

Foreign Affairs: Security and Birthright Citizenship Determination in Canada

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The relationship among citizenship, rights, and national security has been much analyzed over the course of the 'war on terror.' In broad and familiar terms, this relationship has been rendered as the invocation of sovereign exceptionalism to ensure the integrity of national borders, with some or considerable sacrifice of individual rights in order to protect the greater good (Agamben and Attell 2005; Daniels, Maklem and Roach 2001). Those who have challenged the limitations on rights have been counseled by national leaders that only evil-doers need fear the ill-effects of these liberal compromises. Good people would come to no harm. And, in Canada at least, assurances were offered that the country's hastily drafted Anti-Terrorism Act would respect constitutionally guaranteed rights. This assertion rested on the government's presumption that the justices of the Supreme Court would be willing to interpret the imposition of statutory and enforcement limits on rights as 'reasonable' given the extraordinary threat posed by terror (Weinrib 2001, 95).

My aim is to position this familiar narrative alongside a number of citizenship determination cases that have been contested in Canadian courts over the last 15 years and that have helped to shape recent reforms to citizenship law as well as on-going debates about birthright citizenship in Canada. The decisions complicate the security narrative as well as the conceptualization of national threat and belonging. In each of the cases I consider, issues of security, national and otherwise, provide a rationale for restricting citizenship entitlement, but unlike liberty and due process interests that have generally been the focus of analysis in the security vs. rights literature, the cases I examine involve gender and marital status equality as the basis for birthright citizenship determination. Equality, blood and national belonging combine in these cases, demonstrating the power of the sovereign in a distinctive register – both limited by equality rights, but also actively articulating who is worthy of inclusion in the 'kingdom of heaven' – or at least the Canadian nation. Conceptions of foreignness and entitlement collide with patriarchal lineage to confound Canada's national mythology of consent-based political membership and inclusive diversity. And the persistent concern with equality and belonging works as a

break on the effort to securitize citizenship – that is, to render citizenship, in the context of security threats, as beyond the scope of political debate (Hansen 1997, Stasiulus and Ross 2006, 335). Courts and governments have certainly attempted to justify limits on equality as the price to pay for national security, but at least in the cases I consider, with uneven success.

The paper begins by setting a theoretical framework for the case analysis. Here I elaborate on the general claims considering birthright citizenship and national belonging as well as sovereignty and security that will frame my discussion. I then examine the cases of *Taylor v. Canada* (2006, 2007), *Benner v Canada* (1994,1997), and *Augier v. Canada* (2004), embellishing this discussion with material drawn from House of Commons debates and journalistic reporting on cases that have raised similar issues. My findings reveal that equality arguments have been surprisingly successful in overcoming national security concerns in the context of birthright entitlement to citizenship. The larger question though, of how it is, in fact, possible to consider birthright citizenship and equality without noticing their profoundly paradoxical relationship, is resoundingly absent from these cases. I conclude with some reflections on the risks and possibilities of political membership determination if these democratic processes were to disavow criteria of birth as the basis of belonging, and what the consequences of such a shift might be for conceptions of the nation.

### *Citizenship, Security, and the Nation*

The state, as Jacqueline Stevens tells us (1999, 2010), is a membership organization. In the context of establishing the founding norms of western liberal democracy, political thinkers sought to differentiate the liberal polity - a polity of formal equality, rights, and opportunity-driven forms of accomplishment - from its monarchical, hereditary, and status-based predecessors. For these liberal thinkers, who advanced the idea that political society was grounded on the idea of a social contract, membership was the product of consent. And indeed, in the images of citizenship ceremonies that are so frequently repeated on the home pages and front pages of our news media, the significance of that consent, and the desirability of the countries in which it is, apparently, foundational, is reinforced (Honig 2001). But these repeated representations of consent belie the fact that, for most citizens, membership continues to be achieved through birth. For members of the Canadian state, as for members of all state-defined political communities, criteria of birth, rather than consent, form the basis of political belonging.

Birthright citizenship has received relatively little analytical or critical attention from citizenship scholars. The apparent ‘givenness’ of birth and the presumed naturalness of ‘the family’ have compelled most citizenship scholars to look elsewhere to interrogate the substance of political belonging, even if they identify birth as a likely foundation for the production of shared identity and values (Bosniak 2000, Stevens 2010, 34). And yet because human reproduction receives social meaning through law - because the law names the child (legitimate/’bastard’), the mother, and, most emphatically, the father (presumptively the husband or co-habiting male partner) - these categories and their

relationships are subject to definition and manipulation for particular state objectives.<sup>1</sup> The cases I discuss below provide rich evidence of this observation.

