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## ***Immigration***

The Battle for the Wrong Mistake: Risk Salience in  
Canadian Refugee Status Decision-making

Hilary Evans Cameron

Immigration, Xenophobia and Equality Rights

Donald Galloway

Once More unto the Breach: Confronting the Standard of  
Review (Again) and the Imperative of Correctness Review  
when Interpreting the Scope of Refugee Protection

Gerald Heckman and Amar Khoday

Do the Means Change the Ends? Express Entry and  
Economic Immigration in Canada

Asha Kaushal

Medical Inadmissibility, and Physically and  
Mentally Disabled Would-be Immigrants:  
Canada's Story Continues

Constance MacIntosh

Migrant Workers, Rights, and the Rule of Law:  
Responding to the Justice Gap

Sarah Marsden

Quand voyager mène au renvoi: analyse critique de la  
législation canadienne sur la perte du statut de résident  
permanent liée à la perte de l'asile

Hélène Mayrand

The *MV Sun Sea*: A Case Study on the Need for  
Greater Accountability Mechanisms at Canada  
Border Services Agency

Lobat Sadrehashemi



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Hilary Evans Cameron\*

The Battle for the Wrong Mistake:  
Risk Saliency in Canadian Refugee  
Status Decision-making

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*Canadian refugee status adjudicators must choose between two opposing bodies of law, one of which resolves doubt in the claimant's favour and the other at the claimant's expense. How do they decide which to prefer? How do they decide whether it would be better to risk accepting an unfounded claim or to risk rejecting a well-founded one? This paper explores one potentially relevant factor: the saliency of the harms that decision-makers associate with potential risk outcomes. A brief account of recent events in Canadian refugee law history, beginning with the refugee law reforms of former Conservative Immigration Minister Jason Kenney, shows how risk saliency can be manipulated. For each refugee claim to be heard on its own merits, the law cannot leave adjudicators to decide for themselves which kind of error to prefer. It must recognize that sending a refugee home to persecution is the wrong mistake.*

*Les arbitres canadiens du statut de réfugié doivent choisir entre deux arsenaux juridiques opposés, dont l'un tranche en faveur du demandeur d'asile et l'autre aux frais de ce dernier. Comment décident-ils lequel préférer? Comment décident-ils s'il vaut mieux prendre le risque d'accepter une demande non fondée ou de rejeter une demande fondée? Le présent article explore un facteur potentiellement pertinent : l'importance des préjudices que les décideurs associent aux résultats des risques potentiels. Un bref compte rendu des événements récents dans l'histoire du droit canadien des réfugiés, à commencer par les réformes du droit des réfugiés de l'ancien ministre conservateur de l'Immigration Jason Kenney, montre comment on peut manipuler l'importance du risque. Pour que chaque revendication du statut de réfugié soit entendue sur le fond, la loi ne peut laisser les arbitres décider eux-mêmes du type d'erreur qu'ils préfèrent. Il doit reconnaître que le renvoi d'un réfugié chez lui pour être persécuté est la mauvaise décision et une erreur.*

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To make findings of fact in any legal domain, decision-makers must turn their doubts into certainty. They must decide by the end of the fact-finding process which of the relevant allegations to accept and which to reject. To do this, they must resolve all relevant doubts, either in favour of accepting a given allegation or in favour of rejecting it. But which way should they err? Should they more readily run the risk of accepting a false allegation or of rejecting a true one? Which of these two potential mistakes would be worse?

Burdens of proof, standards of proof and presumptions are the law's tools for managing this process, for controlling whether and to what extent an allegation should "pay the price" for the decision-maker's doubts.<sup>1</sup> If every decision-maker could decide for herself how she would prefer to resolve her uncertainty—and could change her preference in any case, for any reason—decisions would be arbitrary and unjust.<sup>2</sup> The law's fact-finding structures therefore have one job: they work together to try to constrain decision-makers to follow the law's error preference rather than their own.

Blackstone's Maxim is one of the common law's most famous notions: "It is better that ten guilty persons escape, than that one innocent suffer."<sup>3</sup> The criminal law's strong theoretical preference for erring in favour of the accused is why its fact-finding structures work as they do. The prosecution bears the burden of proof; the standard of proof is very high, proof of guilt "beyond a reasonable doubt"; and many presumptions favour the accused

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1. Richard H Gaskins, *Burdens of Proof in Modern Discourse* (New Haven: Yale University Press, 1992) 3. See discussion in Hilary Evans Cameron, *Refugee Law's Fact-finding Crisis: Truth, Risk, and the Wrong Mistake* (Cambridge: Cambridge University Press, 2018), Chapter 1. See also Dayna Nadine Scott, "Shifting the Burden of Proof: The Precautionary Principle and Its Potential for the 'Democratization' of Risk" in Law Commission of Canada, ed, *Law & Risk* (Vancouver: UBC Press, 2005) 50 ("[w]ho should be burdened by—and who should benefit from—the limits of our understanding?" at 51). Neil Orloff & Jerry Stedinger, "A Framework for Evaluating the Preponderance-of-the-Evidence Standard" (1983) 131:5 U Pa L Rev 1159 at 1173; Michael L DeKay, "The Difference between Blackstone-Like Error Ratios and Probabilistic Standards of Proof" (1996) 21:1 Law & Soc Inquiry 95 at 131; John Kaplan, "Decision Theory and the Factfinding Process" (1968) 20:6 Stan L Rev 1065.

