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The Variable Child: The Vulnerabilities of Children and Youth in the Canadian Refugee Determination System.

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Abstract

The Variable Child concerns the legal decision-making process in unaccompanied child refugee applications, and the role that conceptions of childhood play in the process. I examine when particular types of knowledge are drawn upon by legal actors, as well as the effects of the claim-making practices that create meaning, or 'truth effects', in legal decision-making. I identify how legal actors exercise discretion by investigating how facts are constructed with different ideas about children's competence, abilities and knowledge.

The "Unaccompanied Child Refugee Evidentiary and Procedure Guidelines", which governs legal decisions, has embedded within it various, sometimes competing, conceptions of the child and childhood. These multiple notions create considerable discretionary space for refugee officers to make decisions about individual cases. My examination of legal decisions reveals a strategic use of vulnerable and/or responsible conceptions of childhood. Another strategy used to establish facts in these cases is to exclude the cultural differences of childhood – both these practices are accomplished through employing several different knowledge moves. Refugee officers invoke vulnerable and/or responsible constructions of childhood to displace the impact of other/alternative constructions of childhood, namely Chinese ideas of parental relations. This avoids the potential for legal decisions to set standards for similar cases in the future.

Childhood studies have documented how different axes of scholarly inquiry produce different understandings, typologies, and knowledges of the child and childhood. What remains understudied is how competing knowledges of the child and childhood are

applied, negotiated, and formalized in legal decision-making. My study investigates how power relations constitute particular constructions of childhood, and the consequences these relations have for children's lives. Unlike examining childhood as contextual, I document how variable understandings of the child and childhood are constituted, institutionalized, and normalized through the law.

My study examines the complexities of legal decision-making, a process that is often black-boxed. I also trace which conceptions of childhood are drawn upon to substantiate legal claims, and how a social context for the child and childhood emerges. By examining the relations of law in the context of children, my work contributes to the growing area of childhood studies and socio-legal practices.

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Chapter 1

Introduction

Project Description

> We know nothing of childhood: and with our mistaken notions the further we advance the further we go astray. The wisest writers devote themselves to what a man ought to know, without asking what a child is capable of learning. They are always looking for the man in the child, without considering what he is before he becomes a man (Rousseau, 1762).

The Variable Child illuminates some of the ways in which truths about children are formed in the Canadian legal system. Specifically, I am concerned with documenting the conditions and practices that enable certain truths about the "child" and "childhood"[1] to take precedence over others in the legal context. My project examines the constitutive power of different types of knowledge (such as expertise on, and conceptions of, childhood), and the role of discretion in legal decision-making. To investigate this process, I examine when particular types of knowledges and understandings of childhood are drawn upon by legal actors (such as judges, juries, lawyers, and Immigration and Refugee Board officers), as well as the effects of their claim[2]-making practices that create meaning, or "truth effects", in legal decision-making.

The process of legal decision-making is a complex one. It does not simply involve legal actors randomly making decisions based on personal beliefs and experience. Legal decisions instead are bounded by various legal doctrines, such as due process and procedural justice. At the same time however, legal agents are also able to exercise

[1] In this project the term childhood refers to a set of practices or expectations concerning those under the age of 18. Conceptions of childhood shape understandings of children's actions, responsibilities and accountability.

[2] The terms claims and case are used interchangeably. Both terms suggest refer to asserting a position concerning whether the unaccompanied child's application should be accepted or rejected.

discretionary power in the application of rules and policies. In this dissertation I consider how decisions are made in light of policies, rules, laws, and the discretionary power of legal agents who apply them. I show how these factors shape legal decisions, either as constraints or facilitators for particular claims. Most notable in this analysis is the importance of legal procedure and due process in shaping both how information is gathered to build facts and claims, and how these procedures bound and shape the ways in which IRB officers can build their case. My interests lies in examining how legal actors work within these bounds to produce certain case outcomes. By examining discretionary power in this way I am able to show how conceptions of childhood are drawn upon within legal doctrines themselves, and how they are used to invoke or ignore sections of these doctrines.

Childhood studies to date have documented how different axes of scholarly inquiry result in particular understandings, typologies and knowledges of the child and childhood (Chen, 2005; Corsaro, 1997; Prout, 2005; Schousboe, 2005; Stephens, 1995). Such research has produced an abundance of important scholarship that offers knowledge and discourses of the different ways to imagine the child and childhood. What remains understudied is how these often competing knowledges of the child and childhood are applied, negotiated, and institutionalized, particularly in the Canadian legal system.

My goal is to understand how particular constructions of childhood are constituted and applied in the legal system, and how these constitutions have real consequences for children's lives (in the shape of legal decisions). The constructions of childhood that are most prevalent in my analysis are ones in which a child is perceived as either vulnerable or responsible. Although not exclusive categories, seeing children as vulnerable

constructs them as innocent and dependent, whereas responsibility denotes competence, self-control, and accountability.

Childhood studies as a discipline also employs the terms 'western' and 'neo-liberal' which incorporate characteristics such as vulnerability and responsibility respectively, but here I choose not to use these terms because they are not mutually-exclusive. Scholars have used 'western' to refer to the prevalent idea in Europe and North America that childhood is a time of vulnerability and innocence. One important critique of western childhood (what I am calling 'vulnerable') is that it universalizes this conception, failing to recognize that understandings of childhood are not the same across diverse social contexts – all understandings of childhood are culturally specific. The term neo-liberal childhood is used to indicate a shift away from the emphasis on vulnerability in western notions of childhood, and towards the notion that children are responsible and accountable for their actions. 'Western' and 'neo-liberal' are not mutually exclusive terms, but rather they variously refer to geographical, cultural, and historical boundaries of the understandings of childhood. Given potential confusion, I use terms that represent their central tenets of childhood: 'vulnerable' and 'responsible', respectively. These discourses continue to co-exist, overlapping and sometimes contradicting each other. In fact, it is these tensions and variability in understanding of childhood that complicates the decision-making processes in child refugee claims and shows the power of childhood to shape facts and claims that I examine in this dissertation.

Examining legal decision-making processes suggests the following: 1. that liberal or western notions of childhood are universalized but selectively so, within particular knowledge moves; 2. that invoking particular constructions of childhood is a meaningful

way to displace the impact of other/alternative constructions of childhood, namely Chinese ideas of parental relations and; 3. the strategic use of vulnerable and/or responsible childhood avoids the potential for legal decisions to set examples or standards for similar cases in the future. In a tribunal setting, such as refugee claims, previous decisions do not set precedent in the same way as formal legal decisions, but lawyers or advocates of the child claimant do draw upon them to bolster claims. In this sense, they set the parameters for adjudication by establishing what factors can be legitimately raised.

In order to show how, when, and why, vulnerable and responsible conceptions of childhood are invoked, I investigate the legal policies for unaccompanied child refugee claimants (notably the Unaccompanied Child Refugee Guidelines) and the legal decisions of four[3] such applications from Fujian province in China. The guidelines demonstrate the existence of both vulnerable and responsible conceptions of childhood, illustrating the space that exists for discretionary power. Consequently, understanding legal decision-making necessitates the examination of actual legal cases. This involves examining the discretionary process of constructing facts to build claims. As socio-legal scholarship indicates, discretionary power is embedded within the legal system. Legal agents are bounded by laws, policies, and rule, but ultimately they are responsible for making sense of evidence within these boundaries. This suggests that conceptions of childhood can be used to shape legal outcomes. Only through examining legal decisions and policies can the potential effect of childhood as a governing concept be seen.

Investigating policies and cases provide just one way to examine what I call the practice of "governing *with* childhood". This concept borrows from Simon's "Governing

[3] I examine two single young female claims, one joint claim that includes two young boys, and one other group claim that involves 16 young boys.

through Crime", which understands crime as a way to govern large-scale political projects and to implement social programming (Simon, 2007). Governing *with* childhood differs from Simon's work in that childhood is examined as a tool and resource to rationalize particular governing practices but not on the same scale as the examples provided by Simon.[4] Nevertheless, the decisions made in these cases have consequences for real children and also reproduce particular notions of childhood in the law. To investigate this form of governmental practice I examine the discretionary power of agents and the knowledge moves used to deploy particular notions of childhood. My approach not only shows how conceptions of childhood are deployed, but also how vulnerable and responsible conceptions of childhood are tools that allow refugee claims officers to avoid addressing the cultural particulars of Fujian Chinese families that might provide rationales to support their claim.

Investigating legal decision-making involves examining how facts, which are collectively used to build claims or cases, are constructed. In legal cases, fact construction distinguishes and constructs meaning from evidence - a process that requires interpretative and discretionary practices. Fact construction plays two important roles in decision-making: First, it influences what types of rules can be applied, and it helps define the meaning of the rules (Hawkins, 1992:85). Secondly, it provides the legal knowledge necessary to marshal a claim or case (these two terms are used interchangeably), which, in this study, consists of either supporting or rejecting a refugee application.

[4] This is not to say that childhood has not and will not continue to govern political agendas such as normalizing practices of motherhood; it does, but that is not the focus of this analysis. This project aims to examine how childhood knowledges are used for governing practices not program or political initiatives.

As socio-legal scholarship has shown, facts and claims do not simply involve examining evidence and drawing self-evident conclusions. Nor are legal actors free to deploy discretionary power freely; legal agents are bounded to some extent by laws, policies, procedural justice, due process, and concerns. Therefore the process of claim-making involves legal actors interpreting and giving meaning to the evidence before them within the boundaries of particular laws and policies. Transforming evidence into facts, then, involves both exercising discretionary power and employing "knowledge moves" (M. Valverde, 2005). Although not formally defined by Valverde, I understand knowledge moves to encompass the actions of legal actors to assert particular positions – such as authorizing or discrediting common sense, expertise, or extra-legal knowledge - in order to establish facts and claims. Knowledge moves are not always successful, but their intended effects can reveal rationales or trends in the decision-making process. By investigating knowledge moves and discretionary power in the legal decision-making process, I show how facts and claims are constructed and mobilized to make decisions that aim to avoid creating cases that could provide the legal knowledge to force the approval hundreds of successful applications.

Identifying the strategies that are employed to produce an outcome also shows how children are governed *with* childhood. Examining governance in this project involves tracing the use of particular knowledges of childhood**,** and the strategies and rationales used to try to ensure particular case outcomes. Specifically, documenting this process shows what circumstances and characteristics of childhood constitute a successful child applicant. Focusing on the types of knowledge and actions of legal actors illustrates that childhood is a product of power/knowledge relations that are shaped and

reshaped to rationalize a particular legal outcome (Foucault, 1977). Conceptions of childhood are a form of governing resource, as they provide a framework to rationalize and support certain types of thoughts and actions. Examining the decision-making process therefore reveals the informal and subtle ways in which the law governs *with* childhood. More specifically, it illustrates how Chinese knowledges of childhood are displaced in the courtroom.

Unlike studying the various culturally- and historically-specific conceptions of childhood, this project examines the deployment of childhood, and how childhood governs legal decisions. The law is a conduit for the operation of various forms of power, and the task here is to identify how, when, and, more speculatively, why particular conceptions of childhood are uttered. This approach is productive because it does not strive to develop a totalizing theory of law or its practices, but rather to examine the ways in which the law formulates its agendas. Examining the constitutive power of childhood provides insights into the practical effect of this category on people's lives. As my analysis indicates, which conception of childhood is invoked can ultimately determine a case outcome. I also show that refugee officer's choice to invoke a certain conception in a particular case illustrates their awareness of the power of legal decisions.

Why Study the Child and Childhood in the Legal System?

With some exceptions (e.g.Ashenden, 2004; Cradock, 2007; King & Piper, 1990; van Krieken, 2006), the process of legal decision-making in cases involving children is not commonly studied by either legal or childhood scholars. That is not to say that the law and children as independent topics of study are ignored; indeed, nothing could be farther from the truth. There is an abundance of legal scholarship that theorizes the law and

investigates the power of this institution in maintaining particular relations of social order; or, put another way, how the law operates and governs. Yet this work does not examine these issues in relation to childhood.

Legal and childhood studies have had a lot to say about how children should be treated and what constitutes childhood, respectively. The portion of these disciplines' histories that pertain to the debates at hand will be elaborated upon in chapters two and three. However, despite the wide array of important research in this area, one would be hard-pressed to find many other research projects that carefully consider the question of how child and childhood are constituted in the law, and what these constitutions mean for legal decision-making (for exceptions see Ashenden, 2004; Cradock, 2007; King & Piper, 1990). Even less work exists on unaccompanied child claimants in Canada (with the exception of Stasiulis, 2002). Work that examines the relations of law with various subjects are plentiful, yet not in the context of children (for centuries, research in general has discussed children in relation to the family or state).

Although the volume of research on children has fluctuated over the years (see Ambert 1986), the late 1980s marked a renaissance of sorts, especially in the social sciences (Shanahan, 2007), ushered in by the introduction of annual publications like the "Sociological Studies of Child Development". It was here that Ambert (1986) (mirroring the much earlier work of Keys (1900)) made her "call to action and her mobilization for the sociology of childhood" (Shanahan, 2007).

Several disciplines answered this call, and interest in studying childhood flourished, reinvigorating debates about how to "know", treat, and manage the child. Embedded within these debates is an effort to move beyond biological and psychological

understandings of the child. Scholars such as Stephens (1995), Zelizer (1985) and Pollock (1983) illustrated the cultural, political and historical context of childhood, thereby problematizing biology's and psychology's legal stronghold on the topic. This work, and others like it, provided empirical evidence of Ariès' famous proclamation that childhood is a social construct rather than a biological/temporal stage of life (1962). These various approaches, each of which employs a nascent form of social constructionism, shows that child and childhood are not universal, natural, or homogenous concepts.

These investigations also began to identify the factors and conditions that explained the multiplicity and malleability of the child and childhood (Donzelot, 1979; Stephens, 1995; Zelizer, 1985). In so doing, questions such as "what is a child?" and "how does one define childhood?" emerged. The complexity of these questions disrupts the notion that the child and childhood can be defined and characterized through a consistent set of indicators. Instead, the characteristics of a child and childhoods vary; this variability creates challenges in the management and determination of children's needs in the legal system.

An important dynamic in the variability of these concepts is the success and power of science that claims to be able to provide empirical knowledge about how to "know" the child. The proliferation of both medical and related sub-disciplinary knowledges, such as psychiatry, shaped both images of the child, childhood and, relatedly, laws, policies and institutions for children. A multitude of actors, including psychologists, biologists, medical doctors and social reformers made quite different claims about the needs of the child, and appropriate behaviours and expectations during childhood (Heywood, 2001; Platt, 1978; Sealander, 2003; Sigel & Kim, 1996). As a

result, what *is* known about the child and childhood then and today is both conflicting and contested. This ambivalence is not due to any failure to "discover the child", or to uncover the essential ingredients for an ideal childhood. Instead, it is a consequence of the fact that children as social beings are shaped by social relations, and that no amount of research or theorizing will change this. Searching for universal cross-cultural "essences" is therefore doomed to fail. However, by investigating the different knowledges, experiences, and discourses that institute and individually govern children I show some of the ways that children are 'governed *with* childhood'. This involves examining which conceptions of childhood are drawn upon – vulnerable, neo-liberal or cultural – and shows the production of the variable child. Since these diverse knowledges play such a large role in the management of children, particularly in legal settings, it is essential to examine how they are instituted and, occasionally, negotiated. The unpredictable nature of legal operations coupled with the ambiguity of these concepts suggests that various incarnations of the child and childhood can be and are produced at the same time. It is for these reasons that legal decision-making manifests several versions of the child and childhood.

Notwithstanding the breadth of scholarship that documents the treatment of children through the nineteenth and twentieth centuries, there is a dearth of research that integrates relationships between the changing treatment of children – as objects in need of protection to responsible individuals – and the proliferation of various disciplinary knowledges of the child (Sealander, 2003). Although many of the studies since the renaissance of childhood studies illustrate the presence of, and changes in, discourses of childhood, less attention is paid to how various discourses and knowledges come to be

privileged, and, in particular, to the conditions that allow for differences in the treatment of children. Research that illustrates the changes in concepts of the child and childhood, more often than not, results in an analysis of these concepts in relation to other disciplinary interests (such as the family and education) leaving the study of childhood as secondary. Several childhood scholars vocalize the concern that the child and childhood are rarely the main focus of study, such as those that prescribe to the "new sociology of childhood."[5] Prout, who contributed to and continues to build on this work, argues that the future of childhood lies in studying child and childhood as variables of social relations (Prout, 2005). This position recognizes that children are products of social relations (interactions, social norms) and conditions, but also that they are actors within these relations.

The New Sociology of Childhood

The "new sociology of childhood" or "the new social sciences of childhood"[6] arose in the 1980s to revise the study of childhood. It is comprised of scholars from several disciplines, including anthropology, sociology, geography, psychology and history (Prout 2005: 2). With the exception of Prout, James, and Jenks, it is not always clear who explicitly subscribes to this perspective, yet several scholars appear to draw upon, and contribute to, this work.

Proponents of this perspective make several suggestions to improve the study of childhood, many of which I will describe in chapter two. One of these suggestions includes reconsidering the notion that children are consistently in a state of "becoming" –

[5] For a more detailed discussion of how variations in perspectives created a crisis in the sociology of childhood see Dunne & Kelly (2002) and Sommerville (1982).
[6] This perspective is also known as the Sociology of Childhood and, in Germany and Scandinavia, as "Childhood Studies".

becoming mature, becoming responsible, becoming aware, etc. – and to instead evaluate childhood as a state of "being" in itself. Specifically, new sociologists of childhood advocate for considering childhood as an independent period of life, and not simply as a transitional phase to adulthood. Reiterating other childhood scholars' critiques, the "new sociologists'" perspective problematizes the binary of adulthood/childhood often found in the developmental framework posited by psychologists and other medical professionals because it hinders the potential for children and childhood to be studied as autonomous and independent. Put another way, it fails to recognize that children are social actors. Understanding children as independent and/or social actors contrasts dramatically from the once dominant perspective (also known as the western perspective) that children are in their dependent, innocent, and vulnerable developmental phase.

Unfortunately, despite the inroads made by this new approach, the study of childhood faces theoretical criticisms and challenges. Lee, for example, warns against fully embracing the notion that childhood can be studied as a state of "being". He argues that in the present age, where families and identities are continuously reconstituted, studying either adulthood or childhood independently fails to capture how individuals vacillate between various forms of becoming, and therefore calls for attention to both stages (Lee, 2001). Furthermore, Lee also points out (and Prout's (2005) later work appears to agree) that studying childhood as "being" implies the same form of dualism that the "new sociology" reacts against: that childhood still precedes adulthood. He further argues that such a claim implies that children and childhood exist independently of the complex relations that constitute them. Such critiques have led Thorne to argue that the new sociology of childhood is in fact not so new (Thorne, 2000), and to encourage

scholars to reflect on the future of childhood studies. Prout, in contributing to the development of this framework (see James, Jenks, & Prout, 1998), echoes these concerns by stating, "[i]t seems, then, that after more than two decades of extraordinarily creative effort, leading to new theoretical, methodological and empirical insights, the new sociology of childhood is increasingly troubled" (Prout 2005: 67).

Moving Beyond the "new sociology or social studies of childhood"

In an effort to move beyond the "new" sociology of childhood, and to incorporate a different set of ideas for the future study of childhood, Prout calls for the future of childhood study to focus on the "middle", or to draw attention to "mediation and connections between the oppositions [adulthood and childhood]" (Prout, 2005). This alternative approach is an attempt to move away from "dichotomous oppositions [that he argues are] routinely employed in the sociology of childhood" (Prout 2005:67). Specifically, Prout propounds what he refers to as a postmodernist perspective[7] because it pays attention to the role of discourse as an important element for understanding the "middle". Despite his use of postmodern approaches, he also argues that this perspective is limited because, "to put it mildly, [postmodernism is] less good at handling questions of materiality" (Prout 2005: 68).

As a solution to this limitation Prout proposes that scholars embrace Actor Network Theory (ANT) as it offers a form of relational materialisms – which he defines as being "…concerned with the materials from which social life is produced and the processes by which these are brought into relationship with each other" (Prout 2005: 70). Prout finds ANT appealing because it understands society as "patterned networks of

[7] Prout draws on the work of Donna Haraway, Gilles Deleuze, and Bruno Latour (specifically Actor Network Theory) to address his concerns for the new social science of childhood – many which reflect Lee and Thornes' ideas.

heterogeneous materials; it is made up through a wide variety of shifting associations (and dissociations) between human *and* non-human" (Prout 2005:70). For the study of childhood this approach considers the material lives of children, and avoids a priori assumptions about childhood. Or, put another way, it opens up the possibility of considering the child and childhood outside of pre-existing understandings – whether it be cultural, social, biological, or in relation to adults. Despite Prout's insights concerning the importance of examining process and the production of childhood his suggestions remain focused on naming characteristics of childhood.

I believe that Prout's suggestion of examining childhood as a product of networks is a move in the right direction, but I feel that his focus on identifying the complexities of childhood remains a nominal project. The field of childhood studies, by examining the effect of different disciplines, technologies and other non-material forms, as suggested by Prout, will provide a wealth of knowledge that documents different possibilities of childhood. It may also further add to the repertoire of tools to challenge existing understandings of the child and childhood. Such outcomes, however, only further support what is already known through research that documents childhood in various social and cultural contexts – that childhood is variable, ambiguous, complex and diverse.

My position on the future of childhood studies

A more productive way to advance the study of childhood is to consider Prout's insights concerning the constitution of childhood as involving technologies, discourses, and materialism but in the context of governing institutions. By examining the process of governance within institutions such as the law, the power of childhood to shape the lives of children can be investigated. What is known about how children are treated and how

childhood is used to govern is not generated randomly by just any form of knowledge. Only those knowledges which are legitimized through institutions shape what is known about childhood, and they in turn inform governmental ambitions. Children's abilities, expectations, and responsibilities are defined and created through institutions – whether it is the family, or the legal and education systems. Disciplinary discourses can and do produce and draw upon knowledge of childhood – such as knowledge pertaining to children's needs, developmental progress – yet only the knowledges that are taken up by institutions directly impact the governance of children. The decision to employ a particular conception of childhood does not just legitimize a certain understanding but it is also instrumentally employed in the institution of law. Attempts to name and accurately depict childhood, no matter how elaborate and complex, eschew the ability to step back and question how the child and childhood actually come into being. Such a project falls prey to documenting childhood authentically, which can hinder the discovery of how such constructions exist.

The importance of moving beyond documenting different lives of children and toward evaluating the conditions that create them is reflected in Scott's (1991) influential piece "The Evidence of Experience". In the context of women and race, she poignantly discusses how exploring experiences of difference potentially sidesteps an important emancipatory quest: explaining how these differences come to exist. She argues that documenting difference in women's experiences for example, produces a form of knowledge that is entrenched in experience, and therefore perceived as authentic. Notwithstanding the importance of giving voice to marginalized groups (such as women and children) the perception of evidence as authentic can disguises the practices that

create that "evidence" (Certeau, 1986; Scott, 1991). Scott therefore argues that documenting differences based on identity and experience is a way to authorize knowledge which masks the processes that creates not only difference, but also unequal power relations (Scott, 1991).

Considering Scott's warning against studying "difference", my work pays attention to "how difference is established, how it operates, how and in what ways it constitutes subjects who see and act in the world" (Scott, 1991). In the case of childhood studies, efforts to incorporate children's voices (an objective of the new sociology of childhood and other contemporary childhood scholars) and document the array of factors that shape their childhoods aims to capture the authenticity of childhood. For example, Prout's suggestion to use Actor Network Theory to identify the networks that construct childhood is presented as an all-inclusive approach able to document the vacillation between childhood and adulthood to provide a more accurate portrait of the "middle".

Deviating from Prout's approach, my project is not concerned with identifying "the changing character of contemporary childhood" and revealing the "new ways of representing, seeing and understanding children and childhood" (Prout 2005:3). Instead, I examine the conditions and practices that determine what we know about childhood and the use of different understandings of children and childhood to govern legal decision-making. Research on children and childhood needs to move beyond documenting differences and towards understanding how and where these differences are produced. As illustrated in this research, examining the rationales in legal decisions shows that childhood is a powerful governing tool that allows legal agents to shape evidence to produce what are arguably very politically motivated outcomes.

Studying the Constitution of the Child and Childhood in the Legal System: Method and Rationale

Working from an emphasis on documenting how differences in the child and childhood are constituted, my study focuses on revealing the operations of discretionary power, and, more specifically, the processes of legal decision-making that create particular constructions of the child. This involves not only referencing discretionary power, law, evidence and social and cultural rationales, but also documenting the small details that alter and inform the interpretation of evidence, and ultimately how the child and childhood are constructed. I do more than describe assumptions implied in the language used to talk to children; I also focus on questions like: How are facts produced? How do they support overall claims? What is the cumulative impact of the small and seemingly inconsequential actions of the legal actors (including child claimants and the refugee officers)? This approach reflects my objective to examine what types of discourses and knowledge of the child and childhood are drawn upon in legal settings and how discretionary power operates in this process.

The structure of the legal system invites and documents debates concerning children's needs and the meaning of childhood through the existence of separate laws for children, which further suggests material differences between children and adults. However, although there are separate laws and rules applied to children there is a great deal of discretion in how the law is applied. Not all children receive the same treatment. How children are treated, regulated or punished is in part determined by how their actions and needs are determined. These decisions are made by legal actors who are responsible

for validating or dismissing the different and often contradictory forms of knowledges that enter the courtroom, such as expert opinions, parental opinions and other knowledge that is relevant to the case. In the decision-making process, discussions about which type of knowledge should be validated often results in debates concerning which understanding of childhood is privileged, and how the legal system engages in decision-making.

Investigating the practices of governing *with* childhood is a productive way to advance childhood studies. Such a process reveals how power operates in the constitution of categories like child and childhood – and more specifically how actions are linked to characteristics like responsibility, consent, capacity, and family relations. Understanding how truth effects about children are produced can be accomplished through a close examination of language, rhetoric, rationales and justification for claims about children's disciplinary or treatment needs.

Investigating power relations in the legal process is of interest to socio-legal scholars, and I argue that it should also be central in the development of childhood studies. It is in studying the dynamic relations of claim-making in the courtroom, a process largely unexplored in cases dealing with children, that variable notions of the child and childhood come to exist in the Canadian legal system can be detailed. This requires moving beyond the now-mature point that these categories are social constructs, and requires investigating how children are governed with childhood, to discern how the power that constitutes them operates. Investigating how and which conceptions of childhood are drawn upon to produce legal decisions show how differences in children's needs are constructed, and how legal actors define and justify these needs.

Investigating how children are governed *with* childhood involves not only identifying the discourses, knowledges and expertise drawn upon in the courtroom, but also investigating how they are negotiated. How is the array of often competing knowledges addressed in the courtroom? How and what do legal actors do to assert their facts and claims and produce "truth effects" about children? In contrast to Rousseau's quotation at the beginning of this introduction, I believe that we in fact know plenty about children, but not enough about how we decide what we know about children.

How to Study the Variable Child in the Legal System

Child and childhood are not unified concepts with a universal meaning. Instead, they are contested, something that occurs through the use of various forms of knowledge which encompasses what is known about the human body, the mind, politics and language (Sim, 1998). The governing power of these concepts lies in their malleability. The pool of understandings offered through various knowledge-producers offers a plethora of options to draw upon and legitimately construct the child and childhood - a process that occurs only through the cumulative, agreed-upon assessments of the legitimacy of each of the types of knowledges.

In the legal process, legal actors are responsible for both making available and assessing knowledge that offers perspectives of the child. Legal proceedings necessitate that lawyers analyze, discredit, and endorse particular knowledges to, for example, support or discredit whether a child of a particular age has the ability to understand the consequences of their actions. The rationale and strategies for accepting, endorsing or dismissing particular forms of knowledge related to the conceptions of the child and childhood is the focus of this investigation.

Although the law is written and operates on the basis of idealized concepts of the child and childhood (such as that those under 18 require special consideration), legal decisions do not, and can not, reflect such ideals. Despite disciplinary efforts (those of psychology, biology etc), the specifics of what constitutes childhood (i.e. the factors that distinguish childhood from adulthood) remain unclear. It is possible, however, to identify the presence of particular disciplinary discourses of childhood in law and legal procedures. In fact, legal practices and decisions reflect negotiations of childhood discourses and knowledges evidenced in debates concerning the validity of particular forms of knowledge (discussed further in chapter three). Knowledges concerning childhood, political agendas, special interest groups, the law itself, and the discretionary power of legal agents to pull and force legal decisions in a particular way. Identifying the moments, actions, evidence, and information that shape legal decisions shows what constructions of the child and childhood are applied.

As discussed in chapter 2, there are diverse perspectives of childhood which have created a unique lexicon (innocence, vulnerability, pre-social, dependence, etc.). These characteristics are a product of biological and psychological measures that define childhood in relation to adulthood. Or to use the words of James et al, children are in the state of "becoming". The notion that children are developing into adults reflects a common understanding of children, evidenced in various institutional practices that protect, discipline and govern malleable children. As mentioned earlier, this understanding of childhood characterizes children as vulnerable and is often referred to as a "western" or "western-liberal" perception, given that these concepts reflect the treatment of children in western societies and do not reflect the cultural differences of

childhood. This conception is critiqued for idealizing a homogenous notion of the child excluding possibilities for difference or variation in children's lived experiences.

Recent conceptions of childhood characterize the period as a time of responsibility, accountability, capability, empowerment (implying that children are active social beings) and entitlement of rights. Children have the potential to be active agents, meaning that they have the voice and capabilities to act and speak on their own behalf. Such ideas of childhood have resulted in changes to children's rights and legal responsibilities, producing what is often called neo-liberal childhood (Stasiulis, 2002). Children's capabilities and needs are characterized differently than in the vulnerable conception. The neo-liberal child is able to participate in decisions that affect them and can be held responsible for their actions although this might still be to a lesser degree than for adults. This alternative conception of childhood has several implications for the treatment of children; it has increased children's individual rights and created the possibility for children to have an identity outside of their family unit. On the other hand, the 'responsible child' removes some of the protections that once characterized the 'vulnerable child'.

Conceptions of childhood are diverse and complex and therefore various dimensions cannot be fully captured in a set of terms or categories. At the same time however, it is necessary to describe the presence and absence of particular understandings of childhood to show the variability in legal decision-making. In chapters four and five, where I analyze the Unaccompanied Child Refugee Guidelines and legal case decisions, descriptive characteristics are used to trace the understandings of childhood employed to construct facts and assert claims. My analysis employs the terms "vulnerable", or

"responsible" to distinguish between the two different understandings. These descriptors provide a clear way to illustrate the differences in understandings of childhood and the effect of these differences in the case outcome.

Within the diversity of these perspectives, a commonality exists in that each conception is drawn upon at different times, and in different ways in the courtroom. The decision to apply particular perspectives to rationalize decisions authenticates a particular form of knowledge about children, and heavily influences the decision-making process. Moreover, it is through rationalizing legal decisions that particular constructions of the child are institutionalized. I identify the various disciplinary perspectives, discourses and strategies used to privilege one construction of the child and childhood over another to argue for the existence of a variable child, and document governing *with* childhood, which highlights how and when conceptions of the child and childhood are used to "extract", "recycle" and "formalize" claims (M. Valverde, 2005).

My approach differs from some other ways to study the law and childhood. In the context of legal studies, my approach aligns with the perspective of contemporary socio-legal scholars. Following the lead of Valverde et al, I illustrate the importance of empirically investigating legal practices, an approach that does not subscribe to grand theories of law or the notion that the law is autonomous (2005). By examining the strategies used to establish particular claims about children, I am able to describe the legal decision- making process. In my analysis of cases, I am able to identify what type of knowledge sources count, and how legal actors exercise their discretionary power to include or exclude particular claims or evidence. I particularly focus on identifying the types and times that various discourses of childhood are reflected in the decisions. For

example, I show when global, local, cultural, medical discourses of childhood are present and how their use creates the conditions for particular constructions that ultimately affect the outcome of the case.

Case Study Information

In order to investigate how children are governed *with* childhood I examined the decision-making processes in four unaccompanied child refugee cases. To do this, I also had to analyze the 'Child Refugee Claimants Procedural and Evidentiary Issues' guidelines (chapter four), which are intended to address the international community's recognition that legal decisions should serve 'the best interest of the child'. In addition to examining the policy, in chapter five I analyzed actual case files for unaccompanied child claimants from Fujian China in 1999. The following sections provide a contextualization, description and rationale for examining these particular cases as well as a discussion of the themes and questions that guided my analysis.

Context of Unaccompanied Child Refugee Cases

On August 12 1999, three ships carrying 599 people from the southeast Chinese province of Fujian (Fukien, Fouzhen, Fuzhoun) were intercepted on the Canadian coast off British Columbia on their way the United States (Hier & Greenberg, 2002). Of those seized, 134 were children[8] (Stasiulis, 2002) between the ages of six and seventeen (Connelly, 1999). Commentary concerning the cost of these refugee claimants fuelled public concern. One article reported that caring for the children alone was over $550,000 a month (Connelly, 1999). Extensive media attention resulted in public scrutiny and criticism of the Immigration Refugee Board and Citizenship and Immigration Canada

[8] The Ministry of Children and Family Development (MCFD) assumed legal guardianship of all 134 children (http://www.mcf.gov.bc.ca/newsletter/pdf/mcf_newsletter_vol2_no3.pdf).

(IRB and CIC) policies and practices. Amongst these concerns was the suggestion that Canada's national security was being threatened by illegal migrants (Hier & Greenberg, 2002). Given this, the public showed great interest in the determination process of these claimants. People speculated about who would be allowed to stay, and how (or whether) these cases could be differentiated.

In the case of unaccompanied children, the answer is complex. Although the children came from virtually identical circumstances, some were allowed to stay while others were sent home. How, and on what basis, did the Immigration Refugee Board (IRB) decide that some children should return to China, while others should be granted refugee status? Although there is no single response to this question, the justifications and rationales for these decisions offer insights into the decision-making process, fact construction, discretion and the routine operations of law, some of the central themes of this dissertation.