The idea of 'birthright' citizenship, or citizenship based on blood, rings dissonantly in settler societies such as Canada and the United States. Only 'ethnic nations' characterized by their tribal fealties and fossilized grievances are commonly imagined to uphold conceptions of political belonging that rest in lineage. Surely countries that have been populated by people from everywhere must establish political membership through more formalized mechanisms.<sup>2</sup> And yet they do not. Criteria of birth, whether birth in the territory, or birth to citizen parents, determines citizenship in settler societies as it does in every country of the world (Stevens 2010, 28). And while birth in the territory (*jus soli*) offers a more inclusive principle of belonging than blood (*jus sanguinis*) lineage, distinguishing between *where* one was born, as opposed to (or as well as) *to whom* one was born as the basis of political membership, is not, in fact more democratic, since the criteria of belonging continue to rely on birth rather than consent. As Stevens observes, "the effect of the citizenship criterion of birth in a territory is to sacralize the political borders, not to defetishize birth as a membership criterion" (1999, 61).<sup>3</sup>

That said birth in the territory is a relatively straightforward means of determining citizenship since the demarcation of national borders is generally quite clear.<sup>4</sup> The

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<sup>1</sup> With the advent of reproductive technologies and the legal recognition of same-sex relationships, this process of naming parents and children has become even more complex. In some Canadian provinces (Quebec and Manitoba), the same-sex partner of a woman who gives birth will be deemed the presumptive parent, but in other provinces, notably Saskatchewan, the law has deemed that biological fact (ie. sperm) demands a father (*C. (P) v. L. (S.)* 2005, see also Harder and Thomarat 2012). Reproductive technologies have made it possible that potentially eight people could be deemed the parents of a child conceived with donated sperm and ova. These people would include the egg donor and her partner; the sperm donor and his partner; the intentional parents (presumed to be only two); and the gestational mother and her partner (see Mykitiuk 2002, 791. The *Uniform Child Status Act* 2010 designates 6 potential parents)

<sup>2</sup> The formulation 'people from everywhere' relies on a prior association to somewhere else. And while that association has been positively embraced in the concept of multiculturalism and ethnic diversity in some settler societies, the insistence on origins has the related effect of imposing a site of origin on people. The logic that designates racial identities with particular continents and attaches racist meanings to those identities is a pernicious effect of such a logic. See Sharma and Wright 2008.

<sup>3</sup> Canada's current Minister of Citizenship and Immigration, Jason Kenney, has been particularly concerned about protecting Canadian society from foreign pregnant women, who, he alleges, come to Canada to give birth in order to ensure that their children have Canadian citizenship status. (Brean, 6 March 2012, A6)

<sup>4</sup> There are some extra-territorial provisions for acquiring citizenship through birth in the territory for children who are born to Canadian diplomats, military personnel, or public servants who are serving abroad see Canada *Citizenship Act* R.S.C. 1985, c. C-29 s. 5. As well, children born in Canada to foreign diplomats, or public servants of foreign countries or

acquisition of citizenship as a result of birth to citizen parents is more complex. Canada's various citizenship acts, for example, have invoked a strict practice of patrilineage through which husbands are presumed to be fathers, and both the statuses of marriage and husband were determinative of the citizenship of associated children. In the absence of marriage (ie. a legal means to identify the father), only the mother could be known for certain, and thus a child's citizenship would be obtained from her mother. The explicit gender and marital status discrimination in these provisions, and their interaction with issues of national security, form the basis of the legal challenges that are the empirical subject of this analysis. It should be noted that current Canadian citizenship law maintains the wedlock provisions for people born prior to 1947 while people born after 1947 may now inherit their citizenship from either parent and regardless of their parents' marital status at the time of their birth.<sup>5</sup>

If we shift the emphasis from citizenship to national security, it quickly becomes apparent that the 'people of interest' have tended to be marked as outsiders, hostile visitors, or 'dangerous, internal foreigners' (Dhmoon and Abu-Laban, 2009). Thus, threats to the nation have been understood to arise from 'outside,' a formulation that has the useful nation-building effect of defining the line between 'us' and 'them.' As Janine Brodie observes, security discourses *produce* the nation; they are integral to the "cultivation of the idea of a national community, and the articulation and re-articulation of national subjectivities" (Brodie 2009, 692). As security discourses express the national identity, concepts of foreignness are also expressed and politicized by various actors, with the follow on effect of framing issues of democratic rule and citizenship. In other words, foreignness works as "a site at which the anxieties of *democratic* self-rule are managed" (Honig 2001, 7 italics original). By locating threats in the space of the foreign, and thus outside the national community, citizens, can understand themselves as secure among 'their kind,' as people who are law-abiding, in contrast to risky, foreign others. And when the Canadian government has made mistakes – mis-identifying 'one of us' as 'one of them' as it did in the extraordinary rendition of Maher Arar to Syria - the country's democratic and multicultural values have had to be very publicly and ceremonially reset.<sup>6</sup>

The connections among 'us' are also reinforced through the use of familial metaphors. "Homeland security," the 'family' of western nations, and the post 9-11 rendering of the Canada-US relationship as 'brotherly,' are iterations of connection that evoke common ancestry, ethnic homogeneity and shared values (Cowen and Gilbert 2008, Kaplan 2003). Indeed, the processes that racialize and familialize the national 'we' have intensified and shifted throughout the war on terror. Canada's official discourse of multiculturalism has always overlain a hierarchy of belonging in which people of European, but especially

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international organizations (or employees of those people) do not acquire Canadian citizenship through birth in the territory. Canada *Citizenship Act* R.S.C. 1985, c. C-29, s. 2.

<sup>5</sup> Canada, *Citizenship Act* R.S.C. 1985, c. C-29, s. 3.1(g) and 3.3(b). New restrictions apply if a child is born abroad to a Canadian parent who was born abroad. In that case, the child is not a Canadian citizen. See s. 3.3a of the *Citizenship Act*.

