Introduction

Which mistake is worse: to deny a refugee claim that should have been granted, or to grant a claim that should have been denied?

The law that governs fact-finding in any legal domain is built on a judgment about which potential error a decision-maker should prefer. Decisions to grant or deny refugee protection often hinge on findings of fact, yet refugee law has not engaged with this question. This hole in the law's foundations may well be undermining refugee protection across the globe, for as this book intends to show, it is contributing daily to the dysfunction of one of the world's most respected refugee determination systems.

The law of fact-finding has fallen between the cracks in the study of refugee status decision-making. A quantity of theoretical work[1] and an emerging body of empirical study[2] contribute much to our understanding of how refugee status decisions are made in practice. This scholarship explores the institutional, sociopolitical, and psychological factors that influence how and why these decisions are made, rather than the law that governs them. At the same time, scholars of law have concentrated

[1] See e.g. Benjamin N Lawrance & Galya Ruffer, eds, *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (New York: Cambridge University Press, 2015); Iris Berger, Tricia Redeker Hepner, Benjamin N Lawrance, Joanna T Tague, & Meredith Terretta, eds, *African Asylum at a Crossroads: Activism, Expert Testimony, and Refugee Rights* (Athens: Ohio University Press, 2015); Efrat Arbel, Catherine Dauvergne, & Jenni Millibank, eds, *Gender in Refugee Law: From the Margins to the Centre* (New York: Routledge, 2014); Thomas Spijkerboer, ed, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Abingdon: Routledge, 2013); Carol Bohmer & Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (London: Routledge, 2008); 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).

[2] See e.g. 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); Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 *Ottawa Law Review* 335; Nick Gill, Rebecca Rotter, Andrew Burridge, Melanie Griffiths, & Jennifer Allsopp, "Inconsistency in Asylum Appeal Adjudication" (2015) 50 *Forced Migration Review* 52. See also below n 4.

almost exclusively on the substantive legal doctrine, on the law that decides *on a given set of facts* whether a person needs refugee protection. This book provides the first general account, within one national jurisdiction, of what the law of fact-finding is trying to accomplish in a refugee status determination, and how and why. With the insights gained from this case study, it begins to build the missing normative foundation, and with it a new legal model of refugee status decision-making.

Part I addresses the role of error preference in the law of fact-finding generally. It explores how the law decides which mistake is worse, and how this judgment informs the legal structures that resolve uncertainty: burdens of proof, standards of proof, and presumptions.

The case study in Part II looks through this lens at refugee law in Canada. The Canadian system is invariably referred to as the "Cadillac" of refugee status determination.[3] Yet seeking refugee protection in Canada has become a game of chance,[4] as it has elsewhere.[5] In recent years, some Canadian adjudicators have accepted all, or nearly all, of the claims that they have heard.[6] Others have rejected every one.[7] And the same adjudicator will sometimes decide very similar cases

[3] See e.g. Hamlin, above n 1, Ch. 5 ("The 'Cadillac' Bureaucracy: RSD in Canada"), 84–85; Peter Showler, *Refugee Sandwich: Stories of Exile and Asylum* (Montréal: McGill-Queen's University Press, 2006) 217–18; Sibaji Pratim Basu, ed, *The Fleeing People of South Asia: Selections from Refugee Watch* (New Delhi: Anthem Press, 2008) 82.

[4] Recent studies have revealed "vast disparities in refugee claim recognition rates" among the members of the Refugee Protection Division of the Canadian Immigration and Refugee Board (Sean Rehaag, "2014 Refugee Claim Data and IRB Member Recognition Rates" (8 May 2015), online: ccrweb.ca/en/2014-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 (*ibid*). This high level of disparity "is consistent with similar findings from previous years for Canada's previous and new refugee determination systems" (*ibid*). See e.g. Sean Rehaag, "2013 Refugee Claim Data and IRB Member Recognition Rates" (14 April 2014), online: ccrweb.ca/en/2013-refugee-claim-data; Sean Rehaag, "2012 Refugee Claim Data and IRB Member Recognition Rates" (13 May 2013), online: http://ccrweb.ca/en/2012-refugee-claim-data [Rehaag 2012]; Sean Rehaag, "Updated 2011 Refugee Claim Data and IRB Member Recognition Rates" (3 August 2012), online: http://ccrweb.ca/en/2011-updated-refugee-claim-data; Sean Rehaag, "2010 Refugee Claim Data & IRB Member Grant Rates" (1 March 2011) online: http://ccrweb.ca/en/2010-refugee-claim-data [Rehaag 2010]. For further discussion, see Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 *Ottawa Law Review* 335.