Substantively, this dissertation focuses on the trials of four (two single and two group claims) Fujian unaccompanied child claimants. I examine how the tribunal invokes notions of consent (as assessed through knowledge of the trip to Canada), parental nurturance/familial context, and credibility, three of the several themes that repeatedly surface as rationales for accepting or rejecting particular refugee applications.[9] I compare and contrast how understandings of childhood related to these three domains are marshaled as evidence, both overtly and covertly, to look at how the tribunal (which usually consists of one refugee officer) made the following determinations:

1) Whether the child claimant consented to the trip.

[9] Arguably, geo-political context could be another factor, but since claimants all originated from the same part of China, I have chosen not to focus on this characteristic here, even though this would undoubtedly be necessary for explaining differences in outcomes between applicants from different parts of the world.

2) Whether there are positive or negative family relations (i.e. evidence of neglect or care).
3) Whether the child claimant is credible

The purpose of exploring these three factors is to determine whether or not a claimant fits the preconceived notion of a child in need of Canada's protection.

Consideration about these three areas not only plays a significant role in the tribunal's decision-making process, but it also provides an effective way to examine knowledge claims and legal decisions, and particularly the conceptions of childhood that shape different legal outcomes[10]. In comparing similar pleas for refugee status in different cases, alongside differences in final decisions, I show that these three areas involve some of the many knowledge moves used to cast children as either worthy or unworthy refugee claimants, detailing how discourses and knowledge of the child and childhood shape the interpretation of evidence and the role of legal actors in determining the validity of evidence and claims.

Legal Operations and Process: Determining Unaccompanied Child Claimant Cases

Refugee claims are not conducted in a courtroom, but are instead decided by a tribunal and involve opposing counsel (lawyers and Refugee officers, and the members who adjudicate the case). Unaccompanied child refugee claims are determined by a quasi-judicial body known as the Immigration Refugee Board (IRB)[11]. The adjudication occurs in "an administrative tribunal process similar to what happens in a court, though less formal" (original emphasis) (http://www.irb-cisr.gc.ca). The person appearing before

[10] The cases I have chosen are a few of the several that I could have decided to examine. The choice of the cases is not relevant given that I am interested in the processes that lead to particular outcomes. Other cases may have illustrated different factors and outcomes, but illustrating the potential for that diversity is the purpose and therefore strength of this approach.
[11] Actually, it is the Refugee Protection Division (RPD) of the IRB that adjudicates cases. For brevity, and since the RPD is commissioned to uphold the agenda of the IRB, I refer to the tribunal throughout the dissertation as the IRB.

the IRB is entitled to legal counsel, which can include a lawyer, an immigration consultant, or a family friend (http://www.irb-cisr.gc.ca). Only authorized representatives are able to act as counsel for the claimants (this includes counsel that has been approved by the IRB to participate in hearings).

The individual(s) who hear the case is referred to as a "member". These members are employees of the Immigration and Refugee Board (IRB). More often than not, one individual hears the case rather than an entire panel. This member is required to provide reasons for his or her decisions. However, their decisions are not required to be written, instead they can opt to verbally state them at the end of the hearing (http://www.irb-cisr.gc.ca). Also, the member can choose to write out his or her decision after the hearing (http://www.irb-cisr.gc.ca). The member(s) adjudicate and render the decision of each case. The refugee claims officer (RCO) presents the claim to support or reject the application. Her/his case is heard in the presence of the applicant's counsel. In chapter five I discuss refugee officers' strategies to construct facts and claims. I also analyze the IRB decisions that are determined by the panel members who adjudicate each claim. At times I distinguish between the panel members and the refugee officer's comments. At other times, when the panel members decide to reject or accept a claim based on the refugee officer's facts and claims, I use the term IRB, because both panel members and refugee officers are members of the IRB. Omitting these distinctions does not affect the analysis, given the similarities in perspectives and power relations.

Applicants have the option to contest a Tribunal's decision. In order to do this, the applicant must apply to the Federal Court of Canada for a judicial review. Such practices occurred in one of the cases examined in this study (Xiao). In unaccompanied child cases,

a separate legal document is used to determine cases known as "Child Refugee Claimants: Procedural and Evidentiary Issues Guidelines" (Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act) (http://www.irb-cisr.gc.ca). These guidelines raise considerations for the member(s) adjudicating the cases, but the only major distinguishing factor procedurally is the assignment of a designated representative. Unlike adult applicants, children are allotted a "designated representative" whose role is the same as that of their legal counsel. In child refugee cases where parents are present, the parents are the designated representative (http://www.irb-cisr.gc.ca).

In Canada there is a distinction between unaccompanied children (or minors) and separated children (or minors). The latter are those that arrive at a port of entry in Canada without a parent or legal guardian. The former includes minors that arrive with an adult who is not, or is suspected no to be the child's legal guardian (http://www.parl.gc.ca/information/library/PRBpubs/prb0715-e.htm#intro). When a child is designated as unaccompanied or separated, IRB officers are required to contact the provincial authority for child welfare (www.parl.gc.ca). In the cases analyzed in this study all minors were classified as 'unaccompanied'. Once a child is found at the point of entry the Immigration officer attempts to identify the child and their age. This often proves to be a difficult task separately because children often arrive without any documentation given the circumstances in which they flee their country (http://www.parl.gc.ca/information/library/PRBpubs/prb0715-e.htm#intro).

Children who arrive in Canada and are deemed to be 'unaccompanied children' are placed in various forms of detention facilities including group homes, juvenile facilities and foster care (Ali, Svitlana, & Kaur Gill, 2003). In the cases examined here

the children were placed 'in especially established group homes' (Ali et al., 2003). Unaccompanied children (or separated minors) are kept in 'soft detention' which involves a high level of surveillance by immigration officials, education and trips off site. In the common predicament where there is no space available at the soft detention centers or fosters homes children are placed in juvenile facilities (Ali et al., 2003).[12]

In Canada, the policies indicate that detention is used only as a last resort. According to Immigration Refugee Protection Act (A60) "For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria"("Immigration Refugee Protection Act " 2001). The IRPA Regulation 249 is a document that outlines special considerations for minor children. Some of the provisions include the "availability of alternative arrangements, anticipated length of detention, types of detention facility, segregation facilities and availability of services - education, counseling, recreation and so on" (Ali et al., 2003).

As mentioned earlier, the application process begins by the immigration officers determining if the child is unaccompanied and under the age of eighteen (http://www.parl.gc.ca/information/library/PRBpubs/prb0715-e.htm#process- PRB-07-15E). If it is determined that the claimant is under eighteen and unaccompanied or if there is any indication that the parents claiming the child as their own are imposters, the immigration board is legally obligated to contact child welfare services (http://www.parl.gc.ca – PRB 07-15E). In Canada each of the three provinces that

[12] Although not without its critics, Canada's practices have been critiqued less than other countries. The UK for example is criticized for not placing children in foster homes but instead in remote detention centers (Ali et al 2003). In France, children are placed in what is referred to as "waiting zones", wheras in Germany and Switzerland children are detained in 'airport procedures' or detention facilities (Ali et al, 2003:18).

receive the most refugees (Québec, Ontario and British Columbia) has different guidelines concerning guardianship (www.parl.gc.ca). However, the Unaccompanied Child Refugee Guidelines dictates that a designated representative be appointed to each claimant and that their responsibility is to "to retain counsel; to instruct counsel or to assist the child in instructing counsel; to make other decisions with respect to the proceedings or to help the child make those decisions; to inform the child about the various stages and proceedings of the claim; to assist in obtaining evidence in support of the claim; to provide evidence and be a witness in the claim; to act in the best interest of the child" ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996).

Why Unaccompanied Refugee Children?

My decision to examine Unaccompanied Refugee Children is motivated by the insights that can be obtained into how children are governed *with* childhood. Refugee cases in particular provide a unique way to examine how different conceptions of childhood are employed to make legal decisions. Unaccompanied refugee children come from different countries and therefore are very likely to have culturally distinct practices and experiences (such as responsibilities). These understandings of childhood and family most likely differ from Canadian-born children and popular Canadian notions and expectations of childhood. Examining how childhood is used as a governing tool in this context shows a broad range of conceptions of childhood, and how Canadian authorities and the legal system deal with cultural differences of childhood. Analyzing a culturally distinct group shows the diversity of childhood and how Canada's legal system integrates or excludes these differences, an important issue given Canada's rhetoric around cultural diversity and child protection. Unlike legal decisions involving Canadian children, there

are more specific cultural factors that can distinguish the special needs and considerations for children raised in other countries.

Unaccompanied child refugee claimants in Canada include children claiming refugee status at Canadian borders or airports as well as children whose parents are facing the possibility of being deported from Canada. These cases are chosen here because I believe that it is in these circumstances that one would assume the best interest of the child is most germane. It is in these cases that Canadian policy, especially those that espouse the importance of protecting and caring for all children, is most apparent.

In Canada the classification of "unaccompanied" or "separated" child is assigned to children under the age of 18 in the following circumstances: a) children who have fled their place of origin and have arrived unescorted by a parent or legal guardian b) children who arrive in Canada with a guardian (older sibling, family member etc) who is later determined to be unable or unwilling to care for the child.[13] For example, according to the United Nations High Commission for Refugees (UNHCR) an unaccompanied child is "…separated from both parents and [is] not being cared for by an adult, who by law or customs, is responsible to do"(UNHCR, 1994: 21).

Method: Legal Research and Sources

My research is based on legal cases and documents, and actual legal case files. I chose my cases through an extensive search of Quicklaw, a legal search engine that catalogues legal cases, articles and commentaries on Canadian legal decisions, using key words such as "unaccompanied", "separated", "children", and "refugee". Quicklaw contains judicial decisions, appeal decisions, and case summaries, as well as the cases that were cited in the decision and in the trial. I also used RefLex, a search engine for

[13] International governing bodies define this category in similar ways.

Immigration and Refugee Board (IRB) decisions, available on the IRB Canada website. In most instances, the information available through these search engines included the decision which outlined the facts of the case in which the Tribunal rationalized their decisions.

The documents available through Quicklaw and RefLex did not provide the entire case files which offer more detailed information than was available online. Case files include the complete public file[14]; specifically, the factums (which outline each party's arguments for why their client's position should prevail), transcripts, the list of evidence submitted, appeal applications, as well as the oral decisions (similar to those found online). These documents allowed me to analyze the types of facts and claims presented by both the IRB and the child's counsel to identify the opportunities for discretionary moments. This type of analysis could not be accomplished by only examining the case decisions.

To view the various case files, I made three trips to the Federal Courts in Ottawa, Ontario. Prior to each visit I contacted the court offices to locate and order the case for my analyses. I made this request by using the file reference number in Quicklaw and ReFlex. Some of the case files contained material to fill up to six banker boxes. I spent weeks reviewing the files and ordering photocopies of the pertinent documents. All four cases I reviewed were available from the Federal Court of Appeal located in Ottawa. Some of my case choices also required me to go to the Supreme Court of Appeal for additional documents, also located in Ottawa. Once again, I was required to order my cases in advance and review the files on the premises.

[14] Some parts of files are not made public usually in order to protect the identity of children. In these cases it is indicated in the file that evidence has been removed, however, in the cases I chose, this was not the case.

My methodology was iterative, in that I read theoretical literature which, in turn, informed my readings of the practices of law as revealed in the judgments. Then, I would return to the literature to find discussions of trends evident in the cases. I studied the cases to identify the types of experts, disciplines, discourses and ways of thinking that framed discussions about children's needs and that are used to justify decisions about how best to regulate, punish or assist the child. I focused on the qualities of childhood and of the child that were given the most weight to discuss how decisions were shaped. It was important to examine these factors because they were central to establishing "truth effects" in the court room (M. Valverde, 2003).

I look at four cases because it is a useful way to illustrate the multiple conceptions of childhood in co-existence in similar case determinations. Also, a comparative project vividly demonstrates the processes and differences in how children are constructed when reading the descriptions and analysis together. Examining transcripts, rationales, and evidence for legal decisions allows me to highlight which elements of childhood and qualities of the child are given more or less weight in the decision-making process. By combining these approaches, my analysis provides a rich illustration of the "variable child."

Method of Analysis

In my analysis, I focus on the conditions – specifically, the knowledge moves, the seemingly inconsequential events, and the actions and incidents of various actors in the legal field – that affect whether information is validated as evidence. I focus primarily on illustrating how particular conditions impact the construction of the child and childhood in particular cases. Concretely, my project involves two forms of analysis. The first

includes examining how children's needs, responsibilities, and maturity and capability levels are determined, by investigating when certain forms of knowledge are relied upon to make these determinations. Specifically, how are contradictory positions, evidence, and assessments addressed? Identifying the processes that privilege particular forms of knowledge are important because authority granted in legal settings impact the decision to regulate, protect or punish, and ultimately reproduce certain constructions of the child and childhood as normal and acceptable.

Of equal importance is the second part of the analysis, because it documents the processes, strategies, tactics, and practices that are used to construct the child and childhood in particular ways. I identify the array of actors, the connections and mediations that impact the perceptions and interpretation of evidence, such as the child's actions and testimony. In focusing on *how* the child is constituted at this level of empirical analysis, I show that the variable child exists, and always will exist in the Canadian legal system through the battle for legitimacy that characterizes legal decision-making. It is through examining how major institutions address the ambiguity of the child and childhood that the future of childhood studies rest. In the case of this research, it is in the legal setting where understanding how different types of knowledges are negotiated can be revealed.

Outline of Chapters

Chapter two,*" Productions of the Variable Child: Disciplinary Perspectives and Knowledges of Children and Childhood",* is devoted to arguing that various conceptualizations of the child and childhood exist. I discuss both debates concerning the inception of the childhood and provide a comprehensive overview of the sociological,

psychological, historical, and cultural approach this area of study. In reviewing these perspectives, I show how these concepts are contested which provides the necessary backdrop for the empirical chapters to follow.

Chapter three, "*The Legal System and the Conditions for Variability: A Playground for Constituting Multiple Conceptions of the Child and Childhood"*, uses the literature from the sociology of knowledge, socio-legal studies, and science and technology, to conduct a comprehensive review of the theories, strategies and tactics evident in legal decision-making processes. I also discuss how legal operations allow for, and create, the conditions for various decision-making practices. In particular, I discuss the role that different forms of knowledges have in the legal system – and how, in other studies, this knowledge has been used to dismiss and authenticate facts and claims. In doing so, I foreshadow some of the strategies used in the case decision, and legal reforms analyzed in the empirical chapters.

In chapter four, "*Rules for Deciding Who to Keep: the Discretionary Power and Variability in Conceptions of Childhood in Canada's Refugee Guidelines for Children*", I question the claim that Canada's refugee policies do not presuppose an adult applicant. I show that the provisions draw upon various conceptions of the child and childhood, including the discourse that children are competent rights bearers (characteristics also associated with adults and adulthood), and that they will often (but not always) have the ability to make decisions about their wellbeing and their future. The guidelines therefore create considerable discretionary space for refugee officers to make a wide range of decisions about individual cases.

Chapter five, "*The Processes of Inclusion and Exclusion of Evidence and the Constitution of Childhood: Legal Decisions-Making in Unaccompanied Child Refugee Applications*", looks at the trials of four (two single and two group claims) Fuzhou unaccompanied child claimant cases. To do this, I closely examine how claims about knowledge of trip, parental nurturance, and credibility were employed, three claims that repeatedly surface as some of the reasons for accepting or rejecting particular refugee applications. I compare and contrast how understandings of childhood are marshaled as evidence, both overtly and covertly. My analysis illustrates that a child's actions, consistency in statements and claims, are vital in the decision-making process and at times are given more weight than testimony presented by experts in the field. In the cases examined in this chapter the child and their stories of their childhood become prominent in the decision-making process.

Chapter six, "*Conclusion and Discussion*", returns to the key issues and questions of this research. I review the operation and role of discretionary power amongst refugee officers. I further this discussion by arguing that my examination of discretionary practices shows that while discretion is bounded there is ample room for legal actors to distinguish facts. I show how legal actors make decisions within the guidelines and while adhering to the procedural requirements (such as due process). My analysis shows that the decision to emphasize vulnerable or neo-liberal conceptions of childhood in particular cases is a move to avoid creating an open-door policy for successful unaccompanied child refugee claimants. Put another way, the legal actor's claim-making practices illustrate an effort to avoid the impact of previous case outcomes.

Chapter 2

Productions of *the Variable Child*: Disciplinary Perspectives and Knowledges of Children and Childhood

Introduction

The terms child[15] and childhood, despite their common usage, are not natural or universal concepts. This project is based on the premise that conceptions of child and childhood are social constructs, which implies that they are dynamic (rather than static) categories. The characteristics of childhood, therefore, cannot be determined solely through scientific methods such as biology or psychology. In contrast, the boundaries of these concepts are flexible and negotiated because they are shaped and reshaped by social and historical factors. Various images of the child and childhood are produced and reproduced through discourses, knowledges and institutions. Discourses are systems of thought or representation that are composed of beliefs, attitudes, and ideas. They encompass not only ways of thinking about children (or anything else), but they produce and derive from disciplinary (psychological, biological, and sociological, etc.) knowledges. It is through these ways of knowing that meaning is given to the concepts child and childhood. The aim of this chapter is to exemplify the variability in these concepts over time, space and social context, which then show the different views that inform the images of childhood today (in Western societies).

My use of the social constructionist position does not deny any effect of biological differentiation between children and adults or the material existence of a

[15] For clarity, the term child and children refer to persons under the age of 18. This legal definition allows for the emphasis of childhood as a social construction that is shaped by political, social and cultural factors. Childhood is the developmental phase that explains children's development. These discourses and knowledges are used to constitute particular types of children.

youthful temporal period. Instead, my use of this orientation is based in the recognition that a single materiality of childhood does not entirely shape the governing process, which occurs at the intersection of discourses and various forms of knowledge. It is in this way that the categories child and childhood becomes not only meaningful, but diverse. This diversity not only stems from the differences in disciplinary perspectives or social and historical contexts, but is also manifest within a single perceptive. Even discourses generated by one particular culture will have variable descriptions of childhood (Smeyers & Wringe, 2003). Documenting the different perspectives on the child and childhood not only illustrates the malleability of these concepts but also how they are made real when constituted and institutionalized through power/knowledges relations.

In this chapter I illustrate the different perceptions of childhood to show the variability in the concept of childhood. Historical and contemporary studies of childhood poignantly illustrate the processes by which economic shifts, disciplinary knowledges (biological, psychological, sociological and cultural approaches) and political ambitions create differing conceptions of the child and childhood. This research brings attention to how legitimate claims about children differ. In a later section of this chapter, I discuss contemporary debates concerning childhood that center on negotiating the multifaceted nature of children's abilities and the challenges this poses for the future study of childhood. In examining the contributions of disciplines to the study of childhood, the amount of competing, and often contradictory approaches to childhood are made evident. The existence of such diverse perspectives illustrates the abundance of knowledge available to justify and rationalize particular decisions to govern children. Moreover, it

illustrates that the concepts child and childhood linger, in that they are available to be draw upon in different ways. Actors (legal, academic, or expert) invoke a particular conception of the child and childhood by engaging in a discretionary project of drawing on various discourses and knowledges.

This chapter provides a backdrop for successive chapters, which examine the discourses of childhood specific legal policies, as well as the role and use of particular conceptions of childhood in determining the fate of unaccompanied child refugee claims. As I will show later, the legacy of these diverse perspectives on childhood is evident today. Moreover, chapters three and four illustrate how and when various knowledges are drawn upon to justify refugee policies and decisions. This once again illustrates the extent to which these concepts linger and are impressed with meaning through the opportunities in the legal process for actors to exercise discretion.

The Inception of Child and Childhood: Contested Historical Perspectives

Exploring the work of the early theorists that made claims about the discovery of childhood sets the stage for examining the contemporary legal debates concerning the child and childhood. In these discussions, the fact that the 'discovery' of childhood was ambiguous is made clear, pointing to the instability of the concept. Philippe Ariès is most reputed for his discussion of the inception of childhood. In his now famous 1962 book *Centuries of Childhood* he argues that childhood as a developmental phase did not exist in medieval times. He believed that it developed somewhere in the fifteenth to eighteenth century, and flagged the growing cultural and political significance of the family as the most influential factor in its emergence (Ariès, 1962). He traces the development of childhood, in part, by looking at how representations of children in art changed over time.

Rather than being miniature adults, children were increasingly portrayed as precious entities. Ariès concluded that the shift in the image of children illustrates a change in their place in the family, giving rise to childhood as a distinct phase – where children were nurtured and protected, much as they are today.

Similarly, Lloyd de Mause argues that childhood, as a period of life where care, advice, and protection are necessary, did not always exist. He points to differences in how children were treated, by showing that '[t]he further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorized, and sexually abused' (deMause, 1974). Unlike Ariès, who focuses on the depiction of children in art and economic shifts, de Mause explains this shift through the use of a 'psychogenic theory of history' (deMause, 1974), where parents interact with their children in an effort to address their own anxieties and psychological problems (Corsaro, 1997). While de Mause and Ariès differ in their rationale for the change in the treatment of children, both agree that parents began to treat their children with much higher levels of care and attention in either the seventeenth century (according to Ariès), or eighteenth century (according to de Mause[16]) (Veerman, 1992). Both de Mause and Ariès link the social recognition of the concepts child and childhood to changing roles in the family.

The key difference between Ariès and de Mause is that de Mause explains the construction of childhood as a universal and evolutionary process, reflecting the developmental perspective that is prominent in psychological discourses. Ariès instead articulates the inception of childhood as a product of changing values of society (both

[16] de Mause describes the fourth through thirteenth century as the period of abandonment, and the fourteenth to the seventeenth as the period of ambivalence. It is in the seventeenth-eighteenth century that he documents the interest in caring for children (Van Bueren 1998).

socially and economically), more consistent with an historical/sociological perspective. Both theorists' articulations suggest that children were no longer simply seen as labourers or commodities, but as precious members of the family. Childhood is characterized as distinct from adulthood and, more particularly, as a phase which necessitated care, discipline, and nurturance.

Notwithstanding the legacy of the work of Aries and de Mause, there is mounting evidence to challenge the idea that children were not treated differently from adults until the seventeenth century (Also see Hendrick, 1997; Heywood, 2001). Linda Pollock and Rosemary O'Day, for instance, argue that parents had always been "aware that childhood was different in kind from adulthood" (Pollock, 1983). Pollock asserts that Ariès's and de Mause's accounts were products of indirect evidence (paintings, advice literature) that failed to capture the actual history of childhood (Corsaro, 1997). She finds, in a close analysis of over 500 autobiographies written between the 1500-1900s that '[t]he texts reveal no significant change in the quality of parental care given to, or the amount of affection felt for, infants for the period 1500-1900' (Pollock, 1983).

She agrees that children were previously treated with greater 'indifference', resulting in strong disciplinary practices, but that childhood was distinguished from adulthood before the 17th century (Pollock, 1983). In her critiques, Pollock argues that parents disciplined their children out of concern and care. Although child care practices have changed, Pollock argues that shifts in disciplinary practices is not enough evidence to argue that parental indifference towards their children existed prior to this shift (Pollock, 1983). Archard also supports the grounds for Pollock's contention, arguing that one cannot conclude that a unique conception of childhood did not exist based solely on

the differences in how children were treated in the past as compared to contemporary practices (1993). Pollock charges Ariès and de Mause, as well as other historians, with imposing a western conception in tracing the creation of childhood. This accusation implies that Aries and de Mause based their discovery of childhood on western understandings – that is, a characterization of innocence, vulnerability and dependence – and that this form of childhood excludes the possibility that other forms of childhood did and could exist.

Like Pollock, Cunningham contests the overarching statement that children were not seen as precious or distinct from adults (Cunningham, 1995). He argues that the shift in pictorial representation of children tell us more about changes in art than changes in how children were perceived. Relying on religious writings that urge mothers to raise their children with care, he argues that although there may not have been a clear conception of childhood, parents had affections for their children (Cunningham, 1995). Further supporting his claim, Cunningham argues that recent scholarship illustrates that parents mourned for the loss of their young. He also identifies linguistic distinctions such as *infantia (babyhood)* and *pueritia (0-20 years)* that recognize stages in life (Cunningham, 1995), and evidence that people held different views of children and adults. Although his findings do not entirely dismiss the impact of Ariès's work, he and Pollock provide strong evidence of distinctions made between children and adults in medieval times.

Each of the aforementioned scholars contributes significantly to understandings of childhood, particularly in problematizing the assumptions of homogeneity or uniformity. Cunningham and Pollock point to practices and documents that suggest children were

treated at the very least as slightly different from adults. Pollock and Cunningham's work, notwithstanding the details of their position, resonates with contemporary critiques of childhood that spawned a growing debate in the field around the diverse ways that children and childhood are understood. Such research, perhaps incidentally, also supports the contention by Ariès and his contemporaries that the child and childhood are social constructs. Moreover, contemporary research also supports Pollock and Cunningham's contention that evidence of childhood takes different forms and can be seen through subtle differences in treatment of children in various social institutions like the family, and the legal system, all which differ based on historical and cultural factors.

Modernity and Childhood: The Proliferation of Knowledges

Modernity[17] can be characterized in many ways, but one component involves the rise and privilege of science and rationality, and the proliferation of new forms of scientific knowledge. As a consequence of the changes brought on by modernity, childhood was constituted as the 'cultural other' (Christensen, 1994) of adulthood. Scientific approaches to the study of the child and childhood have contributed to solidifying the distinction between children and adults, further objectifying childhood, creating the fodder for the growth of childhood studies (Prout 2005:35), and formalizing children as objects in need of protection.

Scholars that debate the exact period of inception when child and childhood were established seem to agree that by the end of the nineteenth century, childhood was firmly

[17] The process in which modernity came into being is complex, heterogeneous and contested by various scholars. For the purpose of this discussion it is used to mark a shift in approached to understanding children and childhood. I acknowledge that there are debates concerning the inception and process of modernity, yet there is little evidence that can argue modernity in the form of technology, rationality and science did exist. It is this aspect of modernity that I focus, particularly in relation to how children were made known.

distinguished from adulthood. From that point onward, child and childhood became formal categories in institution programs of care with their attendant systems of surveillance (Chen, 2003; Jenks, 2005). Education systems for children became mandatory and labour laws prevented children from working in factories. The new regulatory systems were justified on the grounds that children need discipline, care and attention that they would receive in schools, and not in the workplace. This institutionalization reflects the acceptance of childhood as a developmental phase that necessitates special attention.

Prout refers to the distinction between children and adults as an example of 'opposition' dichotomies (See Prout 2005). Juxtaposing characteristics of children to those of adults has shaped the study and understandings of childhood in all disciplines. Each aims to define and understand the distinct nature and needs of children by determining their differences in aptitude, competence, and comprehension. Knowledges about children's needs and the boundaries of childhood become defined in terms of adulthood rather than by a broad array of social, cultural and individual factors. Children and adults were constructed as oppositional categories that in so doing provided a framework to justify differential treatment, including understandings of the different needs of children and adults.

Both 'hard' and 'soft' sciences have been responsible for generating knowledge on the meaning and expectations of these dichotomous categories. The proliferation of scientific and psychological knowledge that attempted to define the needs of children, as well as the establishment of various institutions for children (specific institutes and laws for juveniles, as well as mandatory education, etc.) strengthened the growing duality

between childhood and adulthood (Prout, 2005). Hard and soft sciences, through their investigation of childhood as a developmental phase, helped to construct the child and childhood as universal subjects which are open to discovery and comprehension through tests, analysis, and objective evaluations. Although the originator of the child study movement is contested, there is much evidence suggesting that Charles Darwin's writings were instrumental in the development of child studies (Prout, 2005). His research on children occurred in the early nineteenth an twentieth century, and was founded on the notion of the universal subject (Prout, 2005).

The scientific study of childhood was also evidenced in the late nineteenth century. Illustrating the growing interest in the approach of science in this endeavor is a quote by James Scully, in characterizing Darwin's approach (Prout, 2005) states,

> Ours is a scientific age, and science has cast its inquisitive eye on the infant…we now speak of the beginning of careful and methodological investigation of child nature, by men trained in scientific observations (James Scully 1895 as cited in Woodhead 2003).

The impact of scientific discourses on the child and childhood is extensive, given that science in this time period was responsible for spectacular discoveries and the formulation of universal laws which were held to be the gold standard of empirical inquiry. Science, both hard and soft, therefore assisted in the development of concepts that normalized the child and childhood. For example, '[i]t was the emphasis on normal, together with the development perspective, that gave pediatrics its distinction as a medical specialty' (Prout, 2005).

Science's contribution to the study of childhood remains prominent today. Science treats the child and childhood as though they are objects that can be investigated and researched to the point where truths can be determined that represent common group

characteristics sidestepping individual distinctions. Scientific research also played a large role in establishing the general belief that clear boundaries can be drawn between adults and children. The notion that children's abilities and competences can be measured objectively is also a very appealing sentiment in that it provides ostensibly clear and substantive ways to determine and justify the extent of responsibility and accountability of children. The notion that science and biology play a significant role in determining the differences between children and adults fuels further investigations to establish the elements of these differences albeit from a slightly different perspective.

Perspectives of Childhood in Developmental Psychology

Psychology is the most prominent discipline that contributes to identifying the differences between children and adults, childhood and adulthood. Psychologists originally aimed to define the unique characteristics of childhood through the analysis of age as a development marker that illustrates how children acquire the abilities apparent in their adult counterparts. Most famous for his contributions to developmental psychology is Piaget, who, in an oddly similar way to the sociologist Parsons, argues for a developmental theory approach. He defines developmental psychology as,

> …the study of the development of mental functions, in as much as this development can provide an explanation, or at least a complete description, of their mechanisms in the finished state. In other words, developmental psychology consists of making use of child psychology in order to find the solution to general psychological problems (Piaget, 1972).

Piaget's well-known work is motivated by a 'genetic epistemology' (Jenks 2005:21) that understands development as a series of growth stages. Growth and normal development is measured by milestones such as language, pronunciation and cognition.

In the early 1900s, adding scientific specificity to earlier ideas about childhood, psychologists perpetuated the idea that children differ in various regards 'such as cognitive capacity; memory; language skills; information processing; self-esteem and other emotional factors' (Spender & John, 2001). Along with the invention of mental testing, a plethora of scientific studies emerged to assess many of the capacities in children (Spender and John, 2001). For example, children's 'trustworthiness and moral worth' was also assessed using the 'Liao Test' (Sealander, 2003). Such tests attempt to measure development and further construct childhood as a developmental period, and children as less capable than adults.

Most childhood psychologists today have moved beyond the rudimentary twentieth century notions of developmental homogeneity, recognizing that children (and adults) mature and develop at "differing rates" (Spender & John, 2001). Furthermore, children do not develop in a vacuum, but are instead shaped and influenced by their race, class, gender and socio-cultural environment. However, James et al see utility in examining age as a marker of development to advance the study of childhood as it provides 'processes of temporality' (James et al., 1998) which, like the above-mentioned factors, offers a distinct theoretical aspect to understandings of childhood.

Despite the prominence of psychology in childhood development research today, there is no agreed-upon definition of childhood within psychology itself (Sigel & Kim, 1996). According to Sigel and Kim, a lay definition of childhood amongst psychologists is that 'children are less powerful than adults, smaller in size, under control or care of older children or adults, have no legal rights, and are not franchised members of their society' (1996). This definition not only provides a framework for the construction of the

child and childhood in comparison to adults but also illustrates how definitions of childhood are not specific to one discipline. The definition provided by Sigel and Kim suggests that psychologist rely on social variables to describe childhood, which one would expect to see in a sociological definition. The inclusion of social variables in psychological understandings of childhood further supports that there is not a unified definition of children; there is room for interpretation.

The lack of a single concept of the child and childhood in the discipline of psychology, which explicitly aims to define categories, stages, and certain 'truths' about humans, further illuminates the multifaceted nature of knowledge about children. Even within a discipline that is rooted in the idea that knowledge can be found through scientific research there fails to be a unified answer to the question of what makes a child a child. The lack of a uniform response to these questions points to several central arguments in the literature on the sociology of knowledge. In this sub-discipline, the idea that knowledge is not simply calculated and discovered in a lab or research project is emphasized by illustrating the role of discretion, and individual agent's actions, and the determination to assert a claim or discipline as influential in the process of producing knowledge. Consideration of these factors illustrate the problems with truth claims about children and childhood, particularly when such knowledge is used to justify and determine how children are treated.

The lack of consensus within psychology is not unique. Sociology also does not represent a single perspective on childhood. Sociologists cannot agree on how to establish claims about children or childhood. Unlike psychology, however, sociology is not the most referenced and powerful discourse in the management and regulation of children.

Contestation among psychologists about what is known and can be known about the child and childhood shows that these concepts are shaped by more than just disciplinary perspectives. As will be discussed later in chapter three, the variety of these sources can be seen in the courtroom, and despite the lack of coherence within psychology, psychologist's accounts can enter the courtroom without being critically evaluated by their peers.

Early Sociological Perspectives of Childhood

Like biology and psychology, sociology also contributed to the study of childhood as a distinct period of life. Jean-Jacques Rousseau, in the early eighteen century, is responsible for one of the most recognizable images of childhood today. In his text *Emile,* Rousseau argues that childhood is a distinct period of life, and professes that children were inherently good and innocent (characteristics that could be associated with the western concept of childhood). Further distinguishing Rousseau's position is his assertion that childhood is not simply a process that culminates in adulthood. Instead, he argues that childhood is a distinct stage of life. Like psychological perspectives, this sociological theory asserted inherent differences between adults and children. For Rousseau, however, the differences between adults and children were not limited to a child's maturation process. Childhood in and of itself was a unique period outside of the fact that it preceded adulthood. Unlike Ariès, Rousseau went beyond articulating that children and adults differed and identified particular features of childhood.

Reflecting Rousseau's ideas, but writing much later, Talcott Parsons also tried to define the characteristics of childhood. Working from within his "structural functionalist" approach, Parsons argued that children were socialized beings, and that the family unit

was heavily responsible for this social development. In a classic sociology of childhood approach at this time, childhood was constructed through a dichotomy between nature and nurture, suggesting that children are at first 'natural', and that they only become part of the society through socialization (Prout, 2005).

