Law and moral licensing in Canada: the making of illegality and illegitimacy along the border

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Abstract: The thousands of migrants crossing the Canadian land border irregularly are challenging the nature of law and the role the law plays at and around, the border. Likewise, the thousands of refugees who enter Canada each year through resettlement are framed within the validity of their legal arrival across the border. The article addresses the perceived notion that there is a singularity of the law along the border that informs which migrant is 'legal' or 'illegal'. We examine the refugee system in Canada to illustrate the various layers that influence the normative discourse on refugee protection. We reveal a tension in rendering persons rhetorically legal or illegal not by whether a person is in need of protection but by the means through which persons seek that protection. This article seeks to understand how this tension is tied to and, buoyed by, moral licensing whereby application of the 'illegal' refugee concept, combined with the self-congratulation surrounding Canada's resettlement activities, act together to empower a moral comfort with slackened support for refugees seeking asylum.

Keywords: refugees; illegals; resettlement; borders; migration; Canada-US; irregular-crossings; private sponsorship; IRPA; moral licensing.

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1 Introduction

There was a disturbing odour at the 2017 garlic festival in Cornwall, Ontario and it was not from the pungent bulbs. Two weeks before the festival was to take place on the last Sunday of August 2017, the festival director was told that Haitian asylum seekers who crossed the Canada-US border would move to a hotel on the festival site and that tents would be erected to host potential overflow.[1] As reported by Maclean's Magazine "[w]hen word spread, festival vendors started cancelling out of spite toward the migrants and locals suggested they wouldn't attend…[but] the organisers fought for the show to go on, [and] the garlic festival brought out remarkable resolve from local people who insisted that racial tolerance would prevail in their hometown."[2] Festival organiser Brenda Nelson stated: "It hurt my heart. After the [Haitian] earthquake, it was all warm and fuzzy – 'let's send toothpaste and toothbrushes' – but when they're on our land, [people are] scared."[4] The comments from John Adams, a retired farmer who considered not attending the event because of the migrants, illustrate some of the conflicting thoughts held by many[5]: "I'm not happy; I'm not mad, but I'm disturbed because I don't have all the details… I don't know when our government will drive them back to Haiti or the US, but the sooner the better." Adams said that he volunteers in the community and is "a very generous person in every way, shape and form, believe me" but added "there's a limit to everything." In contrast to the humanitarian response to the earthquake noted by Nelson and despite Adams' own sense of generosity, he felt that the migrants had "no founded reason" to come to Canada and was suspicious of the migrant's entry, saying "[w]hy sneak through the woods? Bank robbers run through the woods because they've done something wrong."

Adams' comments are common discourse when it comes to migrants crossing our borders. As Jeremy Waldron writes, "[o]pen any newspaper and you will see the Rule of Law cited and deployed – usually as a matter of reproach, occasionally as an affirmative aspiration, almost always as a benchmark of political legitimacy."[5] Waldron cites the rule of law as an evaluative ideal.[6] John Adams has invoked a murky sense of the rule of law or illegality here to delegitimise the migrant in Canada. The understanding and label of their entrance as illegal renders their claim for protection illegitimate. They are akin to criminals because they have not gained prior authorisation to enter Canada at a port of entry as invoked by Adams' description that recent migrants are running through the woods. Their lack of immigration status renders them, in the eyes of some Canadians, undeserving of immigration status or a place within our society. An invocation of the law is used to say migrants are not respecting our law and therefore their request for entrance and membership into our community should be challenged and questioned.

Fears of the increasing number of people arriving by foot at the Canada-US border have prompted the Minister of Immigration, Refugees and Citizenship to embark on a public relations campaign, issuing a warning that only 10% of Haitian refugee claims have been accepted and, that "[c]oming to Canada first of all has to be done through regular channels and secondly the asylum system is only for people who are in genuine need of protection."[7]

During this same period of time however, Canada was sending mixed signals. On December 10th, 2016, Prime Minister Trudeau personally welcomed the first planeload of resettled Syrian refugees.[8] On January 28th, 2017, while news headlines were dominated by US President Trump's anti-immigration stance, Prime Minister Trudeau

tweeted: "To those fleeing persecution, terror and war, Canadians will welcome you, regardless of your faith. Diversity is our strength #WelcomeToCanada."[9] And yet, by May 2018, Immigration, Refugees and Citizenship Canada tweeted: "Making a refugee claim is not a free ticket into Canada. Crossing the US border into Canada between ports of entry is against the law and you will be arrested. Learn more at http://Canada.ca/Asylum."[10] Welcomes and warnings were interwoven.

This article examines the role the law plays in shaping the way people evaluate who are legitimate refugees – legitimate in the sense that such persons would qualify under both the Refugee Convention and the Immigration and Refugee Protection Act.[11] In part, this article continues the work of scholars who examine the normative claim that some migrants are "illegal" while others are not.[12] The thousands of migrants crossing the Canadian land border irregularly (crossing the border without going through a port of entry) are challenging the nature of the law and the role the law plays at and around, the border. Meanwhile, the thousands of refugees who enter Canada each year through resettlement are framed within the validity of their legal arrival across the border. Within the contrast of these arrivals, the border is the marker of the law. This article challenges the notion that there is a singularity of the law along the border that informs which migrant is "legal" or "illegal" and questions whether Canada is meeting its international obligation to provide refugee protection.

Further, the article examines law's invocation, in the refugee context, as a means of moral licensing – the concept whereby prior choices that may be perceived as positive, virtuous, moral or ethical lead to subsequent choices that express negative, immoral, ,unethical or otherwise problematic behaviours.[13] In this context, moral licensing can explain Canada's dichotomous treatment of inland and overseas refugees, whereby curtailing access to asylum can be justified because Canada has seemingly done its part in resettling thousands of overseas refugees. Simply put, doing some good (resettling overseas refugees) gives license to behave badly (dismissing the legitimacy of border-crossers claims for refugee status by calling their crossings "illegal").

If we imagine the refugee system to be represented by a garlic bulb, the article tries to reveal the layers of law that govern refugee protection in Canada. By layers or levels of law, we refer to not only the various provisions or parts of the Immigration and Refugee Protection Act and its Regulations, but also to the international conventions such as the Refugee Convention and the Convention against Torture. Part 1 of this article will peel back the skin of the bulb to display the various layers and multiple cloves that influence the normative discourse on refugee protection and in particular how refugees are cast as legal or illegal and therefore legitimate or illegitimate.[14] This section will first examine the inland refugee claimants and law at the border followed by a discussion of those refugees who are welcomed, wanted and supported through both government and private resettlement programs. Part 2 of the article will provide a cross-sectional analysis of the legal layers. We reveal a tension in rendering persons legal or illegal not by whether a person is in need of protection but the means by which persons seek that protection – by inland/border claim or by government/private resettlement. The article will demonstrate that the preoccupation with how a person encounters our border drives how refugees are cast in popular discourse. By examining how moral licensing underlies this juxtapositioning, the article challenges the notion that Canada is fulfilling its international legal obligations when it comes to all refugees. By bringing into focus the cornerstone of refugee protection, the law can play a more positive role in shaping how refugees and refugee claimants are cast in popular discourse in Canada.

2 Part 1: the layers of refugee law in Canada

2.1 Inland and at the border

2.1.1 The irregulars: inland refugee claimants and land border crossers

On June 1st, 2017, Mavis Otuteye, a 57-year-old woman was found dead near the Canada-US border in Noyes, Minnesota, near Emerson, Manitoba.[15] She died of hypothermia. Ms. Otuteye was from Ghana and was living in the USA without immigration status.[16] It is believed that she was trying to cross the Canada-US border through ditches, fields and by foot to reunite with her daughter in Toronto.[17]

According to data released by the Immigration and Refugee Board of Canada (IRB), 14,467 refugee claims were made "by people who crossed into Canada outside legal border points in a nine-month period this year [2017] and nearly half of them were from Haiti."[18] More than 7,000 people crossed the Canada-US border outside of the land port of entries between June and August 2017.[19] One report states, "[t]he RCMP has intercepted close to 3,000 people jumping the Canada-US border into Quebec in July – a 284% increase compared to one month earlier and a more than 1,000% increase than in January, according to Citizenship and Immigration Canada."[20] The increasing numbers of migrants crossing the land border has gained media and public attention. One news story reported, "[a]bout half of Quebecers surveyed in a new poll say they'd be in favour of preventing migrants from crossing illegally at the Canada-US border."[21] Another stated, "many Canadians doubt whether those crossing into Quebec illegally are legitimate refugees; 67% of respondents said they believe the migrants are trying to skip the legal immigration process."[22] Here the connection between illegality and illegitimacy is clear. The use of "illegality" in describing the arrivals was so prevalent that in March 2017 the Canadian Press applied its "Baloney Meter" to the question "are border crossings illegal" with a resulting verdict of "a little baloney" signifying both some degree of accuracy and the need for greater information.[23] The reality is that there is more than one law at play here preventing a singular designation of legality or illegality.

