The Schooling of Irregular Migrant Children in Canada:

Justifications for inclusion and exclusion

Thesis submitted in partial fulfilment of the requirements for the Degree of Doctor of Philosophy in the Department of International Development

by

David Christopher Passarelli
St Antony's College, University of Oxford
October 2017

Abstract

This thesis examines the practice of accommodating irregular migrant children in Canadian public schools, specifically, public schools in Toronto, Ontario. Estimates indicate that there are close to 500,000 irregular migrants in Canada; half are thought to be living in the City of Toronto.

Since the early 1990s there have been several novel policy developments in Ontario that have facilitated access to public schooling for irregular migrant children. This project seeks to identify the normative ideas that have been appealed to by public authorities in the policy development process. First, a critical review is undertaken of theoretical justifications developed in moral and political theory for extending schooling rights to irregular migrant children in liberal states. Then, arguments put forward by public authorities in Canada for extending or limiting schooling rights are analysed and compared with the dominant normative frameworks in the theoretical literature. This research finds that public authorities at the sub-state level made use of normative arguments that fall outside common theoretical approaches in moral and political theory. Normative arguments at the sub-state level are found to cohere with a *fiduciary* conception of public authority.

It is argued that fiduciary theory provides a systematic and innovative theoretical framework for understanding the normative ideas appealed to by public authorities in practice. Moreover, fiduciary theory makes available the normative resources necessary to provide a strong way of conceptualising the duty of public authorities to educate irregular migrant children. This research contributes both to theoretical scholarship aimed at understanding and conceptualizing obligations to irregular migrant children, and also to the field of Canadian Studies, by contextualizing the policy response to irregular migrant children in Canada over time, demonstrating how specific policy responses reflect shifting normative understandings about belonging, government obligation, national culture(s) of citizenship, and the scope of provision of social welfare services to irregular migrant children.

Table of contents

Table of contents....2
List of figures, tables and boxes....3
1. Framing the research project....5
1.1. Overview....5
1.2. Introduction....8
1.3. Definitions....20
1.4. Objectives and research questions....29
1.5. Scope of the research project....31
2. Methodology....41
2.1. Overview....41
2.2. Three forms of analysis....41
2.3. Source material....50
2.4. Limitations....57
3. Justifications in theory....59
3.1. Overview....59
3.2. The partialist justification....63
3.3. The justification from social membership....74
3.4. The rights-based justifications....82
3.5. Conclusion....102
4. Justifications in practice....105
4.1. Overview....105
4.2. Policy moment 1 (1992-1993)....109
4.3. Policy moment 2 (2001-2002)....127
4.4. Policy moment 3 (2005)....148
4.5. Policy moment 4 (2004-2014)....163
4.6. Conclusion....202
5. A fiduciary account of public authority and obligation....209
5.1. Chapter overview....209
5.2. Chapter structure....209
5.3. A brief definition....210
5.4. Argument structure....211
5.5. Genesis of contemporary fiduciary duties....215
5.6. The amorphous nature of fiduciary relationships....219
5.7. Contract fiduciary theory: the role of voluntarily undertakings....225
5.8. Functional fiduciary theory: context and relationships....230
5.9. Philosophical foundations....234
5.10. Applying fiduciary theory....244
5.11. Three challenges....255
5.12. Value of a fiduciary approach: reconciling theory with practice....267
5.13. Conclusion....279
6. Conclusion....283
6.1. Overview of the research and its conclusions....283
6.2. Reviewing the policy challenge....284
6.3. Addressing the policy challenge in practice....287
6.4. Distinctiveness and impact of the fiduciary approach....290
6.5. Limitations....295
6.6. Closing statement....296
7. References....298
8. Annex I....316

List of figures, tables and boxes

Figure 1. Temporary residents present in Canada by category...……..…Page 34

Figure 2. Temporary humanitarian population resident by Province…...Page 35

Figure 3. Temporary humanitarian population by major urban city .....Page 36

Table 1. Tuition fee income Toronto District School Board 2010-2015…Page 173

Box 1. Conditions establishing a fiduciary relationship…….....…….....Page 233

“No one, innocent or not, should be transformed by the state into a pariah in the way that exclusion from schools would.”

Owen Fiss
Sterling Professor Emeritus of Law, Yale University
The Immigrant as Pariah, Boston Review 1998

“Immigration calibrates the heart of our nation.”

The Honourable Jerahmiel S. Grafstein, Q.C.
Senate of Canada Debate of Bill C-11, 25 September 2001

“I take these, as things that Canadians have proudly achieved—on the belief that everyone should have access to security and to those kinds of social services that we share together: to healthcare, to education. I don’t believe for a moment that you should have access to those because you have chosen your country of birth wisely, you chose your parents cleverly. This is not the test we should apply to determine whether or not you live with security, prosperity, opportunity and access to a marvelous healthcare and education system. If a person is here, we should extend those rights, because we know those rights were not won jealously, but won by a sense of association, a sense of empathy, a sense of common purpose. We don’t have the authority or the ability to extend those privileges, those freedoms, that prosperity, that opportunity, that security around the whole world, but we sure as hell have the ability to extend some of those privileges here, to everyone who lives in our city.”

Gord Perks
Toronto City Councillor
Toronto City Council Debate of Motion CD29.11, 10 June 2014

1. Framing the research project

1.1. Overview

In 1993, the Province of Ontario became the first province in Canada to pass legislation that explicitly recognized a right to free public schooling for irregular migrant children. As of 2014 (the end of this research project), it was still the only province in Canada to have such a law. Thousands of irregular migrant children (IRCs) that live in Ontario have, in theory, been able enjoy access public schooling up through to the end of high school (roughly age 18) as a result of this law.[1]

However, this legislation masks a more complicated story. Public authorities have historically disagreed, and continue to disagree, about the accommodation of IRCs in Canada's public schools.[2] This research focuses on this disagreement and explores the justifications put forward by those who advocated for inclusion, as well as the arguments put forward by those who pursued a policy of exclusion. As policy responses—and their underlying arguments—shifted over time, this project also seeks to contextualize the policy response to IRCs in Canada. This is achieved by focusing on discourse and debate at specific, pivotal moments of policy change. This research will show that policy responses in Canada reflected shifting normative understandings about belonging, government obligation, national culture(s) of citizenship, and also

[1] See Section 1.3 for a more detailed definition of the term *irregular migrant children*. The term *irregular* is preferred to *illegal* so as to avoid stressing unwarranted connotations with criminality. The term irregular migrant child refers to a child with an administrative status that is irregular. An irregular migrant is defined by the International Council on Human Rights Policy as: "[…] a person who lacks legal status in a transit or host country. It refers to people who entered the territory of the state without authorization, as well as to those who entered the country legally and subsequently lost their permission to remain" (ICHRP 2010, p.15). The expression *child migrant without legal status* is sometimes used to refer to this same population of children. In the sections addressing discourse and policy in Canada, the terms non-status and undocumented appear frequently because these are the terms used by public authorities and others when discussing this population. These terms are analogous with the expression *irregular status*.

[2] This project focuses specifically on access to schooling for irregular migrant children in the City of Toronto, since this is the primary destination for irregular migrants in Canada. See Section 1.5 for statistics on estimated population size.

differentiated views on what would be a fair provision of social welfare services to irregular migrants and IRCs in particular.

Canada is not the only country to host debates on the rights and entitlements of IRCs. Many countries with irregular migrant populations have questioned the nature of the host state's responsibilities and obligations to this unique group of individuals. It has led some public authorities to argue that the only thing owed to IRCs are basic protections of procedural justice and emergency aid (Moan 2012). To give irregular migrants anything beyond this is to condone their contempt for the rule of law.[3]

The lack of certainty in respect of the treatment of IRCs stems from the fact that they live "at the intersection of conflicting policy agendas": immigration restrictions and child welfare (Spencer 2016, p.1615). This has made it difficult for service providers in host communities to meet the needs of their young *clients*, and it has also made it difficult for IRCs and their families to access critical social services (Sidhu 2008; CoT 2014).

For service providers, especially at the sub-state level, this is complicated terrain to negotiate. Service providers must navigate between conflicting policy agendas, competing responsibilities, and also reconcile the limited rights granted to irregular migrants with both operational concerns to do with funding and their sense of professional responsibility. On the one hand, there is the responsibility to respect and uphold national immigration policy that does not tolerate the presence of individuals without legal status and actively targets them for removal. On the other hand, there is the responsibility these service providers have to provide education to a constituency in need. IRCs and their families also suffer from the clash of policy agendas. They experience a great deal of uncertainty in everyday life and are fearful of public authority because they do not know if their need for crucial social services, like healthcare and education, will matter more to their service provider than their host communities' desire

[3] See, for example, the remarks made by Toronto City Councillor Minnan-Wong in Section 6.3.

to enforce immigration legislation. What is one to do then when a child finds her way into a community without its prior agreement and makes a claim to its social goods (such as education)? How should public authorities go about reconciling moral intuition and public policy?

Even when public authorities may want to give greater emphasis to the needs of those with irregular status in their constituencies, they may simply not have the means to do so, since this often requires the cooperation of other levels of government. This fact calls into question the overlapping spheres of responsibility for the welfare of irregular migrants in a system of multi-level governance like Canada. Greater acknowledgement across the different levels of government of the unique and differentiated responsibilities that accrue to public authorities and service providers at the local level would be a first step toward resolving the tensions that local authorities experience in their dealings with irregular migrant populations.

The fact that IRCs *are accommodated* in Ontario public schools means that an attempt was made to reconcile the differences that arise at the intersection of these conflicting policy agendas. Yet, to date, no systematic effort has been undertaken to understand how policymakers have gone about this reconciliation and what normative arguments were influential in the development of policies of accommodation. This thesis aims to address this gap and in so doing, provide greater insight into local and national practices of accommodation.

Two novel contributions emerge from this work. First, this research maps key policy debates in Canada that have had a bearing on the IRC's access to schooling. It explores the ideas and arguments that animated public authorities when legislation was first passed in the Province of Ontario in 1994, broadening access to public education, through to policy debates in the City of Toronto in the 2010s that led to the establishment of Canada's first *sanctuary city*. The second contribution is in the realm of normative theory. This research contributes to a specific body of scholarly work addressing conceptual dilemmas that arise in the study migrant rights from the

perspective of liberal political theory. Specifically, it adds to understandings of affirmative obligation to assist persons irregularly resident in liberal states.

1.2. Introduction

Evidence presented in this research suggests that policymakers in Canada were, until relatively recently, simply unaware of the existence or scale of the challenges faced by IRCs in terms of access to social services.[4] Consequently, the difficulties IRCs faced accessing public education in Canada went unaddressed for a number of years.[5] When these difficulties came to light in the early 1990s, it prompted a debate about the responsibility of host communities to provide social welfare services to this population of children. This debate took interesting turns between 1992 and 2014, featuring arguments that hew both toward greater access and greater restrictions to public schooling and other social services for IRCs. Landolt, Villegas and Villegas note that for IRCs "debates from both sides on their access to education and healthcare [were] passionately argued" (2012, p.1). However, these debates have been little studied, including those that transpired when landmark legislation was proposed in the Province of Ontario in 1992, which sought, for the first time, to broaden access to schooling for IRCs in the Province.

This research project sets out to explore the trajectory of this debate, and the normative ideas that were influential between the passing of the first provincial law bill broadening access to schooling for IRCs in 1992-1993; through to the passing of the Don't Ask, Don't Tell policy by the Toronto District School Board in 2007, instructing all school administrators in the school board that they should neither inquire nor report an IRC's status to immigration authorities; and continuing onward to 2014 and the

[4] See Chapter Four.

[5] There are several additional reasons why IRCs have had difficulty accessing classrooms in Canada. These include: (a) lack of specific policy and legislation addressing the needs of a population of children that are often difficult to trace; (b) nativist concerns or discrimination by public authorities and front-line workers; and/or (c) the prevalence of administrative barriers, which may not aim at denying access to education, but may nevertheless frustrate efforts to gain access to classrooms in practice.

passing of Toronto City Council motion CD18.5, which was a significant milestone in the irregular migrant struggle for access social services in the City of Toronto.

As noted above, this research project considers access to schooling for IRCs in the City of Toronto specifically. The City of Toronto is unique. It not only hosts the largest number of IRCs amongst all Canadian cities, but it is also the city that has gone the furthest in grappling with the ethical dilemmas thrown up by the IRC's claim to public schooling. And while both the Province of Ontario and the City of Toronto passed policies that aimed to facilitate access to public schooling, to date, no systematic effort has been undertaken to understand why IRCs have been accommodated in this way. This is remarkable given that the local actions in Toronto and more broadly in Ontario have inspired other Canadian cities to promulgate policies that broaden access to social services for irregular migrants.

The fact that the Ontario public education system, today, accommodates IRCs is certainly interesting, but what is left unexplored are the reasons for this accommodation and the evolving perceptions about obligation and responsibility that have accompanied the legislative and policy shifts over the past quarter century. A number of questions should be asked: (a) what ideas were put forward to justify broadening access to social services for IRCs; (b) were these ideas systematically presented; (c) what normative theory best integrates the different strands of justification for accommodating IRCs in Canadian schools?

These questions are relevant, not least because the developments in Ontario and the City of Toronto met with significant opposition along the way. This should not be unsurprising given that the public policy issue being addressed brings together two very complex policy agendas that both have a bearing on the future character of the local and national community; to wit, immigration policy and education policy.

Citizens may have good reasons to want to defend the membership rules that are embodied in immigration policy. Immigration policy determines who can and

cannot enter the political community. These rules are important because they shape the character and composition of the community and determine, to some extent, who will become one's neighbours, compatriots and friends. Similarly, controlling access to education determines to a large extent the character and potential of the future workforce and co-inhabitants, but also has a significant bearing on practices of social reproduction.

There are reasonable, practical and moral reasons to be both for or against restrictive immigration and educational policies. By controlling who is in one's community, one can also control those to whom one will incur obligations. After all, community members can make a claim (directly or indirectly) on one's time and resources, influence government and policy outcomes, and impact the safety and security of the community. Yasemin Soysal notes that "Citizenship in a nation-state is an exclusive status that confers on the individual rights and privileges within national boundaries. Nation-states try to protect this exclusive status through immigration and aliens' laws" (Soysal 1994, p. 120). People may feel strongly they should have a say in defining the future of their community and their relationship to those within it; that 'say' is reflected, to a large extent, in the community's membership rules, i.e. immigration policy.

Next, consider education policy. The provision of education can be guided by vastly different policy agendas; these can be both inclusionary and exclusionary, instrumental or benign. To be sure, education policy can be just as restrictive as immigration policy. One need look no further than contemporary debates on equal educational opportunity for evidence of this. Education policy reflects a number of different objectives; and not all objectives are held by all public authorities in equal regard. These objectives may relate to the child's well-being and future autonomy, the community's future economic resilience, the future character of the electorate, public safety, and also, it has been argued, the entrenchment of class divisions (Gutmann 1987, p.9). As the educational scholar Christopher Jencks points out:

> Everyone's conception of equal educational opportunity requires that educational institutions 'treat equals equally'. But we have dramatically different views about *whom* educational institutions should treat equally and whom they can legitimately treat unequally.
>
> (2007, p. 243)

Education sociologists point out that economic and class mobility is largely dependent on access to education from a young age, However, simply ensuring access may not be sufficient to ensure optimal outcomes for young pupils. Pierre Bourdieu, perhaps the most well-known critical voice on the role of education in the reproduction of social inequality, held the view that the public education system was just another system of power which "seeks to reproduce the cultural arbitrariness of the dominant or of the dominated classes" (Bourdieu and Passeron 1990, p. 5). Or as Jyoti Dalal writes, "The school today does what the church did in feudal society, that is, justifying and legitimising the rule of the dominant by consecrating and sanctifying social divisions" (2016, p. 232). The relevant critique here is that the system of education can, by its very structure, be an alienating place for individuals that fall outside of the dominant class(es). In other words, the public education system should not be viewed as normatively homogenous, nor education policy fully benign.

A different, more generous view of education policy is that it is geared toward nurturing children and youth so that they might become productive, fulfilled adults—the focus here is on the specific goal of prospective self-determination (Feinberg 2007 [1980]). What is more, the provision of education (i.e. access to schooling) should lead to a deeper integration of pupils in their communities by facilitating bonds with other youth, teachers and families. But, as Milton Friedman points out, "the gain from the education of a child accrues not only to the child or to his parents but also to other members of the society" (2007, p. 194). This view, held by many classical political economists, highlights the *neighbourhood effects* of education policy. In policy discourse, it is rather these latter two concerns—prospective self-determination and neighbourhood effects—that are more frequently promoted.

The neighborhood effects of education policy are both positive and negative. The basic neighborhood effects argument for public education stems from the observation that no man is an island (West 1966, p. 9). That is, the actions of every individual will impact all those with whom he or she enjoys a collaborative relationship, be it at the personal, social or political level. Thus, negative externalities are generated by non-participation in schooling, whereas society can reap benefits from a child's participation in public schooling. This reasoning played a key part in the widely cited United States Supreme Court case of *Plyer v. Doe,* a landmark case for schooling rights of IRCs in the United States. In this specific case, the State of Texas sought to avoid an obligation to provide schooling to *illegal migrants* from Mexico. Supreme Court Justice Brennan's decision is instructive:

> It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.
>
> (Plyer v Doe 1982)

The grounds for extending education to IRCs were instrumental and pragmatic in this case: not providing IRCs education in the State of Texas would ultimately undermine the stability and order of the state and the country, i.e. generating negative neighbourhood effects for the host community.

There is clearly a tension created at the intersection of immigration and education policy agendas that must be explored, and that is the purpose of this project. The obvious paradox arises from the fact that offering IRCs access to public education not only draws on the communal resources of *insiders* but it is also likely foster a sense of belonging to the very community that is bound by immigration policy to remove them.[6]

[6] It is acknowledged that specific immigration policies can in some circumstances be more accommodating than specific education policies. One could make this argument by taking a historical view of both these policies. So, for instance, an open immigration policy that was

In the case of children that are legally resident in Canada, public authorities have a well-established obligation to defend and promote their interests. There is no question about the nature of this responsibility. Assigning responsibility for the welfare of IRCs, however, raises daunting moral, legal and political dilemmas.[7] It is not clear on what grounds the special responsibilities public authorities have for legally resident children extend to IRCs in Canada. Hudson et al observe that in the City of Toronto, "Complex, ever-changing federal laws governing status and eligibility can give even the best-intentioned pause about whether providing services is lawful" (2017, p. 15).

This tension manifests itself in practice in myriad ways. The school administrator that is faced with an IRC may feel compelled to inform immigration authorities so that the latter can *do their job* and apprehend or deport the child. Or, the administrator may seek to protect a child's identity and hide their immigration status, but will be left with the feeling that they have committed a moral wrong by undermining their government's policies and priorities. For instance, Sarah Spencer's research on undocumented children in the European Union found that the IRC's immigration status did "intrude into the decision-making process" for local authorities in charge of service delivery (2016, p. 1616). Similar concerns were voiced at a 2014 round-table seminar to discuss city responses to irregular migration, during which the speaker for the Council of the London Borough of Islington (United Kingdom) noted that local authorities can "find themselves with no guidelines or standards on how to interpret their own responsibilities" (Ajuntament de Barcelona 2014). Nando Sigona has similarly observed that "Local authorities, together with schools, GPs and other local agencies

welcoming to most arrivals and offered a pathway to citizenship might be considered more accommodating than a very restrictive education policy, eg one that limits the admission of pupils on considerations of race. However, the tension highlighted in this project relates to the general orientation of these two types of policies—generally, one facilitates integration (education) while the other facilitates restrictions to mobility (immigration).

[7] As Peter Nyers notes, "the growing political movement of non-status migrants in Canada […] has been significant in raising a number of challenges for how we understand political community" (2010, p. 128).

have the difficult task in their everyday practices of mediating between conflicting policy agendas and interests" (Sigona 2010).

It is no less complicated for the IRC and her family. In practice, they may simply avoid approaching schools and the public authorities that administer them for fear that any interaction with public authorities will lead to detention or deportation. Even where access to schools is guaranteed by law, IRCs and their families may nevertheless harbour suspicions about the intentions of public authorities which will manifest as a general apprehension to approach places where social services are provided. The challenges for irregular migrants who want to access services are real and the consequences can be significant for their long-term development trajectory.

Public authorities will rely on a number of factors to decide what an appropriate response will be to migrant children without status. Amongst the considerations that will shape their thinking about service provision are moral beliefs. As Matthew Gibney notes, "Moral beliefs are a force in shaping the attitudes of citizens towards entrants" (2004, p. 213). Policies regulating access to social services are tailored to fit a moral register that will dictate how *outsiders* should be treated in a host community and, in this context, what the purpose of education should be. These different ideological orientations matter because they shape the way the issue of schooling for this population of children will be discussed, which will in turn play some part in shaping access to schooling services in practice. Of course, moral and ethical considerations are not the only factors that will shape policy outcomes, but these considerations are frequently overlooked and merit closer scrutiny.

At the level of theory one finds two competing normative ideas. The first is that the social goods of a political community should not be allocated to *outsiders* (those that have not been accepted as members of the community) without the agreement of *insiders* (those that make up the host community). The second normative idea is that all children deserve an education irrespective of their immigration status.

This conflict at the level of normative theory is just as important as the tension identified in practice. It is important because normative ideas inform political practice; normative theory helps define what is morally required of individuals and political communities, whereas practice reflects to some extent the ethical principles individuals and communities are willing to accept in reality. While one may not be a mirror of the other, there can be no doubt that the way policymakers think about moral obligation, rights, entitlements, and the place of *outsiders* in their community will draw upon normative ideas and lead to conclusions that are, at the very least, *informed* by moral thought.

It is for this reason that this research considers both the theory and practice of accommodating IRCs in Canada's public schools. At the level of theory, this research asks how the accommodation of IRCs in schools can be ethically justified. This question has been the subject of some debate amongst normative theorists. The debate has yielded several possible answers, which are the subject of discussion in Chapter Three. The second question is whether normative ideas were relevant to shaping practice in Canada, which resulted in the accommodation of IRCs in public schools. In pursuing this line of investigation, this project aims to arrive at a better understanding of the normative ideas that have been referenced to defend the inclusion and exclusion of IRCs from public schooling in Canada. The key question is not so much whether IRCs should be educated, but whether the community that hosts IRCs is responsible for educating IRCs where they reside irrespective of their residency status. In this regard, public authorities remain divided about the nature of their ethical obligations to this group of children. It is clear that even though a legal right to free public education exists for children in Ontario, not all public authorities interpret their responsibilities to this precarious group of residents in the same way.

Why focus on sub-state actors?

The policy issue at the centre of this research overlaps with policymaking responsibilities across different government jurisdictions in Canada (federal, provincial and municipal). Immigration policy is a matter of federal jurisdiction, whereas education policy is the remit of provincial authorities. Each jurisdiction is therefore responsible for policies that will have an impact on schooling access for IRCs; moreover, they may view their responsibilities to IRCs differently. For example, research by Salina Abji has found "jurisdictional cleavages […] between federal and sub-state governments with respect to their stated responsibilities towards non-status children and their families present in their jurisdictions" (2013, p. 334).

The policymaking responsibility and authority of municipal governments also matter. Municipalities are an extension of provincial authority, but they do not have responsibility for education policy.[8] However, municipal governments do have an important role to play in safeguarding the welfare of *inhabitants* in municipal spaces. John Burrett, Acting Director for Social and Economic Policy at the Canadian Federation of Municipalities**,** speaking to the need for federal authorities to consult municipalities on strategies for welcoming newcomers and managing irregular and refugee populations notes: "[…] it is clear that municipal government is the government closest to the people, and the most accessible and logical place for services to support people, communities and their quality of life" (SN Bill C-11 3 October 2003, p. 32).

Municipalities are not only an important provider of services, they are also the most frequent port of call for IRCs seeking public assistance and guidance. The lives of IRCs would be made significantly more precarious without the services offered by municipalities, and therefore it matters greatly how these public authorities view their responsibilities toward this population of children. Because services for IRCs are

[8] Municipalities are created by provincial legislation and are regulated by their parent provinces. See Robert Young, *Multilevel Governance and Public Policy in Canadian Municipalities* (2013).

distributed across many different levels of government, it is insufficient to focus only on policy and discourse at the level of federal government (which is responsible for immigration policy). Policies developed by provincial and municipal governments must factor into the analysis as well.[9]

To be sure, sub-state authorities are important actors in the policymaking realm. Engin Isin and Myer Siemiatycki observe that an analysis of citizenship rights "requires investigating not only formal rights conferred by states, but also the autonomous actions, claims and struggles of diverse groups within the same state. Furthermore, it also requires taking into account various polities in which such rights are exercised and enacted" (1999, p. 9). While sub-state authorities acknowledge their limited lawmaking powers in matters of immigration policy, in recent years, some have voiced more forcefully their views on such policies and have worked around the edges of lawmaking to advance policy measures that are highly protective of irregular migrants and IRCs.[10] In doing so, sub-state authorities have signalled that they do indeed view their obligations to IRCs differently from other branches and jurisdictions of government. Further, a report on access to city services in Toronto by *non-status* people notes: "[…] the fight for migrant rights in Canada is increasingly looking to city-based policy initiatives. While the power to grant 'status' is the prerogative of the

[9] Municipalities are responsible for delivering a host of social services that impact directly and indirectly on the schooling access and educational outcomes for IRCs. Municipal authorities set policies for, inter alia, policing, housing, child care services, hardship allowances and some public healthcare services. All of these services have a bearing on the welfare of families resident in the municipality, and will also impact the stability and security a child migrant will experience at home and in their community. There can be no doubt that municipal policies affect IRCs and shape their schooling experiences.

[10] A number of Canadian cities have now declared themselves *sanctuary cities* for irregular migrant populations. The first Canadian city to make such a declaration was the City of Toronto, however, there are now four *sanctuary cities* spread out across Canada (Toronto, Vancouver, Montreal, and Hamilton). This is not a term that appears in any policy document up through 2013, but is rather a designation used by various media, NGOs, and some public authorities to describe policy changes that seek to encourage irregular migrants to access services without fear of apprehension or deportation. However, as of 2017, official documents from the City of Toronto have included the term *Sanctuary City*, noting that Toronto was committed to both the term and the concept of sanctuary city (CoT CD19.9 30 March 2017).

federal government, municipal authorities can side-step this issue by providing services on the basis of *residency*, not legal status" (Berinstein et al 2006, p. 9).[11]

Public authorities at the sub-state level face specific challenges in addressing the rights claims of IRCs. Local service providers experience a tension between the impartial provision of services to all residents and national immigration imperatives that are driven by a need to show that immigration law is coherent and effective.[12] The latter may require limitations on services made available by local service providers. Thus, service providers are frequently forced to reflect on their duties and loyalties, especially as these can conflict when addressing the welfare of IRCs. This situation is not unique to Canada—it is a common ethical dilemma local service providers face in a number of states. As Spencer et al point out in the context of the United Kingdom:

> In-country [migration] enforcement measures are having a divisive impact in local communities. Restrictions on undocumented migrants' access to housing, healthcare and employment require some public service providers to make difficult assessments about immigration status, and create conflict of interests over whether to deny needed services to vulnerable individuals.
>
> (2014, p. 3)[13]

Ambiguity about the responsibilities of public authorities at the sub-state level for the welfare of IRCs can lead to significant differences in service provision, and these differences can result in great hardship for IRCs. For public authorities charged with the well-being of *inhabitants*, defining the boundaries of their responsibilities in an age

---

[11] In the context of the debate of City Council motion CD18.5 (see Section 4.5) the Canadian Union of Public Employees observed: "Toronto's civic leaders speak for an important part of the national community. The voices of those leaders matter in public discourse and in government debate. Toronto should use its capacity for advocacy to serve the communities that make up our City" (CUPE 2014, p. 8).

[12] This is not only the case in Canada. Similar concerns were voiced at a 2014 round-table seminar to discuss city responses to irregular migration, during which the speaker for the Council of the London Borough of Islington (London, United Kingdom) noted that local authorities can "find themselves with no guidelines or standards on how to interpret their own responsibilities" (Ajuntament de Barcelona 2014).

[13] It is not uncommon to find the threat of destitution actively promoted as a policy response to irregular migration. This was done in the United Kingdom in an effort to strengthen immigration control and ensure that the benefits bestowed on citizens were not appropriated by migrants that did not have residence permission (Da Lomba 2004; Sigona and Hughes 2012; OHCHR 2014). The administrative powers of the state are such that barriers are easily erected that can prevent the effective realisation of rights even when these are guaranteed by law.

of increasing immigration restrictions becomes a complex political, moral and legal challenge.

At the outset of this research, there was no clear understanding why sub-state actors (eg cities, provinces, and school boards) agreed to provide access to schooling to IRCs. This policy stance enlarges the number of service users, which may carry additional costs for legal residents in the community. Moreover, a financial burden would be incurred on behalf of a population that some believe should *not* be present to begin with. Furthermore, inclusive policies in the area of social service provision might exacerbate tensions between different levels and branches of government, not least federal authorities charged with the enforcement of immigration policy.[14]

In summary, there are at least two specific reasons for focusing on the actions and discourse of sub-state public authorities in Canada. First, it is at the level of local communities that the everyday needs of IRCs are addressed, and this fact alone compels the study of local understandings of obligations to IRCs. Second, the challenges of sub-state actors in addressing the needs of IRCs are likely different from those of federal authorities. Too little attention is paid to the differences in concerns that arise from different jurisdictions within the state. A thorough study of schooling access for IRCs in Canada must consider policy and discourse at all three levels of government, because each body of government views the claims of IRCs from different vantage points. Indeed, the claim to schooling made by IRCs brings into sharp focus the practical challenges of irregular migration for multi-level governance in a federalist state like Canada.

[14] Repeated attempts by the City of Toronto to lobby the Province of Ontario and the Federal government on immigration reform met with silence during the 1980s through to 2005, when an agreement was eventually signed between federal and provincial authorities to align priorities in the area of immigration (See, CoT 2014, Section 6).

1.3. Definitions

This section defines some commonly used terms in this research project.

(a) Irregular migrants and irregular migrant children (IRCs)

The term *irregular migrant* is not commonly used outside of academic and advocacy circles; the same can be said of the term *non-citizen*. Both terms serve as useful shorthand for social scientists—even if the terms seem ambiguous and imprecise—but they have limited currency elsewhere. While the use of the term irregular migrant is frequent in academic circles, there is no consensus on a definition either in international or national law, so all who use the term are obliged to define it.

Following on common practice in the literature reviewed, the term irregular migrant is preferred to *illegal migrant* so as to avoid stressing unwarranted connotations with criminality (Crépeau and Nakache 2006; Duvell et al 2008; Carens 2008; ICHRP 2010). As Joseph Carens points out, the term illegal migrant "presupposes too much about the normative conclusions we should reach" about these individuals (2008, p. 164). The term illegal migrant stresses the infraction of law and makes this the defining feature of an individual's status. The United Nations and a host of other international actors have also moved toward the use of more neutral terminology such as irregular migrant, and *migrant in an irregular situation*. Major media news organisations have arrived at similar conclusions, including the Los Angeles Times and the Associated Press. In 2013, both news agencies banned use of the term illegal immigrant, arguing that illegality should not be equated with a state of being (Guskin 2013; AMSSA 2014). In a recent statement addressing the role of migration in the post-2015 United Nations Development Agenda, the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, makes the point quite poignantly: "I say that whether your forebears had visas, or were in an irregular administrative situation, they were not "illegal migrants": there is no such thing as an illegal human being" (OHCHRb 2014).

A number of terms and definitions have been put forward which seek to capture the complexity and diversity of this population of migrants. The term *undocumented migrant*, for example, appears more frequently than the term irregular migrant and is used by many researchers as a designation for the same target population (Spencer et al 2014). The term undocumented migrant is also more frequently encountered in research focused on Canada, but it is not without shortcomings. In the context of her work on *persons with precarious status* in Canada, Luin Goldring explains the shortcomings of referring to a person as *undocumented* in the Canadian context:

> [In Canada] Undocumented entry is not the main pathway to living or working without authorization. On the contrary, many people enter with some form of documentation and then fall out of status. Thus, people whom we might be tempted to call undocumented are often documented in that they are known to authorities, having entered with some form of legal immigration status.
>
> (HC CIMM Deb 9 April 2008, 1315)

While the terms irregular migrant and undocumented migrant can generally be used interchangeably, the term undocumented migrant is not used in this research because it is thought to emphasise unnecessarily the acquisition, loss or absence of documentation.

This research adopts the definition of 'irregular migrant' put forward by the International Council on Human Rights Policy, as it captures most comprehensibly the defining characteristics associated with this unique administrative designation. Thus, an irregular migrant is understood to be: "[…] a person who lacks legal status in a transit or host country. It refers to people who entered the territory of the state without authorization, as well as to those who entered the country legally and subsequently lost their permission to remain" (ICHRP 2010, p. 15).

There are multiple ways of *becoming irregular*. A migrant may be without documents or their documents may have been destroyed or taken against their will. It is also possible that a migrant is designated *irregular* if they overstay their visa, enter without a visa, or chose to remain in a host country after failing to obtain asylum (IPPR 2006). A research report from Toronto City Council notes that "the vast majority of

undocumented residents arrived in Canada through authorised channels, but their immigration status has changed over time: refugee claims and sponsorship breakdown result in people losing their legal immigration status" (CoT 2013, p. 6). Unaccompanied asylum-seeking children are especially vulnerable and are likely to fall into situations of irregularity. This is by no means an exhaustive list of the pathways to irregularity, but it is indicative of the predominant causes.

This administrative status is not permanent and can change subject to a variety of factors, not least changing government policies. Indeed, a strong link exists between increasing populations of irregular migrants and government policy. As Mae Ngai points out, "illegal alienage is not a natural or fixed condition but the product of positive law; it is contingent and at times it is unstable" (2004, p. 4).[15] History is rife with examples of exclusion through government legislation. In Latvia, for example, as much as 30 percent of the population found itself without nationality under new citizenship legislation put forward following the country's independence from the Soviet Union in 1991 (Blitz and Lynch 2009, p. 9). The contemporary debates on *Brexit* are another excellent example. If the United Kingdom succeeds in leaving the European Union it is possible that it will unilaterally change the administrative (residency) status of countless European residents in the United Kingdom through an action of government—at least some will risk becoming irregular in the process. Stephen Castles is emphatic in highlighting the role of government policy in defining groups of migrants, arguing that there is nothing "objective" about definitions of migration; they are, he contends, "the result of state policies, introduced in response to political and economic goals and public attitudes" (2000, p. 270). By restricting access to asylum processes, blocking migration routes, redefining categories of migrants, and disbelieving the statements presented by asylum-seekers, governments play a direct role in defining the character and size of irregular migrant populations.

[15] See also, Macklin 2015 in Section 4.5 (c).

The reasons irregular migrants have for migrating are also diverse. There is a rich body of research that explores the reasons and strategies for regular and irregular migration (Castles 2000; Khoser and Pinkerton 2002; Castles and Miller 2009; Bloch et al 2009, 2011; IDC 2012). These range from, inter alia, seeking better economic and social opportunities, fleeing persecution, serving as an anchor for other family members that will come later, avoiding military service, or the promise of greater rights and freedoms. IRCs in particular may migrate because their parents have died, because their ethnic group is persecuted, because their parents have been imprisoned or because they themselves fled their country (Ayotte 2001, p.7). Philip Cole warns that much of liberal political theory has accepted an ahistorical, individualistic account of migration that stresses push-pull factors over historical ties between the sending and receiving countries (2000, p. 29). What one must conclude is that the reasons for migrating are likely to be as diverse as the population of migrants moving across borders.

