CITIZENSHIP, NON-CITIZENSHIP AND THE RULE OF LAW

Audrey Macklin*

I. Introduction

Were one to draw a Venn diagram that put leading administrative law judgments in one circle, and leading migration and citizenship jurisprudence in another, *Roncarelli v Duplessis*[1] and *Baker v Canada (Minister of Citizenship and Immigration)*[2] would fall in the overlapping zone. Each judgment belongs in the canon of jurisprudence about the meaning of citizenship and each articulates an expansive vision of the rule of law.

I want to explore aspects of the relationship between citizenship and the rule of law in Canada. I do not advance the extravagant claim that the rule of law has no purchase on the state's assertion of power over non-citizens. But I do contend that a kind of immigration exceptionalism dilutes the rule of law's operation in relation to non-citizens.

I begin by setting out some uncontroversial attributes of the rule of law. I then provide snapshots from legislation, jurisprudence, and "law in action" that exhibit countercurrents at work in migration law that divert, attenuate or dissipate the force of these rule of law principles. I begin on a high note, by considering the role played by citizenship in *Roncarelli* and *Baker* respectively. Next, I present vignettes from the ordinary operation of immigration and refugee law to illustrate the tenuous grasp of standard rule of law principles in this sphere. Finally, I offer tentative suggestions about the source of this immigration exceptionalism.

II . The Rule of Law

A central tenet of the rule of the law is that the exercise of state power through law must be accountable to law. The rule of law thus positions itself against arbitrary exercise of public power. Beyond that, the scope, content, and power of the rule of law are each and all contested. Even Justice Rand's conception, which invokes an

* Director of the Centre for Criminology and Sociolegal Studies, Professor of Law and Chair in Human Rights, University of Toronto. The author thanks Karen Chen for superb research and editorial assistance in the preparation of this article. The author also acknowledges her intellectual debt to preceding Rand lecturers, notably David Mullan and David Dyzenhaus, whose Rand lectures informed, inspired, and influenced this contribution. [This article reflects Professor Macklin's Ivan C. Rand Memorial Lecture, delivered at the University of New Brunswick, Faculty of Law in February 2018 –Eds].

[1] *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli*].

[2] *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*].

"implied bill of rights", is more expansive than some, but I do not intervene in that debate here[3] or purport to offer a comprehensive account of the rule of law.

For 19th century constitutional lawyer AV Dicey, fidelity to the rule of law required subjection of "every man, whatever be his rank or condition, […] to the ordinary law of the realm."[4] The private individual and the state actor were equally subject to law, and equal before the law, and equally amenable to the jurisdiction of the ordinary tribunals." A commitment to the dignity of the legal subject is embedded in the norm that the state is answerable for the exercise of power over private individuals. In recent jurisprudence, the Supreme Court of Canada uses the phrase "culture of justification" to evoke what an administrative state permeated by the rule of law might look like.[5]

The availability of judicial review as the main forum for supervising government officials in their exercise of statutory power is another element of the rule of law. State actors cannot be the final arbiters of their own power; the independence and expertise of the judiciary is important to the legitimacy of review.[6] The intrusiveness of judicial review has been blunted by the doctrine of judicial deference, but access to the courts remains so vital to the Supreme Court of Canada's vision of the rule of law that it endowed judicial review of administrative action with constitutional protection under s. 96 of the *Constitution Act, 1867*.[7]

Finally, a basic requirement of the rule of law is that state officials, tribunals, agencies, boards, commissions, and Ministers who acquire power by statute must act within their statutory mandate. Actions that exceed their jurisdiction are *ultra vires*. This idea of jurisdiction as bounded authority trades on geographic metaphors of bordered space. In this sense, it resonates with the contemporary nation-state defining itself through the policing of geopolitical borders. But whereas judicial review is preoccupied with preventing power from spillage over jurisdictional boundaries, immigration and citizenship law in a world of nation-states is obsessed with protecting borders from unauthorized incursion. To foreshadow my conclusion, one way of expressing the tension animating this article is to suggest that policing borders against

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[3] For a helpful overview of the rule of law and its application, see Mary Liston, "Administering the Canadian Rule of Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) at 131–182.

[4] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 6th ed (London: MacMillan and Co. Limited, 1902) at 189.

[5] For the origins of the expression, see Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10:1 SAJHR 31 at 32; and David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:1 SAJHR 11 at 11–12.

[6] Of course, the independence and unelected status of the judiciary is the basis of a challenge to the legitimacy of constitutional review.

[7] *Crevier v Quebec (Attorney-General)*, [1981] 2 SCR 220, 127 DLR (3d) 1; *Syndicat national des employés de la commission scolaire régionale de L'Outaouais c UES, local 298*, [1988] 2 SCR 1048, 12 ACWS (3d) 23. Article 27 of the New Zealand Bill of Rights enshrines a right to judicial review, *Bill of Rights Act 1990* (NZ), 1990/109 art 27. See Hanna Wilberg, "Interrogating 'Absolute Discretion': Are NZ's Parliament and Courts Compromising the Rule of Law?" (2017) 45:4 Fed L Rev 541.

entry by non-citizens tends to exert greater force than the rule of law's concern about preventing state power from escaping the jurisdictional boundaries of lawful authority.

But for the moment, I simply want to emphasize the dignity of the legal subject, access to judicial review, and fidelity to statutory mandate as foundational and relatively uncontroversial ingredients of the rule of law. I now turn to examining how these principles manifest in immigration and citizenship law.

A. Citizenship and the Rule of Law

Citizenship signifies membership in a community. For the last few hundred years, the most salient community has been the political unit of the nation-state. But citizenship has many facets, two of which matter for present purposes. One is the legal status of citizenship. That is the citizenship that entitles one to enter and remain in Canada. Non-citizens do not have that right. People acquire citizenship status by birth on Canadian soil or to a citizen parent, or by immigrating and subsequently naturalizing as citizens. The person who lacks the legal status of citizenship on the territory she inhabits is a migrant, a non-citizen, a foreigner, an alien, or a stateless person if she has no citizenship anywhere.

A second dimension of citizenship, "substantive" citizenship, addresses the experience of membership in a political community – the enjoyment of the rights, benefits, entitlements, as well as the performance of the duties and obligations of citizenship. One of the most influential accounts of substantive citizenship was offered by British sociologist T.H. Marshall in his 1951 book *Citizenship and Social Class.* For Marshall, "[c]itizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."[8] On this version, citizenship is not a pre-requisite to rights; it is the outcome or the label we attach to those who already enjoy them. Marshall conceived of rights in broad terms, and organized them into three groups: civil rights (freedom of speech, religion and contract, property rights, and the rule of law); political rights (the franchise, the right to stand for office), and social rights (income support, education, and health care).

Marshall's hypothesis was that the gradual expansion and extension of rights to marginalized groups within the nation-state marks the functional enrolment of the people into citizenship. They become citizens – in the substantive sense – through recognition as bearers of political, civic, and social rights. But note that Marshall's model is closed. It presupposes, as do many contemporary scholars, that his subjects are always already citizens in the legal sense. In the model of Marshallian citizenship, the opposite of the citizen is not the non-citizen, or the foreigner, but rather the "second-class citizen." And when someone complains of being a second-class citizen, they expose the gap between the promise of equal citizenship and the reality of

[8] TH Marshall, "Citizenship and Social Class" in Gershon Shafir, ed, *The Citizenship Debates: A Reader* (Minneapolis: University of Minnesota Press, 1998) 93–111 at 102.

discrimination, subordination, and marginalization. The normative task of his project is to make good on the promise of *equal* citizenship. But non-citizens who complain of injustice cannot access the language of second-class citizenship – because the easy rejoinder is that they are not citizens. They must fasten their claim to an identity that transcends or is otherwise independent of citizenship.

Importantly, the rule of law does not disavow non-citizens: all those subject to law are legal subjects for purposes of the rule of law. And yet, within any polity that operates on a citizenship paradigm – which is to say, all states – claims of non-citizens (*qua* non-citizens) that sound in the rule of law seem less audible to courts and to state actors. I want to explore what accounts for the muffling.

B. All Law's Subjects

Frank Roncarelli and Mavis Baker were both outsiders. Their stories are well known to recent generations of lawyers and law students. Mr. Roncarelli was a Jehovah's Witness of Italian background in 1950s Quebec, a time when the Catholic Church and autocratic Premier Maurice Duplessis ruled social and political life in that province. The Jehovah's Witnesses were vehement and relentless critics of Catholicism. Premier Duplessis vowed "a war without mercy[9]" against the Jehovah's Witnesses, and his government enacted various laws to suppress their proselytizing activities. Frank Roncarelli did not distribute Jehovah's Witness literature, but he acted as a surety for co-religionists who were arrested for doing so. That was the motive for permanently revoking his liquor licence and thereby destroying his business. The Quebec statute regulating the sale of liquor in Quebec made the issuance, extension, refusal, or cancellation of a liquor licence a matter of broad statutory discretion. The government's argument was that since a liquor licence was a privilege, not a right, Roncarelli had no basis for contesting whether or how the privilege was revoked: if you are not entitled to something in the first place, you are not entitled to complain if it is taken away.

In Justice Rand's account, Frank Roncarelli is not only a businessman and a Jehovah's Witness, but also a *citizen*, and it is on citizenship that Rand J's judgment repeatedly alights.[10] No other judge directly mentions it.[11] The work that citizenship performs in Justice Rand's judgment is to fortify the legal link joining Roncarelli to his liquor licence in two ways. The first is rhetorical. To be identified as a citizen is to partake in a rank or honorific that entails a certain stature, esteem, and worthiness in relation to the state and the community. A liquor licence may be a statutory privilege,

[9] William Kaplan, *The Jehovah's Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989) at 250.

[10] Matthew Lewans' excellent and illuminating article examines the role of citizenship in *Roncarelli v Duplessis* with particular regard to the influence of US constitutional jurisprudence on Justice Rand, and the consequent distinctiveness of Rand's constitutionalism (as manifested through the "implied bill of rights" jurisprudence) compared to a narrower Diceyan constitutional model. Matthew Lewans, "Roncarelli's Green Card: The Role of Citizenship in Randian Constitutionalism" (2010) 55 McGill LJ 537.

[11] Justice Abbott quotes a passage from Dicey that refers to citizens. *Roncarelli, supra* note 1 at 184.

but Roncarelli is not a mere supplicant, approaching the sovereign with bowed head on bended knee for the favourable exercise of discretion. He stands in a particular and dignified relationship to the state as citizen, and his stature underwrites the insistence that a citizen not be treated arbitrarily.

Justice Rand's presentation of citizenship hews closely to T.H. Marshall's idea of civil citizenship: "the rights necessary for individual freedom – liberty of the person; freedom of speech, thought and faith; the right to own property and to conclude valid contracts, and the right to justice."[12] Both Justice Rand and Marshall adopt the traditional liberal characterization of these freedoms as negative – freedom from government interference – rather than as positive claims on government; Marshall channeled the latter into the category of "social rights".

So, for example, Justice Rand observes that, "in the absence of regulation," the sale of liquor would be "free and legitimate".[13] The state's arrogation of the power to licence the sale of liquor, then, represents a restraint on the exercise of the civil rights of property and contract. This classically liberal characterization of liquor licencing as state diminution of the freedom of the citizen sets the stage for Justice Rand's resolve that the exercise of discretion "should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute".[14]

The other right in play in Justice Rand's judgment is, of course, freedom of religion. Thanks to Premier Duplessis' hubris, the record before the Supreme Court of Canada was replete with proof that Duplessis orchestrated the revocation of Roncarelli's liquor licence to punish Roncarelli for posting bail for fellow Jehovah's Witnesses. Roncarelli was, after all, a man of "some means"[15] who, for that reason, was in a position "as a private citizen, an adherent of a religious group" [16] to furnish bail, an otherwise lawful act. For this, Duplessis sought the "destruction of his economic life".[17]

Justice Rand alerts us to the fact that *equal* citizenship is at stake here because of the discriminatory motives that lay behind Duplessis' action: Roncarelli's right as a private citizen to engage in commerce was denied to him because of his faith. The decision to revoke his liquor licence on grounds irrelevant to any legitimate statutory purpose thus represented nothing less than "arbitrarily and illegally attempting to

[12] Marshall, *supra* note 8 at 94.

