

**REFUGEE PROTECTION AT THE EDGES:
EXCLUSION FOR SERIOUS CRIMINALITY IN CANADA SINCE *FEBLES***

by

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Abstract

This thesis examines the jurisprudence of the Refugee Protection Division of the Immigration and Refugee Board of Canada since the decision of the Supreme Court in *Febles v Canada (Citizenship and Immigration)*, [2014] 3 SCR 431 in order to determine whether administrative decision makers are heeding the guidance of *Febles* when excluding asylum seekers from refugee protection on the basis of serious criminality pursuant to section 1F(b) of the 1951 *Convention Relating to the Status of Refugees*. In so doing, it examines the controversy around 1F(b) since its inception across various jurisdictions and amongst international commentators, situating *Febles* within that controversy in order to demonstrate that the Supreme Court's reluctance to clearly set out the purpose underlying 1F(b) is in step with a long-standing tendency to understand the provision as serving a gatekeeping function, preventing criminalized noncitizens from obtaining membership in our society. It argues that by omitting to set out a clear and principled standard by which asylum seekers can be excluded from refugee protection pursuant to 1F(b), the Supreme Court failed to live up to a thick understanding of the rule of law. It concludes by calling for a reassertion of the rule of law into exclusion decision-making, both nationally and internationally, in order to ensure that the legitimacy of the international refugee law system is maintained.

Lay Summary

Asylum seekers who have committed a serious crime can be excluded from refugee status by the Immigration and Refugee Board, the administrative tribunal that renders refugee protection decisions in Canada. In *Febles v Canada*, the Supreme Court waded into the controversy around the purpose of exclusion for serious criminality. Despite the disagreements that have plagued exclusion decision-making since the drafting of the *Refugee Convention*, the Court in *Febles* failed to enunciate a clear statement of the purpose underlying exclusion, thereby ensuring that individuals would continue to be excluded for the commission of measurably minor crimes. By examining decisions in this area since *Febles*, this thesis demonstrates that exclusion continues to serve a gatekeeping function, preventing criminalized noncitizens from obtaining membership in our society. Finally, it underlines the need for a thick conception of the rule of law in exclusion decision-making to guard the legitimacy of the international refugee law system.

Preface

This dissertation is an original, unpublished, intellectual product of the author Molly Emilia Esbenschade Joeck.

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Chapter I: Introduction

In recent years, the interpretation of the *1951 Convention on the Status of Refugees*¹ has taken on unprecedented importance as refugee claims rise in both numbers and visibility across the globe. The question of who qualifies for refugee protection, especially in traditionally refugee-hosting countries like Canada, has drawn heavy scrutiny. What lies behind these undifferentiated masses are legal determinations about the limits of refugee protection. A key part of this determination is whether certain asylum seekers should be excluded from refugee status for serious criminality pursuant to Article 1F(b) of the *Refugee Convention*.

The principles and procedures underlying exclusion are of vital importance given that exclusion for serious criminality leads to the denial of the right to seek protection from persecution.² Nevertheless, the principles underlying 1F(b) and its ensuing scope remain subject to serious debate both internationally as well as in Canada. This is perhaps unsurprising given the history of the provision; from the moment of its inception, the drafters of the *Refugee Convention* were unable to agree upon the purpose underlying the provision.³ Its resulting open-textured language

¹ *1951 Convention Relating to the Status of Refugees*, 189 UNTS 150, as amended by the *1967 Protocol relating to the Status of Refugees* [the *Refugee Convention*].

² Exclusion functions as a permanent bar against seeking refugee status. As a result, once an individual is found to be excluded and exhausts all appeal mechanisms, the removal order that is issued upon the filing of a refugee claim pursuant to sections 11(1), 20(1), 41(a) and 44(2) of the IRPA, and section 228(1)(c)(iii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the IRPR], becomes enforceable pursuant to section 49(2) of the IRPA, and “must be enforced as soon as possible” pursuant to section 48 of the IRPA. At that point, an excluded individual can file a restricted pre-removal risk assessment [PRRA] pursuant to sections 112(3) and 113(d) of the IRPA, which means that persecution on an enumerated ground as per section 96 of the IRPA cannot be considered. Only section 97, which encompasses a risk of torture or a risk to life or a risk of cruel and unusual treatment or punishment can be considered, but must be balanced against any danger the individual is considered to pose to Canadian society. If the section 97 risks outweigh the danger, (s)he may only obtain a temporary stay of removal and is denied access to refugee protection; otherwise, the individual is subject to removal and/or refoulement.

³ Alex Takkenberg and Christopher C. Tahbaz, eds, *Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, vol. III (Amsterdam: Dutch Refugee Council, 1989) at 11-51 [the *Travaux Préparatoires*].

is therefore the product of a compromise, ambiguous enough to allow for a multiplicity of interpretations.

While it is uncontroversial that 1F(b) is aimed at preventing fugitives from justice from utilizing the asylum system to avoid prosecution, various jurisdictions have also interpreted it as a means of upholding the integrity of the asylum system and/or guarding the security of the host state.⁴ These latter two interpretations are premised upon ideas of deservingness and dangerousness, both of which lend themselves with difficulty to clear legal standards, tinged as they are with highly subjective notions of morality.

These slippery interpretations of 1F(b) have taken hold in an era when anti-migrant populist movements linked to a loss of western hegemony are on the rise and migration control has become a site for the assertion of state sovereignty, a phenomenon only exacerbated by the epistemological link drawn between migration and state security in the wake of 9/11.⁵ 1F(b) has therefore come to serve a neat gatekeeping function, providing states with a means to prevent noncitizen ex-offenders from seeking membership in their societies.⁶ This use of 1F(b) calls into question state signatories' fundamental commitment to the principles of the *Refugee Convention*.

This thesis, focusing on the 2014 decision of the Supreme Court in *Febles*, demonstrates that Canadian case law is troublingly in step with these developments.⁷ Prior to 2003, Canadian courts

⁴ See e.g. *Dhayakpa v Minister of Immigration and Ethnic Affairs* (1995), 62 FCR 556 at para 29; *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 at paras 118-119 [Zrig]; United Nations High Commissioner for Refugees, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," (4 September 2003), online: <www.refworld.org/docid/3f5857d24.html> at para 73, accessed 16 August 2018.

⁵ See Catherine Dauvergne, *Making People Illegal* (New York: Cambridge University Press, 2008) at 2, 95-97.

⁶ See Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power" (2006) 56 Am U L Rev 367.

⁷ *Febles v Canada (Citizenship and Immigration)*, [2014] 3 SCR 431, 2014 SCC 68 [*Febles*].

had taken the clear position that exclusion for serious criminality should be restricted to fugitives from justice. However, in the wake of 9/11, the *Zrig* decision of the Federal Court of Appeal [FCA] in 2003 set Canadian jurisprudence on a firm course of security rhetoric and the moral condemnation of criminalized asylum seekers, expanding the scope of 1F(b) to include any and all asylum seekers accused of serious crimes, regardless of whether they had been convicted of and served sentences for their crimes.⁸ A second decision of the Federal Court of Appeal in 2008 continued this trend.⁹

This shift towards alarmist security rhetoric leveled at criminalized noncitizens led to large numbers of troubling exclusion decisions, where asylum seekers were excluded for offences that, in the criminal context, would be treated as relatively minor crimes, and would not necessarily even incur a custodial sentence. Examples of the measurably minor crimes for which individuals were excluded include using a false passport,¹⁰ taking bribes,¹¹ possession of 0.9 grams of cocaine,¹² falsifying business records,¹³ and operation of a motor vehicle while impaired.¹⁴ These decisions generated serious concern amongst refugee advocates, who were not convinced that the drafters of the *Convention* had such measurably minor crimes in mind when they drafted Article 1F(b).

⁸ *Zrig*, *supra* note 4.

⁹ *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 [*Jayasekara*].

¹⁰ *Durango v Canada (Citizenship and Immigration)*, 2012 FC 1081.

¹¹ *Vlad v Canada (Citizenship and Immigration)*, 2007 FC 172.

¹² *Abdi (Re)* (22 November 2012) Toronto TB1-10190 (RPD).

¹³ *A.P. v Canada (Citizenship and Immigration)*, 2012 FC 494.

¹⁴ *X (Re)*, 2010 CanLII 91951 (IRB) at para 23.

The SCC's decision in *Febles* heralded an opportunity for Canada's highest court to stake a clear position in the national and international controversy around Article 1F(b), which by then had been plagued by uncertainty and divergent decision-making for years.¹⁵

Febles proved to be a disappointment in this regard. The majority decision failed to make a clear statement of the purpose underlying 1F(b), embracing an understanding of the provision premised upon both deservingness and dangerousness,¹⁶ an interpretation that is hard to square with the broader scheme of the *Refugee Convention* and the debates around the drafting of the provision.

Nevertheless, despite omitting to set out a principled framework for Article 1F(b), the SCC reinterpreted the application of the provision, purporting to narrow its scope such that individuals whose crimes fell at the less serious end of the spectrum would not be excluded. In so doing, the SCC adopted the United Nations High Commissioner for Refugees [UNHCR]'s list of exemplar serious crimes as a framework for the application of 1F(b),¹⁷ which, if taken to heart, would certainly mean that fewer refugee claimants would be excluded for serious criminality than pre-*Febles*.

Almost four years have passed since the *Febles* decision was issued, but no research has been undertaken to determine whether there has been any real change in the application of 1F(b). This is unsurprising. After the Supreme Court's decision in *Febles*, the energy that had previously ignited migrant right activists, academics and legal practitioners in respect of 1F(b) died down.

¹⁵ *Febles*, *supra* note 7.

¹⁶ *Ibid* at para 36

¹⁷ *Ibid* at para 62.

Lawyers concluded rightly that the Supreme Court had spoken, and was unlikely to revisit this issue in the near future. The status quo had been set.

This thesis therefore constitutes the first effort at evaluating 1F(b) jurisprudence post-*Febles*, both on a practical as well as on a broader conceptual level. This research is essential in order to understand the application of this important Supreme Court jurisprudence by the administrative tribunal tasked with refugee determination in Canada, the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB], and to evaluate whether the RPD is, in fact, heeding the guidance of the SCC in *Febles*. My research, by engaging with exclusion decision-making post-*Febles*, demonstrates that the majority decision of the SCC failed on two levels. First, it did not engage robustly with the international controversy around Article 1F(b), and second, it failed to clarify the application of the provision on a more basic practical level. These failures are intricately interrelated, insofar as the SCC's unwillingness to articulate a clear standard for the exclusion of individuals for serious criminality has meant that individuals continue to be excluded for relatively minor crimes.

This means that, at the very least, a concerted effort needs to be undertaken to operationalize *Febles* such that the RPD actually follows the guidance of the Supreme Court. While the commission of a genuinely serious crime is widely understood to mean that an individual is no longer deserving of the protections of the *Convention*, there is no principled reason that the commission of a relatively minor crime should have any significance for purposes of exclusion. This is in tandem with how criminal offences are treated in Canadian society as embodied by our *Criminal Code*. In the criminal law context, the circumstances of the commission of a crime are taken into consideration when assessing the seriousness of a criminal offence, as is the inherently serious or

minor nature of the crime itself. Although the *Criminal Code* sets out mandatory sentencing ranges for certain offences, there is almost always discretion on the part of a sentencing judge to tailor the sentence to the circumstances of the offender and criminal offence in question. This kind of flexibility is what the Supreme Court was alluding to in *Febles*. Although someone who has committed a criminal offence may have transgressed a societal norm, they are still rights-holders, and given the serious impact of an exclusion finding, the proceedings must be conducted in a careful, transparent and principled manner.

Above and beyond how *Febles* has impacted exclusion decision-making in Canada, it is also worth understanding the effect of the decision on a broader level. The majority decision constituted a strong stand by the Supreme Court in the area of criminality and migration, and understanding the ways in which that decision has (not) changed the law in the area of exclusion can shed light on the perception of migrants in a globalized, securitized world. In this thesis, I will draw principally on the scholarship of Juliet Stumpf and Catherine Dauvergne to demonstrate that the Court's failure in *Febles* to set forth a clear interpretation of the purpose underlying 1F(b) is in step with the approach to exclusion embraced by various other jurisdictions. I demonstrate that the problematic approaches taken to the interpretation of 1F(b) internationally are weakening the legitimacy of the international refugee law regime, which is sorely in need of reinvigoration in the form of a robust understanding of the rule of law.

In sum, by analyzing the kinds of crimes for which individuals are being excluded pursuant to 1F(b) in the post-*Febles* era, I will set out what the *Febles* decision means for refugee law in Canada, but also for international refugee law more broadly, showing that the decision falls short both on a doctrinal but also on a conceptual level.

In chapter two, I will explore the history leading up to *Febles*, focusing on five principal areas: the pre-*Febles* Canadian jurisprudence, the debates around the drafting of Article 1F(b), the position of the United Nations High Commissioner for Refugees [UNHCR], international jurisprudence, and the position of international commentators. I will explore how and why 1F(b) has been controversial, and situate *Febles* within that debate, demonstrating that the majority decision is largely in step with an understanding of 1F(b) that has existed since the inception of the *Refugee Convention*.

In chapter three, I will explain the methodology that I employed in analyzing the 1F(b) decisions of the RPD since the *Febles* decision.

In chapter four, I will present my research findings, exploring the various conclusions that can be drawn from an analysis of the dataset. I will examine whether and how *Febles* is being applied, and the crimes for which individuals are being excluded.

In chapter five, I will draw upon the decision of the majority in *Febles* as well as the RPD decisions from the dataset to draw broader conclusions about the securitization of migration. Using Dauvergne and Stumpf's work, I will argue that in an era when fear of the ex-offender noncitizen is at its apex, 1F(b) is being used as a gatekeeper, allowing the Refugee Board to exclude individuals who are deemed undeserving of access to membership in our society. I will also reflect on the implications of this trend for both Canadian refugee law and international refugee law.

I will conclude in chapter six by calling for a reassertion of the rule of law in the refugee law context in order to assure that the humanitarian ideals of the *Refugee Convention* are upheld, and

that the refugee law system maintains its legitimacy and significance at a time when the movement of peoples across borders is only increasing.

Chapter II: Article 1F(b): the history, interpretation and controversy

Article 1F(b) of the *Refugee Convention* states the following:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

Unlike the other two branches of exclusion, article 1F(b) concerns common crimes, and not crimes of an international character. The three branches of exclusion enumerated in the *Refugee Convention* have been directly implemented in Canadian law at section 98 of the *Immigration and Refugee Protection Act*, which states that “A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.”¹⁸

Various jurisdictions, leading commentators, and the UNHCR have taken an array of positions on a variety of aspects of 1F(b).

Controversy persists around, for example, the burden of proof,¹⁹ the standard of proof,²⁰ the relationship between exclusion and inclusion,²¹ and procedural requirements.²² However, the heart

¹⁸ *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

¹⁹ The Federal Court has held that the burden of proof lies with the Minister in exclusion proceedings (see e.g. *Abu Ganem v Canada (Citizenship and Immigration)*, 2011 FC 1147 at para 22; *Arevalo Pineda v Canada (Citizenship and Immigration)*, 2010 FC 454 at para 31; *Nava Flores v Canada (Citizenship and Immigration)*, 2010 FC 1147 at para 64). However, the Federal Court has also held clearly that the Minister does not need to participate in a refugee hearing in order for a refugee claimant to be excluded (see *Arica v Minister of Employment and Immigration*, (1995), 182 NR 392 (FCA) and *Ashari v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8943 (FCA) at para 6).

²⁰ In Canadian law, the standard of “serious reasons to consider” has been held to mean more than mere suspicion, but less than the civil standard of “balance of probabilities” or the criminal standard of “beyond a reasonable doubt” (see *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 at para 101 and *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100 at paras 114-115).

²¹ The Federal Court has strongly encouraged the Refugee Protection Division to carry out an inclusion analysis even where a claimant has been found to be excluded (see *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298, 1993 CanLII 2993 (FCA)).

²² In Canada, for example, refugee claimants who are subject to exclusion, just like those who are not subject to exclusion, benefit from certain procedural protections, including the right to counsel (see e.g. *Canada (Citizenship*

of the controversy is the underlying purpose of the provision. Once its purpose is defined, its ambit follows, and the rest is nuance.