The Immigration and Refugee Protection Act (IRPA) does state that, "[s]ubject to the regulations, every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorised to enter and remain in Canada."[24] The IRPA also states: "A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act."[25] Section 124(1)(a) of the IRPA also provides a broad general offence whereby, "[e]very 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."[26]

However, the IRPA also provides that a person who claims refugee protection may not be charged with an offence in relation to their coming into Canada pending disposition of their claim or if refugee protection is conferred.[27] The exception in the IRPA recognises a long-held principle of international refugee law espoused in the Refugee Convention that a state shall not impose penalties on refugees who may enter without authorisation.[28] This exception recognises that refugees sometimes make

desperate and perilous choices to find safe haven. It is also interesting to note that it is not a contravention of IRPA to cross at a place other than a port of entry.

This legal framework creates a space between offence and exception and within this space thousands of people are crossing the Canada-US border without going through a land port of entry. The preponderance of these crossings can be attributed to the Canada-US Safe Third Country Agreement (STCA).[29] Under the IRPA, the USA is designated, "as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act."[30] The agreement is an acknowledgement that Canada recognises the USA as "safe" and the USA recognises Canada as "safe" for refugee claimants and this recognition raises the expectation that refugee claimants should make their claim in the first "safe" country they reach. The agreement renders those who have spent time in the "safe" country ineligible to make a refugee claim in the other "safe" country (be it Canada or the USA). This expectation means that a person coming to Canada from the USA at any land port of entry will be turned away because they are not eligible to make a refugee claim in Canada.

There are however exceptions to the general rule that a claim be made in the first 'safe' country. First, the STCA applies only to those entering a land port of entry (not air or sea).[31] Second, the agreement does not apply to those with a family member in Canada[32], unaccompanied minors whose parents are not in Canada or the USA[33] and refugee claimants who hold a valid visa to Canada be it a transit, work, study or other admission document for Canada.[34]

Given the limited exceptions, the only choice for many is to avoid going to the port of entries to enter Canada. Persons who manage to get themselves into Canada without crossing an official port of entry (despite having come from the USA) are outside of the purview of the STCA. They become eligible to make a refugee claim once they are within Canada's borders.

The refugee claimant's entry into Canada is temporary and subject to conditions. Once a person has made a refugee claim, they will be examined to determine if they are eligible, referred to the Refugee Protection Division (RPD) of the IRB if eligible and a conditional removal order will be issued.[35] However, the removal order only comes into force if: the claimant is found to be ineligible for a refugee claim; if the refugee claim has been rejected, withdrawn or abandoned; or if an appeal is made, after the Refugee Appeal Division (RAD) rejects the claim.[36] In some cases, a removal order can be stayed if the decision from the RPD or the RAD is being judicially reviewed.[37]

Further, the Refugee Convention sets out the principle of non-refoulement which grants protection against return to a country where a person who meets the refugee definition has reason to fear persecution.[38] The IRPA has brought both the refugee definition and the principle of non-refoulement into Canada's legal framework.[39] The conditionality of a claimant's removal speaks to this balancing between the laws: a failed claimant will be removed while a successful claimant will stay, regardless of how they arrived.

It is important to understand that the law is subject to interpretation. Some interpret the rules and regulations above as simply requiring that a person show up at the closest port of entry as soon as possible.[40] It may not necessarily be required that examination precede entry into Canada. Subsection 27(2) of the Immigration and Refugee Protection Regulations (Regulations) states, "[u]nless these Regulations provide otherwise, 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."[41] Further, the IRPA contemplates alternative means of examination under section 38 where it states that some persons may "be examined by the means indicated as alternative to appearing for an examination by an officer at a port of entry."[42] These provisions provide flexibility for the 'irregular' entries of some persons, including boats or ships that enter into Canadian borders but are unable to get to a designated port of entry for examination immediately upon entering Canada's borders.

Some may point to section 11(1) of Customs Act which provides that, "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…"[43] This requirement however, can be interpreted to apply to the movement of people in relation to goods and the payment of duties, leaving the IRPA to govern asylum seekers. In any case, the Customs Act employs the same language of 'without delay' as is used in IRPA's Regulations.

As discussed above, there are many provisions and coinciding interpretations that a refugee claimant may encounter when seeking protection from Canada. If one were focusing on one provision in the IRPA [Section 18(1)], a refugee claimant may be seen as thwarting Canadian law. When reading that one provision with another provision of the IRPA however, one can see that a refugee claimant may not actually be coming into conflict with any law. For example, refugee claimants and refugees are exempt from prosecution in relation to how they entered Canada (the principle of non-refoulement).

Further, the Charter is another legal layer at the border. As Efrat Arbel writes, the border "finds expression in law" and she references the Supreme Court of Canada's decision Singh to point out, "that every person who is physically present at or within Canada's borders, including refugee claimants, is legally entitled to basic constitutional protection under Section 7 of the Canadian Charter of Rights and Freedoms."[44] Thus, Arbel points out that the border is a "site of limited, but nonetheless meaningful, rights protection for refugee claimants."[45]

The inland refugee claimant is thus subject to various laws including those governing authorised entry, but also those enforcing the removal of persons from Canada. While Canadian law recognises that some people who enter Canadian territory without first being examined or going through a port of entry, are not committing an offence, these layers of law help push the popular view that those circumventing our ports of entry are "illegal" and that those asking for refugee protection within Canada are trying to "jump the queue."[46] Public discourse has clung onto the one provision in the IRPA [Section 18(1)] that could be interpreted as constructing persons as illegal. This preoccupation with the racial subject crossing the border by foot and those that may be helping them tends not to extend to the businessman or yacht that may likewise arrive irregularly.[47]

Nor are immigration officials enforcing the law the way the public believes they are. Very few people crossing the borders outside of the ports of entry are being charged with eluding examination. Some may be accused of not having proper documents and then issued conditional departure orders on that basis and some may be charged with the smuggling provisions of the IRPA.[48] Infrastructure like tents or a temporary building erected by the RCMP at unofficial border crossings at Roxham Road in Quebec are used to process migrants crossing the Canada-US border but also provide visual fodder for assumed illegality.[49] Images of RCMP presence at the unofficial border crossings is used

as evidence that people are "illegal" but arguably, the presence of the RCMP renders the border crossing legal by providing an opportunity for persons to be examined by Canadian officials thus meeting the requirement under Section 18(1) of the IRPA. The presence of the RCMP aids entry and facilitates persons crossing outside of ports of entry to make refugee claims. This reality sits in contrast to the public perception that migrants are coming into conflict with the law.

2.1.2 The irregulars: designated foreign nationals

On August 12th, 2010, the MV Sun Sea, a cargo ship, brought 492 Sri Lankan Tamils (380 men, 63 women and 49 minors) onto the coast of British Columbia.[50] All made refugee claims and all were sent to detention centres.[51] The incident (as well as the earlier landing of the Ocean Lady on October 17, 2009),[52] in part, prompted the federal government at the time to change immigration laws to create a new migrant category, Designated Foreign Nationals (DFN) and to prohibit human smuggling and trafficking. This next section will discuss the DFN scheme while the following section will look at the human smuggling and trafficking provisions.

