Violence and the Form: The ultrahazardous activity of excluding children in Canada’s immigration family class

Jamie Liew

Legal interpretation takes place in the field of pain and death. This is true in several senses. Legal interpretation acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.

- Robert Cover in “Violence and the Word”

INTRODUCTION

They left their children’s names off the forms. That omission barred the Kisanas from living with their children under one roof in Canada.

Ashamed of having had the children outside of marriage, Sushil and Seema Kisana never openly acknowledged the children’s existence, even to their parents. With the exception of Seema’s aunt who helped Seema care for the children, they denied the existence of the children to everyone, including immigration officials.

Sushil and Seema Kisana met in India, fell in love, and had twin daughters. Sushil immigrated to Canada with his parents two years later. Not forgetting about Seema and his children, Sushil returned to India a year after moving to Canada to marry Seema. He sponsored her as his spouse and she came to Canada five years later. Both Sushil and Seema are now Canadian citizens.

But what of the children? Once acquiring citizenship, the Kisanas tried to sponsor their daughters but their application was refused. The twins were deemed “not family” and therefore could not be sponsored as family members. The children were excluded from the family reunification scheme because neither parent, when immigrating years earlier, had disclosed the fact they had children to immigration officials.

The Kisanas then asked that their daughters be exempted from the rules; that they be allowed to enter Canada on humanitarian and compassionate grounds. After waiting two long years for immigration officials to decide, their application was denied. Appeals went nowhere, with the court finding that contrary to family law, the best interests of the child do not trump the state’s interest in ensuring the rules are adhered to strictly.

2 Kisana v. Canada (Minister of Citizenship and Immigration), 2009 FC 189.
3 Ibid. at para. 37 wherein the Federal Court of Appeal held that: “The consideration of a child’s best interests in an immigration context does not readily lend itself to a family law analysis where the true issues are those of custody and access of children. Contrary to family law cases where “the best interests of the children” are, it goes without saying, the determining factor, it is not so in immigration cases, where the issue is, as in the case before us, whether a child should be exempted from the requirements of
The Kisana’s experience illustrates the injustice of applying an immigration rule strictly despite the circumstances surrounding their choice to not disclose the existence of their children. In spite of the Kisanas willingness and ability to provide explanations and evidence that the children are the Kisana’s *bona fide* children, nothing could alter the decision that the children would be excluded from the family class and therefore from immigrating to Canada through the family reunification scheme.

This paper is interested in the value of both having strict rules, and applying the rule in a firm manner. The stringent application of rules can illuminate what we value normatively; it expresses an adherence to rule-based decision making that takes no interest in the context into which people conduct their lives. The paper argues that when we apply rules strictly, we engage in making overbroad generalizations to make decisions in an easier fashion but we do so at the expense of making fair, just and reasonable decisions. In choosing to use a broad generalization to make decisions, the state, in this particular case, is tipping the balance to give more weight to its interests of protecting our borders from fraud than providing a just and fair process for families to reunite in Canada.

The first part of the paper provides an introduction to how the family reunification scheme works in Canada. In providing the means for immigrant families to reunify, Canada has positioned itself as humanitarian and compassionate. A closer look at the scheme however, reveals a provision that provides no flexibility or elasticity in considering the context in which immigrant families find themselves. The provision operates to exclude family members if they were not disclosed when an applicant applied to come to Canada. The rule operates no matter the reason for the non-disclosure. This stringent application of the rule has led to children being excluded from ever being sponsored by their parent to come to Canada despite potentially valid explanations for the non-disclosure by the parent. Culture, extenuating circumstances, language difficulties, lack of experience filling out forms and fear drives the decision for a parent, in a Canadian embassy or consulate and in a refugee camps, to fill out a form in a particular way. Canadian officials tout this rule as ensuring that the state’s interest of prohibiting applicants who are not admissible due to the family member and denying entry to those that are not *bona fide* family members. The rule however, does more than prohibit legitimate fraud; its overbroad application excludes children who are *bona fide* family members, and who would otherwise not affect the admissibility of a parent. Despite this, relief from this strict rule is lacking and difficult to obtain. In comparing this provision with other places in Canada’s immigration policy where fraud and misrepresentation are dealt with, we see that applicants who misrepresent about their travels, education, finances or even their identities are given allowances to explain the misrepresentation. This begs the question of why a rule excluding family members cannot be applied in a less strict manner.

The second part of the paper explores some interpretive themes. Robert Cover’s approach illuminates how the exclusion of children in the family reunification scheme is an act of state
violence. His interpretive lens exposes legal meaning and provides a framework where we can ascertain whether the state acts are official violence; whether it leads to pain, separation and even death. The paper then moves to Frederick Schauer who provides a framework as to how rules, as reflections of Cover’s narratives, can apply force. Schauer’s interpretive approach allows us to explore why the structure of the rule excluding children in family reunification has the force it does. We discover the rule reflects generalizations and justifications, but it also positions the justifications so as to exclude the review of context. Schauer helps us see that the rule is one within an absolute liability frame. The paper explores other places where absolute liability is imposed and seemingly accepted, and examines under what circumstances Cover’s nomos or normative universe accepts such an application of a rule. What we can infer is that absolute liability rules are used to control ultrahazardous activity; it serves to either shift the costs of risky behaviour to those conducting the behaviour or prohibit it altogether. In mapping out the narrative through these interpretive lenses, we are able to make a few inferences about the values the state upholds over making fair and just decisions.

Finally, in light of the narrative provided in Part II, the paper turns to the question of whether a less strict alternative of the rule can exist without compromising the state’s interests in preventing false family members from entering Canada. Given that the immigration system does provide for allowances for explanations for misrepresentations that do not deal with family members, it is argued that a less strict application of the rule should be applied. As well, the paper argues that because the rule applies in such an overbroad, unfair and unjust manner, it should be abandoned. However, if there is to be an exclusion rule, it is only through “reasoning through context” that a fair and just result may flow.

PART I: EXCLUDING CHILDREN IN CANADA’S FAMILY CLASS

A. Family reunification in Canada

Family reunification in Canada’s immigration policy has a long history, and has been described as the “humanitarian” aspect of immigration policy. In allowing immigrants to bring their spouses and children, Canada was seen as compassionate, and a “champion of separated families.” Following World War II, family reunification was seen as a means to increase level of adjustment and stability among immigrant communities. Despite these views, however, some advocated to abolish the practice in favour of a more economic or labour approach. Notwithstanding the proposition, many interest groups in Canada lobbied against eliminating the policy. Today, family reunification is firmly embedded in our immigration system.

---

5 Ibid.
6 Ibid. at 685.
7 Ninette Kelly and Michael Trebilcock, The Making of the Mosaic: A history of Canadian immigration policy (University of Toronto Press: Toronto, 1998) at 353-358; The 1966 White Paper, while reflecting a democratization of the process of policy formulation, recommended family sponsorship privileges be severely restricted. This proposal elicited sharp critical reactions from ethnic groups, church groups, and other community organizations. The reaction (followed by abortive attempts made in 1959 also) seemed to persuade the Canadian government that these rights were now largely inviolable. Thus, the 1967
Indeed, section 3(d) of the Immigration and Refugee Protection Act (“IRPA”) states, as one of the objectives of immigration, “to see that families are reunited in Canada.” The IRPA also identifies family reunification as a method to select permanent residents, and also enumerates a right to sponsor family members.

The Immigration and Refugee Protection Regulations (“Regulations”) delineate how family reunification may occur by enumerating a process to identify the family class. Section 117 of the Regulations defines who are family members, and therefore who can be sponsored under the family class. With regards to children, Section 117 specifies, that to be a family member, the child must be a dependent biological or adopted child, or a person intended to be adopted.

As family reunification operates to include members of a landed immigrant’s family, so too does it operate to exclude. The Regulations specify who is not “family” for the purposes of family reunification. Subsection 117(9) (the “exclusion clause”) defines “excluded relationships.” Among those that can be excluded are children, spouses, common-law or conjugal partners that are under 16 years of age. Under subsection 117(9)(d), persons are excluded from being called “family” for the purposes of reunification if they were not disclosed regulations were seen as abandoning any distinction between the sponsorship rights of Canadian citizens and Canadian landed immigrants. As discussed below, this is not the case any longer.

8 See Chandan Reddy, “Asian diasporas, Neoliberalism, and Family: Reviewing the case for homosexual asylum in the context of family rights” (2010) 23(3-4) Social Text 84 at 107-108 wherein he discusses how the domain of family is central to government policy and is treated as the “main” institution. He states that in the “West”, the family conveys the law and juridical dimension in the deployment of sexuality and that this deployment of sexuality is a mode of power linking the state and family. He questions the different functionings of family may affect government policy, such as immigration.

9 Immigration and Refugee Protection Act, S.C. 2001, c. 27.

10 Ibid. at s. 12.

11 Ibid. at s. 13.


13 Ibid. at s. 117(1)(b); See s. 2 of the Regulations which states that a dependent child, in respect of a parent, means a person who is either a biological child or adopted child and is less than 22 years of age, not a spouse or common-law partner, has depended substantially on the financial support of the parent since before the age of 22, or is a student, or is unable to be financially self-supporting due to a physical or mental condition. See also subsection 117(1)(f) and (h) that defines children as including those who may not be a biological or adopted child, but may nevertheless be sponsored as a relative of the sponsor, under certain conditions.

14 Ibid. at ss. 117(1)(g); See ss. 117 in general to ascertain the conditions necessary for an adopted child to be accepted as a family member for family reunification purposes.

15 Ibid. at ss. 117(9).

16 Ibid. at ss. 117(9)(a); Presumably, this subsection is a reflection of Canada’s abhorrence to child marriages.
to immigration officials by their landed immigrant\textsuperscript{19} family.\textsuperscript{20} This includes children where parents did not disclose the existence of their children.