Since the drafting of the *Refugee Convention*, 1F(b) has been variously understood to serve three general purposes:

- 1) protecting the security of the host state;²³
- 2) preventing common criminals who are “unworthy” or “undeserving” from benefitting from the protections of the *Refugee Convention*;²⁴ and/or
- 3) preventing fugitives from justice from using the protections of the *Refugee Convention* to avoid prosecution.²⁵

In order to understand the position taken by the Supreme Court in *Febles*, it is necessary to undertake an analysis of the Canadian case law leading up to the decision, as well as the *Travaux*

and Immigration) v *Gutierrez*, [2016] 2 FCR 394, 2015 FC 1198 at para 45, aff’d in *Canada (Citizenship and Immigration) v Paramo de Gutierrez*, [2017] 2 FCR 353, 2016 FCA 211 at paras 51-54), the right to know the case to be met and the right of response (see e.g. *Kerimu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 264 at para 27 and *Sarker v Canada (Citizenship and Immigration)*, 2014 FC 1168 at para 24). Moreover, refugee claimants who have been excluded have access to an administrative appeal before the Refugee Appeal Division, and then to judicial review before the Federal Court, though the latter is limited by a leave requirement. In other jurisdictions, individuals subject to exclusion benefit from fewer procedural protections. This has been thoroughly explored by Michael Bliss in his piece on the subject, “‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses” (2002) 12:1 Int’l J Refugee L 92.

²³ See e.g. *Dhayakpa v Minister of Immigration and Ethnic Affairs* (1995), 62 FCR 556 at para 29: “[t]he exemption in Article 1F(b) however, is protective of the order and safety of the receiving State”; *Zrig v Canada*, *supra* note 4 at paras 118-119: “[W]hile the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes.”

²⁴ See e.g. *Zrig v Canada (Minister of Citizenship and Immigration)*, *supra* note 4 at para 118:

“the purpose of [Article 1F(b)] is [...] ensuring that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed”; United Nations High Commissioner for Refugees, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees,” (4 September 2003), online: <www.refworld.org/docid/3f5857d24.html> at para 73, accessed 16 August 2018: “In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply.”

²⁵ See e.g. *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FCR 390, 2000 CanLII 17150 (FCA) at para 4: “[I]t is clear to me that Article 1F(b) cannot be invoked in cases where a refugee claimant has been convicted of a crime and served his or her sentence outside Canada prior to his or her arrival in this country”; James Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 537: “Article 1(F)(b) of the Convention requires the exclusion from refugee status of fugitives from justice.”

Préparatoires, international case law on 1F(b), and the position of leading commentators. The various opinions expressed on 1F(b) therein are helpful for purposes of understanding the issues at stake, and how *Febles* specifically, but also the exclusion of criminalized migrants more broadly, can be understood in relation to questions of migration, globalization and security.

a. Canadian jurisprudence on 1F(b)

i. The beginning: the Supreme Court’s decision in *Ward*

The first time the Supreme Court of Canada addressed the interpretation of 1F(b) was in 1993 in its seminal decision in *Ward*.²⁶

Worth remarking at the outset is the fact that exclusion for serious criminality was not at issue in *Ward* – though it surely would have been had this case arisen in the 2000s, when 1F(b) began to feature much more frequently in refugee decision making, reflecting the trend towards the criminalization of asylum seekers and the usage of security rhetoric around migration.²⁷

There had been no suggestion at any stage of the proceedings that Patrick Francis Ward, an Irish citizen and resident of Northern Ireland who had joined the INLA, a paramilitary group dedicated to the political union of Ulster and the Irish Republic, should be excluded from refugee protection pursuant to 1F(b).²⁸ Rather, the Court was considering the scope of the “particular social group” category as a nexus to a Convention ground, and held that particular social group did not need to be interpreted narrowly to accommodate morality and criminality concerns because criminality

²⁶ *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 1993 CanLII 105 (SCC) [*Ward*] at 743.

²⁷ See. e.g. Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23:1 Int’l J Refugee L 54.

²⁸ See the lower court decision of the Federal Court of Appeal: *Canada (Attorney-General) v Ward*, [1990] 2 FC 667, 108 NR 60.

was contemplated elsewhere in the *Convention*, at Article 1F.²⁹ Nevertheless, it noted that Ward would not be excluded under 1F(b) even if that issue had been raised because he had already been convicted of his crimes and served his sentence.³⁰

In making that observation, the Court referred to renowned migration law academic James Hathaway's interpretation of 1F(b) as applying to "accused persons who are fugitives from prosecution," endorsing this interpretation as "consistent with the views expressed in the *Travaux Préparatoires*."³¹ The problem with this statement was that, as the Court itself admitted, "[t]he interpretation of [1F(b)] was not argued before us," and therefore its observation was made in *obiter*,³² so though persuasive, it was not binding.³³

ii. A continuation: the Supreme Court's decision in *Pushpanathan*

Five years later, in 1998, the Supreme Court again commented on the interpretation of 1F(b) in its decision in *Pushpanathan*.³⁴ In that case, Velupillai Pushpanathan, after being granted permanent residence in Canada, was arrested and charged with conspiracy to traffic in a narcotic. At the time of his arrest, he was a member of a group in possession of heroin with a street value of \$10 million. He filed a refugee claim, but was excluded under Article 1F(c) of the *Refugee Convention*, which

²⁹ *Ward*, *supra* note 26 at 742-743.

³⁰ *Ibid* at 743.

³¹ *Ibid*.

³² *Ibid*.

³³ The Ontario Court of Appeal explained the (non-)binding nature of *obiter dicta* statements by the Supreme Court in its 2010 decision in *R v Prokofiew*, 2010 ONCA 423 at paragraph 20: "Obiter dicta will move along a continuum. A legal pronouncement that is integral to the result or the analysis that underlies the determination of the matter in any particular case will be binding. Obiter that is incidental or collateral to that analysis should not be regarded as binding, although it will obviously remain persuasive."

³⁴ *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 SCR 982 [*Pushpanathan*].

states that the provisions of the *Convention* do not apply to a person who “has been guilty of acts contrary to the purposes and principles of the United Nations.”³⁵

In considering the potential overlap between 1F(b) and 1F(c) when it comes to the crime of drug trafficking, the Court observed that 1F(b) should apply to fugitives from justice: “[i]t is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status,” and “common criminals should not be able to avoid extradition and prosecution by claiming refugee status.”³⁶ This statement was consistent with its statement in *Ward*.

iii. An elaboration: the Federal Court of Appeal’s decision in *Chan*

The decision of the FCA in *Chan* in 2000 was therefore the first non-*obiter* appellate level judgment on the application of 1F(b) in Canada.³⁷ In that decision, the FCA explicitly followed the SCC’s *obiter* statements in *Ward* and *Pushpanathan*. San Tong Chan was a Chinese citizen who had been convicted in the United States of illegal use of a communication device in relation to drug trafficking and sentenced to 14 months imprisonment. Mr. Chan served his sentence, was deported to China, and then subsequently traveled to Canada and filed a refugee claim. He was found to be excluded from refugee protection pursuant to 1F(b), but on appeal, the FCA set aside the exclusion finding, holding unequivocally that “Article 1F(b) cannot be invoked in cases where a refugee claimant has been convicted of a crime and served his or her sentence outside Canada prior to his or her arrival in this country.”³⁸ This conclusion was based on the Supreme Court’s

³⁵ *Supra* note 1.

³⁶ *Supra* note 34 at para 73.

³⁷ *Supra* note 25.

³⁸ *Ibid* at para 4.

decisions in *Ward* and *Pushpanathan*, the writings of academic commentators, and the statutory scheme set out in the *Immigration Act*.³⁹

In coming to this conclusion, the FCA elaborated on the operation of 1F(b), holding that the predecessor to the IRPA, the *Immigration Act*, already contained “a statutory scheme for dealing with persons who have been convicted of serious crimes committed outside Canada.”⁴⁰ If one were to accept the position advanced by the Minister, “a prior conviction for a serious non-political offence would operate to automatically deny that person's right to a refugee hearing, regardless of the person's attempts at rehabilitation and whether or not they constitute a danger to the Canadian public.”⁴¹ This interpretation, according to the FCA, was not in concordance with the “reality that a person may have a valid refugee claim even though they have garnered a criminal record in another jurisdiction.”⁴²

This jurisprudential survey reveals that until the year 2000, the position of appellate level courts in Canada was clearly and uncontroversially that the purpose of 1F(b) was to prevent fugitives from justice from evading prosecution by seeking asylum.

iv. A reversal of course: the Federal Court of Appeal's decision in *Zrig*

However, three short years later brought a dizzyingly sharp about-turn with another decision of the Federal Court of Appeal in *Zrig*.⁴³

³⁹ *Ibid.*

⁴⁰ *Ibid* at para 15.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Supra* note 4.

Mohamed Zrig was a Tunisian citizen who was charged and sentenced in absentia by the Tunisian government for membership in a criminal association, manufacturing explosives and possession of weapons without a licence. He fled Tunisia and claimed refugee status in Canada. The Immigration and Refugee Board found that though Mr. Zrig's fear of return to Tunisia was well-founded, he was excluded under both 1F(b) and 1F(c) for his involvement in criminal activity.⁴⁴ Central to this finding was Mr. Zrig's membership in an Islamist political party now known as Ennahda.⁴⁵ In its analysis, the FCA took up the IRB's findings of fact that Ennahda is "a movement which supports the use of violence" and "uses terrorist methods" in pursuit of its "ultimate aim," the "Islamization of the state."⁴⁶

The FCA held that its judgment in *Chan* was not of any assistance to Mr. Zrig since the crimes for which he was excluded were crimes attributable to Ennahda for which the Refugee Division held him responsible as an accomplice by association, and not the crimes for which he was convicted and sentenced in absentia by the Tunisian government.⁴⁷ Nevertheless, the FCA then went on to question the reasoning in *Chan*, emphasizing that the Supreme Court's comments in *Ward* and *Pushpanathan*, upon which *Chan* was premised, were made in *obiter*.⁴⁸ After conducting a review of international jurisprudence and academic commentary, the FCA concluded that the purpose animating 1F(b) is "ensuring that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because of the seriousness of the ordinary crimes which it suspects such criminals of having committed."⁴⁹

⁴⁴ *Ibid* at para 17.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at para 19.

⁴⁷ *Ibid* at para 65-66.

⁴⁸ *Ibid* at paras 71-72 and 112.

⁴⁹ *Ibid* at para 118.

It is essential to note that the FCA could have upheld the finding of the RPD that Mr. Zrig was excluded without reinterpreting *Chan*. Since Mr. Zrig *was* a fugitive from justice, he would have been excluded under the *Chan* reasoning. The FCA in *Zrig*, in embarking on an extensive analysis of the purpose and application of 1F(b), demonstrated a clear desire to shift the interpretation of the provision away from the jurisprudence that had preceded it. As a result, *Zrig* expanded the purpose of 1F(b) in Canadian law; not only was it meant to prevent fugitives from justice from avoiding prosecution, but it also served to prevent “undesirable” ex-offenders from seeking refuge in Canada.

The stark difference in the factual scenarios underlying *Chan* and *Zrig* is inescapable, as is the timing of the two decisions (*Chan* was argued in June 2000 and rendered in July 2000, while *Zrig* was argued in December 2002 and rendered in April 2003). Also notable is that the reasoning used by the FCA in its interpretation of 1F(b) changed significantly from *Chan* to *Zrig*. These observations will be revisited and expanded upon in part IV.

v. Solidifying *Zrig*: the Federal Court of Appeal’s decision in *Jayasekara*

The change in course signaled by *Zrig* solidified with *Jayasekara*, where the FCA was confronted with a certified question squarely on this issue: whether serving a sentence for a serious crime prior to coming to Canada allows one to avoid exclusion under Article 1F(b).⁵⁰ Notably, in *Zrig* the question certified by the Federal Court did not concern the relevance of expiation to the application of 1F(b), given that the issue of expiation would not have been dispositive of the matter since Mr. Zrig was a fugitive from justice.

⁵⁰ *Jayasekara*, *supra* note 9.

Counsel for Mr. Jayasekara attempted to hark back to the FCA’s decision in *Chan* as standing for the general principle that a person who has served his sentence should not be excluded under 1F(b).⁵¹ The FCA firmly rejected this argument, holding that the decision in *Chan* “did not then, nor does it now, in my respectful view, stand for the proposition that, whatever the circumstances, a country cannot exclude an applicant who was convicted and served his sentence,”⁵² a statement that is difficult to reconcile with the wording of *Chan*.⁵³

The FCA in *Jayasekara* adhered to the rhetoric it had employed in *Zrig* in elaborating on the purpose of 1F(b), again emphasizing the desire of state signatories to the *Refugee Convention* to “preserve [their sovereignty and security] for reasons of security and social peace” by protecting their citizens from the “danger of having to live with especially dangerous individuals under the cover of a right of asylum.”⁵⁴

Jayasekara therefore added a third purpose to the two purposes set out in *Zrig*: the protection of the host society from dangerous ex-offender asylum seekers.

Also important is the fact that the FCA in *Jayasekara* held that a “serious crime” for purposes of application of 1F(b) is one that if committed in Canada would be punishable by a maximum jail term of at least 10 years.⁵⁵

⁵¹ *Ibid* at para 18.

⁵² *Ibid* at para 27.

⁵³ *Chan*, *supra* note 25 at para 15.

⁵⁴ *Jayasekara*, *supra* note 9 at para 28, quoting *Zrig*, *supra* note 4 at paras 118-119.

⁵⁵ *Jayasekara*, *supra* note 9 at para 40.

vi. The culmination: the Supreme Court's decision in *Febles*

Five years after *Jayasekara*, *Febles* arrived at the Supreme Court. Luis Alberto Hernandez Febles was a Cuban citizen who had been convicted of two violent crimes in the U.S., pleaded guilty and served his sentence. Because of his criminal record, the U.S. stripped him of his refugee status, and initiated deportation proceedings.

Afraid to return to Cuba, Mr. Hernandez Febles entered Canada in 2008 and made a refugee claim. At that point, his last conviction had been in 1993, fifteen years previously. In adjudicating his refugee claim, the RPD determined that Mr. Hernandez Febles was excluded from seeking refugee protection under 1F(b) as a result of his criminal record.

Mr. Hernandez Febles appealed, and his appeal wound its way through the Federal Court and Federal Court of Appeal until it landed in front of the Supreme Court on March 25, 2014.

Before the Supreme Court, Mr. Hernandez Febles' team of advocates argued that “[t]he overriding purpose of Article 1F(b) is to prevent fugitives from using the Convention to avoid prosecution or punishment, and the clause should in principle be limited to such individuals. Any exceptions to that limitation must be circumscribed to ensure that the exclusion, in each instance, serves only to protect the integrity and viability of the Convention and not as a punitive measure.”⁵⁶

The Supreme Court rejected this argument, holding that nothing in the text of the provision suggests that 1F(b) only applies to fugitives, or that factors such as current lack of dangerousness

⁵⁶ See Supreme Court of Canada, SCC Case Information, Case Name: Luis Alberto Hernandez Febles v. Minister of Citizenship and Immigration, Case Number: 35215, Facts on Appeal: Appellant's Factum, online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/35215/FM010_Appellant_Luis-Alberto-Hernandez-Febles.pdf> at 1 at para 4, accessed 16 August 2018.

or post-crime expiation or rehabilitation should be considered or balanced against the seriousness of the crime.⁵⁷

Notably, the Supreme Court did not refer to the FCA's interpretation of 1F(b) in *Chan*. Instead, it confined its analysis of FCA jurisprudence to a reference to *Jayasekara*, which effectively reproduces the *Zrig* reasoning. As for *Ward* and *Pushpanathan*, the Supreme Court made the confounding statement that “the Federal Court of Appeal has not followed the *obiter* statements in *Ward* and *Pushpanathan* and has held that sentence completion does not ‘allow [a claimant] to avoid the application of Article 1F(b)’”⁵⁸, a troubling contention considering that *Chan*, a decision of the Federal Court of Appeal, was based squarely on the *Ward* and *Pushpanathan* reasoning.

The Court in *Febles* therefore overruled *Chan* and endorsed the *Zrig/Jayasekara* reasoning.

However, there was one crack in the armor. The Court conceded that the ten-year presumption from *Jayasekara* should not be applied in a rigid, mechanistic manner, stating the following at paragraph 62:

The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17150 (FCA), [2000] 4 F.C. 390 (C.A.), and *Jayasekara* has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill, at p. 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However,

⁵⁷ *Supra* note 7 at paras 15-18.

⁵⁸ *Ibid* at para 58.

as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.⁵⁹

That is, in contemplating exclusion under 1F(b), the Board must turn its mind to the sentence that could have been incurred had the crime been committed in Canada.

b. The international controversy around 1F(b)

The Canadian Supreme Court's decision in *Febles* reflects the lack of clarity in the interpretation of 1F(b) on an international level. Various jurisdictions, leading commentators, and the UNHCR have taken an array of positions on a variety of aspects of 1F(b), but the controversy around the purpose of the provision has proven to be the most heated, and has persisted throughout the sixty plus years since the drafting of the *Convention*, without reaching any resolution.

