regulatory enforcement is focused on the individual and the border. Nor can this process be addressed in the international legal arena purely in terms of criminality or trafficking. It is important to recognize that the erection of borders through immigration policy, anti-terrorist legislation, and anti-trafficking laws, or by a simple policy of incarceration, will not succeed in stopping cross border movements, meeting a nation's security needs, or protecting the sovereign subject. People will continue to move illegally if legal means are not available. Indeed, migrants are moving through irregular and clandestine channels precisely because of the system of political, social, cultural, and economic exclusions that are being produced, in part, through legal interventions.

The problems produced through trafficking, smuggling, and unlawful movement can only partly be alleviated by the expansion of immigration laws that acknowledge and accommodate the entry of people other than those who are part of the highly skilled information technology work force.[131]

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128. Statement by Genevieve Gencianos of Migrants Rights International, Oral Intervention on Item 14(a): Migrant Workers, delivered to the U.N. Comm'n on Hum. Rts. (Apr. 17, 2003), *available at* http://www.migrantwatch.org/mri/whats_new/MRI_oral_intervention_on_agenda_item_14.htm (acknowledging that "[t]he war against terrorism and the war against Iraq are intimately linked to the war against the human rights of migrants").

129. *See* HUMAN RIGHTS WATCH, WORLD REPORT 2002, *available at* http://www.hrw.org/wr2k2/. Some of this fear or aversion is expressed in the enactments of anti-terrorist legislation around the globe which are vaguely drafted, over inclusive and are likely to be used to target legitimate protest which may be disapproved.

130. *Id.*

131. *See* Nandita Sharama, *Race, Class and Gender and the Making of Difference: The Social Organization of "Migrant Workers" in Canada*, 24:2 ATLANTIS: WOMEN'S STUD. J. 5 (2000). Restrictive immigration policies adopted by states have not stemmed the flow of people moving across borders. Rather, restrictive policies create a decline in the number of people coming as legal immigrants and documented migrants,

At the same time, the conferring of legal rights does not address some of the normative challenges produced by the transnational migrant. Her movement across borders exposes the porosity of national borders and breaks down the binaries, the "us and them," "here and there" distinctions that inform the legal regulation of transnational migrants and reveals her location somewhere in between these binaries. She exposes how legal discourse produces exclusions and reinforces differences by drawing bright lines delineating legitimacy of border crossings. Transnational migrants have continuously disrupted these lines and upset the neat boundaries between the domestic and the international, between the national and the transnational, and between the local and the global.

Transnational movements therefore require a transnational response and analysis—they cannot be stuck within older frameworks. A radical departure is required in the area of legal responses to migration. The story of the transnational migrant subject must be told in the context of globalization. This subject exposes the need to think about law and rights in ways that are not confined to the boxes of sovereignty, the nation-state, and the autonomous subject of liberal rights discourse. The liberal state and the liberal subject are based on the idea of fixed borders, with clearly identifiable interests and identities. They are imbued with the power to decide, choose, and act autonomously. Yet the challenge of globalization, which brings the challenge of migration and non-state actors to the legitimacy of the borders of the sovereign state and the autonomous subject, indicates otherwise. The complexity of new global formations and the dynamic character of the individual who crosses borders challenge any notion that the state and individual are hermetically sealed or capable of exercising control through self-contained power. The inability to distinguish those who constitute national subjects from those who are alien or foreign reflects the uneasy location of a distinct national entity with distinct borders and a distinct national subject with borders. The legitimizing tools of cohesion, unity, and sovereignty become blunt in the face of a more complex and integrated world and global economy.

The shift to a transnational framework is neither easily achieved nor persuasive. The right to determine who is entitled to enter into a country remains a prized prerogative of nation-states. However, this discussion reveals that current strategies are not stopping entry, but merely encouraging the production of a clandestine migrant mobility regime that facilitates clandestine movement. A transnational framework can challenge the complex global processes that instigate such movements and moves away from viewing the Other as the main producer of illegality and criminality. In the process, it can serve to break down the binaries, the "us and them," "here and there" distinctions, and exposes how these oppositions are partly produced in and through legal discourse and the focus on a state-centered framework. As long as

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but increase the flow of migrants categorized as indentured, temporary, or undocumented migrants, all often clubbed under the rubric of "illegals."

nation-states neglect to view the issue of transnational migration through the complex lens of globalization and market demand, the (in)security of the nation-state and the rights of the transnational migrant will remain unaddressed, thereby contributing to the growing instability of both the host country and this itinerant population.

The transnational migrant is a subject who remains present and disruptive of any legal project that continues to compel assimilation, exclude, marginalize, or erase her presence. In *Dirty Pretty Things*, every move to unearth, capture, or remove this clandestine subject is subverted, and the migrant continues to pursue her dreams and direction undeterred although her situation remains fraught and vulnerable to exploitation. It is only through the centering of this new global actor that law can begin to address the real issues that emerge in the context of cross-border movements and engage with the new challenges that are being posed in the contemporary moment of globalization.