<sup>6</sup> For Arar this process involved a public inquiry, a public apology, compensation, and the firing of high-ranking public officials (Commission of Inquiry, 2006).

English and French descent, claim greatest proximity to ‘authentic Canadianness,’ but this hierarchy has appeared in new forms since 2001. The Conservative government of Stephen Harper, in particular, has invoked a normative form of national attachment that insists on an exemplary love for the country, as well as a deep suspicion of those who are seen as taking advantage of Canadian citizenship. The juxtaposition of the government’s treatment of the Lost Canadians – people who unwittingly lost their Canadian citizenship and stake their belonging on lineage and long-standing attachment to Canada, with the Canadians evacuated from Lebanon in 2007, and who were denigrated as ‘citizens of convenience,’ provides one example of how this dynamic of belonging has played out (Harder and Zhyznomirska 2012).

The interaction of security concerns with the rules of birthright citizenship determination adds other dimensions to the meaning of the Canadian national identity. In this context, the risks posed by the incorporation of the foreign other within the national family, collapses the distance between ‘them’ and ‘us’. First, the ‘foreign other’ may, but for a technicality, be ‘one of us’ – and not so foreign after all.<sup>7</sup> Second, the risks associated with that person mean that their potential citizenship could incorporate various forms of bad behavior as part and parcel of the national family. Thus, the confrontation between national security and birthright citizenship determination evinces a struggle between excluding real or potential risk as anathema to the national character on the one hand, and taking responsibility for all members of the community, regardless of their morality and misdeeds, on the other. There is an additional distinction worth noting here. When citizenship and national security come together, the debate appears to hinge on both the technical rules and the cultural elements of belonging. In cases involving criminality, the more specific threat, the individualized, embodied form of the criminal, determines the extent to which cultural anxieties of belonging and the national character are expressed. And so it is to the cases that we now turn to explore the tensions inherent in the confrontation among security, equality and citizenship determination.

### *Wartime Security and Canadian Citizenship– Pack Up Your Troubles in Your Old Kit Bag*

World War II and its postwar vestiges provide the first context in which we will explore the tensions between security and birthright citizenship. Canada claimed its own citizenship, distinct from Britain, when the country’s first citizenship law came into force on January 1, 1947.<sup>8</sup> Prior to this time, Canadians were deemed British subjects, Canadian nationals, naturalized or, in immigration law only, “Canadian citizens.”<sup>9</sup> The inspiration for a distinctly *Canadian* citizenship status came from Paul Martin Sr., Secretary of State for Canada’s Parliament, who was moved to take legislative action in response to seeing the graves of Canada’s WWII soldiers marked as British subjects (Canada, 2006). The war also inspired the declaration of Privy Council Order 858, which granted citizenship to the wives and

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<sup>7</sup> Note the forgetting of the immigrant history of all non-Indigenous Canadians that is required in order for such a statement to make sense.

<sup>8</sup> *Citizenship Act* S.C. 1946, c. 15

<sup>9</sup> *Canada (Citizenship and Immigration) v. Taylor* 2007 FCA 349 (CanLII) 2007-11-02, para 18. [*Canada v. Taylor*]

children that Canadian soldiers had acquired during their wartime service overseas (Becklumb 2008, 2). Subsequently, if those wives and children were in Canada when the *Citizenship Act* came into force, they were automatically included as citizens.

Problems emerged, however, if the foreign wives and children of Canadian military personnel arrived in Canada after January 1, 1947, and/or left in the interim, and if the children were born abroad prior to their parents' marriage.<sup>10</sup> The birth-out-of-wedlock provisions were especially pertinent for Canada's security policy, since they allowed the country to evade responsibility for sweethearts and children in the event that a soldier died in battle. This was the situation that pertained in the case of *Taylor v Canada*. Joe Taylor Sr., a Canadian WWII soldier, was not permitted to marry his pregnant, British girlfriend in advance of the D-Day invasion since, as his commanding officer reportedly claimed, "Canada was not in the business of producing widows and orphans" (Canada, *Debates* 30 April 2007). Six decades later, when Joe Taylor Jr. launched a legal challenge and a public relations campaign to publicize the unjust denial of his claim to Canadian citizenship, these wedlock provisions were portrayed as an expression of a prim, outdated morality and Taylor clearly rankled at the persistence of his designation as a 'bastard,' even after his parents had married (Bramham 2008; O'Regan 2008). But the presumption in both the press and the Federal Court, that conservative mores underlay the denial of citizenship to 'illegitimate' children was mistaken.<sup>11</sup> In fact, the wedlock provisions were a means to protect Canada's national security.

When Taylor's case was heard before the Federal Court, Taylor was successful in arguing that, among other things, his s. 15 equality rights under Canada's *Charter of Rights and Freedoms* had been derogated when the Minister of Citizenship and Immigration insisted that Taylor's "illegitimacy" prevented him from inheriting Canadian citizenship from his father.<sup>12</sup> When this decision was overturned on appeal, the retroactive application of the Charter was a key source of contention. As well, the Federal Court of Appeal decision cited the explicit intention to avoid retroactivity in subsequent amendments to Canada's *Citizenship Act*. These amendments did, in fact, allow children to inherit their citizenship from either parent, regardless of their marital status at the time of the child's birth, as long as the child was born on or after February 15, 1977.<sup>13</sup> The decision noted that when the amendments were being debated in 1976, Mr. Lewis Levy, the Director of Legal Services of

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<sup>10</sup> *Taylor v. Canada (Citizenship and Immigration)*, 2006, FC 1053 (CanLII) 2006-09-01 [*Taylor v. Canada*]; *Canada (Citizenship and Immigration) v. Taylor* 2007 FCA 349 (CanLII) 2007-11-02; *Scott v. Canada* (Notice of Application in the Federal Court). F-418-12 February 23, 2012.