An important distinction is made in this regulatory scheme. The exclusion clause only applies to landed immigrants, for how could it apply to citizens who acquired their immigration status through birth?\textsuperscript{21} One who acquires citizenship through natalist means did not need to fill out forms or apply for status; they just obtained it when they entered this world.\textsuperscript{22} The Federal Court recognized the distinction indicating that a preference between dealing with Canadian born and those not born in Canada can be made.\textsuperscript{23}

The scheme governing the family reunification process reflects the state’s deep involvement in defining who “family” is with regards to a landed immigrant.\textsuperscript{24} In doing so, decisions the state makes, within this immigration context, not only upholds the state’s interest in seeming to be humanitarian and compassionate for allowing family reunification, but it also

\begin{itemize}
  \item I use the term landed immigrant as a person who is either a permanent resident in Canada or who has Canadian citizenship through naturalization. Those acquiring citizenship through birth are not landed immigrants.
  \item Regulations, supra, note 12 at ss. 117(9)(d).
  \item See Stephen Shie-Wei Fan, “Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants” (1997) 97 Colum. L. Rev. 1202 wherein the author discusses how discriminatory immigration law and policy sometimes masquerades as facially neutral controls on immigration.
  \item See Jacqueline Stevens, Reproducing the State (Princeton University Press, 1999) at 7-11; Canada’s policy of giving citizenship to those who are born within Canada is one that reinforces the notion of birth and kinship, and therefore family, as the primal force in reproducing our state. As such, Canadian society constitutes the “intergenerational family form” and that the “familial nation” reinforces the membership rules. Some scholars like Stevens pose the question of whether we should be reproducing our community with kinship principles; that the practice of “curtailing citizenship requirements based on birth or ancestry” should be abandoned.; see also Priscilla Huang, “Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies” (2008) 2 Harv. L. & Pol’y Rev. 385; Mary Romero, “Go After the Women: Mothers Against Illegal Aliens’ Campaign Against Mexican Immigrant Women and their Children” (2008) 83 Ind. L.J. 1355; Cynthia Low, “Multiculturalism, Immigration and Citizenship: A View of Social Relations in Canada” Master of Arts Dissertation (Simon Fraser University, 2004) at 40 where the author discusses Canada’s immigration policy as one of acculturation and fitting in with socialized and seemingly neutral factors.
  \item In Kisana, supra note 2, the court referred to Del Cid v. Canada (Minister of Citizenship and Immigration), 2006 FC 326 at para. 6 to make the point that, when assessing the best interests of the child in an application for permanent residence on humanitarian and compassionate grounds, an immigration officer must make inquiries when a Canadian born child is involved, however such inquiries are not necessarily needed when non-Canadian born children are involved. In Del Cid, the court was judicially reviewing an application for permanent residence on humanitarian and compassionate grounds of a parent who had Canadian born children.
  \item Nora V. Demleitner, “How Much do Western Democracies Value Family and Marriage?: Immigration Law’s Conflicted Answers” (2003) 32 Hofstra L. Rev. 273 where the author discusses how family is a protected unit of society, and how immigration law has defined terms such as “child” and “spouse”.
\end{itemize}
reflects the high stakes involved for immigrant individuals, as the state’s decision directly affects private family decisions such as where and with whom children live.25

B. Excluding non-disclosed children

Recognizing that Canada does provide for a method of reuniting immigrant families, we turn to examining the provision that operates to exclude children due to the simple non-disclosure of the children by a landed immigrant parent. This section examines the complications and contexts inherent in culture, language, circumstances in life, explaining why parents may not have disclosed a child and the state’s reasons of preventing fraudulent family members from entering Canada. A roadmap of the exclusion clause is provided along with an examination of the relief available from an exclusion decision.

i. Why do parents neglect to disclose their children?

The question, “Do you have children?” seems straightforward. It merits a yes or no answer. In canvassing caselaw dealing with the exclusion clause however, there are many contexts that landed immigrant parents find themselves in that complicate their ability to answer this question. It is not simply a yes or no answer. The reason why a parent may not tell immigration officials that they have a child vary, and some are viable explanations.

While the reasons for the non-disclosure were noted in the cases in the Federal Court, the court did not have the jurisdiction to take into account the reasons to reverse an application of the exclusion clause because the provision applies as an absolute liability regime. The cases before the court were judicial reviews of decisions arising out of a parent’s application to ask for their children to be exempt from the rules on humanitarian and compassionate grounds. The following are reasons, if an immigration officer had discretion, could provide a reasonable explanation for the non-disclosure of a child:

- The applicant engaged in a relationship with someone in his home country and later found out about the existence of a child from the relationship;26
- While the applicant’s application was pending, she started a relationship and married someone and had children with him from her home country, but did not update her status on her application;27
- The couple had children outside of marriage;28

25 Masking the regulations of family decisions as immigration laws allows the state to engage in making custody decisions, a feature that is seen as unique or fundamental to family law: David B. Thronson, “Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody” (2008) 59 Hastings L.J. 453.
26 See Nguyen v. Canada (Minister of Citizenship and Immigration), 2010 FC 133; Jean-Jacques v. Canada (Minister of Citizenship and Immigration), 2005 FC 104; Adjani v. Canada (Minister of Citizenship and Immigration), 2008 FC 32.
27 See Hamedi v. Canada (Minister of Citizenship and Immigration), 2006 FC 1166.
28 See Chen v. Canada (Minister of Citizenship and Immigration), 2005 FC 678; Mei v. Canada (Minister of Citizenship and Immigration), 2009 FC 1044; Lin v. Canada (Minister of Citizenship and Immigration), 2007 FC 314; David v. Canada (Minister of Citizenship and Immigration), 2007 FC 546.
• The applicant had an extra-marital affair that resulted in a child unbeknownst to the applicant at the time of his application;  
• The applicant was separated from his spouse and children and did not think he needed to include them because of the breakdown in marriage which subsequently did not happen;  
• The applicant fled her abusive husband and children, married a man she met while in a refugee camp and had children with her second husband. She did not disclose her children from her first marriage because she was afraid to tell her second husband;  
• The applicant did not include his children from an extra-marital relationship while he was married;  
• The applicant did not have custody of her children and did not think they would accompany him;  
• The applicant had believed his/her children were dead or did not know their whereabouts;  
• The applicant’s youngest child was born while the application was pending and failed to update the application;  

There are of course, other reasons that are not seen as sympathetic or reasonable for the non-disclosure of the child. Decisions by the Federal Court reveal these reasons as the following:  

• The applicant did not believe she would be allowed to enter if she disclosed she had children;  
• The applicant simply left out one or more of his/her children on his application;  
• The applicant came as a dependent of a parent and could not qualify if she was married or had children of her own;  
• The applicant did not disclose on the advice of an immigration consultant;  
• The applicant left out his disabled child because immigration officials told him the child would be inadmissible due to medical reasons;  

29 See Woldeselassie v. Canada (Minister of Citizenship and Immigration), 2006 FC 1540.  
30 Akhter v. Canada (Minister of Citizenship and Immigration), 2006 FC 481.  
31 Yen v. Canada (Minister of Citizenship and Immigration), 2005 FC 1236.  
32 Tse v. Canada (Minister of Citizenship and Immigration), 2007 FC 393.  
33 Huang v. Canada (Minister of Citizenship and Immigration), 2005 FC 1302; Li v. Canada (Minister of Citizenship and Immigration), 2006 FC 1292.  
34 See Thirunavukarasu v. Canada (Minister of Citizenship and Immigration), 2010 FC 339; Muganza v. Canada (Minister of Citizenship and Immigration), 2008 FC 1250.  
35 Gill v. Canada (Minister of Citizenship and Immigration), 2008 FC 613.  
36 See De Guzman v. Canada (Minister of Citizenship and Immigration), 2004 FC 1276; Hernandez de Guzman v. Canada (Minister of Citizenship and Immigration), 2005 FC 1255.  
37 See Dung v. Canada (Minister of Citizenship and Immigration), 2005 FC 600; Arangurem v. Canada (Minister of Citizenship and Immigration), 2008 FC 1315; Dumornay v. Canada (Minister of Citizenship and Immigration), 2006 FC 541.  
38 Dela Fuente v. Canada (Minister of Citizenship and Immigration), 2005 FC 992; Asuncion v. Canada (Minister of Citizenship and Immigration), 2005 FC 1002.  
39 See Preclaro, supra note 32; Sultana v. Canada (Minister of Citizenship and Immigration), 2009 FC 533.
The applicant did not know about the requirement to list all family members;\textsuperscript{41}

Many of the reasons provided here do not reflect an intention to enter the country fraudulently or an attempt to bring in a person who is not a family member, but rather indicate that the complexity of applicants’ lives may render a different answer to the question the exclusion clause asks. The recognition of other factors outside of the question of whether a child was disclosed or not can bring to light the fact that sometimes life events happen, such as the birth of an unexpected child, the custody arrangement in place at the time, the belief that family members are dead, having children out of wedlock, and acquiring a family while an application is in process. A good number of reasons given are those that could explain why a misrepresentation occurred.

Beyond these stated reasons in the jurisprudence, there are also other contextual factors that may inform how a decision to disclose or not is made. Besides language barriers, translation problems, illiteracy and cultural misunderstandings, anecdotal accounts also reveal numerous reasons why a person may not disclose information to immigration officials. For example, persons accompanying applicants, whether a spouse, family member or immigration consultant, may not only provide ill advice but also induce an applicant to withhold information in fear of how that person accompanying them will react to that information. Many applicants also fill out forms in consulates or embassies all over the world. Often Canadian embassies and consulates hire local staff and while their work is presumed to be confidential, applicants attending the embassies or consulates may not feel their information is confidential because a staff member lives in their own community. Finally, nothing on the immigration forms themselves give any indication of the consequences of non-disclosure. Staff at embassies, consulates or those working at refugee camps are not obligated to provide a disclaimer and often none is given. Applicants are thus often unaware of the permanent consequences that flow from their omission.\textsuperscript{42}

\textbf{ii. Policy reasons for the exclusion of children}

Liars and cheaters. Canada does not want them. An examination of parliamentary debates, jurisprudence and public discourse reveals the fears driving the policy to label immigration applicants as liars and to punish them with inadmissibility or exclusion of their children.\textsuperscript{43} Generally, the sense is that Canada should police its borders from those that want to

\textsuperscript{40}Sandhu v. Canada (Minister of Citizenship and Immigration), 2005 FC 1046; Leobrera v. Canada (Minister of Citizenship and Immigration), 2010 FC 587.

\textsuperscript{41}Krauchanka v. Canada (Minister of Citizenship and Immigration), 2010 FC 209.

\textsuperscript{42}For example see: UNHCR, Passages: An awareness game confronting the plight of refugees [accessed on: December 21, 2010] (online: http://www.unrefugees.org/atf/cf/%7Bd2f991c5-a4fb-4767-921f-a9452b12d742%7D/Passages.pdf)

cheat or abuse the system, those that are challenging the integrity of the system by flouting the rules, and those engaging in scams to garner the benefits associated with membership in the country.  

There is an expectation that immigrant applicants should use “legitimate and proper” doors to enter and that landed immigrants would not help bring others in under false pretences of a genuine relationship. Kisana is not the first case that has upheld the principle of adhering to rules. For example, in Preclaro, the court held: “I agree that the integrity of the system is important and authorities must be able to rely on the truthfulness of information contained in an applicant’s application for entry into Canada.”

The Canadian government’s manual for immigration officers on how to make subsection 117(9)(d) findings tells us that the exclusion clause: “exists to prevent applicants from later being able to sponsor otherwise inadmissible family members under the generous family class sponsorship rules when these family members would have prevented the applicant’s initial immigration to Canada for admissibility reasons.” The manual also states: “The intent of the regulation was to ensure that where, by decision of the applicant, a family member was not examined, that the applicant cannot benefit later by sponsoring this person as a member of the family class. In order to preserve the right to sponsor, the non-accompanying family member must be examined.” In this stated reason, it is implicit that the government wants to promote honesty, and to do two things: deny entry to those who would not be admissible due to a family member, and deny entry to family members not disclosed during an application process.