It would also be incorrect to suggest that irregular migrants are always unwelcome. Indeed, the linkage between migration and development is well tested. From the receiving country's perspective, irregular migrant labour can be advantageous for certain sectors of the economy, and in some cases, it is even encouraged by the state (Bloch et al 2011; Freeman and Ögelman 2000).[16] Freeman and Ögelman see this as symptomatic of a casual attitude in liberal democratic states "towards the violation of formal rules if the ends of economic efficiency are being served" (2000, p. 118). Irregular migrants can form a source of cheap labour, employable in sectors spurned by nationals of these countries—undertaking work

[16] Toronto City Councillor Joe Mihevic describes the relationship of the state with irregular migrants thus: "the state is a complex, multifaceted, contradictory beast. So, while it may be true that immigration officials want to identify these folks and get them out, the finance department, the tax department, the economic development department, they know that they need them in. It's polymorphous, it pushes in a variety of directions" (2014, pers. comm. 19 July).

considered dirty, dangerous and demeaning (Castles 2000; Koser 2005; Carens 2008b; Gibney 2011).

A migrant's country of origin may also have a strategic interest in encouraging emigration, and so one should not conflate irregular migrants with asylum-seekers fleeing persecution. In countries with failing or weak economies, overseas remittances can be vital to stability and growth (Ghosh 1998, p. 35; Castles 2000).

Irregular migrants all too often find that they are unwelcome within their receiving communities. In practice, they may have little or no standing to claim even basic rights because in the eyes of public authorities (and often in the court of public opinion as well) they are trespassers with no right to be present in the first place. They are sometimes cast as *tolerated guests*, people whom the state is willing or legally obliged to host for a limited period but who are not necessarily viewed as desirable for full membership. For these reasons, irregular migrants are "some of the most vulnerable migrants in the world today" (Gibney 2009, p. 3).

IRCs are a unique and multifaceted group that bring an additional element of complexity to the phenomenon of irregular migration. They have been described as "legally marginal, physically deportable and psychologically vulnerable" (Wilson 2008). Similar to irregular migrant adults, children can find themselves in a situation of irregularity for a number of different reasons. Often, however, a child will find their way to irregular status in one of the following ways: (i) being brought with one or more parents into the destination country without authorization; (ii) as a victim of human trafficking; or, (iii) by choosing to make the journey to the destination country on their own accord, but without authorization from the receiving state. Children travelling with a guardian (a parent or family member) may benefit from the additional protection and care a guardian can offer, but they can just as easily be tied to a guardian against their will.[17] In her study of separated children seeking asylum in Canada, Wendy Ayotte

[17] This idea was echoed in remarks made by Canadian Alliance Member of Parliament Paul Forseth during a debate on Canada's new landmark immigration legislation in 2002 (See

notes that "some children who appear to be 'accompanied' are in fact separated from their parents or guardians" (Ayotte 2001, p. 3). In cases where the child is travelling with a guardian, the ability of a guardian to assure the migrant child's welfare is highly variable in situations where migration takes place without legal authorization:

> [for refugees, asylum seekers or other irregular migrants] the ability of parents to protect children is often extremely compromised by the physical dangers of the journey, through involvement with criminal people smugglers or traffickers, by a lack of effective State protection and due to financial vulnerability.
>
> (IDC 2012, p. 23)

IRCs are also non-members of the political community. That is to say, they share the same geographical space, but a different political space from citizens or persons with regularized immigration status. This means that the number of people or public authorities that are in a position to affect their practical interests is much greater. Naturally, this has a significant impact on both the freedom of these migrant children and their opportunities for development given their young age. Insofar as IRCs are concerned, what emerges is a picture of dependency that is quite complex; IRCs are reliant on both their guardians and public authorities to ensure their well-being, the latter sometimes stepping in where the former is incapable of providing care.

While constituting an important part of migratory flows, IRCs have only recently drawn the attention of migration researchers (Carens 2008; Moan 2009; Pinson et al 2010; Sigona and Hughes 2010; Spencer and Pobjoy 2011). This undertaking is intended to complement those prior research efforts.[18]

Section 4.3): "Sometimes even when refugee people show up in the appearance of a family with depending children, the so-called 'wife' is not really the wife, the kids have been purchased, and it's a whole fraud in order to get the terrorist in the country or because there is a trade in children" (CIMM Bill C-11 19 February 2002, 1115).

[18] A number of researchers have produced interesting research on migrant children; for instance, Ayotte's work on unaccompanied children in Canada (2001); Watters' (2008) and Rutter's (1999) work on refugee children; work on the non-citizen child in the United Kingdom by Pinson et al (2010); and Giner's work on asylum-seeking children (2007).

(b) Public authorities

Throughout this research the term *public authorities* is used to refer to officials of the state working at both the federal and sub-national levels, including policymakers and administrators of public institutions.[19] Public authorities use and project state authority through official offices in various ministries, legislative bodies and throughout the institutions of the state. They may act independently or as part of a collective and may think of their responsibilities as either personal or as collective. However, institutions themselves, and other public bodies can also fit in the category of a fiduciary. The characteristics that demarcate some public authorities as fiduciaries can also be ascribed to public bodies and institutions—that is, these entities can exercise the same degree of discretionary power over the interests of a vulnerable beneficiary, as an individual (e.g. a lawyer) exercises over the interests of a second vulnerable party (e.g. the lawyer's client). As the legal scholar Kent McNeil points out, "It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed" (McNeil 2016, p. 920).

A practical case from Canada serves as useful example. In the landmark 1982 decision of the Supreme Court of Canada in *Guerin v. The Queen*, the Supreme Court reversed the Federal Court of Appeal's determination that the Crown did not owe a fiduciary duty to the Musqueam Nation in British Columbia. The Supreme Court of Canada found that the executive branch of the federal government was in breach fiduciary duty because the employees in the Department of Indian Affairs breached a general guiding principle applicable equally to the Executive as to its employees. Similarly, in Quebec (Attorney General) v. Canada (National Energy Board), the Cree Regional Authority charged the National Energy Board with breach of fiduciary duty because electricity export licences were granted to Hydro-Québec which negatively

[19] The term *policymaker* is used to refer to public authorities that develop administrative policy, motions, and laws.

impacted their Aboriginal rights. Here, the claim was that the Board acted as an agent of the Federal Government and thus had a fiduciary responsibility to the Cree. What these two examples illustrate is that fiduciary responsibilities can accrue to individual decision-makers (public authorities in the context of this research), along with public entities (private entities are a well-established category of fiduciary in private law).

The power public authorities exercise comes in many forms. It can be observed in the acts they are empowered to perform, but also in the symbolism of their offices. For irregular migrants, the mere sight of a government official can have negative consequences for the exercise of personal agency. Indeed, the fear some irregular migrants harbour of public officials—a fear of discovery—can restrict their freedom in important ways. Fear of public authority may limit their movements in common spaces, dissuade them from seeking out aid, and generally cultivate avoidance behaviour. This can be debilitating if it is acute and may also prevent irregular migrants from participating in the collective effort of maintaining peace, order and security. More distressing for them personally is the impact such fear can have on their ability to engage public authorities in respect of their rights, welfare allowances, and protections that are *in fact* available to them. As Gibney notes, "The insecurity of residence deprives precarious residents of the kind of firm footing in society necessary to lobby or militate for the protection of the rights that they have by law or to expand their rights and opportunities" (2009, p. 17).

There is a specific form of power one has in mind when thinking about the role of public authorities vis-à-vis residents and citizens, as well as temporary and irregular migrants. This is an administrative form of power, one which is institutional in character and should be deployed to benefit a constituency—it must be *other-regarding* (Fox-Decent 2011, p. 98). It is also not the sort of power an individual can exercise for him or herself. One cannot issue oneself a driver's license or library card; one is dependent on public authorities for those services, along with myriad others that have more

serious implications for one's well-being. Evan Fox-Decent sums up this form of administrative power:

> Administration is *structurally* different from discrete exercises of mere power in a number of ways. Administration, in the relevant sense, implies the use of discretion for some purpose, and that purpose involves the benefit of someone other than the person conducting the administration. […] Whatever the source of administrative power, it always comes with a particular and other-regarding mandate, often but not always the result of an express delegation of decision-making authority. Administration, therefore, is purposeful rather than accidental in the sense that the reason for which administrative power is exercised must be consistent with the other-regarding purpose for which it is held.
>
> (2011, p. 98)

Public authorities are also different in a moral sense—they are held to a different standard of moral conduct than private citizens owing to the office they hold and the power entrusted to them. This idea is key: the power public authorities wield is power *entrusted*, not power freely exercised without constraint.

There is an expectation that public authorities act in ways commensurate with the office they hold and discharge their discretionary power in ways constrained by the other-regarding purpose for which it is held. The same can be said of some public bodies and institutions, and this is certainly the case when decision-makers within those bodies cannot be held personally liable for the actions of the organization—in such cases the organization can be ascribed responsibility, and in the case of a breach of fiduciary trust, blame. This understanding of administrative power orients moral evaluation of individual actors but also of institutions that share the characteristics described above.

(c) Education and schooling

The terms *education* and *schooling* appear throughout this research and are used interchangeably in order to simplify engagement with the literature on social welfare rights for IRCs. It is beyond the scope of this research to consider the impact of immigration status on the IRC's education, broadly conceived. There is an exclusive focus in this research on education defined more narrowly as access to formal

instruction through schooling. However, as the rights of the child often reference access to *education*, and this is normally understood to mean classroom-based education for children, there will be little discrimination between the two terms throughout this research.

1.4. Objectives and research questions

(a) Objectives

This research project has several objectives. It seeks to identify and examine the normative ideas that public authorities appeal to when justifying the accommodation of IRCs in Canadian schools. The project also looks at ways of systematizing these normative ideas that emerge from practice. Finally, the project reconciles practice and theory to construct what might be a more compelling normative justification for the accommodation of IRCs in Canadian schools.

In pursuing these objectives, the project is sensitive to differentiated notions of responsibility (how responsibility for IRCs is conceptualized and expressed) across government jurisdictions (federal, provincial, municipal) in Canada. By including policy, discourse and legislation at the federal and sub-state levels it is possible to map similarities and differences in the way public authorities describe and convey their responsibilities for the schooling of IRCs. Expressed differently, the objective of this research is to ascertain how political ideals (theory) relating to the accommodation of IRCs in public schools are expressed in political practice. This research is not attempting to uncover the true beliefs of policymakers and other public authorities, nor is it seeking to prove that normative ideas are the *cause* of specific policy actions. It is possible that certain statements and policy actions reflect a normative idea, but this is distinct from causation. Moreover, acknowledging that policy proposals and debate of such proposals are not value-free, political aims to question “basic assumptions that govern the way policies are discussed and decided” in different political communities (Swift and White 2010, pp. 51-52; see also, Section 2.2 (a)).

This research can be situated at the intersection of theoretical and sociological work focusing on the ethics of migration, the moral obligations of state's to foreigners and *postnational* understandings of citizenship, specifically, the way urban spaces are reconstituted as a political space distinct from the state.[20] The project aims to contribute to both the fields of policy sociology, as well as legal and political theory, and specifically liberal political theory (See Section 2.2 (a), for a fuller discussion).

(b) Research questions

The research objectives are achieved by answering four interconnected research questions.

> **Research question 1:** What are the main normative justifications for schooling IRCs in the literature from moral and political theory?
>
> **Research question 2:** What justifications for schooling IRCs do public authorities in Canada put forward in practice and what normative ideas are apparent in these justifications?
>
> **Research question 3:** To what extent do justifications in practice mirror the normative frameworks in the theoretical literature (moral and political theory)?
>
> **Research question 4:** What normative theory best integrates the different strands of justification for accommodation of IRCs in Canadian schools?

In Chapter Three, a critical review of the theoretical literature in moral and political theory is undertaken to address question one. This chapter explores how the issue of schooling for IRCs is addressed in several common normative frameworks. Each normative framework will offer a different ethical prescription for political practice. Political practice is the focus of Chapter Four, which addresses the second research question: the way public authorities articulate justifications for including IRCs in

[20] As Isin and Siemiatycki note, "received notions of citizenship have largely been defined at the national level rather than urban" (1999, p. 10). Notable research in this area includes the work of Saskia Sassen (2003), Linda Bosniak (2006), Engin Isin (2008), Peter Nyers (2011), Nando Sigona and Vanessa Hughes (2012), as well as Sarah Spencer (2016).

Canadian schools. This chapter addresses this question through a systematic analysis of discourse over 20 years of policymaking in Canada. Question three sets out to determine whether commonly referenced theoretical frameworks from the literature in moral and political theory are appealed to in arguments put forward in political practice. Chapter Five explores the possibility of an alternative normative framework capable of integrating the normative ideas that are referenced by policymakers in practice and in doing so, addresses the fourth and final research question. It may be that the justifications advanced by public authorities are best subsumed in a normative framework that does not appear as prominently in the normative literature. This fourth question leaves open the possibility of developing a normative argument for the inclusion of IRCs in Canadian public schools.

Question one engages primarily with literature in contemporary moral philosophy and political theory. Question two draws on the discourse of public authorities in debates on legislation and policy at the federal, provincial and municipal levels of government in Canada. Question two also takes into account public statements made by public authorities, and responses given during individual consultative meetings. Question three draws on the critical literature review in Chapter Three and brings it together with the case-study analysis from Chapter Four. Chapter Five engages with a new theoretical literature from legal, political and moral theory to respond to the research questions and critically engage the analysis in previous chapters.

1.5. Scope of the research project

(a) Period under study

The research project considers policy and legislation introduced over a period of approximately 20 years in Canada—this corresponds roughly to the period 1992 through 2014. During this span of 20 years, there is a marked development in policymaking and debate on immigration issues in Canada. However, there are two additional and specific reasons for having confined the scope of the research project

to this time period. First, a number of highly relevant debates are identified during this period that take up the issue of schooling access for IRCs. In addition, there were notable changes observed in immigration patterns and immigration priorities in Canada that encouraged discussion of social welfare rights for irregular migrants in Canada. Each of these reasons is explained in more detail below.

(b) Key policy debates

The first reason for selecting this time period (1992-2014) has to do with the identification of key policy debates in Canada that address the issue of schooling access for IRCs. There are four specific moments during this period when such debates took place. The first three debates arose in the context of specific legislation newly developed at either the provincial or federal level of government. The fourth debate was not restricted to one item of legislation, but in fact traces a campaign that lasts approximately ten years (between 2004 and 2014), which generated two significant policies.

1. (**1992-1993**) Ontario Private Members' Bill No.24 – *An Act to Amend the Ontario Education Act*
2. (**2001-2002**) Federal Government Bill C-11—*The Immigration and Refugee Protection Act*
3. (**2005**) Ontario Government Bill No.194 – *The Education Amendment Act*
4. (**2004-2014**) City of Toronto *Don't Ask, Don't Tell* and *Sanctuary City* policies

During the period between 2004 and 2014 there was sustained debate about the ability of irregular migrants to access municipal services *without fear*. While the whole period was shaped by a public debate on the idea of *access without fear*, this intensified at two specific moments in the City of Toronto. The first moment was in 2007, when the Toronto District School Board passed a *Don't Ask, Don't Tell* policy, essentially barring front-line workers in schools from requesting information from students about residency status, and if such information were to become known, front-line workers

were instructed not to share it with federal immigration authorities. The second moment occurred in 2013 when the City of Toronto adopted a policy of *Access Without Fear*, extending the *don't ask, don't tell* principle to all city services, which resulted in many referring to Toronto as Canada's first *sanctuary city*.

(c) Changing immigration trends

Public awareness of the connection between social welfare services and immigration intensified throughout the 1990s and into the 2000s also in part because of changes in immigration rules and priorities established during this period—entry requirements for immigrants changed, new channels for immigration were established, and as a result the number of immigrants arriving under different categories also changed considerably. Simultaneously, new immigration policies introduced during this period made access to full (legal) immigration status harder to achieve.

What is perhaps most notable about immigration statistics during this period is a move toward greater reliance on temporary workers in Canada and an increase in the foreign student population.[21] The result was a very significant increase in the population of temporary residents in Canada. A report from the City of Toronto highlights the impact changing immigration and labour priorities had on the population of irregular migrants in Canada: "The mismatch between labour demands and the type of immigrants who qualify for acceptance into Canada is a major factor in becoming undocumented. Temporary resident immigration categories often do not provide concrete pathways to permanent residence or citizenship" (CoT 2012, p. 3).

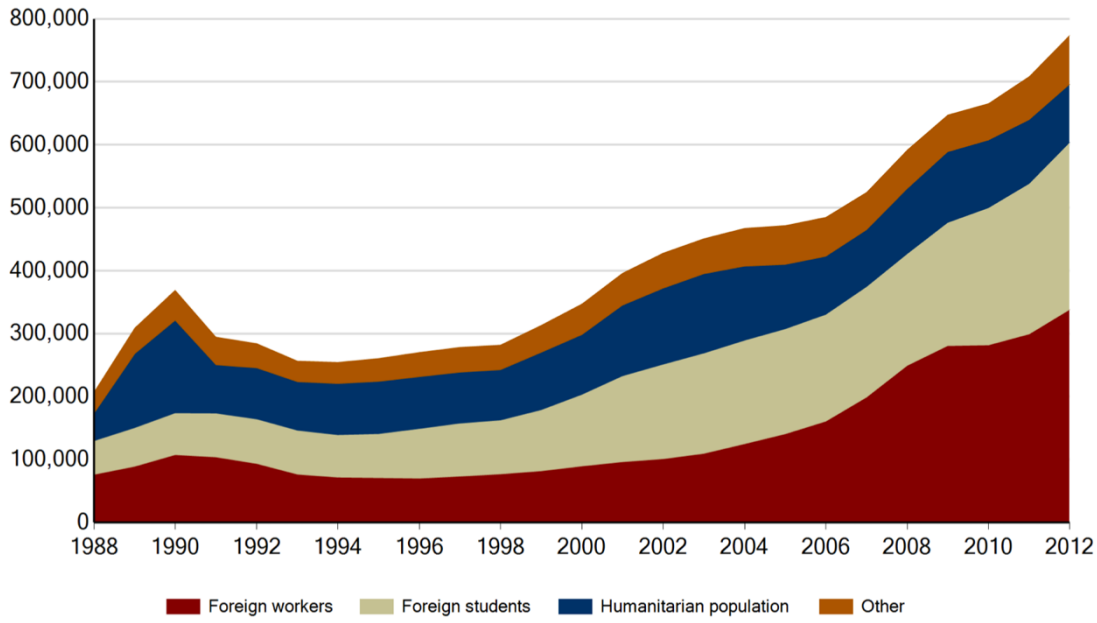
When temporary residents (workers and members of their families, foreign students, refugee claimants, etc) overstayed their temporary visas, they became irregular migrants and thus joined a population of unregistered service users in Canada.

[21] Sarah Marsden notes that temporary foreign workers have several notable features: "they lacked the right to remain permanently in Canada, had limited access to social and economic benefits, lacked access to direct democratic representation, and had limited labour mobility because their status relied on a specific employer relationship" (2011, p. 45).

It is unsurprising then that public debate in Canada on the benefits and services to which irregular migrants are entitled intensified during this period.

Statistics available on migration trends to Canada confirm the increased reliance on temporary labour in Canada. Figure 1, below, shows the rise in the number of temporary residents present in Canada between 1988 and 2012, from a low of 207,200 in 1988 to high of 773,758 in 2012.[22] It also shows that the number of temporary residents nearly doubles during the period under study, with temporary labour accounting for nearly half of all temporary residents in Canada by 2012 (338,281 persons). It is also notable that approximately one quarter of all temporary residents in Canada lived in Toronto in 2012 (CIC 2012).

Figure 1. Temporary residents present in Canada by category

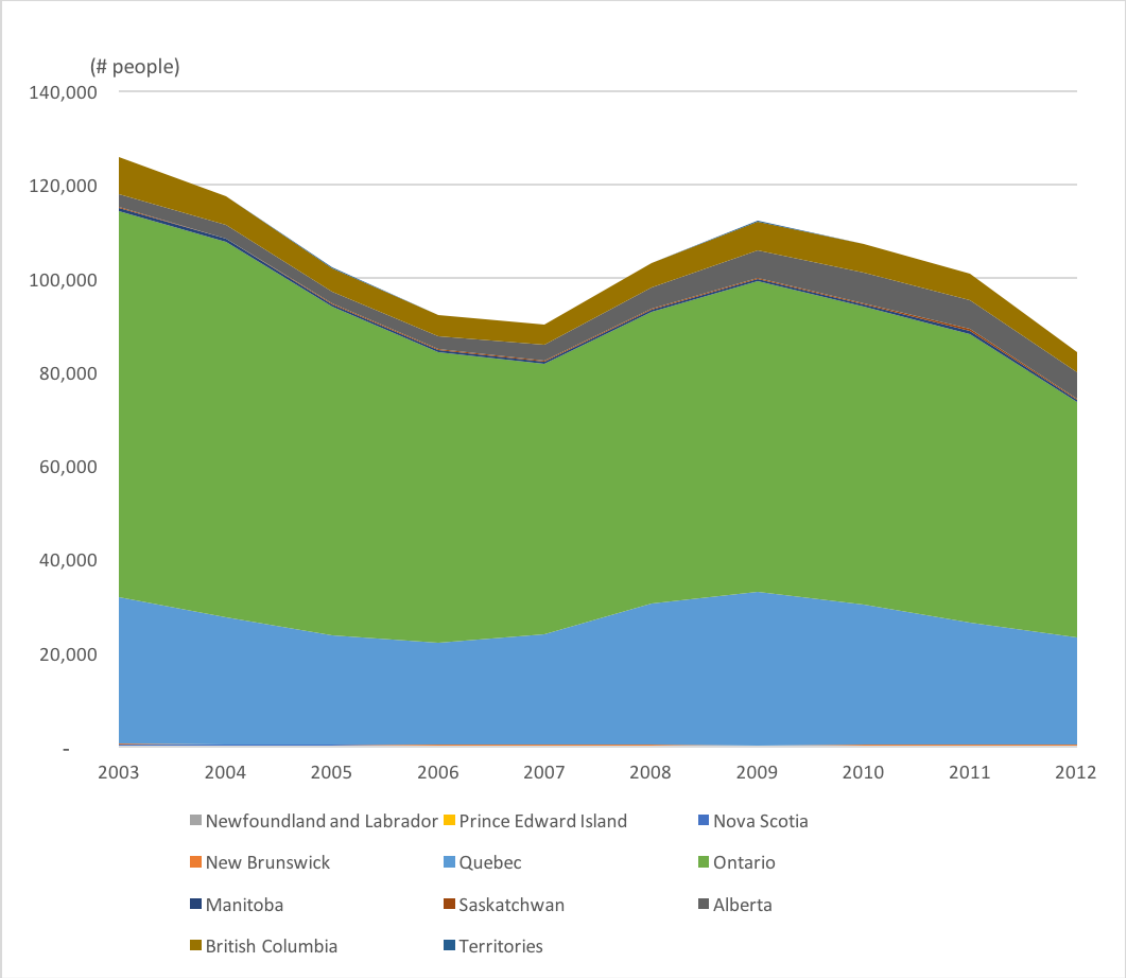


Source: Citizenship and Immigration Canada, Canada Facts and Figures, 2012

[22] The statistics cover four categories of temporary migrants: temporary foreign workers, foreign students, humanitarian (including refugee claimants) and other temporary residents. Explanatory notes from Citizenship and Immigration Canada note that individuals in the humanitarian population are primarily refugee claimants, however the group also includes foreign nationals allowed to remain in Canada on humanitarian or compassionate grounds under special considerations (CIC 2012, p. 51).

Another source of irregular migrants in Canada are refused asylum-seekers who decide to remain in-country rather than exit after a negative verdict in their appeal for asylum. The overall policy orientation in Canada during the period under study made it more difficult to access permanent residency status on the basis of a humanitarian claim. For this reason, statistics on temporary residents in the humanitarian category are meaningful. Meghan Wilson (2008) observes that between 1997 and 2007 approximately 250,000 refugee claims adjudicated in Canada were rejected and that many claimants remain in Canada without status. Figure 1 shows that the humanitarian population sets out at 21 percent of the total population of temporary residents in 1988 (43,479 individuals), but then decreases sharply as a percentage of the total by 2012 to only 12 percent, even if this represents more individuals overall (92,318 individuals).

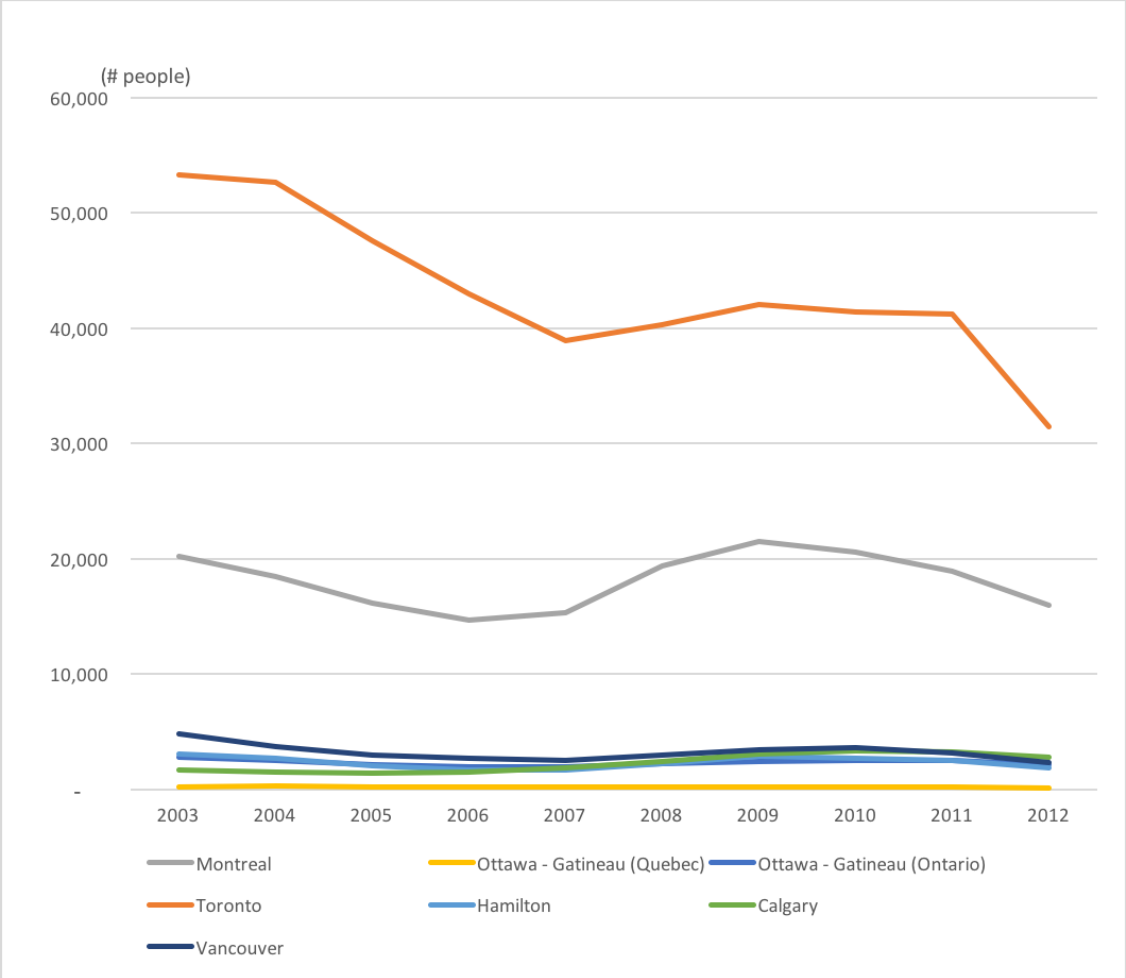
Figure 2. Temporary humanitarian population resident by Province



Source: Citizenship and Immigration Canada, *Canada Facts and Figures*, 2012

Statistics on humanitarian cases for a ten-year period between 2003 and 2012 reveal that Ontario, and more specifically Toronto, has always been the most important destination for immigrants with humanitarian claims, even if their presence in Toronto and Ontario decreased slightly during this ten-year period. Figure 2 shows that the Province of Ontario went from hosting 82,426 individuals with humanitarian claims in 2003 (65 percent of the overall population in 2003) to 50,198 individuals by 2012 (54 percent of the overall population in 2012), but remained throughout this period the most important destination for immigrants with humanitarian claims.

Figure 3. Temporary humanitarian population by major urban city



Source: Citizenship and Immigration Canada, *Canada Facts and Figures*, 2012

Figure 3 shows a similar downward trend in Toronto, but this is not surprising given that the city is the primary destination for immigrants with humanitarian claims in Ontario (ie an overall drop in the number of temporary residents with humanitarian claims in Ontario will translate to a corresponding drop in Toronto). Figure 3 shows that Toronto went from hosting 53,240 temporary residents with humanitarian claims in 2003 to 31,463 temporary residents by 2012.

In summary, the time frame chosen is relevant also because it coincides with a period of unprecedented change in immigration trends to Canada. As a consequence of changing migration patterns, there was both more public attention paid to the issue of irregular migration and also more debate of this issue at federal, provincial and municipal levels of government and amongst public authorities charged with the delivery of public services.

(d) Population size

According to the United Nations Department for Economic and Social Affairs, Canada ranks in the top ten of migrant receiving countries globally (DESA 2013, p. 13). The Canadian Auditor General's report of 2013 indicated that in the 2011-2012 fiscal year, the Canadian Border Services Agency (CBSA) processed 98.7 million travellers at Canadian ports of entry, and given that a third of these persons were foreign nationals, it concluded that on an average day, up to 90,000 foreign nationals entered Canada (AG 2013, Chapter Five). Despite combined spending between the Canadian Border and Services Agency and the Royal Canadian Mounted Police of nearly $ 728 million per year on border control measures, and having succeeded in denying entry to 58,000 people, the Auditor General's report nevertheless concluded that security at Canada's borders in 2013 was still too weak, allowing too many unauthorized persons to enter the country (AG 2013).

Data on the number of irregular migrants in Canada is scarce, as there has been relatively limited scholarly research on this group in Canada. Moreover, efforts to

quantify their numbers are made difficult because irregular migrants fear discovery by public authorities. A report from the Toronto City Council from 2012 notes: “There are currently no efforts to collect large-scale systematic data about individuals with unclear or no migratory status. As a result, the estimates range significantly” (CDRC 2012, p. 3). A 2009 report of the House of Commons Standing Committee on Citizenship and Immigration concluded: “Nobody knows for certain how may migrants are currently living in Canada illegally. The fact that they lack status in this country makes them impossible to accurately track” (CIMM 2009, p. 47).

Estimates of the size of the irregular migrant population in Canada range from 200,000 to 500,000 (Clarke et al 2004; Papademetriou 2005; Goldring et al 2009). A 2003 report by the Ontario Construction Secretariat estimates that approximately 76,000 non-status workers were employed in Ontario’s construction industry. Magalhaes et al (2009) point out that many of these workers are likely to have families with them and thus the figure provided by the Ontario Construction Secretariat would likely need to be complemented by a sizeable number of additional individuals with irregular status.

There have recently also been concerns that the population of irregular migrants could swell following the expiration of visas granted under Canada’s Temporary Foreign Workers Scheme (Hannan and Bauder 2015). The Temporary Foreign Workers Programme (TFWP) registered in 2008 a greater number of temporary labour migrants (399,523 individuals) than all other categories of permanent immigrants in Canada during the same year (247,243 individuals)—the first time such a reversal was registered in Canada (CIC 2009). However, from 2011, the Government of Canada limited TFWP visas to a maximum period of four years after which temporary workers would be obliged to leave the country for a minimum of four years before being eligible to apply for the TFWP again—a policy informally known as the *4-in, 4-out rule* (Macklin 2015). The concern was that this four-year limit would lead to a significant increase in the number of irregular migrants in Canada. As of 1 April 2015, the four-year limit ran

out for those to whom this legislation would apply. Audrey Macklin notes, “On March 31, temporary foreign workers will go to bed as lawfully employed and wake up the next day as illegal immigrants” (Macklin 2015). It is impossible to know how many TFWP visa recipients chose to remain in Canada as irregular migrants.

(e) Choice of case-study: Toronto, Canada

Canada, and more specifically Toronto, was chosen as the main case-study for several reasons. Initially, because both the Province of Ontario and the City of Toronto have been at the forefront of policy developments addressing the social welfare needs of irregular migrants and IRCs specifically. Ontario is the only province in Canada to have changed its education legislation to explicitly recognize the IRC’s right to free public education. At the municipal level, the actions taken by the Toronto District School Board and Toronto City Council to promote access to social services *without fear* were at the time (2007) unprecedented.

Also, it was postulated that public discussion of the rights of irregular migrants would be more frequent and richer in Toronto, since it is Canada’s major migrant-receiving city. Evidence from Statistics Canada reveals that Ontario has attracted the most migrants for at least the past 70 years (Statistics Canada 2016, p.4). Ontario receives 45 percent of all refugee claimants in Canada, and Wendy Ayotte’s research suggests that the province also receives the greatest proportion of separated asylum-seeking children (Ayotte 2001, p. 52).

Toronto is also the city where one finds the largest concentration of irregular migrants in Canada. The best evidence suggests that up to 50 percent of irregular migrants in Canada reside in Toronto (Magalhaes 2009; Solidarity City Network 2013). Stoffman (2006) estimates that 43 percent of *undocumented* migrants live in Toronto.

Moreover, as Canada’s largest urban centre, Toronto offers irregular migrants opportunities for employment in both the formal and informal sectors, and because of a long history of immigration to the city, ties to similar cultural communities are more

likely. Thus, one would expect to find a greater interest in discussing both the rights and obligations of newcomers to the city. It also stands to reason that public debate would be more frequent in Toronto because public authorities confront the challenges of irregular migration on a more regular basis—its causes, consequences and the appropriate policy responses. This mattered also for practical reasons; namely, Canada's rich tradition of parliamentary debate and the fact that these exchanges on matters of public policy are readily accessible. The availability of legislative debates is crucial to the study of discourse on public policy. It also makes possible the investigation of normative positions that underlie policy and legislation (Van Dijk 2000).

Further, it was reasoned that a higher number of migrants in the City of Toronto would likely result in greater visibility for this group of individuals, so that addressing their claims and concerns would occupy a higher priority in the public policy agenda. As a result, as irregular migrants gain prominence on the public policy agenda, the number of actors addressing their welfare needs would multiply; this in turn implies a growing body of discourse focused on the social welfare rights of these individuals. One would also expect to find a greater range of arguments put forward in a large metropolitan setting given the larger number of actors involved in addressing issues of irregular migrant welfare.

Finally, it is worth noting that Toronto has a long history of very active non-governmental organisations (NGOs) on issues of migrant rights (Vincent 2013). Rupaleem Bhuyan and Tracy Smith-Carrier note that "it is no accident that research on precarious status has emerged in the context of Toronto, Ontario", according to them it is "a city that exemplifies [the] notion of a global city, which has participated in shifting the infrastructure of global capital and transnational migration" (2012, p. 204).

2. Methodology

2.1. Overview

This chapter introduces the methodological approaches adopted in this research project and describes key source material.

2.2. Three forms of analysis

Three forms of analysis are employed in this research project: (a) analysis of normative and political theory; (b) policy analysis; and (c) discourse analysis.

(a) Analysis of normative and political theory

Insofar as immigration, citizenship and education policy invoke notions of human flourishing, what it means to live a meaningful life, and the state's role in bringing about such an existence (either for the migrant or the host community), the study of these subjects must be understood as falling within the remit not solely of political practice, but also of political theory. As Adam Swift and Stuart White make clear, "Political theory, (…) occupies a very specific place in the political and policymaking process. That space is crucial and fundamental, but it is also modest and limited" (2010, p. 49).