[13] *Roncarelli*, *supra* note 1 at 140.

[14] *Ibid.*

[15] *Ibid* at 131.

[16] *Ibid* at 133.

[17] *Ibid* at 141.

divest a citizen of an incident of his civil status."[18] In Marshallian terms, Duplessis attempted to strip Roncarelli of his civil citizenship – to make him a second-class citizen.

The other important thread running through Justice Rand's judgment is the attention to the significance of the state's action from the perspective of the legal subject. Here, it is instructive to compare his judgment to Justice Cartwright's dissent. For Justice Cartwright, the story begins and ends with the fact that a liquor licence is a privilege whose scope and content depends exclusively on the one who confers it. The privilege and the essence of a privilege is that the benefactor can retract it. The legislator could have chosen to impose constraints on its own discretion. But having granted itself unfettered discretion, Justice Cartwright concluded that the Legislature intended the commission "'to be a law unto itself'."[19]

While conceding its formal character as privilege, Justice Rand devotes considerable attention to the important role a liquor licence plays in the life of the citizen, and how its withdrawal detrimentally affects his "vital interests": "[a]s its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it."[20] And so, even though a liquor licence is a mere privilege from the state's perspective, the impact of its revocation on Mr. Roncarelli lends weight to the claim that the state must exercise its discretion in accordance with the purposes of the statute, in good faith, without discrimination or arbitrariness. Although the reliance interest that Justice Rand implicitly invokes is a standard feature of private law doctrine, deploying it in public law enables him to pivot from the state's perspective on the loss of a licence to the citizen's perspective. This is an enduring component of Justice Rand's legacy.[21]

So now let me fast-forward to Mavis Baker: if Frank Roncarelli was an outsider to the Quebec of the 1950s, Mavis Baker was even more an outsider to Canada in the 1990s. She was an impoverished Black woman, a domestic worker, a single mother with several children, and a person living with significant mental health challenges. But more than this, Mavis Baker was a so-called "illegal" immigrant – she had been working and residing in Canada for over 10 years with no legal status. She was a non-citizen with no legal authorization for her presence in Canada, and so an outsider in the most technical, totalizing and starkest sense.

Like Roncarelli, Mavis Baker sought a "privilege" – in her case, the favourable exercise of statutory discretion (known as humanitarian and compassionate

[18] *Ibid* at 143.

[19] *Ibid* at 168.

[20] *Ibid* at 140. Lewans, *supra* note 10 at 559.

[21] It also plays a part in the limited role of legitimate expectations in administrative law.

discretion) permitting her to remain in Canada.[22] She was denied H&C on the basis of a recommendation from an immigration officer who disparaged her for receiving social assistance, bearing several children, working as a "domestic", and exhibiting mental illness. Her children did not count – or, more accurately, did not count in her favour; she was derided for having so many of them. Unlike Roncarelli, she could not invoke her civil citizenship, or the indignity of being treated as a second-class citizen because she was not a citizen at all. Indeed, she was utterly precarious, since she did not even possess any of the lesser, conditional statuses assigned to migrants under Canadian law – permanent resident, temporary foreign worker, international student, visitor, etc. All Mavis Baker had going for her was that she was a person, that she was here, and that she had children in Canada.

And yet, that was enough. Justice L'Heureux-Dubé built upon Justice Rand's judgment in two ways. First, *Baker* re-articulates the principle that discretion is always bounded and informed by law – not just the statute, but also the common law, international law, and the *Charter*.[23] This principle was not dependent on the sphere of government regulation, and so Justice L'Heureux-Dubé could deploy it in the service of humanitarian and compassionate discretion in immigration law. Secondly, as noted above, Justice Rand's focus on the impact of licence revocation on "vital interests" of the licence holder provided a counterweight to the ephemeral, contingent nature of a privilege from the state's perspective. This shift in perspective runs from *Roncarelli*, through the recognition in *Nicholson v Halidman-Norfolk*[24] that even the loss of probationary employment can have drastic consequences, and reaches the impact of deportation on someone whose residence in Canada was entirely outside the law. On its best reading, Justice L'Heureux-Dubé's judgment transposes the rule of law's concern from Roncarelli the citizen to Baker the human.

Baker validated the non-citizen as a legal subject to whom the state is accountable via the rule of law. This should not have been news, but it was. It should not have been news because the rule of law defines its sphere of application self-referentially: the rule of law encompasses those ruled by law. The limiting concept for the rule of law is jurisdiction (the reach of law), not citizenship (the status of those subject to law). So, *of course* the rule of law extends to non-citizens. Even Dicey thought so: he famously created a hypothetical of "foreign anarchists" suspected of (what would now be labeled) terrorism to advance his defence of *habeas corpus*. [25]

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[22] Technically, she sought the favourable exercise of humanitarian and compassionate discretion to remain in Canada while applying for permanent resident status but in practical terms, a successful H&C application assured PR status.

[23] Lewans, *supra* note 10 at 560.

[24] *Nicholson v Haldimand-Norfolk (Regional Municipality) Commissioners of Police* [1979] 1 SCR 311, 88 DLR (3d) 671. *Nicholson* concerned entitlement to procedural fairness in a decision to dismiss a probationary constable. One might understand a probationary position as a category of employment analogous to a "privilege".

[25] AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan, 1885) at 239.

So far, I have recited a fairly cheery story about non-citizens and the rule of law. But now I want to probe more deeply into how the specificity of the immigration context often seems to weaken the adhesive that binds the executive to the rule of law. My examples are ordinary compared to more dramatic post-9/11 laws, policies, and practices that infringed the *Charter* rights of non-citizens in the name of security. I choose my examples precisely because they are routine, because immigration exceptionalism is not so exceptional. I will speak only of Canada, but variations of the same story can be told in all common law countries.

Let me introduce this counter narrative by directing attention to another facet of the *Baker* case. Recall that one of the traditional attributes of the rule of law is that no legislator can enact a law that completely precludes access to judicial review of an administrative decision. No privative clause purporting to oust judicial review, no matter how well-crafted or comprehensive, will thwart a court. Except in immigration law, it seems. Under the *Immigration and Refugee Protection Act*[26] and its predecessor, the *Immigration Act*,[27] no decision rendered under the authority of that statute is judicially reviewable unless a judge of the Federal Court grants leave to seek judicial review:

> 72 (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is,… commenced by making an application for leave to the Court.[28]

The difference between a privative clause and a leave requirement is that in the former, the legislator attempts to directly preclude access to judicial review. In the latter, legislation deputizes a judge to act as gatekeeper. There are no statutory criteria for granting leave to seek judicial review. Federal Court jurisprudence provides limited guidance, stating that leave should be granted where there is a fairly or reasonably arguable case, or a serious issue to be tried.[29] This apparently generous standard, however, bumps up against a culture of suspicion typified by the view expressed by one Federal Court judge that applications for leave are "made in many cases without any merit, merely to secure further delays so the applications for leave should not be lightly granted."[30] Judges are not required to provide reasons for denying leave.

One might contend that the leave requirement does not deny access to the ordinary courts, because the judges who decide leave *are* judges in the ordinary courts. I am not persuaded that making judges the gatekeepers makes the process compliant with the rule of law. What judges do by granting or denying leave to seek to judicial

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

[27] *Immigration Act, 1976*, SC 1976–77, c 52.

[28] *IRPA*, *supra* note 26 at s 72.

[29] See e.g. *Canadian Council for Refugees v Canada*, 2006 FC 1046, 151 ACWS (3d) 108; *Level v Canada (Minister of Citizenship & Immigration)*, 2010 FC 251, [2011] 3 FCR 60.

[30] *Virk v Canada (Minister of Employment & Immigration)* (1991), 13 Imm LR (2d) 119 at para 3, 1991 CarswellNat 34.

review is no more judicial review than the process of deciding a leave to appeal to the Supreme Court of Canada is an appeal.

Several years ago, Professor Sean Rehaag produced a careful and provocative empirical study of the leave process in refugee cases to the Federal Court,[31] with disquieting results: [f]irst, virtually all applications for leave were made by refused refugee claimants, and an average of only about 16% of leave applications were granted.[32] Secondly, the leave-grant rates between Federal Court judges were wildly inconsistent. Over a third of judges deviated more than 50% from the mean.[33] Thirdly, judges who rarely granted leave were generally no better at picking cases that would ultimately succeed on judicial review than colleagues who frequently granted leave to seek judicial review.[34] Indeed, almost 40% of cases that reached judicial review succeeded.[35] In light of the erratic grant rates among judges, the high success rate on judicial review creates the disquieting concern that many of the 85% of applications denied leave might also have succeeded had they reached judicial review.[36]

The justification for the leave requirement is obvious once one recognizes that the Federal Court is also a bureaucratic institution with a large caseload to manage. Like many large administrative bodies, it adopts mechanisms to reduce the burden. Lightening the judicial caseload was also one of the original justifications for privative clauses, albeit subsequent jurisprudence disabled privative clauses from performing this function[37]. It is all the more jarring, of course, that access to first level judicial review – so fundamental to the rule of the law that the Supreme Court constitutionalized it – can be subordinated to the instrumental goals of judicial docket control via the leave requirement. Even so, immigration cases take up over 60% of the Federal Court's docket. One can sympathize with the predicament of an understaffed court with an overwhelming number of cases.

A recent qualitative study that tracks 50 cases from Rehaag's original dataset asks whether "effectiveness of legal representation and the strength or weakness of the underlying refugee claim"[38] operate as factors explaining the low leave grant rates. This important research may shed light on the proportion of leave applications that appear to be made for tactical reasons (since the cases have no discernible merit), and

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[31] Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1.

[32] See Rehaag, *ibid* at 24, 52–53 (Table 2) and 58 (Table 7).

[33] *Ibid* at 27.

[34] *Ibid.*

[35] *Ibid* at 58.

[36] *Ibid* at 23.

[37] Other motives for privative clauses include promotion of expeditious resolution of disputes and skepticism about the capacity or willingness of courts to respect the policy goals animating the legislative scheme.

[38] Pia Zambelli et al., "Not Just the Luck of the Draw?: Exploring Competency of Counsel as a Factor in Federal Court Leave Determinations in Refugee Cases (2005-2010)" [unpublished manuscript on file with author].

on the proportion of otherwise meritorious refugee claims are denied leave to seek judicial review because of poorly prepared leave applications. But even if this qualitative research demonstrates that both factors play a role in explaining why almost 85% of leave applications are denied, it cannot account for the dramatic disparity in leave grant rates between judges, or explain the absence of a correlation between leave grant rate and success on judicial review. And finally, the failure to articulate meaningful criteria for leave decisions, whether through guidelines or reasons, means that the leave process is a discretionary decision that remains opaque and unaccountable within the framework of a "culture of justification." Even if one countenances a legitimate role for a leave requirement, it seems hard to imagine that the current system actually meets any plausible conception of the rule of law's guarantee of access to the ordinary courts.

This system of requiring leave to seek judicial review only applies to decisions taken under immigration law. Non-citizens – and only non-citizens – must ask permission to enter the Federal Court. Gates, boundaries, borders, and exclusion are familiar to many non-citizens, and the leave requirement is only a juridical incarnation. Mavis Baker was fortunate that an unnamed judge granted leave to seek judicial review in her case. But on average, for every Mavis Baker who gets her day in court, another six do not. We cannot confidently conclude that the cases of those six people lacked merit.