Although this arguably places too much emphasis on the importance of socialization, it does counter purely biological arguments (Prout, 2005), and makes room for sociological analysis.[18] The notion that children need to be understood (at least in part) as a product of their socialization, incites people interested in childhood to look into the cultural, economic, and social context. In the legal realm, what this suggests is that decisions must at least acknowledge (even if only to dismiss) the social and cultural context in which a child exists.

Parson's work reflects his overall theoretical approach to society, and remnants of his thought remain today – in particular, the idea of children as being the responsibility of their families. Despite his legacy, however, Parsons is criticized by contemporaries, such as Jenks, who argues that he:

> commits theoretical violence, particularly upon the child, through seeking to convert their worlds from content to form….the social system seeks to transform or merge differences into communality (Jenks 2005:13).

Jenk's critique that Parsons aims to "convert their worlds from content to form" implies that he categorized specific characteristics of childhood. Or, put another way, that he collapsed "content" – such as individual experiences - into "form" meaning categories.

[18] The separation between nature and nurture is only one of several dichotomies that have been used to explain child and childhood; others include structure and agency, individual and society, and being and becoming

Parson's approach aims to reconcile material differences of childhood into meaningful social systems - an approach that minimizes individuality of childhood experiences. Jenks' critique of Parsons reflects his understanding of childhood as represented by children in particular contexts; such differences cannot, and should not, be displaced. For Jenks, Parsons downplays the distinct identities of children by invoking an argument that centers on social and contextual relations.

Notwithstanding the impact of sociological work (Parsons most notably), constructing the child and childhood as products of a social environment tends to downplay individual agency. Also contributing to this outcome is the dominant sociological idea that children are part of a family unit. Sociology, by working in such a framework, assists with identifying the needs of children by linking their wellbeing to the family. These early sociological theories of childhood construct children as member of a nuclear family unit, voiding any possibility that they might have individual identities or interests outside of that unit. Children are not only members of the family but are controlled and regulated by its members.

By the 1970s, this 'family sociology' almost mesmerized those interested in the study of childhood. Here, children are understood to have little say in decisions that affect their lives. James argues that "children's interests were taken as synonymous with those of their parents" (A. James, 2004). The assumption that children are dependents, without thoughts or opinions of their own, was further strengthened by socialization theory's adoption of development psychology (A. James, 2004), resulting in what Rafky has called the 'psychologizing' (Rafky, 1973) of children. Like some psychology perspectives, early sociological approaches of childhood treat the child and childhood as

homogenous categories by characterizing the development of children as a process demarcated by age rather than individual experiences.

The Production and Legacy of the Western Child: Protective Ideology

Notwithstanding the various disciplinary discourses of childhood, by the twentieth century the protectionist ideology prevailed. Children need protection, because they are vulnerable, malleable, and impressionable, and these characteristics marked a new understanding of childhood and are evidenced in the creation of educational institutions and labour laws[19] (Jenks, 2005). The dominance of this idea persisted as political parties started to place child well-being as a top priority. Children were valued as future citizens (Chen, 2003), and their well-being and development were important to encouraging and maintaining a 'good society' (Johnny, 2006).

The newly accepted image of children and childhood provided the groundwork for the emergence of the 'western child'. This term is used to describe particular features of childhood that have dominated western understandings, which for many decades prevented the consideration of other conceptions. Holland characterizes the western child[20] as dependent and powerless (1992). Throughout the nineteenth, twentieth, and well into the twenty-first century, the 'western' conception facilitated the notion that children are part of the family unit and that childhood is a period of protection, vulnerability, and innocence.

Other characteristics identified by childhood scholars include fragility, inexperience, and dependence (articulated by children's need of parental guardianship)

[19] It is important to note that during the rise of industrialization children did participate in factory work but the acceptability of this practice changed with the efforts of social reformers (Johnny, 2006:20).
[20] The western child is also sometimes referred to as the 'modern' child both share similar traits; both suggest that children are vulnerable, and that childhood is a time that necessitates protection.

(Schousboe, 2005). Additionally, Johnny uses 'innocence' and 'dependence' to define this concept (2006) and, like others, understands it to be a product of western societies that have perpetuated the idea of children as dependent and immature. Christensen (1994) also argues that vulnerability is a key feature of western conceptions of childhood. The term vulnerability in a general sense refers to children's physical, social and structural vulnerabilities. To most, such characteristics reflect popular understandings of childhood and are institutionalized in most of the western world. The terms innocence, vulnerability, and dependence facilitate the vision that children require guardianship and protection. All of these characteristics compose the idealized conception of the child and childhood that dominate western understandings and governing strategies.

What this perspective fails to acknowledge is that not all children have a childhood that resembles these ideas. Childhood, as understood in the dominant western perspective, is a time of privilege, where children are relieved of the duties and responsibilities of adults, such as providing financially for the family. What is often forgotten was that this 'luxury of childhood was only available to the upper class' (Stephens, 1995).

With the rise of industrial society, the importance of the nuclear family flourished. As early as the 1880s (and until at least the 1920s), child-saving movements attempted to influence and normalize distinctive parenting practices (Chen, 2005). Constructing childhood as a vital developmental stage provided the rationale for forbidding women from working outside of the home. That women remained full-time caregivers presented financial challenges to families, arguably helped bring about the demise of subsistence agriculture (by enabling men to enter into wage labour) (Stacey, 1996). World War II

(1939-1944) prompted a rampant industrialization that pushed women into the labour market, yet moral and social discourses also demonized working women by invoking the discourses of child protection and development. Working-class children were particularly prone to being constructed as potentially deviant, and their mothers were identified as responsible for this risk.

This new orientation towards children both produced and reproduced not only the regulation of women (Coontz, 1992), but also institutionalized the notion of the "precious child" (Zelizer, 1985). Childhood, in Zelizer's research, is shaped by various institutional interests that impact the characteristics of "childhood", serving to define their social roles, as well as those of the state and other authoritative bodies.

More recently, scholars have illustrated how the preservation of the family unit is continuously mobilized by using constructions of the child. One such project is the recent neo-conservative movement's attempt (more evident in the United States than in Canada) to create nostalgic images of a largely fabricated past (Coontz, 1992). In such recollection, the male breadwinner dominates, women tacitly assent to their husbands' wishes, (heterosexual) couples are always happily married, and, of course, children are immune from the world's social ills. Clearly, these images (then as now) are whitewashed, for, as Stephanie Coontz reminds us, for every Victorian child in 19th century America, there was 'an Irish girl scrubbing the floors, a Welsh boy mining coal, a black girl doing the laundry, another mother and child picking cotton, and a Jewish or Italian girl making dresses or artificial flowers for the family' (Coontz, 1992). The powerful neo-conservative image of the idealized family, in which the child plays a central role, illustrates how the preservation of childhood was used to regulate and

monitor relations in the family, and particularly keep woman in the home. In addition to the institution of a family unit, the western child is also constituted through educational institutions, health and labour laws implemented for children, all of which have further strengthened the idealized, western, notion of the child (Stephens, 1995).

Cultural Perspectives of Childhood: Contesting the 'Western' Child

The proliferation of discourses concerning children's wellbeing has fuelled discussions and debates concerning the prominence of a homogenous or western child that negates cultural distinctions. This hegemonic definition of the western child began to be questioned in the late 1970s (Johnny, 2006). Liberating the child from the confines of the western definition was fuelled in part by leveling the same critiques as those made by feminists in the 1960s: that women – or, in this instance, children – are weak and in need of protection. Emancipating children from definitions of the western child, in particular the tendency to view them as incompetent, Holt argues, is self-fulfilling (Holt, 1974).

Cross-cultural analysis demonstrates the diversity of childhoods. Sharon Stephens (1995), for example, articulates the cultural dimensions and politics of childhood, and in so doing, raises analytical questions around the similarities of all forms of childhood, and the presence of this concept in societies other than the western world. She argues that concepts such as child, age, and sexuality are founded on western precepts, making it problematic to assess non-western children on these grounds. According to Stephens, the notion of child and childhood is a product of the politics of culture rather than an inherent unified concept. Although she recognizes the importance of examining societal contexts, she warns against the presumption that culture can be used to describe and differentiate children's lives without being conscious of the politics of culture.

Scholars (such as structuralists) who examine the cultural elements of childhood also question the universality of sociological and psychological perspectives. In an effort to move beyond discussing children as mini-adults, adults in the making, or of childhood as progressive, cultural studies takes into account the context of individual lives to explain the limitations of western notions, further illustrating the variability in childhood. James and Prout state that 'the immaturity of children is a biological fact of life, but the ways in which this immaturity is understood and made meaningful is a fact of culture' (James & Prout, 1990). Culture practices, beliefs, and family organizations therefore shape childhood just as the nuclear family has done in the western world.

Although there is little debate concerning the importance of engaging in empirical investigations of childhood cross-culturally, documenting cultural conceptions of childhood often use western notions of childhood. Stephens explains:

> "While all cultures have given meaning to physical differences of sex and age, it can be argued that the social worlds in which these physical signs become significant are so profoundly different that we are already doing analytical violence to complex constellations of meanings and practices when we single out notions of male and female or childhood and adulthood and attempt to compare them cross-culturally" (Stephens, 1995).

Stephens' concerns are echoed in the work of Scott who cautions against documenting differences at the risk of failing to engage with the power structures and relations that account for such differences (Scott, 1991).

Not only is the concept of childhood challenged from a cultural perspective but also from an individual perspective. Scholars explicating contemporary definitions of childhood are more inclusive. For Schousbe, a child is 'characterized as being a competent and flexible agent who needs a diversity of settings and freedom to choose activities and relations' (Schousbe 2005:211). These characteristics although not

distinctly child like, are often not associated with children but are with adults. Schousbe's definition includes competence and freedom as characteristics of childhood in an effort to expand and build the idea that children are individuals who can make decisions for themselves challenging both psychological and western understandings of childhood.

Facilitated in part by cultural revolutions of childhood, the dominant western conception is challenged by the emerging neo-liberal conception:

> "Previously the Western child was characterized by fragility and inexperience. He or she needed settings that were clear with respect to people and activities and the role of adults was to guide and support the dependent child. Today the child is characterized by being a competent and flexible agent who needs diversity of settings and freedom to choose activities and relations" (Schousbe, 2005: 211)

The changing notion of child is in part a product of a larger movement in the sociology of childhood. Scholars in this field are concerned with, among other things, engaging in the idea that child and childhood are multifaceted categories, whose character extends beyond that outlined in the western conception of childhood. This includes the idea that children are potentially independent, active and capable of participating in decisions that affect their lives. Scholars that emphasize the importance of cultural approaches, particularly the recognition that there are differences in experiences, might be considered part of the New Sociology of Childhood.

Current Debates in the Study of Childhood: The 'new sociology of childhood' and beyond

As illustrated above, several debates are ongoing about how to understand and study the child and childhood. The issues reflected in these debates raised by Schousbe and others began to formulate in the 1980s under the rubric of the New Sociology of Childhood. Proponents emerged to counter the dominant developmental psychology, and socialization theories of childhood. Mainly in the English-speaking world (but also in

Germany and Scandinavia), this framework has a presence in discussions concerning sociological understandings of the child and childhood (King, 2007). Several scholars spearheaded the development of this paradigm, including Alan Prout, Allison James, Chris Jenks, Qvortrup, and Corsaro (See, for example, Corsaro, 1997; James and Prout, 1997; James et al., 1998; Jenks, 1996; Qvortrup et al., 1994). Although it is not always clear which scholars aligned as proponents of the new paradigm, those discussed here have either identified with this framework, or have spoken in terms that illustrate their commitment to the ideas. Like any new approach, this approach also has its detractors, which I outline below.

The new sociology of childhood understands the child as an agent *and* a social construction (Prout, 2005). Proponents agree that "the child is brought into being through the dominant modes of speech that exist concerning age, dependency, development ….or the family …" (Lavalette, 1999). From this perspective, the child is viewed as an active agent who interprets and reflects on the world, participating in creating and constructing their own lives and conditions (A. James & Prout, 1997) a position which differs greatly from that posited in psychology and socialization theories. Proponents of the new sociology of childhood, in an attempt to forge new ground in the study of childhood, start from the assumption that children are "active agents" who should be involved in research that aims to make recommendations about their treatment.

In part, the rationale for treating children as active agents stems from the concern that what is known about children is created by adults. Scientific studies, legal actors and guardians are responsible for regulating and making decisions about children. Adults institute education requirements, decide on the age of responsibility, dictate children's

rights and decide how children are to be regulated. Qvortrup, in articulating this relationship, argues:

> "All too often- in both research and policy- it is taken for granted that children and child families are more or less the same unit…This problem arises not because of ill will, but is rather a problem of the sociology of knowledge in the sense that adults are often intoxicated with the view of children as dependents and themselves as fair representatives of children. Adults simply "forget" to raise other perspectives. It is more or less taken for granted that "what is good for the family is good for the child" (Qvortrup, 1990).

The new sociology of childhood's focus is on children's rights and autonomy and aims to address the authority of adults, and the exclusion of children in decisions that affect them.

Although this approach counters the dominant western conception of childhood, that to reiterate characterizes childhood as a period of innocence and vulnerability, not everyone agrees that childhood should be examined independently from adulthood. Mill, for example, subscribes to the commonly accepted view that the distinction between childhood and adulthood is best fixed by reference to some shared understanding of an appropriate level of competence or capacity (which adults have and children do not) (Urbinati & Zakaras, 2007). Similarly, Mayall, argues that in order to develop the sociology of childhood, appreciating the social status of children in relation to adults is essential (Mayall, 2002). Debates amongst contemporary scholars concerning whether children should be understood and treated in relation to adults further exemplifies the variability of childhood.

In contrast to dichotomizing children and adults, the new sociologists of childhood call for the development of a conceptual image of the child through sociological knowledges. Although not formally defined by Mayall, or new sociologists of childhood, it can be discerned that it is a "catch-all" term to describe the social,

cultural and structural elements of childhood. These proponents argue that sociological knowledges conceptualize children in scientific terms that are distinct from psychological approaches. Specifically emphasizing the importance of sociological knowledge, Berry Mayall argues:

> ". . . we need a sociology of childhood . . . to draw attention to certain neglected features of childhood, to provide a better account of how the social order works; and to use this knowledge as a basis for righting children's wrongs" (Mayall, 2000; 2001).

From this quotation, sociological knowledge is distinct because it considers the social and contextual aspects of childhood, which moves beyond discussing childhood in terms of rationality, naturalness, and universality, all evident in psychological discourses.

James and Prout, in discussing the new paradigm, also employ the term "sociological knowledges". They suggest that sociological approaches reflect a critical edge because they involve questioning the material basis of the concept of childhood (1997). The claim involves praising social science perspectives such as symbolic interactionists and social phenomenology as contributing to taking the study of childhood in alternative directions. Sociological approaches are articulated as 'render[ing] them [childhood] culturally strange by a process of detailed and critical reflection, thus bringing them into the sphere of sociological analysis' (A. James & Prout, 1997). Although the use of theories or ideas from sociological perspectives is not new, the type of sociological approach here is distinct – particularly examining the concept of child and childhood critically – from a cultural perspective, and by including the voice of children. They claim that sociology has in the past failed to think about childhood in innovated ways. Although it is recognized that sociology as well as other disciplines have resisted

"new ways of thinking about childhood", it is sociological analysis that this approach identifies as most useful in the future study of childhood (A. James & Prout, 1997)

Given the importance placed on sociological knowledges, proponents of this paradigm are concerned with identifying sociological "facts" about children to support the child's right to be treated in law as an autonomous being "in his or her own right"(King, 2004). Prout argues that although the child and childhood are shaped by social factors, there is a 'truth' and 'identity' to these concepts. Articulating the importance of understanding the social conditions, Prout argues that "only by understanding the ways in which childhood is constructed by the heterogeneous elements of culture and nature, which in any case cannot be easily separated, will it be possible to take the field forward" (Prout, 2005). Although his ideas reflect the social constructionist approach, Prout cautions against over emphasizing how socially situated discursive practices apprehend and construct different aspects of childhood (Prout, 2005). He argues that such attention can result in this approach producing a "reverse discourse 'declaring society' where previously has been written 'nature'" (Prout, 2005). Instead, he advocates for recognizing the place of biological arguments and understandings of childhood alongside the social, cultural and discursive practices illustrated by social construction. The unique elements of children and childhood can be revealed by using sociological knowledges to deconstruct the social and political discourses that constitute these concepts. The ultimate goal of this approach is to identify elements of these concepts that will provide a path for discussion and comparison.

Notwithstanding the benefits that might derive from sociological knowledges, and acknowledging children's rights, there are some compelling reasons to approach such

suggestions with caution. Children's inclusion in decision-making is intended to increase participation and to reflect their autonomy to participate in the governance of their lives. Constructing children as autonomous arguably empowers them, yet in legal practice it may have unexpected implications and consequences. Research to date shows that discourses of children as active agents are drawn upon to hold them responsible and accountable for their actions (See Cradock, 2007; Stasiulis, 2002). This new dimension to childhood fosters what can be referred to as the "neo-liberal child". Characteristic of this conception include responsibility, and competence, qualities that do not distinguish children from adults but instead draw close parallels between the two. The neo-liberal child, in contrast to the 'western child', is not drawn upon to protect children but rather to justify the need for punishment and accountability. While increasing the rights of children appears to liberate and empower, it also proves to be a powerful governing tools to justify harsher regulation for children.

Opposition to the new sociologists of Childhood Approach

King strongly opposes the new sociology of childhood's approach. He argues against the assertion that facts about children can be derived through sociological knowledge. Specifically, he argues that the 'medium' of sociology cannot be used to transform truth-claims about children into law and as policy (King, 2004). Instead, King advocates approaching the study of childhood through Luhmann's theory of operational constructivism. From this perspective, the reality of children is unknowable (King, 2007). King argues that '[t]here can be no 'facts' about children in society, only observations that may or may not be accepted by other systems in society as facts" (King, 2007:198). For King, the governance of children is not necessarily a product of the type of

knowledge, but rather if and how that knowledge is taken up in powerful social systems, such as the law.

Drawing on sociological knowledges to learn and implement changes in laws, policies, and practices that govern children is appealing. However, as suggested by King, such an objective fails to acknowledge the power of social systems to include or exclude knowledges and construct facts about children and childhood. Despite the source of knowledge, the child and childhood only have real effects when they are institutionalized through social relations. To learn more about children or to attempt to increase their rights, it is imperative to analyze the structures and practices of institutions that govern. Children and childhood do not exist outside of the discourse, knowledges and institutions that constitute them.

This project follows the idea espoused by New Sociologists of Childhood: that scholars need to pay more attention to the interplay between social, cultural and discursive practices. It also draws on King's insight that institutions such as the law construct facts about children. In the analysis that follows, I will focus on how, when, and why particular discourse of childhood are used to make decisions about children's treatment needs, punishment, and overall governance. Governing bodies and agents institutionalize particular ideas of the child and childhood using discourses and knowledges that are produced and reproduced. Laws, legal decisions, and social practices illustrate how institutions use concepts like child and childhood to govern. Focusing on how, which and why these conception come into play at certain times reveals more about the variability in concepts of childhood, and the regulation of children than examining the developing a framework of childhood through sociological knowledges.

In the next chapter, I explore the institutionalization of childhood. In particular, I examine the conditions that allow for variable conceptions of childhood in legal practices. I argue that the future of the study of childhood should aim to examine the processes that formulate particular conceptions of childhood. Scholars should concentrate on the types of discourse and knowledges used and who mediates their use in order to advance the study of childhood. This necessarily requires analyzing the discretionary power of agents that constitute the child through the inclusion and exclusion of knowledge.

Conclusion and Discussion

To conclude, the above discussion offers various rationales and understandings for the plurality of constructions of the child. I show that disciplinary perspectives offer different understanding of childhood. I also provide examples of how the social and cultural context in which childhood is studies shapes how it understood. The illustration of the different views on childhood shows that the field of study that examines childhood is littered with conceptions of the child and childhood. The abundance of approaches to understand childhood provides an array of options of various institutions and governing agents to draw upon in rationalizing and justifying the treatment of children. The lack of consensus concerning how to define childhood complicates the decision to determine children's needs. There are no agreed-upon terms, characteristics or factors of childhood. Scholars, as discussed above, provide different conceptions for childhood and rationales for these concepts. For psychologist although developmental stages are often used as a measure of maturity and competence, even within this discipline there lacks consensus amongst those in the field. Sociologists, historians, and childhood scholars argue for examining social, culture, structure and historical factors, all which alter social relations

and change over time, suggesting that childhood is contextual thereby variable. Each of the perspectives present legitimate claims to childhood, and more pertinent to this study, provide a wealth of knowledges for legal actors to draw upon in order to justify the treatment of children in the legal system.

Many of these perspectives are potentially fruitful ways to understand and pursue future research concerning childhood. Rather than argue for one conception over another, I suggest that the concept will always remain variable as long as multiple disciplines battle for proprietary rights to the domain. Cultural, social and historical context play a large role in how the child and childhood are constructed, in what their place in society is, and how this affects social and political agendas. Rather than privilege one factor over another, I argue that the conditions in which particular understandings are employed is of more use to the future of childhood studies than is the identification of which of these definitions is valid.

What is important, then, for understanding how children are constructed is not to look at the child him or herself, but instead to focus on the context in which they're being discussed or assessed. This is particularly true in legal practices, where different conceptions of the child seem to prevail. Determining which conception of childhood is prevalent requires an investigation of both the governing policies and the legal arena itself. Consequently, in the next chapter I look more closely at the legal system in greater detail, followed by particular instances of the 'law in action'.[21]

[21] This reference to Latour's *Science in Action* is intentional. Much like he treats scientists as members of a tribe, in the chapters that follow I show that understanding legal systems as enclosed systems, with their own rituals and codes of conduct, is useful for understanding how decisions are rendered.

Chapter 3

The Legal System and the Conditions for Variability: A Playground of Constituting Multiple Conceptions of the Child and Childhood

Introduction

The previous chapter describes the conceptions of childhood and the various ways in which disciplinary knowledges and perspectives construct these categories. I argue that discourses, knowledges, institutions and governmental ambitions shape notions of children and childhood, and that the malleability of these factors creates space for debates and challenges within childhood studies.

In this chapter, I review the literature on legal processes to show why it is important to examine law and policy, as well as actual legal decisions, to understand how knowledge claims about social relations (particularly about children and childhood) are constituted. I show how the legal decision-making process creates the conditions for variable conceptions of the child and childhood. The law is a space of contestation, where legal actors (such as judges, juries, lawyers, and IRB officers) are responsible for constructing facts presenting cases and arriving at decisions. The production of facts involves interpreting and assessing various forms of evidence to support an overall claim (or case) which, as stated in the introduction, plays a role in producing a decision. This process requires legal actors to validate one position and discredit another, as often there are several contradictory positions presented by experts, witnesses and clients (in this case unaccompanied child claimants) that assert claims or authority.

Research on legal processes shows that a legal actor's decision to validate claims is a complex one. For example, several knowledge moves are deployed and discretion is

exercised in deciding cases. Discretionary power is integral to the legal process because it enables legal actors to construct facts and claims in ways that allow them to invoke particular rules (Lange, 2002). Policies and laws provide some insight into how legal decisions are made as they provide the legal concepts and claims in which legal actors must use to base their decisions. Examining actual practices of fact and claim-making illustrates both the content of knowledge claims as well as how they are mobilized in legal decisions.

Drawing from contemporary work in the area of social and legal studies, I argue that the discretionary nature of the law, coupled with the variable conceptions of childhood, creates a space for the justification of nearly any possible legal outcome. Below I begin by outlining how the law governs and the myriad of practices in legal operations that shape decisions. These practices show how legal decisions have the power to normalize practices and institutionalize conceptions of the child and childhood further contributes to the variability in these concepts. It is through law's power to normalize particular discourses and knowledges that certain disciplinary perspectives on the child and childhood are legitimized. It is imperative to understand the process of legal decision-making because 'mobilizing facts, through producing specific accounts of the social, can have normative consequences' (Lange, 2002:137). Overall, I show in this chapter that legal decision-making involves a multiplicity of factors, and that attending to formal law and policy are only one way to understand legal outcomes. Furthermore, law and policy are incomplete because legal operations cannot simply be understood through examining policy, but instead through paying attention to the actions of those that interpret and apply such laws.

Law as Governance: Beyond Applying Law and Policy

The law, although itself not a deterministic governing body, is the most self-evident and clearly articulated formal model by which children are governed, and therefore provides a framework in which to begin to investigate different conceptions of the child. The law delineates children's rights, privileges, and obligations, which implicitly draw upon and formalize particular notions of the child and childhood. Legal frameworks delineate, for example, the permissible age for beginning work, attending school, operating a motor vehicle, and consuming alcohol. The law serves as a framework for demarcating the needs of children, and their appropriate treatment, both implicitly and explicitly. In the process, the law constructs particular ideals and expectations about the child and childhood.

Law (which includes the policies and guidelines that shape legal outcomes) is a technology of governance. Governance is disseminated through various disciplinary strategies that "teach" people codes of conduct. Disciplinary strategies for children include the education system that instills expectations and appropriate behaviours. Governance, then, goes well beyond the imposition of formal laws. "Good governance" (in the sense that it is well-executed) becomes an interconnected "matrix of rationality" where only certain types of thoughts and actions are possible to utter and do (Hacking, 1982). Although law explicitly dictates acceptable and non-acceptable behaviour, law alone does not ensure that legal actors (experts, professionals, lawyers, immigration officers and judges) follow these codes. Hence, it is important to look beyond the law to understand legal decisions.

Analysts of governmentality, drawing on the work of Foucault, illustrate the complexity and comprehensiveness of these governing practices. What is more, they reveal the different ways in which governing practices are a product of prevailing discourses and rationalities. These programs are never perfectly realized in practice; instead, they are ideal types, laden with political meanings, contradictions, and competing interests. With this in mind, Garland says that it is necessary to:

> "[avoid] reductionist or totalizing analyses, encouraging instead an open-ended, positive account of practices of governance in specific fields. It [governmentality] aims to anatomize contemporary practices, revealing the ways in which their modes of exercising power depend upon specific ways of thinking (rationalities) and specific ways of acting (technologies), as well as specific ways of 'subjectifying' individuals and governing populations." (Garland 1997:176).

Scholars such as Garland urge us to move away from analyzing particular institutions, such as the law, and to direct our attention to the practices of governing in multiple sites. In this tradition I investigate not only the law and policy that guides IRB decision but the actual decision-making process, thereby pointing to the "field of governance" rather than limiting my discussion to the overarching impact of formal law.

The idea of "technologies of government" is developed by Rose and Miller (1992) who define technologies as: "the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions" (1992: 175). Political rationales and technologies, therefore, form complex relationships with governmental ambitions that are diverse and multiple. Governmental policies represent administrative and operative guidelines and are, in part, reflections of political rationales. They are broad and general in nature, yet facilitate the development and implementation of various specific technologies. It is important to acknowledge that these elements overlap, intersect and

sometimes contradict one another and, therefore, do not operate in a necessarily coherent, unified manner. For example, rationales of governance, which are expressed in administrative policies, are informed by a multiplicity of discourses and their application is affected by institutional and organisational imperatives, which is, as I argue below, mediated by discretionary power.

Foucault's analysis of governmental strategies diverts attention away from any institutional or substantive accounts of 'the state' and instead focuses upon particular practices of governance, located in a variety of different sites. This foregrounding of practices, together with an extended conception of 'governmental authorities', which include families, churches, experts, professions, and all the various powers that engage in 'the conduct of conduct', dissolves any distinctions between public and private or between state and civil society (Garland, 1997). Thus, in this context, the law is a conduit for the operation of various forms of power, and my analysis identifies the context in which statements by different legal actors (experts, professional, and lawyers, judges and IRB officers) can be uttered.

An examination of law as written text, then, does not reveal the effects of law. Laws set out norms, expectations, rights and shape social relations but the power of the law is only made evident through its application. Power is made apparent and real through discourses, suggesting that power is inherent in those that 'speak' the rule of law (Foucault, 1977). It is therefore important to examine the legal actors who mediate the law and how they determine and assert facts and claims. In the context of this study, one way which legal actors support facts and claims is by drawing on established discourses of children and childhood. Discourse is itself a system of representation that is made

possible through the imposition of rules about what types of facts are capable of being spoken, and by whom in what contexts. The law itself, therefore, acts as a reference guide of possibilities, whereas discourses and knowledge provide contexts and ways to interpret and make decisions while considering the boundaries of the law. The law then is a 'discursive formation' in that it makes often authoritative statements about other discourses in the application of particular practices. Legal decisions involve discursive formations (or practices) in order to establish 'truths' about children or to decide how to perceive and account for their reality. 'Truths' as used here are not intended to suggest an authentic representation. Instead they refer to a construction of a legal fact, which is produced through the authentication of legal actors. In order to establish 'truths' legal actors deem particular evidence and aspects of the law relevant. Legal texts guide decision-making, yet legal actors apply and interpret the law by establishing facts through marshalling and interpreting evidence (testimony, expertise etc) in a particular way.

Although legal actors assemble various facts to support their overall claim (in this study whether the child is a conventional refugee or not), some legal theory distinguishes between facts and rules (See Jackson, 1988).[22] In this approach, facts involve interpreting language and determining which opinion is valid (Lange, 2002), rules are applied in light of the facts. Empirical studies show that this approach (mostly built on abstract examples and legal philosophy) fails to acknowledge that in order to determine facts (assess opinions and evidence) legal actors must negotiate between often contradictory evidence. The arbiter, whether a judge, jury member, or IRB officer, is required to mediate evidence, and draw upon his or her own knowledge. Legal actors deploy several

[22] He discusses 'oppositional hierarchy' which distinguishes facts and rules (Jackson 1988:190 as cited in Lange 2002:135).

strategies to validate or dismiss particular pieces of evidence to construct a fact. Scholars identify various strategies used by legal actors to apply different forms of knowledge in order to establish a fact – such as knowledge about cultural expectations of children and childhood. Establishing facts in a particular way is also an effective way to try and ensure the application of particular rules - or, put another way, to determine the overall legal decision.

Various socio-legal camps argue that judicial decisions are not products of formal, impersonal, value-free assessments of evidence, but are instead derived logically by a method of syllogistic reasoning. Reacting to formalism, which posits that rules and principles are applied in the law, legal and critical realists refute the claim that law operates autonomously. Legal and critical realists do not deny the impact of legal rules and regulations but rather question the purity of their application. Legal decision-making and processes are more complex than a process that involves the simple application of formal laws and deductive reasoning. Legal decisions are a product of actors and reflect social and political relations.

Critical legal scholars, for example, consider how "belief-systems, that is, consciousness and ideologies, are shaped with the help of law" (Milovanovic, 1988). These scholars brought much needed attention to the impact of legal actors and social discourses in the decision-making process. For these reasons, borrowing from Nikolas Rose and Marianna Valverde (Rose & Valverde, 1998) I employ the terms 'legal process' and/or 'legal complexes', and 'networks' rather than the referring to 'the law' as these terms better reflect the complexity of legal operations.

In the following sections, I examine different theories concerning the workings of law, each of which illustrates how discretionary power, fact construction, forms of knowledge, and legal knowledge networks create the opportunities for making a particular case and how such claims are justified.

Discretionary Power in Legal Process

Contemporary socio-legal scholars' work from the assumptions that discretion is embedded within legal practice that the law does not govern alone, and that legal actors interpret and make sense of evidence in the legal process based on personal experiences, popular discourses, and actual law and policy.

The argument that discretionary power is shaped by various constraints can be found in the early work of conservative legal theorist Ronald Dworkin. He argues that discretion is not 'absolute' or 'unfettered' (Dworkin, 1977) but instead that discretion is limited or constrained by legal rules and principles. Despite his view on discretion, Dworkin still conceptualizes discretion in binary opposition to law. Dworkin's conception that discretion is bounded in some ways or form remains popular today. However, there is a variance in the extent to which legal actors are bounded and the extent to which discretionary power exists. For Dworkin, law and policy constrain legal actors' discretionary power. This conventional understanding once prevailed as the subtle and complex ways in which discretion shapes legal decisions remained unnoticed due to the limited empirical work on actual legal processes. The move away from abstract theories of law, and towards empirical studies of legal process, challenges the taken-for-granted ways in which discretion ostensibly operates.

Contemporary empirical studies that examine the legal processes of decision-making challenge the conventional view by revealing that discretionary power is extremely productive. For example, by interviewing immigration officers about how they determine who to detain at Border Post 911, Pratt's study found that discretionary power is also a form of constitutive power (Pratt, 1999), whose operations can only be seen through examining actual cases. In other words, discretionary power can produce real effects such as invoking particular laws, and justifying practices and legal outcomes. She examines the Canadian Immigration Act to better understand the role of discretion. Using both policy and practice, she argues that administrative discretion is a technology of governance that permits the expression of racialized knowledges (Pratt, 1999). Furthermore she finds that public fear of criminals gaining entry to Canada facilitates a broad range of discretionary practices that remains uncritically examined. Similarly, in a subsequent piece on security at the border, Pratt and Thompson argue that 'racialized risk assessments, constituted through knowledges of race, nationality, culture and ethnicity, thus shape the discretionary decision-making of frontline officers largely through their association with crime – security risks at the border' (Pratt & Thompson, 2008:632).

These studies show the extent to which agents that deploy law and policy have discretionary power to govern through legal policies, illustrating that law alone does not regulate the actors who deploy it, but instead provides one of the necessary tools to exercise discretion successfully. Furthermore, Pratt and Thompson's study shows that discretion is not necessarily exercised in a subtle manner, but that instead discretionary practices are overt particularly when they satisfy or can be rationalized within a particular

agenda. If exercised in a way that supports the popular discourse (in this case fear of a terrorist gaining entry to Canada) discretionary practices are less securitized. For example, legal actors, such as immigration officers, pull over a driver that fits a particular profile. The immigration officer's decision to do so is not questioned, showing that legal decisions are more complex than applying law, just as immigration policy does not in written form promote profiling.