The justifications policymakers put forward to defend their policy positions carry normative assumptions about the configuration of their political community. When policymakers defend a particular membership practice or argue for extending rights to particular groups of individuals, they draw upon normative ideas that derive from specific conceptions of the political community. For example, Spencer observes that policies that relate to welfare support are framed by moral assumptions (2016, p. 1615). Spencer's work has also found that policymakers' perceptions of undocumented migrant children in Europe shape their decisions on welfare entitlements for this population of children (2016, p. 1616). Through the analysis of justifications in discourse, one can work backwards and identify the ethical standards being appealed

to by policymakers and by extension, the normative theories that are influential in policymaking, even if not causal.

The obligation to support irregular migrants in contemporary liberal political communities is the source of much debate, notably amongst liberal political theorists who have worked to better understand the nature and limits of the obligations to assist resident irregular populations. There is disagreement about what constitutes a just practice for determining membership to the political community and where the obligations of public authorities begin and end with respect to the welfare of individuals who contravene established membership practices. This research project explores several different approaches in normative theory, each of which articulates different prescriptions for practice in respect of the social welfare rights of IRCs in liberal states. The purpose of this exercise is to highlight the different ethical prescriptions that arise from the dominant theoretical approaches to irregular migration in contemporary political theory (specifically, theoretical approaches rooted in communitarianism, liberal nationalism and liberal theory), as well as the strengths and weaknesses of these different normative approaches at the level of political ideals. Normative ideals alone are, of course, not sufficient to derive realistic, workable policy prescriptions. The policymaking process must heed actual resource constraints, democratic appetites, on top of balancing competing ethical frameworks.

The emphasis on the resources and debates in liberal political theory—although considerable attention is also given to communitarian scholarship as well (see Section 3.2 ‘The partialist justification’)—owes to the fact that contemporary immigration and its associated challenges for host and sending communities emerged as an important area of theoretical and applied scholarship for liberal political theorists over the past few decades. Yet, conceptual approaches in liberal political theory remain underdeveloped. As the liberal political philosopher Brian Barry points out, the systematic movement of people across international borders has thrown up problems that “have not traditionally been central to the concerns of any mainstream theory”

(Barry 1992, p. 4). Since at least the early 1990s, ideas and arguments developed by liberal political theorists have begun to fill this vacuum and have proven influential in policy debate as well as in the development of policy; these arguments have specifically addressed the boundaries of obligation to assistant resident irregular migrants, a central concern of this research project (Goodin 1988; Cole 2000; Scheffler 2002; Gibney 2004; Carens 2013).

Other traditions in political thought, such as Marxism, have been influential in debates on the rights of irregular migrants and the moral defensibility of existing immigration regimes, i.e. discussion has not been restricted to the tradition of liberal political theory. Marxist perspectives—a diverse political philosophy in its own right—are critical of modern-day labour practices that favour increasing numbers of temporary migrants, which provide specific economic benefits for the host society (specifically the class of individuals controlling production and wealth), while bolstering rigid, existing class and capitalist structures. Marxist political thought views contemporary immigration regimes as harmful to workers generally—a critique that can help, especially in neo-Marxian approaches, to understand the strong sense of solidarity that sometimes develops between members of host communities and irregular migrants. As Lea Ypi persuasively argues,

> Guestworker programs make for a curious object of enquiry. Rather than an issue to be explored in the context of a theory of just migration, they present a relevant case in which an old and seemingly outdated issue, the exploitation of the working class taken collectively, re-surfaces with all its normative force.
>
> (Ypi 2016, p. 153).

It is useful to note that Marxist political thought would provide strong reasons to view the *working-class* or *workers* in expansive terms, encompassing a diverse set of individuals not segmented by citizenship, all of whom share the commonality of toiling against capitalist structures that retain a monopoly both of the modes of production and the wealth it generates. In order words, the subject in Marxian political thought is 'the worker', not the illegal/legal immigrant. Chris Brown observes that "from a Marxist

perspective, initial thoughts on migration focus on the general issue of demand for labour within a capitalist economy" (Brown 1992, p. 132). To be sure, a Marxist normative critique could generate unique insights into the struggle of irregular migrant populations to access basic social welfare services. However, it is not *ideally* suited to respond to the questions posed in this research project. For Marxist writers, language of individual rights, autonomy, and affirmative obligation clashes with a Marxist normative view of individuals and the state; instead, Marxist political thinkers consider the ethics of movement through the lens of superstructures, such as work, class, and labour mobility.

Some research in the area of Citizenship Studies is notably, though not solely, inspired by neo-Marxian thought. Scholarship that focuses on immigrant protest and scholarship in the area of citizenship studies that focuses on struggles of solidarity which, through the performance of public acts of resistance and friendship (e.g. building networks of mutual support, loyalties, resisting categorizations such as 'illegal' or 'irregular'), challenge the restricted regime of rights defined by modern citizenship practice. Engin Isin observes that through "new subjects, sites and scales of struggle, citizenship, while typically understood as a legal status of membership in the state, if not the nation-state, became increasingly defined as practices of becoming claim-making subjects in and through various sites and scales (2008, p. 16). And as Peter Nyers points out, research in the field of citizenship studies is especially well-suited to studying "new spatialities and temporalities of citizenship are emerging that do not neatly coincide with the space–time of the modern state", including the changing role of cities and localities in addressing the rights claims of irregular migrants (Nyers 2007, p. 2).

(b) Policy analysis

Policy analysis is a frequently used research tool in the social sciences. Written policy can take the form of plans, decisions, documents, legislation, judgments and proposals.

The form of policy analysis employed in this research project is a relatively new form that is influenced by poststructuralist theory. This form of policy analysis sees policy *as a form of discourse*. Susan Goodwin describes the *policy as discourse* approach thus: "Policy as discourse analysis requires policy analysts to uncover the normative nature of statements that appear to be obvious, inevitable or natural, to test judgements about truth claims, and to consider or imagine alternative ways of developing policy and practice" (Goodwin 2011, p. 170). This approach to analysing policy is not uncommon in the area of migration, sociology and politics; indeed, several recent studies have made use of this approach (Bonfanti 2013; Huot et al 2015).

When setting out to analyse policy, Fischer warns against the effects of an overly technical approach that is extraneous from the social context that frames the political issue being studied (1993, p. 27). Fischer calls for sensitivity to context and discourse in the study of policy. Fischer's cautionary note is particularly relevant to this research project. Immigration and education policies are constrained by the political pressures that are brought to bear via parliamentary debate and public opinion. The study of either immigration policy or education policy would be incomplete without taking into consideration the wider socio-political context in which they were developed. Consequently, this research project will reference a broad corpus of texts and debates to provide additional context to the study of education and immigration policy in Canada.

(c) Discourse analysis

Similar to policy analysis, there are a multitude of ways one might approach the study of discourse. Discourse is understood as a privileged means of producing and transmitting meaning in modern society (Ruiz 2009, p. 2). For Michael Freeden, the control of language "is a vital means of moulding and directing a society. To monopolize, channel, or contain the understandings prevailing in that society's language is also to preside over its practices and processes" (2008, p. 198). These

statements make clear the importance of studying *what is said* in practice: when public authorities debate the reasons for or against granting social welfare entitlements to IRCs they are not only defending a policy position, they are also shaping the way their interlocutors come to understand a particular policy issue. Moreover, debates on immigration policy and social welfare will also include struggles over the specific meaning of language and how it is used by public authorities and other actors. This is a meaningful aspect of discourse to focus upon because the type of language one uses or encourages others to use will constrain or enable certain policy outcomes (Freeden 2008).

The approach to discourse analysis utilized in this research draws on methods typically associated with ideological discourse analysis. Ideological discourse has a *dual structure* in that it at once executes or acts upon a belief system and simultaneously serves as a means of persuasion, influencing attitudes and ideologies of others (Van Dijk 1995).

The means of carrying out ideological discourse analysis are discussed in much of Teun Van Dijk's work (1995, 2000). Ideologies may refer to systems of normative ideas that "organize group attitudes […] about relevant social issues, such as abortion, nuclear energy or affirmative action" (Van Dijk 2000, p. 138). Ideological discourse analysis emphasizes the role of the researcher in uncovering ideologies or political thinking of speakers or writers through a close, systematic reading (analysis) of talk and written texts (Van Dijk 1995). This form of discourse analysis will aim to identify what normative positions are typically associated with the views expressed in discourse (Van Dijk 2000, p. 136). These normative positions can be expressed as systems (such as in the case of liberalism, communism and feminism) or may be expressed as basic principles (such deservingness, charity).

The analysis of discourse in this project serves two specific purposes. First, it helps draw out and identify the justifications that policymakers put forward in defending greater access or more restrictions to schooling for IRCs. Second, it facilitates the

analysis of those justifications, and in doing so helps locate the ethical premises inherent in these justifications. As Van Dijk points out, “ideologies are the basis of our social judgements, and ideologically controlled propositions often are opinion statements" and “expressions of such opinions will often indicate what ideological constraints are involved”; in other words, how normative ideas shape discourse (Van Dijk 2000, p. 143).

Following Van Dijk, justifications articulated in discourse are understood as (a) reflecting normative ideas *and also* (b) convincing or persuading others of a specific point of view. At times these justifications are expressed clearly and take the form: *IRCs should/should not have access to public schooling because of x*. However, this form of justification is rare. More often, discourse will frame the problem of schooling for IRCs in more nuanced ways. A specific methodology is therefore required to examine the discourse of public authorities.

Much of the discourse analysed in this research project stems from legislative debate or commentary on policy and legislation. This is an accepted form of policy analysis and one that can generate meaningful insights into the way policymakers justify normative ideas in practice. Jurgen Habermas confirms this view, observing:

> The deliberative mode of legislative practice is not just intended to ensure the ethical validity of laws. Rather, one can understand the complex validity claim of legal norms as the claim, on the one hand, to compromise competing interests in a manner compatible with the common good and, on the other hand, to bring universalistic principles of justice into the horizon of the specific form of life of a particular community.
>
> (1994, p. 5)

Van Dijk proposes several practical strategies for analysing ideological discourse (1995) and legislative debates on immigration (2000). All legislative debates referenced in the case-study in Chapter Four have been systematically reviewed and analysed for specific semantic structures and formal structures of discourse following methods developed by Van Dijk (1995, 2000). The semantic structures analysed include:

(a) **Topics**: The broad framing proposed by a speaker that conveys the essence of their argument or the essence of a policy. This is a *framing strategy* that aims to control what listeners will retain as most important.

(b) **Implicitness**: Discourse that pre-supposes a particular understanding of facts or events. These implicit understandings belong to the speaker's *mental model* but are not conveyed explicitly in their discourse. The listener is asked to take certain facts as granted in these patterns of speech.

(c) **Disclaimers**: This discursive strategy aims to distance the speaker from negative self-presentation, while offering a negative other-presentation. The purpose is to manage the perception listeners have of the speaker. Take, for example, the phrase: *Some illegal migrants are good, hard-working people, but most don't respect the rule of law*. The speaker attempts to manage the listener's perception of the speaker by qualifying their criticism of these migrants.

(d) **Contrast**: A discursive strategy that aims to support the speaker's conclusion through a comparison of two groups. An example of this is when a speaker contrasts the positive actions or attributes of their forefathers to the negative actions or attributes of migrants. For example: *My parents were hardworking immigrants who came to this country in the hope of contributing to society, but today's migrants are lazy and want to take advantage of our generous welfare system*.

(e) **Lexicalization**: The manner in which a speaker describes the target population of migrants, ie whether they are referred to as *illegal* immigrants, *undocumented* immigrants, or *irregular* immigrants. This is a particularly important framing strategy that aims to shape the way listeners perceive the target population. Lexicalization therefore merits special consideration in the analysis of discourse on irregular migration.

In addition to the semantic structures above, four formal structures of discourse are analysed in the case-study presented in Chapter Four—they include:

(f) **Argumentation**: The manner in which policymakers argue for and about the rights of irregular migrants. Different discursive strategies will be employed to advance specific positions; these strategies may emphasize undesirable consequences, appeal to shared value sets, focus on the vulnerability or plight of minorities, or take the form of straw man arguments. The latter is an especially important feature of legislative debate on the rights of irregular migrant children in Canada.

(g) **Semantic rhetoric**: The use of specific semantic devices in argumentation, such as euphemisms, metaphors, similes and hyperbole. These semantic devices attempt to persuade a listener to adopt a preferred framing of an issue. For instance, irregular migrants may be accused of *corroding* social values, or *flooding* local communities when they arrive in great numbers.

(h) **Interaction**: Legislative debates are a form of interaction amongst policymakers, but are also a form of social and political interaction. That is, parliamentary debate will include instances where speakers link their actions and positions to broad social goals or opinions and, in this way, seek to legitimize their claims. This is the case, for example, when policymakers claim that they are channelling the majority of the electorate in arguing for a specific policy position.

Aside from controlling for semantic structures, one further strategy is proposed by Van Dijk to conduct discourse analysis; this strategy seeks to identify information that responds to certain specific questions. The questions are (Van Dijk 2000, p. 146):

> Who are We? Who does (does not) belong to Us?
> What do We do? What are Our activities? What is expected of Us?
> What are the goals of these activities?
> What norms and values do We respect in such activities?
> To which groups are We related: Who are Our friends and enemies?
> What are the resources We typically have-or do not have-(privileged) access to?

Text and talk that is patterned in this way facilitates detection of normative ideas at play in discourse.

(d) Summary

The first part of this research explores the predominant ways the rights claims of IRCs are addressed in normative theoretical literature. This involves contrasting political and normative theories and critically analysing the ethical prescriptions that arise from each theory. This analysis is the focus of Chapter Three. The chapter will show that there exists a tension at the level of political ideals that remains unresolved. Theorists disagree about the priority that should be given to the rights claims of IRCs and the nature of the responsibilities public authorities in the host community have for this population of children.

In practice, however, IRCs do have the legal right to free public schooling in Ontario. So, despite the tension at the level of political ideals, policymakers have accommodated this population of children in Canadian schools. This research investigates the normative ideas that were appealed to as this accommodation came about. Did the tension at the level of normative theoretical work reveal itself in the discourse of policymakers? If so, how was this tension resolved?

To answer these questions, an investigation of the discourse of policymakers is required. The specific method of discourse analysis draws on the work of Van Dijk who offers several ways of analysing discourse that is relevant to the examination of normative ideas in parliamentary debate of immigration policy.

2.3. Source material

Legislative debates are an important source of data in this research project. These debates are useful because they capture the discursive strategies public authorities employ when creating policy that shapes membership rules (immigration) and regulates access to schooling by IRCs. Michael Freeden notes that: “parliamentary debates provide endless sources of political argumentation, on both domestic and international policy, that bridge elite and popular thinking and serve witness to the

mores outlining the permissible and the knowable in a particular context" (2008, p. 206).

This project takes advantage of the fact that all levels of government in Canada make available transcripts (and at times videos) of legislative debates. Debate of new legislation at the federal and provincial levels are captured in Hansard records. The City of Toronto makes available summarized minutes of their debates, but also complete video recordings.

It is important to note that the issue of schooling for IRCs is only very rarely addressed as a standalone policy issue. More frequently, discussion of schooling policy for IRCs is subsumed in other debates that address broad issues of public concern, such as the rights of undocumented workers (and their families), immigration reform, or access to government services by irregular migrants. The first challenge of this research project was identifying those instances when schooling rights for IRCs featured prominently in legislative debates—these instances are presented in Section (a), below.

In addition to legislative debate, submissions by civil society actors and community groups entered into the public record as part of parliamentary inquiries, as well as witness testimony in front of various government committees, are included in the corpus of discourse analysed. A number of *practical texts* are also analysed, such as policy statements, public addresses, government reports, court decisions, pamphlets, as well as newspaper articles and editorials.

The data selected for analysis provides an adequate means of (a) contextualising the landscape within which policy processes evolve, (b) identifying the key policymakers and arguments that frame the problem, and (c) locating underlying normative ideas.

(a) Policies, reports and memoranda

As noted above, only very infrequently was the issue of schooling for IRCs addressed as a distinct policy issue. The policies, reports and memoranda listed below were integral to the analysis developed in Chapter Four:

- December 2004 (Provincial): Ontario Ministry of Education Policy/Program Memorandum No. 136—Clarification of Section 49.1 of the Education Act: Education of persons unlawfully in Canada
- May 2005 (City of Toronto): Policy and Finance Committee Report 4—Support for the Efforts of the Undocumented Workers Committee
- July 2005 (City of Toronto): Administration Committee Report 6—Toronto City Council resolution on Support for Undocumented Workers
- May 2007 (Toronto District School Board): Policy P.061—Students without legal immigration status
- August 2010 (Toronto District School Board): Memorandum concerning admission of students without immigration status

(b) Minutes of legislative debates, committee meetings, and expert testimony

A series of search terms entered into archival research tools made available by the Toronto District School Board, Toronto City Council, the Legislative Assembly of Ontario (Hansard) and both the Federal House of Commons and Senate enabled the identification of legislative debates, committee meetings and expert testimony that touched on the issue of schooling rights for IRCs. The search terms used included the following:

- Irregular migrant, irregular immigrant, illegal migrant, illegal immigrant
- Undocumented migrant, undocumented immigrant
- Undocumented workers, undocumented child/children, undocumented school
- Migrant children, migrant child
- Migrant rights, immigrant rights, newcomer policy
- Don't Ask Don't Tell, sanctuary city, Toronto District School Board
- Education migrant child/children, schooling illegal migrant

Consultative meetings with key resource persons familiar with the research topic were also used to identify key debates and legislation relevant to the research project (See

Section 2.3 (d)). Below is a list of the most important records of testimony and debate considered in the analysis provided in Chapter Four.

- 1992-1993 (Provincial House of Commons): Minutes parliamentary debate of Ontario Law Bill 4 (later Bill 24)—*An Act to amend the Education Act*
- 2001-2002 (Federal House of Commons): Minutes House of Commons debate of Government Bill C-11— *The Immigration and Refugee Protection Act*
- May 2005 (Provincial House of Commons): Minutes parliamentary debate of Ontario Law Bill 194—*Education Amendment Act*
- April 2007 (Toronto District School Board): Minutes of the regular meeting of the Board—*Don't Ask, Don't Tell Policy*
- May 2007 (Toronto District School Board): Minutes of the regular meeting of the Board—*Students Without Legal Immigration Status Policy*
- May-June 2007 (Federal House of Commons): Minutes House of Commons debate—Citizenship and Immigration Committee of the House of Commons
- April 2008 (House of Commons Standing Committee): Minutes of witness testimony before the Standing Committee on Citizenship and Immigration—Study of undocumented and temporary foreign workers
- May 2009 (House of Commons Standing Committee): Report of the Standing Committee on Citizenship and Immigration—Temporary Foreign Workers and Non-Status Workers
- February 2013 (City of Toronto): Minutes Toronto City Council debate of Motion CD18.5—*Undocumented Workers in Toronto*[23]
- April 2014 (Federal Standing Committee): Minutes of witness testimony before the Standing Committee on Citizenship and Immigration—Study on strengthening the protection of women in our immigration system
- June 2014 (City of Toronto): Minutes City Council debate of Motion CD29.11—*Access to City Services for Undocumented Torontonians*[24]

(c) Video testimony and debates

Two sets of video recordings were included in this research and considered in the analysis provided in Chapter Four.

[23] A number of staff action reports offering background information and supplemental evidence in relation to the Council motion CD18.5 are also considered.

[24] A number of staff action reports offering background information and supplemental evidence in relation to the Council motion CD29.11 are also considered.

The first set of videos consist of eleven instances of witness testimony given on 31 January 2013 before the Community Development and Recreation Committee (CDRC) of the Toronto City Council. This testimony is given in the context of the CDRC's consideration of the motion CD18.5 *Undocumented Workers in Toronto*. Several presentations deal directly with the question of schooling access for IRCs in Toronto. The list of witness testimony considered in this research is given at Annex I.

The second set of videos consists of recordings of debates that occurred during regular sessions of the Toronto City Council during which specific motions were tabled dealing with access to city services by *undocumented migrants*. The specific sessions considered in the analysis are:

- 20-21 February 2013**:** City Council motion CD18.5—*Undocumented Workers in Toronto*
- 10-14 June 2014**:** City Council motion CD29.11—*Access to City Services for Undocumented Torontonians*

(d) Consultations

A total of nine face-to-face consultative meetings were held between 1 July 2014 and 1 August 2014 with individuals possessing first-hand knowledge of policy changes in the City of Toronto and the Province of Ontario that aimed at improving access to public schooling for IRCs. The purpose of these consultative meetings was to assist with research design by facilitating the collection of background information on relevant policies, legislation or law bills, as a means of directing a search for other relevant resources (e.g. video debates or recorded testimony), as well as facilitating the identification of other key resource persons.

The initial list of individuals identified for the face-to-face consultation were chosen because of the prominent role they played in advocacy or research specifically addressing access to schooling for IRCs in Toronto. The first meeting was with Toronto City Councillor Joe Mihevic (Toronto City Council), a key City Councillor responsible for advancing motions in Council supportive of new policies that would broaden access

to public schooling for IRCs. The second meeting was with Mr. Navjeet Sidhu, a policy researcher at the Toronto-based community organization Toronto Social Planning, which focuses on the social welfare of immigrants in the City of Toronto. Mr. Sidhu is the author of several policy reports describing barriers IRC face in their attempts to access classrooms in Toronto. The third meeting was with Ms. Erika Gates-Gasse, Senior Policy and Research Coordinator, Ontario Council of Agencies Serving Immigrants (OCASI).

These first interlocutors provided information on additional key resource persons, and in some cases facilitated meetings with them. Additional consultation meetings took place with:

- Ms. Amy Casipullai, Senior Coordinator for Policy and Communications at the Ontario Council of Agencies Serving Immigrants (OCASI);
- Dr. Francisco Villegas, Assistant Professor of Sociology, Kalamazoo College (Michigan);
- Mr. Chris Brillinger, Executive Director, Social Development, Finance and Administration Division, Toronto City Council;
- Mr. Syed Hussan, Coordinator, Migrant Workers Alliance for Change; and, Organizer, No One Is Illegal (Toronto);
- Mr. Desmond Cole, Journalist, The Torontoist;
- Ms. Ayesha Basit, PhD Candidate (University of Toronto); and, Member, No One Is Illegal (Toronto); and,
- Professor Mehrunnisa Ali, Faculty of Community Services (Ryerson University); and, Ryerson Director of the Centre of Excellence for Research in Immigration and Settlement, the Ontario Metropolis Centre (CERIS).

These consultations were semi-structured in all instances. They were recorded and subsequently transcribed. Each meeting began with a brief overview of the research project and then probed, through a series of open-ended questions, the history of the four policy moments listed in Section 1.5. The responses were followed up by a number of more direct closed-ended questions. Each meeting lasted between 45 minutes and three hours depending on the nature of the responses given, the time available and the possibility of asking follow-up questions. Following standard conventions, all

statements from these meetings are referenced as *personal communication* in this research.

(e) Bodies of literature consulted

This research project includes literature drawn from a number of intersecting disciplines. The predominant literature consulted in the theoretical portions of this research draw from political theory and political philosophy, as well as legal theory. These literatures intersect in the study of the ethics of migration, which is the body of scholarship this research project aims to contribute to.

From the fields of political philosophy and political theory, scholarship on the nature of state authority, social justice, and obligations of assistance to individuals outside the recognized political community was of central importance. Therein, the scholarship of Joseph Carens (2005, 2008, 2010, 2013); Matthew Gibney (2004, 2006, 2009); Robert Goodin (1985); David Miller (2007, 2008, 2013); Marit Hovdal Moan (2008, 2009, 2012); Onora O'Neil (1998, 2001) was especially relevant in addressing the research questions specified for this project. Some literature specific to questions of obligation in the field of liberal political theory was of particular relevance, and here one might single out the work of Michael Blake (2001, 2013); Phil Cole (2000); Samuel Scheffler (2002); and, Patricia Smith (1998).

Again, in respect of the theoretical dimensions of this work, contemporary scholarship in legal theory provided the insights and resources that helped identify, through an inductive process, a normative framework able to describe and explicate the nature of the obligations public authorities have toward irregular migrant children. Of particular relevance was the scholarship of Evan Fox-Decent (2005, 2009, 2011, 2014), E. J. Criddle (2006, 2009), Andew S. Gold (2013, 2014), A. B. Laby (2004, 2008), and E. J. Leib (2009, 2011, 2014).

Literature on children's rights, and particularly the rights of migrant children to education was also drawn upon. Here the work of Wendy Ayotte (2001); Jacqueline

Bhaba (2009, 2014); Clotilde Giner (2007); Vanessa Hughes (2010, 2012); Nando Sigona (2009, 2010, 2011, 2012), as well as the joint work of Madeleine Arnot and Halleli Pinson (2005, 2010) was especially useful.

In addition, the theoretical treatment of questions relating irregular migrant rights, there is also significant scholarship addressing the sociological, political and practical dimensions of migrant integration, including practices of welcome and protest, as well as changing perceptions of community, membership, and citizenship. Here, the scholarship of Luin Goldring (2013); Engin Isin (1999, 2008); Peter Nyers (2007, 2010, 2011); as well as the joint work of Alice Bloch, Nando Sigona and Roger Zetter (2009, 2001) proved especially relevant in addressing the research questions in this project.

2.4. Limitations

It is important to note that this project does not seek to uncover the true intentions of policy actors. The methodology employed in this research is not suited to uncovering intentionality. The methodology does however make it possible to identify deep conceptual premises operating within the policy discourse (Bacchi 2009, p. xix). The approach this research adopts is less concerned with what policymakers actually intended and is instead focused on the way political discourse reveals and conveys meaning. It is for this reason that the research project focuses primarily on the analysis of practical texts (policies, legislative debates, etc), rather than on participant interviews.

This research project relies on a degree of interpretation. Deciding on the scope of policies and the specific policy interactions to investigate is, to begin with, an act of interpretation. However, interpretation is a necessary part of any process that seeks to reveal the beliefs and ideas couched in discourse and, more specifically, the influence of beliefs systems on actions, practices and institutions (Bevir and Rhodes 2002, p. 131).

Linking discourse with systems of belief and ideology is not without its methodological challenges. As Van Dijk points out, “Linking the surface of talk and text to underlying ideologies is a process fraught with complexities and contradictions” (1995, p. 142). That is not to say that ideologies cannot be detected in discourse. Indeed, there may be *ideological stability* observable in discussions of some social issues more than in others. Immigration and the social welfare needs of migrants seems to be one such case where groups and individuals rely on a relatively stable repertoire of discursive strategies that can be linked to a narrow range of ethical positions. It should therefore be possible to assess whether the arguments put forward in discourse are anchored in ethical concepts and then highlight which precise concepts are influential.

3. Justifications in theory

3.1. Overview

This chapter surveys arguments in contemporary political and moral theory focused on the social welfare rights of irregular migrants in liberal states. Three types of normative justifications are common in this literature; they are marshalled to support broadening or restricting access to social welfare services for irregular migrants and IRCs. These justifications are categorized as follows:

1. A partialist justification
2. A social membership justification; and,
3. Rights-based justifications.

These three justifications call upon different normative theories in making a case for broadening or restricting access to social welfare services for IRCs. The first fits within the *particularlist* tradition of political theory that draws heavily on communitarian and liberal nationalist orientations and can be used both to argue for more open or more restricted access to schooling. The next two justifications fall within the broad church of liberal political theory and generally support broader access to schooling for IRCs.

In the normative literature surveyed and in the discourse of public authorities, none argue that IRCs do not deserve education. What different authors and public authorities contest are the grounds for laying that obligation at the feet of the receiving community.[25] Jacqueline Bhabha provides a useful reminder of the contested nature of education claims made by IRCs or on their behalf—she notes that "many commentators […] have challenged the liberal assumption of social inclusiveness, arguing against automatic access to welfare benefits and basic public goods" (2009,

[25] In other words, there is a difference between acceptance of the general principle that a child deserves an education, and acceptance of the obligation to educate that child. The first is a general principle, whereas the second is a *positive duty*. See Chapter Five for a full discussion of the different types of duties that arise in moral theory, ie perfect duties, imperfect duties, positive duties and negative duties.

p. 416). Education *per se* is not contested; rather what is contested is the responsible authority that should provide this education. All the justifications in this chapter ultimately aim at achieving a fair distribution of access to education services—however, a fair distribution may or may not include an obligation to provide IRCs with schooling in the receiving community. In other words, proponents of the different justifications may agree on the goal (education), but may not agree on the means of achieving that goal.

Before considering the (common) normative justifications in the theoretical literature, it is important to note that amongst the factors public authorities may consider when determining whether or not to accommodate IRCs in public schools will be factors of a pragmatic variety.

A policy decision to include or exclude IRCs may be taken based on common-sense positions or material resource constraints, without reference to any specific normative idea. Similarly, there may be a variety of interest-based reasons that account for specific policy outcomes, the product of specific democratic structures and power arrangements inherent to a specific level of government or national governance structure—sometimes referred to as *negotiation democracy*—or still, policy outcomes may reflect the influence that non-governmental groups bring to bear on political decision-making (e.g. corporatism). It may also be the case that, in advocating specific policy outcomes, public authorities are in fact appealing to future appetites of the electorate or indeed, future voters. This is what Jane Mansbridge (2003) has referred to as anticipatory democratic representation—a way that elected officials position themselves to appeal to special groups of *potential* voters (one might think of efforts by elected officials to appeal to future immigrants, if such immigrants are recognized as a powerful voting constituency).

There is a distinctly instrumental dimension to pragmatic justifications; for example, evaluating a policy on the basis of the cost/benefit to oneself (e.g. opportunities for re-election) or to the host society. What is important to retain is that

policy outcomes are not solely influenced by normative ideas, but may also reflect pragmatic concerns: unique power dynamics in the policymaking process, or individual and institutional interests. When politicians face populist calls for increased limits on foreign arrivals, detaining irregular migrants, including IRCs, sends a message of *zero tolerance* to the electorate: "The detention of refugees, asylum seekers and other irregular migrants, including children, becomes a powerful message from the government to its constituents – 'we are in control, we are tough!'" (IDC 2012, p. 33). David Weissbrodt, the former United Nations Special Rapporteur on the rights of non-citizens notes that detention policies at times "are advocated by politicians who hope to appeal to nationalist or racist elements in the electorate" (2008, p. 142).

By comparison, normative theory evaluates measures against ethical standards and is principally pre-occupied with the question 'what is just' as opposed to the question, 'what is doable' or 'what is instrumentally valuable'. In this way, normative theory illuminates normative concepts that public authorities reference in the decision-making process, even if these ideas cannot be said to be responsible for specific policy outcomes.

The three types of normative justification surveyed in this chapter do not represent an exhaustive list of normative arguments that appear in the literature from moral and political theory; however, they tend to predominate over others. Each justification frames the responsibilities of public authorities toward IRCs differently. For example, one approach will frame the responsibility to accommodate IRCs in schools as a moral imperative owing to the equal moral worth of the irregular migrant child and the citizen child, whereas another will frame schooling for this population of children as a matter of charity. This survey of normative arguments will serve as a *register* against which it will be possible to compare arguments made in public discourse for opening or restricting access to Canadian schools.

Operating in the background are several important assumptions, which are in their own right contested and controversial. The first is that states exercise *rightful sovereignty* over the territory they govern and that this gives them a moral right to control the terms of entry and stay of immigrants. Second is the assumption that the state is not constrained to support individuals that are present without authorization, nor is it obliged to extend to these individuals many of the rights that individuals with residency permission would normally enjoy. This research does not directly address the first assumption, as it belongs to a different debate about the right of states to control their borders. However, it does engage the second assumption, as constraints on sovereign power within the state are very relevant to the study of schooling rights for IRCs.

Finally, before embarking on this analytical survey, an important point about the way the subject matter dealt with in this research project is referenced in the normative literature. There is a dearth of work in the field of political and moral theory on the specific question of welfare rights for IRCs.[26] Indeed, the justifications highlighted here are normally advanced in connection with scholarly work addressing different, albeit equally challenging ethical dilemmas arising from the development of contemporary immigration policy, such as (a) the claim to free movement of people and open borders; (b) the rights of irregular migrants, stateless persons, non-citizens and asylum-seekers in liberal societies; (c) philosophical work examining the obligations of liberal societies to assist distant, vulnerable populations; and other similar work. While scholarly work in political and moral theory looking at the rights of irregular migrants rarely focuses *solely* on the question of *schooling rights*, both children and social welfare rights (like education) do feature regularly in the landscape of examples theorists use to support their respective theories of just immigration regimes in liberal societies. Theorists frequently invoke these two examples (children and schooling) because they refer to

[26] Notable exceptions include the work of Joseph Carens (2008), James Bohman (2011), and Marit Hovdal Moan (2009, 2012).

cases where one has strong moral intuitions about what would and what would not be morally permissible as a policy outcome in a liberal society. Moreover, the subject matter is highly relatable since nearly everyone has experience of both children and schooling, one way or another. This makes possible widely shared understandings about the purpose and value of education and the status of children (Holzscheiter 2010, p. 84).

Children are a special moral case because they cannot be assigned the same responsibility for their actions as adults. Moreover, the impact of public policies on the life of a child is significantly more acute given their early stage of development. There is a shared understanding in liberal societies that education maximizes opportunities to live a productive, meaningful life. While more education does not equate more welfare, there is common agreement that children deserve a minimum of education and that this will positively impact their development trajectory. With these shared understandings in mind, it is easier to detect when a normative theory requires stepping beyond an intuitive moral boundary—that is, when a theory or justification requires the acceptance of a conclusion that is morally distasteful. By leveraging common, shared views about children and schooling it is possible to investigate how perceptions of *irregular migration* disrupt commonly held moral intuitions about children and schooling in liberal societies.

3.2. The partialist justification

The term *partialist* refers to political theories and theorists that express partiality for the interests of bounded groups—namely, the community and the nation. Obligations to members of these groups are prioritized over obligations to humanity at large. This point of view is also, at times, referred to as *particularist morality* (Bader 2003). The terms *partialist* and *particularist* encompass normative ideas commonly advanced by communitarian thinkers and liberal nationalists. The value partialists ascribe to group

rights and group membership sets them apart from liberals who value, above all else, the autonomy of individuals and the free exercise of personal agency.

The *community* and *nation* represent for partialists sources of independent value and meaning—these groups add richness and meaning to one's existence and life projects. "People need culture", writes Chaim Gans, "because it is the framework within which their plans are realized, their projects exist, and the fruits of their freedom take root. It is the framework in which the actions of people have substance" (1998, p. 165). Seeing oneself reflected in a national culture, a common project, shapes to a significant extent one's own sense of self, belonging and purpose (Taylor 1994). The ability to identify a common past and direct energies toward a common future gives rise to deep affective attachments and feeds a sense of shared purpose among co-members of specific groups (communities and nations).

Partialists conclude that individual rights need to be balanced with the collective rights of communities, because communities and cultural nations give meaning to the exercise of freedom and autonomy. The experience of community and the attachments one develops over time shape an individual's actions and choices. Life plans reflect the experience of relationships, obligations and aspirations formed by living in communities. For partialists, rights-based approaches to social justice downplay the importance of the community in shaping the individual (Buchanan 1989). Daniel Bell notes that cultural factors have an important part to play in the justification of rights and cautions not to adopt too quickly justifications that rely on "abstract and unhistorical universalism" (2005, p. 220). Thus, notions of freedom, so greatly prized in liberal theories of justice, are thought meaningless if they are not read together with the relationships that a community and nation provide.