III. Borderline Law

I turn now to a case study that figured in the headlines in 2017-18: the irregular entry of asylum seekers into Canada across the Canada-US border at a place other than a designated port of entry (POE). The vast majority enter Quebec, and a few have crossed into Manitoba and British Columbia, sometimes under extremely harsh weather conditions. Some border crossers suffered frostbite and lost fingers. From January 2017 to July 2018, about 31 400 people crossed the border irregularly and made refugee claims in Canada.[39] About a third of irregular entrants in 2017 were from Haiti, followed by Turkey, Nigeria, Eritrea, Syria, Yemen, Sudan and Djibouti.[40] In 2018, the relative and absolute number of Nigerian entrants increased, though by mid-2018, overall numbers of irregular entrants were declining.

The media has repeatedly referred to the phenomenon as "illegal border crossing" and characterized border crossers as exploiting a "loophole" in the Canada-US Safe Third Country Agreement. I interpret "loophole" here to mean a gap in a legal

[39] See RCMP interceptions for 2017 at Government of Canada, "2017 Asylum Claims" (15 June 2018), *Refugees and Asylum*, online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims-2017.html>; For RCMP interceptions in 2018, see Government of Canada, "Asylum Claims" (19 July 2018), *Refugees and Asylum*, online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims.html>.

[40] UNHCR: The UN Refugee Agency, Doc, "Irregular Crossings at The Border: Challenging Myths and Preconceptions" (16 April 2018), online: UNHCR <https://www.unhcr.ca/wp-content/uploads/2018/04/PressBackgrounder-Border-En-25April-website-size.pdf>.

regime that enables (or fails to prohibit) conduct by a person that contravenes the spirit or larger purpose of the law. These border crossers thus represent a law enforcement problem, underscored by attaching the label "illegal" to them. In what follows, I want to flip that narrative by suggesting that the legal regime operating upon those border crossers raises serious concerns about the exercise of state power beyond the bounds of its lawful authority. In other words, it is a rule of law problem.

Since 2017, not long after US President Donald Trump was sworn into office, people began crossing into Canada from the United States at unmarked border crossings and asking for refugee protection. This procession of people was odd: clearly, the border crossers did not wish to present themselves to a Canadian Border Services Agency (CBSA) officer at a designated port of entry to ask for refugee protection. Yet, neither did they attempt to enter clandestinely. Adults, some with children, walked across the border in broad daylight, under the watchful eyes of the media and directly into the chilly embrace of RCMP, who warned them not to enter Canada and then promptly arrested them when they do. A few crossed in the winter, across a frozen field near Emerson, Manitoba. Frostbite cost some men their fingers,[41] and a woman died from exposure.[42] But the overwhelming majority have entered at Roxham Road, Quebec, the site of a former designated port of entry that closed several years ago.

The explanation for the sudden phenomenon of irregular border crossing lies with US politics, the Canada-US Safe Third Country Agreement (STCA), and the *UN Convention Relating to the Status of Refugees*.[43] The Canada-US border spans about 6500 kilometers from east to west, not including the Canada-Alaska boundary. Sprinkled across that terrain are a handful of designated ports of entry – border posts staffed by Canadian Border Services Agency on the Canadian side and Customs and Border Protection on the US side. In between there is the notional line dividing the two countries and little else. The Canada-US border is not secured by a wall, by sentries or (so far) by hovering drones, but by the sheer good fortune that both Canada and the United States are generally decent enough places to live that few feel a desperate need to leave one country for the other. And if they do want to leave, temporarily or permanently, they have reasonable confidence that the ordinary channels available to them under each state's respective immigration laws will enable them to do so.

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[41] Austin Grabish, "Frostbitten refugee will lose fingers, toe after 7-hour trek to cross U.S.-Canada border", *CBC News* (11 January 2017), online: <http://www.cbc.ca/news/canada/manitoba/refugees-frostbite-manitoba-1.3930146>.

[42] Laura Glowacki, "Asylum agreement with U.S. to blame for woman's death near border, lawyer says", *CBC News* (31 May 2017), online: <http://www.cbc.ca/news/canada/manitoba/safe-third-countries-border-crosser-death-1.4140348>.

[43] For the origins of the expression, see Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10:1 SAJHR 31 at 32; and David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:1 SAJHR 11 at 11–12.

All states – including Canada – subscribe to the view that their sovereignty subsists in their power to control their borders, admit whom they like, and reject those they do not. Canada is more insulated by its geography than is the United States, and Canada also expends considerable resources on extraterritorial mechanisms for deterring and deflecting non-citizens before they reach Canadian soil.

Another important difference between Canada and the United States is the legal regulation of irregular border crossing. United States law regards irregular entry as a criminal offence:

> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, … shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both.[44]

In Canada, breaches of the *Immigration and Refugee Protection Act* are not criminalized, although they are regulatory offences that can carry a penalty:

> **124 (1)** Every person commits an offence who
> **(a)** contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act;[45]
> **125** A person who commits an offence under subsection 124(1) is liable
> **(a)** on conviction on indictment, to a fine of not more than $50,000 or to imprisonment for a term of not more than two years, or to both; or
> **(b)** on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both.[46]

One might reasonably assume that entering Canada by walking across an unofficial border crossing contravenes a provision of IRPA. Indeed, this sign at Roxham Road, Quebec, the crossing point for thousands of people since 2017, seems to confirm that:

[44] 8 USC § 1325.

[45] *IRPA*, *supra* note 26 at s 124.

[46] *Ibid* at s 125.

Sign at the Roxham Road border

The sign is not wrong, but it is misleading. In fact, the *IRPA* does not restrict people to only entering Canada at a designated port of entry. Most people are expected to – and do – enter Canada via a designated port of entry by air, sea or land, so labelling entries outside of ports of entry as "irregular" makes sense. But is it unlawful to enter irregularly? The *Immigration and Refugee Protection Regulations*[47] states:

> 27(2) … a person who seeks to enter Canada at a place other than a port of entry must appear without delay for examination at the port of entry that is nearest to that place.[48]

This means that Canada's immigration law does *not* prohibit entering Canada via an unmarked border crossing. Irregular entry breaches immigration law only if the person does not thereafter "appear without delay for examination" at the closest designated port of entry.[49] Irregular entry is not, as such, an unlawful entry. Since almost all irregular border crossers enter in the presence of the RCMP, and the RCMP immediately detain and transfer them to a CBSA officer at a nearby port of entry for examination, these border crossers have not violated s. 27(2) of the *Immigration and Refugee Protection Regulations.*

The foregoing applies to any would-be entrant to Canada, but refugees benefit from an additional exemption even if their entry actually was unlawful. The source is

[47] *Immigration and Refugee Protection Regulations,* SOR/2002-227.

[48] *Ibid* at s 27(2).

[49] See e.g. *R v Campbell*, 2000 BCSC 956, 6 Imm LR (3d) 1. An Indigenous US citizen entered Canada through an unmarked border crossing in order to visit a hereditary chief in British Columbia. He did not report to an immigration officer, and was convicted for failing to do so. He unsuccessfully argued that he was asserted an aboriginal right under section 35 of the Constitution.

the *UN Convention Relating to the Status of Refugees* (*Refugee Convention*).[50] Canada ratified in 1969 by signing the Optional Protocol; the United States did so in 1968.

Canadian law incorporates the definition of a refugee contained in the *Refugee Convention* as:

> a person who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
> (a) is outside each of their countries of nationality and is unable or, by reason of that fear, is unwilling to avail themselves of the protection of each of those countries, or
> (ii) not having a country of nationality, is outside their country of former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.[51]

The *Refugee Convention* obliges a State Party to protect a person who arrives at its borders and meets the definition of a refugee. The immediate legal consequence of refugee status is protection from *refoulement* – expulsion to the person's country of nationality. Once recognized as a refugee – or a "person in need of protection" under the *IRPA*, refugees may embark on a path to permanent residence and, ultimately, citizenship.

All states – including Canada – chafe under the obligations of the *Refugee Convention*. Canada receives a trivial number of asylum seekers compared to states closer to refugee-producing regions, but any increase from the status quo triggers melodramatic marine metaphors of "waves," "floods," and "surges". States regard people arriving spontaneously as threats to sovereignty, even though asylum seekers behave exactly as the *Refugee Convention* anticipates they will, and states who signed the *Refugee Convention* did so of their free sovereign will. Asylum seekers do no more than ask states to fulfill their voluntarily assumed obligations.

Of course, not everyone who claims asylum necessarily meets the definition of a refugee, but one cannot determine that in advance of a refugee determination process, which in Canada is performed by the Immigration and Refugee Board.

Front line states that are adjacent to conflict zones may not be able to resist the mass influx of people fleeing war, natural disaster and violence, but states that are geographically remote have more options, and many arguably breach their international legal obligations in exercising them. Like virtually all states, Canada strives to minimize the number of asylum seekers who reach its borders. Having ocean on two sides, the Arctic to the north and the United States to the south has already insulated Canada from asylum seekers more than most countries of the world. Canada is far away from refugee producing regions and it is hard to reach. Yet, successive

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[50] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954, accession by Canada 4 June 1969) [*Refugee Convention*].

[51] *IRPA*, *supra* note 26 at s 96.

governments have continued to explore ways to seal Canada off even more effectively, on the basis that the *Refugee Convention*'s prohibition on expelling refugees to face persecution (refoulement) does not preclude states from doing everything possible to prevent them from arriving in the first place.

> The most basic and ubiquitous barrier facing asylum seekers is the visa requirement, which certifies permission to enter and must be obtained in advance of arrival. This is the main tool against spontaneous arrival, but citizens of wealthy industrial states of the global north are exempt from the visa requirement. Their spontaneous arrival is not regarded as a menace to sovereignty.

There are many types of visas and most people from most countries of the world require one as prerequisite to entry. Entering Canada without a required visa is an offence under Canadian immigration law. As a matter of explicit policy, Canada imposes visa requirements on nationals from countries known to produce refugees, and then systematically refuses to issue visas to citizens of those states. Canada also posts immigration "integrity officers" to foreign airports who scrutinize and peremptorily deny boarding to travelers with allegedly suspicious travel documents, and deputizes airline officials to do the same. The *IRPA* also imposes carrier sanctions on airlines and shipping countries that transport improperly documented migrants to Canada. Because these tools operate beyond Canada's borders, the legal violence of exclusion from Canada is less visible but no less real than the physical violence observable at, for instance, the US border with Mexico. The net result is that it is virtually impossible for asylum seekers to lawfully travel to Canada to seek refugee protection.[52]

It is not news that refugees, in desperation, resort to irregular means of travel and entry, using smugglers, fake visas, or clandestine entry. The drafters of the *Refugee Convention* knew this, and so inserted the following provision into Article 31 of the *Refugee Convention*:

> The 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.

Section 17 the *Regulations* partially mirrors this provision by ensuring that irregular entry is not a breach of the *IRPA* unless the person fails to present themselves to authorities without delay. Canada also implements this international obligation via s.

[52] As a response to the irregular crossing of Nigerian nationals from the US to Canada in 2018, the Canadian Minister of Immigration, Refugees and Citizenship urged the United States to cease issuing US visitor visas to Nigerians. This suggests that Canada is more restrictive in its visa policies than the US, at least regarding Nigeria. See e.g. Ingrid Piritz & Michelle Zilio, "Immigration Minister Ahmed Hussen to visit Nigeria to try to contain flow of asylum claimants", *The Globe and Mail* (7 May 2018), online: <https://www.theglobeandmail.com/canada/article-immigration-minister-ahmed-hussen-to-visit-nigeria-to-try-to-contain/ >.