Following the MV Sun Sea's arrival, the IRPA now gives the Minister of Public Safety and Emergency Preparedness the exclusive power to designate the arrival of a group of persons in Canada as an "irregular" arrival by issuing a ministerial order.[53] Every person in the group becomes a DFN.[54] The Minister is able to make such a designation if one of two conditions is met:

a if the Minister is of the opinion that the group cannot be examined in a timely manner with regard to establishing identity or determining inadmissibility[55]

b if the Minister has reasonable grounds to suspect that the group may be involved in "human smuggling" or working in association with a criminal organisation or terrorist group.[56]

The Minister has issued ministerial orders to label persons as DFNs at least once. In December 2012, eighty-five claimants, including thirty-five children, who came to Canada from Romania via the USA at a Quebec land border, were designated by the Minister.[57]

The repercussions of this designation are severe. Administratively, DFNs are barred from requesting a temporary resident permit for five years[58]; cannot access the Refugee Appeal Division at the Immigration and Refugee Board[59]; do not enjoy an automatic stay of removal if they judicially review a negative refugee decision[60]; and are barred from making a humanitarian and compassionate (H&C) grounds application for five years.[61] Finally, DFNs are required to report to an immigration officer and a number of reporting conditions may be placed on the DFN.[62] The harshest aspect of the designation is the mandatory arrest and detention of a DFN sixteen years of age or older.[63] There are fewer legislative restrictions on the treatment of detained DFNs than for other types of detention under immigration law: detention reviews happen less frequently[64] and the release of a DFN is permitted only by special application to the Minister, if a refugee claim is determined, or if the Immigration Division of the IRB orders the release.[65]

The media has pressed the Trudeau government about why a designation was not invoked on persons who arrived at the Canada-US border during the summer of 2017 without coming through the land ports of entries.[66] The stamping of the legal

determination that one is a designated foreign national not only lends support for the popular parlance of an "illegal" but also arbitrarily imposes a different procedure and treatment on some refugee claimants over others that include criminal-type measures such as detention and interrogation. The reluctance of the government to designate these arrivals highlights the link between the legality and the rhetoric surrounding the arrivals and how easily different groups of people accessing Canada's refugee protection regime can be subject to different legal processes and therefore at risk of being considered 'illegal,', 'criminal', 'illegitimate' and/or undeserving.

2.1.3 The illegal: human smugglers and traffickers

The increasing use of human smuggling and trafficking provisions of immigration law to criminalise the movement of people must also be addressed. The IRPA prohibits human smuggling as follows: "No person shall organise, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act."[67] Human trafficking is also criminalised by the IRPA: "No person shall knowingly organise the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion."[68] Contravening these provisions could lead to conviction on indictment or on summary conviction with associated fines and terms of imprisonment.[69]

In the 2015 case of R v Appulonappa, the Supreme Court of Canada reviewed the constitutionality of the smuggling and trafficking provisions and struggled with the distinction between trafficking/smuggling and mutual assistance/humanitarian aid.[70] The Court discussed the hypothetical scenarios with a person assisting a family member or a person with humanitarian motives and considered whether the provisions criminalising smuggling and trafficking included these scenarios and were therefore overbroad. Ultimately, the Court found the provision overbroad and read down the provision to exclude mutual assistance and "humanitarian" aid. However, the Court does not consider the scope of a motive that is humanitarian but assumes that 'humanitarian assistance' in migration is limited to those working in church groups or NGOs. The Court does not even consider whether the aiding of migration in any other sense should be criminalised in the first place, referring to scenarios that are not of mutual assistance or 'humanitarian' to be of an organised criminal nature.[71] Instead, the Court finds there is a 'legitimate objective'[72] in "protecting the health, safety and security of Canadians and Canadian society, the integrity and efficacy of Canada's lawful immigration regimes and Canada's ability to control its borders and the domestic and international interests tied to them."[73] Here, the Court is legitimising the abstraction of the law's justification for restriction of the border.

In the 2015 case of B010 v Canada, the Supreme Court of Canada tried to discern the scope of 'smuggling' under the IRPA, specifically in relation to determining the inadmissibility of persons.[74] In this case, the Court was tasked with interpreting section 37(1) of the IRPA.[75] This provision renders a permanent resident or a foreign national inadmissible on grounds of organised criminality for engaging in 'people smuggling' or 'trafficking in persons'.[76] The IRB argued for a broad view and that smuggling includes 'all acts of assistance to illegal migrants'.[77] The Supreme Court, in taking up the issue of whether all forms of assisting migrants is reason to find someone inadmissible to Canada, wrestled with what if any limits there should be and what those limits should look like. The Court engaged in legislative interpretation, specifically considering the statutory and

international law context in which the provision was brought to force. The fact that the provision refers to 'criminal activity' and 'transnational crime' led the Court to limit the interpretive scope of 'smuggling'. The Court held that the provision, "targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organised crime."[78] In B010, while the Court may not have called migrants illegal, the reference to 'illegal entry' gives legitimacy to the idea of 'illegal migrants' and also gives legal weight to the notion that helping (for financial or material benefit) migrants is a crime.

The use of immigration law to criminalise movement of people is touted as a means to protect vulnerable people, but its primary effect is to exclude persons from entry into Canadian borders by limiting their means to travel to the border. This is accentuated by the fact that the Criminal Code already criminalises many of the acts that harm migrants including offences related to prostitution, kidnapping, sexual assault, child abduction and human trafficking.[79] Section 279.01(1) of the Criminal Code states, "[e]very person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence."[80] This definition of trafficking in the Criminal Code does not require a transit process; it does not require a 'border-crossing scheme'.[81] The International Labour Organisation, discussing forced labour, states that it "does not consider relevant how a person ended up in a forced labour situation, whether through trafficking or other systems." Despite this, sex work for example (or any kind of work for that matter) occurring in the absence of exploitation and coercion could still be considered trafficking under the IRPA, providing a legal tool to control the movement of migrants who may engage in sex work.[83] The IRPA uses the cover of exploitation and coercion as legal justification to exclude persons at the border. This is especially concerning in the case of Tamil individuals suspected of having supported the Liberation Tigers of Tamil Eelam (LTTE) and who were passengers on the MV Sun Sea or Ocean Lady. Amnesty International concluded that refused refugee claimants face a serious risk of detention, torture and mistreatment if the Sri Lankan government suspects that they travelled on the MV Sun Sea.[84]

Four men on the Ocean Lady were charged with the human trafficking and smuggling provision under section 117(1) of the IRPA. In 2017, the British Columbia Supreme Court found the men not guilty due to the defence of mutual aid; that the actions of the individuals were not done to obtain, directly or indirectly, a financial or other material benefit or that any of them obtained one.[85] The legal path of these four migrants raise questions about how the arrival of the MV Sun Sea and Ocean Lady was approached. These arrivals at the border were treated as criminal and distracted from the task of determining if anyone was deserving of refugee protection. In fact, the media did report that "many of the migrants have had their refugee claims accepted" specifically 230 claims.[86] The potential use of mandatory detention[87] and the prosecution of persons are not only legal barriers to refugee protection, but tools that give weight to the perception that refugee claimants were 'illegal' and therefore illegitimate.

Again, there have been few reports of detention and prosecution of persons crossing the Canada-US border irregularly. Yet, the tools at the disposal of border officials to detain or charge persons allows for the conflation of criminality and border crossing. While this is an issue taken up by many other scholars[88], rarely has this conflation been understood in relation to Canada's response to refugees overseas. Labman has argued elsewhere that "recent discourse, coming from both the government and the media,

represents an increasing tendency to conflate the protection categories of asylum and resettlement and present them as interchangeable, thereby justifying a focus on resettlement at the expense of asylum."[89] Here, where each framework is examined side-by-side, it is evident that while the asylum system hangs heavy with laws that close around the refugee claimant, the limiting and exclusionary role of law is much more subtle in resettlement and the visible aspects of law much more celebratory.

2.2 Overseas and resettlement

2.2.1 The welcomed: the Syrians

#WelcomeRefugees was the Canadian government's online means of sharing and promoting its Syrian resettlement initiative.[90] From November 4, 2015 to January 29, 2017 the site tracked the resettlement of Syrian refugees through the three resettlement programs:

1 The Government Assisted Refugee (GAR) program.

2 The Private Sponsorship of Refugees (PSR) program.

3 The Blended Visa-Officer Referred (BVOR) program.

The site lists 'welcoming communities' across Canada and highlights a speech by John McCallum, former Minister of Immigration, Refugees and Citizenship at a 2015 forum on welcoming Syrian refugees. While other refugees, from other regions, continued to trickle into Canada through each of the three resettlement programs, the Syrian movement captured the energy and compassion of the Canadian public, government and media in an intensifying feedback loop.