For these communities, open membership rules equate to forced cultural change (Bader 2005, p. 352). Given how meaningful identification in these groups is for members, partialists argue that membership should not be open to anyone, as this would fundamentally alter the character of these groups (community and nation). "The

distribution of membership is not pervasively subject to the constraints of justice," argues Michael Walzer (1983, p. 61). Control of membership is essential to ensuring the survival and resilience of a recognizable group with shared values and mutual interests. Doing otherwise undermines the rich particularity of the moral lives of co-members. Indeed, radically altering communities risks undermining not only joint social and political endeavours, but also the community member's sense of place and purpose. Such changes to the character of a community put at risk the inter-generational aspirations of communities and nations, for whom "the demand to survive through historical time is an essential component" (Gans 1998, p. 165). Cultural change should occur on terms set by the community in order to preserve its distinctiveness.

The implication of the partialist viewpoint is that it is not only morally justified to limit membership to the community, but also morally justified to limit the distribution of communal goods, such as public education. Closure of the community results in the erection of a boundary between those inside and outside; the interests of co-members are prioritized over the interests of outsiders, except in extreme cases of need. This is what Chaim Gans calls the *fraternity justification* (1998, p. 180). For partialists, narrowly formed attachments weigh more heavily in moral deliberations. These attachments matter in any calculation that seeks to determine the extent of one's obligations to those outside of the community. Yael Tamir summarizes this position succinctly: "When faced with an exclusive choice of alternative between helping strangers or members of my group – be it my family, my community, or my nation – I have a stronger moral duty to help those to whom I feel close than to help strangers" (1993, p. 99).[27]

[27] This normative idea is not limited to Western liberal societies. Kwame Anthony Appiah describes the idea of *abusua*, whereby "a group of people related by common ancestry, (…) have relations of love and obligation to one another; the closer in time your shared ancestors, roughly speaking, the stronger the bonds" (2006, p. 47).

Partialists also point out that within groups obligations between individuals are less a matter of choice. Obligations that arise between members of a community are of the kind that the liberal individualist would either not perceive or perhaps discount in favour of personal interests. A person is born into a family, a community, a nation, and as a consequence incurs obligations that place stringent demands on her—demands that sometimes involve personal sacrifice which she may otherwise not make. Since obligations of assistance are strongest within the community, responsibilities to outsiders take the form of less stringent, general duties of assistance. These duties of assistance are justified on the grounds of beneficence or charity, but they do not command equal weight in moral deliberation.

The partialist ethical viewpoint is frequently likened to a concentric circle.[28] It suggests that responsibilities are strongest at the centre, amongst one's closest relations (special relationships), and gradually weaken as relationships grow more distant. So, an individual may feel very strongly that their government has a responsibility to educate their child, and feel strongly about the education of the children of fellow citizens (though comparatively less strongly). However, the individual will feel much less strongly about the need for her government to educate children in a neighbouring country, even if citizens there are facing greater hardship overall. This individual is more likely to accept obligations to those close to her, persons with whom she can readily identify. As that capacity of recognition diminishes, so too does the willingness to consider oneself obliged to support another person. Christine Straehle summarizes this as follows: "The idea is that we incur and accept obligations towards those 'close' to us, like our compatriots, relatively willingly. The reverse of the argument is that we have much less motivation to help those outside the realm of moral partiality" (Tamara Lenard et al 2010, p. 114).

[28] Henry Shue uses the act of dropping a pebble in a pond as a metaphor. He is critical of the metaphor and the division of moral labor it supports, arguing that "what is wrong is the progressive character of the decline in priority as one reaches circles farther from the center" (1988, p. 692).

In communities of the sort described above, individuals hold expectations of mutual support (cooperation and reciprocity). This informs an individual's engagement with his or her community. Mutual support and cooperation are shared values that stem from a view of history underwritten by shared sacrifice. These values play a key role in sustaining the belief that others will contribute equally to common projects. Failure to sustain a commonality of values, partialists believe, will have negative consequences for social arrangements based on cooperation and trust. Public education is a good example. Without the confidence that everyone is committed to contributing equally over time to sustaining a public education system, the system would suffer from a deficit of confidence, thus undermining its sustainability in the long-term.

While the foregoing discussion of partialism draws on elements of both communitarian and liberal nationalist scholarship, it presents what might be viewed as a hard, uncompromising version of *cultural nationalism*. However, liberal nationalism is an attempt to marry a weak form of cultural nationalism with the impartiality and respect for autonomy that are hallmarks of liberalism. For a fuller sense of the contributions of liberal nationalist thought, especially as it has evolved in the Canadian context, it is necessary to say a little more about liberal nationalist theory.

Liberal nationalism provides another way of understanding rights, nations, and citizenship, and in Canada, this has emerged as an important and influential set of theoretical ideas. It finds its clearest expression in the literature on multiculturalism that has especially strong roots in Canada owing to seminal contributions by several Canadian scholars, namely, Will Kymlicka, and Charles Taylor. Will Kymlicka goes so far as to suggest that "policies and politics of immigration, citizenship and multiculturalism are inextricably linked" (Kymlicka 2003, p. 196). Both Kymlicka and Taylor address the challenges of living with difference and the balance between the autonomy prized by liberal theorists and the necessity of community for the meaning individuals derive from it.

The concept of *liberal nationalism* or *liberal nationhood* emerges from an attempt to address the changing nature of rights and responsibilities, citizenship, and identity in the face of at least three major shifts in the twentieth century: first, changes in political spaces, which have been both scaled-up to the global level (as evidenced in global rights regimes, and the proliferation of international norms and treaties) and have also been scaled down to regions, mega-cities, as well as small cities and local communities; second, changes in immigration patterns and the composition of national communities, which in Canada have become ever-more diverse (or multicultural); and, finally, changes in political regimes, resulting in a greater number of liberal-democracies worldwide. A shared concern amongst these scholars is the co-existence of diverse national communities within one liberal state (Kymlicka 2006, p. 130). For Will Kymlicka, multiculturalism means accommodating diversity and cultural particularity within a liberal, rights-based state—the objective is to 'tame' liberal nationhood to allow communities to find meaning and protection within the state, rather than looking beyond the state, as *postnationalists* seek to do (see Section 3.2 (b)). Kymlicka asserts:

> I believe that the orthodox liberal view about the right of states to determine who has citizenship rests on the same principles which justify group-differentiated citizenship within states, and that accepting the former leads logically to the latter.
>
> (Kymlicka 2006, p. 339)

The Canadian philosopher Charles Taylor describes policies of multiculturalism as having an the ultimate goal of "transform[ing] the culture of interaction so as to remove the inequalities and confer the status of normative citizen or member on everyone" (2012, p. 416). This does not mean that immigrants must conform to a rigid, dominant national culture, but rather it is the idea of the normative citizen is subject to a constant negotiation and reflects "the new footing on which we want to be with each other, having set aside the inequalities and exclusions which characterized the old" (Taylor 2012, p. 416). In this nuanced form of cultural nationalism, liberal nationalism allows room for multiple differences to thrive and still work toward a national common

project. In Canada, Kymlicka argues, “strong public commitments to immigration and to multiculturalism serve to reduce fears that citizenship policy will be used as a tool of exclusion or assimilation” (Kymlicka 2003, p. 203).

Relevance for schooling of IRCs

The distribution of education services is of paramount concern to partialists because it plays such a vital role in the resilience of communities. Partialist ethics emphasize the fact that an IRC is, first and foremost, *not* a member of the national community. It follows that the needs of IRCs should be considered separate from (a) the society in which that child is to be educated, (b) the purpose(s) of education in the host society; and, (c) the needs and interests of the members that make-up the host society. Proponents of this viewpoint believe that access to communal membership goods must be regulated in such a way that does not compromise the interests of existing members. Distribution practices must first address the needs of members, who will in turn decide what just distributive principles and practices look like for non-members (Scheffler 2002). The IRC’s claims should, on this account, be balanced with the needs and priorities of the host community.

Equally important is that fact that the host community has not agreed to these migrant children joining the community. IRCs are present in the receiving community on terms not agreed to by the membership. But once present, how will the partialist respond to the claim to educate IRCs? The communitarian philosopher, Michael Walzer, may provide a clue in this passage—he writes:

> Groups of people ought to help necessitous strangers whom they somehow discover in their midst or on their path. But the limit on risks and costs in these cases is sharply drawn. I need not take the injured stranger into my home, except briefly, and I certainly need not care for him or even associate with him for the rest of my life. My life cannot be shaped by such chance encounters.
>
> (1983, p. 33)

It is debatable whether the presence of irregular migrant adults count as chance encounters of the sort Walzer discusses, since their presence is, at least sometimes,

the by-product of policy design. The demand in developed Western countries for low-cost labour, along with decreasing legal avenues for migration, are well-documented (Briggs 1993). It is at least plausible that both the private and public sectors in developed countries are complicit in the growing numbers of irregular migrants that they host.

However, IRCs might plausibly qualify as a *chance encounter* of the kind referred to by Walzer, because it seems unlikely that states can attribute as easily to children the sort of strategic, economic motivations for illegal entry and residence that are often thought to motivate adult migrants. So, a partialist response might provide education for IRCs so long as the quantity of need proves to be manageable and small.

However, partialists would resist a blanket obligation that holds for all cases of IRCs; rather, they would accept an obligation of assistance out of sense of charity, so long as such assistance does not compromise the ability of members to support one another. As Exdell observes, for communitarians, "appeals to human rights ask too much when they demand that we be concerned for the welfare of all persons equally" (2009, p. 132). If the costs of educating IRCs hampers significantly the ability of the membership to provide adequate education to co-members of the community, the moral duty to assist IRCs diminishes significantly on the partialist account.

Shortcomings

The partialist position is vulnerable to several criticisms. To begin with, the elevated moral position ascribed to co-members of a community can insulate the community from progressive change. Among other things, this can entrench unfair and discriminatory practices. One means of ensuring social progress and the evolution of social mores is by diversifying the community of people who contribute to the development of social customs—new members question existing practices and offer new, interesting possibilities for cooperative arrangements. Challenges to dominant

modes of thinking, social customs, and belief systems become more difficult if a community is able to restrict membership to the like-minded.

Moreover, it is misguided to view modern states as cultural monoliths (Young 1998; Blake 2013). According to some, defence of closed membership stands on false, and sometimes racist, premises. Michael Blake notes,

> More often, a cultural justification for the right to exclude amounts to little more than a political declaration that some cultures—or, indeed, some races—are more desirable, more worthy, than others. This declaration, in turn, is entirely antithetical to liberal egalitarianism; we cannot ground the right to exclude in a declaration that some people are worth more than others.
>
> (2013, p. 105)

Cultural homogeneity can really only be said to exist in a handful of states. For most modern liberal democracies, pluralism is already the status quo. Moreover, members of most liberal democracies enjoy cultural ties that cross borders and continents (Bader 2003). Irregular migrants can also be cultural outsiders that challenge native belief systems and cultural practices. But that should only serve to underscore the need for appropriate platforms for dialogue and public reason-giving, rather than supporting closure to foreign persons, customs, values, and ways of life.

The partialist view sanctions an insular, almost static view of political life that protects accumulated resources from redistribution. While redistribution may take place within the boundaries of the community, there is no sense of moral obligation to distribute the accumulated capital—be it social, intellectual, financial or of some other sort—with non-members. The impact for IRCs and their families can be significant. Thomas Nagel's seminal essay on radical inequality argues that one must differentiate between goods that one can afford to give up and those which, if not made available, lead to cases of extreme need (Nagel 2008). Food is Nagel's focus, but education for children is really no different. Nagel says that a situation of radical inequality exists when:

> […] the bottom level is one of direst need, the top level one of great comfort or even luxury, and the total supply is large enough to raise the bottom above the

> level of extreme need without bringing significant deprivation to those above—specifically, without reducing most of the people to a place somewhat above the current bottom, or otherwise radically reducing their standard of living.
>
> (2008, p. 50)

When there is a reasonable chance that the IRC will reside in the host community, denying them access to schooling is enforcing a state of radical inequality between the migrant child and other children in the community. This would seem to be an incoherent position for partialists to defend given the importance they attach to a healthy communal life and cognizant of the role education plays in achieving such a state of affairs. An IRC that benefits from education not only stands a good chance at developing the necessary capabilities to live a productive life, but also develops the capabilities to serve as a good neighbour, friend and contributing member of society. Keeping children from enjoying an education in the place where they live imposes a social disability not only on the child but the host community as well (Fiss 1998).

The partialist view also presumes that bonds of trust and obligation are not malleable, while also overestimating the value co-members may place in a shared history. First, it should be noted that not every co-member of a community will develop into a contributing, like-minded resident. Those convicted of crimes presumably benefit from communal social goods, like education, but end up taking from, rather than making a contribution to, the community. Yet, there is no corollary argument that they or their children be denied education—quite the contrary, education is made available to the incarcerated despite the public expense incurred by the community. Similarly, those with severe disabilities may not contribute like other co-members of a community, but they will nevertheless benefit from various social protections. It is therefore incoherent to defend education for the citizen child and not an IRC because one believes the citizen child will feel a strong sense of obligation to contribute back to the community that invested in her education. There is no way for a community to predict the future mobility of its members; the educated Canadian child may well elect to become a productive, contributing member of some foreign country in adulthood.

Also, respect for the principle of mutual aid exists even in pluralistic communities made up of populations that do not share many centuries of common history. Feelings of mutual aid grow in all forms of associations, amongst co-workers, neighbours or members clubs, for example. Obligations to fellow citizens, city-dwellers, co-workers, family members are best thought of as a latticework of overlapping obligations, and less as a neat concentric circle of obligation. There is no reason to believe that an irregular migrant would not assist a fellow resident in need, simply because they are not able to point to a shared heritage—they may well share bonds that are more meaningful.

Finally, one might argue that excluding IRCs from schooling in the host community is equivalent to exercising a form of tyranny over non-members. Non-members (irregular migrants) have no clear path to voice their objections or to ensure that their interests are reflected in the society where they live. They are dominated by the power citizens exercise over their lives.[29] As Peter Nyers observes, "non-status people not only lack the full range of citizenship rights, but they are also denied the opportunity to express themselves as political beings" (2010, p. 129).

Summary

The partialist argues that it is a mistake to think of the individual as standing separate from and in many cases before the community. The community has a right to promulgate and protect a shared identity and culture, and this right needs to be balanced with the needs of outsiders. This balancing occurs in part through the establishment of membership rules. The difficulty with the claims of IRCs is that they

[29] Walzer draws attention to this danger. He grants that for resident non-members who share the territorial space with citizens, naturalization cannot be subject to the constraint of closure: "When second admissions [naturalization] are closed, the political community collapses into a world of members and strangers, with no political boundaries between the two, where the strangers are the subjects of the members. Among themselves, perhaps, the members are equal; but it is not their equality but their tyranny that determines the character of the state. […] Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what the authority does" (1983, p. 61).

are vulnerable residents over whom the state exercises authority. The communitarian would conclude that either the child migrant should be offered a path to membership in the community or must be forced to go elsewhere to have their basic needs met.

3.3. The justification from social membership

A normative justification for extending rights and social welfare entitlements to irregular migrants exists which centres on the meaningfulness of social membership. The argument has the following structure: over time, irregular migrants become indistinguishable from other members of the political community across a range of factors that are meaningful, thus it is not morally permissible to exclude irregular migrants from the enjoyment of certain rights as a result of their irregular status. The political philosopher Joseph Carens articulates this claim most clearly—he frames the argument thus:

> The moral right of states to apprehend and deport irregular migrants erodes with the passage of time. As irregular migrants become more and more settled, their membership in society grows in moral importance, and the fact that they settled without authorization becomes increasingly less relevant.
>
> (2013, p. 150)

The social membership justification is sometimes contrasted with a rights-based justification, which takes as its premise shared *humanity* or the *inherent dignity of people* to argue for rights and entitlements. By contrast, the social membership justification considers what entitlements irregular migrants deserve as *de facto* members of a community, given the need to treat all *co-members* of a community equally (Gibney 2009, p. 32). Underlying this claim for equal treatment is the idea that belonging to a community carries moral significance; social membership is sufficiently meaningful therefore to ground a claim against the state for access to a range of social welfare services and, ultimately, full membership.

Proponents of the social membership justification argue that irregular migrants make valuable contributions to their host communities even in the absence of official

residency permission. "They are," James Dwyer observes, “involved in complex schemes of social cooperation” (2004, p. 40).[30] For instance, irregular migrants contribute to the economic life of the community by paying direct or indirect taxes on goods they purchase, the rent they pay, or homes they buy. They are also active participants in labour markets.[31] In addition, irregular migrants contribute to the diversity and vibrancy of social life—contributions that are highly valued in pluralist societies such as Canada. Despite fears of discovery, apprehension, detention, or removal, irregular migrants make myriad meaningful contributions to their communities.

The social membership justification also stresses the fact that irregular migrants develop over time the same aspirations, motivations, attitudes, and social mores as *native populations*; irregular migrants are therefore hard to distinguish from nationals across these factors. Irregular migrants marry, sometimes have children, and form meaningful bonds of friendship with residents and non-residents. The bonds children develop through interactions with other children they encounter can be especially strong given the young age at which they are formed. These bonds are meaningful not only to the formation of the irregular migrant child’s character, aspirations, and goals, but are equally meaningful for the resident children with whom they interact. As Tim Fowler observes:

> There are many aspects of attending school which might plausibly encourage children to develop tolerant attitudes toward others. While at school children will encounter other children who hold differing views from their own. They may well make friends with such individuals, or at least learn that they must be able to co-exist peacefully with them.
>
> (2011, p. 92)

[30] Dwyer also notes that “Many of the most exploited workers in the industrial revolution—children, women, men without property—were also not full citizens, but they were vulnerable people, doing often undesirable work, for whom society needed to take some responsibility” (2004, p. 40).

[31] What is more, they often provide labor in industries frequently shunned by nationals because they invoke work considered ‘difficult, dirty, and dangerous’—occupations in sanitation services, the agricultural sector, and the construction sector leverage workers in the margins of the labor force. It is believed that many of the more menial jobs in these sectors would go unfilled if nationals were relied upon to meet labor demand, no matter the wage paid (Briggs 1993, p. 505).

In relation to the receiving community, the irregular migrant's experiences become more meaningful over time, as bonds and ties to that community deepen. However, detaining or deporting irregular migrants, or forcing them into hiding undermines these bonds by, inter alia, depriving them of the freedom to interact with their communities, which in turn exacerbates feelings of anxiety, idleness, stress and personal loss for themselves and their families (Noll 2010; Blitz and Otero-Iglesias 2011). Kathy Vandergrift, Chair of the Canadian Coalition for the Rights of Children, in testimony before the Canadian Standing Senate Committee on Human Rights, points out: "the more we understand the potential of children, the more we can shift that discussion away from needing to shape them if we understand that they also help to shape our communities" (SCHR 2007, p. 28). The irregular status that IRCs and other irregular migrants carry forces them to work doubly hard to avoid falling into precarious circumstances while inhabiting and shaping communal spaces they call home.[32]

Social membership can exist even if the state withholds legal membership from a migrant. The migrant is not a recognized member of the political community, but is nevertheless a contributing social member: a mother, a partner, a teacher, a schoolmate, a friend enriching communal life. And once a contributing member, the reasons for denying the migrant access to the social goods of a community become morally dubious according to proponents of the social membership view (Carens 2013; Fiss 1998).

An individual's citizenship is important, but not the most relevant moral factor in determining what is owed to fellow residents, particularly those in need or the vulnerable, such as children.[33] Yasemin Soysal is critical of the institution of

[32] Matthew Gibney has referred to the *undocumented migrant* as the archetypal precarious resident (2009, p. 2).

[33] Carens (2008) has elsewhere challenged the view that states have unconstrained power to decide who to admit and who to exclude from the political community, as has Arash Abizadeh (2008), albeit on different grounds. However, Carens concedes that borders exist and free movement is not possible. These are granted as background assumptions in his discussion of social justice within the state. His aim is to arrive at a *non-ideal theory* of rights for irregular migrants, as opposed to an *ideal theory* that delivers first, organizing principles of a society.

citizenship and its constricting effect on the welfare of irregular residents; she writes, “Citizenship defines bounded populations, with a specific set of rights and duties, excluding ‘others’ on the grounds of nationality” (1994, p.2). For Joseph Carens (2008), reliance on citizenship to shape the distribution of rights and social welfare goods in nation states is morally indefensible. “Citizenship in Western liberal democracies,” Carens has famously stated, “is the modern equivalent of feudal privilege—an inherited status that greatly enhances one’s life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely” (2013, p. 30). A host of entitlements and benefits are granted to those fortunate enough to be born into a Western liberal state, benefits denied to those lacking this happenstance privilege. It is arbitrary to decide the beneficiaries of social justice based on an individual’s place of birth. While some limits to immigration are acceptable from a liberal point of view, these limits lose moral force when it comes to the equal treatment of long-term residents. It follows that it is morally dubious to deny long-term residents (ie social members) the same entitlements and benefits as citizens if they have spent several years rooted in a community.

A number of theorists concur with Carens, arguing against membership practices limited by contemporary forms of citizenship in liberal states; they believe that, in their current form, these practices are not the ideal means of assigning rights and duties. Rainer Bauböck (2008) advances the idea of *stakeholdership*; a variant of the social membership justification Carens proposes (2010). In essence, this is the view that individual residents in the territory of the state are important social and economic agents with a long-term interest in the future of the host community; therefore, they deserve a passport to the community’s social goods. Simultaneously, these irregular residents incur obligations on par with other long-term residents with residency permission.

Time is a meaningful factor for proponents of the social membership justification.[34] Both Carens (2008) and Bauböck (2008) argue that immigrants should receive the full bundle of rights and entitlements other citizens enjoy once it is established that irregular migrants have long-term interests in the fate of the country. Carens writes: "The main thing it is reasonable to expect is the passage of enough time to become acclimated. Three to five years seems a reasonable length of time" (2005, p. 5).[35] On this view, the rights and entitlements of residency are not for those *just arriving*, nor for those *just passing through*. A deep tie to the host community is required, one that is developed over time. Likewise, as time passes, the moral obligation of the host society to grant irregular migrants the same rights as citizens also increases. In other words, the basis for retaining a distinction between these two groups—citizens and irregular migrants—diminishes significantly with time.

Relevance for schooling of IRCs

The social membership justification has several implications for the schooling of IRCs. First, it is useful in spotlighting the fact that children are likely to identify more readily with their host community, develop attachments to it, and self-identify as members of their community because of the young age at which they arrive and their greater adaptability at this stage of their lives. This is unique to children given their early stage of development and the emphasis placed on socialization at this age. People in a young child's surrounding environment expend a great deal of energy shaping the child's identity and worldview; this occurs passively (eg observing recycling practices, modes of social interaction), and actively (eg ensuring that children sing a national anthem or participate in specific religious practices). Moreover, the differences

[34] It is interesting to note that the article that carries Joseph Carens' arguments for social membership-based rights, entitled *On belonging,* includes the sub-title: "What we owe people who *stay*" [emphasis added] (Carens 2005).

[35] Carens also points out that the European Union has issued directives that explicitly recognize the significance of the passage of time; recommending "that third country nationals…be granted a right of permanent residence if they have been legally residing in a single EU state for five years" (2008b, p. 419).

between children at this age are comparatively negligible, as compared with differences in character and worldviews amongst adults.

It would be absurd to conclude that citizen children have a greater moral claim to the social goods of their host community based on assessment of future contributions the citizen child and IRCs will potentially make. If allowed to remain, the migrant child without legal status will have every opportunity to contribute to the host community. Irrespective of the form this contribution takes, it generally requires that the child first benefit from at least a basic education.

Shortcomings

Schooling rights for IRCs is an interesting test case for the claim of inclusion based on social membership. It is unclear, however, that the arguments put forward from the account of social membership are the most compelling or able to secure better access to schools for IRCs in practice.

There are several weaknesses with the social membership justification. This section will consider the writings of Joseph Carens specifically, as he is a leading proponent of this normative theory. One key difficulty lies with the suggestion that the strength of the claims brought by IRCs hinge on *continued* membership in a community. Carens recognizes that, on the social membership view, the children of immigrants have a weaker claim to membership than the children of resident citizens, because the latter have stronger connections to the community (2013, p. 31). There are two problems with this view. First, it offers a static and unrealistic view of migration and settlement patterns. In the case of irregular migrants, difficulties accessing services, finding affordable housing, or employment may require several relocations within the receiving country. These moves unsettle their connection to local communities and therefore, on Carens' account, the claim of the migrant child remains weak until she invests in setting down roots in one particular community. Ryszard Cholewinski, in his study of obstacles facing irregular migrants trying to access "minimal social rights",

observes that their high mobility was a common obstacle preventing IRCs from accessing their most basic rights (2005, p. 37).[36]

The second problem with the social membership approach is that it cannot defend schooling rights for IRCs upon first arrival. Any significant absence by a child from formal instruction risks disproportionate negative effects on the child's development (and life outcomes). Not only does the young child miss important building blocks in a structured curriculum, but they also miss out on important habit-forming experiences that are more crucial the younger the child. The argument from social membership makes a compelling case for broadening practices of inclusion, but possibly too late and at too high a cost for IRCs.

To be sure, bonds of membership matter in developing a sense of belonging in a community. However, these bonds take time to build. How are public authorities to view their obligations in the interim? On what grounds would they justify assistance to IRCs in the period before considering IRCs *members of the community*? The IRC that resides in Toronto for a period of time and then moves across Canada to Vancouver, has no deep ties of membership to the second community upon arrival.[37] From the viewpoint of the social membership justification, this would diminish the obligation of public authorities in Vancouver to support the newly arrived IRCs. This seems to overlook an important aspect of moral responsibility for children by focusing more on the quality of their ties to the community instead of their pressing welfare needs.[38]

---

[36] Ryszard Cholewinski observes a number of practical obstacles hamper access social rights for children of irregular migrants. This is due, inter alia, to the higher mobility of irregular migrants, which precludes their children from settling in one place for a useful period of time. This leads to greater overall vulnerability and poorer living conditions (2005, p. 37).

[37] Naturally, this depends on the reference community. The individual may experience a bond with the national community, as opposed to sub-state communities. However, given that many social welfare entitlements are distributed at the sub-state level, notions of belonging at the sub-state matter as well.

[38] Marit Hovdal Moan also takes issue with Carens' use of time as a morally relevant factor in establishing the obligation of the host community to irregular migrants and concludes that there are other factors more likely to explain the tendency in liberal democratic states to improve the living conditions of non-citizens (2008, p. 209).

Carens suggests that arguments against providing IRCs with education are "outweighed by the moral reasons for granting irregular migrant children a free public education" (2008, p. 168). His justification from social membership cannot support this conclusion. The *moral reasons* Carens put forward include (a) the innocence of the child, viz., that children cannot be held morally accountable for the decisions of their parents; (b) that educational rights are not optional for children per international legal norms (ie United Nations Convention on the Rights of the Child); and, (c) that it is a requirement based on the "vital importance that education plays in shaping the future of the children and of the society in which they live" (2008, p. 169). Among these additional arguments for granting schooling rights to IRCs, Carens settles on one principal argument: the well-being of the child is at stake. Carens writes, "the state must provide her with an education that will enable her to function later in life, regardless of whether she is legally entitled to live there" (2008, p. 170).

It is interesting to note that the normative arguments Carens develops to improve the condition of irregular migrant adults have little bearing on his arguments for expanding access to public education for migrant children without legal status. While he does agree with granting children access to public schooling, he must reach for a host of other reasons that help ground his claim—these additional reasons fall wholly outside of the social membership justification.

Summary of the justification from social membership

By and large, IRCs *are* accommodated in public schools in practice in many Western liberal states, including in Canada. This has not always been the case and it is a practice that is regularly complicated by, inter alia, practical administrative barriers to admission. It seems unlikely that it will be possible to make a case for improved access to schooling for IRCs upon arrival in a receiving state simply by stressing their membership ties to the host community—these ties simply do not exist from the outset. Indeed, one can easily build an argument to exclude IRCs from schools on grounds of

social membership, because their ties to the community (a) are either unknowable, or, (b) where efforts are underway to remove these children from the state, such ties simply never develop.

The social membership justification is useful, however, in drawing attention to the network of bonds and meaningful relationships that irregular migrants and IRCs form when they reside in a community. By highlighting the contributions irregular migrants and IRCs make to their host communities, proponents of the social membership view challenge policymakers to avoid promulgating policies that create disincentives for interacting with the host community; for example, policies that require that irregular migrants reveal their immigration status when engaging in a variety of routine social activities (eg going to a local library). Such policies, proponents of the social membership view would argue, only serve to discourage irregular migrants from engaging productively in communal life.

3.4. The rights-based justifications

For advocates of greater access to schooling for IRCs, a common rallying cry is that education is a basic human right enjoyed by all children. It is a common cry perhaps because human rights are, in the words of Henry Shue, "one of our most appealing moral concepts" (1988, p. 687). They are appealing because they are impartial in scope: applicable to all human beings, derived from a respect for the agency and dignity of all persons.[39]

[39] There are many ways of understanding human rights: among them, a political or institutional conception of human rights, as well as a naturalistic conception of human rights rooted in, among others, moral reasons. Notable proponents of the political interpretation of human rights are John Rawls, Charles Beitz and Joseph Raz. The political philosopher John Rawls takes issue with the naturalistic conception of human rights, based on the belief that one cannot impose norms built on *parochial foundations*, since they will not have legitimacy in political communities to which they are meant to apply. Rawls' conception of justice depends on a hypothetical contract between people espousing different moral philosophies, values, and beliefs. Rawls writes, "[…] rights do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature […] So we take a different tack and say that basic human rights are to express a minimum standard of well-ordered political institutions for all peoples who belong, as members in good standing, to a just political society of peoples" (1993, p. 57). A political conception of human rights defines their foundation in terms of their

This section takes up three forms of rights-based justifications: (a) rights as freedom from harm; (b) rights of personhood; and (c) capability-enhancing rights. These three forms of rights-based justifications are the most common in the literature addressing schooling for IRCs. The *rights of children* and the *right to education* are discussed in the context of the three broader categories, as they draw on those foundational concepts in defending these more specific rights. This section will conclude with a discussion of three challenges to rights-based justifications from (a) indeterminacy, (b) legitimacy, and (c) the prioritization of individual over community rights.

(a) Rights as freedom from harm

A moral conception of human rights is a distinct way of viewing human rights. It is a philosophical distinction that rests on the difference between rights by intentional design and rights arising from moral reasons. Moral rights are pre-institutional, derived from philosophical reasoning and rooted in moral facts. To be sure, moral human rights are not the source for *all human rights*, since other rights relate strictly to processes and practices that are only tangentially tied to moral reasons and require institutions for their realization (labour rights and education rights are two examples). Joseph Carens is of this view, arguing that not all rights are moral rights, pointing to the legal rights states establish for a number of different reasons (2008, p. 164). However, some

acceptability to reasonable persons. Joseph Raz, for instance, argues that it is not sufficient to simply claim that human rights are important rights because they stem from our common humanity; this approach, along with the traditional view that human rights are moral rights, fails to take into account sufficiently the fact that human rights are mostly contingent, "relative to circumstances of time and place, and to the machinery of implementation there and then feasible" (2007, p. 7). The upshot of Raz's political conception of human rights is that they need not be universal or fundamental, but rather are a product of political practice. The different conceptions—that is whether emphasis is predominantly on the political or naturalistic conception—will have an impact on how rights are interpreted and implemented in practice. The tensions between the political and naturalistic conception of rights is not however the focus here—they are both likely to find accommodation with different audiences. Amy Gutmann makes this point brilliantly: "The several foundations of human rights, taken together, are likely to be agreeable to more people than any single foundation, and no single foundation has a monopoly on reasonable claims to be made in its favor" (2011, p. xviii).

argue that moral reasons are found even in those rights that require social institutions for their realization—the two are actually closely linked.

Linking moral rights to a basic, intuitive and universal concept, such as the shared desire not to be harmed is one common way of grounding moral rights. One benefit of grounding rights in moral reasons is precisely that moral reasons stand independent from society and its social mores, and they can therefore serve as a powerful critique of unjust practices and institutions. Carl Wellman proposes that freedom from harm is actually what lies at the heart of all moral human rights—it is one of the most basic rights:

> […] harm is central to the grounds of any moral human right. Therefore, moral human rights presuppose that certain interests are built into normal human nature because harm consists in some setback or adverse effect on one or more interests. […] what grounds a human right is not the satisfaction of one or more interests but the harm resulting from their nonrealization.
>
> (2011, p. 47)

Individuals have the right to be free from harm and the *threat* of harm, since both are detrimental to their freedom, security and development. The salience of this argument is self-evident; it is based on facts that one can investigate and come to know. There is no need to rely on political institutions or any specific social configuration to ascertain the importance of the no-harm thesis.

The *no-harm thesis* can do more than ground negative duties of non-interference (such as the duty to refrain from killing). It can also ground rights that require affirmative action; traditionally, this has been thought of as the domain of economic, social and cultural rights. According to Wellman (2011), moral rights are predicated on the idea that all humans have some interests or needs—be it an interest in living (not being killed), an interest in association (freedom to form groups and communities), or some other need, such as the need for food. Non-realization of these interests results in

harm to the individual.[40] Moral human rights therefore, presuppose human needs (Wellman 2011, p. 50). The basal moral right to be free of either direct harm or harm from the non-realization of other vital interests can serve as a building block in a chain of derivative rights, albeit the first link in that chain.

(b) Rights of personhood

Rights of personhood draw on moral foundations as well, although not construed so narrowly as freedom from harm. Rather, rights of personhood are premised on the moral worth of each individual. The term *human dignity* is often used to capture the sense of moral worth implied by personhood. Human dignity can be defined in numerous ways; one common way is by conceiving of it as respect for human agency:

> What seems to me the best account of human rights is this. It is centered on the notion of agency. We human beings have the capacity to form pictures of what a good life would be and to try to realize these pictures. We value our status as agents especially highly, often more highly even than our happiness. Human rights can then be seen as protections of our agency – what one might call our personhood.
>
> (Griffin 2001, p. 4)

Rights of personhood are entitlements that accrue to individuals from birth; that is to say, they are pre-political. Just like moral rights, rights of personhood exist independent from social institutions and governments. They do not derive from prior political agreement, even if their enforcement is largely dependent on such agreement.

While rights of personhood are cosmopolitan in essence—since they attach to *every* individual—in practice, they are often subsumed in the state-citizen relationship. That is to say, states are the medium through which many individuals exercise and enjoy their rights of personhood (insofar as states recognize certain group rights, groups may also mediate rights of personhood). For this reason, states are able to effectively constrain the universalistic orientation of human rights. States do so by

[40] This is not uncontroversial. Joseph Raz (2010) has argued that this is merely making the source of moral rights a different moral right, as opposed to identifying an element of value that stands on its own.

defining the terms of political membership—who is and who is not a member of the political community. By claiming for themselves the sovereign right to determine who is and who is not a citizen, states limit the scope of human rights to the boundaries of political communities.

By extension, the rights of citizens are safeguarded in a closed, reciprocal relationship that citizens have with the state. Christina Boswell states that, "This prerogative reflects a historically evolved compact between states and citizens: the state mobilizes loyalty and compliance through guaranteeing its citizens privileged access to certain political rights and socioeconomic goods" (2008, p. 188). This is an exclusive province of well-defined, bounded obligations and entitlements based on the view that the state is entitled to discriminate in favour of certain classes of persons in the distribution of public goods and entitlements. The key idea being that these public goods are exclusive and not easily accessible to outsiders. Engin Isin offers a nuanced view arguing that for at least the last thirty years it has become impossible to differentiate human and citizenship rights (Isin 2013, p. 61). He writes:

> The *practical* difference is one of implementation and enforcement: international covenants develop principles and via various mechanisms encourage or coerce states first to sign up to them and then to implement and enforce them. So it seems what happened is that a regime of rights has emerged under the banner 'human rights' and developed various 'rights bundles' by which to govern citizens in sovereign states.
>
> (Isin 2013, p. 61)

David Forsythe notes that "despite the rhetoric of universality […] human rights remained essentially a national matter, to be accepted or not, until 1945 when they were recognized in global international law" (2006, p. 3). The promulgation of covenants and treaties in public international law effectively codified a number of general moral principles as international norms, frequently expressed using in the language of rights. These international instruments benefit, for the most part, from broad inter-state support, guiding the actions of states and individuals the world over.