<sup>11</sup> In his ruling in *Taylor v. Canada*, Justice Martineau stated "it is hard to believe today that citizenship rights would be denied to sons and daughters of Second World War veterans who offered their lives for Canada simply because their parents were not married at time of birth." Para 164.

<sup>12</sup> *Taylor v. Canada*, para 10.

<sup>13</sup> Canada *Citizenship Act* R.S.C. 1985, c. C-29. As we will see below, however, the 1977 amendments imposed additional requirements on children claiming citizenship on the basis of their married Canadian mother's status.

the Department of the Secretary of State, appeared before the parliamentary standing committee. In that appearance, Mr. Levy stated

Now we are proposing... that children will derive their citizenship from either parent whether born in wedlock or not. If we were to go back to provide a sort of retroactive catchall there, the government and the country would be in the position of having to accept as citizens all sorts of – perhaps this might sound a little farfetched but if you want to go back to say the Korean war or Canadian Forces policing expeditions in the Middle East or in Cyprus and so on, and assuming that some of the members of the forces may have been active, and more active than others and they had children, they would have a right to have them declared Canadians and bring them into the country. That is just one thing. You do not know what you would be sweeping up; they might be people that if they were to apply for immigration the Immigration Department would not want to let them in. (cited in *Canada (Citizenship and Immigration) v. Taylor* 2007 para 70).

Mr. Levy's explanation from 1976, and its continued usefulness for the Federal Court of Appeal in 2007 to deny birthright citizenship to the child of a Canadian soldier is indicative of a kind of 'boys will be boys,' "Johnny Appleseed-like vision of [Canadian] servicemen spreading their progeny throughout the world" (Oren 2004, 90)<sup>14</sup> The technicality of out-of-wedlock birth prior to 1977 was then connected to the cultural risk posed by the foreign others who would, despite their Canadian 'seed,' continue to carry their undesirable ethnicities with them, and, along with that suspect origin, the possibility of undesirable behaviors. Evidently, even in 2007, the Federal Court of Appeal was prepared to use whatever dubious tools were available to protect the Canadian nation from the obligations of citizenship entitlement in such cases.

Mr. Taylor did not pursue his case to the Supreme Court of Canada, and thus the Federal Court of Appeal's decision to uphold the wedlock rules for people born prior to January 1, 1947 is still considered good law. Nonetheless, two developments have at least partially mitigated the equality rights limiting effect of *Canada (Citizenship and Immigration) v. Taylor*. First, despite the Federal Court of Appeal's denial of Taylor's claim, the Canadian government, after a great deal of public embarrassment, decided to provide Joe Taylor Jr. with a special grant of citizenship. Clearly this singular response does not resolve the Canadian citizenship claims of other people in similar circumstances.<sup>15</sup> It did, however, satisfy Mr. Taylor, who described his emotional reaction to the citizenship ceremony as 'feeling like he was getting married again' (Foot 2007, A7) and observing that 'it means I can come home to live' (CBC 2007). These familial metaphors worked to fortify Mr. Taylor's claims to Canadian belonging, despite the facts that, until he bought a vacation home in Victoria in 2000, he had only lived in Canada for a few months during his infancy, and that

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<sup>14</sup> Oren's article discusses a similar provision in U.S. law.

<sup>15</sup> Jacqueline Scott whose circumstances of birth were similar to those of Taylor, has recently filed a motion in Federal Court. Unlike Taylor, Scott has resided in Canada for substantial periods of her life.



he had never had a relationship with his Canadian father.<sup>16</sup> Canadianness was ‘in his blood,’ a claim made sensible, despite Taylor’s lack of residence in Canada, by his father’s military service, his mother’s Britishness, and thus his own proximity to Canadian authenticity (O’Regan 2008). It is also worth noting that Mr. Taylor, as an individual, did not pose a security risk to Canada and had no criminal history.

The second development that has partially mediated the Federal Court’s insistence on the non-applicability of *Charter* equality rights for some categories of people born before 1977 and claiming birthright citizenship, is a set of amendments to the *Citizenship Act* that provide an automatic right of citizenship to Canadians born abroad to a citizen parent, regardless of marital status, on or after January 1, 1947 until April 17, 2009. These amendments eliminate the distinctions that the 1977 changes imposed, but they also create a new category of citizenship entitlement for people born after April 17, 2009. Of course, these amendments do not address Mr. Taylor’s situation, and as a result, the wedlock and gender inequality issues persist for people born prior to 1947. Given the advancing age of WWII war brides and babies, the rationale sustaining their lack of entitlement to citizenship may be the threat these people now pose to social security rather than to national security.<sup>17</sup> At the other end of the age spectrum, people born abroad after April 17, 2009, are not eligible for Canadian citizenship if their Canadian parent(s) was also born abroad. This new rule was implemented as a means to prevent citizenship by descent through ‘endless generations born outside of Canada,’ and thus, apparently, ‘to protect the value of Canadian citizenship for the future...’ (Canada, November 2012). People who are rendered stateless as a result of this second generation cut-off may apply for citizenship if, among other things they have not been convicted of a terrorist offence, treason, sabotage, or an act to intimidate Parliament.<sup>18</sup> Thus the security rationale that underscored Canada’s citizenship law from its origins is still in tact for certain classes of citizens, while a new set of security concerns are articulated for emerging generations of *jus sanguinis* citizens.