The commitment of the Canadian public, confirmed through the election of a Liberal majority federal government following Prime Minister Trudeau's promise to resettle 25,000 Syrians, grew both out of the escalating crisis in the region and the personalisation of the tragedy captured in the photograph of three-year old Alan Kurdi's drowned body on a Turkish beach. The knowledge that the family had wanted and tried to resettle to Canada through private sponsorship before their deadly sea journey amplified the particularised Canadian attention. The government response included exceptional treatment of Syrian refugees not extended to other arriving refugees. These responses included an exemption from the repayment of transportation loans for Syrian refugees arriving after November 2015, but before March 2016; and a temporary public policy that exempted Group of Five and Community Sponsors sponsoring Syrian and Iraqi refugees from the requirement in these programs to provide documentary proof of refugee status from the UNHCR.[91] Informally and across the country, various organisations received particular donations for Syrian refugees. The Social Sciences and Humanities Research Council, in partnership with Immigration Refugees and Citizenship Canada (IRCC), created a targeted research grant competition focussing on 'Syrian refugee arrival, resettlement and integration' to encourage peer review research on "a rare event, full of challenges for both the refugees themselves and for all Canadians."[92]

The Syrian initiatives in Canada were facilitated through all three streams of resettlement - government assisted, privately sponsored and blended visa office-referred. When the first planeload of Syrians arrived in Ottawa in December 2015, Prime Minister Trudeau was there to greet them and hand out winter coats. The legality and legitimacy of

their arrival was framed by the Prime Minister himself who stated: "Tonight they step off the plane as refugees, but they walk out of this terminal as permanent residents of Canada."[93] Quite simply, resettled refugees travel to Canada on a permanent residence visa or other temporary travel documentation and are granted permanent residence status upon arrival in Canada. Their entry is within the legal structure of border control and their arrival is celebrated.

2.2.2 The supported: government assisted refugees

In the attentively tracked period from the start of November 2015 to the end January 2017, a total of 21,876 resettled Syrians came through the Government Assisted Refugees program. The GAR program is the model that parallels other states' resettlement efforts. In total, UNHCR reported 37 states were involved in resettlement initiatives in 2016, a significant increase from past years. Looking back a decade, in 2008 there were 24 resettlement states although the numeric admissions vary drastically.[94] The increasing interest in resettlement may be tied to an increasing interest in keeping asylum seekers out while reaching for a moral license to admit refugees through resettlement, something to bear in mind for Part II of this article.

The variance in resettlement numbers is the result of the voluntary nature of the program. States bear no legal obligation to resettle refugees from third countries. Canada presents its efforts on this front as both "uphold[ing] Canada's humanitarian tradition" and as "a discretionary program that complements Canada's in-Canada refugee determination system."[95] Government resettled refugees are referred by the UNHCR or another referring organisation based on resettlement need and receive financial assistance and settlement support from the federal government for one year from arrival. There is a regulatory scheme for government resettlement set out in the Regulations.[96] The scheme enables the government to expand and contract the program with relative ease and responsiveness through yearly immigration level plans. The 2017 immigration plan allowed for 300,000 new permanent residents, above the average annual levels from 2000–2015 which was 250,000. The GAR level, however, is below the annual average of GAR arrivals of 7,600 from the same period of 2000–2015.[97] Significantly while the GAR numbers have surpassed private sponsorship numbers in the past, there has been a diminishing commitment to GARs while private sponsorship numbers increased.[98] Although the Syrian resettlement paired with a change in government temporarily reinvigorated the GAR program, the intention moving forward is that by 2020 the government resettlement target will be increased slightly to 10,000 while the private sponsorship target will soar to 20,000.[99]

There are significant historical moments that mark the protection power of both government and private sponsorship resettlement in Canada spanning the resettlements of Indochinese, Kosovars, Syrians and most recently Yazidis.[100] As well there is a general, on-going and global commitment. Despite this, two moments highlight the precarious nature of the program.

The first moment comes from the USA where there is a similarly designed resettlement program. Following the September 11, 2001 terrorist attacks in the USA, the US Resettlement Program was halted.[101] With no admissions for three months, the program finally reopened but at a slower pace with reduced admissions.[102] As the largest and leading resettlement program in the world, the pause and reduction meant that within the three years that followed over 100,000 refugees are argued to have lost the chance to

resettle to the US.[103] Recent years showed a steep increase in US resettlement with the program rising from just under 70,000/year in 2013–2015 to almost 85,000 in 2016 and a promise by then President Obama to increase admissions to over 100,000 in 2017.[104] With the change in government in the US in 2016, President Trump almost immediately signed an executive order temporarily halting all refugee admissions for 120 days that was delayed by legal action and ultimately only partially implemented.[105] Proposed 2018 US admissions were reduced to 45,000.[106] The discretionary nature of the program means it is within a government's power to completely close or limit resettlement. The American actions demonstrate the fragility of a discretionary government program.

A second moment of precarity comes from Canada even though there has not been the same level of halting and fluctuating of resettlement as seen in the US. In 2011, the Canadian government repealed the source country class from the IRPA regulations.[107] Prior to repeal, the 'Source Country' class sat within the umbrella 'Humanitarian-protected persons abroad' class alongside the 'Country of Asylum' sub-class. Combined these sub-classes enabled the resettlement of those who did not meet the refugee definition either because they did not meet the definition's requirement of a nexus to persecution or because they had not fled across an international border. The government reviewed the effectiveness of the source country class in 2009 and identified issues with limited eligibility, lack of flexibility, lack of referral capacity, necessity for direct access and lack of access or awareness by vulnerable persons.[108] Rather than reform the program, the government announced its intent to repeal the class in March 2011 with the repeal by October that same year.[109] The repeal, like the halting of the US program, demonstrates how swiftly a resettlement program can change, stop or disappear as it is not tied in any way to a requirement for the state to admit refugees.

2.2.3 The wanted: privately sponsored refugees

While the "Wanted" in #RefugeesWanted was specific to Syrians, generally privately-sponsored refugees reflect those individuals that have been specifically targeted to be brought to Canada. This often occurs through individual Canadians and permanent residents who aim to bring extended family or refugees from particular regions. With private sponsorship, sponsors can "name" the refugee they desire to sponsor. Sponsors consider this one of the core principles of the program.[110] What this means is that rather than a UNHCR or organisation referral of a refugee for resettlement in the GAR program, the intending sponsor acts as the referrer.[111] With sponsor-referred cases, Canadian visa officers in the region are responsible for processing the application and making the ultimate selection decision. Like Canada's inland program, which moves beyond the Convention refugee definition to consider also persons in need of protection[112], Canada's resettlement regulations also permit both Convention refugees abroad and humanitarian protected persons abroad to address persons in similar circumstances.[113] Currently there is only one class within the humanitarian-protected persons abroad class – the country of asylum class. Members of this class "have been determined by an officer to be in need of resettlement because:

a they are outside all of their countries of nationality and habitual residences

b they have been and continue to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries."[114]

While undoubtedly in need of protection, sponsor-referred individuals often fall outside of the pool of people recognised by UNHCR as refugees or, if recognised, are not among the persons referred by UNHCR for resettlement. Some point to the fact that private sponsorship fills a gap in family reunification which was created with the cancellation of the assisted relative class of family sponsorship in 2002. That class previously enabled relatives beyond one's immediate family to immigrate to Canada through the family class.[115]

While the challenges of private sponsorship have been recently and well detailed elsewhere[116], a few key points on how law is used to shape the program bear consideration for our purposes. To assist in reducing an application backlog, the Minister began capping yearly sponsorship agreement holder applications in 2011.[117] As mentioned above, with respect to the temporary exemption of Syrians, private sponsors sponsoring as either a Group of Five or a Community Sponsor can, since 2012, only sponsor refugees recognised by either UNHCR or a state. The amendment was justified on the basis that "the program was not designed to support the overwhelming demand for family reunification that it faces today."[118] What these moves do however, in an effort to increase the rate of application approvals, is take some level of that naming power away from sponsors. More directly this was done through the introduction of the Blended Visa-Officer Referred program in 2013.[119] The BVOR program splits the financial commitment between the government and sponsors but the government, through its visa officers, retains the power to select and refer the individuals to be resettled.

In the midst of both these retractions of sponsor power and the explosion of commitment to the protection of Syrian refugees, in September 2016 the Canadian government, in partnership with the UNHCR and the Open Society Foundations announced a joint initiative, the Global Refugee Sponsorship Initiative, aimed at increasing the private sponsorship of refugees around the world.[120] Filippo Grandi, High Commissioner for Refugees, declared "[i]n the face of record levels of displacement and soaring resettlement needs ... this joint initiative is an excellent way for resettlement states to learn from Canada's very successful model of private sponsorship."[121] In Canada, resettlement and private sponsorship developed as a complement to limiting inland refugee claims. The model is now being shared as a response to "record levels" of asylum seekers. Thus in the fall of 2017, just after the Garlic Festival in Cornwall had raised the tension between humanitarian generosity and legality along the border, the Global Refugee Sponsorship Initiative launched its guidebook and website.[122] A report from the Migration Policy Institute also in September 2017 noted that "[s]ince the onset of the migration crisis in 2017, the settlement of refugees through community-based or private sponsorship schemes has attracted increasing attention from governments and civil society groups across Europe."[123] Would those people in Cornwall boycotting the festival and labelling the illegality of the Haitians, take up sponsorship?