The rapid expansion of international norms that followed the establishment of the United Nations unsettled the privileged relationship between the state and its citizens. Onora O'Neill comments that, as they exist today, states "are committed by numerous treaty obligations to a limited conception of sovereignty, to restrictions on the ways in which they may treat other states, and by demands that they respect human rights" (2001, p. 187). The development of international norms and supranational institutions has gradually restricted the capacity of states to articulate who is and who is not the beneficiary of human rights, since states are no longer the sole guarantors of rights. Unlike citizen-centric rights regimes within states, international law takes as its starting point the equality of *all persons* irrespective of their status in any given state. This has led scholars like Peter Nyers to propose that acts of activism that call on human rights frameworks and the notion of rights of personhood are, in fact, instantiations of *cosmopolitan dissent*, insofar as they "contest the state's claim to monopolise the subject(s) of protection on its territory (Nyers 2010b, p. 1071).

The legal principal of equality articulated in international public law finds its clearest expression in Article 2 of the Universal Declaration of Human Rights (UDHR), which reads:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
>
> (UDHR 1948, Article 2)

The main idea in this passage—echoed through the covenants that form the International Bill of Human Rights—is that rights attach to personhood. Rights and freedoms are owed to all human beings because their inherent moral worth demands it. Rights of personhood are impartial, individualistic and absolute. As Michael Perry notes, just like pregnancy, human dignity does not admit of degrees: one either is or

is not pregnant (2010, p. 17). So too with human dignity—it is not possible to have more or less of it.

On some accounts, these developments have led to a partial de-territorializing of rights, by opening new avenues to individuals through which they can access rights, effectively replacing national membership as the sole means of accessing rights. This is what Yasemin Soysal refers to as postnational membership, wherein "universal personhood; and universal human rights replace national rights" (1994, p. 142). The state is no longer the only custodian of human rights, nor the only body capable of ensuring the realization of rights. Supranational courts, such as the European Court of Human Rights, along with a number of international bodies charged with the oversight of international legal instruments, can receive complaints about human rights violations and, in some cases, enforce the correlative duties that rights give rise to.[41,42]

There are several ways a conception of rights as *rights of personhood* shapes understandings of the rights of IRCs. The claim is straightforward and it is typically phrased negatively: states cannot use nationality as grounds for discriminating between the rights of citizens and non-citizens, since rights of personhood attach to all human beings and are fundamentally inalienable. Several notable examples are worth mentioning here.

As of 2017, the United Nations Human Rights Committee has issued 35 General Comments—these are issued from time to time by monitoring bodies and serve to

[41] Canada is a signatory to the UN Convention on the Rights of the Child (UNCRC) and a non-signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the most comprehensive and progressive treaty addressing the rights of migrants. Canada is also a signatory to the International Covenant on Economic, Social and Cultural rights (CESCR), and has signed the 2008 Optional Protocol, which allows the Committee on Economic, Social and Cultural Rights to receive and hear individual complaints of non-compliance with respect to the provisions of the Covenant.

[42] Francois Crépeau and Delphine Nakache note that Article 8 of the European Convention on Human Rights has been used by *noncitizens* in deportation cases: "the decision to expel a family member may constitute an undue and disproportionate 'interference' with the right to respect for family life" (Crépeau and Nakache 2006, p. 31).

interpret and clarify the provisions contained in UN conventions.[43] General Comment No. 15, issued in 1986, addresses the *position of aliens under the International Covenant on Civil and Political Rights* (CCPR) and opens with the following statement:[44]

> Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (Art. 2, Par. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant.
>
> (CCPR 1986)[45]

General Comment 15 singles out *non-citizen children* as a special case, specifying that non-citizen children "are entitled to those measures of protection required by their status as minors" (CCPR 1986). A distinct set of rights accrues to children under international law, as underlined by the CCPR, irrespective of the child's immigration and citizenship status. These rights, including the right to education, are codified across a number of international legal instruments, and most comprehensively for children in the 1989 United Nations Convention on the Rights of the Child (UNCRC) and the International Convention on Economic, Social and Cultural Rights (CESCR).

Article 13(1) of the CESCR states that Parties to the Convention "recognize the right of everyone to education." In their General Comment 13, the Committee on

---

[43] The Human Rights Committee is serviced by the UN Office of the High Commissioner for Human Rights—the treaty body responsible for interpreting provisions of the International Covenant on Civil and Political Rights (CCPR). General Comments issued from time to time by monitoring bodies serve to interpret and clarify the provisions contained in UN conventions.

[44] This General Comment is also noteworthy for two additional reasons: first, for underscoring the obligation of states to take steps to announce Covenant rights to resident aliens, such that they are made aware of their rights; and, second, for recognizing the sovereign right of states to nevertheless determine who to admit to their territories.

[45] The International Convention on Economic, Social and Cultural Rights adopts a similar position vis-à-vis irregular migrants. Article 2 of the CESCR, states: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (ICESCR 1966).

Economic, Social and Cultural Rights sought to clarify the normative content of the provisions set out in Article 13 of the CESCR. General Comment 13 stresses that education "must be accessible to all, especially the most vulnerable groups, in law and in fact, without discrimination" (CESCR 1999, p. 3). The Committee states that insofar as it regards the rights covered by Article 13, the prohibition against discrimination is meant to apply fully and immediately and must not be considered subject to "progressive realization" or "the availability of resources" (CESCR 1999, p. 8).[46]

In several instances, the UNCRC and the Committee on the Rights of Children—the body responsible for monitoring implementation of the Convention—have focused on the rights of non-citizen children and particularly their right to education. Article 28 of the UNCRC states: "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all […]" (UNCRC 1989, Article 28). But two subsequent issuances by the Committee on the Rights of the Child clarify the intent of Article 28:

> The Committee on the Rights of the Child encourages States to continue and strengthen their legislative efforts to integrate the right to non-discrimination that is enshrined in Article 2 fully in all relevant legislation concerning children […] including non-citizen children and children belonging to minority groups. The Committee recommends that: States […] study the situation of non-citizen children, especially in the school system, and the effectiveness of measures to facilitate their integration. […] Children of non-citizens without legal status should not be excluded from schools.
>
> (Weissbrodt 2008, p. 75)

As regards the rights of *non-citizen* children, there is a common theme that runs throughout these various Conventions and the General Comments. Articulated in

[46] Article 26 of the Universal Declaration of Human Rights also addresses education rights. It states that: "(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. (3) Parents have a prior right to choose the kind of education that shall be given to their children" (UDHR 1948, Art. 26).

these documents is a clear prohibition against arbitrary discrimination. Signatories of the various international instruments must pursue with equal interest the rights of IRCs without prejudice to the child's nationality or alienage. Neither alienage nor nationality minimizes the weight of their human rights claims viewed from the perspective of *personhood*.

(c) Capability-enhancing rights

A number of theorists have sought to develop an account of human rights on the basis of neutral principles, agreeable to individuals from various political traditions and with different values. Martha Nussbaum and Amartya Sen pioneered the capability approach (CA) with this goal in mind (Nussbaum 2000; Sen 2005). Nussbaum sees the capability approach as "a species of a human rights approach," one which aims to apply to all nations interested in their populations living a minimally decent human life (2007, p. 22). She writes:

> When we speak simply of what people are actually able to do and to be, we do not even give the appearance of privileging a Western idea. Ideas of activity and ability are everywhere, and there is no culture in which people do not ask themselves what they are able to do and what opportunities they have for functioning.
>
> (Nussbaum 2003, p. 39)

In this passage, Nussbaum alludes to a critical view of traditional human rights discourse. This discourse reflects and promotes a set of values—typically, Western liberal values—over other value systems.[47] Nussbaum contrasts this traditional

[47] The ideological foundations of *modern* human rights doctrine, rooted in 19th century Europe and the events of the First and Second World Wars has often been singled out for criticism; the critique being that the dominant conception of human rights is a distinctly liberal and Western ideological project. Makau Mutua points out that: "Thinkers who are non-Western resist the idea that the official UN-sanctioned human rights movement is the 'final' answer and should not be subject to attack or scrutiny" (2008, p. 18). This criticism has come from, among others, cultural pluralists, who see it as promoting staunch individualism at odds with notions of collective identity and responsibility. In Asia, a surrogate has been proposed in the form of *Asian values*, which takes on board much of the ethical thrust of Western conceptions of human rights, without necessarily arriving at the conclusion that these values are best protected by a democratic form of government, strongly biased towards individual freedoms. And while many believe that the Universal Declaration of Human Rights symbolizes a neutral international human rights canon acceptable to all, recall that at the time of its adoption, Western European powers dominated the United Nations and were in a position to silence dissenting voices. Calls from socialist countries that sought to keep on an equal footing social, economic and cultural rights, for

discourse with CA, noting that CA begins from value-neutral outcomes and works backward from there. The supposition is that everyone will agree that individuals should possess certain capabilities if they are to design and enjoy a meaningful life.[48] In brief, CA aims to identify fundamental entitlements that any just society would commit to providing. The value of these entitlements is based on their *enabling* characteristics, that is, the important human *functionings* they permit individuals to achieve. "The purpose of public policy," writes S. Charusheela, "is to secure and extend entitlements so that everyone's set of capabilities includes such basic functionings as health, good nutrition, adequate shelter and dignity" (2009, p. 1137). CA asks *what is an individual capable of doing given a set of resources* (Nussbaum 2000, p.12). The approach has been useful in identifying that which individuals would require in order to have the freedom to design and pursue a meaningful life for themselves (Sen 1992).

The capabilities approach shares the aspiration of universalism that is characteristic of the two approaches discussed earlier, ie rights as freedom from harm and rights of personhood. Every individual has aspirations to a meaningful life and this is irrespective of their nationality or place of residence. All individuals require certain basic capabilities to exercise the freedom to pursue life outcomes that are meaningful to them. The capabilities approach does not seek to define what the good life is, rather it stresses that in order to choose a good life and realize one's goals, one requires that a basic set of needs are met.[49]

---

example, were drowned out, and ultimately, these rights took second position to civil and political rights (termed second and first generation rights, respectively); first generation rights were considered essential to advancing the Western ideal of democratic liberalism (Mutua 2008, p. 46).

[48] Thomas Pogge also supports this view of rights, connecting on the one hand "potential future ability" and on the other, the conditions necessary to cultivate such abilities. Pogge writes: "A commitment to human rights involves one recognizing that human persons with a past or potential future ability to engage in moral conversation and practice have certain basic needs, and that these needs give rise to weighty moral demands. The object of each of these basic human needs is the object of a human right" (2002, p. 58).

[49] Richard Arneson argues that Sen's 'capabilities approach' approaches a form of liberal perfectionism and is therefore not as neutral toward conceptions of the good life as this passage might suggest. Arneson writes, "Sen's view, though not explicitly perfectionist, points toward

Relevance for schooling of IRCs

The language of rights carries an expectation of fulfilment—they are rights claimed against someone or some institution. Thus, they imply a corresponding duty of fulfilment. A rights claim to education or access to school is, for the most part, a claim brought against the institutions of a state and the government responsible for providing such services.[50] Unlike the claim to the right to freedom, which all can easily respect simply by refraining from meddling in the affairs of others, the right to goods and services requires that some agent shoulder the duty to re-allocate resources—affirmative action is required by some agent to satisfy the rights claim. The enduring challenge of rights advocates is finding a way to identify an agent to undertake this affirmative action. Hereunder some of the specific arguments related to the three rights-based justifications are discussed in more depth.

First, respect for a migrant child's *personhood* grounds the claim to schooling services for IRCs. The IRC deserves access to schooling because fundamentally her dignity and autonomy gives rise to a demand for equal respect; that is, her interests matter as much as any other legally resident child's interests.[51] In practice, the claim from personhood translates into a prohibition on discrimination based on a child's alienage status. It is a riposte to host states that attempt to justify exclusion on the basis of alienage—a political designation, not inherent to any individual qua human being. Alexander Aleinikoff (1998) argues this precise point: "[non-citizen] children […]

---

the perfectionist claim that the fair treatment of persons that social justice requires cannot be known except by appealing to a sound account of human good that enables us to determine what treatment enables the person to flourish, to lead a truly choice-worthy, genuinely good mode of life" (2000, p. 46).

[50] Insofar as constituencies have a voice in the organization of these institutions and the deployment of their resources, they too have moral responsibilities that are engaged by these claims. This is what Veit Bader refers to as mediating duties, "the responsibility to help creating and upholding fair institutions of decision-making" (2003, p. 94).

[51] A number of rights are considered to be inviolable and intrinsic to children everywhere. These rights accrue to children by virtue of their *equal moral worth*, not their citizenship status. International norms have been established that enshrine principles of non-discrimination and states that are a party to these conventions have an obligation not only to ensure that international rights commitments are incorporated in domestic legislation, but also that they are given expression through the necessary domestic legal and policy instruments.

are not pariahs, but rather 'citizens-in-training'. To deny immigrants welfare is to single out for punishment a class that is not appropriately distinguishable from others entitled to welfare."

Only the most exceptional reasons could justify a policy of schooling access for one child and not another.[52] Even if there are grounds that justify discriminating against IRCs, states need to bear in mind the host of other human rights abuses that such a policy position facilitates. Rights are connected, and undermining one right has the practical effect of undermining a host of other rights. By denying IRCs access to schools, states may force these children to seek out more accommodating environments, but to do so with a dearth of resources, exposed to myriad other threats to their security. By discriminating amongst children on the basis of alienage, the host community is complicit not only in denying the IRC an equal opportunity for education, but also in undermining the much larger edifice of rights that hinges on respect of personhood. This serves to magnify the objective and subjective (perceived) inequality between the resident child and the IRC. The claim to rights from personhood is a claim for respect of the child's human dignity *today*, because of who they are, not because of who they may become. As Otto Driedger puts it, "children should have rights as human beings not as 'human becomings'" (SCHR 2007, p. 24).

A second justification commonly encountered for granting IRCs access to schooling is that denying the irregular migrant child education is a form of harm. By barring IRCs from schools and denying them the basic building blocks of development, one encourages the growth of, as Owen Fiss (1998) writes, "socially and economically disadvantaged groups that are forced to live at the margin of society, isolated from the mainstream, always at risk, seen in their own eyes and those of the dominant group as inferior."

[52] One might think of a situation where a child has very special needs arising from one or more disabilities, which would make accommodation difficult.

For Carl Wellman (2011), education rights are not *basal rights*, rather they are a *derivative* right—they repose on another right to justify their existence. The basal moral right to be free from harm can serve as the source of a number of further *derived rights*, among others, a right to education. On this account, the right to education is a right to rescue from potential harm—a claim brought against all institutions that have the capacity to save children from the peril of an untutored childhood:

> The incorporation of these welfare rights into international law might be justified as partial protections of the basal moral human right to be rescued from serious peril. This is a general moral right of every human being holding against all others—other individual persons, governments, and nongovernemental organizations.
>
> (Wellman 2011, p. 63)

Moreover, this right to rescue is constrained by time in the case of children. Education is thought to matter in a way that differs from many other rights, in that the passage of time plays an important role: the longer education is withheld, the greater the harm caused (Carens 2008). Conversely, if education is provided early on, it will likely have (multiple) positive effects. Thus, the irregular migrant child is entitled to education, because it is a specious form of harm to deny a child education from an early age. This harm is expressed in many ways: impairment of the faculties required for reasoning, an impediment to the enjoyment of other rights essential to living a decent life, or limiting the ability of the future adult to secure for him/herself the means of independent living.

Finally, commentators argue that IRCs deserve education because it plays such a fundamental role in determining what they will be capable of doing and achieving in their lives. In the language of capabilities, education is crucial to securing positive human development outcomes. This is a future-regarding justification, one that places a great deal of value in the future persons migrant children become and then links those outcomes to a set of underlying needs or entitlements. Capability approaches generally focus on two outcomes. The first outcome links the IRC to the character and priorities of the host community. On this view, the goal of educating IRCs is to ensure

that they are fluent in the customs of the community and best positioned to sustain those customs in the future. Here, the expectation is that at least some IRCs will remain in the host community. The second outcome that is common in the literature is greater independence for IRCs later in life. This minimizes the chances that others will exploit IRCs in the future, while simultaneously increasing their capacity to live a satisfying life (Benton 2010, p. 155).

Proponents of the CA criticize immigration and education policies that adopt rights language but which only respect process, not outcomes, ie policies that conform to (human rights) rules, but which do not generate the outcomes that the rules are meant to achieve. One such case involves the administration of open access policies for IRCs in public schools (Sidhu 2013). A political decision is taken to bring a country in line with its commitments under international law (eg the requirements set out in the UNCRC) but no further actions are taken by administrators to announce the ensuing entitlements to populations of IRCs. Proponents of the CA would argue that this is a thin form of respect for the human rights of IRCs, since it only asks that certain formal rules be respected without the necessary regard for outcomes.

Shortcomings

It is doubtful that rights-based justifications, on their own, are the most compelling way to expand access to schooling for IRCs. There are at least three weaknesses with these rights-based approaches: (a) indeterminacy, (b) legitimacy, and (c) the prioritization of individual over community rights.

(a) Indeterminacy

While a standard human rights maxim holds that human rights accrue to all individuals qua humans, it is silent about those who must bear the responsibility for securing those rights. As Henry Shue poignantly observes, “One should not […] leap from universal rights to universal duties” (1988, p. 689). Duties have to be assigned for rights to be claimable. The rights-based approach does not clarify who bears responsibility for the

education of IRCs. Relying solely on a universal doctrine that emphasizes personhood leads to a problem of indeterminacy. Discussing the problem of indeterminacy that arises from the text of the Universal Declaration of Human Rights, Onora O'Neill observes:

> […] it is a matter for deep regret that the Declaration is so opaque about allocating the obligations of justice. The reason for regret is that in the end obligations rather than rights are the active aspects of justice: a proclamation of rights will be indeterminate and ineffective unless obligations to respect and secure those rights are assigned to specific, identifiable agents and agencies which are able to discharge those obligations.
>
> (2001, p. 186)

Proponents of greater rights for irregular migrants can point to protections in international law as a good reason why states ought to respect the personhood of irregular migrants and the ensuing basket of rights would seem to entail. Indeed, proponents of this view may point to the codification of rights in international law as proof that states have accepted *rights of personhood* in practice as well as in principle. They may conclude that there is no indeterminacy problem.[53] However, this is not so straightforward, and it is particularly problematic in countries that espouse a dualist approach to international law.[54]

In countries with a dualist application of international law, international norms provide *guidance*, but lack obligatory force unless incorporated into national legislation; international law exists in a realm distinct from domestic law. The influence of international human rights norms will vary significantly in such countries. Even where international law guarantees human rights, states retain the means to blunt the force of covenants and treaties through either means of non-participation and non-cooperation; or, simply by selectively discharging their obligations domestically or

[53] The International Organization for Migration (IOM) notes: "Human rights instruments are the most significant body of law for migrants, especially given the number of persons who do not fall within traditional categories of migration, and who may be in an irregular situation" (2004, p. 11).

[54] Such countries may combine elements of monism and dualism depending on the sources of international law.

entering reservations to these international legal instruments.[55] The cosmopolitan view of rights which would guarantee protections and entitlements on the basis of personhood "contrasts with the degree to which states are prepared to embrace liberal humanitarian concerns and protect those who fall outside of [instruments of international protection]" writes Brad K Blitz (2006, p. 455).

Indeterminacy is a serious problem for IRCs claiming a right to education, because they do not have an obvious way of locating those responsible for meeting their rights claims. Paradoxically, the general obligation to educate children is arguably one of the least contested propositions the world over. However, general acceptance of the principle of basic education for all is significantly different from acceptance of a specific duty to educate IRCs present in a state's territory. Marit Hovdal Moan points out that:

> […] advocates of irregular migrants' rights are compelled to pull in additional, non-universal reasons to explain why the state has a special responsibility to irregular migrants in need, which it does not necessarily have to migrants who did not make it over the border or who did not manage to remain.
>
> (2009, p. 320)

Without these additional *non-universal reasons*, rights of personhood merely establish a general duty to educate children (the world over).

[55] The United Kingdom (UK) notionally accepted the thrust of international norms captured in the Convention of the Rights of the Child as applicable to children in the UK, except in their application to foreign nationals seeking residence in the country. This had the practical effect of signaling that the rights of children seeking refuge in the UK mattered less than the rights of resident or citizen children (JCHR 2007). The reservation entered by the UK succeeded in limiting the influence of the UNCRC in important ways. While this specific reservation was in play, it had the practical effect of denying any reference to the UNCRC in cases that went before the UK courts. For example, in the UK case of *R v Secretary of State for the Home Department ex parte Gangadeen* (1997), the UK Court of Appeal ruled on concerns of the legality of a decision by the Secretary of State for the Home Department to remove an *illegal migrant* from the UK. In its decision, the Court noted that it was faced with an "insuperable difficulty" in its efforts to bring in the principle of the best interest of the child, given the UK's standing reservation to the UNCRC.

(b) Legitimacy

A number of difficult paradoxes arise for liberal states that hold to the necessity of state boundaries but also subscribe to the canon of human rights. Several academics make the point that these paradoxes undermine the legitimacy of liberal states (Cole 2000; Boswell 2008). The paradox is that liberal states are at once committed supporters of human rights doctrine (and its egalitarian orientation); however, they strictly control the terms of entry, presence and exit of migrants so as to practically deny these migrants access to and enjoyment of those rights (Boswell 2008; Noll 2010). In such situations, rights exist in form, but not in practice; what Jack Donnelly calls the "possession paradox" (Donnelly 1989). At best, this highlights a bias in liberal states for the welfare of compatriots; at worst, it signals a deficit of political legitimacy: liberal states support the development and promulgation of international human rights norms while sheltering themselves from ever having to incur obligations to non-members.

(c) Individual versus community rights

The third challenge to the rights-based justifications for schooling IRCs comes from the writing of David Miller, who argues that it is a mistake to view education as a human right in the first instance; rather, it is a right of membership (2008, p. 194). This view is problematic, not least because, upon first arrival in a receiving country, IRCs lack precisely the form of membership required to access education rights. Iris Young (1998) notes, "Opponents of social benefits for illegal immigrants agree. These are not social members, but alien invaders. Writing social disabilities for them into law does not create a pariah status for them, on this view; it merely recognizes their status as alien invaders."

Education rights differ from other rights, Miller argues, because "they stem from an individual's membership in a community and they entail certain obligations to the other members of that community" (Miller 2007, p. 205). This view is founded on a

broader critique of liberal rights doctrine. In traditional liberal rights doctrine, the individual is an agent of free will, deserving of respect. The individual's priorities, desires and values direct her actions. Attachments to other individuals and common projects matter only insofar as the individual accepts these attachments and obligations. Partialist thinkers like David Miller and Michael Sandel do not share this hyper-individualist vision. They argue that such individuals are reliant on common bonds of the sort community provides when forming their plans and projects (Sandel 2005, p. 169). This viewpoint culminates in the claim that liberal theorists are misguided in seeking to impose an obligation to provide an individual outsider with access to communal public goods. Such impositions undermine the community's right to determine its character today and, through the education of children, the character of the community tomorrow as well.

Miller's argument is that education should be viewed as a communal good for the benefit of the community, not to serve one individual's private ends. It matters also that members of the community finance education and thus members have priority and discretion in its distribution.[56] Forcing the receiving community to educate IRCs is tantamount to saying that individual rights supersede the right of the community to self-determination and self-governance.

Summary

Modern human rights doctrine is a highly individualistic doctrine. In ascribes rights to individuals on the basis of shared human dignity. Michael Ignatieff observes that rights language "presumes moral individualism and is nonsensical outside that assumption" (2001, p. 67). Perhaps because of this individualism, human rights doctrine claims to be universal—at least in its aspirations, if not in practice. This universal orientation brings IRCs within the scope of moral concern of both liberal states and supranational institutions tasked with overseeing the implementation of human rights norms.

[56] The next section addresses the weaknesses of this argument.

However, proponents of rights-based justifications for expanding access to schooling for IRCs face an enduring challenge linking rights claimants to duty-bearers. The rights theories presented here do not, on their own, provide a clear reason why a host liberal state should be the one to satisfy the rights claims of IRCs. Proponents of rights-based justifications must also overcome a second challenge posed by partialists, namely, that the demands of IRCs encroach on the rights of the community to distribute public goods in ways that respect the priorities of co-members.

The approach from human rights does succeed in highlighting the important link between the enjoyment of education rights at an early age and the impact this has on the future development of IRCs. Children pass through their most important developmental stages in their youth and are dependent on others to make important developmental decisions on their behalf during this period. The younger they are, the more their freedom and well-being risks being constrained. What is at risk during this phase of their lives is both their current and *future* well-being, that is, the development of competencies and skills necessary to ensure that once adults, they are able to shape and secure minimally decent lives. In the language of capabilities, denying education to a child is equivalent to denying future adults the *opportunity* to exercise a number of basic *functionings*. Where the rights-based approach is most helpful then is in establishing the content of the human right to education, even if it fails to provide clear grounds for levelling that claim against any one duty-bearer. Catherine Dauvergne summarizes the import of human rights doctrine for irregular migrants when she observes that the expansion of the international human rights regime has not resulted in a marked increase in entitlements at the moment of border crossing, but has shifted the way the law addresses the needs of this population “in subtle, unpredictable ways that are hard to trace today” and for which “the future direction is harder to envision” (2004, p. 613).

3.5. Conclusion

The general thrust of liberal political theory suggests that unequal treatment of IRCs is almost always an intolerable form of discrimination. Governments owe all residents, irrespective of immigration status, equal treatment in respect of vital welfare services, such as education. It is an affront to most moral conceptions of liberal justice that IRCs are excluded from the benefits of an education received at a young age simply because of an irregular immigration status—though, some argue that the exclusion of irregular migrants is more egregious as time passes, and less so upon first arrival.

Human rights doctrine offers additional normative arguments for the claim to equal treatment between citizens and non-citizens. Contemporary human rights doctrine suggests that all persons are possessed of basic human dignity and it is an affront to human dignity when one is excluded from the enjoyment of basic rights that are necessary to ensuring a decent life. This is perhaps the most widely shared philosophical foundation for the IRC's right to education. Proponents of greater access to education for IRCs point to the essential role education plays in ensuring that an individual can live a life in dignity. The opposite argument is also made and enjoys similarly wide currency: denying IRCs education subjects them to a grave form of harm in the present, which only compounds in severity over time. This form of harm undermines an individual's security now and in the future by limiting their ability to secure basic subsistence and achieve higher aspirations related to human fulfilment. The negative duty *not to harm* in this specific case actually turns out to imply an affirmative action: not harming a child requires that they receive an education. But one then alights on a problem of indeterminacy—even if one accepts the rights-based justification for educating the IRC, that does not specify who must bear the responsibility for the IRC's education.

The exercise of national sovereignty has occasionally served as a barrier to the universal application of human rights norms. It has also occasionally resulted in the erosion of the enjoyment of rights by peripheral groups such as IRCs. However, the

expansion of supranational institutions and the broad support for international human rights norms is opening up new forms of postnational membership and is giving IRCs new avenues through which they are able to pursue their rights.[57]

One reason given to justify limits to the IRCs claims to education is that such a claim puts the needs of the individual above the needs of a community. In so doing, the IRC strains the pool of resources reserved for the communal projects and priorities of bounded political communities. Moreover, the needs of many IRCs could overwhelm the capacity of the host community to provide quality education to both members and non-members, and the provision of education services would only encourage more unwanted immigration. The suggestion that states must accommodate IRCs in public schools is, on this account, tantamount to suggesting that all communities have a general duty to share their resources with any migrant child that arrives at their borders. This goes too far for partialist thinkers, who believe that this is an excessive demand on communities that did not agree to extend membership to IRCs.

It should be apparent from this literature survey—of the most frequently occurring justifications in support of either greater openness or greater limits to schooling for IRCs—that compelling reasons exist both for accommodating and excluding IRCs from public schooling in liberal states. The strengths and weaknesses highlighted demonstrate that there is space for additional normative theories to supplement existing thinking about the rights and obligations of IRCs and their host communities. As the mass movement of persons across borders is not likely to decrease in the near future, efforts to understand how best to deal with the rights claims of migrant children without legal status must continue. It is an urgent need that will only grow as inequality between regions of the world grows.

---

[57] Postnational citizenship refers to the concept that sovereign states are no longer the sole guarantors of rights. Human rights are part of an international discourse that focus on the entitlements to be enjoyed by individuals qua humans, not solely as citizens of states. In this postnationalist conception, individuals possess multiple overlapping memberships in communities beyond the state, thus *deterritorializing* citizenship. See, Soysal 1994, Chapter Eight.

The next chapter analyses the discourse of Canadian public authorities at the federal, provincial and municipal levels as they discuss access to education for IRCs in order to assess whether they appeal to any of the normative ideas detailed above in practice.

4. Justifications in practice

4.1. Overview

The data presented in this case-study spans approximately 20 years and includes numerous instances of legislation and policy. Together, it presents a comprehensive overview of discussions by public authorities at municipal, provincial and federal levels of government regarding the IRC's right to a public education in the City of Toronto.[58] The aim of the case-study is to develop a better understanding of the reasons IRCs are accommodated in Toronto public schools in practice and what normative ideas are referenced in justifying this accommodation.

For some policymakers—those that are proponents of access to schooling— this is not a complex or controversial issue. At the most basic level, they argue, it is the *ideal* that all children should be in school at a young age. However, other policymakers argue that access to schooling should not be automatic; it must be made available to specific people for specific reasons. On the latter view, IRCs do not have an unrestricted right to schooling because, among other reasons, their presence in Canada *is illegal*. These dissenting voices argue that social welfare goods like education should be restricted to those individuals that have been accepted to be future members of the *national* community. Acceptance, for these policymakers, generally takes the form of admission through established immigration channels.

A number of arguments are made to justify the inclusion or exclusion of IRCs in public schools, and a number of factors are considered by policymakers setting education and immigration policy; among these, are normative beliefs about public responsibility, the rights of individuals and communities, and the purpose of public

[58] While the central focus is on IRCs in the City of Toronto, when policymakers from provincial and federal levels of government address this policy issue they refer to communities of IRCs that span the Province of Ontario and the country (Canada), respectively.

education. These beliefs shape the attitudes of citizens and policymakers towards resident irregular migrants.

IRCs have faced significant challenges accessing public schooling in Toronto, as elsewhere in Canada. Albert Koehl, a member of the Education Rights Task Force—a Canadian non-governmental organization advocating greater access to schooling for IRCs—has described the Province of Ontario's record as "spotty…when it comes to respecting a child's right to education" (2010, p. 1). In 2004, the Ontario Council of Agencies Serving Immigrants noted, "In their daily lives, non-status immigrants have very limited access to legal support, education, health care, social services, basic personal security – and even public recreation and sports facilities" (OCASI 2004, p.6).

These criticisms notwithstanding, many important steps have been taken over the past two decades to improve access to schooling for IRCs. Access has improved because of laws and policies public authorities have promulgated during this period. While several notable improvements were registered between 2004 and 2014, they have not been a panacea for resident IRCs. As of 2014, the end of the period under study, IRCs were still reporting difficulties accessing classrooms in the City of Toronto, and more broadly in the Province of Ontario.[59] IRCs faced numerous administrative barriers owing to language differences, administrative processes dependent upon documentation these children did not possess, as well as difficulties arising from a lack of understanding on the part of front-line workers as to their responsibilities for enrolling IRCs in public schools, among other difficulties. However, another significant barrier

[59] In a meeting with N Sidhu of Social Planning Toronto, he asserted: "I still get calls from non-status residents or people who might work with people, or have friends who don't have access and ask *what should I do*? So we are still hearing that the policies are not being followed. And so, myself and a few members from NOII (No One Is Illegal, Toronto), maybe three, four months ago, had a sit-down meeting with the TDSB [Toronto District School Board] folks and they acknowledged this" (2014, pers. comm. 11 July).

to schooling was the fear of public authorities that these children and their families harboured.

This chapter begins at a time when IRCs did not have a statutory right to education in the City of Toronto. It begins with an investigation into the justifications put forward to establish this right in the early 1990s. To be sure, the progressive changes to legislation in the Province of Ontario and the City of Toronto were, on several occasions, resisted by policymakers and front-line officials. This work draws attention to the fact that the IRC's right to education in Toronto is, in fact, a contested right in practice. It also shows that throughout the period under investigation, sub-state actors struggled to understand their own responsibilities vis-à-vis IRCs that were in need of access to public schooling.

There are four distinct *policy moments* between 1992 and 2014 when the schooling rights of IRCs received sustained public attention by Canadian policymakers. An in-depth analysis of each policy moment is undertaken in this chapter in order to map dominant and emergent normative themes in the debates. The four key policy moments are:

1. (**1992-1993**) Ontario Private Members' Bill No.24—*An Act to Amend the Ontario Education Act*
2. (**2001-2002**) Federal Government Bill C-11—*The Immigration and Refugee Protection Act (IRPA)*
3. (**2005**) Ontario Government Bill No.194—*The Education Amendment Act*
4. (**2004-2014**) City of Toronto *Don't Ask, Don't Tell* and *Sanctuary City* policies

While the issue of IRC schooling rights was discussed across government jurisdictions, those discussions did not always occur simultaneously. A debate may occur amongst provincial policymakers without there being any immediate echo or corresponding debate at either the municipal or federal level of government. Consequently, every key policy moment considered in this chapter is contextualized

and linked to other relevant discursive moments either before or after the specific policy moment analysed.

The first three policy moments are narrow in scope: they refer to specific legislation passed by either the provincial or federal government. The fourth policy moment does not refer to a single policy but rather a political *movement* at the municipal level that spans approximately a decade. During this span of time, several interconnected policies were passed by municipal authorities which involve policymakers from the Toronto City Council and the Toronto District School Board (TDSB). A number of NGOs and community organizations (civil society) were also quite active in this movement and contribute to shaping public discourse on irregular migrant rights. It was, in fact, a primary objective of some civil society actors during this period to influence the discourse of policymakers on the issue of schooling rights for IRCs and, more broadly, to social services for irregular migrants. The positions taken by civil society actors are considered a relevant object of analysis given that they aimed to shape political discourse in Toronto on the question of schooling access for IRCs.

Municipal, provincial and federal debates at these key policy moments reflected broad, interconnected concerns that extend beyond the issue of schooling access for IRCs—this includes concerns about the continued economic competitiveness of Canada, respect of Canadian immigration law, multiculturalism and nation-building, national security, and Canada's human rights obligations under domestic and international law. Policies addressing schooling for IRCs are notable for bringing together a number of different political, economic and ideological concerns. One conclusion that can be drawn from this research is that there was not a single, dominant justification that held throughout the period under study with respect to the issue of schooling for IRCs. It is for this reason that research into practices of accommodation and exclusion is warranted.

