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Compendium: Recent Graduate Student Dissertation and Thesis Abstracts

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A. UNWELCOME BUT TOLERATED: IRREGULAR MIGRANTS IN CANADA, BY ZEINA BOU-ZEID

On a general level, this project is concerned with uncovering the existence of irregular migrants in Canada in order to expose the exploitation they are subject to and their vulnerable legal status. More specifically, this dissertation aims to uncover Canada's history with irregular migration (the movement of persons across national borders in contravention of national laws), and the legal and policy measures that continuously produce an irregular status. It is hoped that a greater understanding of irregular migrants' legal status will encourage further examination by the academic community and NGOs of their existence, legal issues, and vulnerability, and promote immigration and refugee policy and legal reforms directed at reducing the production of irregularity from within the Canadian state.

Although the presence of irregular migrants is considered problematic from the state perspective, the consequences of living without an immigration status are significant and cannot be ignored in the discourse surrounding this issue. Even though irregular migrants lack legal status, these migrants demonstrate that they are integrated into the community as they live and work and therefore may have certain claims to rights, benefits, and eventual citizenship. The dual identity of irregular migrants as outsiders and members of the community suggests that a revision of state policies is required.

Thus, the most appropriate remedies for addressing irregular migration involve: 1) supplementing public policy discussions on this issue with a new discourse that would emphasize the needs and the voice of the irregular migrant within Canada and call attention to their daily struggles for survival; 2) providing channels of entry for those immigrants and refugees deemed "undesirable" by the state, thereby reducing the attractiveness of illegal entry, residence, and employment; and 3) implementing a procedure that directly targets and is sympathetic to the situation of irregular migrants and offers the opportunity for legalization on a case-by-case basis.

B. DEMOCRACY AND TRUST: ELECTORAL BOUNDARY POLITICS IN THE ADMINISTRATIVE ARENA, BY RON LEVY

The author examines impartiality in cases of politically contentious decision-making. Many jurisdictions delegate decisions over matters such as the establishment of fair election ground rules to independent bodies. Some of these bodies, including Canada's Federal Electoral Boundaries Commissions (FEBCs), attract widespread trust and are by most accounts substantially impartial. In contrast, commissions empanelled to draw electoral boundaries in the United States, and to a lesser extent in certain Canadian provinces, are often plagued by partisanship.

The author canvasses approaches to controlling partisanship, relying on a series of interviews conducted with boundaries commissioners and on interdisciplinary literature on trust and trustworthiness in governance. Commentators often favour bolstering formal constraints on FEBC discretion. The author concludes, however, that traditional administrative law models favouring such constraints are often inadequate. In politically sensitive cases these methods often act as a catalyst to partisanship. Proposals for more nuanced design—design sensitive to the complex interactions between law and administrative culture in

cases where the potential for partisanship is high—are better but rarer. The author focuses in particular on the use of ambiguity in legal and institutional design. Although this approach is counterintuitive in light of rule of law assumptions favouring clarity, it has nevertheless gained traction in commentary and has long been at work in practice. The author argues that extensively ambiguous design, as displayed by the complex federal readjustment processes in Canada, has helped to develop the widely admired impartial decision-making cultures of the FEBCs.

C. *CHARTER* RIGHTS IN REGULATORY VS. CRIMINAL PROCEEDINGS: A DISTINCTION IN NEED OF A DIFFERENCE?, BY CHRISTOPHER SHERRIN

Canadian law draws a distinction between constitutional rights in the investigation and prosecution of regulatory versus criminal offences. An individual's rights against self-incrimination and to privacy are much more limited in the regulatory context. There will be occasions when a person can be statutorily required to give statements to the authorities that can later be used against him/her in a prosecution for a regulatory offence. There will also be occasions when a regulated individual will be subjected to warrantless inspections and demands for production. The same cannot be said in the criminal context.

The question addressed in this thesis is whether there is a legitimate basis for distinguishing in this way between rights in the criminal and regulatory contexts. The author asserts that there is not. All the major justifications that have been proffered for the constitutional distinction are analyzed and none are found to have merit. The author argues that most of the justifications suffer from serious theoretical flaws and, even more importantly, each can be used to justify limited (or expansive) constitutional protections in both regulatory law and criminal law. At the very least, none of the proffered justifications offer any basis for drawing a categorical constitutional distinction. Even if there are legitimate reasons for distinguishing between rights in some regulatory contexts versus some criminal contexts, there nevertheless remains a significant amount of overlap. As a result, there are numerous situations where the *Charter* rights against self-incrimination and to privacy should be interpreted identically in both contexts.

D. CHILD PORNOGRAPHY AND LAW IN CANADA: A NEW AGENDA FOR THE INFORMATION AGE, BY SARA SMYTHE

The child pornography problem has preoccupied Canadian courts and the media in recent years and led to demands for justice by an outraged but largely misinformed public. Parliament has consistently responded to the public outcry by broadening the child pornography provisions. Yet the distribution and use of online child pornography has escalated along with increased regulatory attention. It is clear that two important regulatory changes are needed to confront the widespread circulation of these materials. First, the child pornography provisions must be narrowed to concentrate exclusively on images of actual child sexual abuse. This would enable law enforcement agents to focus all of their efforts on eradicating the circulation of real child sex abuse images on the Internet. Second, this innovative form of criminal activity requires a new legal framework to address the fact that emerging technologies are being used to perpetrate crime on a global scale. The legal framework must consist of three complementary layers of regulation: international cooperation, architectural innovation, and user regulation.