2. As Kaplan explains, while the law's preference for erring on the side of the accused is a "fundamental tenet" of the criminal law, the accused's reputation and the nature of the crime (in particular, whether it is one with a high likelihood of recidivism) are factors that might reasonably inflate the jury's perception of the harm of a false acquittal. Since these are eminently rational considerations, the problem that the law faces in trying to ensure that all cases are decided according to the same set of decision-making principles—"one of the basic dilemmas of our criminal system"—is in essence how to stop jurors from reasoning rationally. Kaplan, *ibid* at 1074-1077.

3. William Blackstone, *Commentaries on the Laws of England* 352 (Oxford, UK: Clarendon Press, 1769) cited in DeKay, *supra* note 1 at 96. See also Alexander Volokh, "*n* Guilty Men" (1997) 146 U Pa L Rev 173.

and few favour the prosecution.<sup>4</sup> While the criminal justice system may in fact treat any number of accused very badly, and while the law's fact-finding structures may not constrain its judges and juries in practice, at the level of its legal theory, the criminal law resolves doubt firmly in favour of the accused.<sup>5</sup>

As I have argued elsewhere, Canadian refugee law, in sharp contrast, leaves its decision-makers—the members of the Refugee Protection Division of the Immigration and Refugee Board—entirely free to resolve their doubts in accordance with their own preferences.<sup>6</sup> This is because our Federal Court, which develops Canadian refugee law in its judgments on review of the Board's decisions, is itself profoundly split about which kind of mistake Board members ought to prefer: should they more readily risk granting a refugee claim that should have been denied or denying a claim that should have been granted? As a result, the Court interprets refugee law's fact-finding structures differently in two opposing bodies of law, one of which resolves doubt in the claimant's favour and the other at the claimant's expense. A Board member can choose which of these bodies of law she prefers to apply—and can change her preference in any case, for any reason. In a refugee hearing, a context characterized by “radical uncertainty”<sup>7</sup> where doubt lurks around every corner, the ability to tip the balance in either direction will often allow members to reach either conclusion on the same evidence. I have argued that this may help to explain the “vast disparities”<sup>8</sup> in the Board members' acceptance rates.

How, then, do Board members decide which kind of mistake to prefer? This paper looks at one potentially relevant factor. As discussed below,

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4. See Evans Cameron, *supra* note 1.

5. See Kaplan, *supra* note 1 at 1075. Several studies of jury decision-making have also noted that jurors may apply their own interpretations of both the civil and criminal standards of proof that differ from the law's interpretations. See, e.g., Rita James Simon & Linda Mahan, “Quantifying Burdens of Proof” (1971) 5:3 *Law & Soc'y Rev* 319; Eyal Zamir & Ilana Ritov, “Loss Aversion, Omission Bias, and the Burden of Proof in Civil Litigation” (2012) 41:1 *J Leg Stud* 165; James Andreoni, “Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?” (1991) 22:3 *Rand J Economics* 385.

6. Evans Cameron, *supra* note 1.

7. Audrey Macklin, “Coming Between Law and the State: Church Sanctuary for Non-citizens,” *Nexus*, University of Toronto, Faculty of Law (Fall/Winter 2005) 49, 51, cited in Trish Luker, “Decision Making Conditioned by Radical Uncertainty: Credibility Assessment at the Australian Refugee Review Tribunal” (2013) 25 *Intl J Refugee L* 502 at 515.

8. Sean Rehaag, “2017 Refugee Claim Data and IRB Member Recognition Rates” *Canadian Council for Refugees* (26 March 2018), online: <<http://ccrweb.ca/en/2017-refugee-claim-data>>. As Rehaag notes, while grant rates can of course be expected to vary as a function of the claimant's country of origin, “substantial differences” persist when this factor is taken into account. This level of disparity observed in 2017 “is consistent with similar findings from prior years for Canada's previous and new refugee determination systems.” See also Sean Rehaag, “Troubling Patterns in Canadian Refugee Adjudication” (2008) 39:2 *Ottawa L Rev* 335.

error preference judgments are affected by the salience of the harms that decision-makers associate with potential outcomes. ‘Salience’ captures the idea that for any decision-maker some types of harm will resonate more strongly than others: some kinds of harms will capture their imagination, will “strike them more forcefully,” will “stand out.”<sup>9</sup> To illustrate this idea, and its relevance to what I have called “refugee law’s fact-finding crisis,”<sup>10</sup> this paper will give a brief account of some recent events in Canadian refugee law history, beginning with the refugee law reforms of former Conservative Immigration Minister Jason Kenney.

*The battle for the wrong mistake in refugee status determination*

As Minister Jason Kenney went about overhauling the country’s refugee determination system in the early 2010s, he claimed time and again that change was needed because Board members were too often making one kind of mistake: giving refugee protection to those who did not need it. Although Kenney proudly maintained that the Canadian system was head and shoulders above the rest—“the model system in the world for refugee protection”<sup>11</sup>—when our Board recognized more refugees than decision-makers in other countries, this did not suggest to Kenney that this ‘model’ system was working, catching those who elsewhere were slipping through the cracks. It rather implied, on its face, “a fairly significant degree of abuse.”<sup>12</sup> The Board’s surplus positive decisions were not merely exceptional, in other words, they were *mistakes*. And Kenney had complained for years that these mistakes were coming at too high a price. Among other things, the Board’s “incredibly high acceptance rate for refugee claimants” was making Canada “the laughingstock of the world.”<sup>13</sup>

Yet two potential mistakes hang in the balance in a refugee hearing. The Board might mistakenly grant refugee protection, or it might

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9. Seumas Miller, “Co-ordination, Salience and Rationality” (1991) 29 *Southern J Philosophy* 359 at 362. See also Els CM van Schie & Joop van der Pligt, “Influencing Risk Preference in Decision Making: The Effects of Framing and Salience” (1995) 63:3 *Organizational Behavior and Human Decision Processes* 264.