Such practices illustrate that discretionary power is a 'productive regulatory power' (Pratt, 1999). It also shows that for an immigration officer, or presumably any other legal actor, decisions are not unstructured. Although their governing practices may not be explicitly permitted in the policy, the legal processes that allows for actions to be justified using discourses of public fear, for example, are successful ways to justify discretion. Discretionary power is then not simply about bending the rules to meet a particular end. Instead, it is about constructing and shaping facts, and presenting rationales that justify a legal actor's practices. Understanding how this occurs requires a consideration of the social and political context of the case, which in this study includes the expectations of children and childhood. In addition, understanding legal decision-making requires examining how legal actors use procedural justice outlined in the guidelines to build facts and claims.

The research discussed above challenges the 'rule-based' understanding of decision-making that pervades the literature on decision-making (Shearing & Ericson, 1991:481). The 'rule-based' approach presupposes that legal actors, although somewhat constrained by the rules, have the ability to make choices which is founded on liberal notions of choice that assumes individual autonomy (See Pratt, 1999; Shearing &

Ericson, 1991). The popular 'rule-based' position overemphasized a legal actor's ability to exercise any form of power, failing to recognize that discretion is structured, or at the very least shaped by the necessity of legal practices to construct facts and support claims. This is illustrated in chapter five, where Immigration Refugee Officers' (IRB) decision to interpret evidence is substantiated using varying acceptable rationales and justifications of children and childhood. IRB officers cannot simply assert claims without using the policy, language, and rationales that are accepted in the legal arena in which they are operating. Further supporting the view that discretionary power is structured are studies that disturb the popular liberal legal paradigm that is founded on the proposition that legal agents have the freedom to choose to exercise any form of discretion.

The conventional view of discretion and law is also challenged by contemporaries such as Nicola Lacey. Following the sentiment that empirical studies reveal the inner working of discretion, she argues that studies of discretion necessitate an interdisciplinary and pluralistic approach (Lacey, 1992). It is her contention that such an approach will work towards disturbing the dominant liberal legal paradigm of jurisprudence that is inclined to '. . . reinterpret the nature of the world by essentially imposing legal or quasi-legal categories of thought' (Lacey, 1992: 294). The movement towards realizing that discretion is not simply an addendum to legal process further illustrates the importance of examining law and policy as well as actual legal decision-making. If, as studies show, discretion plays an important, but not always consistent or transparent, role in legal decisions, it is imperative that actual case decisions are examined. Discretionary power is no longer uncritically envisioned as a functional aspect of law, as social science research

in the area continues to grow and illustrate the dynamics of legal decision-making, the importance of empirical work is growing.

The admittedly abbreviated discussion above illustrates the importance of examining both the language of law as well as legal processes. Law and policy do not solely guide the decision-making process, yet they effectively define the parameters of the discretionary power of legal actors. For this reason, it is imperative that law and policy objectives be examined. It is through examining language, and conditions for accepting or rejecting a claim that the boundaries of discretion can be delineated and understood. To further unpack legal processes, and the operations of discretion in these processes, it is important to examine the rationales for such practices. Examining both policy and practices reveals how discretion is constitutive and how it operates as a form of regulatory power. In this study, analyzing both law and policy reveals how variable conceptions of the child and childhood are drawn upon in the legal process and ultimately how the variable child is constituted in the legal system.

Forms of Knowledge and Knowledge Moves

Thus far, I have discussed how the analysis of discretionary power complicates established understandings of the legal process. I have argued that the law itself is only one governing tool, and that its effects are best seen through its application. Agents who exercise discretionary power draw upon particular forms of knowledge and exercise knowledge moves to produce the facts necessary to make legal decisions. The former refers to content (the knowledge source- i.e. expert or lay knowledge), or more specifically which claims are validated or rejected. Knowledge moves (or games), on the other hand, involves describing the 'process' or 'flows' through which legal actors

choose, validate, and marshal particular evidence – such as documents, or discourses to transform particular forms of knowledge into facts. To continue to illustrate the complexity of legal processes, in the section below I discuss the types of knowledge, particularly science and extra-legal knowledge, found in the courtroom and how particular knowledges are favored in one instance and not in others. I focus on showing how, in the legal forum, particular forms of knowledge are not consistently or uncritically accepted – (such as science) which illustrates how particular moves are deployed in an attempt to validate or reject claims. In other words, I show what types of knowledge moves are deployed and how they are used to assert facts, claims (or cases) and ultimately legal decisions.

Science and Experts in the Legal Process

Socio-legal studies have brought attention to the various 'forms of knowledges' and strategies that are used in the legal arena, such as science and the media.[23] For example, investigating criminal trials, show that the extensive use of science in crime solving television shows, often referred to as the CSI effect, not only feeds public admiration for science, but increases the demand for science in the courtroom (Robbers, 2008). Research shows that juries expect conclusive evidence to be presented in court cases. Such expectations not only shape how jury members make decisions but also how lawyers and judges do their jobs (Robbers, 2008). The CSI effect therefore alters the effectiveness of particular types of evidence, and ultimately shapes the behaviour of legal actors. Such a finding is important when aiming to understand how legal agents attempt to assert claims and facts in the courtroom. One would expect that the enthusiasm around

[23] Which includes the space where different forms of knowledge are considered, consulted, and, at times, authorized

science, particularly forensic science, would increase the validity of science in the courtroom. In other settings, however, the role of science is not so prominent. In contrast to Robbers' findings, scientific knowledge in other legal fields is not automatically granted authority. This variance again shows the importance of examining actual practices in different legal realm because legal decision-making remains a complex and, at times, tenuous process.

Empirical social studies of science show that scientific or other professional expertise are not always validated in the courtroom (Haggerty, 2004; Jasanoff, 1995; M. Valverde, 2005). Jasanoff's influential work illustrates that scientific studies do not produce objective facts that are then transplanted into the courtroom. Her empirical study shows that scientists are fractured and establishing scientific claims involves building alliance with particular members (Jasanoff, 1995). In the courtroom this results in scientific claims being 'presented and deconstructed' in ways that illustrate the instability of an opponent's claims (Jasanoff, 1995:44). Competing experts from the same field can both present different interpretations of the same evidence. Such practices necessitate that legal actors decide whether a particular expert opinion is valid. The authority of science, then, is tentative and depends on the legal actor evaluating the opinion, and how the expert testifies. As seen in Robbers' study, legal actors' interpretation of evidence is shaped by their expectations of what type of knowledge constitutes truth (2008). Other studies further support that the use of different forms of scientific expertise in the courtroom does not translate into absolute truths in the legal process. Instead, it is one of the many forms of knowledge found in the legal process, and like extra-legal knowledge it is validated in some cases and dismissed in others.

Further illustrating that expertise is at times displaced by other forms of knowledge is the work of several other scholars who examine claim-making in the legal process. Haggerty, for example, found that criminologists are also not always authenticated as primary sources of knowledge in the legal system (2004). His study examines the extent to which criminologists' work and opinions shape criminal justice policy. Criminologists do not necessarily agree that their work should translate to advocacy work or policy transformation, but what Haggerty points out is that "even if criminologists could agree that they should become involved with policy and what those policies should be, transformations in the practice of governance, the art of politics and the routine operation of criminal justice make it less likely that policy makers will seek out criminological advice or listen were such advice offered" (Haggerty, 2004). Like Jasanoff, Haggerty's work points to the lack of consensus amongst the criminologist concerning their responsibility as well as the challenges they would face in asserting a legitimate place in the legal system.

Further raising questions concerning the claim-making process, Shapiro (1972) argues that no matter what type of knowledge is brought into the courtroom the requirement of the legal system to resolve cases means that "[e]ven where facts cannot be established with certainty, … Anglo-American courts typically make definite findings of facts and treat them as certain even though they are established only on the preponderance of evidence" (Shapiro (1972), as cited in Jasanoff 1995:45). These studies show that the reputation of science or the designation of expertise do not necessarily translate into legal truth-making. Shapiro's comment points to the legal systems demands for resolution which forces legal actors to decide cases upon whatever evidence is

present. The power of legal discourse cannot be underestimated in this process. The law, like science, is a powerful discourse that partially establishes its authority through legal decision-making.

The process of negotiation between different sources of expertise is further complicated by the integration of the two powerful discourses of the law and science. According to Jasanoff, law and science share similar properties - they function through rationality and operate on the notion that truth can be revealed (Jasanoff 1995:51). Despite these similarities in properties, she argues, the legal demand for absolutes makes for a tense relationship with science and its experts. Scientific expertise, unlike the law, operates using probabilities rather than certainties. Brett explains:

> "Not every scientist is willing to decide between rival theories knowing "(a) that neither of the rival theories was bound to put forward all the data in his possession-indeed, that each would regard it as proper to suppress any 'inconvenient' or inconsistent observation of whose existence he knew and (b) that ...the adjudicator, would be precluded from suggesting or requiring the elicitation of any additional data that might prove critical" (Brett as cited in Jasanoff 1995:49).

Thus, the law in its effort to reveal truth necessitates that experts assert a position that in effect discredits another expert implying that one type of knowledge is more rational, truthful and ultimately valuable than another.

Other Forms of Knowledge: Low, High, and Revelatory Knowledge

Some additional forms of the knowledges identified in legal decision-making include 'psychiatric, psychology, clinical medicine, statistics, [and] epidemiology' (Valverde 2003:3). These knowledges are termed by some as 'high status' knowledges which are marshaled as authority because they are produced by experts. Conversely, 'low status' knowledge encompasses what is often termed 'lay knowledges' which is accumulated through personal experiences. The distinctive feature between these two

forms of knowledge lies in their epistemological foundations. Both high and low status knowledge are classified by legal practitioners as 'extralegal', marking them as distinct from legal knowledges which are restricted to law, policy, and case law.

Another form of knowledge similar to those concepts espoused by Valverde is that of lay knowledge as prescribed by Green. Over a decade ago, Green distinguished 'lay knowledge' from what he termed 'revelatory knowledge'(Green, 1997). He argues that revelatory knowledge, which has parallels with Valverde's conception of 'high status' knowledge, displaces lay knowledge. Intuitively it would appear to be a sensible deduction that 'high status' or 'revelatory' knowledge would displace 'lay' or 'low status' knowledge, however this is not always the case. Further supporting Green's findings in an empirical investigation of legal decision-making in the criminal justice system, Valverde finds that both high and low knowledges are drawn upon and, at times, they offer competing points of reference or forms of truths in the legal system. These works show that the types of knowledges incorporated in legal decision-making vary by legal realms and by case, and therefore it is expected that similar variations would be found in legal realms dealing with children, particularly given that what constitutes the child and childhood outside of the legal realm is highly contested (See chapter two).

Despite the differences in terms, both Green and Valverde are talking about extra-legal knowledges. These forms of knowledge in legal cases are often abundant, and therefore must be managed (M. Valverde, 2005). Lawyers from each side often present competing expert opinions concerning facts of the case. Witness testimony also often varies, and material evidence of a case will often fail to represent a consistent story. Legal actors are required to determine which expert, testimony or material evidence is factual.

In other words legal actors authenticate a particular form of knowledge. This process, according to Valverde, "is done in part by reducing documents and testimony to an almost content-free existence" (M. Valverde, 2005:426). In a case-study of zoning ordinances, she found that this involves emphasizing the general principles of law, policy and guidelines and dismissing inconsistent details (M. Valverde, 2005).

Minimizing various forms of evidence (testimony, expertise, material evidence) is referred to by some socio-legal scholars as a 'knowledge move', implying that concrete practices are employed to authenticate, emphasize, or prioritize particular pieces of evidence. 'Bracketing' is one such knowledge move that is used to characterize the courts decision to ignore particular pieces of evidence (M. Valverde, 1996). Similarly Lange uses the term 'bounding' to discuss how particular portions of evidence are mentioned while others are dismissed (Lange, 2002). These by no means represent all the knowledge moves or processes identified in legal decision-making, but they do provide a sense of how legal processes operate. More pertinent to this chapter, it points to how legal decisions are mediated, how facts are constructed, and how this process allows for the variability in which types of conceptions of the child and childhood are included and reproduced in the legal system.

Although there is a dearth of research that examines the interplay between knowledge production by explicating the interplay of professional, lay and administrative knowledge (Ewick & Silbey, 1999; Green, 1997; M. Valverde, 2003), particularly in legal cases dealing with children, there is some evidence of the practices Green and Valverde discuss in other contexts. In the recent custody case of Young v. Young, for

example the judge deferred to the opinion of the parents over that of child experts in order to assess the best interests of the child. Judge L'Heureux-Dubé states

> '…experts are not always better placed than parents to assess the needs of the child. The person involved in day to day care may observe changes in the child that could go unnoticed by anyone else and normally has the best vantage point from which to assess the interests of the child. The custodial parent, therefore, will often provide the most reliable and complete source of information to the judge on the needs and interests of that child. The importance of the evidence of children in custody and access disputes, too, must be emphasized' (Young vs Young 1993:10).

In the above judgment it is clear that knowledge passed along by parents and the child are considered vital in understanding the needs of the child, more so than experts in some instances. Parental opinions could be classified as lay or 'low status' knowledge in comparison to expert evaluations, illustrating that in some cases it is privileged over the 'expert', or 'high status' knowledge. Including the child's testimony exemplifies the variance in legal practice. What, if any, factors lead to the judge's decision to consider the opinion of children and parents? Is this the same in all cases?

The different considerations in evaluating which type of expertise is most useful in defining the best interest of the child further illustrates the potential variability in the legal process. The judge's reference to the parents and the child in order to assess the case suggests both that parental experience is a valuable form of expertise and that children are capable of speaking on their own behalf. The treatment of children as competent in this case shows that there are other conceptions of the childhood besides those that constitute children as vulnerable, or as victims operating within the legal system. The judge's decision to defer to parental knowledge raises some interesting questions concerning the current boundaries of private and public and, more specific to this project,

it points to the complexity of knowledge production and the use of knowledge in the decision-making process. Moreover, it suggests that the law might legitimize knowledges that are otherwise contestable. It is these examples that illustrate the potential deployment of variable concepts of the child and childhood in the legal system, and the theoretical value of empirical investigations.

What this decision in the Young case also shows is that legal decisions are not determined solely on the extralegal evidence of experts presented in the courtroom. Instead legal actors in this case, the judge has the power to decide what weight is given to a particular type of knowledge, such as a child's testimony. Legal agents, or "triers of fact" in the legal realms examined in this research, also include immigration refugee board officers (IRB). This role involves gathering and evaluating the various forms of knowledge – high, low, revelatory, in order to establish facts to build their claims or case. Upon hearing various testimonies (or types of knowledge), legal actors work towards discrediting particular testimonies while strengthening others. Evidence provided by various knowledge sources, however, are not presumed credible, rather the information, and its source is scrutinized, weighed and then authenticated or dismissed. Testimonies, including those provided by experts are considered opinions and are deemed to be a fact only if they are 'legally constituted' (Luhmann 1992:1431 as cited in Kriekan 2006:576). Although all forms of knowledge and expertise are questioned, Valverde's empirical work on legal decision-making finds that disciplines like sociology, anthropology and history are more often contested and scrutinized (M. Valverde, 1996). Other knowledges that are also sometimes disqualified in legal proceedings include feminist knowledge (Smart 1989).

The knowledge sources used to determine facts and build claims (or cases) are not taken at face value. Legal actors determine the relevance of testimony and the expertise brought into the courtroom. To use the words of Levi and Valverde, evidence at times undergoes 'translation'. They define this concept as 'the dynamic process through which fact, concepts, and physical entities move from site to site and are either reinforced or solidified, or else contradicted or undermined' (Levi 2000; Valverde 2003b as cited in Valverde et al, 2005:86). 'Translation' illustrates another strategy that allows for the variability in conceptions of the child and childhood, and the outcomes of legal decisions. The same evidence presented in two separate cases can be interpreted or translated to produce different outcomes in similar cases (this is evident in chapter 5) based on how and what constitution of the child and childhood are used to filter, interpret or make sense of various forms of evidence (actions, testimony, etc).

The Young decision, for example, reflects a particular notion of childhood: a neo-liberal conception which, as discussed in chapter two, characterizes children as competent, responsible and able to speak on their own behalf. The suggestion that children have the ability to participate in decisions that affect their lives reflects a very particular notion of childhood that articulates children as 'active agents', meaning that they have abilities to competently make decisions. It further suggests that children develop at different rates, suggesting that childhood is unique development phase. As I discuss in the forthcoming chapters, the competence of children is contested by invoking various conceptions of childhood. In the discussion of the decision-making process in unaccompanied child refugee claims that are presented in chapter 5, the voice and testimony of the child does not always influence the legal decision. Children's testimony

is at times discredited and used to draw other aspects of their claim into question. In other words, it too undergoes a 'translation'. In some cases similar testimony is taken to establish one fact and claim and in other cases it is used to marshal a different set of facts and claims.

The above discussion shows that the legal actor's responsibilities include making sense of the diverse perspectives and knowledges that enter the courtroom. Evidence does not point to one direction, and legal actors do not 'just know' which evidence to invoke, but they must *decide* which evidence to invoke. Some argue that decisions about including and excluding different forms of knowledge are an effort to construct particular facts to support particular claims. Given that so many competing knowledges are in the courtroom and that they must be deciphered it is not surprising that there is a variable child produced and reproduced in the legal system.

Fact Construction: 'Matching' Rules with Facts

Another way to examine claim-making and knowledge 'flows' and 'processes' is to focus on how facts are constructed. The decision to choose particular forms of knowledge, or in other words to decide to emphasize or authenticate a particular piece of evidence, reflects an effort to produce a fact to build an overall claim or case. As mentioned earlier, claims in this study involve determining whether the child is a refugee or not, the term 'fact' is used to refer to what is produced to support an IRB officer's claim. Examining facts is relevant in several social realms, but is most analytically powerful in the legal realm (Wood & MacMartin, 2007) because it highlights how knowledge, information and documents are displayed or made into legitimate relevant knowledge. Like scholars who examine the process in which knowledges are used in the

legal process, those that study fact construction identify strategies that are employed to emphasize particular evidence.

Facts are used to support overall claims, one way in which to accomplish this goal is 'through the provision of evidence' (Wood & MacMartin, 2007). In the context of child sexual assault cases, Wood and MacMartin found that judges employ devices, such as "text citation", "appearance-reality contrasts", and "references to stake and interest" in variable ways to construct particular facts in order to substantiate a claim (2007). This study, like others discussed in this chapter, shows that particular knowledge moves are deployed to establish claims that are not necessarily shaped by discovering the 'truth', but instead are shaped by the motivation to build a strong claim.

As previously stated, establishing facts involves marshalling evidence to support a particular point or assertion. In real terms this involves interpreting a child claimant's testimony and evidence to how one understands the responsibilities and abilities of children and childhood. In other words IRB officers determine facts and build claims based on their perspective of the social world – that are rooted in discourses, and their personal experiences and opinions. An IRB officer's understandings of the child and childhood shape how they make sense of evidence. So, the property of facts and claims then encompasses several forms of knowledges which are converted into realities by legal actors.

Examining the process of fact and claim-making is important because it has the power to constitute truths about children and childhood, particularly in the legal field. Child and childhood although universally known terms have different meanings in various contexts, both however can be constructed as objective terms with comprehensive

meanings. In so doing, IRB officers are able to assert facts in ways that suggest universalities. Facts are powerful because they are founded in descriptions of the social world that people can relate to and they can be "…created for normative purposes in order to limit and thus prescribe the range of possible options of social action" (Lange, 2002). Lange argues that it is important to examine the fact finding and construction process because it is a powerful and effective way to evade formal legal rules and to pave the way to follow one's own normative ideas (Lange 2002:140). Lange further argues that facts and claims are also used to invoke rules and law that are prescriptive and normative (Lange, 2002). Lange's comments seem to assume that discretion is not allowing law to operate, whereas I would argue that it is the construction process that gives life to rules in particular contexts.

It is not only important to examine the fact-rule relationship but also the various factors that might effect how facts are described and prescribed through law. Again, one such factor is seen in the discretionary power of the arbiters of facts. The representation of particular conceptions of the child and childhood are reflected in facts and the IRB officer's decision who is the producer (Chalaby, 1996) that employs legal knowledges, texts and discourses that are outside the individual child claimant. The real determining force in the construction of the child and childhood are 'the conditions, the properties, and the existence of the texts agents produce' (Chalaby, 1996). It is these texts that hold weight in claim-making, and examining the process of claim-making illustrates the conceptions and strategies used to substantiate those conceptions by legal agents.

The legal system, then, involves not only soliciting expertise and information from various sources but also determines the validity and relevance of that information to

establish facts and claims. Legal actors decide what experts are 'authentic' and which testimony is 'credible'. Krieken goes as far as to argue that

> "Apart from law itself, only two forms of knowledge have effect within the juridical field-'facts' and 'opinions'- and only the first can have any authority in relation to law. The knowledge produced in the fields outside the juridical thus has effect within law only to the extent that it can be rescued from being mere 'opinion' and reconstructed as 'fact'" (Krieken, 2006).

Legal actors in the judicial field then constitute claims by transposing opinions into facts, thereby legitimizing information that might otherwise not be authenticated. This authority is important because the authentication of one opinion (expert or lay) dismisses others, a process that can alter the outcome of a case. Determining facts can potentially shape how the child is perceived in a case, and if their actions are determined to be intentional they will be constructed differently than if they were not. The power of legal actors who themselves carry their own reasons for authenticating opinions creates the conditions for the variable child.

Legal Knowledge Networks

The discussion to this point illustrates that various forms of knowledge are drawn upon in the legal process to construct facts, claims, and to produce legal decisions. In this context, children are made known through the assemblage and organization of various sources of knowledge, and the weight given to particular pieces of evidence. Some legal actors may draw on the child's age, others the testimony of their parents, the testimony of specialists or experts in the field, and still others on the child's appearance.[24] The

[24] The power of visual images is various social realms are well documented in the fields of psychology and social psychology. For example, research in the nineteen seventies by Nisbett and Wilson indicates that physical attractiveness is a factor in how people judge others (1977). Dutton and Aron, in a similar vein, find that the location where we meet people also shapes perceptions(1974). Bodenhanusen completed a study investigating whether people rely on stereotypes in forming impression (1990). He found that people do in fact take into account the meanings associated with for example ones social group

collection, inclusion and exclusion of these various knowledges sources create a knowledge network, which is the material process that involves the assembly and deployment of knowledge (Haggerty, 2001). Knowledge networks are evident in the decision-making process where various forms, expertise, and formal and lay knowledge are both brought into the courtroom and negotiated. As will be seen in the following chapters experts, child testimony and 'tests' of competency are sources used to make decisions about the child claimants' actions and ultimately determine their case.

Knowledge networks are essential in the legal system because they use information that circulates in this process to produce 'legal fictions' which include moral and medico-juridical discourses that constitute governance targets as problematic (M. Valverde, 2003). The sorting of child claimants into particular categories involves legal actors assessing different characteristics illustrating the importance of knowledge networks. Sorting who belongs in which category necessitates the process of 'assignment' which Haggerty defines as the routines of negotiating who belongs in each category (See Haggerty 2001:101). This dissertation identifies the routines, strategies and tactics that legal actors apply and/or draw on to make decisions about a child's knowledge, competence and responsibility in the court room is the focus. Haggerty's

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(Bodenhausen, 1990). The effect of visual social class of an individual, as well as where we meet them might also play a role in how we conceive of children in the legal system. Refugee children are most often than not non-Caucasian and their skin color or psychical features may be attributed to particular characteristics that shape how one interprets their claims, more specifically if they believe them or not. The very fact that a child or youth is in a court room singles particular ideas of the child as deviant that will also color the way one constructs the child. A child victim is most likely one of the most prominent images of children in society. An image of a child suffering is constructed even outside of the presence of the child, an accused charged with a crime of sexual assault or pornography generates mental images of children suffering at the hands of adults. The various ways in which individual make sense of the world also shapes the ways that legal actors interpret their clients and therefore contributes to the variability of the child.

concept of 'assignment' is useful to understand and track 'the act' for which strategies are deployed to construct facts and claims.

The Struggle for Autonomy and Legitimacy

Others argue that legal decisions are not solely a product of legal actors, discretion, and the negotiation of knowledge, but also the effort of the law to establish itself as a unified system. Legal decisions are shaped not only by legal actors mediating between different forms of knowledge, but also by the legal system's attempt to maintain autonomy and authority. The decision concerning which types of knowledges are included or excluded in the legal system involves the actors in the legal field – including judges, lawyer, and, in this study, IRB officers. Some scholars argue that legal decisions are best understood as an attempt by the legal system to maintain autonomy.

Luhmann argues that legal actors contest, resist and mutate the incorporation of extra-legal knowledges in legal operations to maintain the legal authority of the law. He argues that legal autonomy is maintained by ensuring that evidence 'fits' legal frameworks (Luhmann, 1992). This goal is achieved when evidence is organized and made sense of in legal terms, which results in moral codes being reflected in the law only when they are transposed into legal terms and/or operations. To use Luhmann's terms, the law has a unique "credibility profile." He states:

> "Legal facts are made to fit the legal frameworks; they have to facilitate as much as possible the deductive use of legal norms. They have to support the presentation of legal validity by conveying the impression that, given the rules, the decision follows from the facts of the case. They have to be certified facts." (Luhmann, 1992).

The process of transposing information is evidence of "operational closure" (Luhmann, 1992). The law is characterized by operational closure such that information is processed

according to the rules of the organization (the legal system). Such a self-referential system pre-delineates processes and, potentially, outcomes.

The Legal Realm: a Playground for Various Conceptions of Children and Childhood

In this chapter, I discussed the work to date in the investigation of legal decision-making. Several scholars have documented, and continue to document that judgments are made under conditions of uncertainty (See Diamond, 1981; Ebbesen & Konecni 1981; Hogarth 1971; Partridge & Eldridge 1974 as cited in Englich et al p189). The complexities of legal decision-making discussed above provide a context for the importance of studying how child and childhood shape legal process. The forms of knowledge that constitute the child and childhood vary form extralegal, psychological and scientific. Each of which are sometimes authenticated and sometimes rejected as legitimate frameworks by which to make decisions. The work of legal scholars interested in childhood provides insights for my research. The studies discussed here affirm that the legal process is facilitated by discretionary power, it is indeterminate, and is shaped by social, political and cultural motivations. Although many of these studies provide insights into the legal processes, very few legal scholars (For exceptions see King and Piper, Cradock and Wood and MacMartin) have focused on the role of conceptions of the child and childhood.

As illustrated in chapter 2, there is no one way to define the characteristics and boundaries that constitute the child and childhood. Addressing legal issues that deal with children is complicated by the processes of legal decision-making and the competing conceptions of childhood. The plethora of contested views concerning these concepts

only further complicates the decision-making process. The legal system operates under the assumption that the processes will produce sound judgments. In order to arrive at such a situation particular conceptions of the child and childhood must be invoked.

Although age has for centuries been, and remains, the starting point at which laws decipher between children and adults, it is no longer the sole determinant. The proliferation in expertise and knowledges in the courtroom provides a space for the competing conceptions of childhood in the legal process. Variation in children's (and adult's for that matter) comprehension is often used as a strategy to determine levels of guilt, innocence, and responsibility. The extent to which various opinions concerning how to evaluate children's actions enter the courtroom and the responsibility of legal actors to negotiate these opinions emphasizes the importance of examining actual case decisions. Moreover, a similar case comparison, as seen in chapter five, shows how legal processes creates a playground for conceptions of the child and childhood.

Chapter 4

Rules for Deciding Whom to Keep: The Discretionary Power and Variability in Conceptions of Childhood in Canada's Refugee Guidelines for children

Introduction

As discussed in Chapter three, socio-legal scholars problematize the notion that examining written law will explain legal decisions. Laws do not by any means provide a comprehensive understanding of the process of governance. Instead, they are themselves one of the many technologies of governance – that more comprehensibly involves practices, discourses and institutions, each embedded in a certain historico-rational framework (Rose & Miller, 1992). What the law (and administrative polices) does consist of is governing rationales, discourses and ideologies specific to a social and cultural period. Notwithstanding that, law and policies involve a multiplicity of discretionary opportunities. Examining such texts provides insights into governing ambitions.

Historical and contemporary scholarship illustrates the extent to which law and legal policies reflect particular ideologies and governing ambitions concerning the child, the family, and childhood (See Chen, 2005; Stacey, 1996), implying that those who implement these policies have considerable latitude when making and justifying their decisions. Institutions such as the education system, the juvenile justice system, and, as will be shown in this and the subsequent chapter, the Immigration and Refugee Board is an example of the institutionalization of particular ideologies about the needs, treatments, and rights of the child. Law and legal policies therefore not only help govern populations, but they also institutionalize particular formulations of childhood.

That is not to say that children are not, at least to some extent, 'talking back' when it comes to formulations of childhood. One such example of this is the inclusion of young people's opinions in the United Nations (UN). Not only has the UN implemented the Convention of the Rights of the Child, which aims to recognize and empower children as rights bearers that are different but equal to adults, but in recent meetings children and youth have been asked to participate in decisions that affect them. Reflecting the principles of the UN convention of the Rights of the Child, in September 1996, Canada implemented guidelines that instituted rights and due process procedures for children (where children are defined as applicants under the age of eighteen) claiming refugee status entitled 'Unaccompanied Child Refugee Evidentiary and Procedure Guidelines' (See http://www.irb-cisr.gc.ca). Revered as 'groundbreaking', and as an example for other countries to follow, scholars in the United States argued that the Guidelines were distinct, partly because, unlike American policies, they do not 'presuppose an adult applicant' (Bhabha & Young, 1998). The Canadian Guidelines instead created a new social and legal space for children, which ensures due process and, ostensibly, protects both children and fosters Canada's image as a champion of human rights.

The analysis that follows raises questions about the validity of the assumption that Canada's refugee policies do not presuppose an adult applicant. I show that the provisions draw upon various conceptions of the child and childhood including the discourses that children are competent right bearers (characteristics also associated with adults and adulthood), and that they will often (but not always) have the ability to make decisions about their wellbeing and their future. The guidelines therefore create

considerable discretionary space for refugee officers to make a wide range of decisions about individual cases.

In 2002, the Centre of Excellence and Research Immigration and Settlement (CERIS) [25] completed a report that concluded that 'although Canada is acknowledged as a world leader in developing humane policies for responding to unaccompanied/separated minors, current policies have yet to address the full range of issues related to these children' (CERIS). This statement stemmed from problems in the Guidelines about the procedural consistency and transparency of the process[26]. In other words, despite its international acclaim, the Guidelines quickly fell prey to many of the criticisms that socio-legal scholars were making about the complexity of how the law and policies govern legal proceedings.

Research conducted since this report was produced reflects additional concerns about the effect of these directives. To date, however, studies have concentrated on the extent to which children's rights (through the adherence to the UN Convention of the Rights of the Child) are presented in Canadian decision-making. Stasiulis, in her study on the effects of the children's movement on decision-making in child refugee cases, concludes that when children's rights are invoked, this is done to dismiss any sense that a child needs protection (Stasiulis, 2002). Sadoway also examines the effect of the UN Convention of the Rights of the Child on procedures and decisions in Canada's child

[25] This report was originally prepared for Immigration and Citizenship Canada in November 2002.
[26] In conjunction with a synopsis of the research to date in this area, they concluded that there 'very little systematic data collection or research has been done, and even less is available in the public domain' (CERIS iii).

refugee claims, except that she instead identifies how the policy lacks protection from gender persecution (Sadoway, 2001)[27].

Both scholars poignantly illuminate the complexity of child refugee policies and practices. Building on their work, this chapter shows how the conception of childhood, which are the characteristics by which a child's abilities are measured, are embedded within policies to create the conditions where tribunals can justify nearly any desired decision. As shown in chapter five, these decisions do not always consider the protection of children.

While my analysis supplements that of Stasiulis and Sadoway, it is motivated by a different approach and objective. Working from the position that law and administrative policy are important governing tools, I examine how various conceptions of childhood embedded in these regulations shape legal decision-making and in particular, discretionary processes. Childhood is institutionalized in law, policy and legal decisions – these legal knowledges are the axes for discretion. Discretion is not simply an exercise that allows IRB officers to employ any decision without justification. Instead, laws, policies, and ideologies bound and shape discretionary processes. The guidelines attention to differences in competence, comprehension and accountability between children and adults suggests that children's abilities differ. Different perspectives of children's abilities in the guidelines institutionalize a variety of knowledges about children that are drawn upon to deduce and emphasize children's actions in the interpretative moment of decision-making. The contestation around childhood is addressed through the discretionary process that allows for the transmission of a variety

[27]In the work of Sadoway and Stasiulis much attention is paid to the role of the UN Convention of the Rights of the Child. Given the impact of their work I omitted this topic as an area of interest for me.

of claims in often differing ways. Or put another way, childhood knowledges are given expression through the 'technology of administrative discretion' (Pratt, 1999).

The unaccompanied child refugee guidelines are one of the many 'mechanisms' that enable the institutionalization of childhood in legal decisions (M. Valverde, 2006), and examining them provides important insights into our understanding of the operations of law. In other words, my analysis focuses on the formulations of childhood that serve as the 'epistemological preconditions' for legal decisions concerning children, where law is understood as a form of governmental practice (Haggerty, 2001). The various conceptions of the child and childhood in Immigration and Refugee policies are one of many legal tools that can be used to exclude evidence, claims, and individual considerations from legal decision-making. Policies, and the language and texts embedded within them, reveal how competing ideologies and discourses of childhood provide officials with an array of legal knowledges to draw upon in the decision-making process.

This chapter argues that the 'Child Refugee Claimants Procedural and Evidentiary Issues' guidelines reflect various conceptions of childhood, which in so doing provides a way to justify and exercise discretion, resulting in the inability to provide a clear interpretive framework for adjudicating cases. The notion that legal practices involve discretion is not unique, however examining the tools (institutionalized knowledges) that structure and bound discretionary process is important, particularly in this context.

This analysis of the procedures for adjudication provides the backdrop for the proceeding chapter, which examines actual legal decisions in unaccompanied child claims in Canada. Including diverse and often contradictory perspectives on childhood in

the law provides adjudicators with the requisite tools and discretionary power to rationalize nearly any decision, under nearly any circumstance. Theoretically, and more pertinent to the overall goal of this project, this chapter illustrates the dynamic nature of the concept of childhood in the legal process. Childhood is institutionalized in various ways through legal knowledges, and this chapter illustrates how this variability operates as a powerful governing tool. This assists in building claims of the case that shape the decisions of the IRB.