4.2. Policy moment 1 (1992-1993)

Bill 24: *An Act to Amend The Ontario Education Act*

(a) Context

In 1993, the Government of Ontario passed legislation which granted IRCs access to public schooling throughout the province. Bill 24 was first introduced into the Ontario Legislature in 1992 as a Private Members' Bill by the Liberal Member of the Ontario Provincial Parliament (MPP) Elinor Caplan.[60]

The core content of Bill 24 was eventually merged with a different Government Bill (Bill 4—*Education Statute Law Amendment Act*) that also sought to make (unrelated) amendments to the *Education Act*. Royal Assent of Government Bill 4 was given after the standard three readings in the Ontario Legislature and resulted in the creation of a new section in *The Ontario Education Act* (Section 49.1 *Persons unlawfully in Canada*), which reads:[61]

> 49.1 A person who is otherwise entitled to be admitted to a school and who is less than eighteen years of age shall not be refused admission because the person or the person's parent or guardian is unlawfully in Canada.
>
> (The Ontario Education Act 1990)

Bill 24 was significant because it marked the first clear shift in domestic legislation aimed at addressing the schooling needs of IRCs in Canada—indeed, mandating that public education in the Province of Ontario should be free for all children irrespective of immigration status. The bill put forward by MPP Caplan marked the first instance a Canadian province passed legislation specifically aimed at recognizing the rights of IRCs to public education.

---

[60] There are several types of law bills the Ontario Legislature considers. If draft legislation originates from a government ministry it is a *government bill*, whereas if it originates from a member of the legislature it is referred to as a *member's bill*. A *private bill* is one that is initiated by private parties.

[61] In the Ontario Legislature, bills undergo three readings and if passed by a majority are subsequently tabled for *Royal Assent*. Every reading of a bill normally presents an opportunity to debate its contents.

There is no literature—academic or otherwise—that focuses on the debates of this bill in the Ontario Legislature between 1992 and 1993. This is remarkable given that it is the most cited domestic legislation used to defend schooling entitlements for IRCs in Ontario. Moreover, Section 49.1 of *The Ontario Education Act* is frequently referenced by other Canadian provinces looking to broaden access to public schooling for IRCs.[62] It is therefore surprising that the legislative debates of Bill 24 have not been the subject of academic study. The analysis in this chapter will help fill this gap in the academic literature.

At the time of the formulation of Bill 24, there was no policy guidance in the Province of Ontario as to how public authorities—specifically, school board officials and front-line workers in public schools—should deal with IRCs wanting to access schooling services in Ontario. Such guidance might have addressed (i) the documentation families would be required to present when seeking to enrol their children in public schools; (ii) the types of questions that should and should not be posed to parents or children with irregular status; (iii) the responsibilities of front-line workers for these children; or, (iv) what to do with information obtained in the course schooling enrolment. In the absence of any specific guidance, enrolment practices for IRCs were largely un-harmonised; school administrators, unclear about their own responsibilities to admit and educate IRCs were forced to improvise; and the result was both uneven access to public schooling in the province and in some cases, active collaboration between front-line workers in schools and immigration authorities to enforce immigration policy.[63] Albert Koehl offers an explanation for the latter

[62] The absence of academic work on Bill 24 is also noteworthy because the author of the bill, MPP Elinor Caplan, would later go on to become Minister of Citizenship and Immigration in the Liberal Chrétien government and play a pivotal role in overhauling Canada's centrepiece immigration legislation in 2002—the most significant and controversial change to Canada's immigration laws since 1976—it came to be known as *The Immigration and Refugee Protection Act* or IRPA.

[63] In her witness testimony before the House of Commons Standing Committee on Citizenship and Immigration, Caroline Lindberg, a lawyer from Community Legal Education Ontario, notes: "it seems many of the school boards, for whatever reason, still feel this inclination to seek permission or guidance from Immigration in regard to the right of a child to attend school, even

phenomenon—he observes that "Education officials sometimes explain their eagerness to enforce federal immigration laws by a fear that they will be prosecuted for 'aiding and abetting' individuals who violate immigration laws" (2010, p. 59).[64]

At the time of the debate of Bill 24, MPP Caplan described an "almost a chaotic situation in the province" with regard to access to public schooling by IRCs (LAO Bill 24 Deb 11 June 1992, 1100). This view is confirmed in the remarks of Progressive Conservative MPP Elizabeth Witmer:

> There's tremendous confusion throughout the province on this particular issue. We see some boards accepting children of refugees and we see others that do not, but certainly there are many, such as the ones in my own community, that on compassionate grounds do accept these children.
>
> (LAO Bill 24 Deb 11 June 1992, 1130)

Records of the legislative debate suggest that there was, in fact, cross-party agreement on the extent of the problem in the province. This chapter is concerned with the justifications put forward by policymakers to address this problem; specifically, how normative ideas were used to argue for inclusion or exclusion of IRCs in Ontario public schools.

Francisco Villegas points out that the mobilization of community groups is what prompted the Province of Ontario to amend *The Ontario Education Act* in 1992 (2014, p.126-127). These community groups were mostly active at the level of the municipality, however the welfare rights they sought for IRCs could only be granted through legislative change at the level of the province and therefore they directed their lobbying efforts toward provincial policymakers (Villegas 2013, p. 261). It has also been claimed

---

though the Education Act is very clear and it's a matter within provincial jurisdiction" (HC CIMM Bill C-11 19 February 2002, 1140).

[64] Similar cooperation takes place between school administrators and immigration authorities in countries that have provisions granting free education to IRCs. For instance, Sarah Spencer notes of the practices in the United Kingdom: "the Education Act 1996 requires local education authorities to provide free education to all school-age children regardless of immigration status. There is nevertheless an exchange of data between schools and UKBA [United Kingdom Border and Services Agency] on the ostensible grounds that children of parents seeking to avoid immigration controls may need support" (2011, p. 174).

that the amendment of *The Ontario Education Act* came about in response to Canada's ratification of the UN Convention on the Rights of the Child in 1991 (NOII 2010; Abji 2013, p. 334). The analysis of the legislative debate of Bill 24 will show that neither the concerns of community groups nor the ratification of the UNCRC played a significant part in the *passing* of Bill 24, though they may have been influential factors in prompting the drafting of the bill.

In the same year that Bill 24 was brought to the Ontario Legislature, the Lieutenant Governor of Ontario launched a Royal Commission on Learning study to take stock of the challenges in elementary and secondary education in the Province of Ontario. In December 1994, the Minister of Education of Ontario, Dave Cooke, received the Royal Commission's final report, which included this succinct description of the challenges faced by the Province of Ontario:

> Today's Ontario has little in common with the province that existed even three decades ago. In the past 20 years, immigrants from Asia, Latin America, and Africa have outnumbered those from traditional European sources. The manufacturing sector that was once the wellspring of Ontario's prosperity is declining, and service industries are expanding. Not only is everything changing, the pace of change is, itself, increasing. *And there, squarely at the centre of change, stands the school system.* [emphasis added]
>
> (RCOL 1994, p. 50)

The Commission's report went on to highlight the rise in unemployment in the City of Toronto (three times the rate than the rest of Canada), the high number of persons living on social assistance (ten percent at the time), greater poverty and financial retrenchment in the funding of public education (RCOL 1994, pp. 50-51).

The Royal Commission report also highlighted a common discursive theme prevalent during the 1990s in Canada; this discourse took a distinctly economic and consequentialist view of education. Indeed, the Royal Commission authors made this connection abundantly clear, emphasizing "that education drives the economy—that our economic well-being is dependent on a well-educated workforce able to compete in the 'new global economy'" (RCOL 1994, p.51). The link between national economic competitiveness and the *purpose* of public education was an important one, as it

played an outsized role in the arguments presented during the debate of the IRC's right to access public schooling in Canada.

Bill 24 underwent two readings in the provincial legislature of Ontario before it was consigned to the Subcommittee on Social Development (SSD) for further study and debate. It was passed to the SSD for review for two principle reasons. First, because members of the Ontario Legislature found the language used to discuss schooling for this population of children confusing and wanted greater clarity to be provided about the target population—the language used by MPPs debating the bill referenced *children of refugees*, *non-Canadian citizens*, as well *non-Canadian* and *non-resident* children.[65] The second reason for sending Bill 24 to the SSD had to do with concerns about the cost implications for Ontario taxpayers and the burden that would be imposed on Ontario school boards—most especially school boards in Toronto—if the bill was approved.

The legislative debates that took place during the first and second readings of Bill 24 capture the core arguments relating to the bill and are the subject of analysis here. Discussion of Bill 24 in the SSD was ultimately overshadowed by discussion of the omnibus bill (Bill 4) to which MPP Caplan's original legislation (Bill 24) was grafted. Therefore, the key interventions available for analysis are those that occurred in the Ontario Legislature and not in the SSD.

(b) Justifications in practice

In the legislative debate of Bill 24, one justification for including IRCs in Ontario classrooms predominated. This largely instrumentalist argument suggested that Bill 24 would ultimately benefit the Province of Ontario and its members, including IRCs. This was the anchoring discursive topic of Bill 24 presented by MPP Caplan at the outset

[65] MPP Cunningham remarked "non-Canadian citizens, it says in the explanatory note here, who were admitted to a school by a school board. I think I will start by saying whether we mean 'non-Canadian' or 'non-resident', or whatever we do mean, the beginning of my speech is going to say that there's some confusion in this legislation […]" (LAO Bill 24 Deb 11 June 1992, 1110).

of the legislative debate; in so doing, she ensured that it received sustained attention by the other members of the legislature. MPP Caplan stated that it was "in Ontario's best interests to educate *our children*" [emphasis added] (LAO Bill 24 Deb 11 June 1992, 1100). This was the simplest expression of the argument, and it recurred in different forms through her many interventions.

MPP Caplan's remark linked the best interests of the province with those of resident IRCs.[66] She did this by suggesting that IRCs were in fact part of the provincial community. This form of argument bears resemblance to social membership approaches to irregular migrant rights developed in the normative theoretical literature. The argument allowed MPP Caplan to frame their success (IRCs) as the province's success. It also suggested that the province's responsibility toward IRCs was no different than the responsibility the province had for other legally resident children, since they were both subsumed in the idea of *our children*. As a consequence of this discursive framing strategy, MPP Caplan was able to spend more time focusing on the positive returns Bill 24 would generate for the province—which she did at great length—as opposed to referencing the positive returns the bill would generate for one specific group of individuals (ie IRCs).

MPP Caplan's framing resonated with several MPPs. The Progressive Conservative MPP Jim Wilson adopted a similar strategy as MPP Caplan and framed the education of IRCs as a *responsibility* of public authorities to *constituents*. Despite their irregular status, they were nevertheless considered *part of the constituency*, part of *our children*. MPP Jim Wilson argued that the physical presence of IRCs in the provincial community triggered a responsibility to attend to their needs *even if* those children subsequently left the province. The education of IRCs was a contribution by the province to the world at large (ie not solely a benefit for the province):

> The final thing, though, is to have the best school system possible for all our children, to make sure it is accessible to whoever that child is in our community,

[66] The interests of the province were predominantly economic interests.

> partly because that is a thing we can use that goes beyond our community into the world at large, that the resources we have as a group will be devoted to the best interests of everybody.
>
> (Wilson LAO Bill 24 Deb 11 June 1992, 1150)

MPP Jim Wilson was the only member of the legislature to stretch the idea of inclusivity beyond the borders of the province. The other advocates of MPP Caplan's social membership approach stressed the linkage between the economic vitality of the province and the welfare of IRCs. Indeed, it was this linkage that was most reinforced in the interventions by MPPs that advocated for broadening schooling entitlements for IRCs. For instance, MPP Caplan linked poverty levels in the province to high levels of illiteracy (LAO Bill 24 Deb 27 May 1992, 1540). She argued that Bill 24 would help reduce levels of illiteracy in the province by removing a fee barrier that had made access to public schooling challenging for *the children of non-residents*. All children in Ontario would then have the opportunity to become literate, productive members of the community—hence, reducing poverty levels. MPP Caplan stated that education served the broader goal of creating "the very best educated population […] so we can create wealth, create jobs" and "develop that human potential which I believe will make Ontario as attractive in the future as it has been in the past and enhance our competitiveness in this global world" (LAO Bill 24 Deb 11 June 1992, 1100). Similarly, during the second reading of the bill, MPP Caplan argued that the proposed legislation would tackle an administrative barrier to public schooling (fees for non-residents) and in doing so, would also "[…] lead to greater prosperity, greater economic activity and greater wealth creation as well as a better place for all our children and grandchildren, because we've taken steps today to ensure equality of access to education for children living in Ontario" (LAO Bill 24 Deb 11 June 1992, 1150).

On this account, the benefit of an educated population is two-fold. An educated population of children would improve Ontario's economic resilience and productivity in the future. Additionally, the province would derive a second economic benefit as well. The province would benefit from the fact that fewer individuals would be likely to

become reliant on the support of the provincial government later in life (ie welfare support). The theme of *burden* was repeated throughout the debate of Bill 24 and was a significant motivating factor for policymakers. Specifically, they were motived to minimize the possibility of rising numbers of unproductive, dependent inhabitants in the Province of Ontario. Not doing so would result in a financial and social burden for all members of the provincial community, as they would need to make available financial and social support mechanisms for such individuals and increase investment in social safety nets.

MPPs frequently used this argument strategy to muster support for the bill—they linked the absence of schooling for IRCs to a number of undesirable outcomes for the host community. Policymakers focused on the negative consequences for the community if *future members* of the community (IRCs) did not benefit from schooling at an early age. Denying education to IRCs carried a greater risk of illiteracy, which was meaningful because it increased the chances of the individual living in poverty at some point in the future, which would result, it was believed, in a cycle of welfare dependency. MPP Caplan articulated these views in response to criticism that Bill 24 would result in higher taxes for the residents of Ontario, potentially exceeding the available resources of the community. MPP Caplan made the point that it would cost the community more if they did not act: “At the same time, I would point out that the cost to that very same taxpayer of having illiterate, uneducated, unproductive, wasted resources in this province is a much greater cost that we cannot bear when there is a solution” (LAO Bill 24 Deb 11 June 1992, 1200).

MPP Caplan framed the lack of education, illiteracy specifically, not as a form of harm to the child, but as a communal disability insofar as it generated unproductive members:

> I do believe that unless we correct this, it will continue to have great economic impact on the province of Ontario because what will happen is that these children, denied access to education, will be more of a burden on our society in the future than they would have to be or would be at all if we gave them the key to successful living, the key which is education.

(LAO Bill 24 Deb 11 June 1992, 1100)

MPP Caplan used a discursive disclaimer to defend her policy position; this was done in attempt to prevent alienating potential opponents of the bill. She first stressed that she, like the opposition, was staunchly against illegal migration. It was useful to establish this position as it distanced the proposed legislation from the idea that it was condoning the behaviour of illegal migrants: “I would like to mention and be very clear that I do not condone the behaviour of illegal immigrants. I do not condone the actions of adults who come to this country in an illegal way. I do not condone lawbreaking in any manner whatever” (LAO Bill 24 Deb 11 June 1992, 1150).

Immediately afterward, she stressed that the bill, rather than profit illegal migrants, would profit the province. In other words, she was willing to introduce a measure of change to provincial education law to ensure the province did not suffer unduly: “I also believe that it is in Ontario's interests, our interests today and in the future, to ensure that all children living in Ontario, whether the status of their parents is legal or not, to see that those children are educated” (LAO Bill 24 Deb 11 June 1992, 1150).

The framing topic set by MPP Caplan at the outset of the debate of this bill recurred throughout her interventions: the well-being of IRCs was closely linked to the well-being of the community. This form of justification bears resemblance to social membership arguments in the normative theoretical literature. This is the view that long-term residents, even if not legally resident, count nevertheless as members of the community. They are part of an ecosystem of relationships that can either benefit or harm the community. MPPs were encouraged to view this legislation as a choice between investing in the long-term economic vitality of the community or imposing a handicap on the community that would negatively impact all its members.

One can be critical of this framing as well, since it would seem to instrumentalise IRCs—their development and future goals were not framed as worthwhile ends in their

own right, but were rather a means of advancing the province's economic objectives. The early part of the debate of Bill 24 framed the education of IRCs most often as a function of the economic resilience of the community. Inclusion of IRCs in Ontario schools was a valuable policy goal because it would contribute to a broader policy goal: the economic vitality of the Province of Ontario. There was an expectation of a return on investment in the form of a productive, self-reliant workforce—pragmatic, instrumentalist reasons for expanding access to schooling. Only seldom in this debate was the education of IRCs framed in terms of an outcome intrinsically valuable for the child. However, the language used by MPPs Caplan and Wilson suggest that the economic resilience of the province was something to be shared with IRCs when they became future adults, not merely something to be extracted from them. The prosperity of the province was to be co-created and shared amongst its members, amongst whom IRCs were counted. If the intent was to reap maximum benefit from the labour of IRCs when they were future adults, one would not find lexicalization strategies that redefined IRCs as community members.

The foregoing highlights the dominant justification discernible in the debate of Bill 24, but it was by no means the only justification for schooling entitlements put forward by members of the legislature. There were occasional interventions from MPPs during the debate that took a more rights-centred view to the policy problem. These interventions supported inclusion and generally took two forms—they either (a) emphasized the harm that denying education to IRCs would cause, or (b) emphasized the IRC's legal *right to education*. However, these interventions received little sustained engagement in the debate of Bill 24.

MPP Charles Beer was the only MPP that intervened to point out that children who were denied an education would experience some form of harm. He argued that these children would have "difficulties leading a normal life" and denying education put them at great risk: "Clearly one of those areas where kids can be at risk is if they do not have access to education" (LAO Bill 24 Deb 11 June 1992, 1120). This justification,

which was fairly prevalent in the theoretical literature, did not elicit a response from policymakers engaged in this debate.

Similarly, only a few references were made to the UNCRC—MPP Caplan and Liberal MPP Charles Beer both did. MPP Caplan did so to point out that the proposed legislation was “in line with Article 28” of the UN Convention on the Rights of the Child. Article 28 (e), reads: "We should take measures to encourage regular attendance in schools and the reduction of dropout rates” (LAO Bill 24 Deb 11 June 1992, 1110).

New Democratic Party MPP David Winninger also made reference to the IRC’s legal right to education, but cited the Canadian Charter of Rights and Freedoms, as opposed to international law. He stated that the passing of the bill “would bring our legislation under the Education Act more into conformity with Section 15 of the Charter of Rights” (LAO Bill 24 Deb 11 June 1992, 1140).[67] Neither justification seemed to animate policymakers in the debate of this bill, nor did they appear to play a significant part in fostering consensus either for or against the bill. Nevertheless, by foregrounding domestic and international law, these MPPs succeed in framing the policy goals in Bill 24 as a reflection of other broadly held social values and commitments in Canada. This legitimized the policy proposal by normalizing its central proposition and may have made the bill more palatable to opponents.

The policymakers above presented justifications for broadening access to public schools. Other members of the Ontario legislature presented justifications to limit access to schooling for IRCs.

Policymakers that contested this bill did not reject outright the inclusion of IRCs in Ontario schools, but instead advanced arguments that undermined the bill. One strategy was the use of discursive disclaimers, which allowed the speaker to avoid

[67] Section 15 of the Canadian Charter of Rights and Freedoms addresses equality rights in Canada. It states that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” (Charter 1982).

negative self-presentation while voicing their opposition for aspects of the bill. It was this strategy that MPP Dianne Cunningham used. She began her intervention by acknowledging that IRCs may, in fact, have a legitimate claim to public schooling in the Province of Ontario. She was sensitive to the fact that these children and their families were afraid to approach public authorities in schools for fear of apprehension and removal. MPP Cunningham stated:

> They told us, and I think this is true, that illegal immigrants are not out for publicity. They are not the kind of people who are going to go around and talk about their status. They're afraid and concerned and they obviously eventually want some assistance in becoming Canadians. We're talking about their children. But they will not register with school boards for fear of being, in their words, tracked down at this terrible time in their lives. Don't get me wrong. I don't think any of us are here to support that kind of action. We're here to say it's a reality, that it exists and let's deal with it.
>
> (LAO Bill 24 Deb 11 June 1992, 1110)

However, immediately afterward MPP Cunningham hedged her statement by drawing attention to the fact that "the taxpayer will absorb the cost of this [bill] if we allow illegal immigrants into our school system without paying" (LAO Bill 24 Deb 11 June 1992, 1110). The implicit suggestion was that foreigners without regularized immigration status should pay for the right to access public education in Ontario. It is notable that interventions that referenced the financial burden of the proposed legislation also adopted a lexicalization strategy that stressed the illegality of the children who stood to benefit from the policy change. Early on in the debate of Bill 24, MPP Cunningham pointed out that there was some confusion in the legislation about the beneficiary population the bill addressed; she stated: "I think I will start by saying whether we mean 'non-Canadian' or 'non-resident', or whatever we do mean, the beginning of my speech is going to say that there's some confusion in this legislation" (LAO Bill 24 Deb 11 June 1992, 1110). Yet, throughout her subsequent interventions discussing the financial implications of including IRCs in Ontario schools, MPP Cunningham chose to refer to this population as *illegal immigrants*, as opposed to *non-Canadians*, or *non-residents*—categories she drew attention to early on. Others also used this term (ie illegal immigrant), but what is notable is that in the case of MPP

Cunningham this is the term chosen amongst a list of others that she indicated may also be suitable descriptors.

This lexical choice is interesting for another reason as well. Early on in the debate of this bill, MPP Caplan argued that the proposed legislation was specifically intended to allow public authorities in Ontario "to say to children, 'You are not illegal in Ontario'" (LAO Bill 24 Deb 11 June 1992, 1110). The contrast with MPP Cunningham is evident; MPP Caplan went out of her way to emphasize that IRCs were not illegal even if the term was commonly used.

MPP Cunningham sought to legitimize her criticism of the bill by adopting an interactional discursive strategy that linked her policy position to the feelings of the general public. She suggested that she was channelling broader public sentiment in voicing her concerns about the proposed legislation. For instance, MPP Cunningham noted that "all school boards" shared the same concern as her, namely, that there would be additional financial burden on them arising from the accommodation of IRCs in their schools (LAO Bill 24 Deb 11 June 1992, 1110). She noted that these concerns were particularly acute in the City of Toronto, where school boards had estimated that allowing children of *illegal immigrants* into the public school system would cost the City $ 11 million (LAO Bill 24 Deb 11 June 1992, 1110).[68] New Democratic Party MPP Drummond White adopted a similar discursive strategy to counter MPP Cunningham's claim. MPP White began his intervention by equating MPP Cunningham's statements to those of a person who would deny IRCs access to public education; he went on to argue that such individuals "do not represent the majority of our community who are fair and decent people" (LAO Bill 24 Deb 11 June 1992, 1120). Both proponents and opponents of the bill attempted to ground their positions in claims that they each *knew* and *represented* the broader sentiments of stakeholders in Ontario.

[68] All dollar values in this research are in Canadian dollars unless otherwise specified.

The scarcity of resources argument, as it was formulated by MPP Cunningham and other policymakers supportive of her position, merits further attention. This argument is notable for prioritizing the interests of legally resident children over the interests and educational needs of IRCs. On this view, IRCs should not be accommodated in public schools if their accommodation would diminish the quality of education currently enjoyed by legally resident children. The Conservative MPP Jim Wilson stated, "Certainly we want to make sure the money is there, but we don't want to cause changes to it that will create dislocations that will cause downgrading of the educational system" (LAO Bill 24 Deb 11 June 1992, 1150). Such arguments suggest that IRCs may deserve access to the Ontario public education system, but their needs are not equivalent to the needs of legally resident children. The educational needs of IRCs were framed as a secondary priority and must be addressed through additional or supplementary resources. These arguments reference ethical positions that are common to partialist normative theories. The communal resources are, in a first instance, reserved for the benefit of an *in-group* and only additional or residual resources will be made available to meet the needs of outsiders or those in the *out-group*. This does not constitute a rejection of the fundamental claim to education. However, it does propose a limit to the responsibilities public authorities have to meet the needs of outsiders. In the case of MPP Wilson, the implicit suggestion was that the responsibility for meeting the needs of IRCs did not lie with the Province of Ontario, but rather with federal authorities.

To substantiate this position, MPPs argued that it was as a result of federal immigration policy that IRCs were present in Canada.[69] Consequently, there should

[69] In 1992, Bill C-86—*An Act to Amend the Immigration Act and Other Acts in Consequence Thereof*—sought to introduce several amendments to the 1976 *Immigration Act*. It was one of the final major pieces of legislation introduced by the federal Conservative government before a return to Liberal-led immigration policies in the years that followed. Bill C-86, put forward by the Conservative Minister of Employment and Immigration, sought to deliver on a key campaign pledge by the Conservative government: achieving efficiencies in the refugee determination system. This law bill carried additional restrictive revisions to the refugee determination system and also introduced significant security measures that would make it increasingly difficult for asylum seekers to lodge in-country claims for protection.

be a redistribution of funding from federal authorities to provincial authorities to meet the schooling needs of IRCs. For instance, MPP Beer suggested that the issue of public education for this population of children was linked to federal government policy on refugee children; the federal government "is responsible for the refugee system" and therefore it must "help the province, to help the school boards" (LAO Bill 24 Deb 11 June 1992, 1130). He pointed out that in the past both the cities of Ottawa and Toronto found themselves with "large numbers of children showing up on their doorsteps" and yet "there was no funding that came with those children" (LAO Bill 24 Deb 11 June 1992, 1130). The question of schooling entitlements for IRCs brought to the surface a tension between different jurisdictions of government in Canada and the division of their responsibilities for the well-being of residents with irregular migration status.

The issue of responsibility was cast in a somewhat different light by other MPPs in the legislature. Rather than finding fault with federal authorities, they found fault with the parents of IRCs for having caused these children to be *illegal* in Ontario. This *failure* on the part of parents was used to establish provincial responsibility for IRCs. MPPs suggested that the source of the province's moral obligation was rooted in the fact that the province had a responsibility to step in where parents *had failed their children*. MPP Drummond White reached for a biblical metaphor to express this idea:

> I would like to pick up on one of the comments our colleague the member for Oriole mentioned, the quote from the Bible of the sins of the father being passed unto the sons, unto the fourth generation. That is all too true here in Ontario […] Here we are talking of adults who make decisions, who should be responsible for their decisions, but whose children should not be so responsible.
>
> (LAO Bill 24 Deb 11 June 1992, 1120)

Several MPPs re-used the same metaphor, pointing out that IRCs were punished for a situation which they had no part in bringing about. Their exclusion from schooling was therefore unjust on account of the fact that they had no part to play in contravening Canadian immigration law. Consequently, they argued, MPPs had a moral responsibility to advocate for inclusion of IRCs in Ontario schools.

This argument is interesting because, on the one hand, it illustrates that there was a deficient understanding of the root causes of irregularity in Canada, and on the other, because it framed all IRCs as lacking agency and decision-making power. It is certainly the case that IRCs are vulnerable in myriad ways because of their irregular immigration status in Canada. However, IRCs may have chosen to remain in Canada beyond their allowed period of residency or may have been between statuses. These nuances do not seem to be well-understood by policymakers debating this bill.

(c) Summary

The passing of Bill 24 was a watershed moment for IRCs in Ontario and in the rest of Canada. Section 49.1 of *The Ontario Education Act* constitutes a first, clearly articulated policy that defends the IRC's unrestricted access to public schooling in Ontario. While the final language of Section 49.1 of *The Ontario Education Act* suggests that the sole policy concern of policymakers was that IRCs benefit from public education, it is clear from the foregoing that a host of ancillary practical and moral concerns animated policymakers when they considered the proposed change in legislation and that a number of discursive strategies were employed to secure the passing of the legislation.

Perhaps the most common normative argument for educating IRCs is that education will benefit the child; it will allow the child to pursue goals and devise plans that she finds meaningful. This approach focuses on the way education benefits individual children. MPP Caplan did not approach this policy matter in this way and instead adopted a strategy that emphasized the place of IRCs in the community's present and future. She avoided stressing the individuality of IRCs and instead stressed their membership in the provincial community. In doing so, she succeeded in orientating the debate on schooling entitlements, on the one hand, on the benefits that would accrue to the province if it invested in the education of *its children*, and on the

other, the harm that would befall the community if one segment was denied access to schooling.

It is apparent that policymakers were motivated by a number of ancillary concerns during the debate of Bill 24, such as the renewal of human resources in the Province of Ontario, the province's long-term economic competitiveness, and the financial burden created by having community members reliant on financial support from the province. These concerns were shared across party lines (Liberal Party, Progressive Conservative Party, and the New Democratic Party). MPP Caplan leveraged these concerns and linked them to the fate of IRCs in the Province of Ontario and in this way, she offered the most compelling justifications for broadening the IRC's access to public schooling in the province.

Several concerns were also expressed in respect of the proposed legislation. MPPs who raised these concerns did not seek to undermine the claim that IRCs deserved a public education, nor do they deny that IRCs deserved an education in the Province of Ontario—two distinct claims. Rather, they emphasized the financial burden of accommodation and in doing so, suggested that what was owed to IRCs was not the same as what was owed to legally resident children. At one point, MPP Cunningham observed that Bill 24 "may give us [MPPs] an opportunity for some debate around our responsibilities as elected officials representing our constituents" (LAO Bill 24 Deb 11 June 1992, 1110). This discussion of responsibility aimed to draw a distinction between the responsibilities and obligations public authorities had to legally resident children as compared to children with irregular status. For some MPPs, the educational needs of the latter group mattered, but not in the same way as the educational needs of legally resident children. Indeed, they argued that the education of IRCs was not a burden that should be carried by the members of the provincial community.

While the addition of Section 49.1 to *The Ontario Education Act* in 1993 proved to be touchstone legislation for IRCs, it did not resolve the problem of access to

schooling in the decade that followed its introduction into provincial law. Indeed, IRCs continued to face significant challenges accessing public schooling.[70]

The educational needs of IRCs were once again the subject of debate in the provincial legislature in 2005, more than ten years after Section 49.1 became law in Ontario. Policymakers would again take up issues relating to schooling fees, problems of resource constraints, as well as responsibility-sharing with federal authorities. Before turning to that debate, focus shifts to a separate discussion by federal authorities on the schooling rights of IRCs in the context of changes to federal immigration law.

[70] A new provincial government came to power in Ontario in 2003, as did a new Liberal Minister of Higher Education, Gerard Kennedy. In December the following year, Gerard Kennedy undertook specific efforts to clarify the scope of Section 49.1 of *The Ontario Education Act* for the various educational authorities in Ontario, issuing the following clarification to the Secretaries of School Authorities in Ontario in 2004: "Citizenship and Immigration Canada (CIC) has confirmed that there is no federal legal requirement for boards to refer families without immigration status or documentation to a local CIC office to obtain documents before their child is admitted to school" (Ministry of Education Mem No. 136 2004).

4.3. Policy moment 2 (2001-2002)

The Immigration and Refugee Protection Act (IRPA)

(a) Context

The legislative life of federal government Bill C-11 (An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger) is lengthy and complex.[71] Bill C-11 was put forward by Prime Minister Jean Chrétien's Liberal government in February 2001 and received Royal Assent on 1 November 2001, making *The Immigration and Refugee Protection Act*, or IRPA, the new cornerstone of immigration law in Canada.[72]

The purpose of Bill C-11 was to overhaul *The Immigration Act* of 1976 and directly address the issue of refugee arrivals in Canada, as well as border security with the United States. The bill was highly controversial and strongly opposed by several political parties in the House of Commons and the Canadian Senate. At the end of the House's third reading, the New Democratic Party described Bill C-11 as "seriously flawed" and "universally opposed" with "many offensive and troubling aspects" (Wasylycia-Leis HC Bill C-11 Deb 13 June 2001, 1615). The Senate, at the conclusion of its third reading of the bill, issued a similar strongly-worded rebuke, captured in this remark by Conservative Senator Di Nino: "Honourable senators, I have never participated in the study of a bill that has been as universally condemned by nearly all the witnesses who appeared before the committee. This bill represents a milestone of some sort in this regard" (SN Bill C-11 Deb 25 October 2001, 1479).

---

[71] The Liberal Chrétien Government had attempted to overhaul Canada's immigration laws a year earlier with Bill C-31, but debate of Bill C-31 ended prematurely because the Liberal Government called for early federal elections in 2000. Bill C-11 reproduced most of the legislative changes proposed in Bill C-31.

[72] As with most federal government bills, Bill-C11 underwent three readings in the House of Commons and a review by a House of Commons Committee—in this case, the House of Commons Standing Committee on Citizenship and Immigration (CIMM). The bill was subsequently referred to the Canadian Senate for three additional readings and review by the Standing Senate Committee on Social Affairs, Science and Technology. After the bill was passed in November 2001, the CIMM was activated once more to study the regulations that would accompany this new legislation.

The timing of the bill may partly explain how such contested legislation came to form the new cornerstone of Canadian immigration law. The House of Commons debated Bill C-11 in the summer of 2001, but the Senate considered the bill only a few days after the 11 September 2001 attacks in the United States. The latter incidents coloured the debate in the Senate, which focused predominantly on the security aspects of immigration reform as opposed to other ancillary issues (eg education). These security concerns were widespread in North America, but also elsewhere in the world after the events of 11 September 2001. These events played a significant part in entrenching the need for control over borders and immigration and fostered sentiments of fear where refugees and asylum seekers were concerned (Gibney 2004, p. 221). It was the events of 11 September 2001 that enabled the Liberal-led government to push the bill through both the House of Commons and the Senate with relative speed—much faster than many policymakers would have liked.[73]

Bill C-11 was heavily influenced by two realities that dominated national political discourse and the media around the end of the 1990s and the early 2000s. The first was the irregular arrival of migrants from China in 1999.

In the summer of 1999, four ships arrived on the Western shores of British Columbia, carrying a number of Chinese migrants, mostly from Fujian Province. Estimates suggested that between 590 and 599 migrants from China arrived without landing permission; this includes 134 separated children and adolescents between the ages of 11 and 17 years old (Ayotte 2001, p. 5). The overwhelming majority of arrivals were sent back to China within one year (Migration News 2000; Wong 2002).

[73] Responding to a challenge from a Conservative Canadian Senator, the Liberal Senator Sharon Carstairs stated: “I personally hope that we will pass that bill (C-11) very quickly because I think it will send a strong signal to the Americans that we are prepared to tighten immigration controls” (SN Bill C-11 Deb 19 September 2001, 1450). The Liberal Senator was in the minority in holding this view. The Senate was especially critical of the Minister of Citizenship and Immigration, Elinor Caplan, for having initially given the Senate only three days to review the proposed legislation.

These four ships were only a few of the ships that had set course for Canada during the summer of 1999, part of a mixed movement of migrants from Asia that included individuals trafficked by people smugglers and others looking to make a new life in Canada, amongst them economic migrants and refugees (Depalma 1999; Wong 2002). The reaction in Canada was immediate and visceral. The Canadian Broadcasting Corporation noted that the "haunting images" of the migrant arrivals sparked a public debate that was "controversial and evoked a wide range of opinions and emotions", which eventually prompted the Government of Canada to issue an appeal for calm (CBC 1999). "The amount of media scrutiny and sensationalism it received was quite incredible to behold" remarked Conservative Party MP Inky Mark (HC Bill C-11 Deb 27 February 2001, 1100). Bill C-11 was part of the Canadian Government's response to the public fervour triggered by these irregular arrivals in 1999.[74,75] New Democratic Party MP Davies stated "[C-11] is a reflection of the public

[74] MPs made several references to the *boat arrivals* during the debate of Bill C11, underscoring the impact these arrivals had on the national debate on immigration reform. For instance, during the second reading in Parliament of Bill C-11, MP Inky Mark asserted that "the government has learned very little since boatloads of illegal migrants from China made their way to Canada's shore last year" (HC Bill C-11 Deb 26 February 2001, 1550).