---

44 See for example: Vancouver Sun, “Illegal immigrant wants to enter through the back door Laibar Singh should be shown the exit to preserve the integrity of the system” (February 28, 2008) (online: http://www.immigrationwatchcanada.org/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=2923&MMN_position=92:90) [accessed: November 2, 2010].


46 Preclaro, supra note 39 at para. 29: Interestingly, in this case, the applicant challenged ss. 117(9)(d) as violating s. 7 of the Canadian Charter of Rights and Freedoms (life, liberty and the security of the person). The court held that the provision did not engage in liberty rights, that the provision was not overbroad or arbitrary as the heart of the immigration system was its integrity, and this was an overriding concern. Finally, the court held that ss. 117(9)(d) leaves no room for an interpretation to include the best interests of the child.

47 OP 2, supra note 43 at 11-12.

48 Ibid.
iii. Determining bona fide children in an absolute liability regime

No disclosure, no entry. The exclusion clause is the provision with which the state imposes the inadmissibility of a child by defining who is not a member of a “family” for the purposes of family reunification. How does this clause operate in reality? The exclusion clause aims to ensure that only “examined” family members of a landed immigrant are given entry into Canada.\footnote{Ibid. at 12.} The scheme creates an expectation, that upon and during an application for permanent residence to Canada, an applicant will disclose the identities of all of his or her children. An omission or failure to disclose or identify a child leads to an exclusion clause finding which precludes the child from being included in the family class for the purposes of being sponsored to Canada.\footnote{Regulations, supra, note 12 at ss. 117(9)(d).} The non-disclosure, by a landed immigrant, of the existence of a child serves as a substitute to immigration officials for an examination into whether or not a child is a \textit{bona fide} child.

Once an immigration officer determines that a child was not disclosed upon or during an application for permanent residence to Canada, the exclusion clause is triggered. The finding cannot be rebutted. A parent cannot provide an explanation for the non-disclosure. There are no defences to nullify the application of the exclusion clause. No factor, no matter how germane, will be considered by a decision maker. Even if you did not know the existence of the child, this could not serve to alter an exclusion clause finding. The fact that a child is a \textit{bona fide} biological or adopted child is not relevant. The fact that the child’s existence does not alter the parent’s initial admissibility into Canada has no impact. As well, the “best interests of the child” play no role in making the finding.

A decision under the exclusion clause leads to a harsh consequence. Once it applies, the non-disclosed child is defined as not belonging to the “family” for the purposes of family reunification and the parent is barred from sponsoring the non-disclosed child for life. The other outcome from the application of the exclusion clause is blame can be placed upon a parent for the inadmissibility of a child.\footnote{Reddy, supra note 8 at 109-111 and 116: Reddy discusses how the state recruits low-wage workers for our country through networks of family reunification, and in doing so, the state is able to distance itself from the existence of an immigrant workforce. He states that the families who petition or sponsor this workforce are left to provide welfare functions for this workforce, while the state using the existence of such a workforce to dismantle its welfare responsibilities. The state thus benefits from the recruitment of labour through family reunification, without supporting them or acknowledging their benefits. He finds that family reunification enabled state power to create labour while justifying the exclusion of immigrant communities from state power. In this way, state structures act to place responsibility, and blame for “problems” associated with immigrants to be placed on immigrants and their families, rather than the state. Reddy states that we need to ask how regulation marks its interest in difference.} In fact the manual that immigration officers rely upon to make their decision characterizes an omission of a family member as an applicant’s “decision” that they cannot “benefit” from and treats them like sophisticated litigants implying that applicants must “preserve their rights” to sponsor a family member by making the decision to list them.\footnote{OP 2, supra note 43 at 12-13.}
This regime creates a normative stake in how landed immigrants fill out forms; the activity of filling out a form turns into a substantive inquiry of whether persons are in the “family class” under immigration law, and therefore whether they are worthy of membership into our country.

As the regulation stands now, the exclusion clause functions as an absolute liability offence. Absolute liability is generally known as an offence where mens rea does not need to be proven. One is found guilty simply by the commission of the actus reus. It is also known as a theory of liability where one can be held liable for injuries without determining fault or whether reasonable care was taken in the omission or commission of an act.

The exclusion clause imposes a lifetime ban from sponsoring a child where a landed immigrant parent did not disclose the child to immigration officials. As the parent has no opportunity to explain, and the reasons for the non-disclosure do not factor into an exclusion clause finding, an immigration official does not need to consider mens rea or fault. As discussed, no factor, including whether a child has a genuine relationship with the parent; whether the child’s existence affects the parent’s initial admissibility to Canada; or the best interests of the child is not salient to the decision-maker in determining exclusion. The regulation applies absolutely.

iv. Lack of relief

Remedies are few and limited. The exclusion a child from family reunification cannot be reversed. The limitations of two remedies will be explored: appealing the finding of exclusion through the Immigration Appeal Division and submitting a permanent residence application on humanitarian and compassionate grounds.

(a) Appealing the decision

The Immigration Appeal Division (“IAD”) of the Immigration and Refugee Board normally reviews decisions regarding sponsorship applications. While a parent may request the IAD to review a decision made under the exclusion clause, there is often no effective remedy because the question of whether the exclusion clause applies is a strict matter of law. The exclusion clause operates under an absolute liability regime.

The courts have been eager to point out that there are other avenues, however, in the immigration of undisclosed family members. Undisclosed family members can apply as skilled workers. However, is this a viable option for parents wanting young children to join them in Canada? Similarly, the courts focus on temporary resident permits, acknowledging the reality that sometimes children live apart from parents. Parents can also choose to leave Canada to be

53 I use the term absolute liability because absolute liability and strict liability has been distinguished in Canadian criminal law: see R. v. Sault Ste. Marie (City) (1978), 40 C.C.C. (2d) 353 at 374, [1978] 2 S.C.R. 1299 (S.C.C.); See also discussion in Part II(B)(ii)(a).
54 IRPA, supra note 9 at ss. 63(1).
55 See for example: Preclaro, supra note 39.
56 Ibid.; Kisana, supra note 2.
57 Leobrera, supra note 40.
with their children.\textsuperscript{58} Finally, the courts point out that subsection 25(1) of IRPA is often sought as a mechanism for relief from the exclusion clause. Subsection 25(1) of IRPA provides that an application for permanent residence on humanitarian and compassionate grounds ("H&C application") could be made where the applicant is inadmissible, or does not meet the requirements of the Act.\textsuperscript{59}

\textbf{(b) Humanitarian and Compassionate Grounds Applications}

Unfortunately for many parents and their children, an H&C application is not a viable method to circumventing the harsh application of the exclusion clause. The impetus for submitting an H&C application is the recognition that the applicant child is asking to be exempt from the rules. Applicants who seek relief from the exclusion clause by making an H&C application do so with full disclosure to the immigration officer that they have, according to the exclusion clause, either broke the rules or do not comply with the rules. After all, the purpose for the application is to ask for relief from the strict application of the rules. Parents thus have to explain why their child could not be sponsored as a family member under the normal course provided.

From the outset, an immigration officer is alerted to the fact that the applicant child’s parent did not disclose their existence, and immigration officials are likely to construe this act as a lie and as fraudulent behaviour. It is therefore, not improper to bring up past actions and to judge the applicant based on it. The Federal Court of Canada has confirmed this: “it was not improper for the officer to include the failure of the mother to properly declare the applicant as one public policy factor to be considered in the humanitarian and compassionate assessment.”\textsuperscript{60} An H&C application therefore, does not give an applicant child a \textit{de novo} chance to first prove the child is a \textit{bona fide} child of a landed immigrant, and second that the child would not have impacted the parent’s admissibility to Canada. The immigration officer has full license to pit the fact that the applicant child’s parent “broke” the rules against humanitarian and compassionate considerations.

In discussing the avenue of an H&C application as a viable form of relief against the broad and unfair application of the exclusion clause, the factor of the best interests of the child is not at all on the table when a 117(9)(d) decision is made. The best interests of the child are not salient or relevant according to the regulatory scheme. This is despite Canada’s obligation under the \textit{Convention on the Rights of the Child} to consider the best interests of the child in all actions that affect children,\textsuperscript{61} one objective of IRPA is to fulfill Canada’s international obligations,\textsuperscript{62} and the Supreme Court has recognized that immigration decisions must be “alert, alive and sensitive”

\textsuperscript{58} Saporsantos v. Canada (Minister of Citizenship and Immigration), 2010 FC 587.
\textsuperscript{59} IRPA, supra, note 9 at ss. 25(1).
\textsuperscript{60} Li, supra note 33 at para.33.
\textsuperscript{62} IRPA, supra note 9 at ss. 3(2)(b).
to the “best interests of a child”. Only when a non-disclosed child comes to the attention of an immigration officer through an H&C application do the best interests of the child play a role.

In balancing between a parent “breaking” the rules and the mandated consideration of the best interests of the child, the courts have recognized that children are “left behind” due to a “parent’s misrepresentation” and that it is “self-evident that the child was not complicit in the misrepresentation.” However, the courts have also held that “it is well established that such misrepresentation is a relevant public policy consideration.”

