



Session 6: The Enforcement of Immigration Categories

Punishment along, beyond and in addition to the Criminal Law

Immigration Control and the challenges to the rule of Law

João Velloso, permanent resident, University of Ottawa

1) Institutional forms of conflict resolution regarding immigration in Canada:

A quick description of a certain continuous state of exception within the Rule of Law

2) Punishment: administrative style

- Characteristics and examples from Immigration**
- Relationships with other normative systems (Criminal Law, Regulatory Criminal Law, etc.)**



Government
of Canada

Gouvernement
du Canada



Public Safety Sécurité publique

Canada



Citizenship and
Immigration Canada

Citoyenneté et
Immigration Canada



Welcome

Bienvenue

Citizenship and
Immigration Canada

Citoyenneté et
Immigration Canada

Canada

**Institutional forms of conflict
resolution regarding
immigration in Canada**



Immigration and
Refugee Board of Canada

Commission de l'immigration
et du statut de réfugié du Canada

The Immigration Justice System in Canada, a quick overview of:

- Rules of evidence**
- The IRB organization**
- Forms of legal punishment / sanction**

Rules of Evidence

First...

The Immigration and Refugee Board (IRB) “is not bound by any legal or technical rules of evidence ” and “may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances ”.

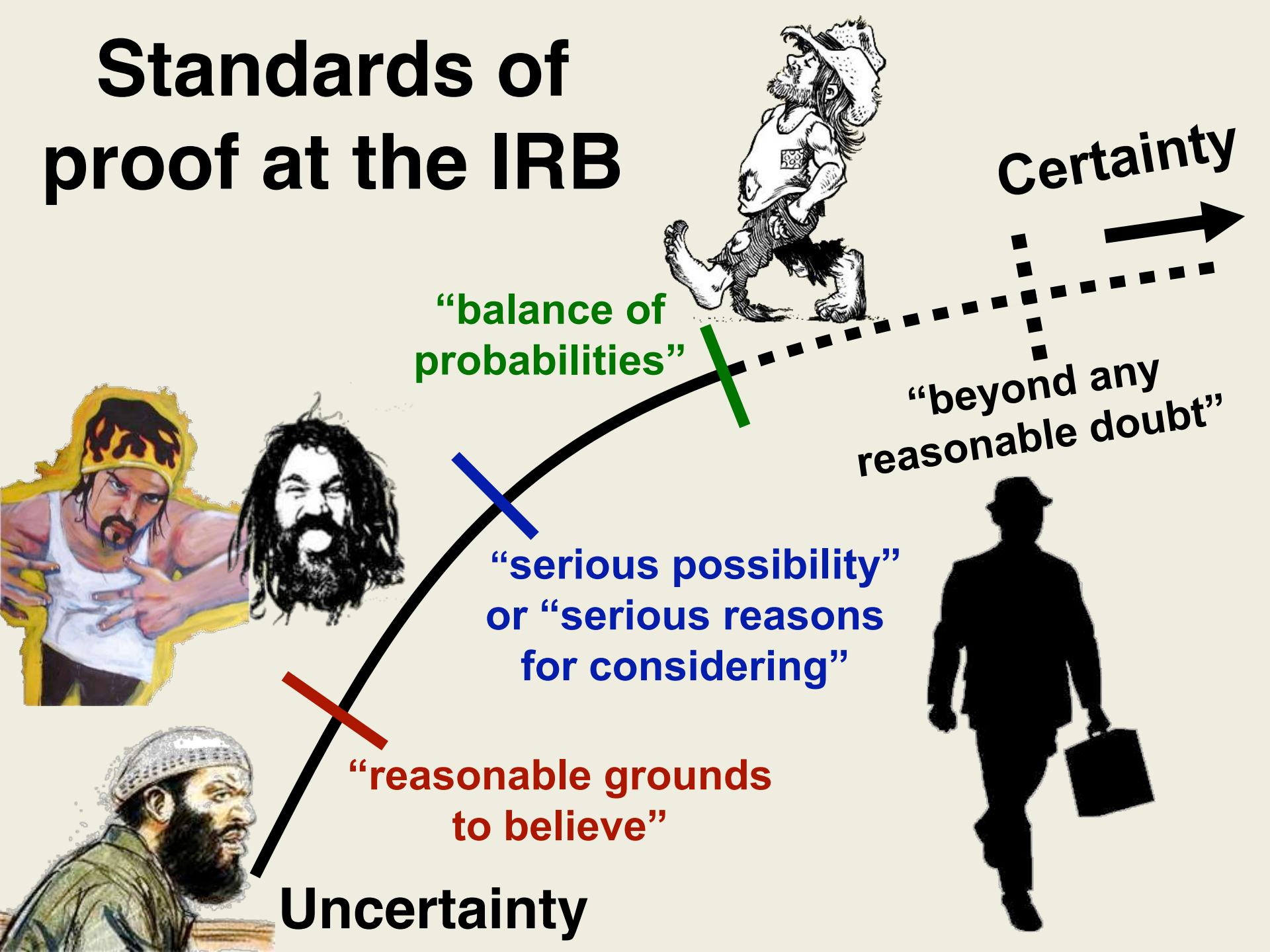
in: *Immigration and Refugee Protection Act (IRPA)*.