10. Evans Cameron, *supra* note 1.

11. Canada, Parliament, *House of Commons Debates*, 41st Parl, 1st Sess, Vol 146, No 108 (23 April 2012) at 1755 (Hon Jason Kenney). See also House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 41-1, No 31 (26 April 2012) (Hon Jason Kenney); House of Commons, Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, *Evidence*, 41-1, Issue 20 (18 June 2012) (Hon Jason Kenney).

12. House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 40-2, No 37 (1 December 2009) at 0955 (Hon Jason Kenney).

13. Canada, Parliament, *House of Commons (Hansard)* 37th Parl, 1st Sess, No 8- (18 September 2011) at 1300 (quoting with approval a comment from an immigration lawyer, Sergio Karas, cited in the *National Post*, during the debates by Hon Jason Kenney).

mistakenly deny it. “As every elementary handbook of statistics will tell you,” reducing the likelihood of one of these errors means increasing the likelihood of the other kind.<sup>14</sup> Reforming the refugee system so that it generates fewer mistaken grants, then, means accepting that it will generate more mistaken rejections.

To convince Canadians that this trade-off was desirable, Kenney had to decrease their concern with the possibility of rejecting genuine claims, or else make the possibility of accepting unfounded claims so worrying that it would eclipse the fact that his changes would send more people back to persecution (as noted at the time by the UN Committee Against Torture, among others).<sup>15</sup> In the language of cognitive psychology, he had to manipulate the salience of these two associated risks. Throughout his campaign to win over Canadians’ error preference, Kenney used classic rhetorical techniques to turn the knobs: to make one type of harm more salient at the expense of the other.

Researchers have long observed that one of the reasons why “salience seems to have a profound impact on decisional preference”<sup>16</sup> is because decision-makers tend to “overemphasize the information their minds focus on.”<sup>17</sup> In deciding which of two risky options to prefer, a decision-maker may simply be struck by one worst-case scenario and “neglect” the other.<sup>18</sup> By “selectively emphasizing” one type of harm, researchers are able to frame a problem so as to increase the salience of that harm, thereby manipulating their subjects’ perception of which potential worst-case outcome is preferable.<sup>19</sup> To this end, sheer repetition is a powerful

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14. Henk van den Belt & Bart Gremmen, “Between the Precautionary Principle and ‘Sound Science’: Distributing the Burden of Proof” (2002) 15:1 *J Agricultural & Environmental Ethics* 103 at 118, cited in Scott, *supra* note 1 at 62. See also Michael J Saks & Samantha L Neufeld, “Convergent evolution in law and science: the structure of decision-making under uncertainty” (2011) 10:2 *L Probability & Risk* 133 at 138; RS Radford, “Statistical Error and Legal Error: Type One and Type Two Errors and the Law” (1988) 21:3 *Loy LAL Rev* 843 at 851, 872.

15. See Terry Milewski, “Canada accused of ‘complicity’ in torture in UN report: UN body says changes to Canada’s immigration laws risk human rights violations,” *CBC News* (1 June 2012); Canadian Council for Refugees & Amnesty International Canada, Media Release, “New refugee system does not treat refugees fairly or protect those most at risk” (4 December 2012).

16. Van Schie & Van der Pligt, *supra* note 9 at 274. For a review see Cass R Sunstein, *Worst-Case Scenarios* (Cambridge: Harvard University Press, 2007) Chapter 1; Cass R Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005) Chapter 4 [Sunstein 2005].

17. Pedro Bordalo, Nicola Gennaioli & Andrei Shleifer, “Salience Theory of Choice Under Risk” (2012) 127:3 *Q J Economics* 1243 at 1245.

18. *Ibid* at 1245. For a review see Sunstein 2007, *supra* note 16, Chapter 1; Sunstein 2005, *supra* note 16 at 45-49, 89-91, 208-209.

19. Van Schie & Van der Pligt, *supra* note 9 at 271.

tool. The more often we hear a statement, the more familiar it feels and the more it starts to ring true.<sup>20</sup>

In the lead-up to the legislative changes, Kenney highlighted the purported harms of mistaken grants at every opportunity, using “such inflammatory language that it has changed the terms of the national debate.”<sup>21</sup> As he repeated at every turn, our system was staggering beneath the weight of a “massive surge” of cheats and liars:<sup>22</sup> these “lawbreakers and queue-jumpers”<sup>23</sup> were arriving in droves to “violate our fair rules,”<sup>24</sup> “game our system and abuse our generosity.”<sup>25</sup> They were costing Canada financially, “asking where they can get their welfare cheque” upon arrival at the airport.<sup>26</sup> They were costing us politically by forcing us to impose visas on friendly countries,<sup>27</sup> causing a “diplomatic row”<sup>28</sup> that was hurting Canada’s image.<sup>29</sup> The fact that people could come to Canada and make a refugee claim inland, rather than “patiently waiting in the queue”<sup>30</sup> to immigrate, was “an insult to the millions of people who aspire to come

20. “A reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth.” Daniel Kahneman, *Thinking Fast and Slow* (New York: Farrar, Straus & Giroux, 2011) 62.