The Council of Europe's *Convention on Cybercrime*, which Canada signed but did not ratify, provides an ideal framework for the implementation of these new regulatory measures. It enables many countries to work together by pursuing a common criminal policy based on international cooperation and the harmonization of domestic legislation. It requires signatory states to update their technological capabilities for combating digital crime by implementing sophisticated evidence gathering techniques to lawfully intercept online communications, share resources, and obtain information about those who use the Internet for criminal purposes. Parliament must implement the measures needed to ratify this treaty and work with other nations to target the proliferation of real child sex abuse images on the Internet.

E. GLOBALIZATION, SECURITIZATION AND THE RIGHTS OF NON-CITIZENS, BY MICHAEL ANTONIK

Scholars have raised concerns about the negative pressures on the protection of non-citizens' interests stemming from the alignment of Canadian immigration law with the perceived imperatives of globalization and securitization, pressures that are particularly acute in the post-9/11 era. This thesis evaluates and substantiates some of these concerns by conducting two case studies examining how and to what extent non-citizens' interests have been protected by Parliament

and the judiciary. Utilizing the concepts of globalization and securitization as analytical lenses, the first case study explores the parliamentary process leading up to the enactment of the 2001 *Immigration and Refugee Protection Act*. The second case study encompasses a quantitative and qualitative analysis of court and Immigration and Refugee Board decisions from 2004-2007 that adjudicated *Charter* rights claims brought by non-citizens. On the basis of the results of these two case studies, it is argued that Parliament and the judiciary have systematically neglected non-citizens' interests, rendering them, in essence, *Charter personae non gratae* in the immigration law context.

F. OPEN ACCESS: MEDICAL DISCLOSURE IN HUMAN RIGHTS LITIGATION, BY ENA CHADHA

The goal of this study was to assess what theoretical models of disability and conceptions of equality underpin human rights disclosure process and jurisprudence across Canada from 1995 to 1996. The thesis outlines four models of disability—medical, economic, social, and feminist—and uses these models to critique disclosure litigation. The study demonstrates that prejudicial notions of disability and gender influence human rights disclosure proceedings. The thesis concludes that there is heightened vulnerability on the part of women and persons with mental disabilities as targets of disclosure demands for their confidential medical information. The thesis found that significant personal and medical information was disclosed under the guise of neutral labels and assumptions of relevancy. By examining disclosure litigation through a critical disability lens, this thesis proposes that social and feminist disability theory can offer alternate equality-oriented and disability-sensitive interpretations for disclosure processes and jurisprudence.

G. THE JANUS COMPLEX: UNIONIZED TEACHERS AS PROFESSIONAL EMPLOYEES, BY DAVID MANGAN

Examining the education labour relations reforms initiated in mid-1990s Ontario and its results to 2006, this thesis explores the implications of teachers as union members who claim professional status. The backdrop is the increasingly dynamic realm of public sector labour relations where government works concurrently as legislator and funder (if not indirect employer) of education. The labour strife during the period under examination underscores the provocative nature of this labour dialogue, as both sides utilized public relations strategies to curry public

favour. The end result points up elements of the changes produced such as: a focus on collective bargaining at the expense of the professional identity; a centralization of funding with government suggesting an unofficial move towards provincial collective bargaining; and the difficult balance between "professional" and "union member" as both government and the teachers unions utilize these terms as touchstones for public relations strategies.

H. SOCIAL MODELS IN PRIVATE LAW: TENDENCIES OF MATERIALIZATION IN GERMAN AND AMERICAN PRIVATE LAW, BY ANDREAS MAURER

Social models in private law are images of society inscribed in a legal system. They alter as a reaction to changing social ideals and values as well as to changing societal basic structures (political, economic, and social) and problems resulting thereof. The solution of legal problems is guided by this image. It instructs and informs the way that the legal system perceives and copes with such problems.

A comparison of some aspects of German and American private law reveals similarities as well as differences which can be associated with respective social models. Current debates over a re-formalization of private law in Germany as well as in the United States do not adequately account for social models. This work pleads for a more precise analysis of social models in private law in order to adequately describe law and its possible developments.

I. THE DETENTION AND DEPORTATION OF CONVENTION REFUGEES ON GROUNDS OF CRIMINALITY AND NATIONAL SECURITY IN CANADA: CHALLENGES AND JUSTIFICATIONS, BY HANSON NJOH SONE

Refugees, permanent residents, and other non-citizens can challenge the legality of security-related immigration measures on the basis of violations of fundamental justice such as due process rights, fairness, right to life, liberty, and security of the person.

These claims have sometimes been peremptorily thwarted through the operation of the specifically delineated and presumptively authoritative sovereignty-derived imperatives of security. These doctrinal edifices, the result of a narrow approach to both the immigration history of these states and their current security-focused practices, have allowed controversial, secretive, and sometimes repressive legal mechanisms to operate. These mechanisms have been subject to rigorous critique by the engaged public, academia, media commentators, parliamentarians, international bodies, and even some judges, only to survive repeated

legal challenges. This has led to the consideration of the issue of how Canada has attempted to reconcile national security and humanitarian policy issues in its treatment of refugees.

This research examines the legal mechanisms (including judicial review) by which decisions are affected to deny entry, to detain (indefinitely), or to deport refugees and/or non-citizens for reasons of national security and other criminal behaviour in Canada. In addressing these situations, this thesis attempts to investigate the following three questions: 1) To what extent may states such as Canada refuse entry, detain, or deport refugees on grounds of national security and criminal risks, particularly to countries where they may face torture and death?; 2) Are these measures consistent with the obligations of these states (Canada) under ratified international (humanitarian) and security law treaties and other international law instruments?; and 3) What legal mechanisms (*e.g.*, judicial review) has Canada established to review executive decisions to deny entry, detain, or deport refugees on security and criminal grounds? How have these mechanisms been applied in practice and have these mechanisms provided a reasonable and just reconciliation between national security and humanitarian policy issues?