In choosing first, to confine the use of best interests of the child in an H&C application, and second, to allow the firm adherence to the exclusion clause to outweigh humanitarian and compassionate grounds such as the child’s relationship to the parent and the best interests of the child, the decision maker looks for something to tip the balance. The only way an applicant child can obtain status through an H&C application is if the child can show that he or she will suffer “undue or disproportionate hardship” if the child is not exempt from the rules. The Federal

---

64 IRPA, supra note 9; Baker, ibid.: Section 25 of IRPA and the Supreme Court of Canada in Baker mandates immigration officers to consider the best interests of the child. Unfortunately, the Court did not illuminate how to weigh the best interests of the child with those public policy interests competing with them. One Federal Court of Canada in a decision called Gill held that the family law context should be imported into an immigration officer’s decision-making process, and that a child-centric analysis should take place. This approach has been definitively struck down by the Federal Court of Appeal in the decision of Kisana: “The consideration of a child’s best interests in an immigration context does not readily lend itself to a family law analysis where the true issues are those of custody and access of children. Contrary to family law cases where “the best interests of the children” are, it goes without saying, the determining factor, it is not so in immigration cases, where the issue is, as in the case before us, whether a child should be exempted from the requirements of the Act and its Regulations and allowed to become a permanent resident: See also Kisana, supra note 2 at para. 37; Gill, supra note 35 where the Federal Court referred to Young v. Young, [1993] 4 S.C.R. 3 for guidance on the contextual analysis of the best interests of the child.
65 Ibid.; See David B. Thronson, “Thinking Small: The Need for Big Changes in Immigration Law’s Treatment of Children” (2010) 14 U.C. Davis J. Juv. L & Pol’y 239 wherein he discusses “parent-child relationships receive favored treatment, but only if the parent holds legal immigration status.” He finds that parents can petition for their children, but children can never petition for their parents and thus immigration law subordinates children’s status to that of their parents. Children and thus objectified, advanced by a successful parent, and held back by unsuccessful parents. Parents are the rights holders.; In Ellen Marrus and Laura Oren, “Feminist Jurisprudence and Child-Centered Jurisprudence: Historical Origins and Current Developments” (2009) 46 Hous. L. Rev. 671, the authors discusses how child-centered jurisprudence has yet to be characterized more fully because children’s voices are not heard in the same way as those of adult women. They also advocate for a simultaneous women-centered and child-centered approach where one is not pitted against the other.; Carol Sanger, “Immigration Reform and the Control of the Undocumented Family” (1987) 2 Geo. Imm. L.J. 295 at 296 wherein the author discusses how the state fails to treat the family as a unit for immigration purposes forcing families to balance the opportunities of legalization against potential disruption of families.
66 Ibid.
67 It should be noted that other factors may come into play in an H&C application. For example other considerations may include factors in the country of origin, the child’s establishment and/or ties in Canada. If the child is outside of Canada, it is unlikely that the child will be established in Canada and
Court has explained: “an officer’s task in assessing the best interests of a child will usually consist in assessing the degree of hardship that is likely to result.” Undue or disproportionate hardship is a high burden for any person to meet. The officer’s task of looking for hardship is not the same as assessing for the best interests of the child or in assessing whether the child is genuinely part of the family. Hardship has been described as something not anticipated by the act and is unusual. In other words, there must be extreme reasons for a child to be exempt from the rules. Courts have described an H&C application as an “exceptional remedy” and one that is not granted lightly or often. After all, it enables an exemption from the rules. The difficulty of meeting the high burden and obtaining this “exceptional remedy” is illustrated in the reported acceptance rate of all humanitarian and compassionate grounds applications (which include those made to have children exempted from the exclusion clause). The acceptance rate sits at around three percent. This is shockingly low. Is it any surprise that in reality, H&C applications do not provide effective relief from the strict application of the exclusion clause?

C. Existence of mechanisms in IRPA that deal with misrepresentation

Not all fraud is the same. That is what our immigration system articulates. The exclusion clause is not the only way the government tries to prevent misrepresentation. In this section, we explore other ways the immigration system deters, investigates and punishes for misrepresentation.

Subsection 40(1) of IRPA deems a person inadmissible for misrepresentation if the person misrepresents or withholds material facts. While the courts in the past have held that even if a person had no intention to misrepresent, or was not aware of the misrepresentation, the person would still be deemed inadmissible, the Federal Court of Canada recently held that if a person could show he or she honestly and reasonably believed they were not withholding material information, they could not be held to have contravened subsection 40(1). As well, persons alleged of misrepresentation can challenge whether or not the misrepresentation would be “material”.

the child’s ties limited to his or her parents.: See Citizenship and Immigration Canada, Immigration Applications in Canada made on Humanitarian and Compassionate Grounds Manual IP 5, (online: http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf) [accessed: November 7, 2010]).
68 Kisana, supra note 2; Hawthorne v. Canada (Minister of Citizenship and Immigration), [2003] F.C. 555.
69 IP 5, supra note 67.
70 Kisana, supra note 2 at para. 20.
72 IRPA, supra note 9 at s. 40(1); Lorne Waldman, Canadian Immigration & Refugee Practice 2010 (LexisNexis: Markam, 2010) at 54; Interestingly, in Wang v. Canada (Minister of Citizenship and Immigration), (2005) F.C. 1059, the Court held that misrepresentation can be made by a third party, such as an accompanying spouse for the applicant to be held responsible for misrepresentation.
73 Wang, ibid.; Mohammed v. Canada (Minister of Citizenship and Immigration), [1997] 3 F.C. 299.
74 Singh v. Canada (Minister of Citizenship and Immigration), 2010 FC 378.
75 Infra note 77.
Jurisprudence provides that once there is misrepresentation, it will be “material” if it forecloses a line of investigation.\(^\text{76}\) The penalty for committing this offence is deemed inadmissibility for a period of two years, or a final determination of inadmissibility. As well, under general offences in IRPA, the offence of misrepresentation is made out with penalties ranging from hefty fines to imprisonment.

Thus, applicants that omit or falsely provide information about their finances, education, travel and even their identity have the opportunity to provide an explanation for their misrepresentation. They are also able to provide an argument that the misrepresentation was not material to the application such that it could “induce a particular decision or an error in the administration of IRPA.”\(^\text{77}\) Some of the penalties associated with a finding of misrepresentation under these rules are not permanent. The penalties include monetary fees, imprisonment or inadmissibility for a period of two years.\(^\text{78}\)

Given the mechanisms to investigate, punish and deter misrepresentation, is there a need for the exclusion clause? Further mechanisms dealing with misrepresentation in IRPA are not framed in an absolute liability regime. Thus, even if there is merit to the existence of the exclusion clause, why is the exclusion provision framed as an absolute liability rule?

The rigidity of the exclusion rule and the relative flexibility or elasticity of the misrepresentation rules in immigration law means that applicants that misrepresent are treated differently depending on what information they are alleged to have omitted or fabricated. The sweeping but stringent application of the exclusion clause combined with the severe penalty of a lifetime ban from sponsoring a person signals that the non-disclosure of a family member is more egregious than any other kind of misrepresentation an applicant could make.

**PART II: THE VIOLENT FORM: ABSOLUTE LIABILITY**

Our discussion of the exclusion clause reveals a few characteristics of the provision. First, the provision aims to prevent dishonest applicants and also “fake” family members of landed immigrants from entering Canada. Second, the provision is a strict rule that operates to exclude all children that were not disclosed by their parents when their parents applied to come to Canada. Third, the exclusion clause does not provide an avenue for parents to explain the non-disclosure or show that the child does not affect the parent’s admissibility. These three features

\(^76\) Waldman, *supra* note 72 at 54.

\(^77\) For example: *Malik v. Canada (Minister of Citizenship and Immigration)* [2005], I.A.D.D. No. 509: In reviewing a contravention of s. 40 of IRPA, the IAD held that the applicant’s misrepresentation was misguided but not motivated by deviousness. The IAD looked to the objective of family reunification and found that this outweighed the misrepresentation.; Similarly in *Ouk v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 891 the court granted relief holding that in deciding whether s. 40 of IRPA applied, the IAD had a duty to inquire into the nature of the relationship, and to identify evidence rather than make speculative findings for a finding of misrepresentation to be made.

\(^78\) See *Zhong v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1636 at 24 where it was held that a person does not become criminally inadmissible solely because they violated the rules regarding misrepresentation. Rather, the court found that the penalties listed in the legislation and regulations suffice for contravening provisions on misrepresentation.
of the exclusion clause give us clues to the narrative that informs us what our community values. In drawing out the narrative and values attached to this rule, we turn to Robert Cover and Frederick Schauer’s interpretive lenses for assistance.

A. Violence and the Word

Robert Cover recognized that “[w]e inhabit a nomos – a normative universe.” Cover, supra note 1 at 95-96. He points out that rules and legal institutions live with the narratives that locate it and give it meaning constructing the world we live in. Thus, in searching for meaning of the law or interpreting it, Cover tells us that there is a narrative for every rule. However, he provides that the rules and narratives in a nomos are not simply visions or alternate futures but a tension of reality and vision. While rules and narrative may help create the nomos, so too does he find a destructive force to rules and narratives; that violence plays a part. Indeed he finds that the application or interpretation of a law can deliberately inflict pain, destroying a normative world.

Cover understood that “because law involves state control over organized violence, legal interpretation is inextricably entwined with violence.” What did he mean by this? Martha Minnow describes how Cover provided a warning and also called for an interpretive approach that points out the violence projected through legal interpretation and application of the rules:

Yet in an essay published after his death, Cover raised a warning that should chill those of us who are taken with the interpretive turn in law. He warned that an interpretive stance fails to acknowledge that “[l]egal interpretation takes place in a field of pain and death.” When judges interpret texts, “somebody loses his freedom, his property, his children, even his life.” Judicial interpretation often supplies rationales for violence that has occurred or will occur….Fundamentally, law embeds interpretations of political texts in institutions that exercise the state’s monopoly over legitimate violence: Law organizes not just meaning, but also power….Cover is right. His is a devastating and haunting insight. Judges may use words and interpret texts, but their words organize and justify official acts of power. Those acts hurt some people and help some people. The threat and fact of the force behind judicial acts shatter the image of normative community and nurturing dialogue embraced by interpretive legal scholarship. The rhetoric, uttered amidst the wielding of power, makes more palatable what might otherwise have been noxious.

79 Cover, supra note 1 at 95-96.
80 Ibid.
81 Ibid. at 98.
82 Ibid. at 101.
83 Ibid. at 139.
84 Ibid. at 205.
85 Ibid.
Being aware of the existence of state violence projected through rules, how do we examine how, in a particular case, violence is projected? Minnow writes that “Legal language has force. It both triggers and justifies power. But precisely because language is not identical to power, people may at times use it as a brace against power….Judicial violence can mean the force and power used to effectuate state regulation.”87 Franklyn Snider agrees and finds that “Cover rejects the picture of the [decision maker] as a mere interpreter of the law, a neutral arbiter between conflicting norms, or as the umpire of some sort of ‘convention of legal discourse.’”88 Cover reflected upon the “brute force” of an imposition of a state’s decision and its effect.89

In using Covers framework of hermeneutics, we see the effect of the exclusion clause as twofold: first that the decision maker strictly adheres to the rule; and second that the effect of the rule results in violence as a child is excluded from entering Canada as a family member and forcibly separated from a parent because his or her name is not listed on a form.

The first result recognizes a role of the decision maker. Rather than allowing the decision maker to claim that he or she had no choice but to adhere to the rule, Cover finds that the decision maker (the immigration officer, the Minister of Citizenship and Immigration, a Federal Court judge and others), rather than a mere interpreter, chooses whether to exert violence or resist it. Cover stated: “[Decision makers] are people of violence….In interpreting a text of resistance, any community must come to grips with violence. It must think through the implications of living as a victim or perpetrator of violence in the contexts in which violence is likely to arise….a [decision maker] might appeal to narratives of [rule] resistance.”90 In choosing to apply the exclusion clause, the immigration officer, Minister of Citizenship and Immigration, the Federal Court judge, and others are agents of the state exerting a force to drive the wedge to separate a non-disclosed child from a parent. In this sense, Cover was courageous in calling for resistance through social movements and communities to recognize and distrust violent rules.91 He invite “new worlds” to step in to bring new norms challenging the exclusion rule. For example, while courts have stepped in, in the past, to challenge the rigidity of a rule and demand that it be applied in a more fair and just manner, courts here have failed to do so. Indeed, as will be discussed in Part III, legislators and judges alike have not challenged the exclusion clause and their silence is a form of violence.