21. Marci McDonald, “And you think Harper is Right Wing: The ascent of Jason Kenney,” *The Walrus* (May 2014) 27. As one reporter noted, for example, in describing on an open letter that Kenney wrote to Amnesty International in response to the organization’s criticisms of his ministry, “The tone of Mr. Kenney’s letter...feels personal. It reads like the kind of letter we sometimes write when we feel wronged, but then delete before sending. The tone makes sense only if Mr. Kenney recently broke up with Amnesty International.” Tabatha Southey, “Look out, Unicef. Next Jason Kenney might be gunning for you,” *The Globe and Mail* (12 August 2011).

22. Cited in *Jaroslav v Canada (Minister of Citizenship and Immigration)* 2011 FC 634 at para 44, 390 FTR 248.

23. Cited in Nicholas Köhler, “A crackdown on queue-jumpers: Will the Tories make bogus refugee claims an election issue?,” *Maclean’s* (3 August 2009) 19.

24. Cited in McDonald, *supra* note 21 at 35.

25. Cited in Campbell Clark, “Minister calls for overhaul of Canada’s refugee system,” *The Globe and Mail* (15 July 2009).

26. Cited in Steven Chase and Tamara Baluja, “Kenney tightens rules for questionable asylum seekers,” *The Globe and Mail* (16 February 2012).

27. See Kenney’s comments quoted in *Cervenakova v Canada (Minister of Citizenship and Immigration)* 2010 FC 1281 at para 46, 381 FTR 74 [*Cervenakova*]. See also Prime Minister Stephen Harper’s comments, cited in Campbell Clark, “Ottawa announces deal to fast-track Mexican refugees,” *The Globe and Mail* (14 February 2013) (“On a visit to Mexico in 2009, Mr. Harper even told the Mexicans the visa restrictions were not their fault, but Canada’s. ‘This is a problem in Canadian refugee law which encourages bogus claims,’ he said.”); Köhler, *supra* note 23.

28. Cited in *Cervenakova*, *ibid* at para 46.

29. See discussion in Köhler, *supra* note 23; Carl Meyer, “Where’s the beef? Sizing up Canada-Mexico relations,” *Embassy* (26 May 2010).

30. Cited in Köhler, *supra* note 23. See also Hon Jason Kenney (Address delivered at the Faculty of Law, University of Western Ontario, 11 February 2011), Immigration, Refugees and Citizenship Canada: Newsroom Archives: Speeches for 2011, online: <<http://www.cic.gc.ca/english/department/media/speeches/2011/2011-02-11.asp>> [“Speech at Western”].

to Canada legally,”<sup>31</sup> and was also jeopardizing their warm welcome: “when Canadians don’t think the government can control its own borders, public support for generous levels of immigration drops significantly.”<sup>32</sup> It was likewise “an insult to the important concept of refugee protection”<sup>33</sup> and kept us from doing more to help genuine refugees, who in Kenney’s esteem were not those who arrive “illegally...on dangerous vessels across the oceans,”<sup>34</sup> but rather those “living in UN refugee camps by the millions.”<sup>35</sup> Moreover, our security was compromised. We had become an obvious destination for “any serious criminal, any terrorist, any dictator” with a fake passport.<sup>36</sup> And, of course, handing out refugee status to cheats and liars was rewarding their deception and allowing them to “play this country for fools.”<sup>37</sup>

Emphasizing the price that Canada is paying to protect refugees not only increases our concern with mistaken grants, it also decreases the salience of the risk of sending them back to persecution. Drawing attention to the costs inherent in reducing a risk—bringing these costs “on-screen”<sup>38</sup>—is an effective way of decreasing its salience. In one study, for example, parents were very worried about the asbestos in their children’s schools and demanded that it be removed, even though experts assured them that it posed only a minimal risk. Once it became clear that removing the asbestos would cause the schools to be closed for weeks, however, “parental attitudes turned right around” and asbestos no longer seemed very dangerous.<sup>39</sup> Such studies have led Sunstein to predict, for example, “that if people were informed that eliminating pesticides would lead to

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31. Cited in Köhler, *supra* note 23. See also “Speech at Western,” *ibid.*

32. “Speech at Western,” *ibid.*

33. Cited in *Cervenakova*, *supra* note 27 at para 46.

34. “Speech at Western,” *supra* note 30.

35. Cited in *Cervenakova*, *supra* note 27 at para 46. See also discussion in McDonald, *supra* note 21 at 38. On Kenney’s analysis, when a claimant comes to Canada without authorization “rather than applying for refugee status at a United Nations High Commissioner for Refugees office abroad,” even if her claim is *genuine*, not only is she diverting resources that could be put to better use resettling refugees from abroad, but “the integrity of our immigration system is compromised, it undermines the entire immigration process, and it undermines the confidence and respect for that process that we require amongst all of those law-abiding immigrants.” “Speech at Western,” *supra* note 30. For discussion and critique of this argument see Andy Lamey, *Frontier Justice: The Global Refugee Crisis and What to Do About It* (Toronto: Anchor Canada, 2013) 243-247.

36. “Speech at Western,” *supra* note 30.

37. House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 40-3, No 12 (4 May 2010) at 1540 (quoting with approval from an editorial in *The Globe and Mail*, in comments to the committee by Hon Jason Kenney). See also House of Commons, Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, *Evidence*, 41-1, Issue 20 (18 June 2012) (Hon Jason Kenney): “I do not like us being taken for suckers.”