133 of the *IRPA*, which prevents a person who makes a refugee claim from being charged with an offence under s. 124(1)(a) pending disposition of their refugee claim:

> 133 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.[53]

Under Canadian law, asylum seekers who arrive at a port of entry and make a refugee claim will typically be inadmissible to Canada because they do not have the required visa. But refugee claimants without valid visas are conditionally admitted to Canada in order to determine whether they are refugees. If they are declared as refugees (protected persons), they will not be charged with entering without a visa.[54] If they are not found to be refugees, they will not likely be charged anyway, but simply removed from Canada as someone who is inadmissible to Canada for entering without a visa. The same principle applies to someone who enters at an unmarked border crossing and fails to proceed to a designated port of entry without delay. Note, however, the epistemic lag: one cannot know whether the entry was unlawful at the time of entry; its legality depends on the subsequent outcome of the refugee determination process.

What I have just described is how the system worked up to 2004, and how it works today at airports, maritime ports, or at Immigration, Refugee and Citizenship offices all over Canada. It works this way everywhere except at designated ports of entry along the Canada-US border. In the years prior to 2004, many refugee claimants – about 30-40% – entered Canada at designated POE at the Canada/US border.[55] They came via the United States for a few reasons: first, the United States is more accessible than Canada for many asylum seekers. They may have travelled overland from Central or South America, or flown into the United States. The reasons why some subset of asylum seekers entering the US ultimately sought refugee protection in Canada rather than the US were diverse, and ranged from the presence of kin or community in Canada, or the belief that Canada would be more likely to extend refugee protection than the United States. Over the years, Canada's asylum recognition rate has fluctuated, but it would be an error to assume that in the years since 2004, it has always or even usually been significantly higher. Nevertheless, certain kinds of refugee claims, such as those based on gender-related persecution, have garnered greater recognition in Canada than the United States.

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[53] *IRPA*, *supra* note 26 at s 133.

[54] See e.g. *United States v Redha*, 2003 MBQB 153 at paras 29–30, [2003] 11 WWR 707.

[55] Canadian Council for Refugees, "Closing the Front Door on Refugees" (December 2005), online: <http://ccrweb.ca/sites/ccrweb.ca/files/closingdoordec05.pdf>.

The Canadian government had long sought a way to reduce the number of asylum seekers reaching the Canadian border via the United States.[56] In 2004, following European precedent, Canada persuaded the US to enter into what is now known as the Canada-US Safe Third Country Agreement. It requires asylum seekers to make their refugee claim in the first country of arrival as between the United States and Canada. The Agreement says that if a person on the US side of the border seeks to make a refugee claim in Canada, that person will be deflected back to the United States, and vice versa. This is expressed in the STCA as authority by Canada or the United States to return a person to the country of last presence. Country of last presence, in turn, is defined in the STCA as "that country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry."[57] Though the Agreement is reciprocal, the flow of asylum seekers at the Canada-US border has disproportionately flowed from south to north. One reason is that it is generally easier to enter the United States. In the year prior to the Agreement, about 14,000 asylum seekers came through the US to Canada; about 200 went the other way.[58] The practical aim of the Agreement was to reduce the number of asylum seekers entering Canada by deflecting them back to the United States.

Recall that the Refugee Convention prohibits Canada from expelling a refugee to a place where he or she faces a well-founded fear of persecution. But the Canada-US Safe Third Country Agreement permits Canada to avoid inquiring into whether an asylum seeker is a refugee (and thereby protected) by deflecting that person back to the United States, which then assumes responsibility for refugee determination. The legality of this reciprocal agreement hinges on a political judgment that refugees should seek protection in the first country they reach that provides an accessible, fair, human rights compliant refugee determination process, and that both Canada and the United States meet that standard. The first state (Canada) cannot deport a refugee claimant to a second state (the country of nationality) without first adjudicating their refugee claim according to a fair, human rights respecting process, but it can send the refugee claimant to a third country (United States) by agreement.

Section 159.4 of the *Regulations* explicitly state that the Canada-US STCA does *not* extend to airports, marine ports, and locations that are not ports of entry. This was a deliberate decision, not an oversight or "loophole" accidentally left unfilled.[59]

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[56] For an analysis of the 2004 Canada-US Safe Third Country Agreement, see Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2005) 36:2 Colum HRLR 365 [*Disappearing Refugees*].

[57] *Agreement between the Government of Canada and the Government of the United States of America For cooperation in the examination of refugee status claims from nationals of third countries*, United States and Canada, 5 December 2002, Can TS 2004 No 2 art 1, s 1(a) (entered into force 29 December 2004) [*STCA*].

[58] See *STCA*, *supra* note 57 and US, *Hearing before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary House of Representatives*, 107th Cong (Washington, DC: 2002) at 69, 78, online: <http://commdocs.house.gov/committees/judiciary/hju82363.000/hju82363_0.HTM>.

[59] See *Zhao v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 1384 at para 17, 2015 CarswellNat 10516. In this case, the Refugee Appeal Division declined to hear an appeal because its members felt that those who enter irregularly should not be "'given an advantage […] over other claimants

The reasons for confining the STCA to the land ports of entry are pragmatic: deflection at an air or maritime port can only work if commercial airline carriers and ships agree to re-transport people who are physically coerced back to where they embarked and the countries of embarkation agree to re-admit them. Commercial carriers refused to cooperate in this enterprise.

As for applying the STCA across the full length of the land border, the 2002 Parliamentary Standing Committee on Citizenship and Immigration considered and rejected this option for several reasons. First, applying the Canada-US STCA along the entire land border would create incentives for surreptitious entry across a border. Vigilantly surveilling the entire border seems neither feasible nor desirable. Some border crossers, seeking to evade detection, would adopt hazardous routes and get injured or die. Others would succeed in entering and make refugee claims inland at immigration offices, at which point it would be difficult (if not impossible) to determine how they entered Canada. The Committee referred to the failure of the inland application of the European Union's multi-lateral safe third country regime (the Dublin Regulation):

> some countries had to establish time-consuming and costly processes for inland claims. It is understandable that the government would like to avoid diverting resources to a procedure intended to establish the inland claimants' route to Canada, rather than using that time and money to actually decide their refugee claims.[60]

These predictable impediments have not deterred some politicians from calling for the government to designate the entire land border a "port of entry".[61] A close reading of the *IRPA* suggests that the proposition is unintelligible within the existing statutory framework, but the demand for it helpfully exposes the discrepancy between border as place and bordering as practice.

The border of cartographic imagery, the line that separates two geo-political patches of territory, is two-dimensional. That is to say, the border is immaterial. One is either on one side of it (and in country X) or on the other side of it (and in country Y). Walls, fences, and ditches purport to impede movement from one side to another, but they are not thresholds. An official port of entry performs the distinct and vital task of creating an infrastructure of liminality where states can assert governance of and at the border. A port of entry has an entry and an exit, and between those two portals lies, in functional terms, a thickened border. It is a fiction, of course, made more obvious

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who respect and observe Canada's border control laws'." The Federal Court disagreed with RAD, citing the Regulatory Impact Analysis Statement that acknowledged irregular entry was a possibility envisaged by the government: "'An increase in refugee claims at inland offices and airports may result as persons seek to bypass the provisions of the Act and Regulations. Citizenship and Immigration Canada (CIC) is developing operational contingency strategies to prepare for these impacts and will reallocate resources as required.'" See also Regulatory Impact Analysis Statement, (2004) 138 C Gaz II, 1624.

[60] House of Commons, Standing Committee on Immigration and Citizenship, *The Safe Third Country Regulations: Report of the Standing Committee on Citizenship and Immigration* (December 2002) at 10 (Chair: Joe Fontana) [*STCA Regulations*].

[61] *House of Commons Debates*, 42nd Parl, 1st Sess, No 284 (24 Apr 2018) at 1020 (Michelle Rempel).

by the operation of ports of entry at airports, which are indisputably within state territory. Ports of entry must be understood less as fixed locations than as part of the process of bordering, which happens inside state territory, extraterritorially, wherever biometric data can be stored, retrieved, and shared, as well as along the jurisdictional boundary we conventionally understand as "the" border.

When the STCA authorizes border officials of either state to return an asylum seeker to "the country, being either Canada or the United States, in which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry," it presupposes that the asylum seeker is, at that moment, making a refugee claim in a space that is neither Canada nor the United States. Other provisions of the immigration legislation make it clear that designated ports of entry are spaces in which immigration officials are present and able to perform various functions, such as examination for purposes of entry (*IRPA* s. 27) or acceptance of an application to renounce permanent resident status (*IRPA* s. 46(1.1)).

Ports of entry create a contained space that operates as a legal threshold, and populates it with state officials. But between ports of entry, this infrastructure does not exist. There is no place and no authorized officer present to which one could address a refugee claim.[62] By logical necessity, the refugee claimant who crosses from the US to Canada between ports of entry is always already physically present in Canada immediately prior to making her refugee status claim. Canada is her country of last presence under the STCA, not the United States. The STCA does not authorize the return to the US of a claimant who is already in Canada when she makes her refugee claim. This is the consequence of how borders are materialized through physical and human infrastructure in order to enable states to perform the functions of inclusion and exclusion of goods and people.

Having said this, it is something of a distraction to focus on whether the entire Canada-US land border could be deemed a port of entry, or whether the exchange of biometric data might better expose asylum seekers who transited through the US en route to Canada[63]. The dilemma posed by the irregular entry of asylum seekers is not a technical problem of how to better detect which asylum seekers transited through the United States in order to return them there. It is a rule of law problem: can Canada continue to lawfully deflect the entry of asylum seekers at designated ports of entry under the terms of the Canada-US Safe Third Country Agreement?

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[62] The RCMP who intercept irregular border crossers eventually deliver them to CBSA officers at a port of entry, where asylum seekers formally ask for refugee protection.

[63] In June 2018, the Minister of Citizenship and Immigration proposed "modernizing" the STCA through the exchange of biometric data with the United States that would purportedly enable Canadian officials to determine whether an asylum seeker had been in the United States prior to Canada. This would presumably resolve the problem of determining how asylum seekers who apply at an inland office originally entered Canada. See Teresa Wright, "Hussen floats ideas to modernize Safe Third Country Agreement with U.S.", *CBC News* (29 May 2018), online: <http://www.cbc.ca/news/politics/ahmed-hussen-modernize-agreement-1.4682962>.

The question matters because the alleged safety of the United States is the predicate and the justification for what is otherwise a breach of Canada's international legal obligations under the Refugee Convention. Commentators who describe irregular border crossers as taking advantage of a loophole in the Canada-US Safe Third Country Agreement have it exactly backwards. As noted earlier, the fact that people who seek refugee protection use irregular means to enter does not make their entry unlawful under immigration law if they subsequently succeed in their refugee claim. Far from exploiting a loophole, they behave exactly as the drafters of the Refugee Convention and Canadian law predict they will.

The only thing that has changed is that until 2004, refugee claimants rarely resorted to irregular border crossings because they could simply present themselves to CBSA officers at a designated port of entry and ask Canada for refugee protection in an orderly, efficient, and safe manner. Now they cannot. The Canada-US Safe Third Country Agreement exploits an ambiguity in the *UN Convention Relating to the Status of Refugees*, which imposes on states a legal obligation not to *refoule* a refugee to a country where he or she faces persecution, but is silent about states' evading their obligation by deflecting asylum seekers to a third country. One might say that Canada (inspired by EU precedent) found a loophole in international refugee law and filled it with the Canada-US Safe Third Country Agreement[64].