An understanding of this controversy is important given the language of the *Vienna Convention on the Law of Treaties*, the “treaty on treaties” which “sets out the law and procedure for the making, operation, and termination of a treaty.”⁶⁰

Article 31 of the *Vienna Convention* states that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, and article 32 states that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of

⁵⁹ *Ibid* at para 62.

⁶⁰ Anthony Aust, “Vienna Convention on the Law of Treaties (1969)” in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2006).

article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”⁶¹ As a result, depending on how 1F(b) is framed, recourse to the *Travaux Préparatoires*,⁶² which reproduce the debates that took place at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in July 1951 in Switzerland, and their subsequent interpretation by various jurisdictions and commentators, could be not just instructive, but essential.

Courts and commentators have proposed three purposes underlying 1F(b). However, and as Justice Abella pointed out in her dissent in *Febles*, there appears to be more or less unanimous agreement that one of the purposes of 1F(b) is to prevent fugitives from justice from abusing the asylum system to escape prosecution.⁶³ Where the disagreement lies is in whether the provision speaks of either danger or deservingness.⁶⁴ This is significant not least because the first purpose – preventing fugitives from justice from escaping prosecution – serves neatly as a bright line rule, easy to understand and apply. Dangerousness and deservingness are less clear-cut legal standards, and therefore require a lot more work on the part of decision-makers to unpack and apply.

A canvassing of the relevant sources reveals that though some courts and commentators have set aside the notion that 1F(b) is meant to address dangerousness because it is addressed at article 33(2) of the *Convention*,⁶⁵ the notion that 1F(b) addresses a perceived security threat persists. The

⁶¹ *Vienna Convention on the Law of Treaties*, Can TS 1980 No 37.

⁶² The *Travaux Préparatoires*, *supra* note 3.

⁶³ *Supra* note 7 at paras 101-102.

⁶⁴ *Ibid* at para 118.

⁶⁵ See e.g. James Hathaway and Michelle Foster, *supra* note 25 at 529: “While it is no doubt true that some persons whose admission would threaten the integrity of refugee law as a whole may also pose a risk to an asylum country, only the former question is relevant to the assessment of exclusion under Art. 1(F)”, citing United Nations High Commissioner for Refugees, “UNHCR public statement in relation to cases *Bundesrepublik Deutschland v. B and D* pending before the Court of Justice of the European Union” (July 2009), online:

notion of deservingness, on the other hand, has been a feature of the framing of the purpose of 1F(b) since its inception, and continues to be widely accepted as a legitimate purpose of the provision. Why this is so will be addressed in chapter three.

i. The *Travaux Préparatoires*

The *Travaux Préparatoires* provide insights into the concerns of state delegates and the decisions that were made in the drafting of individual provisions of the *Convention*.⁶⁶ By now, more than sixty years later, the *Travaux* have been thoroughly analyzed by international commentators, various courts and legal professionals, among others. This is particularly true in respect of 1F(b) because of the controversy that has plagued the interpretation of the provision.

To begin, it is worth noting in respect of the *Travaux* that the express starting point for 1F(b) was section 14(2) of the *Universal Declaration of Human Rights*, which, in reference to extraditable crimes, states that the right to asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes.”⁶⁷

During the heated debate around the wording of 1F(b) at the Conference of Plenipotentiaries, there was a clear division between the delegates, various of whom expressed the concern that the language of a “non-political crime” from Article 14(2) was overbroad, such that any person who was prosecuted and convicted of a crime, regardless of how the trivial the crime, would be

<www.refworld.org/docid/4a5de2992.html> accessed 16 August 2018: “Article 1F is to be distinguished from Article 33(2) . . . These are distinct provisions serving different purposes . . . Unlike Article 1F, Article 33(2) does not form part of the refugee definition and does not constitute a ground for exclusion from refugee protection. While Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country . . . A decision to exclude an applicant based on a finding that s/he constitutes a risk to the security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention.”

⁶⁶ The *Travaux Préparatoires*, *supra* note 3.

⁶⁷ *Universal Declaration of Human Rights*, UNGA Res 217A (III), UN Doc. A/810 (Dec. 10, 1948).

excluded from refugee status.⁶⁸ As James Hathaway has so eloquently explained, “[t]he failure to refer specifically to extraditable criminality reflects [...] a recognition that not everyone who has committed an extraditable crime should be deemed unworthy of refugee protection. The drafters’ explicit preoccupation was thus to constrain the scope of Art. 1(F)(b) to exclude only a subset of persons caught by Art. 14(2) of the Universal Declaration for having committed an extraditable crime.”⁶⁹

The British delegate to the Convention took the lead in this regard, suggesting that subparagraph (b) be deleted altogether as long as a reservation was made elsewhere in the *Convention* which would ensure that extradition obligations were respected and fugitives from justice would not benefit from asylum in order to evade prosecution.⁷⁰ The British position was supported by the Dutch delegate, who pointed out that it would be “illogical to exclude common criminals from the benefits of the Convention.”⁷¹ The Belgian representative noted that it “did not consider that the status of refugee could be denied to a person simply because he had been convicted of a common law offence in his country of origin,”⁷² as did the Swedish delegate.⁷³ Finally, the Swiss delegate also appeared to support the British position, pointing out that “one could conceive of a case in which a refugee could commit a serious crime in the territory of a receiving country without the receiving country considering expelling him for it. In those circumstances, he did not see why such a person should be treated differently from one who had been guilty of a crime in his country of origin.”⁷⁴

⁶⁸ The *Travaux Préparatoires*, *supra* note 3 at 11-12.

⁶⁹ James Hathaway and Michelle Foster, *supra* note 25 at 541.

⁷⁰ The *Travaux Préparatoires*, *supra* note 3 at 12-15.

⁷¹ *Ibid* at 12.

⁷² *Ibid* at 14.

⁷³ *Ibid* at 16-17.

⁷⁴ *Ibid* at 19.

However, there was strong pushback against the British-led position, principally from the French delegate, who, in response to the aforementioned statements, wondered “if it had been the aim of the discussion to place as many difficulties as possible in the way of certain Governments acceding to the Convention,” and stated that he had “only one aim: to make the text of the Convention acceptable,” opining that it would be “truly tragic...if it was made impossible for the French Government, which was responsible for some hundreds of thousands of refugees, to sign the Convention.”⁷⁵ The French delegate went on to make clear his position that France was “a country surrounded by States from which refugees might pour in, some of whom might commit crimes,” but, nevertheless, “was so generous in granting the right of asylum,” and it was therefore necessary to “protect his country.”⁷⁶ Without a provision excluding criminals from refugee status, “entry would be permitted to refugees whose actions might bring discredit on that status.”⁷⁷

The Yugoslav delegate, a firm supporter of the French position, concurred that the point at issue was “whether criminals should be granted refugee status,”⁷⁸ and that the United Kingdom’s position was therefore unacceptable. If adopted, he “would be obliged to reserve the Yugoslav Government’s position, and there would be a good chance that the latter would be unable to sign the Convention...the purpose of the [British-proposed] amendment was to authorize the grant of refugee status to persons who had committed a crime in common law.”⁷⁹

Ultimately, in the face of this deeply divisive debate, the French delegate proposed the language of a “serious crime” (in lieu of the 14(2) language of a “non-political crime”), and the British

⁷⁵ *Ibid* at 15-16.

⁷⁶ *Ibid* at 19.

⁷⁷ *Ibid*.

⁷⁸ *Ibid* at 17.

⁷⁹ *Ibid* at 16.

delegate, while expressing that he did not view that revision as “entirely free from objection,” agreed.⁸⁰

At its heart, therefore, the text of 1F(b) represents a compromise between two very different perspectives. The simple and open-textured language of the provision is indicative of this fact. Though the arguments that have been made in support of an interpretation of 1F(b) as only applying to fugitives from justice are compelling, any mention of expiation, extradition, or fugitives from justice is conspicuously absent from the wording of the provision.

Worth noting is that dangerousness did not seem to be a serious concern of the delegates, apart from the French delegate’s reference to protecting his country. All the delegates accepted that 1F(b) must be compatible with extradition law such that asylum could not be used as a means for fugitives to escape prosecution; however, various delegates were clearly uncomfortable with limiting the ambit of the provision to fugitives, and considered it necessary to leave enough flexibility in the language of the provision such that individuals who had completed sentences for their criminal offences could nevertheless be excluded.

It is noticeable that the French delegate, and those delegates who supported his position, did not seem to articulate a principled position for the expansion of the provision beyond fugitives from justice at any point during the debates, instead making oblique statements about the palatability of the *Convention*. What seems to underlie their concerns is a distaste for common criminals, or at the very least, an understanding that their respective electorates would find the notion of granting

⁸⁰ *Ibid* at 21.

refugee status to convicted criminals abhorrent. Those concerns seem to constitute the genesis of the notion of the “deservingness” of asylum seekers in respect of 1F(b).

ii. The United Nations High Commissioner for Refugees

The UNHCR’s authority is reflected by the statement in the preamble to the *Refugee Convention* that it is “charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,” as well as Article 35, which states that “[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees... and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”⁸¹ For that reason, the UNHCR’s position and its influential *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*⁸² are often considered by Canadian courts for purposes of interpreting the *Convention*.⁸³

The UNHCR intervened before the Supreme Court in Mr. Hernandez Febles’ case, and took the position that 1F(b) serves two purposes: “the denial of international refugee protection to those who, on account of having committed certain serious acts or heinous crimes, are deemed unworthy of refugee status”; and ensuring “that serious criminals do not abuse the institution of asylum and escape accountability for their crimes.”⁸⁴ In so doing, it referred to its *Guidelines on International*

⁸¹ *Supra* note 1.

⁸² United Nations High Commissioner for Refugees, “Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees”, UN Doc HCR/1P/4/ENG/REV. 3 (December 2011), online: <www.unhcr.org/3d58e13b4.html> accessed 16 August 2018 [UNHCR *Handbook*].

⁸³ See e.g. *Ward*, *supra* note 25 at 689 at para 34; *Chan*, *supra* note 25 at para 46.

⁸⁴ See Supreme Court of Canada, SCC Case Information, Case Name: Luis Alberto Hernandez Febles v. Minister of Citizenship and Immigration, Case Number: 35215, Facts on Appeal: Factum of the Intervenor United Nations

Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees,⁸⁵ and their accompanying *Background Note*.⁸⁶

The *Background Note* echoes the position the UNHCR took before the Supreme Court in *Febles*, stating the following:

73. Bearing in mind the object and purpose behind Article 1F, it is arguable that an individual who has served a sentence should, in general, no longer be subject to the exclusion clause as he or she is not a fugitive from justice. Each case will require individual consideration, however, bearing in mind issues such as the passage of time since the commission of the offence, the seriousness of the offence, the age at which the crime was committed, the conduct of the individual since then, and whether the individual has expressed regret or renounced criminal activities. In the case of truly heinous crimes, it may be considered that such persons are still undeserving of international refugee protection and the exclusion clauses should still apply. This is more likely to be the case for crimes under Article 1F(a) or (c), than those falling under Article 1F(b).⁸⁷

Another UNHCR position paper published in 2009, the “Statement on Article 1F of the 1951 Convention,” reflects this same position taken by the UNCHR in the *Febles* litigation and in its *Guidelines*:

“The purpose of Article 1F was recognized by the travaux préparatoires as being twofold: firstly, to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees but who are undeserving of such benefits as there are “serious reasons for considering” that they committed heinous acts or serious common crimes; and secondly, to ensure that such persons do not misuse the institution of asylum in order to avoid being held legally accountable for their acts.”⁸⁸

High Commissioner for Refugees, at 3 at para 11, online: <www.unhcr.ca/wp-content/uploads/2014/10/35215-Factum.pdf> accessed 16 August 2018.

⁸⁵ United Nations High Commissioner for Refugees, “Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, HCR/GIP/03/05 (4 September 4 2003), online: <www.refworld.org/docid/3f5857684.html> accessed 16 August 2018.

⁸⁶ United Nations High Commissioner for Refugees, “Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees” (4 September 2003), online: <<http://www.refworld.org/docid/3f5857d24.html>> accessed 16 August 2018.

⁸⁷ *Ibid* at para 73.

⁸⁸ United Nations High Commissioner for Refugees, “UNHCR public statement in relation to cases Bundesrepublik Deutschland v. B and D pending before the Court of Justice of the European Union” (July 2009), online: <www.refworld.org/docid/4a5de2992.html> accessed 16 August 2018.

It is nevertheless worth noting that the UNHCR's position is muddled by its *Handbook*, published in 1979 and reissued in 2011, which also adopts the third proposed purpose of 1F(b): the protection of the host society from alleged dangerous criminalized asylum seekers:

“The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.”⁸⁹

Overall, the UNHCR seems to have distanced itself from the position that 1F(b) is meant to address questions of dangerousness, and confined its interpretation to the two other purposes: preventing fugitives from justice from fleeing prosecution, and deservingness. This position is in step with the case law of various national courts, which is perhaps unsurprising given that the majority of the UNHCR's funding comes from government donors, and in particular refugee-hosting nations such as the United States, Germany, the European Union and the United Kingdom.⁹⁰ As a result, the seeming cooptation of the UNHCR by state interests may mean that it cannot be looked to for a principled stance on the interpretation of 1F(b).

iii. International jurisprudence

The position of national courts has not necessarily echoed the positions taken by their respective government representatives at the Conference of Plenipotentiaries in 1951. The reason for that discordance, while interesting, is not relevant for purposes of this study, but certainly bears further scrutiny, related as it may be to questions of geopolitics and the reality of refugee flows.

⁸⁹ *Supra* note 82 at para 151.

⁹⁰ United Nations High Commissioner for Refugees, “Contributions to UNHCR – 2017” (14 February 2018), online: <<http://www.unhcr.org/5954c4257.html>> accessed 7 October 2018.

Nonetheless, courts around the world agree that that one of the purposes of 1F(b) is to prevent fugitives from justice from abusing the asylum system to escape prosecution. Whether the provision is aimed at deservingness *and* dangerousness, however, is more controversial. A canvassing of the jurisprudence of various refugee-hosting nations reveals that most courts have accepted that deservingness has some role to play in the analysis. Only some national courts have incorporated danger into the analysis.

a. The United Kingdom

In 1996, the U.K. House of Lords turned its mind to the purpose of 1F(b) in *obiter* in a decision concerning the definition of a non-political crime. In canvassing the history of extradition law and exclusion, the Court noted that “[a]s article 1F of the Convention recognised, war criminals and offenders against the law of nations could properly be sent home to answer for their crimes, and there were others whose criminal habits made it unreasonable for them to be forced on to a host nation against its will. Such persons could not claim to be protected against refoulement, even where their lives or freedom were at risk.”⁹¹

Nevertheless, the Court went on to consider article 33(2) of the *Convention*, concluding that “[t]he state of refuge has sufficient means to protect itself against harbouring dangerous criminals without forcing on an offence, which either is or is not a political crime when and where committed, a different character according to the opinions of those in the receiving state about whether the refugee is an undesirable alien”.⁹²

⁹¹ *T v Secretary of State for the Home Department*, [1996] A.C. 742 (H.L.), per Lord Mustill, concurring at 761.

⁹² *Ibid* at 771.

However, in a much more recent decision, the U.K. Upper Tribunal accepted a dualistic view of the purpose of 1F(b), holding that it serves both the purpose of the “prevention of abuse of the asylum system by undermining extradition law or the mutual interest amongst states in prosecuting serious offenders”, and to exclude “those who have demonstrated by their conduct they are not worthy of it.”⁹³ Danger did not factor into the analysis.

b. Australia and New Zealand

The High Court of Australia has taken the position that the purpose of 1F(b) is to protect the security of the host state, and its ambit should therefore not be restricted to fugitives from justice,⁹⁴ and the Supreme Court of New Zealand has followed suit.

In that vein, the Full Federal Court of Australia in 1998 explicitly rejected the Supreme Court of Canada’s statements on 1F(b) in *Ward* and *Pushpanathan*, using very open-textured language in characterizing the purpose of 1F(b) and effectively refusing to limit its ambit at all:

“the ordinary meaning of the words used in Art 1F(b) does not suggest the qualification [of justiciable, extraditable crimes] . . . What is most striking . . . about Art 1F is the plain, matter-of-fact requirement that there should be ‘serious reasons for considering that’ a person ‘has committed’ a specific type of crime . . . Certainly the language may also apply to fugitives from prosecution or, for that matter, punishment. But there is no obvious reason to confine the plain meaning of the words to that category of persons.”⁹⁵

In 2002, the High Court of Australia elaborated on this position, acknowledging that though the *Convention* represents a compromise between the interests of the contracting states,

⁹³ *AH (Algeria) v Secretary of State for the Home Department*, [2013] UKUT 00382 (IAC) at para 97.