38. See discussion in Sunstein 2005, *supra* note 16 at 47-49.

39. *Ibid* at 47-48.

a significant cost in the price of apples and oranges, the perceived risk would go down.”<sup>40</sup>

In addition, Kenney sought to decrease concern about mistaken denials by creating the impression of a high base rate of fraudulent claims. No one knows what percentage of refugee claimants lie to the Board, including Kenney himself. As his then Director General recently admitted, “We never really had quantifiable information on how much fraud there was.”<sup>41</sup> But if most claimants are frauds, then mistaken grants are unlikely. This suggestion may not have much effect on those for whom this kind of harm is already very worrying—when a risk is salient, “degrees of unlikelihood seem to provide no comfort”<sup>42</sup>—but it will have an evident effect on those who judge its cost, instead, based on some sense of its magnitude and its likelihood.<sup>43</sup> Moreover, rhetoric that works to create the impression of a high base rate of fraudulent claims can become a self-fulfilling prophecy. If members themselves can be made to believe that most claimants are liars, then since they will be more likely to view claimants with suspicion, they will be more likely to conclude that they are lying: “investigator bias” is the well-noted tendency of those looking for deception to find it where none exists.<sup>44</sup> More negative decisions, in turn, only strengthen the appearance that many claimants are frauds.

Kenney used several effective methods of creating the impression of a high base rate of lying claimants. His rhetoric brought the ‘bogus’ refugee claimant squarely to the forefront of the popular imagination, and one of his most obvious rhetorical strategies was what psychologists call “imaging

40. *Ibid* at 49.

41. Quoted in McDonald, *supra* note 21 at 37. Of note, when Board members find that a claim is clearly fraudulent, by law they must indicate this in their decision: the Board must designate the claim as having ‘no credible basis’ if it is “of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision” (*Immigration and Refugee Protection Act*, SC 2001, c 27, s. 107(2) [*IRPA*]). In the nine years leading up to Kenney’s changes, the Board made such a finding in 2.7% of the claims that it decided on the merits, and in the first two years of the new system, in 2.6%. “These figures contradict the exaggerated rhetoric about Canada’s refugee determination process being subject to widespread abuse by fraudulent claimants in the lead up to the reforms” Angus Grant & Sean Rehaag, “Unappealing: An Assessment of the Limits on Appeal Rights in Canada’s New Refugee Determination System” (2016) 49:1 UBC L Rev 203 at 253.

42. John Weingart, *Waste is a terrible thing to mind: risk, radiation and distrust of government* (Princeton, NJ: Center for Analysis of Public Issues, 2001) 362, cited in Cass R. Sunstein, “Probability Neglect: Emotions, Worst Cases, and Law” (2002) 112:1 Yale LJ 61 at 61. See generally Sunstein 2005, *supra* note 16.

43. For discussion, see Evans Cameron, *supra* note 1 at Chapter 1.

44. See, e.g., SM Kassir & RJ Norwick, “Why People Waive Their Miranda Rights: The Power of Innocence” (2004) 28:2 L & Human Behavior 211 at 213; Christian A Meissner & Saul M Kassir, “‘He’s guilty!’: Investigator Bias in Judgments of Truth and Deception” (2002) 26:5 L & Human Behavior 469; Karl Ask, Anna Rebelius & Pär Anders Granhag, “The ‘Elasticity’ of Criminal Evidence: A Moderator of Investigator Bias” (2008) 22 Applied Cognitive Psychology 1245.

the numerator”<sup>45</sup> he illustrated his arguments with numerous concrete examples of actual lying claimants.<sup>46</sup> Allowing us to picture a particular person is one of the most effective ways of increasing our impression that there are many more people like her. It is why advertisements for lotteries always show a photograph of the winner holding the cheque: so that we can “image” her, the numerator, and neglect the denominator, the millions of people who played and lost. And time and again, Kenney used a tactic that has become a prominent feature of the refugee protection debate worldwide,<sup>47</sup> one that the Court has recently noted is “both unfair and inaccurate”<sup>48</sup> and that reflects “a grossly simplistic understanding of the refugee process”<sup>49</sup> implying that any and all rejected claims must have been fraudulent.<sup>50</sup>

In sum, Kenney made very astute use of rhetorical tools that influence how listeners perceive, assess and weigh competing risks to reduce popular concern with wrongly rejecting refugees and to raise the alarm about the costs of mistaken grants. Then, in December 2012, he “performed radical surgery”<sup>51</sup> on Canada’s refugee determination system, bringing about “the most dramatic change since the Second World War.”<sup>52</sup>

At around the same time, the refugee crisis sparked by the outbreak of civil war in Syria was intensifying across the Middle East and North

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45. See for example Thomas Gilovich, Dale Griffin & Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge: Cambridge University Press, 2002) 413-414; Paul Slovic, Ellen Peters & Melissa L. Finucane, “Affect, Risk, and Decision Making” (2005) 24:4 *Health Psychology* S35 at S37; Paul Slovic, John Monahan & Donald G. MacGregor, “Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instructions and Employing Probability Versus Frequency Formats” (2000) 24 *L. & Human Behavior* 271.

46. See, e.g., “Speech at Western,” *supra* note 30.

47. For discussion, see Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (London, UK: Pluto Press, 1996) at 20 (claimants who “fall outside the legal definition of refugee” are seen “increasingly...as ‘bogus’ or ‘fraudulent.’”).

48. *Canadian Doctors for Refugee Care v Canada (Attorney General)* 2014 FC 651 at para 841 [2015] FCR 267, Mactavish J.

49. *Ibid* at para 840. As the Court goes on to explain at para 842, “[r]efugee claims are often brought on the basis of real hardship and genuine suffering. Amongst those whose claims do not succeed will be individuals who may well have come to Canada because of a real fear of persecution in their country of origin, but who were unable to meet the strict legal requirements of the refugee definition.” See also Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008) at 62 (“Some people will, of course, believe that they are entitled to refugee status and later find out that others do not agree with them. This is not an abuse of the asylum process, but a rational response to any number of difficult or desperate situations.”)