The United Nations High Commissioner for Refugees did not object to the Canada-US STCA in 2004. Article 8(3) of the STCA required Canada and the United States to produce a review of STCA implementation within the first twelve months. In that context, the UNHCR provided a monitoring report in 2006 that examined the impact of the STCA on asylum seekers subject to it, namely those arriving at designated port of entry along the Canada-US border. The project involved two protection consultants, a schedule of monitoring activities (included in the report), and specific objectives agreed upon and communicated to the parties. While noting various flaws, the UNHCR monitoring report refrained from serious criticism of either Canada or the United States regarding the safety of their respective refugee determination systems.[65]

In response to the increase in irregular crossings in 2017, the UNHCR representative in Canada has observed the conduct of Canadian authorities toward asylum seekers who cross into Canada outside official border crossings. Unlike the asylum seekers observed in the 2006 UNHCR report, irregular border crossers are not subject to the STCA. There has been no replication of the STCA monitoring project undertaken by the UNHCR in the first 12 months of the STCA. Nor has the UNHCR publicly disclosed any subsequent monitoring reports about STCA conformity with international refugee law.

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[64] Audrey Macklin, "A Safe Country to Emulate? Canada and the European Refugee", Hélène Lambert, Jane McAdam & Maryellen Fullerton, eds, *The Global Reach of European Refugee Law* (Cambridge: Cambridge University Press Online, 2014), 99–131.

[65] United Nations High Commissioner for Refugees, Monitoring Report, "Canada - United States 'Safe Third Country' Agreement 29 December 2004 – 28 December 2005" (June 2006), online: <http://www.unhcr.org/home/PROTECTION/455b2cca4.pdf>.

According to the Canadian Representative of the UNHCR, his US counterpart confines the UNHCR's limited monitoring resources to the busier southern US border with Mexico.[66] The inference I draw is that neither the UNHCR in Canada nor in the United States directly monitors the treatment of asylum seekers returned from Canada to the US, nor United States' compliance with the criteria for designation as a safe third country within the meaning of the STCA.

In 2008, the Canadian Council for Refugees, the Canadian Council of Churches, Amnesty International, and an unnamed Colombian refugee claimant (John Doe) challenged the legality of the STCA.[67] The main argument was that the United States was not, in fact, a safe country for asylum seekers to obtain a fair, human rights compliant refugee determination process. By designating the United States as safe for purposes of rendering refugee claimants ineligible to seek protection in Canada, the Governor in Council (Cabinet) violated the provisions in the *IRPA* authorizing it to designate a third country as safe if it met stipulated criteria.

> 102. (1) The regulations may … for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions
>
> (a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;
> (b) making a list of those countries and amending it as necessary; and
> (c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).
>
> (2) The following factors are to be considered in designating a country under paragraph (1)(*a*):
> (a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
> (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
> (c) its human rights record; and
> (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

The challenge succeeded before the Federal Court.[68] Justice Phelan ruled in favour of the applicants, finding that the United States was not a safe third country because its policies and practices with respect to refugee claims did not actually comply with its obligations under UN *Refugee Convention* and the *Convention Against*

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[66] Email correspondence with Jean-Nicolas Beuze, United Nations High Commissioner Representative for Canada, 5 June 2018 [on file with author].

[67] See *Canadian Council for Refugees v R*, 2007 FC 1262, 69 Imm LR (3d) 163 and *Canadian Council for Refugees v R*, 2008 FCA 229, 73 Imm LR (3d) 159. For a thoughtful critique of the judgments, see Efrat Arbel, "Shifting Borders and the Boundaries of Rights: Examining the Safe Third Country Agreement between Canada and the United States" (2013) 25:1 Intl J Refugee L 65.

[68] *Canadian Council for Refugees v R*, 2007 FC 1262, *supra* note 67.

Torture to not *refoule* refugees to persecution or torture. Therefore, the Governor in Council acted unreasonably in designating the US a safe country to seek refugee status. In addition, the Governor in Council violated ss. 7 and 15 of the Canadian *Charter of Rights in Freedoms* in so doing.

The Federal Court of Appeal overturned the Federal Court decision primarily on administrative grounds.[69] The Federal Court of Appeal ruled that the Justice Phelan erred in thinking that the US' actual compliance with the UN *Refugee Convention* and the *Convention Against Torture* mattered to the legality of the Cabinet's designation. According to the Federal Court of Appeal, the *IRPA* only required Cabinet to consider the statutorily required factors in s.102(2). Having considered the factors, Cabinet fulfilled its statutory duty.

In the Federal Court of Appeal's opinion:

> Once it is accepted, as it must be in this case, that the GIC has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant Articles of the Conventions, there is nothing left to be reviewed judicially.[70]
>
> […]
>
> It follows that the fact that the respondents believe, and that the Applications judge agreed, that the U.S. does not "actually" comply is irrelevant since this was not the issue that the Applications judge was called upon to decide […]. [71]

One way of understanding the difference between the approach of the Federal Court of Appeal and the Federal Court is to align them with Justice Cartwright and Justice Rand respectively in *Roncarelli v Duplessis*. Recall that I described Justice Cartwright as measuring the legality of the exercise of discretion from the perspective of the state: a liquor licence is a privilege that remains within the discretion of the state to grant, withhold or withdraw, and if the statute places no restrictions on the exercise of discretion, then no limits exist. Roncarelli has no right to the licence, and he has no right to complain about its revocation. Justice Rand adopts the perspective of the legal subject, and takes into account the import of the licence and the impact of its cancellation on the holder. Roncarelli may not have a right to a liquor licence, but denying it to him inflicts serious injury to his livelihood and so the discretion to withdraw his liquor licence must be exercised in a principled, non-arbitrary way.

In the STCA case, the *IRPA* does stipulate criteria relevant to the exercise of discretion. But for the Federal Court of Appeal, what the statute requires of Cabinet is only that they consider those factors; neither the rigour of the consideration nor the outcome matter. In other words, the impact of the designation of the United States as

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[69] *Canadian Council for Refugees v R*, 2008 FCA 229, *supra* note 67.

[70] *Ibid* at para 78.

[71] *Ibid* at para 80.

a safe country for asylum seekers is formally irrelevant to the legality of the designation. The Federal Court, however, proceeds from the position that the statute requires and authorizes the court to inquire into whether the evidence supports the conclusion that the United States is a safe third country. Why? Because if Cabinet certifies the United States as a safe country when it is not, an asylum seeker returned from Canada to the United States may unfairly be denied refugee protection by the United States and *refouled* to face persecution in their country of nationality. In short, the impact on refugees will be catastrophic. The Supreme Court of Canada denied leave to appeal in the Safe Third Country Agreement litigation in 2009.[72]

When the STCA was implemented, I predicted an increase in irregular entry of asylum seekers to Canada.[73] This did not materialize over the next dozen years, and so it seemed I was wrong. Perhaps asylum seekers did not perceive the United States as an unsafe country to seek refugee protection, or at least not unsafe enough to warrant the hazards of crossing irregularly into Canada. That changed in 2017. Donald Trump was elected as President of the United States in 2016 on a wave of xenophobic and anti-Muslim rhetoric and campaign promises.

Irregular border crossing has rarely been an issue between Canada and the United States. Ordinarily, numbers apprehended while crossing are small enough that they do not warrant media attention. But the number of irregular border crossers since 2017 has been relatively high and counting entrants has been reasonably easy, because the border crossers are irregular but not evasive. They want to get caught.

[72] *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v Her Majesty the Queen*, 2009 CanLII 4204 (SCC).

[73] See Macklin, *Disappearing Refugees*, *supra* note 56.

Asylum Claims and Interceptions Monthly Report - Calendar Year 2017/18[74]

RCMP Interceptions 2017						RCMP Interceptions 2018					
	QB	**MB**	**BC**	**NB, SK, AB**	**Total – RCMP**		**QB**	**MB**	**BC**	**NB, SK, AB**	**Total – RCMP**
Jan	245	19	46	5	**315**	**Jan**	1458	18	41	0	**1517**
Feb	452	142	84	0	**678**	**Feb**	1486	31	48	0	**1565**
Mar	654	170	71	2	**897**	**Mar**	1884	53	33	0	**1970**
Apr	672	146	32	9	**859**	**Apr**	2479	50	31	0	**2560**
May	576	106	60	0	**742**	**May**	1775	36	53	5	**1869**
Jun	781	63	39	1	**884**	**Jun**	1179	31	53	0	**1263**
July	2996	87	51	0	**3134**						
Aug	5530	80	102	0	**5712**						
Sept	1720	78	79	4	**1881**						
Oct	1755	67	68	0	**1890**						
Nov	1539	38	46	0	**1623**						
Dec	1916	22	40	0	**1978**						
Total 2017	**18 836**	**1018**	**718**	**21**	**20 593**	**Total 2018**					**10 744**

In the first six months of 2018, the RCMP apprehended approximately 10 800 asylum seekers crossing from the US into Canada between designated ports of entry. As in 2017, over 95% crossed at Roxham Road, Quebec.

When the Parliamentary Standing Committee on Citizenship and Immigration studied the proposed Safe Third Country Agreement in 2002, witnesses warned of the risk that closing land ports of entry to asylum seekers would divert them to other entry points along the border. The Committee recognized "the fairly orderly system that now exists at Canada's ports of entry, including the land border [where all] claimants are fingerprinted, photographed and issued instructions for medical examinations." The Committee also acknowledged that "[t]his will, of course, not occur if people avoid reporting to border posts". The spectacle of irregular border crossing could create a "public backlash" against refugees, because irregular entries "tend to create intolerance" – even though irregular entry is a direct result of barring access to regular entry. In response to these concerns, the Committee recommended as follows:

> Should the Agreement fail to decrease the number of claims being referred to the Immigration and Refugee Board, and should an increase in the number of illegal entries to Canada be apparent, the government must be prepared to exercise its authority to suspend or terminate the Agreement.[75]

Fifteen years later, the hypothetical became reality. Given the volume of people crossing the border between designated ports of entry in 2017, one might ask why the government did not simply suspend the STCA so that people could, as they did pre-

[74] See RCMP interceptions, *supra* note 39.

[75] *STCA Regulations*, *supra* note 60 at 10, and *STCA*, *supra* note 57 art 10 s 2–3.

2005, approach designated ports of entry and claim refugee status. This restoration of the *status quo ante* would avoid the disorder and inefficiency of intercepting and managing irregular crossings. In other words, why not heed the recommendation of the Committee in 2002? The answer does not lie in principle, or law, or evidence-based policy, but in politics. The mediatized spectacle of migrants crossing irregularly imprints them with the stain of criminality, however wrong that may be in fact and in law. As long as they are cast as exploiting a 'loophole' in the Safe Third Country Agreement, suspending the STCA so asylum seekers can resume claiming refugee status at a designated port of entry will look like a concession rather than a solution. The distorted logic might be captured by this analogy: people cross the street at designated crosswalks. One day, the law prohibits people wearing black from crossing the street at designated crosswalks. People wearing black start crossing in the middle of the road between crosswalks and are labelled jaywalkers – illegal street-crossers. Reversing the law so that people wearing black can once again cross at the crosswalk is resisted because law breakers must be punished. Lawmakers cannot appear to be "capitulating" to illegality, even if they are reversing an irrational policy that manufactured illegality.