Balancing Competing Notions of Childhood: Canada's Guidelines for Asylum-Seeking Unaccompanied Children

Canada's child refugee guidelines incorporate evolving and competing notions of childhood. The procedures outlined in the guidelines reflect differing conceptions of childhood. At times the characteristics of what has elsewhere been called a 'western' notion of childhood - one that is characterized by fragility, inexperience, vulnerability and a progressive child development - (Stephens, 1995) are prominent. As discussed in chapter two, this conception is rooted in psychological discourses of development which almost fetishize innocence and vulnerability. In other sections, the guidelines reflect neo-liberal conceptions of childhood, ones typified by discourses of accountability, responsibility, and rights. In contrast to the western conception of childhood, this understanding is rooted in discourses and knowledges that recognize children as active agents and in so doing carve out a potential space for responsibility. Since my focus is on children who apply for refugee status as an 'unaccompanied or separated minor', I flesh out these sections of the Guidelines in greater detail, focusing on how the child is discussed and constructed. I then provide a more detailed analysis of the Guidelines' recommendations for adjudicating cases.

Since September 30, 1996, refugee claims by children in Canada have been decided with the *Child Refugee Claimant Procedures and Evidentiary Issues Guidelines,* section 65 of the Immigration Act (Kline, 1992). Although not legally binding (Elgersma, 2007), Canada is well-recognized for its initiative in this regard as it was the first of many countries to establish these guidelines (Sadoway, 2001). Children apply for refugee status as an 'unaccompanied or separated minor' for vastly different reasons. The category is intended to encompass any child who does not have parent(s), guardian(s), or family members physically present upon arrival to Canada. This includes members both arriving with the child to the country, or those that are already on Canadian soil.

Guidelines specifically for child claimants not only officially recognize that childhood is, to some extent, a distinct developmental period, but also legitimizes the state's involvement in governing child claimant applications. The appeal of such policies, laws, and guidelines to officials' derives from how they serve as powerful – and, in the mind of the state, necessary – governance tools. Often, this governance occurs when state officials deem that families cannot or do not perform their pastoral duties and the state intervenes or assumes child-rearing duties. In such contexts, particular notions of children and childhood are formulated through rules, definitions and provisions, ostensibly setting the parameters for successful child claimants. Establishing a specific provision for child refugee claimants also creates the appearance that these cases are adjudicated in an objective and rigorous way.

Constructing children as vulnerable, dependent, and less mature than adults, as portions of the policy tend to do, justifies a welfare approach to child claimants, which one would think might tend to translate into an open-door policy for all child claimants.

If, as Canadian policy and rhetoric profess, child protection is a priority, then children, particularly those who have parents that condone their illegal attempt to enter other countries, should be granted admission to Canada because those parents are effectively abandoning their children. However this is not always the case; although the policy on the surface reflects a welfare state approach it does not necessarily follow that it is more liberal in allowing children entry. The welfare state is either a 'Nanny State' (Cradock, 2007), that creates dependent and morally regulated subjects or is a manifestation of social control exercised under the rubric of empowerment (Garland 2001 as cited in Cradock 2007:153)[28]. Both of these frameworks are powerful governing approaches that allow, utilize and institutionalize constructions of childhood.

Through the embrace of various conceptions of childhood, these guidelines provide the discretionary space to both protect and reject children's claims. By empowering children to speak on their own behalf and to be entitled to rights, the law makes it easy to construct children as responsible for their actions. The policy is designed to allow for such variable claims. In appealing to various understandings of childhood, the guidelines reinforce ideologies for IRB officers and the Tribunal to draw upon and apply in a highly discretionary fashion.

IRB, Law and Policy: How are Claims Decided?

The decision to accept or reject a refugee claim, for both adults and children, is made by members of the Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board (IRB). The IRB is Canada's largest administrative tribunal (Immigration and Refugee Board Canada, 2006). A tribunal, like a court of law, is a venue in which cases are heard and the outcomes directly affect the legal rights of a

[28] For work that examines neo-liberal conceptions of childhood in the legal system see Cradock 2007.

person. The decision-making process, however, is not adjudicated by a judge and/or jury (there is a judge only in appeal cases), but rather, a panel of individuals who report to Parliament through the Minister of Citizenship and Immigration Canada (CIC). Despite this reporting requirement, the IRB is independent of the CIC and the Canadian Border Patrol (Immigration and Refugee Board Canada, 2006). The Tribunal process is defined as:

> Flexible and can take many forms so long as it ensures that the IRB makes well-reasoned, efficient and fair decisions. The IRB tribunal process is based on Canadian law, Canada's international obligations and Canada's humanitarian traditions (www. http://www.irb-cisr.gc.ca/en/about/publications/overview/index_e.htm#process).

According to this definition, refugee officers decisions must incorporate several forms of law, but are otherwise only expected to be well justified. Like the process, the environment in which cases are determined is also flexible. According to the Directorate, "[t]he setting and procedures for hearings are generally informal, so evidence is not limited by technical or legal rules"(Immigration and Refugee Board Canada, 2006). Such instruction suggests that laws and conventions can act as obstacles to IRB officers assessing each child's claim, and are therefore not always the most prudent approach to decision-making. Despite the informality implied in the description of the decision-making process, claims for both children and adults are decided by an administrative Tribunal process that is described as 'similar to what happens in a court though less formal' (http://www.irb-cisr.gc.ca/en/references/procedures/index_e.htm). For example, like a court of law, the tribunal considers previous case outcomes. Although there appears to be a great space for discretion in making these decisions, refugee officers' can be bounded by law, procedural justice and previous case outcomes.

Cases are processed and built by the claimant's legal counsel, who advocates on their behalf. The IRB officer, upon reviewing a case, decides whether they support the refugee claim or not and proceeds accordingly. In making claims to support their positions both legal counsel and the IRB officer draw on various forms of evidence, such as the Personal Information Form (PIF), and expert testimony, as well as legal knowledge. As discussed in chapter three, legal knowledge, includes policy and law, and also includes evidence that is validated in the court proceedings.

The 'designated representative' is a distinctive and unique provision for unaccompanied child claimants that further asserts that children require the protection and assistance of the state[29]. This assistance comes in the form of a person is analogous to a parental guardian, is assigned by the court ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996), and is responsible to advise, support and advocate on behalf of the child[30]. Those eligible to be assigned as the designated representative include a 'trusted friend', 'professional', 'social worker or lawyer' (Elgersma, 2007). Regardless of who is chosen, particular criteria must be met in order for an individual to be deemed a designated representative. In British Columbia, the province where the cases discussed in the following chapter were heard, this process is broadly described as the decision of a team assembled to assess who the best representative is, allowing for several interpretations for who is best suited to represent the child (Elgersma, 2007)[31].

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[29] Internationally an example of similar representation in the legal process is seen in Norway. The Norwegian Parliament has implemented an Ombudsman for Children to promote children's interests (Flekkoy, 1991)

[30] Unlike adult or child claims made within a family unit, unaccompanied children receive a designated representative, as well as a social service agent, and a refugee claim officer (RCO) (this also applies to single adults and family claims).

[31] In Canada, Quebec, Ontario and British Columbia are the most frequently receivers of unaccompanied child claimants. Although there are similarities concerning the treatment of these types of refugee claims,

The designated representative is a classic example of state involvement in children's lives in the absence of family guardians (or, in other cases, guardians deemed appropriate). Assigning an individual to guide and support a child through the legal process is synonymous to a parent representing their child's best interest. Both are expected to guide and serve the needs of the child. The designated representative preserves and reinforces the notion that children require parental care and in the absence of that guardianship the state will intervene to serve the best interest of the child. The mandatory assignment of the designated representative therefore reflects the prominent western conception of childhood: that children are vulnerable, immature and incapable of making decisions that affect their well being in the absence of an adult. The caring and protective nature of this portion of the policy provides insights into the type of child that is the object of protection, and, as will be discussed later, what type of child is not.

Protecting Children through the 'Best Interests of the Child'

The concept 'best interest of the child' is one of the most prevalent themes in the Guidelines, and is mentioned in the first line of the section that outlines the general principles("Child Refugee Claimants Procedural and Evidentiary Issues," 1996). Childhood, it seems here, is a period of development where children's best interests are better evaluated by their adult counterparts. Such a governing principle not only reflects the western notion of childhood (as being in need of protection and guidance) but also operates within the 'parens patriae' philosophy, which literally translates to mean 'father of the people', and refers to the right of the state to usurp the rights of parents when the

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each have instituted their own eligibility criteria (Elgersma, Sandra, Parliamentary Information and Research Service, Library of Parliament, October 11, 2007).

state deems it to be necessary. This jurisdiction has been characterized as 'theoretically limitless', and able to 'extend beyond the powers of a natural parent' (Blanchard, 1996).

Although the concept 'best interest of the child' is historically mature in western law, it is also constantly criticized for being an indeterminate concept, in that it provides the justification for various decisions[32] (Krieken, 2005). The broad nature of this concept therefore provides minimal guidance for decision-makers and leads some to regard the 'best interest of the child' as a 'juristic black hole' (Blanchard, 1996). A child's best interest is a concept that allows for the consideration of an array of factors and therefore provides minimal guidance or boundaries for legal decision-making. The mandatory use of this broad category complicates rather than simplifies the adjudication process as it expands the rationales and knowledges that can be used to justify decisions. Some of the issues considered in children's refugee claims are decided using similarly broad, and arguably indeterminate, categories. Under the rubric of the best interest principle, risk of neglect and persecution for each child claimant is assessed. Like the best interest of the child, these risks can be shaped by cultural, economical, moral, and social factors – this range provides an array of justifications for almost any legal decision.

In unaccompanied child refugee cases, members of the tribunal (IRB officers) decide on what constitutes the best interest of the child. In fact, the guidelines outline the factors an IRB officer is expected to include in applying this principle in the decision-making process. The guidelines state:

> The phrase 'best interest of the child' is a broad term and the interpretation to be given to it will depend on the circumstances of each case. There are many factors which may affect the best interest of the child, such as the age, gender, cultural

[32] Some other criticisms include ways by which men (re-) exercise power over women and children (Smart & Sevenhuijsen, 1989), and a way for society to be dominated by welfare professionals. (Fineman, 1988).

> background and past experiences of the child, and this multitude of factors makes a precise definition of the "best interest" principle difficult ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996).

The inclusive nature of this definition implicitly acknowledges that there is no single prescription for assessing the capabilities and maturity levels of children, implying that age and social and cultural background may only tell a partial story. As indicated by the definition, factors such as age and cultural background shape childhood experiences, which ultimately affect their comprehension and maturation. Such an individual approach increases the factors that can be included in a decision. The 'best interest of the child' as a governing principle therefore offers several factors to include in the decision-making process.

Madame Justice McLachlin of the Supreme Court of Canada's echoes concerns with including several factors in such 'best interest' determinations. In the case of Gordon v. Goertz (S.C.C., no24622), she describes the difficulty with determining what exactly a child's best interest is. She states:

> The best interest of the child test has been characterized as 'indeterminate' and 'more useful as legal aspiration than as legal analysis'…The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interest to expediency and certainty (Gordon v. Goertz , S.C.C., no.24622).

Justice McLachlin's comment reflects a practical (or working) legal knowledge of the difficultly with this concept. Her comments echo the challenges of applying this concept in legal decision-making. While she acknowledges that the 'best interest' as a concept is indeterminate, she also points to the difficulty in defining and applying a 'precise' definition of a child's best interest. In response to this challenge, she posits determining a child's best interest through 'legal aspiration' rather than a 'legal analysis'. Justice

McLachlin juxtaposes these approaches to show the need for discretionary space in assessing a child's 'best interest'. The broad definition creates a space by which various governing ambitions can be realized through the constitution of various conceptions of childhood, and the nexus of interests in determining the 'best interest of the child' changes the discretionary nature of this governing concept (Krieken, 2005).

To summarize the discussion thus far, invoking the best interest of the child is a discretionary exercise. Acknowledging the existence of the various factors that shape children's childhoods creates a space to rationalize many different potential decisions. As broad as it may be, however, the discretionary space is not infinite in scope. Instead, discretionary power is bounded; it can only be exercised to support claims that reflect particular ideas concerning children's needs and best interests. Specifically, the comprehensive list of factors outlined in the guidelines as considerations in determining the best interest must be invoked, consulted or some how incorporated. This process involves choosing what types of knowledge, evidence and considerations to prioritize – such as age or culture. Weighing one factor more heavily than others under the rubric of determining the child's best interest, does not provide precision but again requires individuals to analyze individual cases. The 'general principle' of determining the best interest of the child therefore offers little reprieve from the complexity of decision-making in cases dealing with children. Instead, it creates a forum in which expertise, legal, and extra-legal knowledges can enter into a debate to allegedly determine children's needs and interests.

Protecting 'Minor Children': Age as a Determinate of Eligibility

In the refugee guidelines the treatment of children is initially rationalized by age. The unaccompanied child procedures apply only to claimants of 'minor status', which include 'any person under the age of 18 who is the subject of proceedings before the CRDD' ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996). Children under the age of eighteen are governed using distinct policies that reflect the dominant idea that age marks the presence (and/or absence) of particular characteristics and capabilities. The explicit purpose of these guidelines is to accommodate for the potential differences in comprehension, development and knowledge between children and adults as it is recognized that the procedures applied to adults 'may not always be suitable for child claimants' ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996). More explicitly, it reflects the idea of childhood as period of development and that age marks the stages in that development.

The identification of a child's age is not a 'straight forward process'(Elgersma, 2007). For various reasons (i.e. a child might be fleeing from a country in turmoil), children applying for refugee status cannot prove their age or provide other forms of identification. According to a Parliament publication entitled 'Unaccompanied and Separated Minors as Refugee Claimants (Elgersma, 2007), the child is responsible to prove their identity. The document states '[a]lthough some countries use physiological measures to try to establish age, in Canada the interviewing officer is required to use documentary evidence or testimony. The burden of proof rests on the claimant, who will be treated as an adult if the immigration officer is not satisfied that he or she is more likely than not a minor' (http://www.parl.gc.ca/information/library/PRBpubs/prb0715-

e.htm#intro). This caveat illustrates the level of discretion allotted to the IRB officers. The power to decide if a claimant is a child shapes the entire adjudication process, as the claimant's case would not be eligible to be determined under the unaccompanied refugee child guidelines if deemed otherwise.

Canada's relationship with the United Nations further muddies the process of determining age. In addition to biological age and the discretion to determine whether an applicant is of 'minor status', the United Nations High Commission for Refugee Guidelines (UNHCR), articulates yet another procedure that Canada is seemingly obligated to follow. The UNHCR outlines that where there is no proof of minor status (such as that a person does not know or have identification to prove his or her age), officials should believe the claimant's testimony to their age, suggesting that children should be given the benefit of doubt. When a child 'looks' to be his or her alleged age, the trial proceeds accordingly, but when they do not, there is a subjective assessment of the claimant. Canada, as a signatory to the UN, and therefore is required to abide by such policies, while also adhering to their local policies.

Canada's treatment of refugee children is also praised because of its public commitment to the UNHCR, particularly in light of the fact that not all countries adhere to the UNHCR. In the UK, like Canada, the age of unaccompanied minors is determined by untrained immigration officers, and relies solely on appearance and demeanor of the claimant. This contrasts with the approach of countries such as the Netherlands that use techniques such as bone assessments to verify age (Ali et al., 2003). Despite Canada's less invasive approach, the policies in place can be criticized because they allow for the discretion to disqualify claimants as children with little biological or objective proof.

Instead, there is the prospect that children that are not consistent with an IRB officer's image of a child can be refused the protection of the Guidelines.

The implementation of various strategies to assess age in both Canada and on an international scale sheds light on one characteristic of childhood that is accepted as valid both globally and locally – children are perceived as distinct from adults and therefore in need of protection. Yet at the same time (and this is more so in the Canadian Child Claimant Guidelines than the United Nations High Commission for Refugee Guidelines), the provisions are written in a way to allow for IRB officers to dispute the age of a claimant.

Although no doubt less intrusive than something like a bone scan, including physical traits extends the definition of age beyond chronological years of life. 'Childhood' for claimants is not only defined by the number of years a person has been alive, but also the physical characteristics that illustrate their mental and physical development. In terms of the guidelines, assessing a child's appearance to determine age creates more discretionary space to institutionalize a wider set of characteristics that speak to childhood. In an assessment an IRB officer does not only have the discretionary power to decide whether or not an applicant is a child but, in making such determinations, are further reifying particular characteristics of childhood.

Including physical characteristics in the assessment of age is not completely surprising, because, along with demeanor they are age indicators. Truths about children are in part generated from appearances - images of childhood, as shown by Ariès (1962), represent meanings such as innocent and vulnerability. Reflecting a development, or psychological approach, the idea instituted by this policy is that children and childhood

are biologically recognizable as distinct from adults and adulthood. Although there are undoubtedly some traits that are consistent with very young people, identifying characteristics that distinguish children from adults when the distinctions are slight are much more complicated, and are more likely to be overlooked when assessments are used. What this policy does not do is provide clear indicators to assess applicants whom are close to the legal age of adulthood, and to consider those that might be more or less mature than the 'averages' determined by development theories and premised on Eurocentric definitions of childhood.

The ability to determine childhood through an appeal to physical appearance further provides an IRB Tribunal with discretionary space to determine whether or not a child claimant should indeed be treated as such. The malleability of age claims, coupled with the discretionary space embedded within the guidelines already mentioned, again provides the space for tribunal members to invoke different conceptions of childhood when they deem necessary.

Protection & Punishment: The Power to Assess Comprehension and Capabilities

The differential treatment between adults and children is founded in the assumption that age and physical development shape levels of maturity, comprehension and overall development. Age, however, is no longer accepted as a sole indicator of these differences. As shown in chapter two, socio-cultural experiences, amongst other factors, alter the development of children. Acknowledging the complexity and variability in childhood, socio-cultural factors that distinguish children from adults are also used to assess age in the legal process. Unlike in the days of John Stuart Mill, when age was believed to perfectly measure the 'maturity of faculties' (Mills, 1974), today evaluative

technologies, assessments, and disciplinary knowledges complicates contemporary understandings of age and maturity. Psychology and sociology for example offer different ways to understand age and childhood. The phase of childhood is no longer just marked by age, but also by comprehension and competence, making it more dynamic. This also creates the need for expertise to assess such capacities, as shown in the following chapter.

Acknowledging the differences between children and adults, as well as the developmental rate of children, the guidelines include provisions to elicit evidence to assess levels of competence. The justification for these provisions centers on the assumption that a child's age has an effect on her or his level of competence, maturity and overall comprehension. Continuing to reflect the idea that children are 'adults-to-be', the guidelines acknowledge that children differ in their ability to remember, and recall details. This presupposition reflects notion that childhood is a period of physical and mental development. The developmental rate of children differs based on an array of factors, and to accommodate for such a complex series of provisions tests are used to assess comprehension.

An example of the assumptions about children's distinct nature to be less competent and able than their adult counterparts is evidenced in Section B1 of the guidelines, which state 'children are not able to present evidence with the same degree of precision as adults with respect to context, timing, importance and details [and that] children may manifest their fears differently from adults' ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996). This statement implies that children cannot always articulate detailed information when presenting their refugee claim, thereby

allowing tribunals to 'fill in the blanks' when necessary. The possibility that some children will not be able to communicate the information to the courts due to fear, trauma or a lack of competence points to further obstacles and challenges in deciding refugee claims. Several provisions are in place to assist in obtaining evidence from children. Some of these are discussed below.

The guidelines outline several circumstances in which special treatment should be given to children. As suggested earlier, it is evident that age is a significant factor that shapes knowledge in criminal proceedings. Age, however, is not the only reason that children are perceived to have limited knowledge; there is also the potentially limited comprehension of the concept of 'truth', and the significance of the statements and testimony. The guidelines necessitate that:

> 1) The process which is to be followed should be explained to the child throughout the hearing to the extent possible, taking into account the age of the child;
>
> 2) Before hearing testimony from a child, the panel should determine if the child understands the nature of an oath or affirmation to tell the truth and if the child is able to communicate evidence;

Considering a claimant's age and comprehension illustrates awareness that competence and knowledge differs by child. Once again, however, it appears that the Tribunal has considerable latitude in how (or whether) these things will be assessed. IRB officers must ensure that child refugee claimants comprehend the process and have the ability to understand what is being asked of them in the process. This assessment is particularly important for determining whether children's testimony is legitimate. IRB officers are provided with little guidance, however, on how they should evaluate children's comprehension. This allows for a wide range of discretion in assessing their testimony.

Such assessments create what Floyd Martinson calls a 'concept of variable competence'. As he argues,

> "The concept of variable competence assumes that a normal child has a conscious mind; that he or she is rational, not delusional; can accurately enough perceive the situation and his or her place in it; and has sufficient intelligence and experience to determine what is in his or her best interest. In other words, a child may be able to give informed consent before having reached the age of majority" (Martinson, 1994).

Although not explicitly stated, the concept 'variable competence', is a way to assess a child applicant's ability to consent to the procedures as well as prove that they comprehend the proceedings around them.

Protecting the Fragility of Children: Testimony and Information Gathering

Further reflecting the understanding that childhood is a period of development and fragility, several practices are available to comfort children during their testimonies and the period of information gathering. Some of these provisions provide an informal setting for the child to testify, also the Guidelines suggest that children should be asked questions in a 'sensitive manner'. An informal setting increases the comfort level of a child, and conjures images of a vulnerable and fragile claimant, one who is unable to understand and deal with the formal sterile environment of the courtroom. The less formal procedure is intended to remove any hint that this is a legal process, and is instead designed to create a level of comfort in a trusting environment. This practice is however a legitimate procedure that is justified in the guidelines illustrating how notions of procedural justice are justified by invoking the idea of childhood as a period of vulnerability.

The most striking example of differential treatment between adults and children in the legal process is the extent to which the administrative element of this process is

minimized. Under Section B of the Guidelines ('Eliciting Evidence'), in addition to mentioning the potential impact of age on comprehension and competence, provisions for questioning and facilitating oral evidence are outlined. In addition to providing an 'informal environment', officers are urged to ask questions in a 'sensitive manner', and to solicit information as soon as possible. The justification for such practices includes the importance of recognizing that children 'may find it difficult to testify orally in front of decision-makers' ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996:7).

Creating an informal setting for the benefit of the child claimant, however, also creates the potential for children to misinterpret the informality as the absence of a trial. An informal setting is arguably a misrepresentation in that it undermines the seriousness of what is occurring. Although this procedure is often used in cases of child sexual abuse, these children are victims; not so with unaccompanied children. There is no presumption of innocence or victimhood, and if an applicant is made to believe that they are not in a legal environment, they are more likely to speak freely without consideration of their rights or the implications of their words. Such tactics are constructed as supporting the delicate nature of the client (an unaccompanied child without a guardian) and the circumstance (trauma and a lack of comprehension), but as will be shown in the next chapter, the information gained in this environment is as consequential as any presented in a courtroom. Moreover, it is given preferential status because it was ostensibly acquired spontaneously. Under the rubric of childhood, normal due process protections are therefore pushed aside, as children are unknowingly placed in an environment which

is designed to entice them to provide evidence that can later be used to blame or punish them.

The guidelines create the conditions for informal settings by arguing for the importance of cautiously soliciting evidence from children. They articulate that questions should be asked sensitively, that questioning should be informal, and that the following be considered:

> "In determining what evidence the child is able to provide and the best way to elicit this evidence, the panel should consider, in addition to any other relevant factors, the following: the age and mental development of the child both at the time of the hearing and at the time of the events about which they might have information; the capacity of the child to recall past events and the time that has elapsed since the events; and the capacity of the child to communicate his or her experiences" ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996).

Considering factors such as age and mental development once again reflect a psychological perspective concerning children's developmental ability to comprehend the questions and demands of the court. These factors not only distinguish children from adults, but also children from other children.

The guidelines reflect the idea that children as a group are potentially vulnerable, immature, and that they do not comprehend the legal system. Requiring IRB officers to assess children's individual level of knowledge and comprehension acknowledges that childhoods differ culturally and socially. This practice aims to account for these potential differences in children's comprehension and capabilities. All of this casts individual rights and procedural integrity in a new light.

Instituting Discretionary Power: Assessing the Evidence and Credibility of Children

In addition to the provisions in place to consider children's capacities to participate in the legal system, the guidelines have instructions on how to assess

evidence. Section BII provides a legally sound way to void all forms of testimony or evidence given by children. This section opens with the following statement '[t]he CRDD is not bound by the technical rules of evidence and may base its determination on any evidence it considers credible or trustworthy in the circumstances of the case' (page 8). This section is followed by several instructions that are necessary to consider '[w]hen assessing the evidence presented in support of the refugee claim of a child' (page 8). Among these provision is the requirement to assess the weight that should be given to the oral testimony. This is accomplished by considering 'the opportunity the child had for observation, the capacity of the child to observe accurately and to express what he or she has observed, and the ability of the child to remember the facts as observed' (page 8).

In conjunction with age, gender and cultural backgrounds, these provisions identify credibility, trustworthiness, and the capacity of the child as factors that can impact their evidence, and provide conditions to question, critique, and omit a child's testimony. What is absent in this discussion are indicators of what a 'credible' form of oral evidence would look like. This is a powerful omission, as it leaves no legal or instituted knowledge by which to counter claims of insufficient evidence.

It is not sufficient to say that the above provisions simply paint a picture of childhood as a constant period of vulnerability, and that all children deserve special consideration relative to adults. The IRB, after all, does reject a considerable number of child applications. As will be shown in the following chapter, these refugee claims are rejected on several bases suggesting that childhood is not invariably understood to be about innocence or vulnerability, and that all children do not simply deserve state protection. If that was the case, all of the unaccompanied child claimants would be

granted refugee status because some are constructed as active participants in the decision to flee their homeland.

Under the auspices of 'rights', the guidelines also stipulate that children should be provided with the opportunity to testify and make claims. The guidelines state that "[l]ike an adult claimant, a child claimant also has a right to be heard in regard to his or her refugee claim"("Child Refugee Claimants Procedural and Evidentiary Issues," 1996). Emphasizing the importance of rights and due process is characteristic of neo-liberal conceptions of childhood that incorporate the idea that children are empowered, autonomous, and entitled to individual rights. Constructing children as rights bearers in some ways equalizes the disparity between their abilities and those of their adult counterparts. Furthermore, neo-liberal governing rhetoric increases children's level of accountability, despite the existence of distinct law and policy that aim to minimize their accountability. Rights discourses, though empowering in some contexts, can potentially displace the differences between children and adults abilities, competence, responsibility and accountability. Individual rights are often assigned based on age which displaces, or at the very least minimizes, the impact of other factors that shape differences in abilities – in particular those noted in the guidelines such as maturity and competence. As shown below, the Guidelines allow children to be cast as responsible and cognizant when necessary.

Discretionary Power: Practical Effects of Conceptions of Childhood

Although the guidelines justify and institute distinct practices for adjudicating unaccompanied child claims, there still exists considerable latitude for tribunals to make the decision that they see fit. The guidelines (1996) even explicitly state this:

> *"The Immigration Act* does not set out specific procedures or criteria for dealing with the claims of children different from those applicable to adult refugee claimants, except for the designation of a person to represent the child in CRDD proceedings."

This statement has several implications, most importantly it illustrates that the only guaranteed distinction between children and adults is that children are appointed a 'designated representative' discussed earlier.

In practice, this statement provides a means to dismiss the effect of childhood when adjudicating a child's claim. As I show in the next chapter, stating that childhood is a distinct period but not stating what this should mean in practice acts at times to displace the relevance of other factors or forms of knowledge in decision-making. Discourses of childhood are powerful mediators for shaping knowledge and legal decisions. This seemingly innocuous statement embedded amongst other several provisions provide the ability to side-step several factors; these include emotional trauma of a boat journey, feelings of abandonment by parents, or the fear of retribution for those that are refused entry to Canada, as well other mitigating factors that are unique to childhood, such as children's inability to refuse the journey to Canada.

The incorporation of this statement, then, acts as a disclaimer or form of legal knowledge to treat children just like adults. This is important to note because it means that embedded within the guidelines objectives to provide provisions for child claimants is a legal way to justify the decision not to invoke these provisions. By stating that the only difference in treatment is the designated representative IRB official can invoke the necessity of children meeting the same criteria as adults forgoing consideration of the provisions. More pertinent to the discussion of this chapter, this comment shows that the guidelines do in fact presuppose an adult applicant.

As vague as the guidelines appear, certain portions denote rigidity. The most striking comments in the guidelines for unaccompanied child claimants is the one that states: *"*[w]ith respect to the merits of the child's claim, all of the elements of the Convention refugee definition must be satisfied"("Child Refugee Claimants Procedural and Evidentiary Issues," 1996)[33]**.** This provision directly contradicts others by refusing to differentiate between child and adult requirements for a successful claim. The mandate that children meet the same requirements as adults negates the differences between them that is delineated in other portions of the guidelines. In essence, this clause permits the tribunal to treat child applicants the same way they treat adults, as it allows for no consideration of differences in abilities, conditions, or mental capacities.

Enforcing the same criteria for children and adults claimants implies that children have the ability to make choices, and that they are therefore not always at the mercy or under the supervision of their guardians. This part of the policy therefore contradicts some of the other portions discussed earlier that are designed to address the difference in competence levels between children and adults. That there are identical criteria for attaining refugee status can have profound effects on the decision-making process, because it arguably situates children within the same neoliberal adjudication framework that adult applicants face. This creates the discretionary space to void claims that appeal to the discourses of childhood as distinctive to justify the rejection of child refugee claims.

To summarize, the Guidelines allow IRB Tribunals to accept or reject a child applicant's testimony, to interpret evidence about their case however they see fit, and to treat children as distinct from, or identical to, adults. The Guidelines appear to be

[33] See http://www.cisr-irb.gc.ca/en/references/policy/guidelines/child_e.htm

designed to grant IRB Tribunals the discretionary power to make and justify virtually any decision.

Discussion and Conclusion: The Potential Effects of a Multiplicity of Conceptions of Childhood

Analyzing the 'Child Refugee Claimants Procedural and Evidentiary Issues' guidelines above reveals several key aspects of childhood that are used to determine the worthiness of a refugee claim. Foremost among these are age, the best interest of the child, and competence, characteristics often associated with the western notion of childhood. Alongside these conceptions, there is evidence that childhood is not simply about innocence and protection, as evidenced by the appeals to responsibility, consent, and volition (either explicitly or implicitly) in the guidelines. The guidelines' incorporation of different understandings of childhood illustrates an attempt to balance both children's rights and address the differences between children and adults. The inclusion of both children's rights and vulnerabilities officially recognize the need to balance compassion and impartiality when adjudicating unaccompanied refugee claims in Canada.

In many ways, these are contradictory goals. Some parts of the guidelines reflect a conscious effort to address the effect of children's different abilities, comprehension, and culpability from adults. Yet the guidelines also clearly emphasize that successful child refugee claims must meet the same requirements set out for adults. This qualification has serious implications for including the role of childhood in legal decision-making. Evaluating a child's refugee claim using the same criteria as adults creates the discretionary space for IRB officers to minimize or even dismiss the impact of children's different capabilities when assessing the evidence in their case. It also institutionalizes a

particular notion of childhood, one that suggests children are accountable for their actions.

Canada's unaccompanied child refugee guidelines successfully outline a multiplicity of legally instituted childhood knowledges. These guidelines not only provide an array of childhood knowledges for IRB officers to draw on, but also make the guidelines themselves a powerful legal knowledge form. As discussed in the introduction, these guidelines are revered as an illustration of Canada's commitment to protecting children on an international scale. On the surface, the libertarian image prevails, designing a policy to address this particular population suggests that Canadian governing is progressive. The analysis in this chapter shows, however that the various conception of the childhood embedded in these guidelines creates the discretionary space for IRB officers to determine nearly any decision. Laws and policies bound discretion yet when they are written in a way that allows the inclusion of an array of factors they increase the legal knowledges necessary to justify case decisions. The ambiguity of childhood represented in the guidelines ultimately provides the tools for IRB officers to protect some, select children while maintaining the official position of a liberal and concerned Canadian government. Instead of protecting all children, these guidelines are designed to appear liberal and progressive, yet my analysis reveals that such rhetoric masks the true effects of this policy that prioritizes protecting its borders rather than children, particularly non-Canadian children.

What the analysis in this chapter also suggests is that the Guidelines do not explain the variation in decisions, and that to understand when and why particular conceptions of childhood are used to guide the claim-making process (which involves the

interpretation and inclusion of evidence) it is necessary to sociologically examine particular cases. This forms the focus of the next chapter.

Chapter 5

Evidence Inclusion and Exclusion and the Constitution of Childhood: Legal Decisions-Making in Unaccompanied Child Refugee Applications

Introduction

As discussed in chapters three and four, law and policy constitutes only part of what is necessary to understand how legal decisions are made. In the previous chapter I looked at the Canadian "Unaccompanied Child Refugee Guidelines" to examine how this form of legal knowledge[34] outlines the criteria for refugee status. My analysis illustrates that varying conceptions of children and childhood are institutionalized in the guidelines, creating the legal tools to justify nearly any legal decision. Childhood, then, is a form of legal knowledge, delineated by various, often contradictory, characteristics. The categories child and childhood describe the social world, in particular children's responsibilities, capacities and abilities in relation to adults and their position in society. The variation in the characteristics that constitute childhood and children makes these categories powerful governing tools; the institutionalization of various forms of childhood allows for different aspects or perspectives on childhood and not others to be employed at one time in order to justify a variety of different legal decisions.

In chapter four I show that the Child Refugee Claimants Procedural and Evidentiary Issues Guidelines do not provide clear directives for adjudication, but they instead create discretionary space for IRB officers to make and justify a wide range of decisions. Consequently, understanding how decisions are made involves examining the

[34] The term legal knowledge is used to refer knowledge produced in the legal system. It is formulated in the legal process that is shaped by the discretionary process of fact and claim construction that involves various knowledge moves.

process itself – that is, the evidence that is accepted or rejected, and how in the process different conceptions of childhood are invoked. Since the guidelines do not outline a distinct terrain that can trace and predict legal decisions (White, 2004), it is more useful to think of legal decisions as a product of legal knowledge that is embodied within legal actors (Bourdieu, 1997). Understanding legal decisions can only be achieved through examining the discretionary processes of fact construction and claim-making (asserting whether the child is a refugee or not).