The second result is the effect itself; the violence against non-disclosed children and their landed immigrant parents. As noted in Part I, because the state determines who is admissible under the family reunification scheme, the state’s action directly affects a private family decision of where and with whom children live. The language of the exclusion clause exerts force by driving a wedge between non-disclosed children and the parent. But is that all? In examining the

87 Ibid. at 1897-98
88 Franklin Snyder, “Nomos, Narrative and Adjudication: Toward a Jurisgenetic Theory of Law” (1999) 40 William and Mary L. Rev. 1623 at 1693; While Cover posited that the state maintained imperial order rather than was a social group that is jurisgenerative, many argue that the state itself can create norms
89 Ibid. at 1694: Cover goes so far as to use the extreme analogy of torturer and victim to show how decision makers like judges dominate over others.
90 Cover, supra note 1 at 151, 155 and 161.
91 Ibid. at 172.
exclusion clause, it is not simply the violent effect, but the process by which the decision maker engages in to apply the force of the decision. It is the lack of interest in the context and the factors that may explain why a child was not disclosed by a landed immigrant parent that makes the application of the rule seem unfair and unjust.

Beyond identifying or visualizing the violence, Cover’s interpretive approach also allows us to explore what other approaches could be taken when applying a rule. For example, as Thomas Ross writes, Cover’s interpretive approach can help us understand the feminist movement’s approach that “reasoning from context allows a greater respect for difference and for perspectives of the powerless. The focus on context over abstraction and the taste for specific rules is not unique to feminist legal reasoning.”

In understanding that there is a violent effect and process to the current application of the exclusion clause, Cover leads us to explore two further things: first, how does the structure of the rule exert violence on landed immigrant parents and their children; and second, could the rule be modified to ensure decision makers are “reasoning from context”? In asking these questions, we are leaving behind the role a decision maker has in exerting violence and moving towards examining the rule itself. To answer these questions, we look towards Frederick Schauer to show us how a rule is structured can show how state violence is imposed.

B. Violence through rules

i. Violence through generalizing and being over-inclusive in a rule

Some rules have a forceful and violent construction. Frederick Schauer’s interpretive approach identifies four characteristics of rules that not only help people make decisions, but also affect the whether the decision fits with the aim of the rule.

Schauer helps us to understand first and foremost that rules are generalizations. Schauer himself wrote: “To generalize is to engage in a process that is part of life itself. Our confrontations are commonly with particulars – this person, that building, these rocks, those words – but we hold on to the world by organizing those particulars within larger groupings.” Thus rules (generalizations) help us get through the world.

Rules are generalizations because they simultaneously select and suppress particulars or properties to either describe (ie: All dogs have four legs) or prescribe (ie: No dogs allowed in restaurant). Schauer breaks down rule to having a “factual predicate” or a “hypothesis” that are factual conditions or descriptive statement triggering the application of the rule and also a consequent, prescribing what is to happen when the conditions specified in the factual predicate are alive. For example, if a person drives in excess of 100 km per hour, then that person shall

---

94 Ibid. at 18.
95 Ibid. at 21-23.
96 Ibid. at 23.
pay a $50 fine. The factual predicate is driving in excess of 100 km per hour, and the consequent is the fine. Separating the factual predicate from the consequent, Schauer points out that we not only see a descriptive generalization, but a generalization perceived to be causally relevant to some goal sought to be achieved or evil sought to be avoided. The prescription of that goal or prohibition of that evil constitutes the justification of the rule.97 Schauer summarizes: “The factual predicate thus represents a set of facts whose existence indicates an increased likelihood of the occurrence of the justification, and whose (effective) prohibition will consequently decrease the likelihood (or incidence) or evil against which the rule is aimed.”98

The exclusion clause can be characterized as: If an applicant does not disclose a family member to immigration officials when they made their application, they will be excluded from coming to Canada under the family reunification regime. The factual predicate or trigger for the rule is the non-disclosure of family members. The consequent is the exclusion of the family member. From Part I, the evil the rule is aimed at is keeping “fake” family members and dishonest applicants out of Canada. The generalization created by the exclusion clause is that those not disclosed by their family member (sponsor) in their immigration applications are either not bona fide family members or persons that would have rendered the sponsor inadmissible if disclosed. The causal relation the rule communicates is if family members were not disclosed to immigration officials are excluded, fraudulent applicants are prevented from entering Canada.

Schauer however, also recognizes that simply because a rule’s factual predicate is a generalization does not make it problematic. It is where the generalization the rule is premised upon is under- or over-inclusive, the rule can lead to unfair or unjust decisions.99 Because generalizations are necessarily selective, they will include some properties that in some cases will be irrelevant, and exclude some properties, that in other cases, will be relevant. Schauer acknowledges that: “Factual predicates will therefore in some cases turn on features of the case that do not serve the rule’s justification, and in others fail to recognize features of the case whose recognition would serve the rule’s justification.”100 The over-inclusiveness of a rule can be adapted in a “conversational” conception, but if we understand the rule to be entrenched, as we understand legal rules to be, Schauer states: “The generalization would by its terms control the decision even in those cases in which that generalization failed to serve its underlying justification.”101 Thus because rule-based decision making fails to be particularistic, some otherwise relevant features of a decision-prompting event are “actually or potentially ignored by the under- or over-inclusive generalization constituting the factual predicate of any rule.”102

The exclusion clause is violent because it is over-inclusive. It relies only upon the factual predicate to reach a decision; no other factors or considerations are looked at. The decision maker relies solely on the factual predicate (the non-disclosure of children) to generalize that the children are not family members or they would have excluded the parent. The consequent of the factual predicate is that the non-disclosed children are excluded from entering Canada through

---

97 Ibid. at 27.
98 Ibid. at 30.
99 Ibid. at 31.
100 Ibid. at 33.
101 Ibid. at 48-49.
102 Ibid. at 78.
family reunification. In excluding all family members that were not disclosed to immigration officials in an application, the provision excludes every non-disclosed person regardless of the reason for the non-disclosure. The rule applies whether or not the person is a \textit{bona fide} member of an applicant’s family. The provision applies whether or not the child would have rendered the parent inadmissible. While the firm adherence of the rule furthers the exclusion clause’s aim of preventing fraudulent applicants from entering Canada, it also excludes those that are not trying to get into Canada on false premises.

Third, Schauer provides that decision-making proceeds from a “prescriptive generalization.” Where that “prescriptive generalization” is “rule-based” (as opposed to conversational or malleable) as legal rules are, the decision maker treats the generalizations as entrenched and takes the “fact of their existence as constituting a reason for action (or decision)” even when it does not serve the underlying justification.\footnote{Ibid. at 52.} Rule-based decision-making “rejects the continuous revisability of generalizations, and consequently imbues them with force even in those cases in which that force appears misplaced.”\footnote{Ibid. at 78.} Rules are “sticky” and “essentially frustrating” by impeding “access to those facts that would otherwise, under a given theory of justification” would be relevant to making a decision.\footnote{Ibid. at 82, 86 and 87.} “Theories of justification” are applied by “force by excluding from decision-making pursuant to that theory factors that the theory would otherwise have deemed relevant.”\footnote{Ibid. at 86.}

This characterization of “prescriptive generalizations” is apt when examining the exclusion clause. If we recall the Kisana’s, we can see they were “essentially frustrated” in their many attempts to push facts towards a decision maker that would “otherwise be relevant” to the justification of the exclusion clause. The rule “stuck” in the Kisana’s case. The theory of justification in the provision forced the exclusion of relevant facts that would have been informed a decision maker of whether the children were really the Kisana’s or whether they would have changed the parents’ admissibility into Canada. The Kisana’s could have explained that the disclosure was due to cultural shame of having children outside of marriage, that they could prove the children were their biological children, and also that the children would not have changed their admissibility into Canada. The rule, as it was structured, did not deem these considerations to be salient in the process of reaching a decision.

Finally, Schauer discusses how using generalizations such as rules, while beneficial in allowing our lives to be organized predictably and efficiently, are necessarily \textit{suboptimal}. He writes: “Rules may sometimes or frequently be good things to have, but a system committed to rule-based decision-making attains the benefits brought by rules only by relinquishing its aspirations for ideal decision-making.”\footnote{Ibid. at 100.} A result by a rule is inferior to the result indicated by direct application of its justification. Ruth Gavison interprets Schauer in this respect: “The resolution is not a matter of the rules themselves, but a matter of the way that the “system” deals
with such conflicts” and that “if the system in question does not provide adequate leeway for resolving such conflicts, this may affect its justness and viability.”

Again, this depiction is relevant when examining the exclusion clause. The firm adherence to the rule means that our state is committed to rule-based decision-making leading to a result that is sometimes suboptimal. The Kisana’s children are barred for life from being sponsored by their parents to come to Canada. This over-inclusive application diminishes not only the humanitarian and compassionate aspect of the family reunification scheme, but demonstrates that the rule’s actual result in some cases is inferior to the intended result indicated by a direct application of its theory of justification.

ii. Violence and the Form: Absolute liability

Schauer’s interpretive lens has allowed us to map out the exclusion clause so that we can see the rule’s bones to understand its structure and the process it expounds. We have identified the exclusion clause as a rule whose aim is to prevent fraudulent applicants and “fake” family members from coming to Canada under the family reunification scheme. The rule’s factual predicate or trigger is the non-disclosure of family members during an immigration application and the consequent is the inadmissibility of a family member through the family reunification scheme. The generalizations the rule relies upon are persons not disclosed to immigration officials are not “real” family members of the applicants and non-disclosed persons may affect the admissibility of a sponsor. As well, the rule has been entrenched in our legislation and because the generalizations the rule are based upon are entrenched, a decision maker following the rule takes for granted that if the factual predicate is met, the consequent must follow; that if a child is not disclosed, the child is assumed to be “not family” for the purposes of family reunification. The rule is stuck in this entrenched form and does not allow any other factors to be considered despite how salient or relevant it may be to ensuring the justification of the rule is met. Because the rule’s generalization is so broad, it sometimes is over-inclusive; the effect of the exclusion clause is that sometimes bona fide family members are excluded from being sponsored as a family member. Finally, because the rule in its actual application has been adhered to so firmly, the state is committed to rule-based decision making at an extreme to the detriment of those who the rule is applied to. We see that the stringent application of a rule is more important to the state than getting a fair and just result; that the application of the exclusion clause currently exerts violence in the form of separating children from parents where it is not warranted.