⁹⁴ See *Dhayakpa v Minister of Immigration and Ethnic Affairs* (1995), 62 FCR 556 at para 29: “[t]he exemption in Article 1F(b) however, is protective of the order and safety of the receiving State.”

⁹⁵ *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998), 88 FCR 173 at 6 and 13, as quoted in *Febles*, supra note 7 at 179.

“countries of refuge are usually entitled to ensure the integrity of their own communities. In the case of serious crimes, such countries are normally entitled to exclude persons convicted of, or suspected of complicity in, such crimes. This is because such involvement may indicate, to some degree at least, the possibility of future risk to the community of the country of refuge. Without such entitlement in defined extreme cases, there would be a risk that the protective objectives of the Convention might be undermined by strong popular and political resentment. Upon this theory, it is beyond the purposes of the Convention to oblige countries of refuge to receive, and provide safe haven for, persons in respect of whom there are serious reasons for considering that they have committed, relevantly, ‘a serious non-political crime’.”⁹⁶

Similarly, the Supreme Court of New Zealand held in 2010 that “art 1F(b) reflects two Convention purposes. The first is to ensure those who commit serious non-political crimes do not avoid legitimate prosecution by availing themselves of Convention protection. The language of the provision cannot, however, be read as confining exclusion to those who are fugitives from justice. A further purpose is to protect the security of states in which refuge is sought by providing an exception from Convention obligations in respect of those with a propensity to commit serious non-political crimes.”⁹⁷

In short, the courts of Australia and New Zealand have made clear that 1F(b) is aimed at both preventing fugitives from justice from avoiding prosecution as well as protecting the security of the host state, but have not made any clear statement as to whether it is additionally meant to prevent so-called “undeserving” ex-offenders from seeking asylum.

c. France

French courts have taken the position that an individual who has served his sentence is not excluded from refugee protection unless he is assessed to pose an ongoing danger or risk to the

⁹⁶ *Minister for Immigration and Multicultural Affairs v Singh*, [2002] HCA 7, 209 CLR 533 at 95.

⁹⁷ *Attorney-General (Minister of Immigration) v Tamil X*, [2010] NZSC 107, [2011] 1 NZLR 721 at para 82.

host country.⁹⁸ There has not been an adoption of the position that the provision is aimed at so-called “undeserving” refugees.

d. The European Union

In 2008, the German Federal Administrative Court stayed proceedings in the matter of an asylum claim which raised questions on the ambit of exclusion under 1F(b) in order to refer a series of questions to the Court of Justice of the European Union [the CJEU].⁹⁹ One of those questions was whether 1F(b) exclusion presupposes that the applicant still represents a danger, and if not, whether a proportionality analysis should be carried out.¹⁰⁰ Upon consideration of those reference questions, the CJEU determined first, that:

“[T]he grounds for exclusion at issue were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status conditional upon the existence of a present danger to the host Member State.”¹⁰¹

Second, the Court held that the exclusion of a person from refugee status is not conditional on an assessment of proportionality in relation to the particular case.¹⁰² In explaining these conclusions, the Court noted that both 1F(b) and (c) “are intended as a penalty for acts committed in the past.”¹⁰³

In short, the European Union has embraced a broad interpretation of 1F(b) that embraces all three purposes.

⁹⁸ Conseil d’État, 4 mai 2011, OFPRA c./M.H. n°320910 B.

⁹⁹ *Bundesrepublik Deutschland v B and D*, [2010] EUECJ C-57/09 and C-101/09.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid* at para 104.

¹⁰² *Ibid* at paras 107 and 109.

¹⁰³ *Ibid* at para 103.

iv. Leading commentators

Division on this issue also persists among leading commentators. It is worth parsing their positions given the *Vienna Convention*'s statement that recourse may be taken to "supplementary means of interpretation" where the meaning of the provision is not clear on its face.¹⁰⁴ One such means of interpretation is the writings of international academics, three of whom are discussed below.

Two of the most renowned scholars of international refugee law, James Hathaway and Atle Grahl-Madsen, have both firmly taken the position that the scope of 1F(b) should be limited to fugitives fleeing prosecution. Guy Goodwin-Gill and Jane McAdam, however, have adopted a position more in line with the prevailing winds of international jurisprudence.

a. *Atle Grahl-Madsen*

Atle Grahl-Madsen, author of *The Status of Refugees in International Law*, which is often cited by the Supreme Court of Canada,¹⁰⁵ has taken the position that the purpose of Article 1F(b) is to exclude fugitives from justice from refugee status and that it should not be applied to crimes that are no longer justiciable.¹⁰⁶ He has interpreted the reference to "serious crimes" to mean that only extraditable crimes punishable by several years' imprisonment are of sufficient gravity to offset the presumptive duty to protect a person at risk of being persecuted.¹⁰⁷ In fact, Grahl-Madsen goes so far as to contend that under exceptional circumstances, fugitives could be exempt from the

¹⁰⁴ *Supra* note 60.

¹⁰⁵ See e.g. *Ward*, *supra* note 26 at 714; *Febles*, *supra* note 7 at para 111.

¹⁰⁶ Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. I, (Leyden: W. Sijthoff, 1966) at 270-273.

¹⁰⁷ *Ibid* at 297.

exclusion clause if the severity of the persecution were such that equity would require that they be recognized as a refugee.¹⁰⁸

b. James Hathaway and Michelle Foster

James Hathaway, who, with Michelle Foster, is the author of *The Law of Refugee Status*, has written extensively on the application of 1F(b) and conducted a comprehensive survey of the relevant international jurisprudence.¹⁰⁹

Regarding the debates that took place at the Conference of Plenipotentiaries, Hathaway has concluded that the text of the provision constitutes a compromise, given that the drafters of the *Convention* “were persuaded that if state parties were expected to admit serious criminals as refugees, they would simply not be willing to be bound to the Convention.”¹¹⁰

However, in his own analysis of the text of the provision, its history, and the broader context of the *Convention*, Hathaway has concluded that 1F(b) should be understood as only applying to fugitives from justice.

In drawing this conclusion, Hathaway points out that the provision’s evolution from article 14(2) of the *Universal Declaration of Human Rights* “suggests a fairly modest and rather technical reason to enact Article 1(F)(b): avoiding conflict between the duty to protect refugees and the duty to honour extradition treaties.”¹¹¹ Moreover, while the text of the provision does not restrict its application to fugitives from justice on the face of it, Hathaway contends that it must be understood

¹⁰⁸ *Ibid* at 297-298.

¹⁰⁹ *Supra* note 25.

¹¹⁰ *Ibid* at 25.

¹¹¹ James C. Hathaway and Colin J. Harvey, “Framing Refugee Protection in a new world disorder” (2001) 34:2 *Cornell Int’l LJ* 34 257 at 276.

in the context of the broader *Convention*, which allows states to refoule refugees who pose a danger to the host state pursuant to article 33(2). In this regard, Hathaway argues that “the view that Art. 1(F)(b) seeks at least in part to protect host state safety and security raises the question why the relevant part of the Convention’s Art. 33(2) exists at all: if “serious” criminals who threaten asylum state security can be peremptorily denied protection under Art. 1(F)(b), will there be any “particularly serious” criminals left to consider in relation to Art. 33(2)?”¹¹² He goes on to ask why exclusion should be limited to the commission of serious non-political crimes: “[t]he political or non-political nature of the crime is unlikely to be thought dispositive – as it is under Art. 1(F)(b) – of whether a person prepared to commit a serious crime poses a risk to the asylum state.”¹¹³ As a result, Hathaway concludes that 1F(b) makes “perfect sense” if it is understood as directed at fugitives from justice “given the recognized view that persons who have committed a ‘political crime’ are not truly fugitives ‘from justice,’ and hence are normally exempt from extradition.”¹¹⁴ Therefore, Hathaway concludes, “the broader context and drafting history of this clause ... confirm the view that Art. 1(F)(b) serves only the limited purpose of disallowing the claims of persons who are liable to sanctions in another state for having committed a genuine, truly serious crime, and who could avoid such liability by claiming refugee status.”¹¹⁵

c. Guy Goodwin-Gill and Jane McAdam

Guy Goodwin-Gill and Jane McAdam, on the other hand, have provided a different analysis of 1F(b), and were pointedly quoted in the Supreme Court’s decision in *Febles* in that regard:

¹¹² *Supra* note 25 at 540.

¹¹³ *Ibid* at 541.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*.

“[T]he “fugitives from justice” thesis appears to be on the wain, as being inconsistent with the ordinary meaning of the words. It is one thing to say that those seeking to escape prosecution for serious non-political crimes should not be recognized as refugees; but quite another to say that *only* such fugitives come within the scope of article 1F(b).”¹¹⁶

As a result, “each party has some discretion in determining whether the criminal character of the applicant for refugee status in fact outweighs his or her character as bona fide refugee, and so constitutes a threat to its internal order.”¹¹⁷

Goodwin-Gill and McAdam have argued against a linkage between exclusion and extradition law, instead preferring a test where there is evidence “of some future danger to the community of the State of refuge.”¹¹⁸ This position has been criticized as “wide-ranging and subjective, amounting to an agglomeration of Art. 1(F)(b) exclusion with permissible refoulement under Art. 33(2)” by James Hathaway.¹¹⁹

c. Situating *Febles* in the broader debate

Given the lack of agreement on 1F(b) found in the *Travaux Préparatoires*, UNHCR documents, international jurisprudence, and treatises by leading commentators, it is perhaps unsurprising that the Supreme Court failed to take a clear stance in the *Febles* decision. However, the degree to which the Court dissembled in its characterization of the purpose of 1F(b) merits further consideration.

¹¹⁶ Guy Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 175, as quoted in *Febles*, *supra* note 7 at para 48.

¹¹⁷ *Ibid* at 176.

¹¹⁸ *Ibid* at 175-176.

¹¹⁹ *Supra* note 25 at 550 at fn 165.

Troublingly, the Supreme Court characterized the purpose of 1F(b) in *Febles* as “clear” and “admit[ting] of no ambiguity, obscurity or absurd or unreasonable result.”¹²⁰ How this can be so given the lively international debate on the subject is unclear. Elsewhere in the decision, the Court characterized the main purpose of the provision as “exclud[ing] persons who have committed a serious crime,”¹²¹ a singularly unhelpful statement that merely reiterates the language of the provision itself. As already discussed, defining the underlying purpose of 1F(b) is key to understanding its application, and most importantly, its ambit. The Court then went on to opine that “[e]xcluding people who have committed serious crimes *may* support a number of subsidiary rationales,” and listed various potential subsidiary rationales in permissive but not imperative language.¹²²

In so doing, the Court appeared to accept all the proposed purposes of the provision: preventing fugitives from justice from evading prosecution, protecting the host society, and assessing the deservingness of ex-offender asylum claimants, among others.

The Court’s failure to resolve the obvious contradictions contained in previous jurisprudence, including two of its own decisions, is a major weakness of the decision. As already explained, *Ward*, *Pushpanathan*, *Chan*, *Zrig* and *Jayasekara*, when read together, provide unsettlingly contradictory interpretations of 1F(b), and *Febles* does not assist in disentangling those contradictions.

¹²⁰ *Supra* note 7 at para 39.

¹²¹ *Ibid* at para 35.

¹²² *Ibid* at para 36 (emphasis added).

For that reason, the majority's statement in regard to the *Vienna Convention* that the language of 1F(b) is clear enough that recourse to interpretative mechanisms like the *Travaux Préparatoires* is not necessary cannot be taken seriously.¹²³

Justice Abella in dissent, with Justice Cromwell concurring, entered into an extensive review of the debate in the *Travaux*, and in so doing, reached the opposite conclusion of the rest of the Court.¹²⁴ Her analysis is much sounder than that of the majority, based as it is on an engagement with the relevant sources.

That being said, it is far from clear that the *Travaux* would have led the majority in a clear direction. As already discussed, the delegates to the General Assembly were in fundamental disagreement from the beginning concerning the scope of 1F(b), and the *Travaux* reflect this disagreement. However, at the very least, the SCC needed to undertake an analysis of the debate contained in the *Travaux*, and stake a clear and principled position in that debate in order to lend credibility to its decision. Without a clear statement of the underlying purpose of 1F(b) in light of the debates around its drafting, RPD board members are left significant latitude to add texture to the meaning of the provision, which results in uneven and unprincipled decision-making.

Ultimately, the majority's failure to enunciate a clear purpose of 1F(b) in the *Febles* decision is indicative of the Court's reluctance to explain what it is really doing when it interprets the provision. The idea that 1F(b) is aimed at the security of the host state is not well-supported, given the clear language of section 33(2) of the *Convention* in that regard and the lack of any discussion of dangerousness in the *Travaux*.

¹²³ *Ibid* at para 39.

¹²⁴ *Ibid* at paras 107-116.

The notion that 1F(b) is aimed at perceived undeserving refugees, on the other hand, allows the provision to serve a gatekeeping function, a proposition that would be challenging to frame as a legal principle in clear and bounded terms. How to define what a “deserving” refugee is? Why does “deserving” matter? Courts since the inception of the *Convention* have struggled to enunciate this purpose in principled terms, and so maybe it is unsurprising that the Supreme Court sidestepped this thorny problem, instead preferring to rely on a broad, all-encompassing framing of the purpose of the provision.

In the wake of the SCC’s decision, therefore, one could hardly expect that the Refugee Board’s 1F(b) decisions would become clearer and more principled. *Febles* offered very little in the way of guidance.

As a result, in conducting an analysis of the jurisprudence of the RPD post-*Febles*, it was important to determine how the decision has affected the reasoning of the Board when engaging in exclusion analyses under 1F(b).

Chapter III: Methodology

Given the lack of clarity provided by *Febles*, and the controversy preceding it, I undertook an examination of exclusion decisions rendered by the RPD since the decision in order to determine how, and if, *Febles* is being applied and understood.

The decisions I examined include those that are publicly available on CanLII, as well as decisions that were obtained pursuant to an access to information request [ATIP request] filed with the Immigration and Refugee Board. This produced a total of eighty-five decisions. The ATIP request targeted any decision in which the RPD conducted a 1F(b) analysis on or after October 30th, 2014, the day on which *Febles* was published, up to and including April 7th, 2018, the last date on which case law research was conducted before the writing of this paper.

However, upon receipt of the request and analysis of the decisions contained therein, it became clear that only decisions where the claimant had been excluded had been disclosed. Decisions where exclusion had been raised, but the claimant was not ultimately excluded, were not disclosed. As a result, my dataset was more limited than originally anticipated because the IRB codes for decisions where an individual has been found excluded, but not where exclusion was merely raised.

Nevertheless, the resulting dataset is significant, and allowed me to draw important conclusions about the nature of exclusion decision-making in Canada post-*Febles*. Past research has shown that once exclusion is raised, an individual is much more likely to be excluded than not.¹²⁵ As a result, the minority of decisions where exclusion is raised and the individual in question is not

¹²⁵ See Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23:1 Int’l J Refugee L 54.

excluded would not have a significant impact on the conclusions drawn here. Moreover, this research is intended to focus on where *Febles* is failing to do what it set out to do. While it may be the case that there are a minority of cases where *Febles* has succeeded in clearly bounding the scope of 1F(b), such cases are not a matter of concern. Rather, what matters is the decisions where individuals are being excluded, and whether those decisions live up to the standard *Febles* purported to set. This is the case not only because it is necessary to gauge the success of *Febles* as a jurisprudential standard, but also because of the importance of the rights at stakes in exclusion proceedings (as explained in the introduction to this piece). Where someone is excluded they have been denied a fundamental right: to seek protection from persecution. It is essential that instances where this occurs are scrutinized to ensure that this proceeding is taking place in a principled and coherent manner. The dataset analysed here takes those decisions, and subjects them to a robust analysis.

Also important to note in terms of the bounds of the dataset is that where exclusion was raised but not pursued, I did not include the decision because the Board does not enter into an exclusion analysis in such scenarios. There would therefore be no exclusion analysis to scrutinize. Often, though not always, this occurs where the Minister files a notice of intervention raising exclusion as an issue, but upon further consideration or investigation, withdraws the intervention before the hearing, causing the RPD to drop the issue.¹²⁶

¹²⁶ It is worth noting that the Federal Court has held that the RPD, as an inquisitorial body, is required to determine whether section 98 of the IRPA, *supra* note 18, applies regardless of whether or not the Minister chooses to intervene (see e.g. *Ospina Velasquez v Canada (Citizenship and Immigration)*, 2013 FC 273 at paras 2 and 15). In this dataset, I included decisions where a 1F(b) analysis was conducted regardless of whether or not the Minister intervened.