In order to support their desired outcome, legal actors perform knowledge moves, such as "bracketing", which isolates how particular information or practices (Valverde 2005) are employed. Examining how facts are constructed illustrates that refugee officers and members of the IRB exercise discretion to "bracket" certain types of knowledge (M. Valverde, 2005) and to produce the facts necessary to support their claim. This knowledge move can work independently, or in conjunction with other moves, but ultimately each attempts (they are not always successful) to establish "facts" to invoke particular rules ("do sections of the guidelines apply or not?") and claims ("is a child a valid refugee claimant or not?").

In addition to documenting how knowledge moves establish facts and claims, I examine the role that conceptions of childhood play in how facts and claims are constructed. I find that drawing upon different constructions of childhood allows for similar pieces of evidence to be used to support different claims. A detailed examination of the decision-making process shows how abstractions of childhood vary in legal decision-making and illustrates the role of discretionary power in this process. The focus

on which conceptions of childhood are drawn upon adds a new dimension to legal studies because it shows how knowledge moves employ particular understandings of childhood.

The cases of children from China's Fujian province are one way to examine what I call (as discussed in the introduction) "governing *with* childhood". Illustrating how children are governed with childhood involves examining the power of legal practices to institutionalize particular concepts of the child and childhood. To do this, I investigate when and how particular conceptions of the child and childhood are invoked to make sense of evidence, establish claims, facts, and rationalize case decisions. Case outcomes are produced by various social actors and can be better understood through examining the process of legal decision-making and its relations between facts and rules (or laws).

This approach goes beyond boundary mapping (M. Valverde, 2006:591) which draws distinctions between, for example, politics and economics, historical and empirical, and can be accomplished using theoretical tools. A critique of boundary mapping is that by nature of its objective it presumes that law is unified and operates in ways that allow for lines to be identified. To this end, boundary mapping black boxes the operations of the legal system failing to integrate the unified image it attempts to deploy. In contrast, the aim of this analysis is to highlight the contradictions in decision-making, and particularly when and how some knowledge is validated and others are silenced. What my analysis reveals is the power of childhood as a governing tool to justify particular decisions in order to prevent particular legal practices in the future.

To date, socio-legal scholars working in the area of legal claim-making have identified the narratives of judges and attorneys as actors that discursively sustain, undermine, and/or negotiate expertise and other forms of evidence (Richman, 2005). This

is in contrast to the "judicial view", which posits that legal decisions are made with little room for discretion (Milovanovic, 1988). The analog to these authorities in refugee cases is refugee officers and the tribunal members (who adjudicate case and are referred to as panel members). Like judges and attorneys, officers construct, discredit, and/or confirm "facts" and claims through language and interpretation (Bogoch, 1999; Matoesian 2001) and as will be shown, by employing various knowledge moves and conceptions of childhood.

In addition to affirming some findings in socio-legal research, my analysis adds a new dimension to the growing body of literature on legal operations, the production of knowledge claims and the governance of children. While examining the discretionary practices in legal decisions, I focus on how particular notions of the child and childhood are strategically used to shape and constitute facts and claims. To do this, I investigate claims and rationales in the legal decision for each case. This involves paying attention to what types of evidence are used to establish facts (that substantiate claims) and how rules (law and policies) are applied in light of these facts. Refugee officers employ particular language and decide to interpret evidence in a certain way to establish facts and claims that have profound effects on substantiating their decision to reject or support a refugee claim.

As discussed above, establishing facts involves marshalling evidence to support a particular point or assertion. In real terms, this involves interpreting a child claimant's testimony and other evidence to discern the responsibilities and abilities of children. In other words, IRB officers, like everyone else, determine facts and assert claims based on their perception of the social world – that are rooted in discourses, their personal

experiences and opinions. An IRB officer's understandings of the child and childhood shape how they make sense of evidence.

It is not only important to examine the fact-rule relationship, but also the various factors that shape how facts are described and prescribed through law. One such factor involves the discretionary power of the arbiters of facts. The representation of particular conceptions of the child and childhood are reflected in facts and the Refugee officer, who is the producer of facts (Chalaby, 1996), employs legal knowledges, texts and discourses to make sense of the individual child claimant. The real determining force in the construction of the child and childhood are "the conditions, the properties, and the existence of the texts agents produce" (Chalaby, 1996). It is these texts that hold weight in claim-making, and examining the process of claim-making illustrates the conceptions and strategies used by legal agents.

This chapter, and this dissertation in general, aims to show the variability in legal decision-making and the role of understandings of childhood in this process through empirical investigations of legal processes. At the same time, however, I also show that this discretion and variability is not random, but that it adheres to principles and concerns that extend well beyond identifying the best interests of the child.

I find that refugee officers and "panel members" (IRB officers who adjudicate these cases) choose to bracket child claimant's testimony, family relations, extra-legal (often low-status) knowledges, expert knowledge, and particular understandings of childhood in some cases and not in others (despite the similarities between these cases). One example of bracketing consists of the dismissal of expert testimony that presents 'filial piety', or the idea that children will obey and respect their parent's wishes

regardless of what the request may be, as a framework to understand a child claimant's level of obedience to their parents. This knowledge move requires the IRB to draw upon certain knowledges of childhood, and the ability of children to resist their parents' request. Determining that children could resist their parents' wish provides the justification to ignore neglectful parental actions and dismiss some children's claims.

I also argue that there is a trend in these decisions. Refugee officers and the panel members (IRB officers who adjudicate these cases) make an effort to ensure that applicants do not successfully attain refugee status based on cultural family relations such as filial piety.[35] Despite the evidence that suggests filial piety often explains these children's predicaments, refugee officers' bracket this evidence, ostensibly because of concerns about the potential for filial piety to increase the opportunity for all child claimants from China to successfully receive refugee status. In other cases, however, although filial piety is not directly used to justify a decision, the IRB argues that there is evidence of parental neglect based on the applicant's claim that they were forced to take the trip. This claim could also have been made using filial piety because this Chinese cultural practice explains children's compliance to their parent's requests. Instead, the IRB constructs the claimant's compliance as evidence of force and neglect avoiding the need to invoke filial piety, a Chinese specific discourse of family relations.

The decision to support the applicant's claim of neglect, without using filial piety as a justification, further supports that the IRB is attempting to ensure that such a claim cannot be used to approve a refugee application. Although the refugee officer supported these two applications (Zhang and Li) the panel members rejected the refugee officer's

[35] Although discussed more fully below, filial piety can be defined as the obligation of children to obey their parents' wishes, because it is parents that know what is best for the familial unit.

recommendations and ordered that their cases be reviewed. This move by the panel members further supports my argument that claims which apply to large populations are rejected or at the very least cautiously approved, in order to prevent the possibility of these cases supporting the success of other applicants in similar predicaments.

Discretionary practices are not random, then, but they are instead driven at times by the IRB's fear that future cases could cite current proceedings to support their claim.[36] Discretionary practices also point to the importance of examining legal decisions in specifically social and cultural contexts.

As mentioned in the introduction, the following three themes guide my inquiry:

1) Whether the child claimant consented to the trip.
2) Whether there are positive or negative family relations (i.e. evidence of neglect or care).
3) Whether the child claimant is credible

Before moving on to the analysis itself, however, I will first describe my method and the four cases.

Fujian Chinese Refugees in British Columbia 1999: Cases and Method

As discussed in the introduction, I chose my cases after conducting an extensive search in Quicklaw, a legal search engine that catalogues legal cases, articles and commentaries on Canadian legal decisions, using key words such as "unaccompanied", 'separated", "children", and "refugee". Quicklaw contains judicial decisions, appeal decisions and case summaries. I also used RefLex, a search engine for Immigration and Refugee Board (IRB) decisions, available on the IRB Canada website.

In most instances, the information available through these search engines includes the decision that outlined the facts that tribunal (referred to as 'refugee officer'

throughout this chapter) drew upon to rationalize their decision. I decided to review the entire case files that I obtained in Ottawa because they offer more information than what was available online. Case files include the complete public file[37]; specifically, the factums (which outline each party's arguments for why their client's position should prevail), transcripts, the list of evidence submitted, appeal applications, as well as the oral decisions (similar to that found online). These documents allowed me to analyze the types of facts and claims presented by both the IRB and the child's counsel to identify the opportunities for discretionary moments. This type of analysis could not be accomplished by only examining the case decisions.

I examined unaccompanied child refugee claims from Fujian province because they allow me to compare case outcomes that deal with similar legal issues and draw upon similar knowledges about children. Furthermore, they provide a transparent instance where the characteristics of childhood are openly discussed and debated. For example, despite the similar conditions in which Fujian children arrived, both their personal characteristics (such as age) and the basis on which they claimed refugee status varied, as did the decisions rendered about them. Some claimed refugee status based on "fear of persecution," others "fear of membership to a particular social group"[38], both of which are legitimate bases upon which to claim refugee status. The success of these claims in part depends on the applicant's ability to establish that she/he had a well-founded fear of persecution for reasons of membership in a particular social group (age, background,

[37] Some parts of files are not made public usually in order to protect the identity of children. In these cases it is indicated in the file that evidence has been removed, however, in the cases I chose, this was not the case.

[38] See Guideline 3, Child Refugee Claimants, Procedure and Evidentiary Issues. Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act. This document has been in effect since September 30, 1996.

religion). These categories suggest that commonalities such as background and social status, as well as whether a group is seen negatively by the government in their country of origin are all factors that would increase the likelihood of persecution (Carasco, 2007). Still others cited "persecution due to religious beliefs" or 'suffering serious penalties for having left China illegally" (2746-00:2). That is not to say that the situation of claimants were all legally unique; several applied for refugee status under the same claim (fear of persecution, etc).

Given the similarities between several of the cases used in this chapter (all children came from the same location, in a similar fashion, at around the same time, etc.), on several occasions cases were adjudicated together. Even in these circumstances, the evidence, perceptions of childhood, and rationales for decisions varied, suggesting that the type of claim did not exclusively or even primarily explain the outcomes. The unique 'facts' of their situation mattered and these facts were informed by often very different understandings of the abilities, rights and, expectations of children.

Case Descriptions

Case 1: Mei Feng Xiao (IMM-953-000, V99-03527)

Canadian authorities caught Mei Feng Xiao on the shores of British Columbia at age 16 in a dilapidated boat with 134 other children (V99-03527). Although some of her claims overlapped with those of other Fujian child claimants, her case was heard separately. Xiao's case was separated because she grounded her refugee claim on fear of persecution based on religious beliefs, and on the fear that there were additional risks imposed on females if they return to China. On February 9, 2000, the Canadian Refugee Determination Division (CRDD) decided that Xiao did "not meet the evidentiary burden

required to establish that her fear of persecution in China is well-founded"[39] (V99-03527: 00139). Her counsel appealed the case, and the appeal was heard on January 31, 2001. On March 16, 2001, the judge dismissed the appeal, claiming that there was not an error in law (the only grounds on which an appeal can be made).[40] In the upcoming cases the same three issues surfaced: whether or not she consented to the trip, the nature of her relation with her family, and the credibility of her claim.

Case 2: Lead Case: "Lily" (TAO-3535, TA0036605)

The court established a lead case to provide a standard for similar cases. Typically, such cases contain longer than usual discussions of the rationales for the decisions, so that those adjudicating subsequent cases will have a fairly detailed instruction at their disposal. "Lily" was at the centre of one such case. Although Lily was not one of the 134 children on the boat mentioned in the introduction, she came to Canada at around the same time, but instead arrived at Vancouver airport along with 70 other children (TA00-3665:47). Since her situation was comparable to those who were captured on the shores of British Columbia, her case was used to adjudicate these claims. The use of this form of transportation distinguishes her case from the others examined in this analysis who traveled by boat, and whose ultimate destination was the United States, not Canada.

Lily's case analysis is completed using the panel member's decision. In this lengthy decision (52 pages) the members justify their decision by outlining the evidence that their decision was based on. To analysis Mei Feng Xiao, Zu Huang Li and Young

[39] Her claims of fear and persecution were based on the fear of religious and gender persecution. I chose not to discuss these issues because they are elaborated upon directly to this case in the work of Stasiulis (2002) and generally in the work of Sadoway (2001).

[40] In appeals, new evidence cannot be introduced, unless the appeal is based on an error of law that led to the failure to admit the evidence.

Ming Zhang cases, I also examined the transcripts that discuss the evidence drawn upon by the refugee claims officer to decide on their position on each case in addition to the panel member(s) (also known as the tribunal) decision.

Case 3: 16 Young Males (IMM-2746-00).

A group claim was heard that involved 16 young male claimants, all under the age of 18. In the oral decision, less than one page of explanatory notes defends rejecting all 16 claims. The primary rationale for rejection was that the young males had all consented to migrate to Canada, and that none of them was therefore credible in terms of their claims to refugee status. These claims, and the startlingly brief explanatory notes, illustrate the centrality of consent and credibility in the decision-making process, so much so that the mere act of consenting to come to Canada was sufficient to reject the cases. No mention whatsoever was made of the "Child Refugee Claimants Procedural and Evidentiary Issues" guidelines, presumably because the case that each of these claimants consented appeared both evident and factual that it was sufficient to justify the denial of their refugee claims.

This decision illustrates a very particular knowledge move. Denying these children refugee status based on the 'fact' of consent made claimants ineligible for refugee status. On a larger scale, this move also created a standard for using consent as a basis to reject applications. It implies that if a claimant is found to consent they cannot be a refugee. These cases are the first of the examples that illustrate that the IRB officers are motivated by creating legal trends that allow for the rejection of claims. These cases are somewhat exceptional in how tersely they were rejected; the four cases examined below involve lengthier deliberations, and therefore provide more insight into how childhood is

constituted and evaluated. Unlike these 16 cases, the claims of Xiao, Lily, Li and Zhang, assess and build evidence to determine the presence or absence of consent.

Case 4: Zu Huang Li and Young Ming Zhang (IMM-2894-00, 2893-00, V99-02955,02926,02950)

On April 20, 2000, Zu Huang Li, seventeen years old, and Young Ming Zhang, age fifteen, applied for refugee status on the grounds that they had a well-founded fear of persecution due to [their] membership in a particular social group, which was defined as "minor children who are sent from China into servitude and who fear incarceration upon return due to their illegal exit" (V99-02926 and V99-02950:1-23). Li and Zhang's claims were heard separately from 18 similar claims of young males.

Both were declared to be conventional refugees, "[t]he board (or the members who constitute the tribunal and are IRB officers) concluded that the Respondents' parents were the agents of [their] persecution because they forced their son into situations of systematic hardship" (IMM-2894-00:6-7). The board justified its decision by recognizing that the conventional definition of a refugee is "forward-looking" and that the respondents faced more than a "mere possibility" of persecution if returned to China. The Board concluded that it "cannot be sure that [the claimant] would not be subjected to continuing family coercion" and possibly be again sent away on another boat ((IMM-2894-00:4).

In the section below I show how the findings that some claimants consented to the trip and others did not is built through constructing facts in a way that allows alternatively for the rejection and validation of various forms of knowledge.

Expanding the Boundaries of Consent: Knowledge of the Trip

One of the three areas that constantly surfaced in the adjudications was a child's level of consent in making the trip to Canada. Establishing consent constitutes the claimant as a voluntary migrant rather than a victim. This claim is central for rejecting or accepting a refugee claim, as 'voluntary migrant' are not legal grounds for a child refugee claim. If a child is deemed to have participated or failed to reject his/her parent's demands they are perceived as a voluntary migrant. On the other hand, if a child's actions illustrate either an effort to reject his/her parent's demands, an ignorance of the trip, or fear of their parents, they are deemed to be a victim. In other words, only when it has been determined that a child legitimately faces fear of persecution, a legitimate ground for refugee status, are they granted entry into Canada. In these cases, a primary way in which claimants are deemed to be a voluntary migrant or a victim is by determining whether or not they had knowledge of the trip, and whether they resisted their parents' requests.

This practice illustrates a different way to evaluate consent in legal practices that deal with children. Informed consent involves, in its simplest form, the absence of coercion and the mental capacity to make decisions. The challenges of determining the presence or absence of consent when dealing with children is well-documented in the area of clinical psychology (Jacinta O.A. Tan, Passerini, & Steward, 2007), medicine, and to a lesser extent, law. Consent as a legal concept is heavily theorized in adult female sexual assault cases (See Bell, 1993; Lacombe, 1994), yet less attention is paid to how consent is established in the legal context when dealing with children. McMartin's work is an exception in that her research shows that although laws dictate that children cannot

consent to sexual activity with adults (See Sas et al., 1996 as cited in McMartin 2002), legal decisions show that some children are deemed to have the 'capacity' for consent (2002). Notwithstanding the difference between sexual assault claims and unaccompanied child refugee claims, in both, consent is constructed using proxies – in McMartin's research it is capacity, and in my research on refugee claimants it is through "knowledge of the trip", arguably an action that illustrates a form of capacity. Consent in these legal decisions is determined based on distinguishing whether a child had knowledge of the trip or not – which as will be discussed later, is a fact that is established by excluding the impact of Chinese cultural familial obligations.

In the case of unaccompanied refugee claims, as illustrated in the previous chapter, the Guidelines contain no discussion of consent or its importance in adjudicating cases. The closest discussion of consent is a note on capacity where the Guidelines state that the panel members (who adjudicate the case) are expected to "determine if the child understands the nature of an oath or affirmation to tell the truth and if they are able to communicate evidence" ("Child Refugee Claimants Procedural and Evidentiary Issues," 1996:7). The criteria for assessing capacity are not outlined, providing little guidance concerning how children are deemed to be capable of it. Given the minimal references to capacity and consent in the guidelines, it is unclear what role they should play in the adjudication process (again illustrating the value of examining how facts are distinguished). The cases investigated here show that consent is actually a large part of the decision-making process and that it is assessed based on whether or not the child claimant had knowledge of trip, and if they refused their parents" request to come to Canada.

In the case of Xiao and Lily, this understanding of consent simply requires that the refugee officer illustrate a lack of evidence that the claimant refused his/her parents' request to come to Canada. This claim is established by constructing facts to support that these claimants consented. The understanding that children might have the power to reject their parent's demands reflects the notion that childhood is a period of responsibility (also known as the neo-liberal conception of childhood, an increasingly popular perception in western parts of the world) that constructs children as capable, and therefore accountable for their actions. The refugee officer and panel members' decision to draw upon this conception, instead of considering the Chinese specific definition of childhood, is a knowledge move that closed any possibility to consider that Xiao was forced to take the trip. If the refugee officer raised the expert evidence concerning children's relation in Chinese families, which postulated that children are required to obey their parents (filial piety), the fact that Xiao could not have refused her parents directions could be made. The fact that Xiao consented is established through the denial of cultural differences in familial relations, and drawing on the notion that children have the ability to exercise rights and independence. Despite Canada's overarching philosophy to attend to cultural differences in these cases, no consideration is given to the effects of cultural differences concerning childhood to understand how these claimants reacted to their parents. Moreover, ignoring these differences 'brackets' the dominant assumptions that children are obliged to (and do not know better than to) listen and trust their parents' requests.

Constructing the Presence of Consent

Lily and Xiao

From the four cases (two male, two female) examined in this chapter, it was the two females cases of Xiao and Lily that were denied refugee status. Although Lily and Xiao's cases were heard separately, they shared several commonalities. Lily grounded her claim (a well-founded fear of persecution in China) in her membership in a particular social group: young rural Fuzhounese females. Xiao grounded her refugee claim on fear of persecution for religious beliefs. Both claimed that there were additional risks imposed on females who return to China. In both cases the panel denied the claim by declaring that neither demonstrated a "well-founded fear of persecution in China", not fulfilling the evidentiary requirements necessary to constitute them as Convention refugees.

Both Lily and Xiao claimed that they were not aware of their parent's plans in advance, and that neither of them wanted to take the trip. The IRB successfully built the case, however, that they actually *were* aware of the trip, and that if they did not want to take the trip they had failed to actively refuse their parent's request. In order to establish this, the IRB argued in both cases that it was unlikely the children were ignorant of the trip, and that they had therefore implicitly consented. In order to establish this as a fact, the IRB officer performed two knowledge moves that 'bracketed' expertise to counter the children's testimony claims. First, expert testimony was trumped by extra-legal knowledge; second, the cultural practices of Fujian Chinese were emphasized to establish that their claim of ignorance was implausible.

The fact that Lily and Xiao had knowledge of the trip was demonstrated by noting that sending children away was common practice in this part of China, and that these

claimants *must* have known about their parent's plans, despite expert evidence suggesting otherwise. This claim is first introduced in Lily's case, the lead case, and later used in Xiao's case. In the panel members' decision about Lily, they reject the expert testimony of Dr. Szonyi by marshalling contradictory information. The panel member summarized Dr. Szonyi's several pages of testimony as an argument that "many rural Fuzhounese are poor, and ignorant as to the risks associated with illegal emigration and to life in North America" (TA0036605:45). The member then countered this claim by stating that "there is other evidence before us that suggests that many of them are not so ignorant, not so poor" (TA0036605:45). What is perhaps most revealing about how the member rejected this expert's evidence is in how it was done. This "other evidence" is not referred to in the decision except for the footnote which refers to an article in the *New York Times*, entitled "Chinese Town's Main Export: Its Young Men" (The New York Times, June 26, 2000 as cited in TA0036605:45). The panel member uses the evidence presented by the refugee officer to support their belief in the claim that Lily had knowledge of the trip – which is built on the premise that it is common for people, including children, in her hometown to embark on illegal migration, as cited in the New York Times, and that expert evidence and first-person testimony are both supplanted by this article. The panel members then draw on the New York Times article entered as evidence by the refugee officer instead of the expert evidence to justify their decision to reject Lily's application.

In terms of legal decision-making processes, this example illustrates that expert knowledges are not necessarily the primary source for fact construction or legal decision-making. In this instance, the member dismissed Dr. Szonyi's expert testimony not by discrediting the expert himself but rather by invoking contradictory low-status

knowledge. Such knowledge encompasses a different form of expert knowledge- one generated through practical experience – which I expand to include newspaper articles as they are a form of expert knowledge for the general population.

Countering Xiao and Lily's claim that both were unaware of their parent's plans using the newspaper article is a successful knowledge move because it does not directly attack the knowledge of the expert. Instead, the member supports their claim that Lily and Xiao had knowledge of the trip through questioning the likelihood of their ignorance. The member establishes doubt on Lily and Xiao's claim while avoiding a debate about the legitimacy of expert testimony and the New York Times article. The expert testimony in this case proves not to be an undisputable fact. The member countering Dr. Szonyi's claim using low status knowledge supports research that questions the extent to which expertise are validated in legal decision-making (See Jasanoff, 1995).

This knowledge move also draws upon a particular conception of childhood. The New York Times article is weighted more heavily than Lily and Xiao's testimony of ignorance. This suggests that the IRB did not find their testimony credible, which implies two potential explanations, either that these claimants are capable of lying, or that they were playing ignorant to strengthen their case. Which scenario is more likely is not relevant, what is important is that both imply that these claimants' testimonies are contrived or untruthful. The dismissal of their testimony, using minimal evidence, implies that these claimants are not innocent, vulnerable and helpless. Instead, these children are described as 'not so ignorant'. Rather than assuming these child claimants are less knowledgeable of political climate in their homeland, the member works from the assumption that these child claimants posses the mental capacity and awareness of the

politics in their country – which is a level of knowledge that is not often presumed in children. Such a conception of the child differs drastically from the dominant understanding of children as innocent and as less knowledgeable than their adult counterparts. Yet, drawing on the conception of children as aware, competent and knowledgeable contributes to asserting the fact that they are not ignorant, and therefore knowingly entered the arrangement to attempt to migrate to Canada illegally.

Lily

To further advance the claim that she was not ignorant of the trip, Lily's testimony is used against her. The member states "[w]hen asked whether she saw older children leave China, she testified, 'I didn't know at all'" (TA0036605: 45). The member also summarizes her testimony by saying that "[s]he also testified that her friends never talked about emigration and that no one discussed it" (Ibid.). The member reiterates these points in order to establish that the claimant outwardly denied knowing that it was common for children in her hometown to be sent abroad. In reiterating these claims the member intends to discredit or counter Lily's claims. This is a useful knowledge move because it raises scepticism about all testimony presented in her case, and therefore introduces doubts about Lily's overall credibility.

To counter Lily's testimony, the panel member once again invokes the 'evidence' (the New York Times article) of 'heavy emigration of young people from the Fujian province' as a rationale for discrediting Lily's claim that she was unaware of the trip. As the member states:

> "We find this testimonial claim to that amount of ignorance highly implausible. We find it extremely unlikely that she did not know "at all" that it was common for young people to leave Fujian and that she never had conversations about it with her friends, and that no one discussed it. Her testimony in this regard struck

> us as an attempt to cover up her true knowledge about emigration. We draw a further adverse inference as to the alleged forced emigration of the first claimant from this implausibility" (TA0036605: 45).

In this statement the member argues that the ignorance Lily claims in her direct testimony is not plausible, given the frequency of parents sending their children abroad. The normalcy of this process is used to discredit and counter Lily's claim of a lack of knowledge. Moreover, the popularity of this practice in Fujian culture is used to substantiate this claim where, as I will discuss later, in other cases other specific aspects of Fujian culture are dismissed, again to establish facts that match her/his overall claim (reject or accept refugee applicant).

In this particular context, expert testimonies are dismissed as "opinions", and are deemed to be factual only if they are "legally constituted" (Luhmann 1992:1431 as cited in Krieken, 2006). On the other hand, popular knowledge sources like newspapers are considered more than opinions when they're validated by a legal actor. The member, by making more of "other evidence", is able to dismiss expertise or a form of "high status" knowledge. This strategy suggests that the type of knowledge does not determine the validity of the claims that rely on them, but rather that it is the legal actor that mediates the weight of that knowledge that is integral.

Xiao

Similarly, the members conclude that Xiao, the second female applicant in this study that was denied refugee status, was also not ignorant of her parent's plans. This claimant's testimony was again invoked to reject claims about an unawareness of coming to Canada. In Xiao's testimony, when asked the question "[s]o when the decision came up, were you – was it discussed with you, the decision to take the boat?" she said 'no'

(V99-03527: 55). Furthering this line of inquiry, Xiao is then asked "when was it mentioned to you that you would be going on the boat", she responds "[o]ne day before I left, they say, 'You are going'" (V99-03527:55).

As with Lily's decision, the refugee officer in the hearing countered Xiao's claims of ignorance by invoking her testimony and suggesting that, given that she had prior knowledge, consented in the decision to leave. To successfully use this part of the testimony, however, other portions needed to be ignored, notably the fact that both these claimants expressed a sense of guilt and duty to relieve their families' financial strain. Facts are constructed through marshalling the New York Times article and employing Xiao's testimony, and as discussed below Lily's testimony to counter both their claims of ignorance ultimately supporting the rejection of their refugee claim. As will be shown in the case of Zhang and Li, the two boys granted refugee status, significant parts of the testimony are selectively ignored, illustrating that "testimony" is not a consistent source of legal knowledge in fact and claim making.

Constructing Consent: Financial Strain & Feelings of Responsibility

Lily

In the transcripts, Lily and Xiao both explain that they were unwilling to reject their parents' requests due to feelings of obligation and responsibility to their families. In Lily's case, the claim of consent is established through her testimony: "I felt obliged to go" (TA0036605:48). She also details her father and brother's illness and her families' economic hardships. She relays that her family is poor, that her father has a "chronic bone aliment", her brother a "terrible intestinal disease, and that her family was fined for the birth of her sister" (TA0036605: 41-42). Although Lily gave several reasons for agreeing

to her parent's request to attempt to migrate illegally, and explained her 'obligatory' feelings, the IRB interpreted this as consent. To further support claims of volition, the testimony she provided concerning her family's illnesses and financial trouble are raised, not to suggest coercion, but rather illegal migration. The IRB officer highlights a portion of Lily's written statement:

> "I knew that our situation was desperate, because my father's condition has been worsening, and because both he and my brother need medical treatment. If my father couldn't work, we would starve. *I agreed to go*, *but I was very scared.*" (TA0036605:48).

After citing this testimony, the IRB officer concludes that "[t]his statement is consistent with voluntary economic migration" (TA0036605:48). By stating that there are parallels between Lily's rationale for her decision (her brother and father's health, and her family's financial constraints) and voluntary economic migration – which is an invalid reason to claim refugee status, the IRB officer discredits her claim using rules and policies which together amount to one form of legal knowledge.

Said differently, the 'facts' of Lily's circumstances are constructed to fit the definition of economic migration, allowing for the application of a different fact-rule relation. In constructing the facts as they were – demonstrating that Lily showed signs of consent through an absence of resistance – her testimony is no longer considered to be consistent with that of a refugee claimant. By 'offering' her consent to come to Canada in search of a better life, she is recast as an economic migrant. Her testimony, instead of being verified, is discredited as a legal fact. Additionally, the guidelines, which argue that protection against child neglect is a priority, is now no longer legally pertinent, suggesting that legal knowledge is not a thing in itself, but instead is the product of negotiation. It is information that is verified or deemed to be worthy of consideration in

the legal process, suggesting that in these cases "reality is often compressed into crude moulds. It is workable that way" (Hawkins, 1992:164).

The IRB officer's decision to disregard sections of Lily's testimony illustrates an effort to simplify her social world and make it similar to that of Xiao. To do this, he employs the 'bracketing' technique to isolate particular information or practices. He described their cases using select parts of their testimony which results in bracketing descriptions of their circumstances. By filtering out the rationales provided by Lily and Xiao for their actions, the application of rule – particularly that they consented and therefore are not eligible for protection – is easily applied.

What is also implied in this knowledge move is the idea that children have the ability to refuse their parents' requests, which reflects a particular notion of the child and childhood. The dismissal of Lily's testimony that her parents requested she migrate to ease the financial strain of her family can only be accomplished through her constitution as an active child agent. This implies that she is responsible for her actions because she could have resisted their requests. Constituting the child in such a way is a popular neo-liberal governing strategy that allows IRB officers to disregard protecting children (Stasiulis, 2002). The neo-liberal conception of childhood is used in this case to justify the claim that Lily had the capacity to resist her parent's request. If, on the other hand, the notion of childhood as a period of vulnerability and extreme dependence on, and subservice to, parents was used to interpret her actions, the IRB may have made a different decision.

To further determine the level of Lily's consent, the IRB officer references her written narrative for additional proof:

> "On top of the previously stated reasons we have for not believing the first claimant's testimony that she did not consent to the decision to go abroad, there is evidence that she did consent. Her written narrative suggests some reasons to believe that there was volition out of concern for her family's economic well-being at a time of unusual hardship." (TA0036605: 48).

Here the claim of consent is established without referring to specific details, but instead simply asserting that consent was present. Outside of mentioning that evidence exists in her 'written narrative' about her family's economic hardship, little else is provided. The combination of emphasizing Lily's narrative and employing the term 'voluntary economic migration' builds the ideas of volition, choice, and, consequently, an unworthiness of protection from the state, and ultimately institutes the notion that in cases such as these children are active agents. In building this fact, the IRB further institutes childhood as a period where children can be active agents, with similar capacities as adults.

Xiao

As with Lily (the lead case), Xiao's testimony is used to assess consent. Like Lily, Xiao made statements that implied that she did not resist her parents' request to come to Canada, and provided explanations concerning her family's distress for her decision. This is apparent in the following line of questioning by a refugee claims officer.

> Q: Now, I'm going to, I'm going to ask you some questions about your trip to Canada. Whose decision was it for you to leave?
> A: I made the decision myself
> Q: Okay. Why did you leave?
> A: Two Reasons. One is because my family is very difficulties, had the hardship. Another reason, when I come to Canada, I [would] be able to practice my religion freely.

A little further in the transcript, she is asked:

> Q: Okay. So when you say hardship, what do you mean by the hardships?
> A: Because my family owe[s] a lot of money.
> Q: Any other hardships?

A: I have a lot of brothers and sisters at home
Q: Okay. And is there any other source of income other than the money your father makes from fishing?
A: No

Xiao, unlike Lily, takes responsibility for the decision to migrate, but follows up by outlining her concerns for her family as the reason for her decision. The information about family hardships is used to establish consent. By constructing Xiao and Lily as acting on their own volition, the potential that they were forced into deciding to come to Canada is less likely to hold weight.

The Power of Biological/Psychological Discourses

To counter Xiao's explanation for accepting her parent's requests, the IRB deployed a very specific knowledge move. It disregarded the potential neglect and abusive actions of the parents who had sent her to Canada by herself on a dilapidated boat to work. This possible interpretation is overlooked in favour of constructing Xiao as consenting (and even participating) in the decision to attempt to migrate. To sidestep the family's economic conditions that Xiao claims forced her to decide to act as she did deploys a particular conception of childhood. To successfully construct Xiao's actions as voluntary and her claim of family obligation as irrelevant, two knowledge moves are made that depend on particular conceptions of childhood. First the notion that children have choice and independence is the foreground of these claims. Second, the decision to ignore the cultural demands on children in Fujian families is completed by understanding childhood as differences in biological and psychological abilities rather than social differences. The family relations that shaped these children's decisions are not acknowledged as important cultural factors but rather, children's actions are framed as a matter of individual choice.

Cultural differences are not universally valid, yet the guidelines are designed in a way that allows for their exclusion in the decision-making process. Instead biological and psychological notions of childhood are relied upon. Evidence of this is seen in the assumption that Lily and Xiao's decision reflects their psychological development. The use of biological and psychological yardsticks, features of the western childhood, makes conclusions about the presence of consent that subtly excludes non-western notions of childhood. Unlike developed countries, childhood in other countries often focuses on social characteristics that are not universally applicable (See Boyden 1999:184 as cited in Jenks 2005:46) rather than biological and psychological traits.