In the meantime, the same public interest litigants who litigated the Safe Third Country Agreement a decade ago – along with different asylum seekers – are relitigating the legality of the Safe Third Country Agreement post-Trump. Since taking office in January 2017, President Trump has arguably supplemented and amplified support for the claim that the US is not a safe country for people to obtain refugee protection. Not all laws, policies, and practices adopted by his administration would directly affect all asylum seekers entering Canada, although they contribute to creating a climate of hostility, xenophobia, and vilification for non-citizens and Muslims – or anyone presumed to fit those categories.[76] The Trump anti-immigration catalogue includes reversal of the Obama-era measures protecting "Dreamers", the notorious "Muslim ban" on immigrants from Muslim majority states,[77] resettlement of Muslim refugees, militarization of the southern border with the Mexico, increased powers to deport irregular migrants, and penalties for non-collaborating states and municipalities. Measures specifically targeting asylum seekers or people in refugee-

[76] During a White House meeting, Trump called immigrants "animals," saying of those who seek to cross the border illegally: "These aren't people, these are animals, and we're taking them out of the country at a level and at a rate that's never happened before." On many occasions, Trump has read a poem to compare immigrants and refugees to a "vicious snake." He has also frequently referred to immigrants from Mexico as "rapists." See Julie Hirschfeld Davis, "Trump Calls Some Unauthorized Immigrants 'Animals' in Rant", *The New York Times* (16 May 2018), online: < https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>; Eli Rosenberg, "'The Snake': How Trump appropriated a radical black singer's lyrics for immigration fearmongering", *The Washington Post* (24 February 2018), online: <https://www.washingtonpost.com/news/politics/wp/2018/02/24/the-snake-how-trump-appropriated-a-radical-black-singers-lyrics-for-refugee-fearmongering/?noredirect=on&utm_term=.c5c916913cf0>; and Katherine Krueger, "Trump Resurrects His Most Infamous Anti-Immigrant Statement to Smear Migrant Caravan", *Splinter News* (5 April 2018), online: <https://splinternews.com/trump-resurrects-his-most-infamous-anti-immigrant-state-1825026371>.

[77] For a timeline of the "Muslim ban" suspending entry of immigrants from listed Muslim majority countries (and now North Korea and Venezuela), see "Timeline of the Muslim Ban", *ACLU Washington* (blog), online: <https://www.aclu-wa.org/pages/timeline-muslim-ban>.

like situations (some of which have been judicially halted or superseded by other policies) have included the following:

- Criminal Prosecution of asylum seekers for illegal entry[78]
- Automatic and indeterminate detention of all asylum seekers arriving at the southern border, whether they enter irregularly or appear at a port of entry requesting asylum[79]
- Separation of children from parents at the southern border (whether presenting at a port of entry or entering irregularly); indeterminate detention of families[80]
- Refusal to process asylum claims made at a port of entry[81]
- Cancellation of Temporary Protected Status for nationals of Sudan,[82] Nicaragua,[83] Haiti,[84] El Salvador,[85] Liberia,[86] Nepal,[87] and Honduras.[88]

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[78] "Punishing Refugees and Migrants: The Trump Administration's Misuse of Criminal Prosecutions", *Human Rights First* (January 2018), online: https://www.humanrightsfirst.org/sites/default/files/2018-Report-Punishing-Refugees-Migrants.pdf [*Punishing Refugees*]. As a State Party to the UN Refugee Convention, the United States is also bound by Article 31 of the Convention, which prevents prosecution of refugees for unlawful entry.

[79] "Fear Mongering and Alternative Facts: The Trump Administration's Attacks on Asylum", *Human Rights First* (19 March 2018), online: <https://www.humanrightsfirst.org/sites/default/files/Fear-Mongering-Alternative-Facts.pdf>.

[80] Caitlin Dickerson, "Hundreds of Immigrant Children Have Been Taken From Parents at U.S. Border", *The New York Times* (20 April 2018), online: <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html>.

[81] "Crossing the Line: US Border Agents Reject Asylum Seekers", *Human Rights First* (May 2017), online: <https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf>.

[82] Reuters Staff, "U.S. ends temporary protected status for Sudanese but extends it for South Sudanese", *Reuters* (18 September 2017), online: <https://www.reuters.com/article/us-usa-immigration-sudan/u-s-ends-temporary-protected-status-for-sudanese-but-extends-it-for-south-sudanese-idUSKCN1BT2RL?il=0>.

[83] Reuters Staff, "U.S. to end protected status for Nicaraguan immigrants in 2019", *Reuters* (6 November 2017), online: <https://www.reuters.com/article/us-usa-immigration-protections/u-s-to-end-protected-status-for-nicaraguan-immigrants-in-2019-idUSKBN1D704X>.

[84] Miriam Jordan, "Trump Administration Ends Temporary Protection for Haitian", *The New York Times* (20 November 2017), online: <https://www.nytimes.com/2017/11/20/us/haitians-temporary-status.html>.

[85] Miriam Jordan, "Trump Administration Says That Nearly 200,000 Salvadorans Must Leave", *The New York Times* (8 January 2018), online: <https://www.nytimes.com/2018/01/08/us/salvadorans-tps-end.html?mtrref=www.google.com>.

[86] Michael D Shear, "Trump Ends Temporary Immigration Status for Thousands of Liberians", *The New York Times* (27 March 2018), online: <https://www.nytimes.com/2018/03/27/us/politics/trump-temporary-immigration-status-liberians.html>.

[87] Reuters Staff, "U.S. says to end protected status for 9,000 Nepalese immigrants", *Reuters* (26 April 2018), online: <https://www.reuters.com/article/us-usa-immigration-nepal/us-says-to-end-protected-status-for-9000-nepalese-immigrants-idUSKBN1HX2X4>.

[88] President Trump reportedly called Haiti and African states "shithole countries" when explaining his opposition to TPS for nationals of those states. Josh Dawsey, "Trump derides protections for immigrants from 'shithole' countries", *The Washington Post* (12 January 2018), online: <https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-

- Reduced ability of asylum seekers to obtain legal representation for asylum claims[89]
- Elevation of the standard for satisfying a 'credible fear' of persecution necessary to prevent expedited removal from the United States without adjudication of an asylum claim[90]
- Reversal by Attorney-General Sessions of jurisprudence that resulted in refugee protection for women fleeing domestic violence and people fleeing gang violence.[91]
- Reversal of requirement for full hearing of all asylum claims before Immigration judges[92]

At least some – possibly several – of these measures violate international refugee law and human rights obligations binding on Canada and the United States. In June 2018, the United Nations High Commissioner for Human Rights condemned the practice of separating children from parents in order to deter migrants and asylum seekers, noting that, "the practice of separating families amounts to arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child"[93].

The post-Trump election policies and practices exacerbate those features of the US asylum system that, in 2008, led the Federal Court of Canada to conclude that the United States asylum regime did not comply with Article 33 of the UN *Refugee Convention*, which protects refugees from *refoulement.*[94] Cumulatively, they provide a welter of new evidence about the altered character of the United States as a putatively safe country for asylum seekers to obtain refugee protection that did not exist in 2009, when the prior STCA litigation came to an end.

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countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.2ff5892103b5>. See also Richard Gonzales, "Trump Administration Ends Temporary Protected Status For Hondurans", *NPR* (4 May 2018), online: <https://www.npr.org/sections/thetwo-way/2018/05/04/608654408/trump-administration-ends-temporary-protected-status-for-hondurans>.

[89] *Punishing Refugees, supra* note 78 at 3–4.

[90] *Ibid* at 5–6.

[91] Katie Benner & Caitlin Dickerson, "Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum", *The New York Times* (12 June 2018), online: <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html>.

[92] Antonio Olivo, "Advocates say Sessions's decision to toss rule on asylum hearings endangers thousands", *The Washington Post* (7 March 2018), online: <https://www.washingtonpost.com/local/social-issues/advocates-sessions-decision-to-toss-rule-on-asylum-hearings-endangers-thousands/2018/03/07/24b63b24-2214-11e8-94da-ebf9d112159c_story.html?utm_term=.88c280a09589>.

[93] Office of the High Commissioner for Human Rights, "Press Briefing Note on Egypt, United States and Ethiopia" (5 June 2018), online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174&LangID=E.>.

[94] See the Federal Court's analysis of US compliance with Article 33 of the Refugee Convention, *supra* note 67 at paras 143–240.

Consider this comparison: a Honduran woman is subject to ongoing, brutal domestic violence from her spouse in a country. Honduras has the highest femicide rate in the world. Her husband threatens to kill her if she leaves. The police do nothing to protect women in her situation, and she gives up seeking their assistance. She flees with her children. If she could reach Canada to make her refugee claim, it is unlikely that she or her children will be detained. If she can establish the elements of her claim before the Immigration and Refugee Board, her refugee claim and her children's claim could be accepted. If she attempts to make an asylum claim in the United States, she and her children will be arrested and prosecuted for illegal entry and they will be detained under harsh conditions, possibly separately. And, the woman's refugee claim will be refused. She will be deported back to Honduras.[95] The Canada-US Safe Third Country Agreement dictates that this woman must make her refugee claim in the United States because it is a safe country for her to seek and obtain refugee protection.

In order for the current round of litigation to surmount the Federal Court of Appeal precedent, the actual consequences to asylum seekers of returning them to the United States must be regarded as relevant to the legality of designating the United States as safe. Asylum seekers must matter in law. Justice Rand in *Roncarelli*, and Justice L'Heureux-Dubé in *Baker* offer a vision of the rule of law that would mandate attention to the impact of state action on those subject to it; the Federal Court of Appeal rejected that vision.

When individuals cross irregularly into Canada at Roxham Road in the presence of an RCMP officer, the same ritual performance is re-enacted over and over: the RCMP officer recites a scripted warning to border crossers that it is illegal to cross into Canada, that they will be committing a crime if they do so, and will be arrested. Because border crossers have typically been informed in advance about what to expect,[96] and so they cross anyway, state that they wish to seek protection in Canada. The RCMP officer arrests them and deliver them to CBSA for processing as refugee claimants under the *IRPA*. I explained earlier that irregular entry does not violate the *IRPA* as long as an individual presents herself for examination at a port of entry without delay. In any event, refugees cannot be penalized for unlawful entry. So, are RCMP officers lying to border crossers when they warn them that they will be committing an unlawful act? Not exactly.

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[95] *Matter of A-B-, Respondent*, 27 I&N Dec 316 (AG 2018), online: <https://www.justice.gov/eoir/page/file/1070866/download>. See also John Washington, "ICE Is Sending a Message to the World's Asylum Seekers: The US Is No Place of Refuge", *The Nation* (29 May 2018), online: < https://www.thenation.com/article/ice-is-sending-a-message-to-the-worlds-asylum-seekers-the-us-is-no-place-of-refuge/> and Robert Moore, "At the U.S. border, asylum seekers fleeing violence are told to come back later", *The Washington Post* (13 June 2018), online: < https://www.washingtonpost.com/world/national-security/at-the-us-border-asylum-seekers-fleeing-violence-are-told-to-come-back-later/2018/06/12/79a12718-6e4d-11e8-afd5-778aca903bbe_story.html?utm_term=.3250b86 3b4e6>.

[96] See for example this pamphlet prepared by refugee support group Plattsburgh Cares, "For Asylum Seekers Crossing Into Canada", *Plattsburgh Cares*, online: <https://plattsburghcares.org/wp-content/uploads/2018/04/newenglish6.pdf>.

The Canadian *Customs Act*[97] governs payment of duty on goods imported into Canada. It applies, for example, when a Canadian shops abroad and re-enters Canada. The individual declares the value of purchases upon entry to Canada and may be required to pay duty. Section 11 of the *Customs Act* states as follows:

> **11 (1)** Subject to this section, every person arriving in Canada shall, except in such circumstances and subject to such conditions as may be prescribed, enter Canada only at a customs office designated for that purpose that is open for business and without delay present himself or herself to an officer and answer truthfully any questions asked by the officer in the performance of his or her duties under this or any other Act of Parliament.[98]

The illegal act prompting the arrest of border crossers is failure to present at a designated port of entry in order to declare imported goods. The substantive unlawful act to which the *Customs Act* is addressed is not entry as such, but the payment of duty on imported goods. No one alleges that refugee claimants entering Canada irregularly are evading the payment of duty and I know of no instance where a refugee claimant was actually tried or convicted of an offence under the *Customs Act*. Yet it is s. 11 of the *Customs Act* that enables the RCMP to warn – and the public to accept – that irregular border crossers commit an "illegal entry" into Canada.