50. See, e.g., “Speech at Western,” *supra* note 30; comments cited in *Cervenakova*, *supra* note 27 at para 46.

51. Debra Black & Nicholas Keung, “Immigration and refugee system: Canada made controversial changes in 2012” *Toronto Star* (29 December 2012).

52. McDonald, *supra* note 21.

Africa.<sup>53</sup> In September 2015, the photograph of Alan Kurdi, a three-year-old Syrian boy who drowned attempting to reach safety, hit newspapers around the globe. This photograph has been widely credited with focusing the world's attention, at least for a time, on the plight of refugees fleeing the region. It is generally accepted that this photograph helped to make Canada's response to refugees a "defining issue" of the 2015 national election, which saw the election of a Prime Minister who ran on the promise to bring 25,000 Syrian refugees to Canada by the end of that year.<sup>54</sup> It has also been suggested that this photograph had a "disproportionate effect" on public opinion here because it "hit close to home:"<sup>55</sup> members of the Kurdi family had unsuccessfully applied to come to Canada. For a time, Alan Kurdi's little face became the face of mistaken rejection.

Our ability to change the channel when confronted with human suffering is, of course, profound. But the following year brought a spectacle from which it was harder to turn away: the 2016 US election and all that followed. As pollsters must ever remind us, "Canadians aren't as accepting as we think."<sup>56</sup> But 'welcoming' and 'generous' are key aspects of "the way many Canadians traditionally see themselves."<sup>57</sup> A new government website, which allowed us "to track the arrival of Syrian refugees in communities across the country, receive information on how they could help welcome the refugees, and view photos and stories of refugee resettlement," bore the heading "Open Hearts and Welcoming Communities: It's the Canadian Way."<sup>58</sup> Crucially, though, we see ourselves as warm and generous not just in absolute terms but in relative terms: we are a "welcoming land... unlike our neighbour to the south."<sup>59</sup> Canadians' opinion of human rights

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53. See, e.g., Mark Tran, "UN warns of worst refugee crisis in nearly 20 years" *The Guardian* (19 June 2013), online: <[www.theguardian.com/global-development/2013/jun/19/refugee-crisis-world-worst-united-nations](http://www.theguardian.com/global-development/2013/jun/19/refugee-crisis-world-worst-united-nations)>; Lindsey Phillips, "Top 10 of 2013 – Issue #4: The Escalating Syrian Refugee Crisis Challenges the International Community's Ability to Respond" *Migration Policy Institute* (18 December 2013), online: <<https://www.migrationpolicy.org/article/top-10-2013---issue-4-escalating-syrian-refugee-crisis-challenges-international-communities>>.

54. Michelle Zilio, "Survey finds 'dramatic shift' in Canadian perceptions of U.S. approach to human rights," *The Globe and Mail* (21 August 2017). See also Geordon Omand, "Photo of Alan Kurdi had disproportionate effect on Canada: observers," *CTV News* (1 September 2016); Teresa Wright, "Alan Kurdi photo left Canadian government scrambling, emails reveal," *The Toronto Star* (29 April 2018); Victoria M Esses, Leah K Hamilton & Danielle Gaucher, "The Global Refugee Crisis: Empirical Evidence and Policy Implications for Improving Public Attitudes and Facilitating Refugee Resettlement" (2017) 11 *Social Issues & Policy Rev* 78 at 105.

55. Zilio, *supra* note 54.

56. Angus Reid, "Canadians aren't as accepting as we think—and we can't ignore it, writes Angus Reid," *CBC News* (4 October 2016).

57. *Ibid.*

58. Esses et al., *supra* note 54 at 105.

59. *Ibid.*

in the US started to decline in 2015,<sup>60</sup> and even under President Obama, polls showed that we “associate[d] few positive attributes with the U.S.”<sup>61</sup> After President Trump was elected, with esteem for the US “plummeting” across the globe, Canada showed “the largest such decline of any country within the Western Hemisphere.”<sup>62</sup> In the first months of 2017, as the US administration announced that it was temporarily barring the citizens of seven Muslim-majority countries, along with all refugees, from entering the country, our opinion of our neighbour’s human rights record reached its lowest level recorded to that point, and our Prime Minister famously assured refugees via tweet that “Canadians will welcome you.”<sup>63</sup>

A risk’s salience may be affected by a decision-maker’s “self-categorization,” by how she conceives of her own identity in relation to it.<sup>64</sup> Decision-makers’ risk judgments will reliably change in response to experimental manipulations that affect how they see themselves and their decision-making role. When reminded of their role as parents, for example, subjects perceived strangers to be more dangerous and trusted them less.<sup>65</sup> When reminded of their own mortality, subjects were more inclined to support harsh measures to counter the risk of terrorism.<sup>66</sup> Legal scholar and former Board member Audrey Macklin observed years ago that some members “conceive of their mandate in terms of fulfilling Canada’s human rights obligations under the Refugee Convention and Canadian law,” while others “understand themselves as gatekeepers, tasked with protecting Canada’s borders from unscrupulous and undeserving migrants who

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60. Zilio, *supra* note 54.

61. Angus Reid Institute, “Canada-U.S. perspectives: ‘sunny ways’ versus gloomy days” (9 March 2016), online: <<http://angusreid.org/canada-us-perspectives/>>.

62. Alexander Panetta, “World’s opinion of U.S. hits new low under Trump—especially in Canada: poll,” *Global News* (18 January 2018).