The dataset includes both refugee protection determinations as well as vacation proceedings,¹²⁷ which are the two kinds of proceedings in which the RPD conducts exclusion analyses.

Decisions of the Refugee Appeal Division [RAD] were not included, principally because of the importance of the first instance decision maker. There are many reasons for which claimants may not pursue an administrative appeal and/or an application for leave and judicial review to the Federal Court, including financial and sociocultural barriers; the emotional toll exacted on individuals subject to exclusion proceedings; and the lengthy timelines that appeal and judicial review applications entail. The first instance decision is the only proceeding to which every refugee claimant in Canada is subject, and as a result, a comprehensive understanding of the analyses being conducted at that stage is of primary importance.

Federal Court decisions were also not considered because even fewer claimants have access to the Federal Court for judicial review than to the Refugee Appeal Division. Decisions of the RPD and the RAD are well-insulated from review by the leave provision and certified question requirements that are built into the Canadian Federal Court system. Moreover, judges of the Federal Court are not required to provide reasons upon a grant (or refusal) of leave. What this means is that it is impossible to know why certain decisions are subject to judicial review and others are not. An ATIP may be possible in order to determine the percentage of exclusion decisions that are subject to applications for leave and judicial review, and of those applications, the percentage that are

¹²⁷ The public-facing RPD decisions in this dataset include both refugee determination decisions as well as vacation hearings pursuant to section 109(1) of the IRPA, *supra* note 2, which states that the RPD can “vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.” The ATIP did not include any vacation hearings, presumably because they were not explicitly requested.

granted leave and the percentage that are refused. However, a robust understanding of the concerns underlying those leave grants and refusals would be impossible to achieve.

It is also worth noting the constraints imposed by an analysis the RPD's decisions without access to the underlying evidence. This means that I was only able to analyze "facts" that were chosen and articulated by the Board. While a decision-maker should, of course, recite the facts upon which they are relying, time and again I faced difficulties understanding what was going on because of what was *not* articulated in the decisions. The only way to get around this problem would have been to contact lawyers who represent claimants in exclusion proceedings and secure permission from those claimants to access their files. When analyzing decisions from past years, it is not even clear that this would be possible, considering some of the individuals may have been deported in the interim, and in any case, this research was beyond the scope of this paper. I am therefore bounded by the four corners of the RPD decisions in the dataset.

Chapter IV: Research Findings

A. The rate at which *Febles* is being cited

The first noteworthy finding is the rate at which the RPD refers to *Febles* in its 1F(b) exclusion decisions.

One could be forgiven for assuming that *Febles* has become the main point of reference in terms of 1F(b) exclusions, though not necessarily to the point of displacing *Zrig/Jayasekara*, particularly since *Jayasekara* laid out a set of criteria for the determination of aggravating and mitigating factors when determining whether the presumption of seriousness is rebutted. Nevertheless, the importance of *Febles* in this area is unprecedented, particularly because it purported to establish a new component to the framework for an exclusion analysis.¹²⁸

As a result, I was shocked to find that of the eighty-five decisions in the dataset, the RPD referred to *Febles* in only thirty-three. *Jayasekara* was referred to in sixty-seven, and *Zrig* in fifteen. Only one decision referred to *Zrig* alone, and in every other instance *Zrig* was referred to in tandem with *Jayasekara*. Nine decisions did not refer to any of the three.

The extent to which the decisions in the dataset engaged with *Zrig/Jayasekara/Febles* decision is not part of the analysis at this point. The sole point being made here is how infrequently the RPD is referring to *Febles*. It is troubling that such a recent and seminal Supreme Court decision in this area of the law is being referred to only slightly more than a third of the time during the relevant tribunal proceedings.

¹²⁸ *Supra* note 7 at para 62.

The reason for the lack of uptake of *Febles* by the RPD is impossible to discern with any certainty. However, the lack of clarity of the decision may be one reason, given that the majority declined to elucidate the purpose of the provision beyond *Zrig* and *Jayasekara*. Moreover, the new element it purported to add to exclusion analyses – a consideration of the possible Canadian sentence – is not well-elaborated, buried as it is in one paragraph of a 136-paragraph decision, and provides no guidance for decision-makers in engaging in this new piece of the equation.

Jayasekara, on the other hand – which was the most-cited decision in the dataset – created a bright line rule in the form of a ten-year presumption. It is therefore probably not surprising that RPD decision makers continue to gravitate towards this clear standard, particularly given that the nuance *Febles* purported to add was so poorly elaborated. *Febles*, it seems, is failing to accomplish what the Court set out at paragraph 62.

B. The crimes for which individuals are being excluded

The next category I examined was the nature of the offences giving rise to exclusion proceedings. For purposes of this paper, the offences were grouped into seven categories: identity fraud, violent offences, drug offences, financial crimes, child abduction, sexual crimes, and property crimes. Three crimes did not fall easily into any of these categories, and therefore are considered separately in a group referred to as “*sui generis*.” Where an individual had committed multiple crimes that fell into more than one group, I assigned them to the more serious group.¹²⁹

¹²⁹ The groups were ordered in the following manner according to seriousness: violent crimes, sexual crimes, drug crimes, property crimes, financial crimes, child abduction and identity fraud. The reason for which child abduction was placed on the lower end of the scale of seriousness is made clear in the section devoted to child abduction.

i. Identity fraud

Of the two largest groups of decisions, one was identity fraud. Twenty-two decisions concerned identity fraud, which generally involved either the forging of an identity document or the use by one individual of another person's identity documents.

The more serious of the crimes in this group involved, for example, the use of a series of different identities and dates of birth by a Venezuelan man in the U.S. over the course of many years in order to avoid deportation.¹³⁰ Similarly, a Mexican man in the U.S. used eight different identities over the course of approximately thirty years, also to avoid deportation.¹³¹

More often, the crimes in this category were less serious, and involved, for example, the use by an individual of one fraudulently obtained passport for personal reasons. As an example, a Somali man living in the United Arab Emirates improperly obtained a Yemeni passport in order to marry his wife, an Emirati citizen, because he was unable to legally marry her as a Somali citizen. He later traveled to Canada and the U.K. on that same passport.¹³² Similarly, a Nigerian woman obtained a falsified passport to travel to the USA on holiday, and then to Canada to claim refugee status.¹³³ A citizen of Tajikistan was excluded for filing a false document at a Canadian visa post in Moscow, though he contended that he had simply contracted an agency to prepare the visa application, and it was the agency that had falsified his visa information.¹³⁴

¹³⁰ MB2-04173.

¹³¹ MB7-02347.

¹³² TB3-07517.

¹³³ TB3-06047.

¹³⁴ TB5-12999 at paras 2 and 17.

In a particularly troubling case, a Nigerian woman had used her daughter's identity documents in Ireland for twelve years because she had been diagnosed with HIV, and as a result of her HIV status, was ostracized by husband and family and was therefore unable to obtain adequate medical treatment in Nigeria.¹³⁵ She fled to Ireland, where she was informed by an immigration lawyer that though her daughter was an Irish citizen, she was not a resident of Ireland and therefore could not sponsor her. As a result, she used her daughter's identity in order to reside in Ireland and obtain HIV treatment.

In many ways this group of decisions is the most significant, and the most problematic, given that refugee claimants are often forced to resort to the use of forged or misappropriated identity documents in order to flee persecution. This is such a strong presumption that consideration for that fact is built into the *Immigration and Refugee Protection Act* at section 133¹³⁶ and the *Refugee Convention* at Article 31(1).¹³⁷

However, in every instance in this group, the claimants were found to have used forged or misappropriated identity documents for something *other* than fleeing persecution. Nevertheless, it is worth noting that another unique feature of this group that in more or less every case, it is highly likely that the individual in question could not have engaged in the act in question (i.e. traveling internationally, working legally, marrying the individual of their choice) *without* using a

¹³⁵ TB5-08279.

¹³⁶ *Supra* note 18 at section 133 states that “[a] person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.”

¹³⁷ *Supra* note 1 at article 31(1), which states that “[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

forged or misappropriated identity document. Put another way, if they happened to be citizens of another country, they would have had no difficulty in engaging in an act, but due to their countries of nationalities, their only access to the act in question was with a misappropriated identity document. This fact is reflected by the testimonies of the claimants in question, which is referred to in the decisions. More or less every claimant raised necessity as a mitigating factor (i.e. I couldn't have traveled/worked/married without committing the crime in question). This mitigating factor was generally rejected or minimized by the RPD.

Notable also is that only three claimants in this group were charged, prosecuted, and sentenced for their criminal act when they came to the attention of the authorities in the jurisdiction where the crime was committed (which they often did).

These decisions are problematic for a few reasons. First, it is hard to imagine how identity fraud could ever rise to the level of seriousness of a crime like homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery, which are the examples of serious crimes enumerated by the UNHCR and adopted as such by the Supreme Court in *Febles*. Presumably the lack of seriousness of this kind of offence is the reason for which these individuals were not charged and convicted when they were caught.

Second, and following on the heels of that first observation, is the way the RPD frames these kinds of crimes. On multiple occasions, the same board member made the following observation in regards to identity fraud:

“The panel finds that anytime one can obtain an improperly issued, fraudulent or fraudulently modify identity documents, such as the birth certificate, or like this case passports, causes great harm to any democratic system [*sic*]. Security, particularly in the post 9-11 world, is a serious issue that costs governments and in the end taxpayers a

significant amount of money. So though this appears a victimless crime, the panel finds the harm committed is the weakening of the security, and the costs are often born by taxpayers.”¹³⁸

The same board member, in reference to the Nigerian woman who traveled to the U.S. on a fraudulently obtained passport, stated the following in her decision: “The panel finds the matter serious in light of...the use of this passport for foolish reason such as a vacation. [*sic*] This flouting of law for enjoyment purposes undermines not just the security of the U.S.A. but lessens the security of the United Kingdom.”¹³⁹

This kind of sentiment was repeatedly uttered throughout the decisions in this area. In another such decision, the board member described the offence in question in the following manner:

“If [the claimant] had been successful in gaining admission, a foreign national would have entered the country without security screening and without the ability of authorities to know who was in the country. The ability of a state to control its borders and protect the public is an important responsibility of government.

Protecting the public is a stated objective that underlies Canada’s immigration laws. An attempt to circumvent immigration inspection that allows public officials to inquire into the criminal or security history of a foreign national puts the public at risk, both with respect to public safety and public security.”¹⁴⁰

In another decision, the board member stated that the claimant had “shown a willingness to participate in fraudulent activity for his own benefit and to the detriment of the American authorities,”¹⁴¹ and that “[i]t is a reasonable expectation that individuals seeking protection on arrival in Canada are truthful and forthright with the Canadian officials they are in contact with.”¹⁴²

¹³⁸ TB3-06047; see also TB3-04854 and TB4-11073.

¹³⁹ TB3-06047.

¹⁴⁰ X (Re), 2015 CanLII at paras 55-56.

¹⁴¹ X (Re), 2015 CanLII 110279 at para 38.

¹⁴² *Ibid* at para 71.

Another board member noted in this regard that “The act committed is non-violent in nature and the actual harm inflicted by the claimant’s crime is difficult to measure as specific victims have not been identified. However, the use of fraudulent documents undermines the integrity and effectiveness of any country’s immigration system.”¹⁴³

Finally, a board member made the following observation about the crime of traveling on a fraudulently obtained passport: it “not only undermines the integrity of domestic security protocols, but also hampers the international community in preventing trans-national terrorism or other serious crimes by being able to vet those seeking admission with knowledge of their true identity. Identity fraud for purposes of obtaining a travel document and then using it for purposes of international travel is a serious offence when considered in the context of national and international security issues.”¹⁴⁴

The themes that emerge from these decisions are concerns about the integrity of Canadian (and other countries’) immigration systems, national security issues, terrorism, and notions about costs to taxpayers, seemingly because the challenges posed by irregular entries at borders lead to a need for increased security, which requires a corresponding increase in the budget allocated to border security by the government (though it’s important to note that the concern was never articulated quite this clearly in the decisions).

While these concerns may have some legitimacy on an abstract level, it is difficult to ground them in the text of 1F(b) and the relevant jurisprudence. Linking identity fraud to sweeping concerns like the security of the host state means that the claimant’s crime (and claim) are not being

¹⁴³ TB3-07092.

¹⁴⁴ TB5-05869.

subjected to the kind of individualized, fact-based analysis that refugee hearings are meant to involve; rather, such individuals are being swept up in broader fears about national security that have very little to do with their individual circumstances. As a result, identity fraud is being treated with undue harshness for exclusion purposes, despite the relatively minor nature of the offence. At their heart, these decisions appear to belie a deep fear that a very serious danger is posed by the ability of individuals to breach the immigration systems in place at our borders that has very little to do with the actual individual in question. This fear will be revisited and analysed subsequently.

ii. Violent offences

This second group also consists of twenty-two decisions, and is one of the three groups that fits in the list of exemplar crimes from *Febles* with ease.

The kinds of crimes in this group include multiple instances of various kinds of assault (simple assault, aggravated assault, assault with a weapon, assault of a peace officer and assault causing bodily harm), multiple instances of robbery, one instance of human trafficking, one instance of breaking and entering of a dwelling house, and one instance of murder and/or manslaughter.

One notable feature in this group is that the majority of the individuals (nineteen) had, when they came to the attention of the authorities in the jurisdiction where they committed the crime in question, been charged, prosecuted, and sentenced, and had generally served their sentence. At least one individual had been acquitted.

Of the individuals who were charged, convicted, and served sentences, in thirteen cases that took place in the United States, and in one case in the United Kingdom. The sentences meted out by the

United States ranged from no custodial time at all to, at the most extreme, seven years in jail.¹⁴⁵ In four cases, claimants had been charged, prosecuted and sentenced in the United States and received no custodial sentence whatsoever.¹⁴⁶ In the case of the individual who had been convicted in the U.K., he was sentenced to eighteen months in jail.¹⁴⁷

Two of the individuals who had committed crimes in the U.S. were fugitives from justice.

This information is problematic in light of *Febles*' guidance. While the sentence meted out by a foreign jurisdiction is certainly not determinative for purposes of determining the seriousness of the offence in question, it is a factor that must be taken into consideration pursuant to the *Febles/Jayasekara* analysis. In the case of the United States and the United Kingdom, this should be particularly the case given the affinity between those countries' legal systems and the Canadian legal system. In fact, the United States is generally considered to administer harsher sentences for many crimes than Canada.

As a result, it is puzzling that individuals who are not sentenced to any custodial time whatsoever, or receive sentences on the very low end of the ten-year spectrum, in a country like the United States or the United Kingdom, are nevertheless excluded, when this fact should militate for exactly the opposite finding.

¹⁴⁵ The custodial sentences meted out were 365 days, 8 months, 7 years, 57 months, 81 months, 8 months, 3 years and one month.

¹⁴⁶ Of these four, one claimant was given a suspended sentence with conditions (MB4-03590). A second was given six months of probation (TB5-03358). A third, who demonstrated obvious signs of severe mental illness, had her charges dismissed without prejudice, though was advised charges could be rebrought up in the future (VB6-01675). In the fourth case, charges were brought, but the decision is unclear as to why there was no conviction (TB2-04774).

¹⁴⁷ TB5-11771.

iii. Drug offences

Ten of the decisions in the dataset involved drug crimes. The crimes in this group all consisted of possession of heroin, marijuana and/or cocaine for the purposes of trafficking. One, in addition to possession for the purposes of trafficking, also involved illicit preparation and production.¹⁴⁸

Seven of the individuals in this group committed the crimes in question in the United States, one in Germany, one in Belarus, and one in Ukraine. Four were fugitives from justice. Two received sentences of probation in the United States. The others received custodial sentences ranging from eight months to seven years.¹⁴⁹

Drug trafficking is one of the crimes listed by the Supreme Court in *Febles* as an example of a crime that is sufficiently serious to raise a presumption of exclusion. Consonant with this is the fact that drug trafficking is enumerated at Regulation 246(e)(i) of the *Immigration and Refugee Protection Regulations* as one of the crimes that is presumptively considered dangerous in the context of a detention review analysis.¹⁵⁰ The fact that these individuals were considered for exclusion should therefore not be surprising.