Where have we seen rules like this before? Where have we seen a rule that does not allow a decision maker to look at any other factor other than the factual predicate to make a decision? This kind of rule has been commonly called absolute liability in Canada. Absolute liability rules exist in both the regulatory or criminal context and also in the tort law context. Examining why this type of rule exists in these two areas for particular factual predicates will reveal the circumstances in which our nomos or our community will go to such extremes to use rules that apply simply upon a factual predicate.

The jurisprudence related to absolute liability offences in the regulatory or criminal context reveals first, a delineation between absolute and strict liability; and second a recognition that absolute liability offence could violate an individual right under section 7 of the Canadian Charter of Rights and Freedoms ("Charter") if the provision has the potential of depriving the life, liberty and security of the person. As well, the Supreme Court of Canada has struck down absolute liability where it found its use led to an unfair and unjust result. One notable example was in R. v. Hess. There, the Supreme Court held that the offence of having sexual intercourse with a person less than fourteen years of age (statutory rape) constituted an absolute liability offence because Parliament had specifically provided for the accused’s guilt upon proof of the actus reus “whether or not he believes that she is fourteen years of age or more.” The Court held that the offence was an unjustified violation of section 7 of the Charter when compared to a less restrictive alternative that would allow the accused a limited defence.
that he took all reasonable steps to ascertain the age of the complainant, and thus would require objective fault or negligence.\textsuperscript{113}

There is a “small minority of reported decisions” where the courts have held an accused could be held absolutely liable.\textsuperscript{114} These cases include possessing an uncased rifle at night,\textsuperscript{115} failing to stop a vehicle at an intersection,\textsuperscript{116} operating an overloaded truck,\textsuperscript{117} selling and advertising a new drug before submitting it for testing,\textsuperscript{118} permitting a minor to enter licensed premises,\textsuperscript{119} providing and collecting funds for a listed person under the Terrorism Regulations,\textsuperscript{120} and depositing hazardous substances in an area frequented by migratory birds.\textsuperscript{121}

The regulatory and criminal law jurisprudence leads us to make three points with regards to absolute liability. First, there is reluctance, in the main, to allow absolute liability. The general consensus is there is a relationship between penalty levels and the requirement for mens rea. The greater the penalty, which is to be inflicted, the greater the culpability, which is needed to justify the penalty, and the greater the care, which must be taken.\textsuperscript{122} Secondly, as can be gleaned from the few instances where absolute liability exists, it is acts that legislators or the courts can define as ultrahazardous activities, which could potentially cause great harm, that are prohibited absolutely.\textsuperscript{123} Finally, the regulatory and criminal courts have acted in the past to infuse more flexibility into a rule. Cover has taught us that the inaction of the courts to infuse flexibility into the exclusion clause is itself an act of violence.

\textsuperscript{113} Ibid.; Similarly, in R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193 (S.C.C.) the Supreme Court held that provisions that required the prompt correction of misleading advertising, even in cases where it was not reasonable for the accused to know that the advertising was misleading, amounted to absolute liability that could not be justified under the Charter.

\textsuperscript{114} Stuart, supra note 109 at 193.

\textsuperscript{115} Lands and Forests Act, R.S.N.S. 1967, c. 163, s 123(2); R. v. Morrison (1979) 31 N.S.R. (2d) 195 (C.A.) (adopted in R. v. Maidment (1984) 37 C.R. (3d) 387 (N.S.C.A.)) wherein MacDonald J.A. held: “These provisions were obviously enacted to prohibit night hunting and are couched in absolute terms, viz., no person shall…rather than the cause or permit language employed in the offence charged in the Sault Ste. Marie case” at 203.


\textsuperscript{117} Highway Traffic Act, R.S.O. 1990, c. H.8, s. 125 (prev. R.S.O. 1970, c. 202, s. 72(1)(c)); R. v. Allen (1979) 59 C.C.C. (2d) 563: Fitzgerald J. held that this is a public welfare legislation of the highest importance to ensure traffic could move safely.


\textsuperscript{119} Liquor Licence Act, R.S.O., c. L.19, section 30; Capozzi Enterprises Ltd. (1981), 60 C.C.C. (2d) 385 (B.C.C.A.).

\textsuperscript{120} Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism, SOR/2001-360.

\textsuperscript{121} Migratory Birds Convention Act, 1994, (1994, c. 22), s. 5.1.

\textsuperscript{122} Colvin & Anand, supra note 109.

\textsuperscript{123} In Wholesale Travel Group, supra, note 113, Justice Cory stated that regulatory offences exist to protect the public from the potentially adverse effects of otherwise lawful activity. Since there, there has been a debate as to whether there is a distinction between prohibition and regulation, especially when the regulation prohibits specific forms of conduct. However, prohibition can always be reformulated as a regulation by placing it within a broader context.; See also Colvin & Anand, supra note 113 at 252-53.
**Absolute liability in tort law applied to socially productive but ultrahazardous behaviour**

Absolute liability in the area of tort law has been characterized as “relatively insignificant” partly because it “is clearly at odds with the values and objectives of fault-based compensation to hold a person liable for faultless behaviour.” While some scholars describe absolute liability as the exception and not the rule, some argue that it is more prevalent than we think. Regardless of whether absolute liability is a doctrine of its own, the principle is clear: no fault is required in finding someone liable.

The application of absolute liability in Canadian tort law is often traced to the case of *Rylands v. Fletcher*, where a property owner allowed the construction of a reservoir on his land. The reservoir burst, leading the escaping water to fill mineshafts located on neighbouring property. The Court, in this case, held the defendant liable. In doing so, the Court acknowledged that building the reservoir was an activity that was on the one hand lawful and beneficial, and on the other hand, highly dangerous. In characterizing the situation this way, the Court found that those who engage, for their own benefit, in highly dangerous, although lawful, activities ought to bear the costs of the activities.

Following *Rylands v. Fletcher*, the courts have expanded the absolute liability to few areas. Courts have found a defendant liable for engaging in what may be socially productive or valuable activities, but are ultrahazardous and risky. Scholars posit that this regime is also justified because the activities themselves lead to accidents where evidence would be difficult to obtain because it would be destroyed in the accident, and because it creates incentives to either stop the activity, or find alternative ways to achieve a goal rather than using the activity. In

---


125 *Ibid.*; However see Gregory C. Keating, “The Theory of Enterprise Liability and Common Law Strict Liability” (2001) 54 Vand. L. Rev. 1285 wherein Keating argues that the strict liability theory of tort law is more prevalent that people think and is really a competing theory alongside the fault theory of negligence. He argues that it is primarily the way we have framed strict liability as an exception in the fault liability doctrine that has promoted the perception as strict liability as less prevalent than it really is.

126 *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, affirming (1866) L.R. 1 Ex. 265. See Klar, *supra* note 124 at 620-29 and Fridman, *supra* note 124 at 225-35 where they discuss how one determines whether an activity is dangerous or not. They concede it is vague from *Rylands v. Fletcher* but identifies the main characteristics from the case, namely, (a) there is a non-natural use to the activity; (b) that something accumulated or collected escaped out of your land or control that will cause mischief; (c) the activity is for the defendant’s own purposes or benefit. They also discuss that while the use of an object itself may not be dangerous, its use in certain circumstances or situations may convert it into a dangerous object, and thus have strict liability applied.

127 *Rylands v. Fletcher*, *ibid.*

128 Kenneth S. Abraham, *The Forms and Functions of Tort Law (3rd ed.)* (Foundation Press: New York, 2007) at 169-173: Abraham discusses how strict liability encourages people to use substitutes to the activity, rather than engage in the dangerous activity, or engage in research to find another way of achieving a socially productive outcome.
this sense, scholars challenge the notion that any safety mechanisms or processes could not temper the risks or harm associated with the activity, and therefore the activity must be done sparingly, or if done, with the assumption of risk and liability. Some examples include the creation or use of: natural gas explosions\textsuperscript{129}, aerial spraying of herbicides\textsuperscript{130}, fires for non-natural use\textsuperscript{131} keeping or owning dangerous animals,\textsuperscript{132} the release of toxic substances into the environment,\textsuperscript{133} and explosions.\textsuperscript{134} Still, courts have found a reluctance to expand the doctrine of absolute liability to equally productive and valuable, but dangerous activity. Some examples include the creation or use of: domestic and industrial fires,\textsuperscript{135} domestic gas appliances,\textsuperscript{136} and even explosives.\textsuperscript{137}

Regardless of whether or not absolute liability is a common or not, it applies to activities that can be seen as socially productive or valuable, but also ultrahazardous and has the potential for great harm.\textsuperscript{138} When absolute liability is associated with an activity, legislators or the courts are sending a message: if people want to engage in the activity, they do so knowing the risks and that they will be responsible with damages associated with the activity.


\textsuperscript{131} See for example: \textit{Attorney General of Canada v. Diamond Waterproofing Ltd.} (1974), 4 O.R. (2d) 489 (C.A.); \textit{Creaser v. Creaser} (1907), 41 N.S.R. 480. Note that several jurisdictions in Canada have created statutes to mitigate the strict liability position of the common law by ensuring that defendants would not be held liable for fires which were outside their control. Still the role of the statutes has been limited, and the general opinion is that those starting fires for non-natural use can be held strictly liable.

\textsuperscript{132} See for example: \textit{Rands v. McNeil}, [1955] 1 Q.B. 253 (C.A.) which involved a bull on a farm; \textit{Cowles v. Balac} (2005), 29 C.C.L.T. (3d) 284 (Ont. S.C.J.) which involved a tiger in a wildlife park; \textit{Behrens v. Bertram Mills Circus Ltd.}, [1957] 2 Q.B. 1 which involved a circus elephant.; See Klar, \textit{supra} note 99 where he notes that there is a general rule at common law that an owner of cattle is strictly liable for trespasses committed by them in leaving their owner’s fields and wandering onto the land of others. Unlike other actions based on trespass, liability is strict. However, there is no common law duty for neighbours to fence and to protect property from wandering cattle.


\textsuperscript{135} See for example: \textit{Dudek v. Brown} (1980), 33 O.R. (2d) 460 (H.C.); \textit{Maron v. Baert & Siguaw Dev. Ltd.} (1981), 126 D.L.R. (3d) 9 (Alta. Q.B.). Note that the general opinion is the difference between these cases and those where strict liability is held is the whether a fire is natural or non-natural use. The difficulty is determining whether a fire is natural or a non-natural use.


\textsuperscript{138} Abraham, \textit{supra} note 128 at 166: Abraham finds that strict liability is in effect activity-based, whereas negligence liability is act-based. Strict liability is designed to promote optimal deterrence and achieve corrective justice.
(c) Ultrahazardous activity: Excluding children in the family reunification scheme

The regulatory and criminal law context has taught us that absolute liability is reserved to strictly prohibit acts society views as abhorrent because the activity is dangerous to the public. However, criminal law also is reluctant to apply the regime to all dangerous activities, especially where the penalties associated with the offence are severe. Our review of absolute liability in the tort law context reveals that while society may view an activity as productive or valuable, but also ultrahazardous, a person will be held strictly responsible for any harm that arises out of the choice to engage in the dangerous, but beneficial activity.