63. American Civil Liberties Union, “Timeline of the Muslim Ban” (June 2018), online: <[www.aclu-wa.org/pages/timeline-muslim-ban](http://www.aclu-wa.org/pages/timeline-muslim-ban)>; Zilio, *supra* note 54; David Ljunggren & Anna Mehler Paperny, “Justin Trudeau tweets messages of welcome to refugees as Trump travel ban sets in,” *Global News* (28 January 2017).

64. See, e.g., Diederik A Staple, Stephen D Reicher & Russell Spears, “Social identity, availability and the perception of risk” (1994) 12:1 *Social Cognition* 1. See also Esses et al., *supra* note 54.

65. Richard P Eibach & Stephen E Mock, “The vigilant parent: Parental role salience affects parents’ risk perceptions, risk aversion, and trust in strangers” (2011) 47:3 *J Experimental Social Psychology* 694.

66. Matthew B Kugler & Joel Cooper, “Still an American? Mortality Salience and Treatment of Suspected Terrorists” (2010) 40:12 *J Applied Social Psychology* 3130; Mark J Landau et al, “Deliver Us From Evil: The Effects of Mortality Salience and Reminders of 9/11 on Support for President George W Bush” (2004) 30:9 *Personality and Social Psychology Bulletin* 1136.

abuse the asylum system to gain entry.”<sup>67</sup> Kenney’s rhetoric emphasized the latter identity. In the first months of 2017, looking south with mouths agape, more Board members may have been reminded of the former. And if affirming this identity was pleasing, if it brought with it a warm satisfied feeling—smugness, if you will—this would only have intensified its effect on risk salience. The more appealing a decision, the less we worry about its attendant risks.<sup>68</sup> If preferring mistaken grants allowed members to identify themselves as *Canadians*—as a different and better kind of creature than their southern neighbours—they may more easily have looked past any harms that they associated with accepting unfounded claims.

When Board members now look south, however, they may well be struck by a different vision. Canada does not accept refugee claims at official ‘ports of entry’ along our southern border on the increasingly untenable premise that asylum seekers will get a fair hearing in the US.<sup>69</sup> Those who enter Canada at unauthorized crossings, however, may make refugee claims at a government office inland. By August 2018, around 30,000 people had side-stepped our ports of entry in this way in order to make refugee claims.<sup>70</sup>

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67. Audrey Macklin, “Refugee Roulette in the Canadian Casino” in Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag eds, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (New York: New York University Press, 2009) 135 at 158 [Macklin, “Refugee Roulette”]. See also François Crépeau & Delphine Nakache “Critical Spaces in the Canadian Refugee Determination System: 1989–2002” (2008) 20:1 Intl J Refugee L 50 at 112-113.

68. See Paul Slovic, Ellen Peters & Melissa L. Finucane, “Affect, Risk, and Decision Making” (2005) 24 Health Psychology S35 at S37; Hilary Evans Cameron, “Subjective Fear and Risk Theory: The Role of Risk Perception, Risk Assessment and Risk Management in Refugee Status Determinations” (2008) 20:4 Intl J Refugee L 567 at 570-571.

69. See Teresa Wright, “Canada faces mounting pressure to end safe third country agreement with U.S.” *CTV News* (21 June 2018).

70. Government of Canada, “Asylum Claims” (Ottawa: 13 August 2018), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims.html>>. In sum, over 30,000 claimants have crossed into Canada without authorization since the 2016 US election. Éric Grenier, “Justin Trudeau is losing the argument on border crossings, poll suggests,” *CBC News* (3 August 2018).

The images of masses of claimants crossing ‘illegally’ into Canada have caught and held the public’s attention.<sup>71</sup> For a majority of Canadians, the fear that the country “is being invaded”<sup>72</sup> has become powerfully salient; pollsters predict that it may in fact threaten the government’s chances of re-election.<sup>73</sup> At least one Canadian commentator has called on the government “to build a wall.”<sup>74</sup> Moreover, 40% of respondents to a recent poll, and nearly two-thirds of those who identify as Conservative, believe that these claimants are “mostly economic migrants” and not refugees.<sup>75</sup> “The perception is that these people are illegal and that they’re violating Canada’s borders and that they’re just queue jumpers trying to get freebies on welfare.”<sup>76</sup> In short, the sheer number of new arrivals, and the manner of their arrival, are greatly increasing popular concern with the purported harms of mistaken grants.

### *Conclusion*

If you had to make a refugee claim at some point during this historical narrative, when would you choose to do it? If you chose the period when Kenney was hard-selling his plan to limit ‘bogus’ claims, you chose poorly. At that point, the Board’s acceptance rate, which had “declined substantially since 2006 when the Conservative Party took office,” was

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71. In a recent poll, “[f]ully 70 per cent of respondents...said they were either ‘following it in the news and discussing it with friends and family’ or ‘seeing some media coverage and having the odd conversation.’” Grenier, *supra* note 70. Of note, under both Canadian and international law, a person will not be penalized for entering a country without authorization for the purpose of claiming asylum, and moreover, Canadian immigration law “does not make it illegal to enter Canada using informal border crossings, as long as a person reports to border services without delay.” Lobat Sadrehashemi & Lorne Waldman, “Four myths about Canada’s border crossings,” *Ottawa Citizen* (15 May 2018). Whether claimants crossing from the US at unauthorized entry points are nonetheless arriving ‘illegally’ has, however, been the subject of some debate. For discussion, see Stephanie Levitz, “Are asylum seekers walking across the border into Canada actually breaking the law?,” *Global News* (9 March 2017); Tristin Hopper, “Irregular or illegal? The fight over what to call the thousands of migrants streaming into Canada,” *The National Post* (10 July 2018).