Nevertheless, the language of the Supreme Court is that of a presumption; a presumption which can be rebutted upon consideration of the *Jayasekara* factors and, according to *Febles*, the sentence that would have been meted out had the crime in question been committed in Canada.

There are also principled reasons to be particularly attentive to how drug crimes are treated in the exclusion context given the complexity of the international drug trade and the varying roles that

¹⁴⁸ MB4-04106.

¹⁴⁹ The custodial sentences meted out consisted of 8 months, 8 years, 3 years, 3 years nine months and 7 years.

¹⁵⁰ *Immigration and Refugee Protection Regulations*, SOR/2002-227.

individuals can play within that trade. In a 2006 piece, Martin Gottwald used the *Vienna Convention* to interpret the characterization of supply-related drug offences in the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* in relation to 1F(b), arguing that “UN drug conventions enjoy almost universal adherence and thus constitute the relevant international standard for characterizing the seriousness of drug offences.”¹⁵¹ Gottwald concludes that drug crimes should not be considered presumptively serious absent certain aggravating factors, because 1) the core crimes over which the International Criminal Court was given jurisdiction do not include drug offences; and 2) “the Trafficking Convention establishes a seriousness hierarchy of drug offences, with ‘criminal offences’ (for personal use) as the least serious offences at the bottom, ‘serious criminal offences’ (for trafficking purposes) in the middle and ‘particularly serious offences’ (for trafficking purposes) at the top.”¹⁵² Gottwald argues that aggravating factors which could elevate a drug offence to the level of a serious crime for purposes of 1F(b) include involvement with international criminal activities; involvement in the offence of an organized criminal group to which the offender belongs; criminal responsibility of the offender in the chain of commercialisation; the scale and frequency of the drug offences; the nature of the drugs involved; the general criminal profile of the offender; and victimization of vulnerable persons.¹⁵³ Gottwald concludes that “[w]hile none of the trafficking offences can be presumed to be serious per se, any of them can attain the seriousness threshold if aggravating circumstances

¹⁵¹ Martin Gottwald, “Asylum Claims and Drug Offences: the Seriousness Threshold of Article 1F(b) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions” (2006) 18:1 Int'l J Refugee L 81 at 93.

¹⁵² *Ibid* at 99.

¹⁵³ *Ibid* at 100-104.

prevail over mitigating circumstances, and if there are no grounds for rejecting individual responsibility or defences to criminal liability.”¹⁵⁴

Gottwald’s analysis is premised upon a consideration of proportionality which is coherent with the majority’s approach in *Febles* in mandating that the ten-year *Jayasekara* presumption not be applied mechanistically. However, a consideration of the circumstances underlying the drug crimes in this group make it clear that the Board’s approach in this area does not incorporate a proportional and flexible approach based on the context of the commission of the crime, the aggravating and mitigating factors, and what a possible Canadian sentence would be.

As an example, in one decision a Nigerian claimant was excluded for possession of cocaine for the purposes of trafficking in Germany.¹⁵⁵ The Board accepted the claimant’s evidence that he had only transported the drugs, and had no involvement in selling them, and that this had been a one-time mistake after the claimant had been laid off from his job, when he had no money for food or shelter, that no weapons or violence had been involved, and that he had no previous or subsequent charges or convictions.¹⁵⁶ The Board mysteriously rejected most of these as “extraneous” factors, stating simply that “users of cocaine represent a serious danger to society.”¹⁵⁷

In another decision, a female claimant from the Dominican Republic in the United States testified before the Board that she sold cocaine because she was homeless.¹⁵⁸ The Board dismissed this evidence, concluding that because the maximum sentence for the crime in question in Canada is life in prison, the seriousness of the crime was clearly established and could not be rebutted, a clear

¹⁵⁴ *Ibid* at 117.

¹⁵⁵ MB0-06907.

¹⁵⁶ *Ibid* at para 22.

¹⁵⁷ *Ibid* at para 27.

¹⁵⁸ MB1-02395 at para 2.

error according to *Febles*, which mandates consideration for a possible Canadian sentence as opposed to simply having regard for the upper end of the sentencing range.¹⁵⁹

In a third decision, a man from the Dominican Republic was excluded for what appeared to have been a relatively isolated incident of selling cocaine and marijuana in the United States.¹⁶⁰ He had been convicted and sentenced to probation for the offence in question.¹⁶¹

Are these the kinds of crimes that should render individuals undeserving of refugee status? It seems obvious that the individuals in these decisions do not pose an ongoing danger to Canadian society, given that the offences in question were isolated events. When Gottwald's framework is considered, almost none of the aggravating factors are present, apart from the nature of the drugs (Gottwald differentiates between high risk drugs, such as opium, morphine and cocaine, and low risk drugs, such as cannabis.¹⁶²)

Moreover, the same commentary can be made for this group as the violent crime group. Where a claimant was convicted and served their sentence, and that sentence fell on the low end of the ten-year spectrum in a country like the United States or Germany, it is difficult to understand why the presumption of seriousness is not rebutted.

¹⁵⁹ *Ibid* at para 10.

¹⁶⁰ MB2-04540.

¹⁶¹ *Ibid* at para 4.

¹⁶² *Supra* note 151 at 103.

iv. Financial crimes

This fourth group consists of eleven decisions. The kinds of crimes in this group consisted of, for example, forgery with intent to defraud (i.e. writing cheques in someone else's name), drawing documents without authority, bank fraud, embezzlement and fraud over \$5000.

It is notable in this group that six of the eleven claimants had committed the crimes in question in the U.S., and all six had been charged, convicted and sentenced. Two were not given custodial sentences, and the other four were given custodial sentences ranging from ten months' time served to five years six months.

Four others, who had committed their alleged crimes in China (twice), Cameroon and Iran, were fugitives from justice.

The last claimant had committed the alleged crime in Ukraine, but because of the heavy redaction of the decision, it was not clear if he had been convicted and whether he had served a sentence.

As with the violent crimes group, the sentence imposed in a foreign, often western jurisdiction, was generally ignored by the RPD, and if it was considered, the conclusion was often difficult to understand. Take as an example the case of a Bulgarian Roma man who was charged and convicted of six counts of forgery in the United States because he had written six cheques in someone else's name and four bad cheques, in addition to a conviction for one count of theft/deception for an amount of money between \$300 and \$10,000.¹⁶³ He was sentenced to 18 months of probation and the payment of restitution. The RPD determined that because forgery in the United States is a

¹⁶³ TB3-07093 at para 19.

felony, “[t]he sentence imposed on the principal claimant in the USA should not be considered to be lenient, as it resulted in Felony convictions on the charges,” and went on to conclude that “[t]he principal claimant was convicted of economic crimes, which constitute serious non-political crimes,” without any further explanation.¹⁶⁴ The fact that our tough-on-crime American neighbours did not see fit to sentence this man to even one day in jail appeared to have no significance for the RPD, despite *Febles*’ emphasis on the importance of a possible Canadian sentence.

There is certainly an argument to be made that the offences contained in this dataset are more serious than the identity fraud set given the impact on other individuals of financial crimes. Nevertheless, it is worth reiterating the UNHCR’s list of crimes, adopted by the SCC in *Febles*, that would give rise to a presumption of seriousness, none of which are financial crimes. The crimes in this group do not involve violence, nor did any of the individuals in question have particularly extensive criminal records. Also worth noting is the fact that, apart from the fugitives from justice, no one in this group was charged, convicted, and faced a sentence of anything remotely approaching ten years in jail.

As with the previous group of decisions, it is hard to understand how these crimes can possibly rise to the level of seriousness necessitated by paragraph 62 of *Febles*.

v. Property crimes

Only four decisions concerned property crimes. This particular group was quite eclectic in terms of the underlying circumstances of the four crimes, and they are therefore worth exploring.

¹⁶⁴ *Ibid* at paras 34 and 37.

In the first, a Cuban man was tasked by his employer with paying bribes to various authorities in Cuba to turn a blind eye to the transport of goods being diverted to the black market.¹⁶⁵ Though illegal, this task was a condition of employment.¹⁶⁶ Eventually the claimant challenged the director of the company on this issue and was fired.¹⁶⁷ Importantly, the RPD did not make any negative credibility findings. The claimant argued that in Cuba, partaking in the black market and paying bribes is a way of life, but the Board ultimately excluded him for possession and trafficking of stolen property, finding that, though the “Cuban context and reality” were mitigating factors, the claimant was part of a “planned and organized scheme to defraud the Cuban government of goods belonging to the State.”¹⁶⁸ The claimant was not charged, convicted or sentenced in Cuba for the offence.

In the second decision in this group, a young Namibian man had taken six cattle from his father and sold them in order to raise money to buy a taxi.¹⁶⁹ At his hearing, he testified that his father had gifted the cattle in question to him, but that his father was opposed to the sale.¹⁷⁰ The claimant’s lawyer argued that he held an objectively reasonable subjective belief at the time that he took the cattle that he had a right to do so because his father had gifted them to him, and therefore he lacked the requisite *mens rea*.¹⁷¹ Minister’s counsel, on the other hand, argued that “Namibian cultural tradition” demands that children ask their parents for permission to sell their own cattle.¹⁷² The Board ultimately concluded that “it is not the claimant’s state of mind at the time of the crime or his assumption that he has a right to commit the action, but the action itself, as determined by the

¹⁶⁵ MB5-05780 at para 10.

¹⁶⁶ *Ibid* at para 5.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid* at paras 17, 37 and 39.

¹⁶⁹ VB3-01349 at paras 16 and 46.

¹⁷⁰ *Ibid* at para 47.

¹⁷¹ *Ibid* at para 93.

¹⁷² *Ibid* at para 94.

laws of the country which determines the legality and criminality of the action, and in this case, also the comparable laws of Canada.”¹⁷³ The claimant’s father did not report the crime, and therefore the claimant was not charged, convicted or sentenced for the crime.

In the third decision, a Hungarian claimant had committed a series of theft offences in Hungary between 2007 and 2010, which involved approaching individuals at their homes under the pretence of engaging them in a transaction and diverting their attention, during which time his associate would take their money from the residence.¹⁷⁴ He was charged, convicted and sentenced to one year of imprisonment, and fled before serving his sentence.

In the fourth and last decision, a Hungarian claimant had stolen a vacuum pump valued at 12 870 euros in Hungary. He was charged and detained for five months in Hungary pending trial, but fled the country the trial took place.¹⁷⁵

The first two of this group are particularly troubling. In both cases, it is hard to imagine that the individuals in question would have received any kind of stringent custodial sentence had they committed the crimes in question in Canada. In both, there were significant mitigating circumstances related to the sociocultural context in which the individuals committed the offences in question. As with the previous group, surely these cannot be the kinds of individuals who the Supreme Court in *Febles* imagine to be undeserving of refugee status when it enumerated crimes such as murder, assault, rape and drug trafficking.

¹⁷³ *Ibid* at para 93.

¹⁷⁴ VB4-00265 at para 4.

¹⁷⁵ VB4-00314 at paras 7, 9, 11, and 27.

v. Abduction

One of the biggest surprises of this study was the size of this subset of decisions: eight out of eighty-five, or almost ten percent. All the claimants in this group were women. Thirteen of the eighty-five individuals in the overall dataset were women, and eight of those fourteen women were subject to exclusion proceedings for so-called child abduction – that is, for taking their own children to Canada to claim refugee protection without the permission of the children’s father. In seven of the eight decisions, the underlying claim involved allegations of physical and/or sexual violence at the hands of the children’s father. Important in this regard is section 285 of the Canadian *Criminal Code*, which provides for a defence to child abduction where a parent must remove the children from imminent harm.¹⁷⁶ Though this defence was raised in various of the child abduction cases, in all seven of these decisions, the principal claimant was found not to be credible, and therefore the defence was not accepted.¹⁷⁷

In sum, more than half of the women in this dataset alleged in their claims that they had suffered violence or abuse at the hands of the fathers of their children, but were found not to be credible on that issue, and were excluded for failing to provide permission from their children’s fathers to have their children in Canada for the purpose of making a refugee claim.

The eighth woman, the only one who did not allege violence at the hands of her children’s father, was an Afghan woman who sought refugee status on the basis that her husband worked for an

¹⁷⁶ *Criminal Code*, RSC, 1985, c C-46 at art 285: No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm.

¹⁷⁷ X (Re), 2015 CanLII 110275; X (Re), 2015 CanLII 107878; X (Re), 2015 CanLII 111037; X (Re), 2015 CanLII 35403; TB2-09187; TB4-01282; TB5-09329.

international organization and she had therefore been targeted by the Taliban.¹⁷⁸ She stated that she had been unable to contact her husband initially in order to obtain a consent letter, and therefore provided a letter from her brother-in-law in which he stated that he had spoken with his brother, who had indicated his consent for his wife to have their children in Canada.¹⁷⁹ She later provided a letter from the person she alleged to be her husband, but did not provide documentation showing that the person named on the consent letter was, in fact, her husband and the father of her children.¹⁸⁰ She was therefore found not to be credible and excluded.

At this juncture it seems fair to say that this group poses very particular and thorny issues which are largely beyond the scope of this paper, and which are subject to preliminary analysis by Catherine Dauvergne in her upcoming publication, “Excluding Women”.¹⁸¹

Nevertheless, it is worth observing that one troubling aspect of this group is that proceedings under the *Hague Convention* had been undertaken in only one of the cases, and in that case, the mother returned the child to her father in Hungary because of those legal proceedings.¹⁸² Despite the fact that she had relinquished custody of her child, she was nevertheless excluded. The fact that the other fathers had not launched proceedings under the *Hague Convention* did not factor into the RPD’s analysis in the rest of the decisions.

It is also worth noting that the countries of origin of the seven women who alleged violence at the hands of their children’s fathers are the Honduras, the United States (twice), Hungary, and (three

¹⁷⁸ TB6-10956.

¹⁷⁹ *Ibid* at 2.

¹⁸⁰ *Ibid*.

¹⁸¹ Catherine Dauvergne, “Excluding women” (2018), forthcoming.

¹⁸² X (Re), 2015 CanLII 111037 at para 45.

times) Nigeria. The Honduras and Nigeria are both countries for which abundant evidence is available about violence against women and inequality between the genders.¹⁸³

If these women did, in fact, abduct their children without the consent of the children's father and fabricate allegations of physical or sexual abuse in order to substantiate a refugee claim, then it is certainly the case that there needs to be a mechanism to intervene and ensure that justice is rendered for both parents. Nonetheless, it is troubling that exclusion proceedings are being used as a forum to work out whether these mothers are, in fact, in need of asylum with their children, for whom they are generally the primary caregivers.

vi. Sexual crimes

Five of the decisions in the dataset involved sexual crimes, which fit easily in the list of exemplar crimes enumerated by the UNHCR and adopted in *Febles*.

In the first of the five, a Guinean man had had a sexual relationship with a fifteen year old minor when he was twenty-eight.¹⁸⁴

¹⁸³ The National Documentation Packages, compiled by the RPD for purposes of analysis during refugee hearings, contains abundant evidence in this regard. See e.g. United States Agency International Development, "Gender-Based Violence Analysis for USAID/Honduras", November 2015, online: <www.encompassworld.com/resources/gender-based-violence-analysis-usaidhonduras-final-report> accessed April 24, 2018; Immigration and Refugee Board of Canada, "Domestic violence, including legislation and protection available to victims (2010-November 2013)", HND104660.FE, 10 December 2013, online: <www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=455002&pls=1> accessed April 24, 2018; Immigration and Refugee Board of Canada, "Domestic violence, including Lagos State; legislation, recourse, state protection and services available to victims (2011-October 2014)", NGA104980.E, 10 November 2014, online: <http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=455596&pls=1><accessed April 24, 2018>; Amnesty International, "Nigeria: Submission To The United Nations Committee On The Elimination Of Discrimination Against Women: 67th Session, 3-21 July 2017", AFR 44/6430/2017, 7 June 2017, online: <www.amnesty.org/en/documents/afr44/6430/2017/en/> accessed April 24, 2018.

¹⁸⁴ MB5-01470.

In the second, a Cuban man had been convicted in the U.S., where he lived for twenty years, of committing lewd and lascivious acts in the presence of a child under the age of sixteen years with whom he lived in the same house.¹⁸⁵ He was sentenced to eighteen months' time served and one year of probation.¹⁸⁶

In the third, a Chinese claimant had been charged in the U.S. with “criminal attempt- indecent assault persons less than 13 year of age” and “corruption of a minor,”¹⁸⁷ though the exact details of the incident were heavily redacted. The claimant alleged that the charges had been part of a set-up as a result of a conflict with another individual.¹⁸⁸ He fled the charges and sought refugee status in Canada.