3 Part 2: multiple legal layers and taking moral licence

The previous section concludes with the dichotomy between private sponsorship and the public perception and responses to asylum seekers. The layered legality that blurs understandings of the refugee's border crossing begins to show its strata.

Public discourse and often government rhetoric, presents refugee law and the laws applicable to border crossings as a singular, one-dimensional plane upon which to

examine the legitimacy of a migrant claiming protection. It is through this simplified perception of a solitary or discrete law that the refugee is constructed as illegal or legal and thereby either legitimately or illegitimately seeking safety and protection in Canada. Resettled refugees are seen to legally cross the border, asylum seekers are seeking to illegally sneak across. Resettlement refugees deserve Canada's warmth and welcome, asylum seekers do not. This constructed dichotomy in Canadian public discourse is not accurate. It does not represent "the law." The law is multi-dimensional, layered and more complicated.

It is within the layers and complications of the law that moral licensing can be easily deployed. The problematic treatment of inland refugees appears, in public discourse, to be justified by Canada's largesse with overseas refugees. There is a plethora of research that demonstrates that, "[p]ast good deeds can liberate individuals to engage in behaviours that are immoral, unethical, or otherwise problematic, behaviours that they would otherwise avoid for fear of feeling or appearing immoral" and that "moral self-licensing occurs because good deeds make people feel secure in their moral self-regard."[124] Moral licensing has also referred to, "the effect that when people initially behave in a moral way, they are later more likely to display behaviours that are immoral, unethical, or otherwise problematic."[125] Further, research that looks at the intersection of behavioural science and law recognises a concern with "unaware biases that prevent people from understanding that their behaviours are self-interested and unethical" and that "[u]ncovering these biases is especially important because society is being harmed by non-deliberative bad deeds."[126] Indeed, in the criminal law context, moral licensing has been shown to lead people to commit moral transgressions and crime.[127] Research in this area further affirms that vicarious moral licensing or social moral licensing is a phenomenon. Group or social influences can lead to unethical or problematic choices[128] and research shows that moral licensing also applies to group behaviour.[129]

There is something familiar here in the image of abhorrence of refugees at Cornwall's garlic festival and the benevolence of Canadians welcoming Syrian refugees at the airport. The good feelings that come from providing refuge for one set of refugees has given Canadians a sense of moral self-licensing to turn their backs to the refugee claimants arriving at our land and sea borders. Legal perceptions bolster the moral positioning; misunderstandings of the law are easily accepted as they justify the welcoming of overseas refugees as law-abiding refugees while allowing the denouncement other refugees coming directly to Canadian borders as "illegal" and "deviant" law-breaking refugees. The "chance to establish 'moral credentials'" by publicly and widely sponsoring overseas refugees has reduced our "inhibition against behaviour that could cast doubt on [our] morality"[130] when it comes to inland refugees. Public confidence in the belief these claimants are acting illegally is easily achieved because Canada's welcome protection to legitimate refugees is evident elsewhere. Indeed, as some researchers have written, "acting virtuously can ironically reduce future virtuous action."[131]

In this way, both a sense of the law and the moral confidence in the generous and humanitarian act of resettlement, without any understanding of the legal limits of this resettlement, is utilised to avoid appearing unwelcoming, prejudiced and more problematically, violating our international legal obligations towards refugees. This follows research illustrating how persons may "wish to avoid feeling or appearing prejudiced, yet all the same can be tempted to express views that could be construed as

prejudiced."[132] Indeed, comments responding to an opinion piece we penned on May 5th, 2018, ("Rhetoric on refugees only hurts border control", which outlined the layered legality of border crossing), exhibits how a misconstruction of the law can justify moral licensing.[133] For example, one commenter wrote:

Labman and Liew's [sic] new guide to legal definitions:

Theft irregular purchase

Assault irregular contact

Murder irregular contact causing irregular living.[134]

In response to the comment, another commenter wrote: "Perhaps this is how false news starts. Someone reads this comment, it gets repeated and before long people start to think the authors actually said that."[135]

The comments also demonstrated how law, or an understanding of how the law functions at the border, is not weighty enough to deter people from engaging in moral licensing and in fact, how moral licensing permits one to move beyond the law. One commenter wrote, "I greatly respect the argument made by Labman and Liew [sic], but being legal does not make something right….I am not insensitive to the needs of refugees - but there are ways and means of entering the country other than slamming open a door and just barging in."[136] Irregular border crossers in this construction are not illegal but their illegitimacy is rendered by a lack of manners and the contrast to the seemingly patient resettlement refugee waiting for their turn at resettlement.

4 Conclusions

It is our hope that the focal point in public discourse will zoom out of the provision that requires persons to be examined at a port of entry (and also the laws preventing people helping those crossing borders) to look at the bigger picture and the plethora of legal provisions that could and do apply to refugees and refugee claimants. This includes Canada's international obligations to adhere to the principle of non-refoulement and to prevent the return of persons to torture, cruel or inhumane treatment and death. It also includes Canada's pledge to examine each and every individual inland refugee claim on its own merits under section 96 and 97 of the IRPA. The focal point should not be on the crossing of the border and whether or not it squares with the many rules and regulations that could comply. Instead, the public should be concerned about whether such persons are indeed fleeing persecution, torture, cruel and inhumane treatment and whether Canada is appropriately evaluating such claims. Indeed, the public should have more confidence in our well-established systems to evaluate not only who is a refugee but whether there are any security concerns at our border.

The public should also be concerned about whether Canada is putting barriers up to people through our law, such as the Safe Third Country Agreement, but also through public messaging to refugees not to come to Canada. For example when the US Department of Homeland Security announced in early January 2018 that it was withdrawing temporary protected status (TPS) for 200,000 Salvadorans, giving them 18 months to sort out their immigration status or face deportation, the Canadian government embarked on an information campaign to discourage Salvadorans from coming to the Canadian border, sending a Spanish speaking Member of Parliament to

California to speak to Spanish language media and community groups.[137] The Canadian government is taking a varied approach to constructing multiple borders.[138] The challenge here is that at these multiple borders, there is no individual assessment of refugee status. The law's structure and the government's public messaging together reinforce public discourse of the illegality of some border crossers.

When put up against public images of resettled refugees greeted by their sponsors, obtaining winter coats and meeting the Prime Minister, it is easy to see why a dichotomous picture of the refugee appears in our public understanding.

It is important to recognise that resettled refugees are screened as intensely as refugee claimants. The screening simply occurs before their arrival. Both successful refugee claimants and resettled refugees obtain permanent residence in Canada. Again, it is just that the resettled refugees are selected for this status while still beyond the Canadian border whereas refugee claimants must make it to Canada in order to access this status. Rather than stepping out of the airport as permanent residents, they are often left with no choice but to cross a frigid field. Individuals who cross in this irregular way still can and do succeed in their claims for refugee status and obtain permanent residence status just as resettled refugees do.

Aside from the preoccupation with border crossings, Canadians should also be concerned about whether our resettlement program is doing all it can to meet Canada's international refugee obligations. The public image of the resettlement program has largely been positive, but the impact of the program while humanitarian does not necessarily contribute to addressing the global resettlement need of refugees. And it is important to reiterate here, states bear no legal obligation to resettle refugees from third countries. While resettlement is considered a form of burden or responsibility sharing, it in no way is the primary mechanism for refugee protection. The reassurance allowed by moral licensing to privilege this program is diminished through numeric truths. Resettlement is one of three durable solutions, alongside local integration and voluntary repatriation but the reality is most refugees lack any solution. The global refugee population under UNHCR's mandate hit a high of 19.9 million by the end of 2017.[139] The UNHCR indicates that 1.4 refugees are in need of resettlement in 2019, a 17% increase in need from the year prior.[140] Global resettlement numbers have suffered a steep decline with UNHCR submitting only 75,200 refugees for resettlement in 2017.[141] While the US has drastically diminished its resettlement efforts, Canada has upped its commitment to resettlement with the 2018-2020 Levels Plan moving up to 30,000 resettlement spots in 2020. This is significant compared to just over 12,000 resettled refugees to Canada in 2014 prior to the change in government.[142] But in 2014, over 60% of the resettlement was government assisted. The 2020 target set 20,000 spaces for privately sponsored resettlement and only 10,000 for government assisted. As discussed above, the private sponsorship requirements do not necessitate that individuals resettled through this category come from the UNHCR referrals. Private sponsorships fulfil a humanitarian commitment and indeed offer protection to many in need but they do not address the global resettlement need prioritised by the UNHCR.