[5] See Ramji-Nogales et al., above n 2.

[6] Rehaag 2010, above n 4; Rehaag 2012, above n 4. It is not unusual for Refugee Board members hearing predominantly "expedited positive" cases to have very high grant rates, for the Board's administration has prioritized these types of claims based on the objectively dangerous conditions in the claimant's home country and they "generally result in positive decisions" (Rehaag 2010, above). But even leaving these cases aside, one member recently granted 95 percent of the 120 cases before him, where the "predicted recognition rate" based on country averages would have been 62.5 percent, for example (Rehaag 2012, above), and another granted each of the 35 cases that appeared before her (Rehaag 2010, above).

[7] Rehaag 2011, above n 4; Rehaag 2010, above n 4. One member recently rejected each of the 129 cases that appeared before him (Rehaag 2011, above); another rejected each of his 62 cases (Rehaag 2010, above). See also discussion in Sean Rehaag, Juliana Beaudoin & Jennifer Danch, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015) 52 *Osgoode Hall Law Journal* 705.

differently. One recently reached opposite conclusions in two hearings held hours apart, on the same package of evidence, for members of the same family, who feared the same people, for the same reasons.[8] Looking at the Canadian law through the lens of error preference sheds light on how this otherwise well-functioning system has come to have such an elemental flaw at its core.

Part III suggests a way forward. It argues that international refugee law should recognize an obligation under the Refugee Convention to resolve doubt in the claimant's favour. What is more, as the Canadian case study demonstrates, to meet its Convention obligations this process must function as a risk assessment. Building on recent UK and Australian jurisprudence, this book proposes a model of refugee status decision-making that gives effect to these two legal imperatives.

Of the many relevant areas of inquiry that this book does not address, three are worth noting.

This book does not undertake a comparative analysis of the law across jurisdictions. As discussed in Chapter 2, many kinds of decision-makers make refugee status determinations. In countries with functioning refugee systems, these decisions are made variously by border officials, bureaucrats, tribunal members, and judges, all of whom are expected to apply their country's own laws and to follow its own sets of rules and procedures. In many other countries, and increasingly, these decisions fall to the officials of the United Nations High Commissioner for Refugees (UNHCR), who are instructed to rely on the UN's internal guidelines. The introduction to this book's case study explains the Canadian system's idiosyncracies for an international audience. Beyond this, like the texts that clarify the substantive law, this book aspires to make observations that will be relevant in any jurisdiction in which a decision-maker of any kind decides a refugee claim.

Moreover, while dipping a toe in the pond, this book does not attempt to explore in any serious way the psychology of legal judgment.[9] It proposes that how Canadian judges structure the law of fact-finding in refugee cases suggests something about how they see refugee claimants and the role of international refugee protection. In so doing, it takes the rationales that these judges offer to justify their choices at face value, and uses them as an analytical tool to help make sense of the judges' decisions. Whether these rationales reflect the judges' actual motivations is, of course, another question.

In the same vein, this book's claim to have identified a cause of Canadian adjudicators' inconsistent grant rates is not based on any empirical observation of

[8] *Rusznyak* v *Canada (Minister of Citizenship and Immigration)*, 2014 FC 255 at para 47, 23 Imm LR (4th) 318, Russell J.

[9] For an introduction to this field, see e.g. Jeffrey J Rachlinski, Andrew J Wistrich, & Chris Guthrie, "Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences" (2015) 90 *Indiana Law Journal* 695; Jeffrey J Rachlinski, Andrew J Wistrich, & Chris Guthrie, "Altering Attention in Adjudication" 60 *UCLA Law Review* 1586; Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, "Extraneous Factors in Judicial Decisions" (2011) 108 *Proceedings of the National Academy of Sciences* 6889.

their decision-making. Instead, it draws on an analysis of the legal environment in which this decision-making is taking place, and rests on the premise that inconsistency is inevitable if the law itself is incoherent. If this book were looking to explain car crashes, it would be examining how decisions about the rules of the road are made and communicated to drivers, rather than trying to understand how people drive. If people are driving too quickly, or recklessly, or while under the influence, this is surely worth exploring. So, too, is the fact that road signs are missing, or unclear, or are directing drivers into oncoming traffic.