In the fourth, a Ghanaian claimant had fled charges in the U.S. of repeated sexual assault of his stepdaughter, over whom he had supervisory authority.¹⁸⁹

The fifth and final was the most complex. A Somali man was excluded for two sexual assault offences committed in the United States while he was living there, both of which occurred in 2006 and involved allegations of fondling the breasts and pubic area of female patients in the course of his work as some sort of medical professional.¹⁹⁰ He was fired as a result of these incidents.¹⁹¹ The claimant entered Canada in 2006 and was accepted as a refugee in Canada in 2008.¹⁹² Evidence was tendered by the Minister at a subsequent vacation hearing indicating that the claimant had been charged for those offences, but the claimant alleged that he was unaware of the charges at the

¹⁸⁵ TB4-06617.

¹⁸⁶ *Ibid* at para 5.

¹⁸⁷ TB5-05599.

¹⁸⁸ *Ibid* at paras 35-36.

¹⁸⁹ TB6-04681.

¹⁹⁰ X (Re), 2015 CanLII 108822 at para 32.

¹⁹¹ *Ibid* at para 47.

¹⁹² *Ibid* at paras 7-8.

time he left the U.S., and during his refugee hearing.¹⁹³ He also alleged that he had not committed the crimes in question, contending that the first complainant had recently had surgery, and was under the effect of drugs that cause hallucinations and feelings of intimacy, and that the second claimant was a drug addict, low-income, and homeless, and that she may have had financial reasons for making the allegations against him, in that it would provide grounds for a lawsuit.¹⁹⁴ He also attributed racist motivations on the part of both complainants due to his Somali ethnic origin.¹⁹⁵ The claimant appears to have presented evidence that he attempted to return to the U.S. to face the charges in question, but was refused entry by the American authorities.¹⁹⁶ His refugee status was vacated and he was found to be excluded in 2015.¹⁹⁷ In its decision, the Board held that the refusal of the U.S. authorities to allow the claimant to enter that country to face the charges and their failure to seek his extradition were not indicative of the U.S. authorities' perception of the crimes as not being serious.¹⁹⁸

Notable here is that only one individual in this group had been caught, charged and convicted for the crime in question. Three were subject to outstanding charges in the U.S., and the last had never come to the attention of the authorities.

As for the individual who was never convicted, and was unable to return to the United States to face the charges in question, this is exactly the kind of scenario that is difficult to square with the current law on exclusion. If that claimant did commit the offences in question, it would be worth entertaining the notion that those crimes may have been serious enough to warrant exclusion.

¹⁹³ *Ibid* at para 13.

¹⁹⁴ *Ibid* at para 34.

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid* at paras 46 and 50.

¹⁹⁷ *Ibid* at paras 7-8.

¹⁹⁸ *Ibid* at para 50.

However, through what may have been no fault of his own, he was unable to face the charges and have them aired in a criminal court setting, and if his allegations were true, then it is very troubling that he was excluded. The standard of proof and lack of evidence tendered to secure exclusions remains a pernicious problem, and one that bears scrutiny even though it was not addressed in *Febles*. That particular problem is beyond the scope of this paper, but does call into question the well-foundedness of the RPD's decisions in this area.

vii. Sui generis

This group consists of three decisions, none of which fit neatly in any of the other groups, and which will therefore be considered separately.

In the first, a Chinese claimant was excluded for human smuggling in an odd set of circumstances.¹⁹⁹ The claimant had been apprehended after walking into Canada in the company of two girls aged 10 and 8, whom he insisted he didn't know. The details of the incident were hard to discern due to redaction and the decision maker's writing style, but the claimant seems to have alleged that he had been instructed by an agent who he had hired to get him into Canada to walk across the border in the company of these two girls, and that they were simply all crossing the border together.²⁰⁰ In excluding him, the RPD found that the claimant did intentionally bring the two children across the border.²⁰¹

Troublingly, despite the justiciability of this offence in Canada, the claimant was not charged with any criminal offence. The Minister's representative, who intervened at the claimant's hearing,

¹⁹⁹ TB4-06792.

²⁰⁰ *Ibid* at paras 19-22 and 30.

²⁰¹ *Ibid* at paras 19-22.

indicated that there had been a criminal investigation into this incident pursuant to which one person had been charged, but that the claimant himself had not been charged for reasons related to the concept of implied consent.²⁰² The fact that there were not grounds to charge the claimant did not appear to have any influence on the RPD's decision to exclude him, though.

In the second decision in this group, a Pakistani claimant was excluded for firearms trafficking from the United States to Pakistan.²⁰³ The claimant alleged that he had been unaware of the contents of the shipments in which the firearms were hidden when he fled the United States and came to Canada, and that he had been in a situation where he had no choice but to follow the orders of his employer, who had trafficked the firearms in question.²⁰⁴ Importantly, he was a fugitive from justice.

The third decision was so heavily redacted that it was impossible to tell what the underlying offences were.²⁰⁵ However, the decision notes that the maximum sentence in the *Criminal Code* for the underlying offence is life in prison, and that the UNHCR has suggested that the offence in question is a serious one.²⁰⁶ I am reluctant to draw any firm conclusions with such heavy redaction, but it may be safe to assume that this was one of the decisions in the dataset where the offence(s) in question were uncontroversially and sufficiently "serious" that the presumption of seriousness would not have been rebuttable.

²⁰² *Ibid* at para 27.

²⁰³ X (Re), 2016 CanLII 105339.

²⁰⁴ *Ibid* at para 89.

²⁰⁵ X (Re), 2016 CanLII 105345.

²⁰⁶ *Ibid* at para 54.

C. The application of the *Febles* framework

The final element of this dataset that merits scrutiny is the degree to which the RPD is actually engaging in an additional layer of analysis in order to follow the guidance of the Supreme Court at paragraph 62.

It is worth revisiting what appears to be the key element of the SCC's decision in *Febles*: its statement that “a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded” in order that “the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.” I understand this to mean that where a claimant has committed a crime that, if committed in Canada, would garner a sentence of zero to ten years, where the sentence would have been on the lower end of that ten-year range, the claimant should not be excluded, but where the sentence would have been on the upper end of that ten-year range, he should be excluded.

In order to engage in this kind of analysis, one would think that the RPD would need to refer to criminal sentencing jurisprudence in order to determine how the crime in question would have been treated had it been committed in Canada. This is not an easy exercise, considering the myriad of factors that can be taken into consideration in a criminal sentencing analyses, including, for example, age, socioeconomic status, past criminal convictions, the influence of alcohol or drugs, etc. Nevertheless, the SCC in *Febles* appeared to be mandating that the RPD attempt this kind of analysis.

It is remarkable in this dataset that this element of the analysis occurred on only one occasion. The decision in question, described above, involved the Ghanaian claimant who had sexually assaulted

a young woman under his supervisory authority on multiple occasions over the course of two years.²⁰⁷ In this decision, the RPD conducted an evaluation of relevant Canadian sentencing law, drawing comparisons between the relevant decisions and the case at hand, and concluding that a sentence of four to six years would be appropriate given the sentencing factors.

In one other decision, the claimant's lawyer had provided evidence from a law firm on the likely Canadian sentence for the offence in question, but the RPD paid virtually no heed. The opinion letter noted that "cases with similar facts could currently attract a term of imprisonment between 6 months and 2 years" in Canada and it seems that case law was cited in support of this proposition.²⁰⁸ The RPD dismissed this letter on the grounds that it "[failed] to outline specifically what those facts are that the opinion is based on," and that the cases it was based on were "distinguished from that of the respondent on their facts."²⁰⁹

In every other decision, the RPD generally (though not always) considered aggravating and mitigating factors as per *Jayasekara* in order to determine whether the presumption of seriousness should be rebutted, but never hypothesized a potential Canadian sentence based on the known facts of the offence. On the contrary, the seriousness of the offence was often referred to in sweeping statements that made no reference to a potential Canadian sentence.

What this shows is that not only is the RPD failing to engage in any analysis of the potential Canadian sentence despite the SCC's guidance in *Febles*, it is, as already reiterated, paying little heed to the sentences that individuals are receiving as a result of crimes committed in western

²⁰⁷ TB6-04681.

²⁰⁸ X (Re), 2015 CanLII 108822 at para 56.

²⁰⁹ *Ibid.*

democracies where the rule of law is relatively robust and the judicial system is considered to function well (i.e. the United Kingdom, Germany and the U.S.).

In short, the best evidence we have as to the potential sentence for the crimes in question — the sentence that was meted out by the authorities in a similarly situated western legal system, or the choice of the Canadian/foreign authorities not to charge and prosecute the individual despite the availability of that option – provides a strong indication that the sentence would fall on the lower end of the spectrum, yet is never framed that way by the RPD in its analyses. In this respect, the RPD is ignoring the guidance of the SCC’s holding in *Febles*. As a result, claimants continue to be excluded for crimes that would fall on the less serious end of the ten-year spectrum.

Chapter V: *Febles*’ failure

The above analysis reveals that despite (or perhaps because of) the Supreme Court’s decision in *Febles*, refugee claimants continue to be excluded for crimes which are, by criminal law metrics, not serious, as well as crimes that are serious. Further, they are excluded without any analysis as to what the potential sentence would have been in Canada, flouting the guidance of the SCC in *Febles*. And they are excluded pursuant to a very low standard of proof and on a thin evidentiary record.

However, given the position that the of majority of the SCC in *Febles* took, or did not take, maybe it is unsurprising that the decision brought about very little in the way of change at first instance. The Supreme Court’s decision, though 136 paragraphs long, provided guidance as to the nuance of the application of 1F(b) in only one oblique paragraph. Its indication in that paragraph that a more flexible approach needed to be taken to the application of the provision was not accompanied by any guidance or instruction in that regard. Criminal sentencing law is a complex, specialized

area, and IRB board members, many of whom are not lawyers, are already plagued by accusations of insufficient training and a poor grasp of the more eclectic corners of refugee law. Expecting them to expand their field of knowledge to encompass even a rudimentary understanding of criminal sentencing law without any training in that regard may not have been a serious or realistic proposition.

So should *Febles* be written off as a loss for refugee lawyers and asylum seekers, and the product of a Supreme Court populated mostly by judges who were appointed by a Conservative-led government? The way 1F(b) was framed by the drafters at the Conference of Plenipotentiaries, as well as the various interpretations of the provision that have been set forth by national courts, the UNHCR, and leading commentators, make clear that *Febles* is in step with a persistent ambiguity that has plagued the provision since its inception. This seemingly intentional ambiguity has allowed a great deal of latitude in the interpretation of its purpose, which permits national courts to take a broad, flexible approach to exclusion under 1F(b), an approach that is counter to the principle that exceptions to human rights protections be interpreted narrowly.²¹⁰

What this shows is that *Febles* is the product of a troubling trend, and as a result, it is important to understand why it matters that the SCC refused to take a principled stance in its decision, and how that has probably impacted the decisions of the RPD in the wake of *Febles*.

A. The securitization of migration

A step back from *Febles* to consider the bigger picture reveals that the decision demonstrated a lack of commitment by the Supreme Court to ensure that 1F(b) decisions are made in a principled

²¹⁰ See *Pushpanathan*, *supra* note 34, and *Chan*, *supra* note 25.

manner such that they are well-founded with reference to Canadian law and jurisprudence as well as international norms. Instead, *Febles* represented a continuation of the security rhetoric that finds its origins in the decision of the FCA in *Zrig*, which was decided not long after 9/11, when fears about terrorism and the supposed threat posed by migrants at the borders came to the forefront of migration and security politics.

Though *Febles* purported to be a legal debate about the interpretation of a discrete provision of the *Refugee Convention*, the Supreme Court's reluctance to intervene more strongly in the Board's decision making in this area despite the high stakes of refugee decisions reveals that what is really being debated in relation to 1F(b) is not who should be excluded from seeking asylum, but rather, who merits membership in our society. That is, on a fundamental level, what is being decided is who we want to include, and correspondingly, who we want to exclude.

The fears around state security in the modern era are an essential aspect of this picture. Catherine Dauvergne, in particular, has set out a compelling argument that the worldwide crackdown on extralegal migration is a reaction to state perceptions of a loss of control over policy initiatives in other areas. That is, “[i]n contemporary globalizing times, migration laws and their enforcement are increasingly understood as the last bastion of sovereignty.”²¹¹

The notion of state security, and the alleged threat posed to state security by migrants, particularly migrants perceived to be “illegal”, is key to this picture. Dauvergne points out that migration regulation has borne a security element since its inception, though the exact nature of the supposed threat and how it has been framed has fluctuated.²¹² Though the view of migrants as a security

²¹¹ Dauvergne, *supra* note 6 at 2.

²¹² *Ibid* at 95.

issue is longstanding, the 9/11 attacks changed the enforcement and application of immigration provisions in many Western countries.²¹³ New agencies were created to address the alleged migrant security threat, and cooperation between states on security matters increased.²¹⁴

What this means is that we are in an age where a prosperous group of (western) states have used the alleged threat posed by illegal migrants to realign their migration laws in order to reify the divide between the prosperous “us” and the non-prosperous “them”.²¹⁵ Essential to this development is the ability to exclude, or if not, then detain, individuals at the border because they are security risks of some sort.²¹⁶

B. Membership theory

Into this context — a globalized world where irregular migrants are perceived as an existential threat to our safety, security, and way of being — came *Febles*, a case about criminalized individuals who seek admission to our society. They do so as refugee claimants, which means that, at base, the question that must be posed is whether they face a risk of persecution on an enumerated ground in their home country. However, ultimately, regardless of why or how they enter our country, if we allow them to remain and grant them some sort of permanent status, they become members of our society, with all the rights and privileges that membership confers.

I think, therefore, that the question that was really being asked when the Supreme Court was confronted with *Febles* was: “Are we willing to allow (foreign) ‘criminals’ to become members of our society?” And because this question would be difficult, if not impossible, to frame in a

²¹³ *Ibid* at 96.

²¹⁴ *Ibid* at 96-97.

²¹⁵ *Ibid* at 113.

²¹⁶ *Ibid*.

principled manner, the Supreme Court did not state this explicitly, instead relying on the text of the provision for purposes of defining its purpose. In so doing, the Court has continued to allow an interpretation of the provision based on vague considerations of security and deservingness, and it is therefore unsurprising that the decisions of the RPD remain inconsistent and unprincipled. Board members are heeding the Supreme Court's message that 1F(b) provides an opportunity to act out existential concerns about loss of control over our borders and prevent unworthy individuals from gaining entrance to our society, both of which are assessments that are inherently subjective and emotional.

Juliet Stumpf's argument on the conversion of immigration and criminal law in the context of membership theory is instructive here.²¹⁷ Stumpf has argued that membership, which limits individual rights and privileges to the members of a social contract between the government and the people, is at work in the convergence of criminal and immigration law.²¹⁸ She suggests that membership theory has the potential to include individuals in the social contract or exclude them from it, marking out the boundaries of who is an accepted member of society.²¹⁹ Importantly, membership theory manifests through two tools of the sovereign state: the power to punish and the power to express moral condemnation.²²⁰

Stumpf points out that immigration and criminal law both play the core function of acting as gatekeepers of membership in our society, determining whether an individual should be included in or excluded from our society.²²¹ A decision to exclude in criminal law results in segregation

²¹⁷ See Juliet Stumpf, *supra* note 7.

²¹⁸ *Ibid* at 377.

²¹⁹ *Ibid*.

²²⁰ *Ibid* at 378.

²²¹ *Ibid* at 396-397.

within our society through incarceration, while exclusion in immigration law results in separation from our society through expulsion from the national territory.²²² Ultimately, these two fields of law converge in that they embody choices about who should be members of society: individuals whose characteristics or actions make them worthy of inclusion in the national community.²²³

This paper does not seek to apply the criminal law element of Stumpf's analysis, as compelling and important as that argument is. An analysis of the ways in which the Canadian criminal law system removes unwelcome members from our society is beyond the scope of this paper.

However, Stumpf's argument provides insight into the exclusion context through her theory that both irregular migrants and criminals attract moral condemnation, which brings to bear the power of the state in excluding those individuals from society with the tools offered by immigration law and penal law, respectively.²²⁴

Individuals subject to exclusion proceedings are identified as both criminals *and* asylum-seeking noncitizens. This dualistic identity means that they are subject to all the suspicion and hostility brought to bear on both of these groups. Moreover, the criminal law is often not helpful in these cases, since some of the time the individuals in question have already served their sentences, while in other cases there is a lack of will on the part of prosecutors to pursue charges, probably because of the insufficiency of the allegations and the evidentiary record underlying the alleged offences. Nevertheless, in many ways immigration law is a much more effective tool of exclusion. Individuals can be deported in ways that effectively guarantee they will never be able to return to

²²² *Ibid* at 397.