72. Sigal Samuel, “‘There’s a Perception That Canada Is Being Invaded’: Justin Trudeau’s government has started rejecting more refugee claims from migrants who cross the U.S.-Canada border on foot,” *The Atlantic* (26 May 2018).

73. Grenier, *supra* note 70; Angus Reid Institute, “Two-thirds call irregular border crossings a ‘crisis,’ more trust Scheer to handle issue than Trudeau,” (3 August 2018), online: <<http://angusreid.org/safe-third-country-asylum-seekers/>>; Bruce Anderson & David Coletto, “Liberals and Conservatives neck and neck as the race to 2019 takes shape,” Abacus Data (31 July 2018), online: <<http://abacusdata.ca/liberals-and-conservatives-neck-and-neck-as-the-race-to-2019-takes-shape/>>.

74. Anthony Furey, “Someone has to say it—it’s time to build a wall at Roxham Rd.,” *Toronto Sun* (22 May 2018).

75. Grenier, *supra* note 70; Angus Reid Institute, *supra* note 73.

76. Samuel, *supra* note 72.

approaching an all-time low.<sup>77</sup> If you chose the time when Prime Minister Trudeau was tweeting Canada's welcome to refugees, you chose wisely. At that point, our Refugee Board was accepting a greater percentage of claims than it had at any point in the previous 27 years.<sup>78</sup>

Myriad other factors affect the Board's acceptance rate in significant ways, of course.<sup>79</sup> But as Macklin notes, "it would be naïve to suggest that decision makers are impervious to the political currents circulating around them."<sup>80</sup> There is ample evidence of the power of political and media rhetoric to sway public opinion about refugees, both positively and negatively,<sup>81</sup> and as the Federal Court has observed, Board members make their decisions "in the glare of...political and public attention."<sup>82</sup> Or as Lord Sedley of the Court of Appeal of England and Wales has put it: "You can attend fifty social gatherings, you can drink in a hundred bars, where the conversation never comes remotely near the problems of eviction or bankruptcy; but it's unusual to be in any gathering where immigration does not sooner or later come up."<sup>83</sup>

Policy concerns have no place in a refugee hearing room.<sup>84</sup> A Board member's sole responsibility is to determine whether the claimant needs protection. Members have no broader mandate to save Canada money, to spare it embarrassment, or to promote a particular vision of the social order. In her study of the Board's institutional culture, however, political scientist Rebecca Hamlin noted that its members at times came under considerable

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77. Debra Black, "Acceptance rates for refugees to Canada decline substantially since 2006," *The Toronto Star* (1 November 2012); Sean Rehaag, "2012 Refugee Claim Data and IRB Member Recognition Rates," *Canadian Council for Refugees* (13 May 2013), online: <<http://ccrweb.ca/en/2012-refugee-claim-data>>.

78. Tara Carman, "Canada's acceptance rate of asylum seekers is the highest in 27 years—here's why," *CBC News* (7 February 2018).

79. See, e.g., Carman, *ibid.*

80. Macklin, "Refugee Roulette," *supra* note 67 at 140.

81. See Danielle Gaucher et al, "Changes in the Positivity of Migrant Stereotype Content: How System-Sanctioned Pro-Migrant Ideology Can Affect Public Opinions of Migrants" (2018) 9:2 *Social Psychological and Personality Science* 223; Esses et al, *supra* note 54.

82. *Geza v Canada (Minister of Citizenship and Immigration) (CA)* 2006 FCA 124 at para 55, 267 DLR (4th) 54 [*Geza*].

83. Sir Stephen Sedley, "Asylum: Can the Judiciary Maintain its Independence?" (International Association of Refugee Law Judges World Conference, April 2002) cited in Angela Barisic, *Credibility Assessment of Testimony in Asylum Procedures: an Interdisciplinary Analysis* (LLM Thesis, Lund University Faculty of Law, 2015) at 11.

84. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 48, 28. See also *Geza*, *supra* note 82; *Canada (Minister of Citizenship and Immigration) v Pearce* 2006 FC 492 at para 31, 290 FTR 287, in the context of a vacation determination (Blanchard J): "The refugee protection provision of the *IRPA* provides for the adjudication of rights and entitlements in respect to refugee claimants and not the balancing of competing interests."

pressure to make negative decisions on policy grounds.<sup>85</sup> Hamlin explained that there was “no clear mechanism for how politicians or policymakers can force the [Board] to crack down and be less generous.”<sup>86</sup> Yet as long as the law allows members to resolve their doubts as they choose, none is needed. Convincing them that granting refugee status is the wrong mistake will achieve the same result.

Sending a refugee home to persecution is the wrong mistake. This error preference, anchored in the Refugee Convention, is as fundamental to refugee law as Blackstone’s Maxim is to the criminal law.<sup>87</sup> Fact-finding structures that entrench this foundational normative principle are refugee law’s strongest tool for protecting these life and death decisions from what Lord Sedley calls “the ambient pressure” on decision-makers “to put a finger in the dyke, to stem the tide, to stop the rot; to reject the stories they hear from asylum-seekers so that they can be sent home.”<sup>88</sup> Without a coherent and principled law of fact-finding, it is too much to hope that each refugee claim will be heard on its own merits. As the harms of mistaken grants become more salient with each unauthorized border crossing, Canadian refugee law must fix this elemental flaw at its core.

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85. Rebecca Hamlin, *Let Me Be A Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (New York: Oxford University Press, 2014) at 97.

86. *Ibid.*

87. For this argument, see Evans Cameron, *supra* note 1.

88. Cited in Barisic, *supra* note 83.