[75] Adding to the tension between Canadian political parties over *illegal immigration* during the late-1980s and early-1990s was the fact that the Canadian refugee adjudication system suffered significant, publicly discussed shortcomings. Policymakers frequently discussed the large number of refugee claim backlogs that plagued the Canadian immigration system during this period. These backlogs owed in part to the increasing number of asylum claims being lodged in Canada and also from the immigration rules put in place in 1976, which were not designed to cope with large numbers of refugee claimants—policymakers in 1976 did not anticipate that Canada would come to play an important role as a country of first asylum given its remoteness from many conflicts. Between 1980 and 1990, Canada saw an exponential increase in the number of asylum claims submitted for adjudication in Canada: 1,600 claims were lodged in 1980 and 54,837 claims were lodged 1990 (Azaad 1991; CIC 2010). The Program Policy Development Division of the Department of Employment and Immigration Canada estimated the average adjudication period for a claim during this period to be 1,282 days (Magnat 1995). In 1984, there were 12,000 cases of pending refugee claims, a figure that would reach 60,000 pending claims by 2009 (CCR 2008; CIC 2013). Right up to the major reform of the Canadian immigration system in 2002, and even in the years since, changes to the Canadian immigration and refugee protection system have often been framed in terms of seeking greater efficiency; that is, policymakers have sought to *effectively* address *bogus refugee claimants* and ensure that skilled migrants were able to contribute to the Canadian economy with few obstacles. Other policymakers argued for continued commitment to humanitarian principles in immigration legislation, especially where refugees were concerned—the latter saw a natural complementarity in the twin policy aims of growing the Canadian economy and humanitarian aid. Canadian Senator Jerahmiel Grafstein was one such policymaker, arguing in 1988 that in matters of refugee policy, "our [Canadian] humanitarian policy and our national interest converge"; the question should therefore not be how many refugees can Canada keep out, but "how many refugees can Canada safely absorb and how quickly" (Sen Bill C-84 Deb 26 July 1988, 1846).

mood that has become more negative about immigration and refugee policies" (HC Bill Deb C-11 27 February 2001, 1035).

The prominence of border security as an issue of bilateral concern between the United States and Canada was the second major impetus for drafting Bill C-11. The bill took account of heightened collaboration with the United States on issues relating to national security and border control both immediately before and after the attacks of 11 September 2011. Prime Minister Chrétien and liberal policymakers were intent on responding to calls from their counterparts in the United States *to get tougher on immigration* and vowed to make immigration reform a success of their leadership. The drive to make good on this commitment only heightened after the events of 11 September 2001.

In 2001, legislative debate of Bill C-11 broadened to encompass a wider set of policy issues.[76] What began as a discussion of the narrow issue of refugee policy and border security in Canada at specific moments also addressed the welfare of IRCs and particularly, the rights of IRCs to schooling in Ontario. The bill also addressed the general welfare of IRCs. More specifically, Clause 25 of the bill addressed the issue of child welfare, whereas Clause 30 addressed schooling rights. The former is addressed here as it is not directly relevant to the issue of schooling, but is relevant to the population of children studied in this research; the latter, Clause 30, is taken up in the next section.

Clause 25 of Bill C-11 is significant because it addressed IRC welfare generally. This clause spelled out a commitment to integrate into the new immigration law the decision of the Supreme Court of Canada in *Baker v Canada* (1999), which required that the Minister of Citizenship and Immigration take into account *the best interests of*

[76] The same occurs during the debate of Bill 194 in the Ontario legislature in 2005—see policy moment three in Section 4.4.

any child directly affected by any decision taken by the Ministry or its officials.[77] For instance, where detention was concerned, Bill C-11 stipulated that it must be a last resort for children. Clause 25 (1) stipulated:

> The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.
>
> (HC Bill C-11 2001)

Clause 25 was a positive development for migrant children in Canada, as it recognized the need to fix a problem that had existed in the 1976 Immigration Act: unconstrained discretionary authority where migrant children were concerned. Bill C-11 attempted to ensure that the Supreme Court's guidance in *Baker* "to consider the children's best interests as an important factor, given them the substantial weight, and be alert, alive and sensitive to them" would thereafter play a central role in Canadian immigration legislation. However, the legislation did not fully implement the *best interests of the child* (*best interests principle*), as required by the UNCRC, because the Minister of Citizenship and Immigration still retained significant discretion in determining what *the best interests of the child* meant in practice and this frequently

[77] The Canadian Supreme Court case *Baker v Canada* (1999) is relevant to this research for several reasons. It is important first because it addressed limitations of the *best interests* principal in constraining federal immigration legislation; and second, because it clarified the force of the UNCRC in Canadian law. In *Baker* the Canadian Supreme Court considered the following question: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" (*Baker v Canada* [1999] 2 SCR 81, para. 1). One part of the Court argued that provisions in the UNCRC were not binding on the Canadian Government; Justice Iacobucci noted that "primacy accorded to the rights of children in the Convention […] is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament" (Baker v Canada [1999] 2 SCR 81, para. 81). However, a majority held that the UNCRC had persuasive force in Canadian law even if it did not have obligatory force, and as a consequence any discretion immigration officers exercised was constrained at least insofar as the immigration officers need to pay "close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society" (Baker v Canada [1999] 2 SCR 81). The values of international human rights law and other Canadian laws were essential in informing the Supreme Court's interpretation of obligations arising from the UNCRC.

meant that the child's best interests were only one factor considered in making policy decisions, not *the most important factor* as required by the UNCRC.[78]

The UNCRC requires that the best interests of the child be the overarching and guiding principle in *all policy matters* dealing with the welfare and interests of children and this is irrespective of migration status. IRPA only applied the *best interests* consideration in specific contexts, not *in all contexts*. Moreover, IRPA suggested that the best interests of the child was one factor amongst many that must be *taken into consideration*, whereas the UNCRC required that the child's best interests be "the primary consideration" in all aspects of policy dealing with children (UNCRC 1989, Art 3).

With this context established, one can now consider the elements of the debate on Bill C-11 relevant to the question of schooling for IRCs. In doing so, it is important to bear in mind the way the broader discourse in the debate of Bill C-11 represented the issue of social welfare rights for irregular migrants in Canada. Justifications put forward by policymakers defended a new approach to managing irregular migration, and this reveals much about the place of irregular newcomers in Canadian society from the perspective of federal policymakers. To be sure, Bill C-11 signalled a new turn in the discourse of rights and obligations as it pertained to new irregular arrivals and resident irregular migrants. This broader discourse on the place of irregular migrants in Canadian society from the perspective of federal lawmakers is considered first, and subsequently analysis turns to the statements made concerning the IRC's to schooling.

[78] Several years after IRPA passed into law children were still being detained in immigration facilities despite the fact that the Ministry of Citizenship and Immigration was not able to show that the children were a security risk—one of the trumps of the *best interests* principle. Children were frequently being detained as *guests* because they were accompanying a detained parent (Silverman 2014, p. 31). One might argue that the child's best interests would matter sufficiently to warrant both the parent and child to be allowed to dwell in the host community, ie outside of detention, but this was not the practice in Canada in the early 2000s.

(b) Justifications in practice

The Minister of Citizenship and Immigration, Elinor Caplan—formerly a Liberal provincial MPP in Ontario—took the opportunity to frame Canada's new approach to irregular migrants in her opening remarks to the House of Commons on Bill C-11 in 2001.[79] Just as in the opening of the provincial debate of Bill 24 in 1992, Minister Caplan's opening remarks established the anchoring topic for the debate of Bill C-11. Her framing of the issue shaped the ensuing debate, which unfolded over the course of nearly two years of parliamentary and senate hearings. In her remarks, Minister Caplan framed Canada's approach to irregular migrants thus:

> This is important legislation, legislation which will be of great benefit to the country. The reason why is quite simple. By saying ''no'' more quickly to those who would abuse our rules, we will be able to say ''yes'' more often to those immigrants and refugees who Canada will need to grow and prosper in the years ahead. […] Bill C-11 remains a tough bill. However, I want to emphasize that it is tough on criminal abuse of our immigration and refugee protection systems.
>
> (HC Bill C-11 Deb 26 February 2001, 1525)

In 2002, Minister Caplan framed Bill C-11 as delivering success for the country similar to how, in 1992, she framed Bill 24 in the Ontario Legislature as legislation that was in the best interests of the province. However, unlike her defence of the 1992 provincial bill, during which she argued that irregular migrants were part of the provincial community and thus co-beneficiaries of the province's future success, her defence of Bill C-11 suggested that Canada would only prosper by being more selective in its choice of immigrants. The implicit message was that irregular migrants were an unwelcome presence and that Canada's success was very much linked to their removal.

Minister Caplan's discursive anchoring permitted a number of arguments to be made which criminalized and penalized irregular migrants. Harsher punishments were made to look like reasonable policy responses given that the national community was

[79] This is the same policymaker that introduced Private Members' Bill 24 in the Ontario Legislature in 1992. See policy moment one in Section 4.2.

faced with *criminal entrants* and *resident lawbreakers*. Minister Caplan proposed an unambiguous policy response to those individuals who did not fit within Canada's immigration priorities: swift removal.[80]

The position advanced by the Liberal Party of Canada found supporters in the Canadian Alliance Party. "The Canadian Alliance supports deportation of undesirable individuals without delay in the cases of criminal activity and non-compliance with the Immigration Act" stated Canadian Alliance MP Paul Forseth (HC Bill C-11 Deb 27 February 2001, 1105). *Individuals in non-compliance with the Immigration Act* was a broad designation that did not admit nuance: this group included all individuals with an irregular status in Canada. It was a discursive designation that reinforced the homogenization of irregular migrants, leaving unaddressed the complex pathways to irregular status in Canada, many of which begin with legal entry.

According to the Liberal Party, Canada needed to urgently address an unbalanced immigration regime, one which allowed criminals (irregular migrants) to enter and remain in Canada *abusing the generosity of Canadians*. These irregular migrants delayed entry for *deserving* refugees and *hard-working* immigrants. This strategy of discursive contrast was a common feature of Canadian immigration debates; it was therefore unsurprising to find it employed during the federal debate of Bill C-11: migrants who entered Canada via established channels were *deserving and hard-working*, while those who found themselves in Canada without regular status were *illegal* and harboured, seemingly, criminal intent. Familiar lexicalization strategies were used to further the notion that irregular migrants were lawbreakers; irregular migrants were variously referred to as *false or bogus refugees*, *queue jumpers,* and *criminals* in the House of Commons debate of this bill.

[80] In witness testimony, the lawyer Kenneth Zaifman argued that Canada was proposing with Bill C-11 not "a selection system", but an "exclusion system", thus if you were not on the desired occupation list you were excluded from immigrating to Canada (HC CIMM Bill C-11 1 May 2001, 910).

The strategy of discursive contrast which invited comparison of migrants who entered Canada via established channels against those with irregular status is also significant because it led to a binary framing of immigrants to Canada. The first group (legal entrants) were presented as individuals who were able and willing to make contributions to Canada. Implicit in this discursive framing was the suggestion that irregular migrants were, by contrast, net *takers*. Bill C-11 "closes the back-door to those who would *abuse* [Canadian] generosity" and "opens the front-door wider to immigrants and refugees" stated Minister Caplan (HC Bill C-11 Deb 26 February 2001, 1520). MP Inky Mark stated, "The Canadian Alliance immigration policy would accommodate legitimate immigrants and their families who seek to contribute to Canada, while locking it tight to those who would abuse the system" (HC Bill C-11 Deb 26 February 2001, 1540).

The metaphor of front and back doors evokes contrasting imagery that puts the welcomed guest in opposition to the unwelcome *other* that comes surreptitiously via some illicit entryway. The metaphor reinforces the idea that only those who come in via established pathways have both *the intention and capacity* to make contributions. No-one is compelled to view the *back-door entrant* as either a contributing or a welcomed guest. There are two, mutually exclusive categories of migrants on this view, the deserving/contributors and the undeserving/takers. It follows from this that one's status determines the contributions one can make to the national community. Remarks by the Canadian Alliance MPs Forseth and Mark exemplify this mind-set; they argued that Canada should "attract the cream of the crop" and "keep out criminals"; keep "the best and the brightest, not just those who show up at Canada's door" (HC Bill C-11 Deb 26 February 2001, 1540). With Bill C-11, the Liberal Party sought to attract migrants that would add value to the Canadian economy and workforce, and consequently, they argued it was appropriate to enforce punitive measures against those who undermined this goal.

Where once the Liberal Party was criticized for encouraging too much immigration to Canada, in 2001, the party leadership was rebuked for not being able to meet its yearly quota of 300,000 immigrants which, according to many policymakers and opposition party members, the economy desperately needed. Rather than facilitating the movement to Canada of *hard-working* migrants—*the cream of the crop*, as MP Forseth put it— illegal migrants were *exhausting* the Canadian Government's resources because they were given access to social services to which they were not entitled.

According to proponents of Bill C-11, Canada was facing mounting pressure by other states who were also "competing for the world's best and brightest" and "this competition will only grow more intense" (Caplan HC Bill C-11 Deb 26 February 2001, 1520). One threat was from *lawbreaking* migrants who took resources and did not contribute to their replenishment. But there were also opportunity costs that Canada incurred by hosting irregular migrants while other nations attracted the best of the global talent pool. The Liberal Party argued that this misalignment must be corrected so that immigration practices would better reflect national priorities. On this view, immigration should not be defined by a permanent disposition of welcome to whomsoever should find themselves in the country.

The Canadian Alliance Party joined the Liberal Party in stressing the importance of an economy built on human capital. Both parties argued that immigration was key to ensuring that Canada remained competitive going forward. According to the Canadian Alliance Party, what was needed was an immigration system that "targets people who can add very quickly to our system and to our economy" (Benoit HC Bill C-11 Deb 27 February 2001, 1315). This would be achieved not only by attracting skilled workers and temporary workers that the economy needed, but also by ensuring that applications from qualified workers were processed more efficiently so that Canada could meet its yearly immigration targets, while ensuring the swift removal of those that did not meet the standards set by immigration rules.

The Liberal Party made no secret of the fact that Bill C-11 aimed to make life more difficult for those who do not respect Canadian immigration laws. Wendy Chan argues that Bill C-11 is an "example of the criminalizing and retributive tone that is now commonplace in immigration policy making [in Canada]" (2004, p. 34). Chan's criticism of Bill C-11 and its turn toward greater securitization of immigration to Canada was widely shared amongst NGOs and amongst some political parties in Parliament, most notably the Bloc Quebecois and the New Democratic Party—these political parties opposed both the ethos and content of Bill C-11. Together with a host of NGOs, these political parties argued that the new legislation prioritised a *law and order* approach to immigration management. Policymakers from both parties intervened repeatedly to call attention to the xenophobic overtones of Bill C-11, lamenting also its narrow, market-driven view of human mobility. Speaking for the Bloc Quebecois, MP Madeleine Dalphond-Guiral stated:

> […] the anchor point for Bill C-11 is the harsh treatment accorded illegal immigrants. […] Initially, it would appear from the bill that Canada has been invaded by criminals of all sorts; in a word, the door is open too wide. Not only is there a need for a bolt, but for an impenetrable alarm system as well.
>
> (HC Bill C-11 Deb 13 June 2001, 1600)

She went on to assert that:

> The Bloc Quebecois finds regrettable the hard line taken by the government in introducing this bill and the accompanying public announcements. Through its approach to this issue, we believe that the government, which seems to be trying to reassure the Canadian right, is reinforcing prejudices towards refugees and immigrants. It is thus encouraging division and heightening xenophobic and racist sentiments in society.
>
> (HC Bill C-11 Deb 13 June 2001, 1605)

The Progressive Conservative MP John Herron took issue with the terminology adopted by proponents of the bill which cast a broad net over all migrants with an irregular status in Canada—he remarked: "We need to have more confidence in and respect for human diversity so that we do not get sucked into the debate of always having to add the word criminal in a paragraph related to immigration. I would like to flag that particular aspect" (HC Bill C-11 Deb 26 February 2001, 1710). MP Herron

was calling attention to a discursive crutch that had been used by many policymakers in the debate of Bill C-11. Rather than engage with the complexity of immigration factors, the diversity of migrant backgrounds, and the various factors that might motivate a migrant to come to Canada or remain with an irregular status, a number of policymakers had taken to using lexical choices that cast all irregular migrants as lawbreakers.

Other policymakers took a stand against the market-driven view of immigration articulated by proponents of the bill. Policymakers from the New Democratic Party were particularly vocal critics of the instrumentalization of migrants for economic ends. In an effort to lend further legitimacy to their criticism, members of the New Democratic Party put forward an argument which, they claimed, drew on a popular conception of Canadian values, employing a familiar interactional discursive strategy. They argued that Bill C-11 represented "a fundamental shift in policy" that betrayed Canada's humanitarian ideals and instead spotlighted a fortress mentality by ushering in a very punitive, restrictive process for immigration (Wasylycia-Leis HC Bill C-11 Deb 26 February 2001, 1615-1655). According to the New Democratic Party, Bill C-11 classified migrants first and foremost by their utility, discounting the many other reasons why an individual may choose to make Canada home—reasons which may nevertheless resonate with core Canadian values—and the many contributions they make to both the Canadian economy and society. The migrant's reasons for moving were discounted because they were not presented in the correct fashion, ie by going through *the front door*.

The New Democratic Party was not alone in leveraging this discursive strategy. Indeed, the Liberal Party legitimized its proposed legislation by arguing that it was what the majority of Canadians wanted—and what they wanted, above all, was *respect*. MPP Caplan stated, "Canadians want a system that is based on respect, both respect for our laws and our traditional openness to newcomers" (HC Bill C-11 Deb 26 February 2001, 1530). Both parties claimed to be interpreting *fundamental Canadian*

values to legitimize their arguments; Canada's humanitarian values were pitted against the value Canadians placed in respect for the rule of law.

If one sets aside the underlying xenophobic implications of this homogenizing discourse, one can find evidence of a partialist ethics operationalized in the discourse of policymakers defending Bill C-11. Membership to the Canadian community should be guided by the priorities of current members, and social services should serve the needs of those same members, they argued. Irregular migrants did not join the political community on terms agreed by the membership, and therefore moral obligations to them were limited. Indeed, on this view, the continued presence of irregular migrants in Canada actively harmed the interests of legally-resident Canadians, thus Canada was morally justified in removing them.

A partialist normative approach is also evident in other aspects of discourse put forward during the course of the debate of Bill C-11. For instance, policymakers that were supportive of Bill C-11 made a claim that jettisons equal treatment for irregular migrants under the Canadian Charter of Rights and Freedoms. This position was best summed up in a concise remark made by Conservative MP Inky Mark: "Foreign nationals without status should not be under the protection of the Charter […]" (HC Bill C-11 Deb 26 February 2001, 1550). This viewpoint was further developed in a remark by the Canadian Alliance MP Randy White:

> The charter of rights and privileges [sic] must be revisited. […] Charter rights and freedoms shouldn't be for everyone upon first arrival. Individuals coming into the country should have certain rights and privileges but not the same rights, privileges and freedoms as Canadians. Society has taken the charter of rights much too far today.
>
> (HC Bill C-11 Deb 27 February 2001, 1250)

Proponents of this view argued that rights and entitlements that accompanied legal status in Canada should be earned over time and after meeting set criteria established by the host community. These entitlements accrued to individuals because they had been accepted into the community, not because they were human, needful and present.

The Canadian Charter of Rights and Freedoms takes its inspiration from the 1948 Universal Declaration of Human rights and is intended to guarantee equality of treatment to all *Canadians* under the law. While irregular migrants do not qualify as Canadians in this narrow sense, they do have established rights under the Charter, such as the right to fundamental justice (Section 7) and, somewhat confusingly for the Canadian courts, a right to individual equality before the law "without discrimination based on race, national or ethnic origin […]" (Charter 1982, Section 15).

The interpretation of the rights of irregular migrants in Canada under the Charter is an evolving process. It is noteworthy, however, that the Canadian Supreme Court has lent weight to the differentiated treatment advocated by the supporters of Bill C-11.[81] As Crépeau and Nakache point out, while there is still room for the law to evolve, in the present context it "is characterized by an emphasis on security and a narrower reading of the rights and interests of noncitizens" (2006, p. 12).[82]

The discursive construction of irregular migrants in Bill C-11 suggested (a) that this group was monolithic (ie they were lawbreakers and should all be subject to similar punitive treatment); (b) that this group was notable for undermining the rule of law in Canada; and (c) that this group was unlike prior generations of hard-working immigrants that sought to make contributions to Canadian society, and therefore, irregular migrants were undeserving of status in Canada along with the rights and entitlements that status would bring.

The broad framing of irregular migrants during the debate of Bill C-11 is significant—it spoke to the place of IRCs and their families in Canada if they too, were

[81] See *Canada v Chiarelli* (1992), which is a leading Canadian Supreme Court case addressing deportation, which served to establish that irregular migrants do not have an unqualified right to remain in Canada.

[82] In the 2001 report of the Standing Senate Committee on Human Rights, *Promises to keep: implementing Canada's human rights obligations*, the Standing Committee observed that the Canadian Charter of Rights and Freedoms exceeded Canada's commitments to international human rights norms in some instances, but fell short in others. The growing attitude in Canada, argued the Senate Committee, was to leave interpretation of rights and their protection to the courts and not to policymakers (SCHR 2001).

without a regularized status. IRCs were specifically impacted because (a) the irregular migrants referred to by policymakers are the parents and guardians of IRCs, and the treatment of these migrants impacts family stability and unity; (b) it set a national tone on approaches to irregular migrants which reflected negatively on both adults and children with irregular status in Canada; and finally, (c) the policies put in place guided the actions of the Canadian Border Services Agency (CBSA), who exercise discretionary control over the freedom of all irregular migrants in Canada (ie because they have the power to detain and deport them).

Bill C-11 was also relevant to the schooling of IRCs in more direct ways; indeed, the bill addressed schooling specifically in Clause 30. Clause 30 did not receive sustained attention in either the debate in the House of Commons or in the Senate. However, it is not surprising that schooling did not receive more attention from policymakers debating this bill since, as already pointed out, education policy is not a federal competency, but a matter of provincial policymaking authority. Liberal MP Mark Assad pointed this out to other MPs, noting, “We know that education for young people is under provincial jurisdiction. It’s easy to say in the bill that they can go to school, but at the end of the day that is not up to us to decide” (HC CIMM Bill C-11 15 May 2001, 1655). Nevertheless, for the reasons mentioned above, the discourse of federal policymakers is germane to this research project. Policymakers reckoned with the implications of Clause 30 in the meetings of the House of Commons Standing Committee on Citizenship and Immigration (CIMM) when witness testimony was presented to CIMM members on the draft bill and its consequences for irregular migrant populations in Canada.

It is notable that Members of Parliament that participated in the debate of Bill C-11 were largely unware that access to public schooling constituted a challenge for children with irregular status in Canada. Bloc Quebecois MP Dalphond-Guiral remarked: “Were you in fact serious when you said that some children are deprived of the right to attend primary and secondary school because their parents are in limbo?

If that's true, then I'm flabbergasted and surely I'm not alone in feeling this way" (HC CIMM Bill C-11 1 May 2001, 935).

These remarks were made following witness testimony at the CIMM on the implications of Clause 30 of Bill C-11. This clause addressed access to schooling more directly than any other provision in Bill C-11. Specifically, it addressed *work and study in Canada* for permanent and temporary residents. The Liberal federal government aimed to achieve one goal with Clause 30 (2): restricting access to public schooling to children "other than those of a temporary resident not authorized to work or study." According to the Liberal Government, individuals on tourist visas were abusing Canada's public education system. These individuals were accused of seeking to take advantage of the public education system in Canada by arriving on tourist visas and enrolling in Canadian schools without paying international schooling fees. "My concern is that it [Bill C-11] not allow people who want their children to be educated in Canada to be able to come to Canada as a visitor so that their children can take advantage of the public education system" stated Liberal MP Anita Neville (HC CIMM Bill C-11 15 May 2001, 1655).

Clause 30 (2) aimed to bar pure tourists from enrolling in Canadian schools. It addressed two problems: a normative problem (designating those who should be entitled to schooling services in Canada) and a resource problem (policymakers believed that the accommodation of children into the public schooling system would entail significant costs for local school boards). Discussion of costs—that is, who should pay for the education of IRCs—brought to the fore differences of opinion regarding responsibilities for the welfare of IRCs. Sub-state authorities argued that the federal government's involvement in establishing rules of entry, and now rules of eligibility for schooling, was imposing obligations on sub-state authorities, yet federal authorities would not meet the costs associated with the legislation proposed. Federal authorities, for their part, suggested that sub-state authorities were foremost concerned with income generation and balanced budgets, not the principle of

education *per se*. The Chair of the CIMM, Liberal MP Joe Fontana, addressed the issue of resources and responsibility-sharing, noting: "[…] the boards of education couldn't care less about human rights, in my opinion. They want to know who's going to pay for the education of the child. […] It comes down to the question of money. Everybody needs to know who is going to pay. That's the problem" (HC CIMM Bill C-11 19 February 2002, 1145).

Provincial and municipal authorities argued that those responsible for the costs of schooling IRCs were federal authorities, given that they were responsible for legislation which designated some individuals as admissible and others as non-admissible to Canada (see Section 4.1, 4.3 and 4.4). Federal authorities were sensitive to the financial burdens imposed on municipal and provincial authorities through the change of immigration legislation but made no additional provisions available to meet those costs. Indeed, the *burden* on sub-state authorities was a justification federal policymakers put forward to keep access to Canadian schools carefully circumscribed.

Most of the debate on Clause 30 took place in the CIMM, a standing committee of the House of Commons whose members include representatives from the political parties represented in the Parliament of Canada. As it is a subset of the House of Commons, the views shared in this Committee cannot be said to be representative of all policymakers at the federal level. It is because the CIMM engaged in a clause-by-clause analysis of Bill C-11 that one encounters a discussion on the right to schooling for IRCs. It is notable that this discussion took place against the backdrop of the discussions of federal policymakers on new immigration legislation that sought to enforce measures to exclude irregular migrants from Canada. Paradoxically, the CIMM took a much more inclusive view of the IRC's right to schooling. Once the debate of schooling access for IRCs began in the CIMM, a cross-party consensus quickly emerged amongst the members of the Committee; "essentially, the committee wants to make sure that any child who is here does get to go to school" noted the Chair of the CIMM, Liberal MP Joe Fontana (HC CIMM Bill C-11 15 May 2001, 1650). Of

foremost concern for policymakers reviewing Bill C-11 in the CIMM was ensuring that Canada met the normative standards set out by international conventions to which Canada was a signatory, such as the Convention on the Rights of the Child. This would be achieved by ensuring that children *resident* in Canada (ie not tourists) could access public education. New Democratic Party MP Judy Wasylycia-Leis observed: "In this case we have to be worried about meeting our obligations under the conventions and ensuring that children of parents who are here under those provisions are not denied access to education" (HC CIMM Bill C-11 15 May 2001, 1655). MP Joe Fontana added that the Committee was obliged to "make sure the best interests of the children are in fact served […] the best interests of children are best served by them being in school" (Fontana HC CIMM Bill C-11 19 February 2002, 1200). So, while in federal parliament there was an overarching discourse which framed irregular migrants as unworthy of the social protections and benefits that Canada offered its legally-resident population, there was nevertheless consensus amongst a cross-party group of parliamentarians that *all children* should be entitled to access public education. The primary justification cited for this accommodation was a rights-centred justification, namely, that policymakers needed to heed the human rights instruments applicable to these children and which Canada had accepted through the ratification of relevant international legal instruments. This was offered as a statement of fact without much engagement with its underlying principles—the justification rested on the idea that Canada had bound itself to an international convention and should therefore respect this commitment.

To ensure that implementation of Bill C-11 adhered to these obligations, the CIMM issued two recommendations to the Liberal Government after their review of the draft legislation—as follows:

> RECOMMENDATION 67
>
> To avoid a chilling effect on children's access to education, the regulations should include provisions to clarify for school authorities the intent of the Act regarding the education of minor children.

RECOMMENDATION 68

Citizenship and Immigration Canada should develop clear procedures for school authorities to follow so that all minor children who are eligible may be enrolled in school. These should be communicated to school authorities.

(SCCI 2002, p. 46)

The Liberal Government was to instruct school authorities and immigration officials that the purpose of Clause 30 (2) was to prevent tourists from accessing public education, but *not* to limit access to all other children with irregular status.

Clause 30 (2) had the practical effect of denying education to a number of migrant children whose parents were in administrative limbo (eg parents who had been issued a non-executable removal order, or refugee claimants), as well as children who entered Canada using a travel visa for the purpose of seeking refuge or to establish themselves in Canada for other reasons.[83] In each of these cases, Clause 30 (2) obliged the IRC to divulge their status to school authorities so that they could prove that they *were not a tourist*. Geraldine Sadoway, Staff Lawyer and Supervisor of the Immigration and Refugee Law Group at Parkdale Community Legal Services stated during her witness testimony before the CIMM:

> The exception unfortunately leads to a demand by school authorities for documentation. 'What is your immigration status?' they ask, in order to find out that you're not a bona fide tourist. If you don't think it's happening—and many of you from other parts of the country may not realize that this is a problem—it's a huge problem in Ontario. The school boards in Peel and Mississauga have said they turn away hundreds of children every year because they don't have immigration authorization. The school boards use this [need for authorization from federal authorities to prove they have a claim in process] as a reason to deny entry to schools.
>
> (HC CIMM Bill C-11 19 February 2002, 1055)

Federal policymakers in the early 2000s were divided on the appropriate approach to irregular migrants in Canada. Some argued that their obligations to these migrants were limited owing to the fact that they were present in contravention of immigration rules. However, layered through the debates at the time were various

[83] Refugees could be in administrative limbo because, inter alia, they lacked the necessary documentation to establish an asylum claim.

claims about the motivations of migrants to come to Canada and their incompatibility with Canadian values. An exception was granted for IRCs. Though they too were present *illegally*, it was not as easy to ascribe to them the *dishonest* motivations ascribed to their guardians. What was owed to children—at least those that could establish that they would be present in Canada for a significant period time—was access to education. Canada's international human rights obligations would allow nothing less.

(c) Summary

The discourse of many policymakers supportive of Bill C-11 advanced a pejorative view of irregular migrants in Canada, which facilitated homogenizing descriptions of irregular migrants as *lawbreakers* who were a burden to Canadian society. These individuals were characterized as people motivated to secure maximum advantage for themselves. Their actions (non-compliance with Canadian immigration law) were to the detriment of other needier strangers that Canada would have been willing to accommodate if *their places* had not been taken by *illegal immigrants*.[84] On the basis of this reasoning, some policymakers remained opposed to the idea of a moral association with the resident population of irregular migrants in Canada. They believed that what Canada owed resident irregular migrants was a pathway to exit the country.

This narrative is problematic for its simplicity first and foremost. Discussion of irregular migrants in the context of Bill C-11 reveals a poor understanding of the different sorts of individuals that can find themselves without regularized status in Canada. For instance, the student that has overstayed his visa was hardly discussed,

[84] Numerous references of this kind were made in the House of Commons debate of Bill C-11 on 26-27 February 2001. Take for instance the remark by Canadian Alliance MP Jason Kenney: "[it is] by correcting such injustices and inequities in the system that we can best create an attitude of openness and tolerance toward the many hundreds of thousands of new Canadians who come to this place lawfully and contribute to our prosperity" (HC Bill C-11 Deb 27 February 2001, 1245).

nor for that matter was the possibility of a migrant child arriving on a tourist visa because this was the only means available to the child to access asylum in Canada. As the New Democratic Party pointed out, the Liberal government was focused on "the exceptions to the rule" to make its case for harsher treatment of irregular migrants (Wasylycia-Leis HC Bill C-11 Deb 26 February 2001, 1645). These exceptional cases were used to frame irregular migrants as a risk for disease, crime and welfare profiteering.

Another prevalent aspect of the discourse of policymakers in the debate of Bill C-11 was the emphasis on the self-reliant immigrant: the self-reliant immigrant is able to contribute to the prosperity of the nation and therefore is a welcome immigrant. However, in sharp contrast with the debate in the Ontario Legislature in 1992, there was no sense in the debate of this federal legislation that irregular migrants were part of a shared community; that is, that they should fall within the scope of moral concern of public authorities in Canada. Irregular populations did not form part of a *national constituency*—indeed, for many, they were strangers that should not be given membership to this community. Proponents of Bill C-11 argued that the purpose of the immigration legislation was to facilitate the identification of irregular migrants, document their claims, and if these claims did not meet the threshold of inclusion set by the state, remove them as quickly as possible.

An exception was carved out for IRCs in the debate of Bill C-11. There was no indication whether federal policymakers viewed IRCs as *future members of the community* or co-beneficiaries of the country's successes. There is much evidence to suggest that the majority were disinclined to this view of irregular migrants—certainly the manner in which they described the place of irregular migrants in Canada did not suggest a differentiated set of responsibilities for IRCs. Nevertheless, federal policymakers were concerned with meeting their international obligations and found this to be a sufficiently robust justification for accommodating IRCs in public schools.

4.4. Policy moment 3 (2005)

Bill 194: *The Education Amendment Act*

(a) Context

In May 2005, Ontario's Liberal Minister of Education, Gerard Kennedy, introduced Bill 194 in the Legislative Assembly of Ontario with the aim of amending *The Ontario Education Act*. When Bill 194 was introduced to the Legislative Assembly of Ontario, the relevant legislation applying to children of parents *unlawfully* in Canada (thus applying to IRCs) remained Section 49.1 of *The Ontario Education Act*. Bill 194 had a different purpose; it sought to eliminate schooling fees levied on children of recent immigrants to Canada, more specifically, *children without a permanent right to residency*. This group included children awaiting a decision to be made following a request for permanent residency in Canada in line with the rules of the Immigration and Refugee Protection Act (IRPA). It also included individuals who had been denied refugee status but had requested a review of their application on compassionate grounds. In brief, Bill 194 applied to the children of parents on a student visa in Canada, as well as individuals:

> (iii) claiming refugee protection under the Immigration and Refugee Protection Act (Canada) or having had such protection conferred on him or her;
>
> (d) a person if that person is awaiting determination of an application for permanent residence in Canada under the Immigration and Refugee Protection Act (Canada) or an application for Canadian citizenship and his or her parent or someone else with lawful custody of him is a Canadian citizen resident in Ontario;
>
> (LAO Bill 194 2005)

Children in these categories found themselves in *administrative limbo* because a definitive decision had yet to be made about their residency status and they were therefore subject to non-resident student fees. These children could access public education, but only at considerable personal cost.

At the time, *The Ontario Education Act* imposed schooling fees for all children with temporary non-resident status in Canada, including those in the above-mentioned categories. In 2005, these fees could reach up to $10,000 per year (per child). For many families, these fees represented a significant barrier to the education of their children. In the words of Education Minister Kennedy, Bill 194 aimed to "unlock our school doors for children of recent immigrants" by removing these fees (LAO Bill 194 Deb 4 May 2005, 1350).

At first glance, Bill 194 does not appear to be especially relevant to the issue of schooling access for IRCs. Bill 194 dealt with children that *were visible* to immigration authorities—their presence was known to immigration authorities and they were assigned a status in Canada, even if this status was temporary and precarious. However, it was fairly common for children (and their families) to transition from temporary status to irregular status—this is why temporary status is frequently described as a *precarious status*. For instance, children who remained in Canada following a negative decision in a refugee application process would become *irregular*. It was because of this pathway from temporary status to irregularity that policymakers considering Bill 194 also found themselves discussing the schooling entitlements of IRCs in Ontario. The fact that this legislation would provide education to children who *could become irregular* was an important consideration for provincial policymakers.

To be sure, the debate that took place in 2005 in connection with Bill 194 addressed key aspects of the policy issue considered in this research; namely, which children should be considered beneficiaries of public education in Ontario and on what grounds access to schooling should be provided to this population of children.