Chinese Familial Distinctions: A Strategic Tool in Legal Decision-Making

The Lily and Xiao cases provide examples of how invoking Chinese cultural distinctions in understandings of family relations can be used as a powerful knowledge move to ensure the application of particular sections of the guidelines. The dismissal of immense family pressures as valid evidence to explain Lily and Xiao's actions constructs the claim that they had consented to take the trip, or, in other words, that they are responsible and accountable for the decision to come to Canada. In constructing this fact, the IRB is able to invoke rules of evidence (particularly the rule that children who participate in their decision to leave are not victims of persecution, but instead they are responsible for their actions). The evidence necessary to prove persecution is not detailed in the guidelines. As shown in the previous chapter, the guidelines fail to acknowledge Chinese cultural differences of childhood. Rather than incorporate guidelines that reflect an understanding of differences in family relations, a binary conception of consent (consenting/not consenting) is at play. Consent/non consent was, in this case, effectively

used in argument via the neo-liberal idea of the responsible child (which effectively displaces the potentially powerful synergy between 'vulnerable' childhood and the demands of filial piety).

The notion that children are responsible for contributing to the financial well-being of their family is a practice that is not legally (or perhaps socially) endorsed in Canadian society. In Canada, the conditions and age at which Canadian children are allowed to work is highly regulated, as is the level of financial responsibility children have more generally (for example, they are not legally permitted to have financial responsibilities such as credit cards, mortgages or bills). In Canada, imposing financial obligations on a child would probably constitute parental abuse and could potentially have legal consequences. Yet in the case of Lily and Xiao, the fact that their parents sent them abroad in order to contribute financially to the household is not entertained as evidence of potential neglect or abuse. I am not suggesting that these parents' actions are indeed evidence of neglect or abuse, instead I wish to point out that in Canada such actions would most likely be characterized in that way. The lack of attention to these issues for non-citizen children is a point worth mentioning as it illustrates how the variable child is useful in legal arguments – deploying one discourse of childhood neglects other potential discourses.

By side-stepping the potential impact of Lily's and Xiao's parents, the IRB officer can focus on building the claim that Lily and Xiao consented to the trip. The potential impact of Lily's and Xiao's parents' actions (sending them abroad to alleviate financial strain at home) is countered through the claim of consent. The voices (via testimony) of these two young females are silenced by employing legal knowledge (voluntary

migration) and extra-legal knowledge (NY Times). This claim constitutes these child claimants as responsible for their predicament, and therefore neither is ostensibly in need of, or worthy of protection from what could be constructed as potentially neglectful parental practices for Canadian children.

It is worthwhile to point out that these circumstances could have been interpreted differently had the IRB officers worked from a different understanding of childhood. If the vulnerable construction of childhood had been invoked in producing these facts, very different outcomes may have resulted. With the evidence provided, these children's circumstances could have been interpreted as evidence of harm or neglect – this, however, would have necessitated that IRB officers understood childhood as a time of innocence and subservience. They would then be indisputably cast as victims. In contrast to the conclusions drawn about Xiao and Lily, the testimony of Zhang and Li below is more or less taken at face value, and consequently no attempt is made to discredit their claims through various knowledges.

Constructing the Absence of Consent: Li and Zhang's Lack of Knowledge

In contrast to Lily and Xiao, the Tribunal determined that Li and Zhang, the two boys who were granted refugee status, did *not* consent to come to Canada by arguing that they did not have knowledge of their parents' plans. To reiterate, the IRB officer argued for the separation of these two claimants cases from the group claim (discussed early) because, unlike the other males, Zhang and Li claimed that this trip "was not an adventure" (V99-02926, V99-2950: 52). This statement was reason to proceed with these cases separately illustrating how consent impacts the facts and claims of the case.

Invoking such a rationale for separation shows the importance of the claim of consent, particularly given that the Tribunal found these boys to be refugees, unlike Xiao and Lily.

> "I think for the panel principally the issue we'd like to explore a bit more is the notion that both claimants described being sent on this journey and being sent away against their will. I think it's the area of the other associated claims that these two claims distinguish themselves in the fact that they had the strongest testimony about this was not an adventure for them. This was something very different" (V99-02926, V99-2950:52).

Further supporting this initial claim, in the IRB transcripts, these two claimants were judged to have been "forced" to take the trip to Canada, unlike the other, similar, cases[41]. Further supporting the ignorance of these claimants, the IRB reiterates its testimony (in the 'Oral Decision and Reasons') by stating:

> "You state you were unaware of the arrangements before your departure. You state that you felt no compunction to leave China before your father's announcement and you state that you experienced a sense of fear about the situation you were being placed into. Your testimony was also that you had no idea what you were going to do and there was no one to assist you upon your arrival." (V99-02926, V99-02950)

Here, the IRB officer builds the claim of ignorance using the claimant's testimony. What is interesting is that Xiao and Lily had made similar statements, suggesting that their parents did not notify them of their plans until the last minute. The statements of Xiao and Lily, the two young females denied refugee status, however, were countered by invoking the argument that such practices were common in their communities, and by using their testimony which, incidentally, is similar to that of Zhang and Li, the two male claimants who were granted refugee status. Comparing the use of testimony in this

[41] The board accepted only the respondent's claims. In contrast to the other minor applications, who indicated that they agreed with their parent's decisions to send them to Canada, these two Respondents testified that they were sent against their will" (Page 3 of Federal Court Reasons for order) Note: this quotation was found in the appeal discussion.

example with that of Lily and Xiao is a straightforward example of how similar testimony can be used to substantiate opposite decisions. As will be shown below, the testimony is also used to marshal different constructions of childhood.

In these cases, unlike the cases of Lily and Xiao, no expert testimony about the popularity of migration practices in this community is mentioned, even though these children came from the same region, and even though one of the claimants reveals that his father has in the past attempted to send one of his siblings to the US. The IRB officer illustrates knowledge of this practice in the very statement in which he asserts the claimants lack of knowledge of the trip. Below is the excerpt (from the section entitled 'Oral Decision and Reasons'):

> "You also stated that your father had selected you because an earlier attempt by your older brother to go to New York some two or three years previously had failed" (V99-02926, V99-02950).

In at least one of the latter two cases, it appears that IRB officers could have concluded that the claimant knew of the trip, since the claimant was aware of his brother's attempts, and would most likely be privy to the process and arrangements of such a venture, yet this was not mentioned. Like other contradictory statements in the refugee officer's construction of facts, in summations of the Zhang and Li's testimony, it is ignored. The decision to bracket such evidence is interesting given that in the case of Lily and Xiao such strong evidence that they could have had knowledge of the trip did not exist. Nevertheless, the fact that Xiao and Lily had knowledge of the trip was established through a popular media article.

In this case, the fact that Zhang and Li did not consent is constructed using several knowledge moves. By bracketing information, the IRB officer is able to construct the

claim of ignorance. Such a fact makes both Zhang and Li innocent victims of their parent's actions. This move also shows how testimony is not always a legal knowledge source. In Lily and Xiao's case, testimony is often invoked to bring attention to what is seen as a contradiction. In the Zhang and Li case testimony is excluded to avoid this problem. In both cases, testimony serves the same end: to support the fact that the IRB is attempting to construct.

Ignoring Contradictory Details

The panel's justification for granting both Li and Zhang refugee status rested on the belief that, unlike the others, they did not consent to the journey, and that they did not come to Canada for personal gain, or for their families' gain. An examination of the hearing transcripts shows that when Zhang was asked "…why did you leave China?" he replied "[f]or—because I—I was leaving for my livelihood. And, also, for my further study" (V99-02926, V99-2950:31). Like Xiao and Lily (who were both denied refugee status and deemed to be voluntary migrants), Zhang's decision to come to Canada is motivated in part to improve his life. This is not acknowledged, because it contradicts the claim of the IRB that he did not consent to the trip. If the evidence that Zhang attempted to migrate to increase his 'livelihood' came to surface the IRB's earlier claim that he did not consent to the trip would be compromised. The implications of questioning a previously established fact are great, as the overall argument of the IRB officer could be undermined. Hence, in order to maintain consistency and appear as though the facts are sound, it is imperative to ensure that the evidence continues to support what has already been shown. The exclusion of this piece of testimony is a way to "cleanse" the argument of innocence of these two claimants, by bracketing contents of the claimant's testimony.

Another example of details that are presented but overlooked in the legal realm can be seen in the boy's testimony. The IRB actually includes this contradictory statement in the process of asserting their claim of non-consent.

> "[a]t the beginning of your hearing you stated that your father informed you that he was going to send you on a boat to North America. You stated that you were a little bit afraid and that you did not want to leave your family people. When my colleague and I asked you if you were aware of your father's plan prior to June 10, 1999, you stated that you were not and that you and never discussed the issue or idea of leaving China with your parents previously." (V99-02926, V99-02950(Oral Decisions and Reasons):2)

In the beginning of this statement it is suggested that the two claimants were aware of their father's plans to send them abroad. Yet it is also indicated that they were unaware of their parent's plans. The first portion of this statement, although contradictory to their testimony, is later ignored by the IRB. Only portions of their testimony are considered and weighed into the decision. This is an important knowledge move because it is only through disregarding the contradictory evidence that the claim of ignorance can be established. Ignoring contradictory evidence is possible because legal actors, such as IRB officers, have the power to validate and dismiss pieces of information as evidence when necessary (M. Valverde, 2005).

The rationale for believing that these two boys did not consent is in part justified by the interpretation that they did not come to Canada for personal or financial gain, and that they did not know of the trip. Yet the transcriptions reveal that the notion of improving their life actually was a motivation for Zhang, but the IRB officer chooses to ignore this part of the testimony, whereas for Lily and Xiao such testimony was used to support the decision that they were not conventional refugees. In Lily's case particularly, the IRB officer argued that her testimony reflected the definition of a voluntary migrant

because she explained that her family's financial predicament was a reason for her acceptance of her family's request. She, unlike Zhang was denied refugee status even though both of their testimonies suggest a financial motivation for coming to Canada.

Discretionary Power & Claim-making Strategies to Assert "Knowledge of the Trip"

In this section, I will show how the fact of 'knowledge of the trip' is established through discretionary power. The claim-making strategies evidenced in these cases show how facts are constituted to invoke particular rules of evidence. The inclusion of certain pieces of evidence in one context and not another is an illustration of 'translation.' This is a conceptual tool that presents claim-making as a dynamic process that, among other strategies, involves undermining some knowledge in one situation and authenticating it in others (Valverde et al., 2005). The discretionary nature of the legal process and the unaccompanied refugee guidelines partly explain how such radically different determinations can be made with similar evidence.

For Zhang and Li there are several differences in the evidence marshaled to determine and assert whether these claimants knew of their parent's plans. Although in all cases the claimant's testimony is invoked, it is not always believed. As I have shown, Xiao and Lily's voices are challenged, yet Zhang and Li's are not. Furthermore, in Li and Zhang's case, two sections of their testimony that do not support the IRB officer's initial claim of non-consent are dismissed or 'extracted' from the claim. For Xiao and Lily, expert testimony provides general knowledge concerning children's obligations to their families and its effect on the claimant's ability to reject their parent's demands to migrate from Fujian, China. Although this testimony is applicable in all four cases (given that it

was in reference to Chinese family relations in general) it is only drawn upon in the cases of Zhang and Li.

Again Denying Cultural Differences of Childhood

As in the case of Lily and Xiao, cultural differences of childhood are side-stepped to distinguish the evidence that constructs facts and claims. Insight into the use and power of the concept of child and childhood are also seen in this example. Crucial to constructing Lily and Xiao as consenting and Zhang and Li as non-consenting is the discourse of childhood. In the case of Xiao and Lily, discourses of child agency are drawn upon to construct the conditions under which a child can be held responsible for coming to Canada. On the other hand, Zhang and Li are constituted as vulnerable and dependent, and therefore as victims of parental neglect. These four claimants with similar circumstances are constructed using different conceptions of childhood, illustrating both the variability of this concept and the power of legal process to create the conditions for invoking variable definitions. As shown, part of this difference is based on the emphasis placed on children testimony, and the 'translation' or 'extraction' of facts of the case – all knowledge moves that assisted in supporting the pre-determined claim of non-consent. Unlike Xiao and Lily's testimony, Zhang and Li are believed despite the wrinkles in their testimonies.

Variability in Conceptions of Childhood: Building the Presence or Absence of Consent

The above discussion outlines the knowledge moves used to put forth the claim of consent. The conception of childhood also plays a role in successfully constructing the 'fact' that Lily and Xiao, the two females denied refugee status, consented and that Li and

Zhang, the two young males granted refugee status, did not. To reiterate the presence or absence of consent was established through assessing whether the claimant had knowledge of the trip, and whether there was evidence of their resistance. Embedded within these processes are particular conceptions of the child and childhood.

In the case of Lily and Xiao, the refugee officer constructed the fact that she was not ignorant of her parent's plans or the frequency of children being sent abroad in her country. Implicit in the IRB's claim is the belief that children are capable, knowledgeable and even manipulative beings. To assume that Lily understands the politics in her country, and/or has the ability to lie about her knowledge of the trip suggests that she acted by her own volition. Viewing children as empowered, knowledgeable and capable of acting on their own volition is a product of the contemporary children's movement, and the existence of these discourses allow for such facts to be constructed (Stasiulis, 2002). Moreover, in the refugee determination process, constructing claimant's actions as evidence that they exercised volition is a strategy used by the courts to deny protection (Stasiulis, 2002). It is also evidence that children are no longer assumed to be pre-citizen, which as discusses in chapter two, is characterized in part as "silent, invisible, passive objects of parental and/or state control" (Stasiulis, 2002). Instead children, as evidenced in this case, are characterized as 'active citizens' that are "full human beings, invested with agency, integrity, and decision-making capacities" (Stasiulis, 2002).

On the contrary in the case of Zhang and Li, the two young boys granted refugee status, a very different conception of childhood is invoked. These two boys are perceived as victims of their families' ambitions. Their testimony, despite the contradictions and evidence to support that they might have consented, is ignored in order to satisfy the idea

that they are victims of their parents. In this case the idea that children are expected to listen, and have less power than their parents, is prominent rather than assuming that, as was in Xiao and Lily's case, children have the power to resist their parents. The conceptions of childhood witnessed here also say something about the relations with the family.

Constructing Various Familial Relations and Conceptions of Childhood

The role of family in caring for children and the state's regulation of this guardianship is a longstanding theme in the legal governance of children[42], particularly under the welfare state that allowed for extensive state intervention into the lives of children (Stacey, 1996). The education and justice system exemplify legal intervention aimed to govern and, arguably, protect children. Such institutions are founded on a particular construction of the child and childhood, one that reflects the notion that they are dependent and vulnerable and in need of family protection, or state protection in the absence of a suitable family context. The construction of the child and childhood in these family relations reflects western cultural norms and expectations of families and children, and do not incorporate different cultural dynamics.

Current governmental regimes are often referred to as 'neo-liberal'. This governing approach emerged as a reaction against the welfare state model of governance. Under the welfare state, the government played an instrumental role in regulating and controlling individuals. This time period is often referred to as illustrative of an

[42] One such example is the Baker case in which legal research shows family relations can play a significant role in immigration decisions. In this highly referenced case, after denied immigration status, Baker's appeal is successful based on the argument that her presence in Canada was in the best interest of her Canadian born children. The importance of parental guardianship is institutionalized in this decision to justify granting her application through the positive effects it would produce for her children well being and development. The Baker decision, has several important implications for immigration policies and practices (Pratt 1999).

interventionist government. In contrast, under neo-liberal governance, rather than an interventionist approach, the state responsibilizes the individual and the family, reducing the state's responsibility. The actual effects of the shift in governance on the individual and family are debated. Some scholars argue that the neo-liberal ideology increases individual freedoms and reduces the power of the state to intervene in the private lives of citizens (Etzioni, 2000; Offe, 1996; Rose, 1999). Others suggest that, rather than offer reprieve from state intervention, the withdrawal of the welfare state only alters the instruments of social control and repression, resulting in the continuous disempowerment of citizens (Garland, 2001). Although the effects of the shift in governmental power and control are debated, the concern here is the effect of this change in the governance of children.

Children, most emphatically under the welfare state, are conceived as dependents that are first and foremost a familial responsibility. However, welfare and the development of children are viewed as so instrumental to the success of the state that there exists a platform for intervention when necessary. With refugee claimants, a generous welfare state would cast children as dependents in need of state protection, due to the absence of appropriate family structure.

Today, under neo-liberalism, children remain the responsibility of the family. In fact more so than under the welfare state, and it is now only in the extreme absence of this family support that the state intervenes. Additionally, under neo-liberal governance children are not presumed to simply be vulnerable and dependent, but are instead constituted as rights bearers and responsible active citizens, thereby justifying the withdrawal of the state – after all, if children are responsibilized citizens, they do not

require the protection of the state to the same extent. This shift is evident in legal doctrines, such as the 1989 UN Convention of the Rights of the Child, as well as portions of Canada's newly implemented Youth Criminal Justice Act. However, the real effects, or, more specifically, governing power of these rights, is seen in the analysis of the unaccompanied child claim.

Given that unaccompanied children arrive in Canada without any family or guardians, family relationships are no doubt an important issue in determining the claims of these children. The importance of examining the role of family relations in this dissertation is not to condemn, judge, or even comment on what is appropriate or inappropriate parenting. Instead, my purpose for raising this point is to show the different ways in which actions are interpreted, and how claims are included and excluded in the legal process. For example, as will be shown, the fact that Chinese parental relations include sending children abroad to improve their children's life or the well being of the family overall is not discussed within the space of IRB hearings.

Family Relations and the Risk of Harm

In each of these cases, evidence is drawn upon to determine the relationship that claimants have with their families. A claimant's familial relations are assessed using various forms of evidence. Examining the strategies applied to determine parental relations to their child are important because the determination is used to assess risk of harm. IRB officers determine whether a claimant's parents are suitable guardians to which to return claimants or whether they are agents of persecution. Again, we see the use of variable evidence and notions of childhood to assert these claims. In some cases seemingly powerful evidence that could be constructed as neglectful in western families

is disregarded, while in other cases it is foregrounded. Whether the decision of Chinese families to send children abroad to work and/or improve the families livelihood is neglectful action is not of interest here. My interest in making this point is to illustrate how actions are interpreted and used differently in different cases.

Xiao

Xiao's relationship to her family is only elaborated upon in discussions about her family's religion and their financial and physical wellbeing. To reiterate, she was denied refugee status, and her claim involved gender-based arguments regarding a common risk to females returned to China. A common concern with children arriving from China is the potential that they will be exploited by snakeheads (traffickers assumed to be responsible for smuggling children into North America). Young women, in an effort to repay the debts for the cost of their trips abroad, are often sexually exploited, seemingly until the balance is paid in full. This particular threat of harm is downplayed by the IRB despite the acknowledgment that she was found aboard a snakehead's ship (IMM-953-00). More to the point here, the possibility that her parents knowingly sent her into this situation is not seen as central to the issues of the case. The IRB officers did not entertain the possibility that Xiao's parents' actions could be an indication of neglect. Instead, the rationale for her case, as discussed above, focused on consent[43], and as found by Stasiulis, applying a flexible decision in the definition of age (Stasiulis, 2002). The practice of sidestepping the issues of risk of harm is accomplished by constructing Xiao as a responsible rights bearer rather than a vulnerable member of the family unit. Constructing Xiao as responsible for her actions – particularly the decision to come to

[43] It also concentrated on substantiated that Xiao claim to fear of persecution for religious reason is a false claim.

Canada and work in exploitive conditions – removes the need to apply a protectionist approach to the decision making process – which would include considering the implications of her parents decision to send her abroad. No doubt the tribunal's claim that she is an 'elderly minor' also strengthened the decision to return Xiao to her family in China (V99-03527).

Although the Unaccompanied Child Refugee Guidelines are designed with the consideration that children are deserving of rights but are also vulnerable, and potential victims, which notion of childhood will be made relevant in any particular decision is decided by the IRB officer. In Xiao's case, the former discourse is used to construct and interpret her case to suggest that as a rights bearer the potential for protection from her family is undermined. After all, if Xiao made the choice to come by herself, her parents' actions could not be interpreted as potentially neglectful or as risking harm to their daughter, and Xiao is therefore not in need of protection.

Lily

The rejection of Lily's application also rested in part on the claim that she had a good relationship with her family and that for this reason there would be minimal risk of harm to her if she returned to live with them in China. Additional testimony that she had contact with her family was also invoked to suggest that her parents cared for her. IRB officers summarized the contact that she had had with her parents and concluded that she had good relations with them. The following paragraph in the IRB decisions states:

> "However, it is clear from the first claimant's testimony that she has been in frequent telephone contact with her family while she has been in Canada, right up until the eve of the hearing. She testified that she calls her parents to comfort them, that she thinks they worry about her and care about her, and that she trusts them. In the course of explaining her continuing contact with her family given the allegations of exploitation, she even offered a spontaneous and, in our view,

> extremely damaging admission that they have never cheated her." (TA0036605:5c).

In this statement several interesting legal strategies are visible. They include the mobilization of the neo-liberal definition of family to establish lack of coercion.

Nikolas Rose articulates the difference between the liberal and neo-liberal family as the latter acknowledging that families are constituted by affections rather than biological relations (1999). In Lily's case, the unlikelihood of coercion by her parents is established by pointing to particular acts, such as the consistent phone contact and concern which is used to establish affection. The IRB further details the family relations as positive by establishing affections:

> "The testimony that there is mutual love and trust between herself and her parents and that they have never exploited her have led to our finding that the first claimant was not forced to leave China and that she was a consenting party to the family decision to send her abroad." (TA0036605:5c).

In establishing a positive child-parent relationship, consent is further mobilized. The discourse of the neo-liberal family not only counters the possibility of coercion, but also silences the voice of the child. By assuming that Lily's parent's actions are evidence of affection, Lily's testimony that she did not wish to embark on the trip is dismissed. Her parent's actions coupled with the discourse of neo-liberal family are strategies deployed to counter her claim of coercion.

To further support this claim, the fact that she was sent on a plane, which is a less risky and more expensive form of transportation, was also used to suggest that her parents cared about her safety and well-being. Parents who care so much for their children to send them on a plane (rather than a boat) would not force them to do something they did

not want to do. In the context of IRB argumentation, this further supports the idea that Lily was a willing participant in her journey.

Li and Zhang

Li and Zhang, the two boys granted refugee status, were deemed to have not consented to come to Canada; evidence was instead marshaled to establish that their parents were agents of persecution. Officials argued that returning these two children to China would place them in harm's way, and it was their responsibility to protect against these "agents of persecution, [who would] force their sons into situations of systematic hardship" (IMM-2893-00, IMM-2894-00). The claim that Li and Zhang's parents were 'agents of persecution' complements and reinforces the IRB's claim that these two boys did not choose to illegally migrate. Moreover, it is the necessary claim to construct these claimants as vulnerable victims, a designation, as we saw earlier, that was not allotted to Xiao and Lily.

The assumptions in these cases imply that the family abrogated its responsibility to provide welfare to these boys, and that it then becomes the responsibility of the state (as defined in the Guidelines) to intervene. In some ways, claiming that the applicants were forced to migrate only makes sense when childhood is seen as a period of vulnerability and innocence. At the same time, however, this welfare approach to child governance is fully justified within a neo-liberal regime when the claim that parents have failed their children is established.

Filial Piety a potential Legal Strategy to Curtail Claims of Volition and Consent

Another source of discretionary decision-making is the validation of filial piety as an important and meaningful source of legal knowledge. Filial piety is a term which

translates to mean “love and respect for one’s family”, and is often used to describe family relations in China (known in Chinese culture as shixiao). Filial piety beliefs clearly define the relationships of each member of the family by describing the expectation between children and their elders (most strongly the relationship between father-son, and husband and wife) (Zhang & Kline, 2009). Filial piety is described as demanding “absolute obedience, devotion, and sacrifice on the part of children” (Yang, 1959 as cited in Zhang and Kline 2009:6). Children’s obligation, in short, is to abide and respect their parents. Through filial piety children as they age are expected to reciprocate the care and support provided to them in their younger years (Schwarz, Trommsdorff, Kim, & Park, 2006). Along with respect, this includes attending to their parents needs, supporting their parents materialistically, to comfort their parents and to honour their achievements. Within these requirements contributing financially to support their families can easily be justified as a child’s obligation.

Scholars show that strong parent-child interdependence is decreasing (Goodwin & Tang, 1996), particularly towards the oppressive elements of filial piety such as absolute obedience (Ho, 1996), yet they remain respectful to their parental obligations and expectations (Ikels, 1993). This ancient practice remains present in the families and lives of Chinese children today.

As relevant as filial piety would seem to be for adjudicating cases that involve Chinese children, it is interesting from both a socio-legal and childhood studies perspective to note that IRB officers use familial relations to justify a decision without referencing filial piety. The dismissal of this cultural discourse is purposeful and achieved through various knowledge moves that included (but are not limited to) the dismissal of

expertise. An examination of this process not only reveals operations of legal process but also the power of childhood as a mediator in legal decision-making. More specifically, it illustrates the strategies used to identify some – but not all, even when they are in similar predicaments – claimants as being at risk of family neglect.

Seemingly in keeping with the directives of the Guidelines (to consider the cultural and social context of refugee claims), experts are periodically asked to testify about family life and the political context in Fujian China. Although, in the decisions, some of the expert testimonies are dismissed as not relevant to the cases by the tribunal, their testimony is still cited in the transcripts. Dr. Szonyi, one of the validated experts, testified that "returned rural youth face a number of legal and social disadvantages that make it extremely difficult, if not impossible, for them to resist their families demands that they return to North America" (TA00-366505:17). This sentiment is reinforced by other experts including Dr. Read who made comments such as "children in the People's Republic of China (PRC) are considered the property of the parents" and statements by Dr. Myers that "A Chinese family has been called 'a corporate entity' in which the members cooperate to meet economic goals" (V99-02971 et al: 0740).

Dr. Johnson[44], whose expert testimony was based on knowledge of family relations in China, and information gained from several friends involved in Chinese politics argued for the importance of recognizing filial piety.[45] Incidentally, these

[44] Dr Graham Edwin Johnson has been a sociology professor at the University of British Columbia since the 1970s.. The presiding member attempts to disqualify his expertise by stating "He has not even been in that area, and he's made – he spent only a month there at a certain point of time. There is a perceived potential of weakness in his source on this area and I wish it to be explored, and that's a fair question" (V99-0295:149-159). He testified that the "Fuzhou region is culturally-distinct" (V99-0295: 0143)

[45] Incidentally, he is also the expert that was dismissed elsewhere by the courts for providing "opinions" instead of expertise. The judge in his decision states "[c]ounsel also presented an expert witness, Dr. Johnson, who provided some anecdotal information that has been weighted accordingly. However I think

relations were used by IRB officers to conclude that his testimony resembled opinions more closely than expert knowledge, even though his testimony echoed that of Dr. Szonyi (the validated expert). He argues that there is a large emphasis on filial piety in China[46]:

> "The value of filial piety suggests that sons owe to their fathers a number of concrete obligations, one of which is that they obey their fathers; the other of which they support their fathers (and by implication their mothers as well) particularly of course on old age. But they are critical links in the maintenance of a family, both religiously and economically, through time. But "filial piety" means basically you have to respect and obey, and support. You do not challenge." (V99-2971)

Dr. Johnson also provides the following response in a general line of questioning gathered as evidence for a male group claim:

> Q: So if the parents of these claimants suggested to them that they should get on a boat and go to North America to work, what would the response be on the part of – what would the likely response be on the part of these
> Dr. Johnson: The filial response would be you accept
> Q: Even if it meant breaking the law?
> Dr. Johnson: Yes
> Q: Now, what if the –if the parents didn't specifically request that their sons go to North America? Would there be any other pressures on them to in fact embark on this voyage?
> Dr. Johnson:. Well, I mean one of the important things about Chinese families is that members are in some ways very critically controlled by the family. I mean, the idea of individual volition, which seems to be so much a part and parcel of our own sense of family is very much constrained in the Chinese culture.

Here, Dr. Johnson points to the differences in North American understandings of the ways in which families operate, underscoring the importance of cultural understandings in the family, and raising questions about the extent to which consent can be constructed as a legitimate ground for denying refugee status. These facts were not used to defend the

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for many of the minor refugee claimants, it was their testimony that for me has distinguished your situation from theirs" (Decision from the Bench:43).

[46] Although this testimony was found in the group claim of males, the concept of filial piety was raised in all these cases.

notion of volition and consent that was so central to these cases. Mr. Puddicombe, Xiao's lawyer, also offered corroborating anecdotal evidence, by stating:

> "I myself lived in Korea for three years and I'm very familiar with the notion of family and how it differs from the notion of family here. The love and the respect is still the same but the sense of obligation and duty is not. The level of such an obligation and duty in Asian countries is much, much higher than it is here." (V99-03527-00113).

The two expert testimonies and Xiao's legal counsel all raise the issue of filial piety as a legitimate and potentially important issue to address. In particular, this testimony constructs the relationship between children and their parents in Chinese culture as distinct. Expert testimony attests to the fact that children in Chinese cultures are considered to be a relatively powerless part of the family unit, yet such knowledge is pushed aside when necessary.

Xiao and Filial Piety

In Xiao's case (remember that Xiao was one of the young women denied refugee status), legal counsel attempts to counter the claims of consent by employing filial piety. The counsel for Xiao, Mr. Puddicombe, argues that "[a]s a child, Mei Feng is not in a position to effectively make a true choice. Children are vulnerable and hence require greater protection" (V99-03527:00093). In this assertion, however, the presiding member asks: "might we refer to her as a minor rather than a child?" Her counsel agrees and the presiding member rationalizes his request by stating "when I hear 'child', I hear ten year-old, and there's a difference" (V99-03527:00093). The difference asserted by the presiding member implies that childhood is recognized as a heterogeneous category. Although Xiao's counsel agrees to the distinction, he continues to construct his client as

being in need of state protection, implying the western conception of childhood, by arguing that:

> "[m]inors are vulnerable and hence require greater levels of protection and assistance. This has been recognized in both international and domestic law. It's incumbent upon the parents and the state to care for children, to make proper decisions for them until they are capable of doing so for themselves. It goes to a lack of capacity, which is recognized." (V99-03527:93).

Xiao's counsel, using legal knowledges, attempts to construct his client as a child at risk and as childhood as a period in which the state is obligated to protect, not only according to Canada's policy, but also on an international stage.

To further support his claim of childhood as a protective space and his client as deserving of this protection, Xiao's counsel invokes the discourse of family. In particular he uses the expert knowledge brought into the courts to make the claim that Chinese children, given the family culture, cannot choose to disobey their parents, and in that fact she is not able to make any independent decisions. Although he does not reference the experts directly, his comments are obviously informed by their testimony. He argues:

> "The Chinese concept of family duty and obligation further erodes a minor's capability of choice. The conditions in which she lives, as well as the mentality which is formed in her culture and her religion would compel her to go along with whatever decisions are made for her. She feels obligations to be brave or to make sacrifices for her family. She has been forced to make decisions that we wouldn't expect a 17 year old from our culture to have to make. For a child to get on a rust-bucket, to make a voyage overseas under horrible conditions, end up in indentured servitude or prostitution if she makes the journey successfully, or to face penalties of detention and beatings if she's returned, it cannot be said that there is any true volition. A minor cannot consent to such persecution" (V99-03527:93).

Mr. Puddicombe draws on discourses that appeal to a western concern with victimized children in 'other' cultures. He constructs Xiao as a victim of her cultural environment and expectations. Notably, he also continues to invoke the term child despite the request of the presiding member to employ 'minor'. Despite the use of legal knowledges

(invoking both local and International commitment to child protection) and expert knowledges, his claims are discounted by the IRB officer.

The legal and expert knowledges employed by Mr. Puddicombe (counsel for the claimant) are not easily countered. For the IRB to counter legal knowledge would allow the potential for other legal knowledges to be problematized. Instead of countering Mr. Puddicombe's claims directly, the IRB officer critiques the relevance of filial piety altogether. One of the moves to discount this evidence is by subsuming filial piety under a more allegedly 'universal' form of parent-child relations. The IRB officer (opposing Xiao's claim) states:

> "[c]ounsel argues that the concept of filial piety should be taken into account, in that the claimant was culturally bound to do what her mother told her. In my view, the concept is a neutral one, not dissimilar from the Judeo/Christian admonition that children obey and honour their parents. In my view it is not a helpful or instructive concept for determining the claim" (V99-03527).

The IRB officer minimizes the cultural differences between Chinese families and a western religious orientation to eliminate the possibility that Xiao felt pressure that is distinct from that felt by children in other countries – particularly western countries with a Judeo-Christian tradition. The IRB officer's employment of particular terms such as 'neutral' are intended to minimize the distinctions between Fujian culture and other cultures (like the protectionist approach found in most western countries). In doing so, it is suggesting that filial piety is not a cultural practice that needs to be considered in assessing these cases. Drawing similarities between the Judeo-Christian principles and filial piety in family relations weakens the argument that children governed by such Chinese familial expectations are unable to resist their parents' orders. Again, we see the dismissal of expertise, and the specific cultural conceptions of childhood trumped by

various strategies to minimize the importance of filial piety, ultimately asserting the characteristics of a successful claim include vulnerability and innocence and not responsibility or independence.

The IRB officer, in asserting his reason for the rejection of Xiao's application, reviews the evidence to support his decision. He continues to build his claim of volition by discrediting the effect of filial piety by combining a series of factors to give the impression of an abundance of evidence to suggest that Xiao did act on her own volition. The first portion of his decision reads:

> "First, her story as assessed shows quite the opposite: she did employ her volitional powers, within the context of her own unique culture, to make, participate in, or concur with, the decision to leave China. Second, she is at least 16 years of age. Clearly, she is already at an age of some responsibility. Third, while the concept of filial piety may be engrained in China, there is not an indication from this claimant's testimonial that it has affected her in a persecutory way." (V99-03522:139).

As indicated above, part of the officer's strategy includes asserting that evidence exists to support his claim. Also, he employs very specific language and rationales that reinforce the idea that childhood is a period where children do not have the ability to act responsibly (presumably, this is why he opted to use the term 'minor' instead of child in an attempt to suggests that minors are older than children, yet not adults). He references Xiao's age to justify holding her responsible for her decisions. The use of such arguments shows the power of the conceptions of childhood as a period of responsibility to counter claims grounded in Chinese familial relations (particularly filial piety's connection to volition).