“Since the IRB is not bound by the rules of evidence, it may receive into evidence, evidence which would not be admissible under those rules.”

“Thus, the assessment of the evidence should be framed in terms of the credibility and trustworthiness of the evidence, as that is the test set out in the *Immigration and Refugee Protection Act* .”

in: IRB, *Weighing evidence* (guide).

Standards of proof at the IRB



The IRB organization

- **Immigration Division**
 - detention review
 - (in)admissibility hearings
 - **Immigration Appeal Division**
 - removal order appeals
 - sponsorship appeals
 - **Refugee Protection Division**
 - refugee claims
 - **Refugee Appeal Division (delayed – Bill C-280)**
- Characteristics:**
- Adversarial
 - Strict liability
 - Adversarial
 - Jurisdiction over H & C
 - non-adversarial (inquisitorial)
 - “Guess game”

Forms of legal punishment / sanction

. Detention

- general
- security certificates

. Removal orders

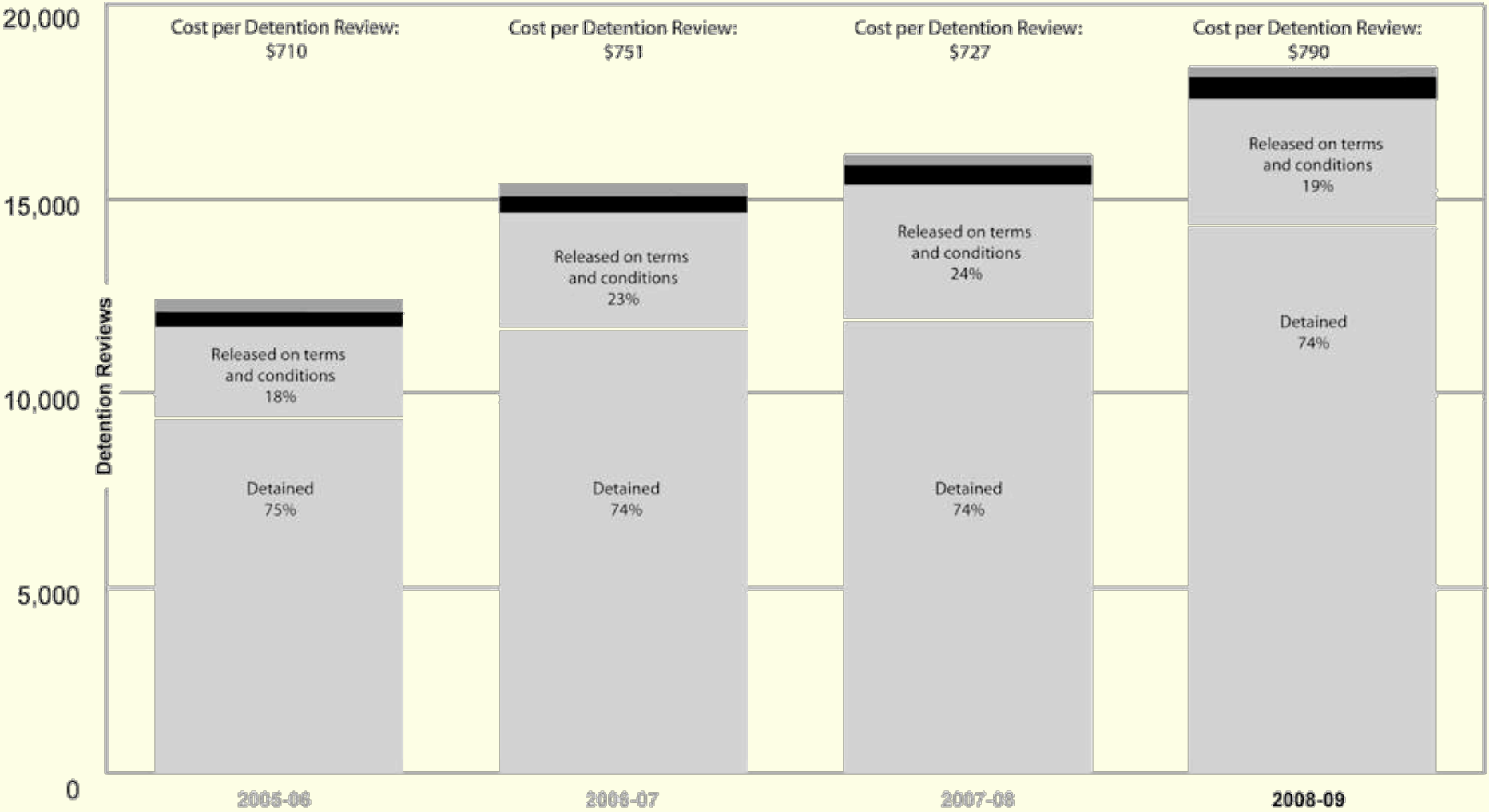
- Departure order
- Exclusion order
- Deportation order