The proper management of our border and requests for refugee protection will be an ongoing policy concern for Canada. By responding to migrants here and overseas, we hope this article provides some insight into the law's role in public discourse and how law's construction in public discourse may be deployed to justify moral licensing.

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Notes

1 Campbell, M. (2017) 'Cornwall's garlic festival goes on despite anti-migrant sentiment', *Macleans*, 29 August [online] http://www.macleans.ca/news/cornwalls-garlic-festival-goes-on-despite-anti-migrant-sentiment (accessed 27 March 2019).

2 Ibid.

3 Ibid.

4 Ibid.

5 Waldron, J. (2008) *The Concept and the Rule of Law*, Working Paper No. 08-50, New York University School of Law – Public Law and Legal Theory Research Papers Series, 1 November.

6 Ibid at 12.

7 Keung, N. (2017) 'Immigration minister warns Haitian border-crossers that Canada will probably reject them', *The Star*, 22 November [online] https://www.thestar.com/news/immigration/2017/11/22/immigration-minister-warns-haitian-border-crossers-that-canada-will-probably-reject-them.html (accessed 27 March 2019).

8 Friesen, J. (2017) 'Syrian exodus to Canada: one year later, a look at who the refugees are and where they went', *Globe and Mail*, 12 November [online] https://www.theglobeandmail.com/news/national/syrian-refugees-in-canada-by-the-numbers/article33120934/ (accessed 27 March 2019).

9 Paling, E. (2017) 'Trudeau tells refugees: Canada will welcome you', *Huffington Post*, 28 January [online] http://www.huffingtonpost.ca/2017/01/28/trudeau-refugees_n_14461906.html (accessed 27 March 2019).

10 Immigration, Refugees and Citizenship Canada (2018) *Making a Refugee Claim Is Not a Free Ticket into Canada. Crossing the US Border into Canada between Ports of Entry Is against the Law and You Will be Arrested*, 15 May [online] https://twitter.com/CitImmCanada/status/1022198601894842368 (accessed 27 March 2019).

11 Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, Art 31 (entered into force 22 April 1954) [Refugee Convention]; Immigration and Refugee Protection Act, SC 2001, c27, s18(1) [IRPA].

12 See for example Dauvergne, C. (2008) *Making People Illegal: What Globalization Means for Migration and Law*, Cambridge University Press, Cambridge and *Making People Illegal* and Arbel, E. (2016) 'Bordering the constitution, constituting the border', *Osgoode Hall Law Journal*, Vol. 53, No. 3, p.824.

13 Khan, U. and Dhar, R. (2006) 'Licensing effect in consumer choice', *Journal of Marketing Research*, Vol. 43, No. 2, p.259; Merritt, A., Effron, D. and Monin, B. (2010) 'Moral self-licensing: when being good frees us to be bad', *Social and Personality Psychology Compass*, Vol. 4, No. 5, p.344.

14 In using the terms legal and illegal, we are primarily referring to these terms as legal categories. However, throughout the article, we also use these terms to refer to discursive categories and when we do, we try to be clear that the term as discursive. We have chosen

not to differentiate between the legal category and discursive to illustrate the fluidity in which the public, media and politicians have deployed the term discursively and how some people rely on the weight of its meaning found in the legal realm to deploy it discursively in a powerful and persuasive way in the discussion of whether refugees are legitimate or not.

15 The Canadian Press (2017) 'Woman who died trying to cross border was trying to get to daughter in Toronto', *The Star*, 1 June [online] https://www.thestar.com/news/canada/2017/06/01/woman-who-died-trying-to-cross-border-was-trying-to-get-to-daughter-in-toronto.html (accessed 27 March 2019).

16 Ibid.

17 Ibid.

18 Harris, K. (2017) 'Nearly half of illegal border-crossers into Canada are from Haiti', *CBC*, 22 November [online] http://www.cbc.ca/news/politics/haiti-border-crossers-canada-irregular-1.4414781 (accessed 27 March 2019).

19 Peritz, I. (2017) 'Immigration Minister denies that Canada was unprepared for surge of asylum seekers', *Globe and Mail*, 22 August [online] https://www.theglobeandmail.com/news/national/ottawa-denies-being-unprepared-for-surge-of-asylum-seekers/article36063067/.

20 Minsky, A. (2017) 'Number of asylum-seekers crossing into Canada skyrockets in July', *Global News*, 17 August [online] http://globalnews.ca/news/3677129/asylum-seeker-numbers-quebec-canada/ (accessed 27 March 2019).

21 CBC News (2017) *Half of Quebecers Want to Prevent Illegal Crossing at Canada-US Border: New Poll*, 14 August [online] http://www.cbc.ca/news/canada/montreal/poll-numbers-border-crossing-migrants-1.42461 (accessed 27 March 2019).

22 Global News, supra note 21.

23 Levitz, S. (2017) 'Baloney meter: are border crossings illegal?', *Canadian Press*, 9 March [online] https://www.durhamregion.com/news-story/7181670-baloney-meter-are-border-crossings-illegal-/ (accessed 27 March 2019).

24 IRPA, s 18(1), supra note 12.

25 Ibid at s 11(1).

26 Ibid at ss 124(1)(a), 41(a).

27 Ibid, s 133.

28 Refugee Convention, supra note 12.

29 Government of Canada (2002) *Agreement between the Government of Canada and the Government of the United States of America For the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, 5 December [online] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html (date accessed: March 27, 2019).

30 Immigration and Refugee Protection Regulations, SOR/2002-227, s 159.2 [Regs]; see also IRPA, supra note 12 at s 102(1)(a).

31 Regs, ibid, s 159.4(1). See, however, s 159.4(2), which provides that the agreement does apply to those coming by air if the person seeking refugee protection in Canada is a person who was determined not to be a refugee in the USA, has been ordered deported from the USA and is in transit through Canada for removal from the USA.

32 Ibid, s 159.1 and 159.5. Family member, "in respect of a claimant, means their spouse or common-law partner, their legal guardian and any of the following persons, namely, their child, father, mother, brother, sister, grandfather, grandmother, grandchild, uncle, aunt, nephew or niece." The family member must be a Canadian citizen (s 159.5(a)), a protected person under s 95(2) of the IRPA (s 159.5(b)(i)), a permanent resident (s 159.5(b)(ii)), a person subject to a removal order but that removal order has been stayed (s 159.5(b)(iii)), a person eighteen years or older who has made a refugee claim that has not been withdrawn,

abandoned, rejected, or terminated (s 159.5(c)), or a person eighteen years or older who holds a valid work or study permit (s 159.5(d)).

33 Ibid, s 159.5(e). A minor is a person who has not attained the age of eighteen years and has neither a spouse nor common law partner.

34 Ibid, s 159(f).

35 Regs, supra note 31 at s 229(2). This removal order is normally a departure order.

36 IRPA, supra note 12 s 49(2).

37 Regs, supra note 31 at s 231(2).

38 Refugee Convention, supra note 12 at Art 33.

39 IRPA, supra note 12 at ss 96, 115.

40 This has arisen from conversations we have had with lawyers practicing for example in British Columbia on how the practice works with arrivals to Canada by boat where persons report themselves after they have entered Canada.

41 Regs, supra note 31 at s 27(2).

42 IRPA, supra note 12 at s 38.

43 Customs Act, RSC, 1985 c 1, s 11.

44 Arbel, supra note 13.

45 Ibid.

46 For example, see Glowacki, L. (2017) 'Asylum seekers taking advantage of Canadian generosity, MP Ted Falk says', *CBC News*, 6 March [online] http://www.cbc.ca/news/canada/manitoba/ted-falk-refugees-emerson-1.4011441 (accessed 27 March 2019) where MP Falk stated: "These folks are in a safe country. They're not under threat where they are in the USA and I don't think they should have the ability to jump the queue and get preferential treatment."

47 See for example Dauvergne, *Making People Illegal*, supra note 13.

48 Forrest, M. (2019) 'CBSA charges woman alleged to have smuggled irregular asylum seekers into Quebec', *National Post*, 23 January; See for example cases like X (Re), 2012 CanLII 95162 (CA IRB); X (Re), 2014 CanLII 103605 (CA IRB); B306 v Canada (Public Safety and Emergency Preparedness), 2012 FC 1282; Appulonappa, supra note 70. See also Immigration and Refugee Board, Irregular border crosser statistics (November 2018) online: https://irb-cisr.gc.ca/en/statistics/Pages/Irregular-border-crosser-statistics.aspx: It is interesting to note that the IRB collected statistics regarding irregular border crossings in 2017 and 2018. While it collected statistics on how many were detained and subject to detention reviews (to decide if a person should be released if they are not a danger to the public, a flight risk, inadmissible and or their identity has not been established), these detention proceedings do not involve assessing whether s 18(1) was contravened.