The *Taylor* case represents the interaction of citizenship law in the context of a general concern for national security as represented by war and various international military, peace-keeping and aid missions. Under these conditions Canada’s political leaders and some of its judges felt that it was, and in some instances, continues to be important for Canada to protect itself from the claims and entitlements of belonging that could arise from the overseas sexual adventurism of Canadian men. As Canada’s citizenship law has developed, the concern for equality has certainly been made manifest in its provisions, but the remaining inequalities, and the construction of new forms of distinction/discrimination, demonstrate the inherent tensions in the sovereignty/security/equality nexus. The cases of *Benner* and *Augier* heighten these tensions through the criminal personages of their principals, but resolve by granting birthright citizenship to convicted felons in order to uphold the broader principles of gender and marital status equality within the rules of citizenship acquisition by descent.

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<sup>16</sup> *Canada v. Taylor 2*, paras 8-10.

<sup>17</sup> See Brodie 2009 for a very useful discussion of the typology and development of Canadian security discourses over time.

<sup>18</sup> *Canada Citizenship Act* R.S.C. 1985, c. C-29, s. 5(5)(f)

*Marriage makes Paternal Lineage post 1947-1977; or It's Hard to be a Woman*

The case of Mark Benner (which predates *Taylor* by a decade), involved a man born in 1962 in the United States. Benner's mother was Canadian and his father was American, but because his parents were married at the time of his birth, the law stated that minor children inherited their citizenship from their fathers, and, moreover, dual nationality was not permitted. Mark Benner was separated from his parents in childhood, and eventually located his mother in Toronto in 1986.<sup>19</sup> According to the record of the Federal Court of Appeal, Mr. Benner lived in Canada under at least two pseudonyms, he had committed a number of serious crimes, and, at the time his citizenship case was heard in federal court, he was serving a prison sentence for manslaughter.<sup>20</sup> He was deported prior to receiving a positive decision from the Supreme Court of Canada in 1997.

Benner's argument was based on a sec. 15 equality rights claim. Benner conceded that he was not born a Canadian citizen, as was clear from the terms of the Canadian Citizenship Act that pertained at the time of his birth. Nonetheless, he was entitled to apply for citizenship through a provision within the 1977 amendments to Canada's *Citizenship Act* that enabled persons born abroad before February 15, 1977 to be granted citizenship on the basis of the Canadian citizenship of either of their parents, on application. He made this application in 1987. The equality issue arose because people who claimed citizenship through a Canadian father did not have to undergo a security check or swear an oath, whereas those applying on the basis of their mother's Canadian citizenship did have to undertake these additional requirements. Not surprisingly, given Mr. Benner's colourful criminal history, his application was rejected because he failed the security check.

Mr. Benner's equality argument did not persuade the justices of the Federal Court and the Federal Court of Appeal. In denying Mr. Benner's application, the justices offered a variety of reasons, the most significant being either that sec. 15 did not apply to an act that predated the *Charter* (no retroactive or retrospective application) and which had, in any event, corrected the discriminatory treatment for people born after February 15, 1977; or that the violation of sec. 15 equality rights performed by the *Citizenship Act* could, nonetheless be saved by sec. 1 of the *Charter* as a reasonable limit on rights and as being "demonstrably justified in a free and democratic society."<sup>21</sup> Other, more contorted reasons for denying Mr. Benner's equality argument included Marceau J.A.'s argument that there was no discrimination based on sex in 1947 and that the law's provisions were simply a reflection of contemporary attitudes.<sup>22</sup> And even if one conceded that there was sex discrimination, that discrimination affected the parents not the child.<sup>23</sup> Both sons and daughters of Canadian mothers married to foreign fathers were treated the same way.

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<sup>19</sup> *Benner v. Canada* (Secretary of State) [1994] 1 FC 250, para 17. QL [*Benner* FC]

<sup>20</sup> *Benner* FC, para 20.

<sup>21</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. s. 1.; *Benner* FC para 47, 50.

<sup>22</sup> *Benner* FC, para 2-3.

<sup>23</sup> *Ibid.*, para 3.