²²³ *Ibid*.

²²⁴ *Ibid* at 410.

Canada, while individuals who are incarcerated will, for the most part, eventually be freed, and will regain most, if not all, of the privileges of membership in society.

The moral condemnation of individuals who are caught by 1F(b) is revealed by the moralistic language used by the drafters of the *Refugee Convention* and various courts around the world in discussing individuals subject to exclusion: “desirability”²²⁵, “worthiness,”²²⁶ “unsuitable”²²⁷ and “ordinary” or “common” criminals.²²⁸ *Febles* refused to distance itself from this kind of moralistic rhetoric, and the RPD therefore continues to incorporate this perspective into its exclusion decisions.²²⁹

What is to be gained by excluding these “undesirable” individuals from membership? Excluding ex-offender noncitizens creates a palpable distinction between members and non-members, solidifying the line between those who deserve to be included and those who have either shown themselves to be deserving of exclusion or have not yet shown themselves worthy of inclusion.²³⁰

In this light, withholding these privileges conceivably improves the quality of the membership by excluding those less deserving of membership.²³¹

²²⁵ *Supra* note 26 at fn 18 at 526: “In a separate concurring opinion in the US Supreme Court, Scalia J. observed that refugee status is about more than simply identifying culpability; it also reflects “a more general consideration: desirability”: *Negusie v Holder, Attorney General*, (2009) 555 US 511 (USSC, Mar. 3, 2009).”

²²⁶ *Supra* note 3 at 14: “There were certainly objections to granting the status of refugee to a person who was not worthy of it.”

²²⁷ See the decision of the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1 at para 102, where the Court stated that Article 1(F) followed from a “natural desire of states to reject unsuitable persons who by their conduct have put themselves ‘beyond the pale.’”

²²⁸ *Supra* note 26 at 525 at fn 11: “the French delegate to the Conference of Plenipotentiaries insisted ‘that it was important not to allow any confusion between [refugees] and ordinary common-law criminals’ (Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.24 (Jul. 17, 1951), at 5)”.

²²⁹ See e.g. *supra* note 135: “Her actions of assuming her daughter’s identity by producing a forged birth certificate to the Irish authority...demonstrates her flagrant disregard for authorities, ability and willingness to produce fraudulent information to foreign authorities, and her willingness to abuse the generous social welfare system of Ireland for the sake of personal gain.”

²³⁰ Juliet Stumpf, *supra* note 6 at 414.

²³¹ *Ibid.*

It is important to acknowledge here that immigration law is far from an illegitimate site for defining the bounds of societal membership. *Au contraire*, it is exactly where that happens much of the time. In the Canadian context, with means such as the points system, the Canadian public through its elected representatives defines exactly who we want in our society, and what kinds of qualities those individuals should have. Work experience, education, fluency in French or English, and youth are among the qualities that are explicitly sought. In this way, we are setting out barriers for entry into our society.

The problem is that the asylum system is not meant to serve this purpose. Refugee law and immigration law, though problematically folded into the same piece of legislation in Canada in the IRPA, serve very different purposes. While immigration law regulates who we choose to allow to join our society, refugee law provides a framework for individuals who are fleeing persecution to seek safety. Conflating the two is a dangerous exercise.

C. The consequences for international refugee law

If *Febles* is, as I have argued, the product of efforts to assert state sovereignty in the face of a (generally unfounded) linkage between migration and security by excluding ex-offender noncitizens who we perceive to be undesirable, then the legitimacy of the asylum system is called into question. First, because the rule of law is weakened when the Supreme Court uses refugee law as a means to exclude asylum-seeking individuals based on political concerns about globalization, security, and group membership. And second, because, as Anthony Anghie and B.S. Chimni have

so compellingly put it, “[a]ny system that purports to be universally valid must surely be assessed in terms of how it deals with the most disadvantaged.”²³²

I am using the rule of law in this context to encompass more than the Diceyan conception, which focused on “the lawful constraint of authority” and “the right to equal individual subjection to the law”.²³³ Susan Kneebone observes in regards to the Diceyan view that “[t]he idea of authority suggests a ‘formal’ or ‘thin’ vision of the rule of law”, whereas “the notion of rights which arises from ideas of equality, citizenship and democracy, and the corresponding duties or responsibilities of the state, refers to the exercise of government. It suggests that something more than formal validity is needed to make a law. This could be called a ‘thick’ or substantive vision of the rule of law, as it embodies values and norms.”²³⁴ Kneebone points out that in elaborating the thick version of the rule of law, various arguments have been posited about the relationship between law and morality.²³⁵ She also contends that the challenges posed by issues around the rights of refugees, which are at the center of debates between the executive and legislative branches of government, make it difficult to separate politics from debates about law and morality.²³⁶

Given the nebulousness of morality and politics, how to frame a thick version of the rule of law that ensures the rights of criminalized asylum seekers is a thorny question. Arguments for the use of a humanitarian principle to persuade states to meet their obligation to assist refugees²³⁷ have

²³² Anthony Anghie & B.S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2:77 *Chin J Int L* at 102.

²³³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London, MacMillan & Co, 1959) as discussed in Susan Kneebone, “The rule of law and the role of law” in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law* (Cambridge: Cambridge University Press, 2009) at 35.

²³⁴ *Ibid* at 35 (footnotes omitted).

²³⁵ *Ibid* at 37.

²³⁶ *Ibid* at 38.

²³⁷ Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004) as discussed in Susan Kneebone, “The rule of law and the role of

been countered by critiques that humanitarianism and justice have very little in common, insofar as “justice rests on a view of equality and similarity between individuals” whereas “humanitarianism rests on a profound inequality between haves and have-nots.”²³⁸ For purposes of this paper, suffice it to say that a thick conception of the rule of law must build in a consideration for human rights.

This is not a simple or straightforward claim. As Catherine Dauvergne has pointed out, though the 20th century has been a time of the “robust flourishing of human rights”, the challenges posed by a perceived asylum crisis have demonstrated the limitations of rights arguments when it comes to refugees.²³⁹ However, the power of law in contemporary western society and the dominance of rights discourse means that the notion of refugees as rights holders must be continually inserted into debates such as the purpose of 1F(b).²⁴⁰

It is impossible to discuss rights in Canada without reference to the *Charter of Rights and Freedoms*²⁴¹, and the way the Charter has been interpreted in relation to noncitizens may mean that the advent of decisions like *Febles* should be unsurprising. Based on a comprehensive review of Charter jurisprudence prior to the *Febles* decision, Catherine Dauvergne posits that, for the most part, the Charter has failed noncitizens.²⁴² The application of international human rights norms and the Charter often go hand in hand when it comes to refugee law, and in terms of the degree to

law” in Susan Kneebone, ed, *Refugees, Asylum Seekers and the Rule of Law* (Cambridge: Cambridge University Press, 2009) at 73.

²³⁸ Catherine Dauvergne, “Amorality and Humanitarianism in Immigration Law” (1999) 37:3 Osgoode Hall LJ 596 at 623.

²³⁹ *Ibid* at 202-203.

²⁴⁰ *Ibid* at 205.

²⁴¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter].

²⁴² Catherine Dauvergne, “How the Charter has failed non-citizens in Canada: reviewing thirty years of Supreme Court of Canada jurisprudence” (2013) 58:3 McGill LJ 703.

which the Charter has “translated” international human rights, Dauvergne concludes that as time has gone on, more recent decisions of the Supreme Court have left less “space” for international law.²⁴³ *Febles* is certainly and troublingly in step with this trend.

It is probably worth noting that the 1F(b) decisions of the Refugee Board that have emerged in the wake of *Febles* fail on both a thin and a thick conception of the rule of law. On a very basic level, *Febles* failed to provide a coherent standard by which individuals can be determined to be excluded, as the analysis of the dataset of decisions above has demonstrated. The law is being applied in an uneven, unpredictable and unprincipled way.

Nevertheless, it is important that in calling for an insertion of the rule of the law into exclusion decision-making, we aim for the thick and not the thin version. While it would be easy to create a bright line rule such as the 10-year presumption in *Jayasekara* and its subsequent strict application by the RPD, the outcome would be such that the human rights of asylum seekers would be imperilled. Canadian society is built upon the notion that being convicted of a crime does not strip an individual of his or her human rights. Apart from life sentences, individuals who have committed criminal offences and served their sentences are permitted to re-enter society, and understood on a legal level to hold the same rights as any other citizen.

The denial of the right to asylum, which is enshrined in the *Refugee Convention*, cannot be a kneejerk reaction to the commission of measurably minor crimes. If we are not going to restrict the application of 1F(b) to fugitives from justice, then there must be a principled and coherent explanation for the expansion of its application. If we accept the underlying reasoning of the

²⁴³ *Ibid* at 723.

majority in *Febles*, then 1F(b) can also be applied where an individual poses an ongoing danger to society, or where the commission of the crime in question has rendered that individual undeserving of refugee status. Dangerousness, while a challenging legal measure to apply, nevertheless has been fleshed out elsewhere (in 33(2) of the *Refugee Convention*²⁴⁴ and section 115 of the *Immigration and Refugee Protection Act*²⁴⁵). Whether the RPD is well-positioned to assess dangerousness is a valid question, but as a legal standard, it is feasible.

It is the question of deservingness that is a dangerous and slippery slope, entwined as it is with subjective notions of morality and worthiness. If this is the legal standard that is to be applied, then our courts will need to do some careful work explicating this notion in a manner that is understandable and replicable by the RPD. The distaste of a Board member for an individual who, due to poverty and marginalization, turned to the sale of drugs or the purchase of a falsified passport in order to function, cannot be the foundation of an exclusion decision.

The Supreme Court's failure to lend any coherence to exclusion decision-making is contributing to our legal system's failure to uphold the rights of criminalized noncitizens, who are among the most disadvantaged individuals in our society. Moreover, to the degree that international refugee law as practiced by signatory states of the *Refugee Convention* is replicating the flaws exhibited by *Febles* (which Hathaway makes clear is currently the case, for the most part), it is also failing the most disadvantaged.

Guy Goodwin-Gill, in a recent piece, advocates for the continuing relevance of international refugee law in a globalized world. In so doing, he acknowledges the problems posed by the

²⁴⁴ *Supra* note 1 at art 33(2).

²⁴⁵ *Supra* note 18 at art 115(2).

growing trend towards the securitization of migration and the perception of migrants as threats.²⁴⁶ However, he lauds what he calls the “cross-fertilization” of international refugee law across jurisdictions, and the attempt to “forge common understandings of common terms.”²⁴⁷ This is a hard pill to swallow, since, while acknowledging that states “will continue to deny protection to those in search of refuge [...] for reasons that are and ought to be irrelevant to their enjoyment of fundamental human rights,”²⁴⁸ Goodwin-Gill cites *Febles* as an example of cross-fertilization because of its coherence with decisions of the U.K. Supreme Court, the U.K. House of Lords, and the High Court of Australia.²⁴⁹ *Febles* is an exemplar of the denial of the right of individuals to seek asylum from persecution, and the fact that it is in step with decisions of other major refugee-hosting developed nations is a harbinger of the weaknesses of the international refugee law regime.

Similarly, Hathaway’s characterization of the text of 1F(b) as a compromise lending legitimacy to the *Refugee Convention* cannot be understood as anything more than a description of the geopolitics of the time, albeit a description that remains relevant today. And, while Kneebone points out that politics and morality are fundamentally intertwined, and a thick rule of law is often understood as encompassing notions of morality, a starkly political compromise cannot be understood as a legitimate application of a thick conception of the rule of law, particularly where it is unsupported by a robust statement of principles.

As has been spelled out above, most national courts around the world have been reluctant to restrict the application of 1F(b) to fugitives from justice because that would not allow it to serve a

²⁴⁶ Guy Goodwin-Gill, “The Continuing Relevance of International Refugee Law in a Globalized World” (2015) 10 *Intercultural Hum Rts L Rev* 25.

²⁴⁷ *Ibid* at 38-39.

²⁴⁸ *Ibid* at 41.

²⁴⁹ *Ibid* at 39-40.

gatekeeping function. By instituting a vague and unprincipled application of the provision, courts are drawing in non-legal political concerns related to fears around national security and the perceived asylum crisis. It is the role of politicians to be attentive to the concerns of the electorate and legislate in response within the bounds of whatever constitutional guarantees may exist. Courts, on the other hand, play a very different role, and while the importance of morality in an understanding of the rule of law seems crucial, this cannot mean a lack of a principled framework for applying a provision with the kind of power that 1F(b) has. If we are going to effectively remove someone's right to seek asylum, we must do so carefully and thoughtfully.

Chapter VI: Conclusion

In her dissent in the *Febles* decision, Justice Rosalie Abella called the *Refugee Convention* the “Rosetta Stone” of refugee protection²⁵⁰; that is, the *Convention* is the foundational textual document of international refugee law, and should be treated with the reverence it is due. Despite the political machinations of the delegates to the General Assembly, the humanitarian purpose of the *Convention* is incontrovertible. The SCC has acknowledged this fact, citing the preamble to the *Convention* for its commitment “to assure refugees the widest possible exercise of . . . fundamental rights and freedoms.”²⁵¹

Despite Justice Abella’s strong statement, *Febles* was largely a disappointment, providing very little in the way of strong guidance to lend consistency and credibility to decision-making in the area of exclusion. However, an analysis of the debates that went on at the Conference of Plenipotentiaries, the divergent jurisprudence on 1F(b), the positions of international commentators, and Canadian jurisprudence makes clear that *Febles* is in step with the understanding of the provision that has been adopted by the majority of courts, various delegates at the Conference of Plenipotentiaries, and even, to some degree, the UNHCR and some leading commentators.

Since 1951, decision-makers and politicians have been careful not to restrict the application of 1F(b) to fugitives from justice. There seems to have always been a desire to leave enough flexibility in the application of this provision that decision makers feel entitled to act from a place

²⁵⁰ *Supra* note 7 at para 71.

²⁵¹ *Ezokola v Canada (Citizenship and Immigration)*, [2013] 2 SCR 678, 2013 SCC 40 at para 32.

of emotion: fear of the other, distaste for ex-offenders, or whatever else the prevailing zeitgeist may be.

In short, though *Febles* purported to be a legal debate about the interpretation of a discrete provision of an international convention, consideration of the broader context reveals that what is really being debated in relation to 1F(b) is not who should be excluded from seeking asylum, but rather, our desire to retain ultimate control over who we perceive to be worthy of membership in our society. On a fundamental level, what is really being decided is who we want to include in our societies, and correspondingly, who we want to exclude. This reality is reflected by the polarization of the debate around 1F(b) from the Conference of Plenipotentiaries to the UNHCR's position papers to international and domestic courts to international commentators.

These underlying and improper concerns meant that the SCC refused to lend clear guidance to the debate in its decision in *Febles*. It is therefore not surprising that in the wake of *Febles*, the RPD has continued to exclude individuals who have committed crimes that are measurably minor, or the seriousness of which would be rebutted by a consideration of the sentence that would be meted out for such a crime in Canada. The RPD's approach and rhetoric when excluding individuals reflects the attitude of the Supreme Court: that the underlying and defining concern in the application of 1F(b) is the worthiness of the individuals in question for purposes of admission into our Canadian society. Strong moralistic statements belie a fear bordering on hysteria of the noncitizen ex-offender asylum seeker, contravening our border norms and requesting admission to our society despite their past transgressions.

This continuing trend is deeply worrying. The SCC's decision in *Febles* and the RPD decisions that have followed it are evidence that Canadian jurisprudence is straying from the purpose of the

Convention, and from the commitment of the signatory states to the *Convention* to uphold the protection of refugees. Rather, the decision is informed by a fear of the other, in this case an ex-offender noncitizen other, who is forced to bear the brunt of western insecurities about a loss of hegemony in the face of globalization and transnationalism.

The Canadian, and even the international, asylum systems risk a loss of legitimacy if they do not adhere in a consistent and transparent manner to the humanitarian norms upon which the system was created. The *Febles* decision creates a problematic precedent that could easily be imported into other aspects of refugee law.

A thick conception of the rule of law needs to be introduced to international refugee law, and concerns about membership must be set aside in order to provide safe haven to vulnerable individuals who are fleeing persecution. The *Convention* contains adequate checks and balances as drafted, without national courts inserting fears about dangerous migrants into provisions where they have no place. Only by restoring adherence to the explicit principles of the *Refugee Convention* can we ensure that the international refugee law system maintains its credibility and legitimacy in a world where the movement of migrants is sure to continue.

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