49 CBC News (2018) *RCMP Want Warmer, Larger Work Space at Roxham Road's Illegal Border Crossing*, 30 January.

50 Bell, S. (2011) 'Documents: the sun sea investigation', *National Post*, 13 February [online] http://nationalpost.com/news/canada/documents-sun-sea-investigation (accessed 27 March 2019).

51 Ibid.

52 Brosnahan, M. (2014) 'Ocean lady migrants from Sri Lanka still struggling 5 years later', *CBC*, 18 October [online] http://www.cbc.ca/news/politics/ocean-lady-migrants-from-sri-lanka-still-struggling-5-years-later-1.2804118 (accessed 27 March 2019). This report also details how the 75 Tamils were detained and interrogated.

53 IRPA, supra note 12 at s 20.1(1); see also s 6(3) which specifies that the minister may not delegate the power conferred by s 20.1(1).

54 Ibid at s 20.2(2); see also s 19.

55 Ibid at s 20.1(1)(a).

56 Ibid at s 20.1(1)(b).

57 Public Safety Canada (2012) 'Immigration and refugee protection act, designation as irregular arrival', PSC, 5 December [online] http://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2012/20121205-eng.aspx (accessed 27 March 2019); CBC News (2012) *Romanian Human Smuggling Ring Busted in Ontario*, 6 December [online] http://www.cbc.ca/news/politics/romanian-human-smuggling-ring-busted-in-ontario-1.1292783 (accessed 27 March 2019).

58 Regs, supra note 31 at s 24(5): For DFNs that have made a refugee claim or application for protection, the five-year period commences the day after which a final determination has been made. For other DFNs, the five-year period commences the day after they are deemed a DFN.

59 IRPA, supra note 12 at s 110(2)(a).

60 Regs, supra note 31 at s 231(2)

61 IRPA, supra note 12 at s 25(1.01): The five years starts after a determination of a refugee claim or after a designation if no refugee claim is made. See also s 25(1.02)-(1.03), s 58(4), 58.1, 98.1, 11(1.3), 20.2(3) and 24(7): If a refugee claimant becomes a DFN after submitting an H&C application, the processing of the application can be suspended and the Minister may refuse to consider the H&C request.

62 Regs, supra note 31 at s 174.1.

63 IRPA, supra note 12 at s 55(3.1).

64 Ibid at s 57–58: Instead of detention reviews after 48 hours, seven days, then every 30 days after that, DFNs get their first detention review within the first 14 days but not again until 6 months have elapsed.

65 Ibid at s 56.

66 Smith, J. (2017) 'Baloney meter: Libs avoid triggering 'irregular arrival' of asylum seekers', *National Post*, 10 August [online] http://nationalpost.com/pmn/news-pmn/canada-news-pmn/baloney-meter-libs-avoid-triggering-irregular-arrival-of-asylum-seekers (accessed 27 March 2019).

67 IRPA, supra note 12 at s 117(1).

68 Ibid at s 118(1); subsection 118(2) defines organise as, "organise, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons."

69 Ibid at s 117(2)-(3) and s 120.

70 R v Appulonappa, 2015 SCC 59, [2015] 3 SCR 754 [Appulonappa].

71 Ibid at para 70.

72 Ibid at para 36.

73 Ibid at para 65.

74 B010 v Canada, 2015 SCC 58, [2015] 3 SCR 704 [B010].

75 IRPA, supra note 12 at s 37(1).

76 Ibid.

77 B010, supra note 75 at para 15.

78 Ibid at para 72.

79 See Roots, K. (2013) 'Trafficking or pimping? An analysis of Canada's human trafficking legislation and its implications', *Canadian Journal of Law and Society*, Roots, Vol. 28, No. 1, p.21.

80 Criminal Code, RSC 1985, c C-46, s 279.01(1).

81 Beatson, J., Hanley, J. and Ricard-Guay, A. (2017) 'The intersection of exploitation and coercion in cases of Canadian labour trafficking', *The Journal of Law and Social Policy*, Vol. 26, No. 137, p.142.

82 Hoff, S. and McGauran, K. (2015) *Engaging the Private Sector to End Human Trafficking: A Resource Guide for NGOs*, p.24 [online] https://www.somo.nl/engaging-the-private-sector-to-end-human-trafficking-a-new-resource-guide-for-ngos/ (accessed 27 March 2019).

83 See Roots, supra note 80; Zhang, S.X. (2009) 'Beyond the 'Natasha' story – a review and critique of current research on sex trafficking', *Global Crime*, Vol. 10, No. 3, p.178.

84 Amnesty International (2012) *Concerns With Respect to Forced Returns to Sri Lanka for Passengers of the Ocean Lady and MV Sun Sea*, 12 December.

85 R v Appulonappa, 2017 BCSC 1316, 140 WCB (2d) 358.

86 Dhillon, S. (2017) 'In wake of Sun Sea acquittals, calls to end refugee detentions', *Globe and Mail*, 26 January [online] http://www.theglobeandmail.com/news/british-columbia/in-wake-of-sun-sea-acquittals-calls-to-end-refugee-detentions/article33789890/>.

87 See Amnesty International (2011) *Rights Advocates Decry Detention of Refugee Claimants from MV Sun Sea*, 19 February [online] http://www.amnesty.ca/news/news-item/rights-advocates-decry-detention-of-refugee-claimants-from-mv-sun-sea (accessed 27 March 2019).

88 Aas, K.F. and Bosworth, M. (Eds.) (2013) *The Borders of Punishment: Migration, Citizenship and Social Exclusion*, Oxford University Press; Dauvergne, "Making People Illegal", supra note 13; Arbel, E. (2015) 'Between protection and punishment: the irregular arrival regime in Canadian refugee law', in Reiter, K. and Koenig, A. (Eds.): *Extreme Punishment: Palgrave Studies in Prisons and Penology*, Palgrave MacMillan, London; Silberman, S. (2014) 'In the wake of irregular arrivals: changes to the Canadian immigration detention system', *Refuge*, Vol. 30, No. 2, p.27.

89 Labman, S. (2011) 'Queue the rhetoric: refugees, resettlement and reform', *University of New Brunswick Law Journal*, Vol. 62, No. 1, p.55.

90 Government of Canada (2017) *#WelcomeRefugees: Canada Resettled Syrian Refugees*, 4 May [online] https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/welcome-syrian-refugees.html (accessed 27 March 2019).

91 Immigration, Refugees and Citizenship Canada (2017) *End of the Temporary Public Policy to sponsor Syrian and Iraqi refugees by Groups of Five and Community Sponsors*, 25 January [online] https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/notice-end-temporary-public-policy-sponsor-syrian-iraqi-refugees-groups-five-community-sponsors.html (accessed 27 March 2019).

92 Canada, Social Sciences and Humanities Research Council (2016) *Targeted Research: Syrian Refugee Arrival, Resettlement and Integration*, SSHRS, Ottawa, 5 May [online] http://www.sshrc-crsh.gc.ca/funding-financement/programs-programmes/syrian_refugee-refugie_syrien-eng.aspx (accessed 27 March 2019).

93 Joseph, R. (2015) '1st planeload of Syrian refugees land on Canadian soil', *Global News*, 10 December [online] https://globalnews.ca/news/2394286/live-blog-toronto-set-to-welcome-feds-first-syrian-refugees-to-canada/ (accessed 27 March 2019).

94 See UNHCR (2012) 'UNHCR Projected global resettlement needs 2014', *18th Annual Tripartite Consultations on Resettlement*, Geneva, 9–11 July, pp.73–74 [online] http://www.unhcr.org/51e3eabf9.html (accessed 27 March 2019).

95 Citizenship and Immigration Canada (2009) *OP 5: Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-protected Persons Abroad Classes*, Citizenship and Immigration Canada, Ottawa, 13 August, p.8 [online] https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/op/op05-eng.pdf (accessed 27 March 2019).

96 Regs, supra note 31 at ss 138-151.

97 Canadian Council for Refugees (2017) *2017 Immigration Levels – Comments* [online] http://ccrweb.ca/en/2017-immigration-levels-comments.

98 Labman, S. (2016) 'Private sponsorship: complementary or conflicting interests?', *Refuge*, Vol. 32, No. 2, pp.67–80.

99 Immigration, Refugees and Citizenship Canada (2017) *Notice – Supplementary Information 2018-2020 Immigration Levels Plan*, 1 November, IRCC, Ottawa [online] https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/supplementary-immigration-levels-2018.html (accessed 27 March 2019).