. Surveillance

- release on terms and conditions (detention)
- removal order appeals (stay)

These instruments are not necessarily (criminal) sentences, but police measures.

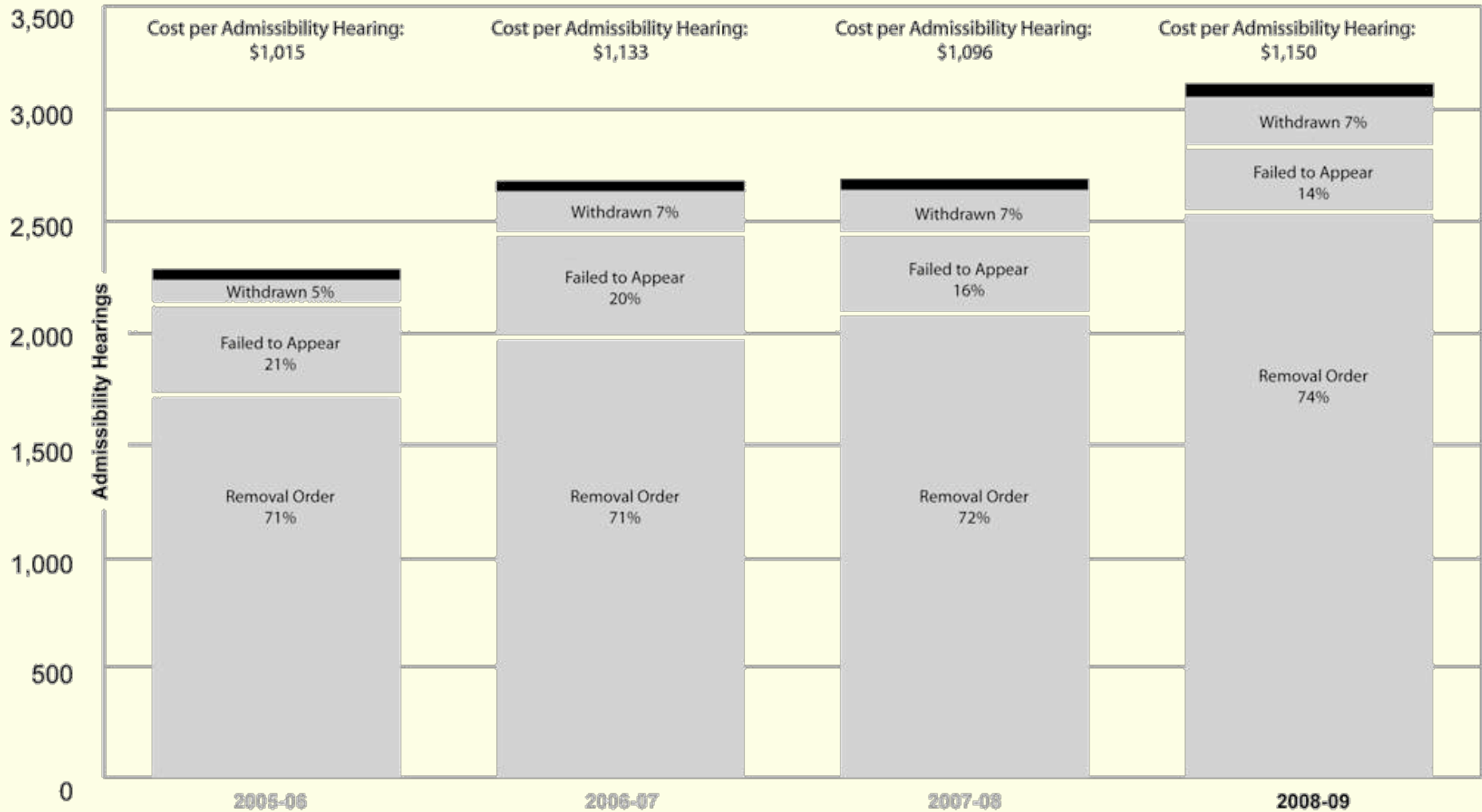
Detention Reviews



Released (change of conditions): 3% in 2005-06 and 2006-07; and 2% in 2007-08 and 2008-09
 Ordered Released (no terms & conditions): 4% in 2005-06 and 2006-07; 5% in 2007-08; and 6% in 2008-09

Note: The totals may not be exactly 100% due to rounding.

Admissibility Hearings



Permission to enter/remain: 3% in 2005-06, 2% in 2006-07 and 3% in 2007-08 and 2008-09

Note: The totals may not be exactly 100% due to rounding.

Punishment: administrative style

It embodies the 'qualities' of administrative law, such as: its efficiency, speed, economy, lack of formality and even accessibility (enforcement)

- **Less procedural guarantees**
- **Punishment may be (and often is) justified by the potentiality of an act (the offence is virtual)**
- ***In dubio pro rex VS in dubio pro reo***
- **Not restricted to immigration**
- **Punishment along, beyond and in addition to...**

If it is not obviously irrational, we're okay...

“The Court's function is to decide not whether, on the evidence before the Board, there were ‘reasonable grounds to believe’, but only whether it was obviously irrational for the Board to conclude that there were.”