The application of absolute liability in these areas of our law illuminates what the exclusion clause really means. In once sense, we view the evil the exclusion clause is aimed at (letting in otherwise inadmissible parents or “fake” family members) as so hazardous and egregious that it merits the strict application of the law and also a severe punishment. The use of absolute liability in conjunction with a harsh penalty confirms that we do not think the penalty of a lifetime bar to sponsoring a child is too much.

In another sense, while we can view the activity of reuniting families as socially productive and valuable, there are risks associated in allowing landed immigrants to bring their families into Canada (allowing fraudsters and those that are not bona fide family members in). The state has signaled that the risk posed by fraudulent applicants is ultrahazardous. To protect against this hazard, the state has chosen the strongest measure; the use of absolute liability in the exclusion clause. Does the way the rule is structured or how it operates inform us as to what the state values? Again, we will turn to Schauer to give us an interpretive frame to discern the values the state prefers.

iii. Violence through the state justifying the rule

Schauer’s interpretive framework provides that the state’s choice in using an absolute liability regime in the exclusion clause reveals a preference for three values: reliance, predictability or certainty of the final decision; efficiency in the decision making process; and stability by narrowing the range of potential decisions. Schauer aptly describes what we sacrifice when using an absolute liability regime: “Insofar as factors screened from consideration by a rule might in a particular case turn out to be those necessary to reach a just result, rules stand in the way of justice in those cases and impede optimal justice in the long term.”\footnote{Schauer, \textit{supra} note 93 at 137.} Schauer finds that in preferring reliance, it does not mean that the decision is free from conflict from other values, but that it places more importance on the decision being settled, rather than it be settled right.\footnote{Justice Louis Brandeis in \textit{Burnet v. Coronado Oil & Gas Co.}, 285 US 393, 406 (1932); Schauer, \textit{ibid.} at 141-42.} Second, Schauer writes that efficiency “comes at the price of precluding decision-makers from investigating factors that might, for the particular case, have been dispositive.”\footnote{Schauer, \textit{ibid.} at 148.} Finally, Schauer discovers that valuing stability generates more errors in decision-making.
By truncating the array of facts to be considered, rules commit a decision-making process to some number of errors, an error being defined as a result other than that indicated by direct particularistic application of a background justification or theory of justification. These errors are not a function of mistakes that decision-makers may make, but instead are generated by decision-makers faithfully and accurately following the rules.\textsuperscript{142}

Thus, when we use an absolute liability regime, we are sacrificing the consideration of factors. We also ignore that decisions may conflict with other values, and turn a blind eye towards errors being made because we feel that we need reliable, efficient and stable decisions to prevent against the ultrahazardous harms that the rule aims to protect us from. In the narrative within our \textit{nomos} then, the abnormal danger of letting in people who are fraudulent is so frightening, that we dare not risk any lapse or leniency in how we apply the rule. We allow the use of a broad generalization to tackle the ultrahazardous evil.

With regards to the role of a decision maker in an absolute liability regime, we signal that there is no trust in a decision maker’s discretion. For Schauer, rules are tools for the \textit{allocation of power}.\textsuperscript{143} A decision-maker not constrained by rules has the power, authority, and jurisdiction to take everything into account.\textsuperscript{144} In an absolute liability regime however, the decision maker is constrained by the rules, and has not been allocated any power. Under the exclusion clause, the immigration officer functions as an automaton checking if names of children are disclosed on forms and using that as a proxy for identifying genuine and admissible family members.

Finally, absolute liability schemes fail to recognize that there may be differences between one applicant and the next in why a child was not disclosed. Schauer offers this:

\begin{quote}
Because rules suppress potentially relevant differences, they can serve to suppress differences among members of a community and thereby function as implements of homogenization...By blocking consideration of all potentially relevant factors, rules may encourage us to see ourselves as relevantly similar to others, rather than relevantly different.\textsuperscript{145}
\end{quote}

The narrative of the exclusion clause is not only are all parents who do not disclose their children are the same, but they are all liars, cheaters, and abusers of the system. Once the factual predicate has been made out, the state can label those falling under the provision as deliberately trying to misrepresent no matter what the circumstances or reasons.

What Schauer points out is important in not only identifying once again that rules are generalizations, but also that there is a normative and violent force beyond the simple application of the rule. The narrative of the rule is as Cover describes, a cultural medium that can itself be “jurisgenerative” or norm creating. The creation of legal meaning “is a force as powerful and

\textsuperscript{142} Ibid. at 149.
\textsuperscript{143} Ibid. at 159.
\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid. at 162.
pervasive as gravity, ‘as much “our world” as is the physical universe of mass, energy, and momentum.”146 Indeed as Meredith Render discussed with regards to gender rules, a rule can reflect a type of generalization that can be unfair and unjust: a stereotype. She finds that a rule based on a “nonuniversal and categorical generalization is unfair, even if the rule’s [factual] predicate is statistically supported”147 is “analytically empty.”148 While it is beyond the scope of this paper to discern whether the factual predicate in the exclusion clause is discriminatory by Render’s account, what is important to glean from this discussion is that violence can emanate from the rule in not only the direct effect from a decision made using the rule, but also the normative force of a rule in affecting how our community or the nomos sees a group of people. The projection of an unfair generalization can affect the community’s acceptance of such a brutal rule and can be used to justify state violence without resistance. When we generate rules in the form of an absolute liability, and when they are adhered to in a firm manner, it not only signals our aspiration for certain values, but also reflects our ease with allowing the law to operate in a destructive or violent way.149 Is there an alternative?

PART III: TOWARDS A LESS VIOLENT FORM

In light of the narrative we have pulled using the interpretive approaches of Cover and Schauer, the paper now asks whether a less strict alternative of the exclusion clause can exist without compromising the state’s interests in preventing fraud in the immigration system. Cover’s approach calls for more “reasoning through context.” Schauer reminds us the costs to using rules that give no room for considering not only context but other factors relevant to making a decision that leads to the justification of the rule. The costs from failing to use a particularistic form of decision-making lead not only to unfair and unjust decisions being made but the violent and permanent harm of separation of children from their parents.

To this end, the paper argues that the exclusion clause has no place within the family reunification scheme for two reasons. First, there are mechanisms in place for immigration officials to determine whether an applicant is a bona fide family member or whether a person would affect the sponsor’s admissibility; and second, there are mechanisms in place in immigration law that combat misrepresentation and fraud.

Recognizing that repealing the exclusion clause may be more difficult, perhaps we can also look to providing a less strict application of the rule. The following discusses how a less strict application of the exclusion clause is not only viable, but also does not compromise any of the state’s interests inherent in the rule.

146 Snyder, supra note 88 at 1630.
147 Meredith M. Render, “Gender Rules” (2010) 22 Yale J.L. & Feminism 133 at 143.
148 Ibid. at 190.
149 Cover, supra note 1 at 95.
A. A less strict form does not compromise the state’s interests

i. To ensure more honesty

If the purpose is to ensure honesty, the exclusion clause should be limited to cases where there was a deliberate intention to mislead. The provision however, is not limited to fraudulent non-disclosure; it equally excludes family members deliberately excluded and family members where there was no conscious decision not to disclose them. The Federal Court has made this point: “I do not read the paragraph in which those terms are found as limiting the scope and effect of paragraph 117(9)(d) to fraudulent non-disclosure. The regulation is clear. Whatever the motive, a failure to disclose which prevents the immigration officer from examining the dependent precludes future sponsorship of that person as a member of the family class.”

To overcome Schauer’s identified problem of over-inclusiveness of a rule, Cover’s “reasoning from context” should be a guide. Honesty can be ensured by doing a proper evaluation of whether the child is a bona fide family member and whether the parent would be otherwise admissible due to the existence of a child. This evaluation system already exists, as children sponsored by citizens born in Canada and applicants seeking admissibility go through this process. This is not a situation where an explosion occurred, and all evidence as to who belongs in a family disappears. As well, unlike a situation where there are no mechanisms or processes in place to warrant the use of absolute liability to curb the activity or encourage other ways to accomplish a goal, there are processes in place to verify such information.

Finally, if it is the integrity of the system the government wants to protect, it is difficult to say there is integrity when the rule applies to exclude bona fide family members no matter what. If there is a true concern for integrity of decision-making in the system, a less strict alternative is warranted.

ii. To provide a deterrent

The government claims that the measure is intended to promote honesty and certainly knowledge of possible exclusion could be said to deter non-disclosure from future applicants in some cases. In other cases however, knowledge would not deter non-disclosure. For example, an applicant may really have no knowledge that a child exists. As well, in a case where a woman fears that disclosing an “illegitimate” child could mean risk to her life, she may still choose to not disclose. This may be more of a factor when considering the context under which the woman is asked to disclose. Was she with her spouse when she applied? Perhaps there is a history of spousal abuse. Perhaps the couple was in a refugee camp and no one could advise them of the consequences.

---

150 Chen v. Canada (Minister of Citizenship and Immigration), 2005 FC 678.
151 See Woldeselassie, supra note 29.
Instead of turning a blind eye to the over-inclusiveness of the rule, decision makers should be given more flexibility to recognize that there are differences between landed immigrants; that relying on broad and sweeping generalizations to make a decision is not just.

Finally, as discussed in Part I, there are other mechanisms within IRPA that deal specifically with misrepresentation. There is no reason why the misrepresentation regime that exists outside of the exclusion clause is not sufficient in promoting honesty.

iii. To deny entry to those that are inadmissible to begin with

It is true that if one person in a family is inadmissible, the applicant and the accompanying members are found inadmissible. The reasons why an applicant may be inadmissible due to their listing of a family member may be one reason why an applicant will not list them. What are those reasons? Applicants and their family members could be deemed inadmissible on health grounds if they are likely to be a danger to the public, likely to be a danger to public safety, or might be expected to cause excessive demands on health or social services. However, the Regulations also provide that family members are exempt from the excessive demands on health or social services application of inadmissibility. Individuals could also be found inadmissible due to serious criminality, security concerns, for failing to comply with the IRPA (such as conditions imposed on status) and of course for misrepresentation. Other than these reasons, an applicant and his or her family members could not be deemed inadmissible.

With regards to children, it is easy for immigration officers to engage in an investigation with regards to whether any of them would be inadmissible. Young children are less likely to engage in serious criminality or be security concerns. While there may be question with regards to medical inadmissibility, this can be determined.