In the second section of his decision, the IRB officer concentrates on countering Xiao's counsel's claim that filial piety explains her actions. He argues:

> "[f]ourth, I am concerned that claimant's counsel has unwittingly incorporated a Western value of individual volition as a yardstick to, in turn, pronounce apparent requirements of filial piety to be persecutory, if it has meant that she has (willing, though blindly) left China and now risks legal sanctions for her illegal exit. That is, the argument is superficial. Ironically, though this is undoubtedly unintentional, it tends to debase Chinese cultural concepts. Fifth, counsel's argument for the non-volitional implications of filial piety begs the question whether this concept is itself persecutory. The anthropological difficulty of this postulate, necessarily implied in the argument, needs no further comment." (V99-03527:139).

Perhaps the most striking section of this comment is the IRB's treatment of both Chinese and western ideas of childhood as culturally specific, which is unusual since western ideas are more often mistaken to be universal. First, the adjudicating officer suggests that filial piety as potentially persecutory is 'superficial' because it is being assessed with a western mindset and normative framework. Thus, the comparison between the two is what creates the conditions by which one can suggest persecution, and argues that such practices 'debase' Chinese familial practices such as filial piety, thereby constructing filial piety as unique, but not relevant, for adjudicating claims.

Understanding the Importance of Curtailing the Claim of Filial Piety

As illustrated above, filial piety offers an alternative discourse to explain the compliance or, as described in some of these cases, the volition of Chinese children to migrate. In particular, filial piety provides a defence for this claim of volition, because these claimants did not independently choose to make the trip to Canada. Instead, their parents approached them with this request and they complied. The latter scenario does not comply with the definition of volition, but instead shows a deference and obedience to parents, which is a characteristic of filial piety. The claim that the pressures of filial piety absolve children of responsibility for their actions also suggests that filial piety is a

potentially oppressive cultural practice. This claim might then open up dangerous territory because it could be argued that returning them to their family would place them at risk. The Immigration and Refugee guidelines provide a way to justify approving child claims in cases where a risk is identified. It is therefore not surprising that filial piety is countered in Xiao's claim, in order to reject her claim, and that it is *not* invoked to establish the claim that returning Li and Zhang, who were granted refugee status, to their families would place them at risk. By definition, the actions of all the claimants in this analysis could be explained by invoking filial piety. This approach would not only be a form of critiquing Chinese familial practices, however, but it might suggest an unmanageable standard in a refugee claimant hearing (presumably, any child coming from China could claim refugee status on the basis of filial piety).

Arguing that Li's and Zhang's parents were agents of persecution not only satisfies the guidelines requirements for refugee status – remember that substantiating a fear of persecution is grounds for a successful refugee claim – but it also constructs their families as a risk within a non-specific Chinese discourse of family. The IRB maintains the discretionary space to reject claims without opening the floodgates of a legal decision that would provide the legal tools to justify accepting all similar claims. By accepting refugee claims based on western family relations and childhood discourses – of vulnerabilities and innocence – and not filial piety, they are able to avoid the potential legal power to employ the same standards in other cases concerning those that come from similar if not the same areas of China.

Despite the refugee officer's support of these two applications (Zhang and Li) the panel member rejected the refugee officer's recommendations and ordered that their cases

be reviewed. This move by the panel members' suggests that although filial piety was not employed the claim of persecution and neglect may also create an avenue for other claimants. The panel members rejection of the refugee officer's recommendation to support Li and Zhang's application further supports my argument that claims which apply to large populations are rejected in order to prevent the possibility of case decisions creating standards that may support the success of large groups of applicants.

The decision of the panel members to reject the refugee officer's determination and the decision to avoid invoking particular discourses of the family illustrates the discretionary power of IRB agents and the flexibility in knowledges to, at times, dismiss expertise. The panel member's rejection of their colleague's assessment illustrates that even amongst legal agents working within the same legal framework different assessments are possible. The difference in opinion between the refugee officer and panel members further emphasizes that discretionary power is not purely random, but that it instead operates within a particular political context (Canada's international obligations for compassion, operating alongside the need to project rigor in adjudications).

Silencing Risks

Arguably, deciding not to invoke filial piety as a basis for understanding children's actions is a way to silence the concern about the risk of harm to child claimants. Identifying such a risk increases the responsibility of the state to protect these children, particularly if they are constructed as vulnerable and victims of persecution. By portraying these children as actors and citizens, volition and consent can be imputed, and the responsibility of the state to treat claimants as children is diminished.

The different attention paid to assessing risk of harm to these claimants exemplifies that particular claims are included or excluded strategically to support overall case decisions. The decision to engage in a discussion of risk in only some of these cases reduces both the type and number of claims that can be successful. Interestingly, in order to downplay, and arguably dismiss, the possibility that some of these claimants are at risk of harm if returned to their families the often privileged 'western' discourse of the vulnerable child is suspended. Ostensibly, if legal agents were confronted with a Canadian child who had been sent illegally overseas by their parents, a discussion of risk, parental neglect and perhaps abandonment would ensue (both within the courtroom and in the public sphere). This protectionist conception of childhood, however, is not seen in the cases of Xiao and Lily. By failing to invoke the protectionist conception of childhood returning children to the people who placed them at risk is a possibility. What is also interesting are the parental actions that *are not* constructed as threats in each of these cases in order to sidestep this issue. This is most evident in the case of Xiao, the young female who was denied refugee status, where fear of persecution and participation in the sex trade is largely dismissed in the adjudication of her case, as is the potential that her parents will once again expose her to such exploitative behaviour if she returns to China.

With Canadian children, the threat of harm is scrutinized much more closely; courts are deeply concerned when Canadian families place children at risk of sexual assault or involvement in pornography cases. These differences can only suggest that Canadian children are more closely protected than non-Canadian children. In the case of Zhang and Li, verbal testimony of abuse is interpreted as evidence of risk, but ignoring key facts in Xiao's and Lily's cases glosses over their risk of entry into the sex trade. The

differential level of concern and attention to indicators of family abuse in these refugee cases suggests that threats to non-Canadian children are not taken as seriously as those to Canadian children. This practice also shows why it is important to examine how decisions are made and rationalized to build facts and claims. Formal decisions focus on outlining the reasons for a decision, while examining how facts and claims are built to support these reasons reveals practices such as these.

These different interpretative strategies (including and excluding particular pieces of info when necessary) show once again the subjective and discretionary aspect of assessing risk. On a larger scale, what this process shows is that a different amount of care, concern, and protection is provided for children, based not only on legal contexts, but also on citizenship. What also helps explain the possibility for the inclusion and exclusion of knowledge and evidence is the deployment of vulnerable and responsible discourses of childhood, and the dismissal of allegedly culturally-specific knowledges in the decision-making process (which is more accurately described as displacing non-western concepts like filial piety with western protectionist notions of childhood).

Governance and Childhood

The examples discussed above also show how particular conceptions of children are used to shape different legal decisions. At times protectionist discourses of childhood are raised and at other times responsibilized ideas of childhood come to the surface. Chinese familial (particularly filial piety) discourses are dismissed. The use of these various discourses and particularly the decision to downplay Chinese familial discourses points to the importance of examining how childhood is constituted rather than aiming to define different types of childhood. In these decisions, it is apparent that even when an

abundance of research or evidence shows that childhood differs and how these differences may affect children's actions, abilities and therefore our expectations, it is not always considered or included. Purists tend to realize that variations in childhood, as argued by Prout, although productive, do not show how childhood is taken up to govern. A greater pool of research on childhood may not have the desired effect in terms of altering or shaping the governance or treatment of children in any way, particularly children that are not citizens of Canada.

Constructing the "Confession" and Authenticity to Establish Credibility.

How evidence is assessed is closely tied to the extent to which a claimant is perceived as credible. In the case of Lily and Xiao, their credibility is immediately questioned, opening claims up for scrutiny, whereas for Li and Zhang credibility is accepted immediately. Several differences in legal decision-making are discerned in light of the extent to which the claimant is deemed credible. More scrutiny is given to the statements and comments made by those that are not deemed credible than those who are; evidence is then interpreted with suspicion and distrust. This shows how the construction of one fact shapes the construction of other facts.

The act of questioning claims and testimony shows that a child's potential to lie exists, illustrating a move away from the assumption that children and childhood are solely characterized as innocent and vulnerable. In these cases, a child's credibility is interrogated using various knowledge moves that assess the conditions in which statements are made. The Guidelines (1996) make several suggestions for how information should be gathered from these particular types of claimants – instruments such as the Personal Information Form (PIF) for example are intended to be completed in

a ‘sensitive manner”("Child Refugee Claimants Procedural and Evidentiary Issues," 1996). Yet it is these very conditions that are used by IRB officers to assess the overall credibility of the claimant. Children are invited to speak about their experiences in a non-threatening, non-coercive, environment. The construction of childhood as vulnerable and innocent provides the rationale for practices that are designed to gain spontaneous information that is then treated as truth because it was procured in a friendly non-coercive environment. The legal strategies used to transpose statement into truth involve categorizing these claims as ‘spontaneous’ and representative of a form of ‘confession’.

As part of unaccompanied child refugee applications, claimants are asked to tell their story, and the details are recorded in the Personal Information Form (PIF). According to one Canadian immigration site, the PIF “…forms the basis of the entire refugee process.” It continues that “[i]t is therefore important that the information and details of fear of persecution is properly outlined in an honest, credible, and thorough manner” (http://www.immigration.ca/refugee-pif.asp). This document provides the necessary background information to assess a refugee application, so it is therefore important that the 44 questions that make the PIF “must be completed in detail”, and “[w]ith the help of the translator the claimant should be encouraged to provide such detail in a chronological order with dates, places and persons who form part of the narrative of the events supporting the claim” (http://www.immigration.ca/refugee-pif.asp).

In conjunction with the information gained in this process, “[d]uring the hearing the claimant will be giving oral testimony, which should be complemented by the PIF. Credibility is gained or lost on the basis of how oral testimony or subsequent questioning by Board members is consistent with the information contained in the PIF”

(http://www.immigration.ca/refugee-pif.asp). The PIF therefore serves as a way to verify information, facts and make decisions about the claimant.

The refugee officer determined Lily's claim using both oral testimony and information gained from the PIF (TA00-3665:41). These sources together form her narrative from which key statements are identified and used to assert that she willingly migrated to North America. The IRB highlights that she admittedly "felt obliged to go", which was constructed as a 'confession'. Although she explained her 'obligatory feelings'[47], the IRB asserted nonetheless that "s*he consented to emigration and averted to a risk of harm of her own will"* (emphasis added) (TA00-03660: 43).

In other parts of her testimony Lily details her contact with her family. These details are classified as 'omissions' on her part, and used to further support that she was not a victim of exploitation. The IRB constructs Lily's family relations as positive by 'revealing' damaging evidence to her case:

> In the course of explaining her continuing contact with her family given the allegations of exploitation, she even ***offered a spontaneous*** and, in our view, extremely damaging admission that they have never cheated her (emphasis added) (TA0036605: 44).

The use of the terms 'damaging' and 'spontaneous' validate the IRB officer's decision to reject Lily's claim of parental exploitation. Deciphering whether this is a fair assessment is not the purpose of this discussion; what are instead gained from this analysis are insights into how particular types of knowledge produce facts or truth effects. Information that is constructed as 'revealed' or 'discovered' rather than drawn through active questioning increases its impact. Though it wasn't, the information that Lily

[47] She also details her father and brother"s illness and her families" economic hardships. She relays that her family is poor, her father has a "chronic bone aliment", her brother a "terrible intestinal disease, and that her family was fined for the birth of her sister (TA0036605: 41-42).

disclosed can also have been constructed as illustrative of her innocence, vulnerability, and lack of ability to comprehend the legal decision-making process. The weight and interpretation of her spontaneous evidence therefore could have had several meanings, illustrating the malleability in the process of interpreting evidence.

The weight placed on direct evidence is further evidenced in a comment made about Lily's case, where her written testimony is highlighted as a key source of factual information. The panel member's state:

> "On top of the previously stated reasons we have for not believing the first claimant's testimony that she did not consent to the decision to go abroad, there is evidence that she did consent. Her written narrative suggests some reasons to believe that there was volition out of concern for her family's economic well-being at a time of unusual hardship." (TA0036605:48).

The invocation of her written narrative plays as a way to authenticate facts and bracket them from dispute. Similarly, in the case of Xiao, the impact of seemingly non-coercive information is used to establish authenticity of particular claims.

As shown, one way of establishing credible claims and testimony is by identifying direct statements or testimony made by the child claimant outside of interrogations. This type of information or statement is constructed as forms of truth by labeling them as 'confessions' or 'spontaneous'. The term 'confession' implies revealing a hidden secret or truth, and 'spontaneous' suggests a lack of coercion or force in drawing testimony. Appealing to truth through the statements made in such conditions is intended to authenticate both the statements itself and the use of the IRB officer to make claims based on these statements. This way of establishing a claim illustrates yet another legal strategy used in the network of claim making, and provides a way to either construct a child as credible or not.

Discussion and Conclusion: The Role of Legal Knowledges and Strategies in Building Claims about Childhood in Unaccompanied Refugee Determinations

The IRB officer's rationale for choosing to emphasize the individual testimony of some claimants and not others is not easily discernable (See Valverde et al., 2005)[48], nor is it the goal of this research. Although the answer to *why* these decisions can be made would be speculative, the answer to *how* these different decisions arose provides insights into the flows and process of legal knowledges and claims. What can be gleaned from these claim-making strategies is some of the ways that claims are strengthened. This includes weighing evidence differently from one case to another, at times with little regard for whether they are high- or low-status, or extra-legal knowledges. The use of various knowledge moves illustrates how IRB officers exercise discretionary power within the legal process using the multitude of legal knowledges available to them.

In the previous chapter I discussed the various conceptions of childhood embedded in the Unaccompanied Child Claimant Guidelines that were written to guide legal decision-making for unaccompanied child refugee claimants. I argue that these various conceptions provide a discretionary space for IRB officers to justify almost any decision while still following the Guidelines. I use the existence of this discretionary space to argue for the importance of looking at actual case files. In this chapter I do exactly this, and examine how officers operate within the discretionary space allotted to them by the Guidelines. In analyzing the claim-making process, several strategies for asserting truths are identified that illustrate the complexity of legal decision-making as well as the governing power of a broad category such as childhood. In particular, I focus on consent, familial context, and credibility, while delving into discussions of neoliberal

[48] A genealogy of decision-making is an impossible task as language and history have a complicated relations.

and western conceptions of the child, claim-making strategies, and high- and low-status knowledges.

One of the conclusions of this chapter is that, following the findings of other empirical legal research, 'extra-legal knowledges' often play an important role in the courtroom. Perhaps the most poignant example of this is the way in which the New York Times article was used to not only provide context *but to actually refute a child's testimony*. The cases reviewed here also show that both expertise and child testimony are sometimes relied upon, and at other times dismissed. The weighting of these knowledge sources vividly illustrates how "[k]nowledges are always circulating, changing, being taken apart, and reassembled in new shapes by new actors" (Valverde et al., 2005).

By looking at how consent, family context, and credibility are used to justify decisions, I have constructed what might be considered a child refugee "archetype". The ideal claimant is credible, non-consensual, and has poor family relations, and in justifying decisions IRB officials seem to discard or inflate portions of a claimant's case as necessary to construct a child as such. Just as policy was shown in the last chapter to provide little guidance, here the facts of a case appear to do the same.

To conclude, I would like to note that the inconsistencies in how evidence is interpreted or how the Guidelines are applied does not implicate the decision-makers themselves. IRB officers, like all other individuals, have a host of obligations that probably shape how they make decisions: to their jobs, their colleagues, the immigration minister, and, ultimately, Canadians overall. It is these obligations – aided by the discretionary guidelines and the ambiguity of the conception of childhood – that allows for the co-existence of such different outcomes. Whether it is intended to or not, this

results in the differential treatment of Chinese children, and in an unequal treatment of child refugee claimants. Furthermore, it results in the production of a variable child.

Ultimately, this analysis has shown that variable definitions of childhood provide the tools for IRB officers (whether it be refugee officers or panel members) to reject and accept claims despite their similarities in applicants situations. Moreover the trend in these cases implies that the decision to accept or reject an application is motivated by an interest in reducing the amount of claims that can be accepted. In other words, IRB officers are aware of the effect of previous case decisions. If the IRB had endorsed the validity of the claim that filial piety explained these applicants actions rather than their suggestion that they consented, all the children facing the panel during that time could invoke the success of one applicant to put forth their own claim. Given the discretionary power of legal agents and the various knowledge moves that can be employed to curtail particular evidence, the existence of one successful claim based on filial piety would certainly not guarantee success for others. It does, however, provide yet another venue by which to pursue a case. Moreover, it is publicly unappealing to fail to protect a child that is being treated neglectfully even if the differences in treatment can be explained by Chinese familial practices or understandings of childhood.

As socio-legal studies have shown there are strategies used to construct facts and claims to produce desired outcomes or, to use the words of Lange (2002), to build a fact-rule relationship. What this study also shows is how conceptions of childhood are one of the many knowledges used within the various claim-making strategies to produce particular decisions. To date, research shows that different forms of knowledges play into legal decisions, however, the role that conceptions of childhood play in legal decisions

has received limited attention. This analysis illustrates the governing power of this concept and therefore the importance for further legal research.

Lastly, the trend in IRB decisions to limit the opportunity for large populations to marshal these claims also suggests that, in a subtle way, this practice is aiming to illustrate the rigidity of Canadian immigration and refugee policies. Not even children can 'beat' the system, their claims are also scrutinized. Such practices enforce the idea that Canada is not a refuge to all people, not even when those people are children.

Chapter 6

Discussion and Conclusion

The objective of this project has been to illustrate how the law governs *with* childhood, and in so doing examine how understandings of childhood provide a resource in legal decision-making. In particular, I focus on understanding how facts and claims are constructed, and the role of discretion in this process. I show some of the ways that the legal actors use different, often contradictory, conceptions of childhood to establish facts, and ultimately build a case to reject or accept an unaccompanied child application. My analysis illustrates how discretionary power operates, which knowledges of childhood are drawn upon in determining a refugee claim, and the knowledge moves used to construct facts and claims.

Prior to examining the policies and practices of refugee determination cases, I contextualize my project in chapter one by outlining the importance of studying childhood as it is produced in the legal realm. Examining which and when particular understandings of childhood are deployed is important for illuminating how childhood governs children. Chapter two further justifies the importance of examining how childhood is constituted by demonstrating that childhood is both a contested and a variable concept. The lack of a single agreed-upon understanding of childhood across and within disciplines means that how children's needs are defined differs based on the perspective employed by those governing. Conceptions of childhood are contingent on disciplinary perspectives, as well as social, cultural and political contexts. Which understanding is validated or dismissed depends on the legal actors involved in the decision. It is through examining the constitution of childhood in light of these

considerations that the operations and governing power of the child and childhood can be seen.

In chapter three, I reviewed the literature on legal processes to show why it is important to examine law and policy, as well as actual legal decisions, in order to understand how knowledge claims about children and childhood are constituted. I showed how the legal decision-making process creates the conditions for particular ideas of childhood to be invoked. I illustrated that the legal process consists of negotiations, discretion, and processes of legitimizing various knowledges. The law is a space of contestation, where legal actors (such as judges, juries, lawyers, and IRB officers) are responsible for constructing facts, presenting cases, and arriving at decisions. To decide on cases, legal actors selectively draw upon various conceptions of the child and childhood by exercising discretionary power. The multiple perspectives concerning these concepts coupled with the discretionary power of legal agents to determine facts and claims makes the law an ideal site to investigate the constitution and governing power of the child and childhood.

Chapters four and five provide contextual examples of the variability of childhood, and the process of claim-making in the law. Chapter four examines the 'Unaccompanied Child Refugee Guidelines' to show how these policies employ and draw upon vastly different conceptions of childhood. This analysis highlights how the legal system does not operate using a single unified understanding of childhood. This is important to show because it is these policies that provide the tools for legal actors to produce decisions and case outcomes that can be used to decide future claims. Chapter five examines legal fact and claim making practices, accentuating which understandings

of childhood are reflected in IRB officer's interpretation of evidence and decisions. This chapter draws together the various theoretical insights of socio-legal and childhood scholarship discussed in chapters two and three through an examination of case files in four refugee cases of unaccompanied child refugee claimants who arrived on the shores of British Columbia in 1999. The focus on decision-making practices shows how discretionary power operates, and in particular how this allows for legal actors to invoke western or neo-liberal conceptions of childhood in one context and not in another.

Project Contributions

Prospective Impact of Case Decisions

My research contributions also include illustrating how discretionary power operates. I show that while discretion is bounded by law and policy, there is still ample room for legal actors to navigate between different facts. Although law and policy guide decision-making practices how these policies are written, and the assumptions implied in the provisions for unaccompanied child claimants, creates room for legal actors to exercise discretionary power. I illustrate these two points in chapter four and five.

In chapter four, where I analyze the Unaccompanied Child Refugee Guidelines I illustrate how the guidelines incorporate variable understandings of childhood that creates the space for nearly any decision to be justified. The guidelines outline provisions for the treatment of children, which presupposes knowledge about children's abilities, needs, and capabilities. More specifically, the variability in childhood in the provisions provides the necessary tools for legal agents to justify a wide array of claims. As shown in this research, this includes shaping claims in a way that avoids the prospect that large numbers of applicants can make similar claims.

In addition to reaffirming that discretionary power is exercised in unaccompanied child refugee cases, I show that although legal agents have some leeway their interpretation of evidence and decisions are not random. Instead, it is quite clear that the decision to emphasize particular types of knowledges, and to draw upon certain understandings of childhood illustrates a consistent attempt to avoid creating an open-door policy that would allow children to successfully claim refugee status. The decision-making practices, discussed in chapter five, show an effort to ensure that reasons and circumstances that could apply to a large population of children are not institutionalized in legal practice as a successful way to gain refugee status in Canada.

The fact and claim-making practices employed to avoid institutionalizing legal decisions that would allow for large populations to be accepted as refugees show how discretion operates and the place of socio-political factors in case outcomes. For example, the decision to establish consent in cases where children expressed a sense of 'obligation' to assist with their parent's financial struggles closes the possibility for the undoubtedly hundreds of other families who face a similar predicament. Another example is seen in the minimal attention given to filial piety as a form of knowledge that helps explain children's obedience, or as constructed by refugee officers, their 'consent' to their parents request to migrate. Refugee claims officers could have drawn upon the testimony of one of the many experts that claimed that filial piety is part of Chinese familial relations, and explains why Chinese children would obey their parents request to migrate whether they agreed with it or not. Embracing the full implications of this reality, however, would provide legal decisions that could potentially allow an enormous number of other children to make similar claims. Considering that the population for whom this claim

might apply exceeds the total population of Canada, this is a particularly relevant concern. In other words, the decisions in these cases suggest that refugee determinations are made to prospectively avoid in part producing cases that can be used as the standard for a large number of claimants.

Legal practice, particularly in common-law legal systems such as Canada, is largely based on case law, which refers to the rules and principles found in other cases. In real terms this means that the reasons for one successful refugee application can be used in other cases. Although invoking case law does not necessarily guarantee that a case will be successful, it provides a form of legal knowledge that can be marshaled to support another similar claim. As stated in chapter four, the tribunal process allows for a great level of discretion. The flexible and informal tribunal process does not however resolve refugee officers from considering past case decisions. The establishment of a lead case (Lily) also indicates that case law plays a role in these decisions.

The trends illustrated in chapter five along with the finding that the guidelines are written in such a way as to allow for almost any decision are of particular interest given the Canadian government's mantra of child protection. The understanding of children as vulnerable, innocent and in need of protection has been an iconic image in Canadian policy and rhetoric. Despite these messages, Canadian refugee determination processes analyzed in this research suggests that protecting children is not an unequivocal objective. Instead, the wider implications of approving particular cases matters in deciding a case. The anticipated consequence of this practice is that unaccompanied child refugee claimants are evaluated on factors other than the threat of harm. Such a practice not only contradicts Canada's rhetoric but also has severe consequences for unaccompanied child

claimants. Future child applicants could be denied refugee status if there is an abundance of claimants in similar predicaments. In cases where large groups flee their country resulting in large numbers of children being left without guardianship, their circumstances will not yield them refugee status, but will instead affect how all the applications will be considered. Refugee cases then are not solely assessed on the merit of the application.

Arguably, the goal of Canada's refugee system is not exclusively to prioritize the best interests of the child, but to do so in such a way as to ebb the flow of future applications while also maintaining the national image of compassion. The extent to which Canada is revered for being a world leader in child refugee applications provides a strong incentive to investigate the legal decision-making practices in these, and future cases.

Also striking is how little attention the cultural elements of childhood are given in the adjudication process. Again, one of Canada's mantras is that it is a multicultural nation, grounded in policies that aim to foster multiculturalism. The rhetoric surrounding Canada's attention to cultural difference suggests that such distinctions would be central to refugee cases. It would seem particularly likely that they would be at the forefront of understanding and determining refugee claims, given that these sorts of cases by nature deal with specific cultural distinctions. The minimal attention to, and impact of, Chinese familial relations (that shape understandings of childhood) in these cases challenges the reality of Canada's commitment to cultural difference. The extent to which these images define Canada increases the importance of examining how different knowledges of childhood (western or Chinese) are addressed in legal practices.

This research also demonstrates that it is futile to identify the realities of childhood without looking first at the context of the determination. Ariès and many contemporaries in the field show us that childhood is variable, but a more fruitful project at this point is to examine how and why these concepts are institutionalized. Examining legal practices is an effective way to begin to do this, because the legal system is one of the institutions where childhood is created and reified. The legal system plays a figurative role in governance, as legal decisions institute particular norms and ideas about children – specifically about those who receive protection and those who should be barred from entry to Canada.

The impact of legal decisions however does not tell us about how some of these decisions come to be. Therefore, it is important to examine the legal decision-making process and the role of discretion in this process. Examining how facts and claims are constructed in various cases can reveal trends and differences in how evidence is interpreted. For example, investigating how evidence is given meaning can reveal socio-political effects and the role of understandings of childhood. Although it is known that discretion is part of legal decision-making how and when discretion is exercised may differ. Similar refugee cases adjudicated in a different social and historical context might yield different practices and outcomes. The knowledge that legal actors have the discretionary power to shape decisions based on socio-political factors, for example, provides more incentive for conducting research that investigates actual legal decision processes.

Why Care about Discretion in Refugee Claims?

The claim that legal actors exercise discretion and that legal practice involves manipulating or downplaying particular forms of evidence and arguments is not entirely novel. However it remains important to analyze the legal decision-making process, and the role of discretionary power in this process to reveal trends concerning how and why refugee claims are accepted or rejected. As seen in this research, investigating legal decision-making raises questions concerning Canada's commitment to the national rhetoric around child protection and acceptance of cultural difference.

Revealing trends in decision-making is also important because the outcomes have real effects on children's lives. In practical terms, the findings in this research suggest that protecting children and serving their best interests is not the exclusive principle guiding refugee decisions. Instead, my analysis suggests that the likelihood of a successful application does not just depend on the case, but instead on a series of contingencies. What types of contingencies shape cases are made visible through examining how facts and claims are constructed. In this study examining which and how facts and claims are validated and dismissed shows that refugee determinations are shaped by the objective to reduce the potential of creating cases that can be used to persuade decisions in future claims.

Also, examining actual case decisions reveals that a great deal of discretionary power exists in determining unaccompanied child claims and that this space allows for other agendas to operate discretely. Moreover, investigating the construction of facts and claims illustrates *how* discretionary power and knowledge moves are exercised to accept or reject an application. For example, 'bracketing' evidence of filial piety is used as a

way to successfully reject a refugee claim. By understanding how discretion operates, and the power of knowledge moves, to build claims provides a better understanding of the legal process. The importance of understanding this process is discussed below.

Contributions to the Discipline

My dissertation contributes to the sociology of law, the sociology of knowledge/culture, and childhood studies. In relation to the sociology of law, for centuries, debates have ensued concerning how to study the law. Socio-legal scholars have advocated moving away from producing legal meta-theories and for examining law in operation (See Lacey, 1992; Lange, 2002; Valverde et al., 2005; M. Valverde, 2003). These discussions prompt a movement away from identifying change in the law to examining how the law routinely operates. This involves investigating the construction of facts and claims, and the knowledge moves used in this process. Conducting such research moves scholarship away from defining boundaries. It also, as Latour and those using his framework suggest, focuses attention on 'the creativity of both human and nonhuman actors' (cf. Latour, 2002). The strength of my work is that it illustrates the opportunities that exist in the law to produce different facts and claims (M. Valverde, 2006). Although this type of work already exists, it has not been conducted in the context of unaccompanied refugee child cases. Moreover, it is important to examine decision-making processes, even in the same legal arena because the socio-political factors that motivate decision-making practices change over time.

My work also contributes to legal philosophy. In illustrating fact and claim construction, my work points to how this process creates the necessary tools to invoke particular rules, such as determining that a claimant's application does not meet the

refugee requirements. The fact–rule relationship in legal philosophy has often been discussed with reference to highly selective and abstract examples (Lange, 2002). Research that examines actual decision-making practices provides concrete examples of how facts and claims are constructed and produced.

Studying the legal process in cases dealing with children is also unique. Since the 1970s-1980s, scholars involved in the study of childhood have struggled with identifying new ways to think about childhood. As discussed in the introduction and chapter two, scholars today are focusing on identifying new ways to study the child and childhood. Some articulate the importance of including children in this process while others call for examining the osculation between childhood and adulthood (remember Prout's articulation of the 'middle'). In contrast to these approaches, my study examines how the child and childhood are institutionalized rather than identifying new configurations of childhood. Locating conceptions of childhood in technologies, institutions and governing practices without examining when, why and how these 'black boxes' came to be. It is only by examining the conditions and rationales for governing practices that the logic and processes of legal decisions can be examined, and how variable understandings of the child and childhood are constituted can be seen.

Revealing that childhood is variable and that this variability is dependent on socio-political contexts and the discretionary power of legal agent's further points to the importance of examining childhood in the legal realm. Policies designed specifically for children suggest a commitment to their protection and well being. As evidenced in chapter five however this protection is not granted to all children, in all cases.

In the case of Xiao and Lily, the parent's decision to send these children abroad against their will is not constructed as evidence of neglect or mistreatment. This decision contrasts that made in the case of Li and Zhang who were both initially granted refugee status based on evidence of parental neglect. However, as discussed in chapter five, the tribunal rejected the refugee officer's determination suggesting that the threat of neglect was unfounded. If parents of Canadian children placed their children in an unsafe situation, the risk of returning them to their homes would most certainly be discussed. Whether such Chinese familial practices are acceptable is not of interest here, what is instead important is the fact that these actions are not used to discuss risk as they would be in cases involving Canadian children and families.. Such differential treatment illustrates not only that the concepts of child and childhood are variable, but also that not all children are equally protected.

The fact that in these refugee cases less attention is paid to the threat of neglect suggests that protecting non-Canadian children is taken less seriously than protecting Canadian children. Given these findings one must assume that policies and program agendas that deal specifically with children must be focusing on a particular type of child – one that fits a particular level of ability, culture or citizenship. Or perhaps there are various typologies of childhood that are present in one agenda or policy. It is this variability that needs to be explored rather than assuming that policies, laws, and programs all operate under a unified notion of what childhood is. If we were to continue under this assumption, the governing power of childhood would remain black-boxed. Moreover, the differential treatment of children might remain unnoticed or at the very least underexposed.

Areas for Future Study

My research project opens up several questions and further areas of study. First, the cases analyzed in this project could be further examined. There are several other issues, facts and claims that were raised in these cases that could be further explored. Most pressing is the lack of attention paid to the threat of gender persecution. In the cases of Xiao and Lily, little attention was given to the possibility that both would be forced into a life of prostitution. An examination of several other cases of young women who arrived around the same time from the same province of China would allow for a comparative analysis. Using a comparative approach, I would investigate whether greater attention was given to the threat of gender persecution in other female unaccompanied child cases, and, if so, what evidence legal actors used to distinguish the threat in one female case and not another.

Another factor that should be further explored is the role of race/ethnicity in the decision to employ particular understandings of the facts. For example, how does the race/ethnicity of these applicants play into the evaluation process? There is no doubt that it plays a role in the process of legal decision-making, but to better understand this it would be useful to interview Immigration and Refugee Board officers. This would provide a way to learn more about how IRB officers determine when a child is making a legitimate or fraudulent claim, and to investigate how race, gender and discretion play into this process. Some research questions include: do additional factors such as the child's physical appearance affect how the IRB officer determines the claimant's responsibility, capabilities and accountability? Does the IRB officer's interaction with the

child claimant shape or influence their perception of the case? What role does the IRB officer's years of job experience play in their determinations?

Given the findings in this project it would be fruitful to examine actual practices of legal decision-making in different legal realms, such as case decisions dealing with child sexual assault victims, and young offenders. In sexual assault cases it would be interesting to examine if children are always constructed as victims, and if not, what understandings are used to hold them accountable? In the case of young offenders, the variability and governing power of childhood could be examined by focusing on the reasons judges provide for imposing adult sentences. Lastly, a comparative analysis of the use of childhood in young offenders, sexual assault and refugee cases would provide further insights into the variability and governing power of childhood.

My research also shows that children's testimony is not always validated in the courtrooms. The decision to displace the voices of children again points to the variability in childhood – not all children are considered trustworthy or perceived as innocence. This finding raises questions concerning the treatment of children's testimony in the courtroom. Given the recent implementation of Bill C-2 (An Act to Amend the Criminal Code: Protection of Children and Other Vulnerable Persons and the Canada Evidence Act), several changes have been made to the evidentiary act for children. A timely research project would be examining if, and how these changes have altered practices in the courtroom and how they've shaped legal decisions.

The aforementioned projects contribute to understanding how legal decisions are made in various contexts, and perhaps like in this case study, will illustrate a trend or motivation to produce particular outcomes. Given the extent to which children are

governed and regulated, it is important to understand if the treatment of children is a result of a process that aims to determine the best interest of the child, or if there are alternative agendas at play. It is through these types of investigations that the governing power of the variable child can be revealed. Furthermore such research illustrates how, even within the bounds of the Guidelines and procedural justice, there is room to construct the variable child.

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