Following this logic and since a third party could not bring a claim for discrimination, Mark Benner lacked standing. For the lower courts, Mr. Benner's criminal record and the risk he thus posed to Canadians were sufficiently egregious to override the broader gender equality issue. As Letourneau J.A. witheringly summarized Benner's claim, the appellant "submits that criminals born outside of Canada to a married Canadian mother ought to be treated in the same way as criminals born outside of Canada to a Canadian father. These criminals ought to be granted citizenship and you cannot grant it to one category, those with a paternal link, and not to the others who have a maternal link."<sup>24</sup>

The Federal Court of Appeal decision in *Benner* also offers a brief survey of the legislative rationales for distinguishing between Canadian mothers and Canadian fathers in the provisions offering this grant of citizenship to people born outside of Canada between January 1, 1947 and February 14, 1977. In short, the oath and security requirements would aid in establishing allegiance to Canada, and ensuring the security of the nation and the safety of the people.<sup>25</sup> Linden, J.A. conceded that, while it would have been preferable to apply the oath and security check to children of Canadian men as well, to do so would have derogated from existing rights.<sup>26</sup> In a classic articulation of negative liberty, Linden asserts that the integrity of the liberal democratic state is upheld when the law maximizes the freedom of individuals rather than mandating a pledge of fealty and expectations of good behavior, however salutary those expressions might be. And adding a bit of patriarchal icing to that liberal democratic confection, Linden J.A. nonetheless maintained that the distinction between maternal and paternal lineage "was not a significant incursion into the equality rights of [maternal lineage claimants], but it allowed the government to pursue the pressing and substantial objectives of the relevant provisions of the *Citizenship Act*."<sup>27</sup>

Letourneau J.A. also examined the parliamentary record to explain the decision to draw a line between people born before and after February 15, 1977. He noted that Parliament chose to respect the national, international and individual implications of retroactive legislation.<sup>28</sup>

For instance, one could lose his foreign nationality if his country of origin did not allow its nationals to have a double nationality. One could avoid compulsory military service. In other words, one could be relieved of duties imposed by his country of origin or could become, by virtue of a new nationality imposed upon him, subject to all kinds of obligations that he does not necessarily want.<sup>29</sup>

This set of considerations represents a telling conflation of birthright and consent based conceptions of citizenship. According to Letourneau, the retroactive awarding of citizenship would be imposed without choice – although one can also imagine a provision,

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<sup>24</sup> Ibid., para 72.

<sup>25</sup> Ibid., para 40.

<sup>26</sup> Ibid., para 44

<sup>27</sup> Ibid., para 46

<sup>28</sup> Ibid., para 69

<sup>29</sup> Ibid., para 69

rather like the one under consideration in the case at bar – in which people could choose to apply for that citizenship or not. But Letourneau also observes that law emerges out of custom and consent.<sup>30</sup> This observation would seem to beg the question as to why membership in a polity, and particularly a democratic polity, is a matter of status and imposition rather than purposeful agreement, individual choice and consent. And yet, Letourneau does not entertain this question, opting instead to regard Benner as an alien and hence subject to the choices of the sovereign.

In weighing the balance between equality and security in Canadian citizenship law, Canada's Federal courts, even in the 1990s, clearly held that security was a more significant virtue. The justices of the Supreme Court, by contrast, regarded Benner's equality claim rather more favorably, and overturned the lower courts' rulings. The Supreme Court dismissed the argument regarding retrospective application, holding instead, that the 1977 *Citizenship Act* had contemporary effects, and thus that Mr. Benner's situation did involve a rightful *Charter* claim.<sup>31</sup> The critical time was not when the person *acquired* a particular status, but when that status was held against that person or disentitled the person to a benefit.<sup>32</sup> The Supreme Court also rejected the argument that the discrimination in the *Citizenship Act* did not apply to the children of Canadian mothers married to foreign husbands, with Iacobucci J stating that Mark Benner was the primary target of the sex-based discrimination and thus that he possessed the necessary standing to raise it.<sup>33</sup> In Iacobucci J's judgment, it did not matter whether historical circumstance or gender stereotypes provided the rationale for the differential treatment of the children of Canadian mothers and Canadian fathers, since the ultimate effect of the legislation was "to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen. In fact, it suggests that children of Canadian mothers may be more dangerous than those of Canadian fathers, since only the latter are required to undergo an oath and security check."<sup>34</sup> This concern, it might be noted, aligns with the anxiety about the potential citizenship demands of unwed foreign women and their children, who, as we saw in *Taylor*, also inspired some of the thinking behind the non-retroactive effect of the 1977 *Citizenship Act*. Clearly the reproductive and thus citizenship-producing activities of women abroad, Canadian or foreign, was a site of regulatory angst.

Having established that the sex-differentiated entitlement to pass on one's citizenship constituted a violation of equality rights, the Supreme Court may have, as Linden J.A. did in the Federal Court of Appeal, nonetheless decided that the security interests of the Canadian nation constituted a reasonable limit on those rights. The Supreme Court did not take this view. While the justices acknowledged that the security and national allegiance objectives of the legislation were pressing and substantial, they did not see an inherent connection between these objectives and the discriminatory means used to realize them.<sup>35</sup> In

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<sup>30</sup> *Ibid.*, para 70

<sup>31</sup> *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, para 44 QL

<sup>32</sup> *Ibid.*, para 56

<sup>33</sup> *Ibid.*, para 77.

<sup>34</sup> *Ibid.*, para 89-90.