100 Standing Committee on Citizenship and Immigration (2018) *Road to Recovery: Resettlement issues of Yazidi Women and Children in Canada*, Committee Report No. 18, March.

101 United States Committee for Refugees and Immigrants (2001) *In the Aftermath of September 11: US Refugee Resettlement on Hold*, Refugee Reports, 1 October, Vol. 22, Nos. 9/10 [online] http://www.refworld.org/docid/3c5809994.html (accessed 27 March 2019).

102 See Schoenholtz, A. (2005) 'Refugee protection in the United States post-September 11', *Columbia Human Rights Law Review*, Vol. 36, No. 2, pp.323–324.

103 Ibid at 324.

104 Migration Policy Institute (xxxx) *US Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present* (online) https://www.migrationpolicy.org/programs/data-hub/charts/us-annual-refugee-resettlement-ceilings-and-number-refugees-admitted-united (accessed 27 March 2019); Kennedy, M. (2016) 'white house wants to resettle 110,000 refugees in US next year', *The Two-Way*, 14 September [online] https://www.npr.org/sections/thetwo-way/2016/09/14/493922399/white-house-wants-to-resettle-110-000-refugees-in-u-s-next-year (accessed 27 March 2019).

105 Government of the United States (2017) *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States*, 27 January.

106 US Department of State (2017) *Proposed Refugee Admissions for Fiscal Year 2018*, US Government Printing Office, Washington, DC (online) https://www.state.gov/j/prm/releases/docsforcongress/274613.htm (accessed 27 March 2019).

107 Immigration and Refugee Protection Regulations, SOR/2002-227, section 148 repealed, SOR/2011-222, s.6; Citizenship and Immigration Canada (2011) 'Regulations amending the immigration and refugee protection regulations and regulatory impact analysis statement', *Canada Gazette*, 19 March, Vol. 145, No. 2 (online) http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-19/html/reg3-eng.html (accessed 27 March 2019).

108 Ibid.

109 Ibid.

110 Canadian Council for Refugees (xxxx) *Private Sponsorship of Refugees* [online] http://ccrweb.ca/en/private-sponsorship-refugees (accessed 27 March 2019).

111 Regs, supra note 31 at s 140.3(1)

112 IRPA, supra note 12 at s 97.

113 Regs, supra note 31 at ss 144-147.

114 Regs, ibid at s 147.

115 Repeal of the Immigration Regulations, 1978, SOR/78-172 through the Immigration and Refugee Protection Regulations, SOR/2002-227, s 364(a) that accompanied the introduction of the Immigration and Refugee Protection Act. See for example, Canadian Council for Refugees (2004) *Assisted Relatives: Resolution Number 2*, November (online) http://www.ccrweb.ca/en/res/assisted-relatives (accessed 27 March 2019); Denton, T.R. (2011) 'Relational migration and refugee policy', *Conference paper presented at 2011 National Metropolis Conference*, Vancouver, British Columbia, 25 March.

116 Labman, supra note 98.

117 Citizenship and Immigration Canada (2012) 'Regulations amending the immigration and refugee protection regulations and regulatory impact analysis statement', *Canada Gazette*, SOR/2012-225, 9 June, Vol. 146, No. 23 [online] http://www.gazette.gc.ca/rp-pr/p1/2012/2012-06-09/html/reg1-eng.html (accessed 27 March 2019).

118 Government of Canada (2012) 'Regulations amending the immigration and refugee protection regulations', *Canada Gazette*, Vol. 146, No. 23, p.1 [online]

http://www.gazette.gc.ca/rp-pr/p1/2012/2012-06-09/html/reg1-eng.html (accessed 27 March 2019).

119 Citizenship and Immigration Canada (2017) 'Blended visa office-referred program – sponsor a refugee', 26 July [online] *CIC* https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-outside-canada/private-sponsorship-program/blended-visa-office-program.html (accessed 27 March 2019).

120 The UN Refugee Agency (2016) 'Canada, UNHCR and Open Society Foundations seek to increase refugee resettlement through private sponsorship', *UNHCR*, 19 September [online] http://www.unhcr.org/afr/news/press/2016/9/57e0e2784/canada-unhcr-open-society-foundations-seek-increase-refugee-resettlement.html (accessed 27 March 2019).

121 Ibid.

122 Global Refugee Sponsorship Initiative (online) http://www.refugeesponsorship.org/.

123 Fratzke, S. (2017) *Engaging Communities in Refugee Protection: The Potential of Private Sponsorship in Europe*, Migration Policy Institute (online) https://www.migrationpolicy.org/research/engaging-communities-refugee-protection-potential-private-sponsorship-europe (accessed 27 March 2019).

124 Merritt et al., supra note 14 at 344; Sachdeva, S., Iliev, R. and Medin, D. (2009) 'Sinning saints and saintly sinners: the paradox of moral self-regulation', *Psychological Science*, Vol. 20, No. 4, p.523.

125 Blanken, I., Van de Ven, N. and Zeelenberg, M. (2015) 'A meta-analytic review of moral licensing', *Personality and Social Psychology Bulletin*, Vol. 1, No. 19, p.1.

126 Feldman, Y. (2014) 'Behavioural ethics meets behavioural law and economics', in Zamir, Y. and Teichman, D. (Eds.) *The Oxford Handbook of Behavioural Economics and Law*, Oxford University Press.

127 Puteri, N.M.M., Muluk, H. and Riyanto, A.A. (2018) 'Seeking context for the theory of the enforceability of the moral licensing effect in a collectivist culture: when moral surplus leads law enforcers to get involved in corruption', in Ariyanto et al. (Eds.): *Diviersity in Unity: Perspectives from Psychological and Behavioural Sciences*, Taylor and Francis Group, London; Feldman, Y. (2018) 'Behavioural ethics and the meaning of 'good people' for legal enforcement' in *The Law of Good People: Challenging States' Ability to Regulate Human Behaviour*, pp.32–57, Cambridge University Press.

128 Welten, S., Seelenberg, M. and Breugelmans, S. (2012) 'Vicarious Shame', *Cognitive Emotions*, Vol. 25, No. 5, p.836; Lasarov, W. and Hoffmann, S. (2018) 'Social moral licensing', *Journal of Business Ethics*, 15 December, pp.1–22; Moore, C. and Gino, F. (2013) *Ethically Adrift: How Others Pull Our Moral Compass from True North and How We Can Fix It* [online] http://nrs.harvard.edu/urn-3:HUL.InstRepos:10996801 (accessed 27 March 2019).

129 Kouchaki, M. (2011) 'Vicarious moral licensing: the influence of others' past moral actions on moral behavior', *Journal of Personality and Social Psychology*, Vol. 101, No. 4, p.702.

130 Effron, D. and Conway, P. (2015) 'When virtue leads to villainy: advances in research on moral self-licensing', *Current Opinion in Psychology*, Vol. 6, No. C, p.32.

131 Ibid.

132 Merrit et al., supra note 14 at 345; Crandall, C.S. and Eshleman, A. (2003) 'A justification-suppression of the expression and experience of prejudice', *Psychological Bulletin*, Vol. 129, No. 3, p.414.

133 Labman, S. and Liew, J. (2018) 'Rhetoric on refugees only hurts border control', *Winnipeg Free Press*, 5 May [online] https://www.winnipegfreepress.com/opinion/analysis/rhetoric-on-refugees-only-hurts-border-control-481819133.html (accessed 27 March 2019).

134 Ibid.

135 Ibid.

136 Ibid.

137 Freeman, A. (2018) 'After Trump's TPS decision, Canada tells Salvadorans: please don't come here', *Washington Post*, 10 January [online] https://www.washingtonpost.com/news/worldviews/wp/2018/01/10/canada-is-sending-a-politician-to-california-to-dissuade-salvadorans-from-crossing-the-border-illegally/?utm_term=.15e6b3fc7de4 (accessed 27 March 2018).

138 For more in-depth discussion of the multiple borders strategy see, Arbel, supra note 13.

139 UNHCR (2017) *Global Trends – Forced Displacement in 2017* [online] http://www.unhcr.org/globaltrends2017/ (accessed 27 March 2018).

140 UNHCR (2019) *2019 Projected Resettlement Needs* [online] https://www.unhcr.org/5b28a7df4.pdf (accessed 27 March 2018).

141 Ibid.

142 Department of Immigration, Refugees and Citizenship (2015) *Annual Report to Parliament on Immigration – 2015*, Canada [online] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2015.html#2_1 (accessed 27 March 2018).