If the state is concerned about preventing the “flood” of sponsorships of “legitimate” or “bona fide” family members, the state has already circumscribed the meaning of family members where children are involved. They have only deemed as legitimate, biological or adopted children. There are methods by which to verify biological children. With regards to adopted children, Canada has imposed strict regulations in how children are recognized as adopted. Finally, as discussed, there is already an offence for misrepresentation in the legislation aimed at those that deliberately provide false information, which begs the question of whether we need the exclusion clause.

---

153 Regulations, supra, note 12, s. 42.
154 IRPA, supra, note 9, s. 38.
155 Ibid., s. 38(2); Regulations, supra note 12, s. 24.
156 IRPA, ibid., s. 36.
157 Ibid., s. 34.
158 Ibid., s. 31.
159 Regulations, supra note 12: See 117 of the Regulations generally.
Schauer and Gavison are instructive here. While the rule itself is rigid and restrictive, the immigration system can deal with the injustice the exclusion clause presents. Providing leeway for resolving this injustice is one way to increase the viability and fairness of the system.

iv. To facilitate family reunification

Reuniting families. The purpose behind section 117 of the Regulations is to define who family is for the purposes of family reunification. As it stands now, the exclusion clause does not further this purpose, as it does not help determine who are genuine family members. It operates to prevent the reunification of children with parents based upon a flawed method of determining whether the child is a genuine member of the family. The provision is too broad and reaches out beyond the scope of it limits. The point of the provision is to ensure that bona fide members of family are the only people sponsored by landed immigrants. However, the provision’s reach prevents even those “real” family members from being eligible for membership in our society. Again, Schauer and Cover remind us that the over-inclusiveness of the provision can be remedied through a particularized decision-making process.

As of now, the government also does not know whether this provision is effective in preventing fraudulent family members into Canada. There is no way of knowing for certain. The fact that we cannot know however, does not mean that we need to use such a strict measure. Further, we cannot be sure that there is a large problem of fraudulent family members from entering into Canada. All we have is public discourse and government statements in the media, indicating the fear of allowing those cheating the system in.160

B. A less strict alternative is viable

i. A call for action by legislators and the judiciary

We have seen that in the regulatory and criminal law context, there is reluctance to extend an absolute liability regime to control activities that society finds abhorrent or ultrahazardous when there is a severe penalty attached to the proscription. Indeed, if Canadian courts can see that a less strict regime can be applied when prosecuting statutory rape, there is no reason why, at a minimum, less stringent application of the exclusion clause cannot be applied. Cover recognized that inaction by judges or decision makers itself can constitute violence and the silence from both legislators and the courts on this issue is all the more violent when we see that in the past, absolute liability regimes were struck down because they violated a sense of fairness and justice.

ii. Reasoning with context by considering relevant factors

There is a lot at stake here. Many factors can be considered to aid a decision maker in making an optimal and ultimately a decision that adheres best to the justification of the rule. At a minimum, four factors should be considered when determining whether a child should be excluded: whether the child has a genuine relationship with the parent under the Regulations; the reasons for non-disclosure; whether the child’s existence would have affected the parent’s admissibility; and the best interests of the child.

The reasons why the first three factors should be considered have been discussed. They are relevant because they give insight as to whether or not the justification of the exclusion clause merits exclusion. If the child is not a *bona fide* family member; if there is no reasonable explanation for the non-disclosure; or if the child would have deemed a parent inadmissible, a decision maker could be justified in applying the exclusion clause. However, if investigation finds otherwise, a decision maker should be able to have the discretion to ask whether it would serve the purposes of the rule and to family reunification to exclude the child.

The last factor is one that does not directly affect whether the evil the provision is preventing will be diminished, but it should be included for several reasons. When defining whether children should be excluded from living with their parents in Canada, we owe a duty to ensure their best interests are accounted for.161 As Canada is a signatory to the United Nations *Convention on the Rights of the Child*, that duty is paramount in decisions and actions taken with regards to children.162 This obligation is not without weight as Canada has not only recognized this right but also applied it in the immigration context. We accept the application of Canada’s international legal duties as an objective in our immigration legislation,163 and the Supreme

161 Bridgette A. Carr, “Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure” (2009) Yale Hum. Rts & Dev. L.J. 120; See also Thronson 2008, *supra* note 25 wherein he states that “best interests” can take on many meanings.; Aliamisse O. Mundulai, “Stretching the Boundaries in Child Access, Custody and Guardianship in Canada” (2005) 21 Can. J. Fam. L. 267 wherein she discusses that the best interests of the child cannot be drawn completely separate from the interests of the parents. She finds that there is really a balancing act between competing interests of parents in family law disputes, and that it should be recognized that parents interests factor into family law decision, and whether that is the best interests of the child. While there is debate on what should be included in the best interests of the child, for the purposes of the paper, it is important to recognize that the interests of the child are not even in play with regards to subsection 117(9)(d), and that some regard to the interests should be given.


163 IRPA, *supra* note 9, ss. 3(3)(f); see Aniz Alani, “To Construe and Apply: Does the Immigration and Refugee Protection Act Assign Priority to International Human Rights Law?” (2006) 64 U. Toronto Fac. L. Rev. 107 wherein he discusses the Federal Court of Canada’s treatment of article 3(3)(f) of IRPA, and
Court of Canada has made it clear that the best interests of the child is a salient consideration in immigration decisions.164

CONCLUSION

The exclusion clause is a violent form. The Kisana’s story is proof of this. The rule makes a broad and sweeping generalization that landed immigrants who do not disclose their children are ultrahazardous to our society because they are liars, cheaters and abusers of Canada’s immigration system. The firm adherence to the rule shows our preference for a rule-based system that values reliability, efficiency and stability of a decision-making process rather than whether the decision itself is fair or just. Where a system of decision-making has all the tools in place to make a decision that adheres to the aim the rule is crafted for, why turn a blind eye? In preventing the automatic exclusion of children from the family reunification scheme, decision makers applying the exclusion clause should reason with context. Do we want to live in a community where reliance on broad generalizations informs our decision making no matter how ill fitting and destructive the decision is?

---

APPENDIX: Section 117 of the Regulations

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(a) the sponsor's spouse, common-law partner or conjugal partner;
(b) a dependent child of the sponsor;
(c) the sponsor's mother or father;
(d) the mother or father of the sponsor's mother or father;
(e) [Repealed, SOR/2005-61, s. 3]
(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is
   (i) a child of the sponsor's mother or father,
   (ii) a child of a child of the sponsor's mother or father, or
   (iii) a child of the sponsor's child;
(g) a person under 18 years of age whom the sponsor intends to adopt in Canada if
   (i) the adoption is not being entered into primarily for the purpose of acquiring any status or privilege under the Act,
   (ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and
   (iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption
      (A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and
      (B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption; or
(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father
   (i) who is a Canadian citizen, Indian or permanent resident, or
   (ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.

Adoption — under 18

(2) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was under the age of 18 shall not be considered a member of the family class by virtue of the adoption unless
(a) the adoption was in the best interests of the child within the meaning of the Hague Convention on Adoption; and

(b) the adoption was not entered into primarily for the purpose of acquiring any status or privilege under the Act.

Best interests of the child

(3) The adoption referred to in subsection (2) is considered to be in the best interests of a child if it took place under the following circumstances:

(a) a competent authority has conducted or approved a home study of the adoptive parents;

(b) before the adoption, the child's parents gave their free and informed consent to the child's adoption;

(c) the adoption created a genuine parent-child relationship;

(d) the adoption was in accordance with the laws of the place where the adoption took place;

(e) the adoption was in accordance with the laws of the sponsor's place of residence and, if the sponsor resided in Canada at the time the adoption took place, the competent authority of the child's province of intended destination has stated in writing that it does not object to the adoption;

(f) if the adoption is an international adoption and the country in which the adoption took place and the child's province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have stated in writing that they approve the adoption as conforming to that Convention; and

(g) if the adoption is an international adoption and either the country in which the adoption took place or the child's province of intended destination is not a party to the Hague Convention on Adoption, there is no evidence that the adoption is for the purpose of child trafficking or undue gain within the meaning of that Convention.

Adoption — over 18

(4) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was 18 years of age or older shall not be considered a member of the family class by virtue of that adoption unless it took place under the following circumstances:

(a) the adoption was in accordance with the laws of the place where the adoption took place and, if the sponsor resided in Canada at the time of the adoption, the adoption was in accordance with the laws of the province where the sponsor then resided, if any, that applied in respect of the adoption of a child 18 years of age or older;

(b) a genuine parent-child relationship existed at the time of the adoption and existed before the child reached the age of 18; and

(c) the adoption was not entered into primarily for the purpose of acquiring any status or privilege under the Act.

(5) and (6) [Repealed, SOR/2005-61, s. 3]

Provincial statement

(7) If a statement referred to in clause (1)(g)(iii)(B) or paragraph (3)(e) or (f) has been provided to an officer by the competent authority of the foreign national’s province of intended destination, that statement is, except in the case of an adoption that was entered into primarily for the purpose of acquiring any status or privilege under the Act, conclusive evidence that the foreign national meets the following applicable requirements:

(a) [Repealed, SOR/2005-61, s. 3]

(b) in the case of a person referred to in paragraph (1)(g), the requirements set out in clause
(1)(g)(iii)(A); and

(c) in the case of a person referred to in paragraph (1)(b) who is an adopted child described in subsection (2), the requirements set out in paragraphs (3)(a) to (e) and (g).

New evidence

(8) If, after the statement is provided to the officer, the officer receives evidence that the foreign national does not meet the applicable requirements set out in paragraph (7)(b) or (c) for becoming a member of the family class, the processing of their application shall be suspended until the officer provides that evidence to the competent authority of the province and that authority confirms or revises its statement.

Excluded relationships

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

(a) the foreign national is the sponsor's spouse, common-law partner or conjugal partner and is under 16 years of age;

(b) the foreign national is the sponsor's spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended;

(c) the foreign national is the sponsor's spouse and

(i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or

(ii) the sponsor has lived separate and apart from the foreign national for at least one year and

(A) the sponsor is the common-law partner of another person or the sponsor has a conjugal partner, or

(B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor; or

(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

Exception

(10) Subject to subsection (11), paragraph (9)(d) does not apply in respect of a foreign national referred to in that paragraph who was not examined because an officer determined that they were not required by the Act or the former Act, as applicable, to be examined.

Application of par. (9)(d)

(11) Paragraph (9)(d) applies in respect of a foreign national referred to in subsection (10) if an officer determines that, at the time of the application referred to in that paragraph,

(a) the sponsor was informed that the foreign national could be examined and the sponsor was able to make the foreign national available for examination but did not do so or the foreign national did not appear for examination; or

(b) the foreign national was the sponsor's spouse, was living separate and apart from the sponsor and was not examined.

Definition of “former Act”

(12) In subsection (10), “former Act” has the same meaning as in section 187 of the Act.