In the absence of an allegation that the Board erred in law, or that its procedure was unfair, it was difficult to establish that the Board's conclusion that ‘reasonable grounds to believe’ existed was patently unreasonable.”
(Emphasis mine)

in: *Thanaratnam v. Canada* (2005) F.C.A.

In dubio pro rex

(In case of doubt, we'll rule in the king's favor)

“A conclusion is not patently unreasonable merely because inferences different from the Board's could reasonably be drawn from the evidence.

While no single piece of evidence was determinative in this case, the overall evidence was sufficient to ensure that the Board's decision could not be characterized as patently unreasonable.” (Emphasis mine)

in: *Thanaratnam v. Canada* (2005) F.C.A.

Relationships with other normative systems

**Mostly Criminal Law and Regulatory Criminal Law
(especially its enforcement agencies)**

- **asymmetric incorporation (S. Legomsky)**
- **concurrent punitive and exclusive systems**
- **punitive surplus value (for non-citizens only)**
 - **more time**
 - **more conditions**
- **These are not exceptional cases, but the norm**

Final Considerations

The major problem here is not that it's a matter of criminalization of immigration, but of punitive non criminalization. We are not equipped to deal with such administrative trials and administrative forms of punishment.

Creative / possible solutions?

Article 6 of the ECHR (fair trial)

***Engel v Netherlands* [1976] 1 EHRR 647, 678-9**

The nature and severity of the penalty is also taken in consideration