Here is an actual form recording the arrest of an irregular border crosser. Note that the nature of the event is described as "illegal entry", but the offence is "s. 11, Non report, customs act". No breach of the *IRPA* is indicated.

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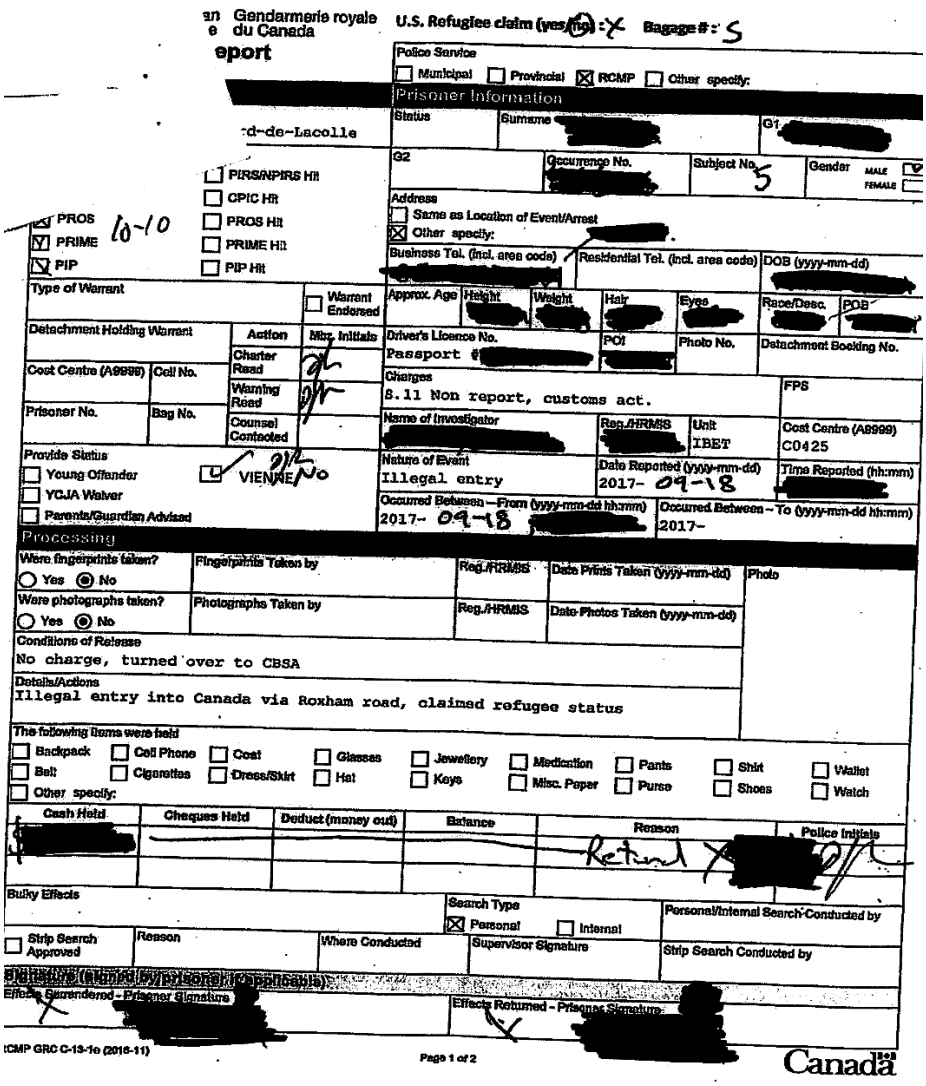
[97] *Customs Act*, RSC 1985, c 1.

[98] *Ibid* at s 11(1).



gn Gendarmerie royale e du Canada
eport

U.S. Refugee claim (yes/no): X Baggage #: 5

Police Service
☐ Municipal ☐ Provincial ☒ RCMP ☐ Other specify:

Prisoner Information

:d-de-Lacolle

Status | Surname [redacted] | G1 [redacted]
G2 | Occurrence No. [redacted] | Subject No. 5 | Gender MALE ☐ FEMALE ☐

☐ PIRS/NPIRS Hit
☐ CPIC Hit
☐ PROS Hit
☐ PRIME Hit
☐ PIP Hit

☐ PROS 10-10
☒ PRIME
☒ PIP

Address
☐ Same as Location of Event/Arrest
☒ Other specify: [redacted]

Business Tel. (incl. area code) [redacted] | Residential Tel. (incl. area code) | DOB (yyyy-mm-dd) [redacted]

Type of Warrant | ☐ Warrant Endorsed
Approx. Age | Height [redacted] | Weight | Hair [redacted] | Eyes [redacted] | Race/Desc. [redacted] | POB [redacted]

Detachment Holding Warrant | Action | Mbr. Initials
Driver's Licence No. | POI | Photo No. | Detachment Booking No.
Passport # [redacted]

Cost Centre (A9999) | Cell No. | Charter Read | JL
Warning Read | JL
Prisoner No. | Bag No. | Counsel Contacted

Charges
S.11 Non report, customs act.
FPS

Provide Status
☐ Young Offender
☐ YCJA Waiver
☐ Parents/Guardian Advised
☒ VIENNE JL ☐ No

Name of Investigator [redacted] | Reg./HRMIS [redacted] | Unit IBET | Cost Centre (A9999) C0425
Nature of Event Illegal entry | Date Reported (yyyy-mm-dd) 2017-09-18 | Time Reported (hh:mm) [redacted]
Occurred Between – From (yyyy-mm-dd hh:mm) 2017-09-18 [redacted] | Occurred Between – To (yyyy-mm-dd hh:mm) 2017-

Processing

Were fingerprints taken? ○ Yes ◉ No | Fingerprints Taken by | Reg./HRMIS | Date Prints Taken (yyyy-mm-dd) | Photo
Were photographs taken? ○ Yes ◉ No | Photographs Taken by | Reg./HRMIS | Date Photos Taken (yyyy-mm-dd)

Conditions of Release
No charge, turned over to CBSA

Details/Actions
Illegal entry into Canada via Roxham road, claimed refugee status

The following items were held
☐ Backpack ☐ Cell Phone ☐ Coat ☐ Glasses ☐ Jewellery ☐ Medication ☐ Pants ☐ Shirt ☐ Wallet
☐ Belt ☐ Cigarettes ☐ Dress/Skirt ☐ Hat ☐ Keys ☐ Misc. Paper ☐ Purse ☐ Shoes ☐ Watch
☐ Other specify:

Cash Held	Cheques Held	Deduct (money out)	Balance	Reason	Police Initials
$ [redacted]				Return X [redacted]	JL

Bulky Effects

Search Type ☒ Personal ☐ Internal | Personal/Internal Search Conducted by

☐ Strip Search Approved | Reason | Where Conducted | Supervisor Signature | Strip Search Conducted by

Signature (Claimed by/Personal Effects) [redacted]
Effects Surrendered - Prisoner Signature X [redacted] | Effects Returned - Prisoner Signature X [redacted]

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It is clear that the RCMP and CBSA collaborate on a range of operational matters, including irregular border crossing. But, they are creatures of different statutes; their respective legislative mandates are distinct, though they overlap at the edges. RCMP officers have all the powers, authority, protection and privileges of a peace officer. These relate to "preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody". [99] Canadian Border Services Agency officers enforce the *IRPA* as well as other statutes such as the *Customs Act*,[100] the *Excise Tax Act*,[101] the *Export and Import Permits Act*,[102] and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.[103]

The RCMP have a mandate to investigate crime, including smuggling and trafficking in persons, and crimes related to national security. The role of the RCMP, however, is not to determine admissibility to Canada or eligibility to claim refugee status under the IRPA. Those tasks fall within the exclusive jurisdiction of the Canadian Border Services Agency, which is why the RCMP generally detain, search and then transport asylum seekers to the nearest designated port of entry.

But in Roxham, Quebec, something else began happening in 2017. The Roxham RCMP detachment, which was extremely busy intercepting border crossers, devised a three-page questionnaire that RCMP administered to all border crossers.[104]

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[99] *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 18(a).

[100] *Customs Act*, *supra* note 97.

[101] *Excise Tax Act*, RSC 1985, c E-15.

[102] *Export and Import Permits Act*, RSC 1985, c E-19.

[103] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17.

[104] "Interview", *RCMP*, online: <https://www.scribd.com/document/361351906/The-RCMP-s-Roxham-Rd-questionnaire#from_embed> [on file with author].

RCMP GRC

NOM / NAME:

DDN / DOB:

CITOYENNETÉ / CITIZENSHIP:

ENTREVUE / INTERVIEW

Demandez aux gens s'ils ont fait eux-mêmes leur valise et que tout le contenu leur appartient? Au même titre pour les ordinateurs de poche. Vous pouvez leur dire que tout ce que vous trouverez pourrait servir de preuve contre eux.	Ask people if they have loaded their suitcases themselves and whether all of the contents belong to them? In the same way for handheld computers. You can tell them that anything you find could serve as proof against them.

1. D'où venez-vous? / Where do you come from?
2. Pourquoi ne vous êtes-vous pas présentés à un poste frontalier? / Why did you not come to a border crossing?
3. Depuis combien de temps demeurez-vous aux États-Unis? / How long have you been in the United States?
4. Qu'est-ce qui vous motive à quitter les États-Unis? What motivated you to leave the United States?
5. Que faisiez-vous aux États-Unis pendant tout ce temps? / What were you doing in the United States all this time?
6. À quel endroit demeuriez-vous? / Where did you stay?
7. Avec qui? Nom(s) et DDN(s) / With whom? Name(s) and DOB(s)?
8. De quoi viviez-vous? (ex. emploi, famille, gouvernement) / What were you living off of? (ex. work, family, government)
9. Qu'est-ce qui vous motive à venir au Canada? / What motivated you to come to Canada?
10. Avez-vous appliqué pour un statut d'immigration ou de réfugié aux États-Unis? / Have you applied for refugee status in the United States or to immigrate to the United States?
11. Quels sont les résultats de votre demande? / What were the results of your application?
12. Aviez-vous un emploi? Si oui, quel était votre métier? / Did you have an employment? If so, what was it?
13. Avec qui voyagez-vous? / Who did do you travel with?
14. Avez-vous de la famille au Canada? Nom(s) et DDN(s)? Où sont-ils? Que font-ils? / Do you have family in Canada? Names and DOBs? Where are they? What do they do?

Membre famille / Family Member	DDN / DOB	Métier / Occupation	Ville / City

15. Comment est votre santé? / How is your health?

Membre / Member:

Reg. / Reg #:

Heure / Time: Date:

Signature du détenu / ~~Detainee~~'s signature

RCMP GRC

16. Qui vous a informé sur la façon de vous rendre au Canada? / Who informed you about how to get to Canada?

17. Que vous a-t'on dit? / What were you told?

18. Est-ce que l'on vous a chargé quelque chose? Si oui, combien. / Have you been charged with anything? If so, how much?

19. Avez-vous manipulé des armes à feu par le passé? / Have you handled firearms in the past?

20. Avez-vous servi dans l'armée? / Have you served in the army?

21. Avez-vous des affiliations à des groupes politiques? / Do you have affiliations with political groups?

22. Avez-vous déjà subventionné des organisations ou des groupes politiques? / Have you ever contributed to organizations or political groups?