<sup>35</sup> *Ibid.*, para 95.

particular, the justices were unmoved by the argument surrounding the negative effects of retroactive entitlement to citizenship, not only because it was unclear why this effect would be worse for children of Canadian mothers, than children of Canadian fathers, or than for children born after 1977 regardless of their Canadian parentage, but also because citizenship based on lineage has never been imposed automatically.<sup>36</sup> Rather, a parent could choose to register the birth of a child or not. The Supreme Court also noted that they could have re-established gender equality by imposing the security check and oath on all applicants, regardless of the sex of their Canadian parent. Ultimately though, because a security check and oath was not required of people born after 1977, the Court felt that the chosen path of abolishing the requirements interfered “far less with the overall legislative scheme introduced by Parliament....”<sup>37</sup> (para 104).

At the level of the Supreme Court, one would not expect concern with the details of Mr. Benner’s particular bad behaviors, since the Court’s interest lies with the principles of the law rather than the facts of the case. Undoubtedly Mark Benner did not fit the model of the ideal citizen, but in the broader context of Canada’s national values of citizenship and how that status should be acquired, the democratic principles that governed the law of lineage rather than Benner’s personal virtues and vices were what mattered. Note again, the perverse imbrication of democracy and birthright that makes it possible to craft the sentence ‘the democratic principles that govern the law of lineage’ as our unifying subtext.

#### *Birth out of Wedlock 1947-1977; or Daddy Was a Rolling Stone (redux)*

While *Benner* concerned the capacity of Canadian women married to foreign men to pass on their citizenship, the case of *Augier v. Canada (Minister of Citizenship and Immigration)*, took up the issue of the capacity of unwed Canadian men who had children with foreign women to pass on their citizenship. *Augier*, heard in 2004, involved a request for judicial review of a refusal to grant citizenship to Gideon (Glenn) McGuire Augier, born in 1966, in St. Lucia to a St. Lucian mother and a Canadian father.<sup>38</sup> Augier’s parents were unmarried, and thus, under the 1947 *Citizenship Act*, which governed Mr. Augier’s status, he acquired his citizenship from his mother. Augier moved to Canada in 1970 as a permanent resident and has lived in Canada ever since. His application for a grant of citizenship was denied in October 2001. In responding to the request for judicial review, the Federal Court held that the immigration officer had been correct in denying citizenship to Mr. Augier, but also found that the relevant section of the *Citizenship Act* (sec. 5) violated the equality guarantees of sec 15 of the Charter, by discriminating on the basis of marital status and gender (in this case, the fact that Augier’s unmarried father could not pass on his citizenship), and thus that these provisions were unconstitutional.<sup>39</sup>

The outcome of this review is relatively predictable, given that it takes place with *Benner* as precedent, but it might also be noted that the case was heard in the intensified national

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<sup>36</sup> Ibid., para 96-97.

<sup>37</sup> Ibid., para 104.

<sup>38</sup> *Augier v. Canada (Minister of Citizenship and Immigration)* [2004] 4 F.C.R. 150

<sup>39</sup> Ibid.

security regime of the post 9-11 moment. Moreover, Mr. Augier's criminal involvement was at least as brightly hued as Mr. Benner's. Indeed, Augier had been convicted of fraud, he was a suspected member of a forgery ring, and he acknowledged his involvement with Russian organized crime, in running immigration scams in Belarus, Ukraine and Russia (Helfend 2003, 36-37; Off 2003). And, when a Canadian investigative news program began examining Mr. Augier's rich background several years after the Federal Court ruling, in 2008, the question of his father's identity also appeared to be in question (W-Five, 2008). Nonetheless, in the strict terms of the constitutionality of Canada's *Citizenship Act*, the Federal Court held that Augier should be entitled to claim citizenship on the basis of his father's Canadian citizenship, and regardless of his parent's marital status. It would be up to a new citizenship officer to determine whether the evidence supporting the identity of Augier's father's was sufficiently persuasive.

Since Augier established that the marital status distinction in the *Citizenship Act* was unconstitutional, how do we make sense of the Federal Court of Appeal's subsequent decision in *Taylor* discussed above? In that case, the court distinguished both *Benner* and *Augier*, holding that the application of the Charter to legislation that had been repealed (the 1947 *Citizenship Act*) would give the Charter retrospective effect that it cannot have, and that, even if *Taylor* was defined as a Canadian citizen under the 1947 Act, he was subject to its loss provisions, having lived outside of Canada for six years and not having registered his intention to maintain his Canadian citizenship by the age of 24.<sup>40</sup>

#### *He Ain't Heavy, He's My Brother*

The courts' rulings in *Benner* and *Augier* did trigger some political efforts to amend Canada's citizenship legislation, although tellingly, security concerns continued to shadow the discussion. In 2004, under the minority Liberal government of Paul Martin, an opposition-sponsored private members' bill was passed that restored citizenship to yet another category of 'lost Canadians' – people born in Canada whose 'responsible parent' took out citizenship in another country, between 1947-1977. As minor children, these people acquired the new citizenship of their fathers, if their parents were married, or their mothers, if their parents were unmarried. Prior to amendment, the *Citizenship Act* required citizenship applicants in this category to reside in Canada for one year, and undergo security and criminal checks. The amendment dispensed with these safeguards, providing an automatic right to citizenship (Canada, *Debates* 30 November 2004). Given that the debate surrounding the bill occurred in the wake of the *Benner* decision and in clear sight of the prospect that dubious characters could lay claim to Canadian citizenship, it is intriguing that the bill's sponsor, a Member of Parliament from a notoriously 'tough on crime' political party, dismissed the security concerns as 'scaremongering.' (Canada, *Debates* February 2005). By contrast, the Parliamentary Secretary to the Minister of Citizenship and Immigration expressed concerns about the lack of safeguards for medical inadmissibility, the lack of a demonstrated commitment to Canada, the risks of permitting hardened criminals to enter Canada after a long absence, and the necessity of heightened scrutiny of citizenship applicants 'in this day of border security and... the alliances of

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<sup>40</sup> *Canada v. Taylor* para 57, 71.

people with certain groups...” (Canada Debates, 30 November 2004 at 13;25). Despite these objections, however, the bill passed.