23. Connaissez-vous quelqu'un affilié à un groupe politique ou extrémiste? / Do you know someone affiliated with a political or extremist group?

24. Quelle est votre opinion sur les attaques terroristes? / What is your opinion about terrorist attacks?

25. Quelle est votre opinion à propos du groupe État Islamique (EI, EII, ISIS, DAESH), des Talibans, etc. ?/ What is your opinion about the group Islamic State (EI, EII, ISIS, DAESH), the Talibans, etc. ?

26. Avez-vous déjà commis une infraction criminelle? / Have you ever committed a criminal offense?

27. Avez-vous déjà été arrêté? / Have you ever been arrested?

28. Êtes-vous recherchés par les autorités policières de votre ou d'un autre pays? / Are you being sought by the police or other government authorities from your or any other country?

29. Avez-vous des intentions criminelles durant votre séjour au Canada? / Do you have any criminal intentions while in Canada?

30. Avez-vous des intentions de protester au Canada au sujet des événements qui se produisent dans votre pays? / Do you have any intentions to protest in Canada about the events that are taking place in your country?

31. Le Canada est un pays très libéral qui croit à la liberté de la pratique religieuse et de l'égalité entre les hommes et les femmes. Quelle est votre opinion sur ce sujet? Comment vous sentiriez-vous si votre patron était une femme? Comment vous sentez-vous par rapport aux femmes qui ne portent pas le Hijab (couvre la tête), Dupatta (couvre la tête et les épaules), Chador (couvre la tête et le corps), Niqab (couvre la tête, la figure et le corps), Burka (couvre tout le corps, incluant les yeux)?

31. Canada is a very liberal country that believes in freedom of religious practice and equality between men and women. What is your opinion on this subject? How would you feel if your boss was a woman? How do you feel about women who do not wear the Hijab (covers the head), Dupatta (covers head and shoulders), Chador (covers head and body), Niqab (covers head, face and body), Burka (covers the entire body, including the eyes)?

Membre / Member:

Reg. / Reg #:

Heure / Time: Date:

Signature du détenu / Detainee's signature

RCMP GRC

32. Si une personne de votre entourage commet une infraction ou un acte réprimandable que feriez-vous? / If someone around you commits an offense or a reprimandable act what would you do?

33. Le dénonceriez-vous? / Would you denounce him or her?

34. Quelle est votre religion? / What is your religion?

35. Pratiquez-vous votre religion, si oui, à quelle fréquence? / Do you practice your religion, if so, how often?

36. Avez-vous utilisé un passeport d'une autre nationalité pour voyager? / Did you use a passport of another nationality to travel?

37. Avez-vous de la famille, des amis ou contacts aux États-Unis? / Do you have any family, friends or contacts in the USA?

Nom / Name	Sexe / Gender	Relation / Relationship	Ville / City

38. Qui vous a aidé pour voyager aux États-Unis et au Canada? / Who helped you to travel to the USA and Canada?

39. Combien d'argent avez-vous avec vous? Combien d'argent avez-vous de disponible tel que les cartes de crédit, compte bancaire, etc.? / How much money do you have with you? How much money do you have available such as credit cards, bank account, etc.?

40. Avez-vous des affiliations avec des groupes extrémistes? / Do you have affiliations with extremist groups?

Commentaires additionnels / Additional Comments :

Membre / Member:
Reg. / Reg #:
Heure / Time: Date:

Signature du détenu / Detainee's signature

The first few questions seem ordinary enough:

> Where do you come from?
> Why did you not come to a border crossing?
> How long have you been in the United States?
> Who informed you about how to get to Canada? What were you told?
> What motivated you to leave the United States?
> Did you use a passport of another nationality to travel?

These questions are relevant to law enforcement duties since, for example, human smuggling, forgery and passport fraud are also criminal offences. As the questioning progresses, the inquiry begins to veer away from past criminality toward future risks:

> Have you ever been arrested?
> Have you ever committed a criminal offence?
> Are you being sought by the police or other government authorities from your or any other country?
> Do you have any criminal intentions while in Canada?
> If someone around you commits an offence or a reprimandable act, what would you do?
> Would you denounce him or her?
> Do you have affiliations with political groups?
> Have you ever contributed to organizations or political groups?
> Do you have any intentions to protest in Canada about the events that are taking place in your country?

The problematic nature of some questions is heightened because they are posed by RCMP officers with no contextual understanding of refugees and asylum seekers. For instance, refugees may have been (illegitimately) targeted by their states of nationality for arrest, detention and criminal prosecution precisely because of their race, religion, nationality, political opinion or social identity. Questions about past arrests, or whether the individual is sought by authorities in the country of origin, are not inherently objectionable, but they take on a different and troubling hue when posed of an asylum seeker under these circumstances. Beyond that, several questions appear to regard the exercise of democratic rights (political affiliation, protest, etc.) as denoting a security risk, which is clearly troubling.

In short order, the questionnaire moves on to unabashedly discriminatory, Islamophobic questions:

> What is your religion?
> Do you practice your religion? How often?
> What is your opinion about terrorist attacks?
> What is your opinion about the group Islamic State?
> Canada is a very liberal country that believes in freedom of religious practice and equality between men and women.
> What is your opinion on this subject?
> How would you feel if your boss was a woman?
> How do you feel about women who do not wear the
> - Hijab (covers the head),
> - Dupatta (covers head and shoulders),

- Chador (covers head and body),
- Niqab (covers head, face and body),
- Burka (covers the entire body, including the eyes)

If nothing else, the questionnaire encapsulates a perception of the mandate of RCMP officers as a combination of policing the geo-political borders of the state and policing the ethno-religious borders of the nation. For present purposes, I wish to emphasize the narrow point that many questions simply resist any attempt to situate them within any plausible account of the statutory mandate of the RCMP. To bring it back to *Roncarelli*, the religious faith of border crossers is no more relevant to the RCMP's job at Roxham Road than is Roncarelli's religious faith relevant to a liquor licence decision. A central – even defining – feature of legality is that public officials do not use the powers conferred on them by the legislator to attain goals extraneous to the purpose for which those powers were conferred. It is hard to find a more flagrant excess of jurisdiction than some of these questions posed by the RCMP officers from the Roxham detachment.

Had the questions been conjured in the moment by one or a few rogue RCMP officers, the rule of law would not necessarily have been engaged. One might have characterized it as an abuse of power by a handful of individuals – the usual "bad apples" story used to protect an institution's reputation from infection by the misconduct of their personnel. But consider the context here: these questions appear in an official questionnaire printed on RCMP masthead. The RCMP is a large government organization. This questionnaire is not the work of a single individual, but of an organization with layers of bureaucracy and managerial control modeled on a military hierarchy. This questionnaire must have been vetted and viewed by many people within the RCMP organization, even if it did not reach the highest levels. The questionnaire was administered to 5438 individuals over the course of a year.[105] The responses were entered into both RCMP and CBSA databases. It only came to public attention when a refugee claimant was handed his completed form by mistake, and then showed it to his lawyer. In short, the questionnaire was part of the routine interaction between RCMP and border crossers, an interaction that appears on the surface as lawbreaker meets law enforcer. I hope I have given cause to think that appearances may be misleading.

The good news is that as soon as Ralph Goodale, Minister of Public Safety and Emergency Preparedness, was alerted to the questionnaire, the RCMP was directed to withdraw it, redraft it, and to redact electronic records containing the offending questions and responses. It is not clear, however, whether the records have already been shared with the United States or any other country.

Even so, the celerity of the Minister's response is reassuring. It provides an opportunity to reiterate that I do not allege that the state is engaged in a relentless,

[105] Michelle Shephard, "RCMP will redact more than 5,000 records collected using questionnaire targeting Muslim asylum seekers", *Toronto Star* (27 November 2017), online: <https://www.thestar.com/news/canada/2017/11/27/rcmp-will-redact-more-than-5000-records-collected-using-questionnaire-targeting-muslim-asylum-seekers.html>.

wholesale negation of the rule of law in relation to non-citizens. Nevertheless, I have presented instances that ought to be disquieting: immigration legislation denies non-citizens access to the ordinary courts for judicial review. The executive can, according to the Federal Court of Appeal, lawfully designate a country as safe for asylum seekers to obtain refugee protection on a formal basis and with no accountability for the substantive content of the determination or its impact. A large and powerful state agency can spend an entire year routinely subjecting over 5,000 border crossers to a series of questions that are both discriminatory and extravagantly beyond the agency's statutory mandate – without any internal oversight. These are neither the misdeeds of a few bad apples, nor the progeny of a government with callous disdain for the rule of law.

Based on my exposure to the field of administrative law and migration law for over two decades, and allowing for the vicissitudes of changing governments, modes of governance, and so on, I believe that the distortions to the rule of the law that we witness in the field of immigration are both singular and chronic.

What saps the rule of law's vitality in regulating the encounter between the state and the non-citizen? I think the answers lie in two constitutive features of contemporary sovereignty – territoriality and status. That the security of the state is most imperiled by external threat – the foreigner – is not only or mainly an empirical claim; it is an article of faith. The border operates as a reified site for the perpetual, almost liturgical, performance of that anxiety. The border faces inward on the domestic order structured through legal relations between state and legal subjects, but outward toward an international order that is conceived in terms of power relations among states and foreigners, which in turn have grown more securitized in recent years. At the risk of being reductive, the character of relations at the border are shaped much more by the external than the internal perspective. When I teach my students, I always warn them that you are nowhere more powerless than at a border, even when entering your own country of citizenship. The rule of law thins out as it edges toward the border.

The other dimension is status. The traditional common law posture toward non-citizens (or aliens), quoted and paraphrased for over a hundred years throughout the commonwealth – including in Charter jurisprudence – is articulated most starkly in *Canada (AG) v Cain*:[106]

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien [...].[107]

According to this, the sovereign's power over the alien is as close to absolute, unfettered, and untrammelled as one can imagine – the very antithesis of Justice Rand's famous declaration to the contrary in *Roncarelli*. As raw and unfiltered as the

[106] *Canada (Attorney General) v Cain*, [1906] AC 542, 1906 CarswellOnt 761.

[107] *Ibid* at 546.

dictum in *Canada (AG) v Cain* is, it continues to reverberate in every encounter between state and alien. Its effect is to make the non-citizen a privilege holder in perpetuity, because the non-citizen's legal existence in the jurisdiction – their presence on the territory – is always subject to the discretion of the sovereign. In a technical sense, this is not entirely accurate, because we have an immigration statute according to which non-citizens possess some statutory rights, state power is constrained in various ways, and the exercise of discretion – like the humanitarian and compassionate discretion in *Baker* – are bounded by law. But my point is that just as Frank Roncarelli's status as citizen anchored Justice Rand's insistence that he be treated with dignity and respect in the allocation of a privilege by administrative actors, the privilege-holder-in-perpetuity status of an "alien" erodes her claim to be regarded as a full legal subject and bearer of rights, even if those rights are secured by statute, constitution, or international law.[108]

The rule of law has not yet succeeded in making the state as accountable to non-citizens as it is to citizens, even as the state asserts its legal authority over both citizen and non-citizen alike. To the extent that genuine adherence to the rule of law requires internalization of its tenets by all branches and all levels of government, the project stumbles – but does not always fall – because the idea expressed in *Canada (AG) v Cain* continues to pervade law, policy, and discourse as an edict about the nature of sovereignty and the place of citizenship within it. It makes immigration law distinctively arbitrary and non-citizens uniquely vulnerable. We should, we can and we must do better at ensuring that the rule of law stumbles less often and less badly.

[108] I develop this hypothesis further in relation to section 7 of the *Charter* in "Facing the Constitution", in David Dyzenhaus and Thomas Poole, eds, *The Double Facing Constitution* (Cambridge: Cambridge University Press, forthcoming).