The inadequacy and inconsistencies in Canada’s rules of birthright citizenship came to a head in the lead-up to the imposition of the passport requirements of the Western Hemisphere Travel Initiative. As of June 1, 2007, Canadians and Americans have been required to produce passports, rather than drivers’ licenses or birth certificates, in order to cross their shared border. In the process of applying for those documents, many people discovered that their long presumed Canadian citizenship was in question. And, not surprisingly, most of these people, and certainly those profiled in the media and who appeared before the Parliamentary Standing Committee on Citizenship and Immigration, were fine, upstanding characters, with an admirable love for Canada (Harder 2010). Some of these people were categorized as “Benner babies,” referring to their exclusion from Canadian citizenship through the same rule that had affected Mark Benner, but the reference certainly did not extend to the criminal dimensions of his case. The public incredulity that emerged around these ‘lost Canadians’ finally compelled the Conservative government of Stephen Harper to implement more thorough-going amendments to the *Citizenship Act*, including, as discussed earlier, the elimination of the 1947-1977 category of citizenship, and the reinstatement of citizenship for anyone born in Canada, or to citizen parents, who had not personally renounced their citizenship.<sup>41</sup> And with regard to the risk of ‘what might be swept up’ into the Canadian fold as a consequence, the Parliamentary Committee’s report on the matter offers a laudable and logical perspective.

The Committee is of the view that lost Canadians who have a significant attachment to Canada should not be subjected to [security] checks at all as a precondition to being granted citizenship. ...It would be consistent with the idea that granting citizenship to lost Canadians is about correcting their status to reflect that these people have been Canadians all along, as opposed to looking at them as new candidates for citizenship. If any lost Canadian with a significant connection to Canada is a criminal or a security threat, that person should be viewed, morally speaking, as a Canadian criminal or security threat (Canada 2007, 24).

In short, the birthright rules of membership in the Canadian state, that is, in the Canadian national family, meant that the short-comings and inadequacies of particular family members would simply have to be accepted.

### *Conclusion*

The Canadian case law and the political debate that unites birthright citizenship and security display a complex dynamic of claims and resistance to belonging, and instrumentalism and principled commitments to equality. As the cases I have discussed demonstrate, the courts and Parliament have struggled to resolve the tensions that this dynamic creates, sometimes insisting that democratic values must be moderated in light of national security concerns, and sometimes insisting that national security can only be

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<sup>41</sup> Canada *Citizenship Act* R.S.C. 1985, c. C-29, sec. 3.1(f-j), sec. 3.6, sec. 3.7

realized if those democratic values are fortified. It is important to emphasize that the applicability of equality arguments to national membership is only obvious, if unevenly determinative, for birthright claims to citizenship. The power of the sovereign to determine the state of exception, and thus to compromise liberal rights, is fully operational in Canada's interactions with immigrants and refugees. Thus, if one can establish a connection to the nation through birth in the territory or birth to citizen parents, that is, if blood (as defined by law) ties a person to Canada, the legitimacy of one's claim to political membership is powerfully reinforced through the safeguard of access to liberal rights.

So what are the risks and possibilities of abandoning birthright citizenship in the interests of forcing liberal democracies to live up to their principles? The risks are considerable, particularly as western governments, including Canada's, openly contemplate new ways to limit access to national space and citizenship. To offer a principled argument against birthright citizenship in the face of a Canadian government that has recently floated the idea of abandoning *jus soli* citizenship to children of non-citizens and has implemented a ham-fisted, second generation limit on *jus sanguinis* citizenship, is, perhaps, a cavalier exercise of academic privilege. And in the immediacy of the need to resist and amend such proposals, an appeal to birthright makes good strategic sense.

On the side of possibility, however, re-thinking the terms of political membership could offer a very different conception of how we live together and who we are to each other. The meaning of 'consent to be governed' and the significance of refusing to consent would require some serious thought about the character of the relationships among the institutions of governing, the governors and the governed. The possibilities of leaving one political community to join another, or perhaps participating in several political communities at once would, as now, require some rules and conditions. And of course, we cannot be naïve about claiming 'inherent rights' or 'human rights' when the institutions of governance are disinclined to recognize such claims. Yet despite these difficulties, when one considers the vicious politics of national citizenship, the insecurity that arises from the policing of borders, and the racism, exclusion, and ethnic tensions that emerge from political communities constituted by kinship – that is, *all* nation-states – the need for alternative forms of political belonging is undeniable. Would we simply replace kinship with some other mechanism of exclusion? Perhaps. But to do so would require a re-politicization, and most importantly, a denaturalization, of political belonging, and, in the process, a valuable opportunity to think hard about the principles of desirable polities.



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