(b) Justifications in practice

The Liberal Party of Ontario offered several justifications for broadening access to schooling for immigrant children in 2005. The principal justification put forward is similar to the justification offered by the Party in 1992 in the context of the

parliamentary debate of Bill 24. Recall that in 1992, MPP Caplan's justification for granting IRCs access to public schooling was that IRCs were *already* part of the provincial community (*our children*) *and* were essential to the province's future economic success—IRCs were thought of as *co-beneficiaries* of the province's success. In 2005, Minister Kennedy made a similar claim: education should be provided to immigrant children in *administrative limbo* because the majority of these children would become future Canadians.[85] Minister Kennedy opened the debate of Bill 194 by emphasising this point and continued to promote this view until the bill was passed in June 2005. During the third reading of the bill, the Minister of Education stressed this key message one final time: "They're here, they're in this country, and we're told by the most reliable data we have that in 85% or 90% of cases they're eventually going to become citizens" (LAO Bill 194 Deb 18 May 2005, 1850).

The link between the education of IRCs and a strong provincial economy buttressed by an educated and competitive workforce was not lost in the period between 1992 and 2005. This justification was key to defending province-wide access to education for IRCs in 1992. It remained a compelling strategy for Liberals in 2005. Several members of the Liberal caucus rehearsed this argument in the debate of Bill 194, including Liberal MPP Kathleen Wynne during the second reading of Bill 194:

> We need to give our children an Ontario education advantage so they can develop the skills they need to get good jobs and enjoy life to the fullest. And our province needs an Ontario education advantage too. We need a workforce of the future, one that attracts investment and supports a strong, prosperous economy.
>
> (LAO Bill 194 Deb 10 May 2005, 1550)

Even when defending the legislation from critics, the strongest argument presented by Liberal MPPs was not a rights-based argument—for instance, underscoring the child's right to education under international law—but rather an

[85] What is clear from the debate of this bill is that the emphasis is less on the notion of citizenship, but instead the idea of a shared community in the future. Citizenship is one means of accessing that community, so too is permanent residency. The key normative idea is that IRCs would be future members of the provincial community.

instrumentalist argument—the Liberal Party favoured a change to the *Ontario Education Act* because it was concerned about the resilience of Ontario's future workforce:[86]

> For me this issue is one where we don't have any choice. These children must be in our schools. If we are going to have a skilled workforce, if these children, whose families are planning to stay in Ontario, are going to have successful lives as citizens of this province, then we've got to get those kids into school so that they can become acclimatized to the province and can get the academic skills they need.
>
> (LAO Bill 194 Deb 10 May 2005, 1620)

The portion of children that were likely *not* to become Canadians—the other 10-15 percent, according the Liberal Education Minister—were rarely discussed by Liberal policymakers. The discourse of Liberal Party members points to a concerted effort to convince other policymakers in the legislature that Bill 194 primarily addressed the province's obligations to *future Canadians* who found themselves temporarily in an "educational grey zone" (Kennedy LAO Bill 194 Deb 18 May 2005, 1800). Many MPPs in the Legislature accepted this view. Indeed, they argued this very point, namely, that children who would benefit from this bill stood a good chance of becoming Canadian citizens and they should therefore be provided with access to free public education: "We want them to have every advantage our education system can provide so they can be valuable contributors to our civilized society in turn" (Sandals LAO Bill 194 Deb 10 May 2005, 1610).

---

[86] In a November 2010 debate in the Legislative Assembly of Ontario, the Liberal MPP Yasir Naqvi offered a detailed account of the Liberal view of immigration and its impact on economic growth. MPP Naqvi stated: "[…] another very important reason that we have such an open immigration policy in this country, another important reason that we welcome immigrants to Canada, to Ontario, is because we need them. It is important for our economic longevity. It is important for our economic prosperity. It is something which is a necessity for us, because we do have an aging population; we do have a situation where—and I think we've debated this in this House—we are not producing enough babies to sustain our population. So we have a significant demographic challenge that we need to address. If we take immigration out, our demographic line is this way: It's going down. By bringing people in, what we're doing is barely keeping the line straight. That is a big reason why we need immigrants coming to Canada and to Ontario: to ensure that we can continue to grow an extremely viable economy in Canada and particularly in Ontario. Something we need essentially is to maintain the quality of life we enjoy so much" (Naqvi LOA Deb 24 November 2010, 940).

The Minister of Education, like many of his Liberal colleagues, argued that every child must be able to attend school and make the most of their future, but that future was a distinctly *Canadian* future. Minister Kennedy stated: "It is our firm belief that many of these students […] will end up being Canadian citizens, making it even more important that we provide them now with the opportunity to get a good education" (LAO Bill 194 Deb 4 May 2005, 1350). Moreover, the future ahead of these children, according to Liberal policymakers, was one in which they occupied a productive role in *Canadian* society.

The ruling Liberal government also argued that the continued imposition of a schooling fee on children with temporary status was a legacy of a Conservative government that refused to invest in public education. Having just succeeded the Conservative Party, the Liberal government sought to make the point that it was taking a more inclusive approach to public education in the province. In doing so, the Liberal government was also ensuring that much-needed immigration to the province would not be stymied by a negative global perception of Ontario, ie a province unwelcoming of new immigrants. The Minister of Education stated: "We see that fixing this long-standing anomaly is sending a signal that Ontario is still a place where people want to be. I think this province is defined by successive waves of immigrants coming here, hoping to better themselves and certainly their children […]" (LAO Bill 194 Deb 10 May 2005, 1500). And later the Liberal MPP Shafiq Qaadri added: "I would like to, with your permission, stress a far more important aspect of this legislation: the message that it sends to hardworking immigrant families who are fast becoming the backbone of this province" (LAO Bill 194 Deb 10 May 2005, 1600).

Thus, Bill 194 sought to address multiple problems at once—it was not solely addressing a barrier to public education for children in the province, but also the political and economic ramifications of barriers to public schooling as perceived by prospective future immigrants.

What emerged from the discourse of Liberal policymakers was a serious concern about the province's relationship with *future community members*. The discourse of policymakers from the Liberal Party suggests that significant value was placed on the *social membership* of immigrants. This is an inclusive view of the provincial community that is based on the idea that long-term residents are owed the same social welfare benefits as Canadians, since the distinction between these groups is negligible over time. It is also a viewpoint that acknowledges the capacity of asylum-seeking children and other immigrant children to make contributions to the province soon after arrival, but also over the long-term. The Liberal Party relied overwhelmingly on this normative understanding of membership to justify broader access to public schooling. However, this does not mean that the Party representatives discarded rights-based justifications. Discourse analysis suggests that this normative idea (the right to education) also played a part in the strategy of Liberal policymakers.

At certain moments, Liberal MPPs adopted rights-based arguments to justify broader schooling entitlements, for example, referencing *the right of every child to education*. The Minster of Education frequently made statements that underscored such a right; for example, referencing the "right to go to school" (LAO Bill 194 Deb 18 May 2005, 1850). In the words of MPP Wynne, "This [Liberal] government firmly believes that every child has the right to learn" (LAO Bill 194 Deb 1 May 2005, 1520). However, nearly every reference to *education rights* was qualified. Rights-based arguments were rarely presented as stand-alone justifications for broadening access to schooling. They were frequently accompanied by other forms of justification that leveraged positions of *common appeal*, such as economic growth and resilience. This is illustrated most clearly in a remark made by Minister Kennedy, when he reframed the right to public schooling as a *reciprocal benefit*: "They shouldn't start behind the eight ball; there's no need for it. We can accommodate this. This is not about extending any particular benefits; this is a reciprocal benefit" (LAO Bill 194 Deb 18 May 2005, 1850).

The rights-based justification was also frequently marshalled to argue against critics of the legislation who suggested that providing education to *foreign nationals* was an unfair financial burden for the host community. Liberals adopted a discursive strategy that linked their position to *broad public support*—a strategy frequently used to legitimize political argument in immigration debates. In this case, the argument made by the Liberal Party was that *all Ontarians* would agree that education was a fundamental right for all children in the province. Minister Kennedy stated: "I think it epitomizes the overall outlook that a lot of Ontarians share—in fact maybe all Ontarians at this point—around the purposes of education in the first place. Education in Ontario is a privilege, but it's also a right" (LAO Bill 194 Deb 18 May 2005, 1845). This statement is notable because it suggests that two principles were fundamental to members of the provincial community; for some, it was the fact that public education was a privilege extended by the host community; while for others, it was the fact that education was a right of the immigrant child. Education was not an entitlement that could be distributed in an unrestricted fashion; this distribution carried some limits, hence the reference to *privilege*. One is not owed privileges as a matter of justice; privileges are extended out of a sense of deservingness or beneficence.

The main anchoring theme put forward by the Liberal Party in the debate of Bill 194 stood in direct contrast to the theme put forward by critics of the bill. These critics focused on the fact that some of the children concerned by Bill 194 *would not* be future members of the community and their education was therefore an unfair burden on tax-payers and would negatively impact the education of legally resident children in the community. This viewpoint had implications for what was thought to be owed to foreign children with temporary or irregular status in Ontario.

There was good reason to believe that a significant portion of children concerned by this legislation would end up with an irregular status in Canada. Acceptance rates for asylum claimants hovered around 50 percent in 2005, which suggested to critics of the bill that a significant number of children would end up benefitting from public

education in Canada *unjustly*. The benefit was considered unjust because a sizeable portion of the concerned children were unlikely to become permanent residents or *future Canadians*.[87] On this view, public education for children with temporary or irregular status was not a problem *per se*; the problem was the absence of a return on investment. New Democratic Party MPP Michael Prue asserted: "you have to know that if there are 40,000 or 50,000 claims made a year, at least 20,000 to 25,000 of those will not bear out in the end […] you have a lot of people staying here for what I would suggest is a long period of time without status and for whom this government is going to, under this bill, pay for schooling" (LAO Bill 194 Deb 10 May 2005, 1740).

The intervention by MPP Prue signalled a turning point in the debate of Bill 194. His intervention reframed the anchoring topic of the debate which, from that moment onward, focused on the benefits that would accrue to a population of children that lacked permanence in Canada. MPP Prue pointed out that the proposed legislation would affect more categories of children than those referenced by the Liberal Minister of Education. He suggested that MPPs had misunderstood the bill, the scope of its applicability, and its likely consequences:

> If you read the body of the bill, what is being said is not what is contained within the body of your legislation. There are costs involved […] and the government is going to have to estimate how many children who are not included in the program now are going to be included in the future. This same government is going to have to say whether that money is going to be taken from existing programs, to the detriment of the students who are in the school system now, or whether they have money to be added to the system to accommodate these children who need the education.
>
> (LAO Bill 194 Deb 10 May 2005, 1610).

Resistance to the bill became more acute once policymakers were seized with the bill's broader implications, ie that the population concerned included a number of children who would transition from a legal status to an irregular status.

---

[87] Key to this argument are statistics about refused asylum seekers in Canada and, linked to this, the number of refused asylum seekers that are actually removed from Canadian territory. The figures marshaled by MPP Prue suggested that a great deal of refused asylum seekers would remain in Canada and would have benefitted from public education *at the expense of Canadian children*.

Recall that the bill allowed children to access free public schooling while their parents were awaiting determination to be made for permanent residency in Canada pursuant to IRPA. Critics of the bill asserted that they were against the education of *foreign nationals* given that it would likely come at the cost of providing adequate education for Canadian children:

> I do not want this government, however, to take the money and spend it on this bill to the detriment of what you are already doing. If there is a finite amount of money, and I would acknowledge that in government there is a finite amount of money, then continue to do what you're doing.
>
> (Prue Bill 194 Deb 10 May 2005, 1750)

Such statements provide an insight into the way some provincial policymakers viewed the intended beneficiaries of public schooling in Ontario. One prevalent view amongst critics of the bill was that public education was not meant to benefit *unknown children*, *strangers* or *bogus asylum seekers*, nor children who would one day leave the province. The purpose of public education was linked to the long-term vitality of the community, and therefore access needed to be allocated with a sense of priority in mind.

Critics of the bill in the New Democratic Party fixate on the idea of profiteering—a concern also expressed by public authorities at the federal level:

> The process [refugee determination] generally takes from one to two years because the backlogs are so enormous. […] If this is running at $8,000 to $10,000 a year per child, as the government's own estimates state, there are quite literally thousands of such children who may become available under this plan or *who may be brought to Canada or to Ontario to take advantage of this plan*, and the costs will not be insignificant. [emphasis added]
>
> (Prue LAO Bill 194 Deb 10 May 2005, 1740)

On this view, *bogus asylum seekers* would be able to profit from a free education with no intention of making a contribution to the province or the country: "I, for one, have to question whether it is within all of our hearts to allow not only a bogus refugee claim to be made that we know is blatantly false and has no chance of success, but also to spend taxpayers' money to encourage it" (Prue Bill 194 Deb 10 May 2005, 1740). Critics argued that the limited resources reserved for education should serve

the needs of community members; access to public schooling should not be unrestricted.

MPP Prue did allow the possibility that schooling be extended to children of persons in administrative limbo; he recognized that, in principle, children had a right to education. However, he suggested this should only be done if money was left-over after attending to the needs of *vulnerable Canadians*: "If there is money left over—and if this government has money left over, I'm suggesting it is a worthwhile expenditure—then you have to look, as you are doing in this bill, to help foreign nationals who happen to be in Canada" (LAO Bill 194 Deb 10 May 2005, 1730). Statements such as this reinforced the view that public education was not a fundamental entitlement of *all children*, but a privilege which host communities had discretion in extending according to their priorities. The cost of extending this social entitlement was weighed against other priorities that mattered to the host community, including the welfare of those that were legally resident. MPP Prue claimed that he was channelling the electorate when he stated that it could be permissible for IRCs to go to school, but not at the expense of Canadian children:

> I want to state that the people I represent and most of the people who have talked to me about immigration over the years want to make sure that it does not come at a cost to their own children or to their own school system. […] I would suggest that if they were to see that the money that they think is owed to them and to their children was taken away and given to others, it may cause some difficulty.
>
> (LAO Bill 194 Deb 10 May 2005, 1740)

Indeed, MPP Prue framed the schooling of IRCs as a breach of the responsibility owed by public authorities in the Province of Ontario to *Canadian children* and other vulnerable Canadians in need. The idea of prioritizing the needs of vulnerable community members over the needs of *foreign nationals* is in keeping with a partialist normative approach to social welfare entitlements. It suggests that the moral obligation to assist the necessitous foreigner is a general moral obligation. Such obligations are not, for example, as demanding as the obligations that citizens have to one another.

The former is more akin to charity, and given that one cannot be compelled to direct charitable action to any specific cause or individual, the obligation to provide schooling services to *foreign children* is somewhat diminished.

During the third and final reading of the bill, the Minister of Education attempted to justify the merits of the legislation on different grounds: he flipped the argument just discussed on its head—namely, the need to balance the interests of *vulnerable children in the community* with the needs of foreign children. Minister Kennedy spoke at length about other disadvantaged children in the Ontario education system that had historically *fallen between the cracks*, such as those with disabilities. Minister Kennedy asserted that the province's treatment of these individuals in the past was unjust because policymakers either deliberately, or by omission, failed to promulgate education laws that would have permitted those with disabilities to flourish. Referring to one case in particular, as an indicative example of the wider problem, the Education Minister stated:

> I can tell you that he never got a chance to access his potential because of the attitudes of those days. He did a tremendous amount for himself, but it wasn't recognized in the school system. What we decided to do for this broader range of children [disabled] is nothing less than extend citizenship to them. We are saying, "You matter, you count," and even underneath that we're saying, "You can look after yourself to the greatest degree possible." It's a smart thing to extend that citizenship to those classes of children.
>
> (Bill 194 Deb 18 May 2005, 1850)

The children concerned by Bill 194 were framed as an equivalent case: children with temporary status had potential and must be given the resources and the opportunities to maximise their potential. The Minister of Education tried to resituate the children affected by Bill 194 as children who deserved equal moral concern from provincial policymakers, not unlike the concern shown for children with disabilities in the Ontario schooling system (in spite of the costs involved). In the words of MP Wynne, "This is not either/or" (Bill 194 Deb 10 May 2005, 1720). The extension of *citizenship* was meant to capture a normative conception of inclusivity: by accommodating these

children in public schools, the province would be offering practical inclusion to the provincial community.

Minister Kennedy's argument suggests that provincial authorities had a special responsibility for children resident in the province, irrespective of their immigration status. On this view, the province's responsibility for securing education for children in Ontario was distinct from the responsibilities of federal authorities. That is to say, notions of responsibility for IRCs had a jurisdictional dimension. The Progressive Conservative MPP Toby Barret observed: "As a result of the government not acting on this immediately, children awaiting landed immigrant status were prevented from attending a school and receiving the kind of education *that we do wish them to receive*" [emphasis added] (Bill 194 Deb 18 May 2005, 1720).

The differentiated responsibility articulated by MPPs was most apparent when policymakers discussed funding for the education of children concerned by Bill 194. Just as in 1992, some policymakers argued that federal authorities should assume responsibility for the cost of educating IRCs. The problem of IRCs, these provincial policymakers argued, was one that resulted from legislation put in place by the federal government (immigration policy), and therefore, it was the responsibility of federal authorities to address the social welfare needs of IRCs (not the province). The Conservative MPP Jim Flaherty remarked:

> The other point that needs to be made: This costs $8,000 to $10,000 per year per student. This cost should be borne by the federal government, not by the people of the province of Ontario. The federal government is responsible for immigration. I don't know why this Liberal government can't work that out with that other Liberal government. I hope they do so soon, so we'll stop putting all these burdens on the overburdened taxpayers of Ontario.
>
> (LAO Bill 194 Deb 4 May 2005, 1400)

Not all policymakers shared this notion of responsibility. Among others, the Liberal MPP Donna Cansfield pointed out that arguments put forward by the Conservative Party—which charged federal authorities with furthering the welfare of children in Ontario—were tantamount to describing the education of children of recent

immigrants as *a burden* to the people of Ontario: "Educating a child is a burden? I don't think so. […] The real cost is leaving these children in the dark and leaving them behind […]" (LAO Bill 194 Deb 10 May 2005, 1500). MPP Cansfield's intervention furthered the view of responsibility articulated by Minister Kennedy. Her argument was that the Province of Ontario bore responsibility for the education of IRCs and children with unresolved visa applications and this *irrespective* of federal immigration policy. Children in limbo and with irregular status fell within the scope of the province's moral concern.

Minister Kennedy went further and asserted that the province had a *special responsibility* to address the difficult conditions that marked the lives of these children because of federal immigration legislation—the province "has a responsibility to remove barriers that leave children in administrative limbo regardless of their parents' immigration status"; this is "our mission and our moral purpose", argued Minister Kennedy (LAO Bill 194 Deb 4 May 2005, 1350). The Liberal MP Michael Cole added emphasis to this position by highlighting that the bill was not seeking to educate strangers or foreigners, but that it was a bill "for the benefit of all our constituents" (LAO Bill 194 Deb 18 May 2005, 1910). The notion of *special responsibility* echoes a normative idea expressed by provincial policymakers in the context of the debate of Bill 24 in 1992: it is the idea that provincial policymakers have the capacity, and indeed the responsibility, to address the needs of vulnerable minors even when provincial authorities had no part to play in generating the conditions of vulnerability. In 1992, reference was made to the sins of parents who made poor choices for their children—the province had a responsibility to step in and advance the best interests of those children where others seemingly failed to do so.[88] In 2005, it is not the sins of the parent that give rise to a special responsibility on the part of the province, but the

[88] This is not to suggest that parents did not have the best interests of their children in mind, merely that policymakers framed irregularity this way in the context of IRCs.

actions of federal authorities responsible for establishing policy regimes that define who is legal and illegal in the Province of Ontario.

(c) Summary

Bill 194 went through three readings in the Ontario Legislature in May 2005. They key arguments are captured in the debates that took place on 10 May 2005 and 18 May 2005, during the second and third readings of the bill. Bill 194 received Royal Assent on 13 June 2005 and in addition to repealing several sections of *The Ontario Education Act*, the bill also introduced provisions that prohibited Ontario school boards from levying fees on children with temporary immigration status.

Bill 194 addressed the schooling needs of children *temporarily* in Canada or in administrative (immigration) limbo, not children *unlawfully in Canada*. However, the debate of Bill 194 broadened very quickly to focus on the wider applicability of the proposed legislation to a variety of categories of children, including IRCs. The Liberal Party of Canada defended the legislation by arguing that the legislative initiative (a) corrected many years of negligence by the opposition party (the Progressive Conservative Party);[89] (b) protected children who were kept vulnerable through exclusion from public schooling; (c) ensured the long-term economic dynamism of the province; and, (d) communicated a message of welcome to prospective immigrants to Ontario, ie that the province was a welcoming place to build a new life.

The bill also did much to highlight the close relationship between children with temporary status in Canada and IRCs. The population of IRCs was and continues to be, according to the best estimates, fairly small in Canada and thus the cost of their public education was not very significant. However, there was a much larger population of children in Canada that were present with a precarious immigration status and who were at constant risk of falling into a situation of irregularity. Bill 194 underscored the

[89] The Progressive Conservative Party led the Province of Ontario from 1995 through 2003.

impermanence of immigration status in Canada and the risks associated with temporary status both for the child and the host community.

There were several key normative themes that emerged in the debate of Bill 194. The first widely shared argument put forward by critics of the legislation was that the education of foreign children was an unfair burden on the citizens of Ontario, and most especially legally resident children who were at risk of an ever-diminishing quality of education owing to the absorption of foreign nationals in the public education system. In an era of finite resources, some policymakers argued, the obligation to *foreign national children* was limited to a distribution of those resources available once legally resident children were cared for. This was, in part, because public education was perceived to be a reciprocal benefit—it was meant to benefit the child and the society where they would make a life. Education was not a public good made available unconditionally to whomsoever was present in the province. Given the likelihood that a foreign national staying in Canada would make a contribution to Canadian society was slim, critics argued, their claims to education commanded less moral weight.

The Liberal Party was equally concerned—one might even argue, principally concerned—with the long-term economic resilience of the Province of Ontario, and for this reason (among others) it advocated for a more inclusive public education system. At heart, the Liberal Party shared a similar concern with other MPPs about the long-term resilience of the province and the return on investment that public education would generate (the reciprocal benefit). However, Liberals saw this return on investment coming not only from the population of children who would acquire an education, but also a benefit that would derive from prospective immigrant populations establishing themselves in the province. Liberal policymakers offered other normative justifications as well, such as the idea that the province had a special responsibility to vulnerable children that were contending with circumstances they had no part in bringing about.

4.5. Policy moment 4 (2004-2014)

City of Toronto: *Don't Ask, Don't Tell* and *Sanctuary City* policies

(a) Context

The fourth policy moment considered in this case-study focuses on policy developments in the City of Toronto between 2004 and 2014. It complements the analysis in Sections 4.1 through 4.3 by focusing on the way public authorities at the *municipal level* of government have justified the accommodation of IRCs in Canadian public schools. For reasons that will be made clear below, this section also takes into account discourse addressing the broader welfare of irregular migrant adults and children.

This section differs from the three preceding sections in important ways. One notable difference is that this policy moment includes analysis of multiple policy debates over an extended period of time (2004-2014), as opposed to one debate of a single legislative bill, discussed over a comparatively short period of time. Also, whereas analysis in the three previous policy moments focused strictly on the discourse of policymakers during legislative debates, in policy moment four a larger corpus of discourse is taken into account; it includes statements made by NGOs and community organizations, public statements made by government and school board authorities, witness testimony before government committees, debates of specific motions by Toronto City Councillors, as well as personal accounts provided by participants in consultative meetings conducted in the City of Toronto in 2014. It is because of the interaction between civil society and policymakers—which proves meaningful in the context of policy moment four—that a larger body of discourse is taken into account. This broader corpus of discourse also helps contextualize a movement that lasted a decade.

These elements of discourse are not all treated the same. It is the discourse of public authorities that matters most to the analysis in this case-study because the

purpose of this research is to better understand the normative ideas at play when *public authorities* advanced positions that sought to either include or exclude IRCs from Canadian public schools. In the context of policy moment four, one finds an explicit attempt by civil society actors to influence the discourse of policymakers in the interest of promoting specific normative ideas and policies. These civil society actors encouraged the use of specific terminology in public discourse as well as specific normative framings of irregular migrants and IRCs. The evidence suggests that civil society actors were at least partially successful in their efforts to influence policymakers; therefore, one must also pay attention to the arguments these non-governmental actors made.

The conclusions drawn from the analysis of discourse in policy moment four are *only* based on the discourse of policymakers and other public authorities, in keeping with the methodology outlined for this research.[90] However, the discourse of public authorities is better contextualized by including the positions and views of relevant civil society actors, when available. This allows a more comprehensive account of events between 2004 and 2014 to emerge.

In 2004, civil society groups in Toronto launched the *Access Without Fear* (*AWF*) campaign. The purpose of the AWF campaign was to ensure that irregular migrants could access city services (a) without fear of being reported to federal immigration officials and (b) without fear of removal from Canada. These groups advocated for access to public schooling and a wide range of city services for irregular migrant adults and children (library services, public health services, police services, as well as access to food banks and women's shelters, among others). Hudson et al note:

> Beginning in at least the mid-2000s, community service organizations, activists, professionals (doctors, teachers, lawyers), and migrants mobilized for

[90] The term *public authorities* refers not only to elected officials, but also city officials and other individuals exercising discretionary authority over populations vulnerable to their specific administrative powers—typically, but not always, such individuals will occupy administrative or policy-setting positions (see Section 1.3 (b)). This is the case, for example, of Chris Brillinger, Executive Director for Social Development, Finance and Administration at the Toronto City Council, who is frequently cited in policy moment four.

> analogues to a sanctuary city policy in discrete service areas, such as education, health and policing. Although initial activism was targeted towards separate service areas, we can also see how they were beginning to advocate for city-wide changes.
>
> (2017, p. 7)

While the AWF campaign began as a non-governmental initiative in 2004, it quickly found sponsors and supporters amongst different groups of public authorities, including at different levels of government, as well as at the Toronto District School Board (TDSB).[91] The actions of civil society actors *opened a space* that facilitated debate of irregular migrant welfare in the City of Toronto and their right to access various services within the city, including public schooling.[92] Indeed, shortly after the launch of the AWF campaign there were public expressions of support from city officials in Toronto. For instance, in 2004, the Mayor of Toronto, David Miller expressed the city's support for the objectives of the campaign underscoring the city's approach to irregular migrants: "The general policy in our administration is that, unless legally obliged, city workers do not ask about immigration status" (Amuchastegui 2004).[93]

The AWF campaign provided an overarching framework for a number of policy initiatives in the City of Toronto between 2004 and 2014. During this period, public authorities adopted two specific policies that gave the AWF campaign concrete shape. First, the TDSB passed a *Don't Ask, Don't Tell* (DADT) policy in 2007. The DADT policy re-affirmed the principle articulated in Section 49.1 of *The Ontario Education Act*,

---

[91] It is notable that the 2007 general election platform of the Ontario New Democratic Party was aligned in support of AWF initiatives in Ontario—it committed to: "Advocating that schools adopt "Don't Ask, Don't Tell" policies regarding persons without immigration status" (CoT SCPD 2007).

[92] One community organization played a very prominent role in the AWF campaign: No-One Is Illegal, Toronto (NOII). NOII describes itself as "a group of immigrants, refugees and allies who fight for the rights of all migrants to live with dignity and respect" (NOII n.d.). While NOII played a central role in pressuring the TDSB to adopt the *Don't Ask, Don't Tell* policy, the broader DADT movement involved over forty community organizations (Berinstein et al 2006, p. 10). Other community organizations active in this campaign and in the broader AWF campaign included: the Education Rights Task Force, the Ontario Council of Agencies Serving Immigrants, Parkdale Legal Community Services, the Grassroots Youth Collaborative, as well as unions such as the Canadian Union of Public Employees, the Canadian Auto Workers Union and the Ontario Secondary School Teachers' Federation.

[93] While the Mayor of Toronto suggested it was "general policy", it is important to clarify that no *actual* policy existed at the time this statement was made.

namely, that all children in the Province of Ontario should be able to access public schooling free of charge irrespective of their immigration status. More specifically, the DADT policy instructed teachers and administrators throughout the school board not to ask about a child's immigration status, nor to report the child if it they were found to be in a situation of immigration irregularity.

The DADT policy was an endorsement by local authorities of the claims made by civil society groups behind the AWF movement—the policy was one successful milestone in a decade-long movement. This movement (AWF) found its ultimate expression in the passing of a *sanctuary city* policy by the City of Toronto in February 2013. Toronto City Council voted in favour of motion CD18.5 (*Undocumented workers in Toronto*) with a final tally of 37 votes for the motion and 3 votes against. Following the adoption of motion CD18.5, Toronto City Councillors were credited with establishing Canada's first *sanctuary city* for irregular migrants.[94] Paragraph 1 of the Council's decision CD18.5 stated: "City Council re-affirm[s] its commitment to ensuring access to services without fear to immigrants without full status or without full status documents" (CoT CD18.5 2013). Therefore, both the DADT and eventual sanctuary city policy should be understood as policy by-products of a decade-long campaign to ensure that irregular migrants could access city services without fear in the City of Toronto.

Toronto City Council motion CD18.5 tasked the Executive Director for Social Development, Finance and Administration to, inter alia, conduct a "review of opportunities to improve access without fear" and "provide training for front line staff and managers to ensure that undocumented residents can access services without fear" (CoT CD18.5 2013, par 2 (a) and (c)). These objectives were to be achieved by instructing municipal workers not to ask about an individual's immigration status unless

[94] It should be noted that nowhere in City Council motion 18.5 does one find mention of a *sanctuary city*. This term was introduced by civil society actors to draw the attention of the media to the debate that occurred on 21 February 2013, and was subsequently repeated by the Canadian press (Keung 2013; Calabrese 2014).

a specific legal requirement existed to do so; also, municipal workers were to refrain from reporting an individual's immigration status if it was not explicitly mandated by law. Several *advocacy positions* were also inscribed into this Council motion; they mandated the City of Toronto to communicate to federal and provincial authorities the views of Toronto City Council on issues relating to national immigration policy; specifically:

> (4) City Council request the Federal government to establish a regularization program for undocumented residents, and that a letter be sent to the Government and Opposition parties to this end.
>
> (5) City Council request the Federal government to increase Provincial Nominee Program levels so that the Province can bring in workers with specific skills who have left Canada as undocumented workers with Canadian children, and that they be given priority processing by Canadian Citizenship and Immigration.
>
> (6) City Council request the Provincial government to review its policies for Provincially- funded services for undocumented residents with a view to ensuring access to health care, emergency services, community housing and supports for such residents within a social determinants of the health framework.
>
> (CoT CD18.5 2013)[95]

With this context in mind, it is useful to revisit the objectives of this section of the case-study. This central aim of this section is to capture the different justifications put forward by public authorities—especially, but not only, local public authorities—which are relevant to or which directly address access to schooling for IRCs. This analysis will facilitate a better understanding of how local public authorities view their responsibilities to IRCs; namely, their role in ensuring that the myriad social services required to make life safe and secure for IRCs are provided without prejudice to a child's immigration status. Schooling services figure amongst these services, and where they are discussed, specific attention will be drawn to the positions taken by public authorities.

[95] The City of Toronto issued two letters in March 2013; the first to the Deputy Minister of Citizenship, Immigration and Multiculturalism, and the second to the Deputy Minister of Citizenship and Immigration. As of May 2014, the City of Toronto had not received an official response from either government representative (CoT 2014b).

The approach to discourse analysis in this section might be termed *holistic* in the sense that it considers justifications put forward by public authorities to ensure IRCs have access to a host of critical social services, not just schooling services. The reason for taking a holistic approach is because policymakers expressed their views in a holistic manner; that is, they frequently referenced a basket of social services for irregular migrants when debating policy in the context of the AWF campaign. Public authorities discussed services as a basket of social goods which irregular migrants either *did or did not deserve*. For many public authorities, the provision of social services corresponded to a broader issue of equity in the City of Toronto, and they therefore did not always separate out services. In a 2014 meeting with the Executive Director of Social Development at the City of Toronto, Chris Brillinger, he stated:

> My understanding of my role as Executive Director of Social Development, Finance and Administration is that my work—if I'm true to what I'm supposed to be doing—is about increasing equity in the City. It is about ensuring that social justice considerations are first and foremost in what we're doing.
>
> (2014, pers. comm. 15 July)

Remarks made by Toronto City Councillor Joe Mihevic during the February 2013 debate of motion CD18.5, in which he advocated for greater access to city services for *undocumented persons*, are also instructive. Councillor Mihevic approached this issue in the holistic manner described above:

> We are here to discuss, *as the City of Toronto*, not as immigration officials. As the City of Toronto, how we are going to deal with the 100,000 to 200,000 residents in our community that have no documentation or whose documentation has lapsed or not fully there. How are we going to deal with them? Well, we actually do have a policy. It's never been formalized here at Council but we actually do have a policy. If you go on the TTC, everyone knows that that ride is subsidized by the "tax payer". We don't ask for an immigration status to get on that TTC. When you go to library, if you have an address, you can get a library card. No-one asks you that status. Did you know that if your child, if you're undocumented and you want your child to go to school, no one will ask you your citizenship or your landed immigrant status at the School Board.
>
> (CoT Deb CD18.5 21 February 2013)

When Toronto City Councillors discussed social services for irregular migrants, they were frequently also discussing the conditions of welcome that should or should

not be extended to irregular migrants and IRCs, as well as the well-being of irregular migrant families as a whole. For this reason, the analysis of justifications put forward throughout the period 2004-2014 includes a mixture of specific arguments about schooling access and more general arguments about the welfare of IRCs and their families in the City of Toronto.

(b) Justifications in practice: *Don't Ask, Don't Tell*

It was the detention of school-aged children from Toronto schools that set in motion a country-wide debate on the access IRCs should have to public education in Canada. In 2006, a series of widely publicized immigration *incidents* in the City of Toronto focused national attention on the social welfare of IRCs and their families and the precarious conditions that marked their lives as irregular migrants in Toronto. One of the most widely publicised incidents was the apprehension in April 2006 of two young high school students of Costa Rican nationality, Kimberly and Gerald Lizano-Sossa, by the Canadian Border Services Agency (CBSA).[96] The CBSA entered the premises of two separate schools in order to apprehend the children, as they had failed to appear for a deportation hearing in February 2006. Kimberly and Gerald Lizano-Sossa were held by immigration officials to lure their parents and other family members to meet with the CBSA for immigration enforcement purposes (Jiménez and Alphonso 2006, Sidhu 2008; Koehl 2010). The family was removed from Canada once the parents presented themselves to immigration authorities.[97]

---

[96] These children were not the only children that were targeted by the CBSA in the process of enforcing immigration rules in the City of Toronto. In May 2006, two young children, Lisbeth and Hacel Araya (7 and 14), were also threatened with detention at their school (St Jude Catholic school) if the parents did not report to the school within 30 minutes at the request of the Canadian Border and Services Agency (Jiménez and Alphonso 2006).

[97] The City of Toronto was also the focus of national attention in 2006 because of a separate incident involving irregular migrant workers of Portuguese origin. The Canadian Border and Services Agency had issued removal orders to over twenty Portuguese citizens who had been working in the construction industry without permission (Focus Migration 2007). Portuguese and Hispanic community groups fiercely resisted these deportation orders. This led to a public debate on the idea of an amnesty for *undocumented individuals* in Canada. The Minister of Citizenship and Immigration ruled out an amnesty in October 2006, however debate of the issue opened a space to discuss the rights of other irregular migrants in the City of Toronto. Policymakers at federal, provincial and municipal levels showed sudden intense interest in the

These arrests by the CBSA were met with large community protests, mobilized in support of the Lizano-Sossa family and other IRCs in the City of Toronto. Civil society actors that had been mobilizing since 2004 to bring about better access to services for irregular migrants in the City of Toronto were quick to use this incident to draw national attention to their cause. One community organization was especially prominent during this period: No-One Is Illegal, Toronto (NOII).

NOII rose to prominence in the period immediately prior to the Lizano-Sossa removals. The organization had become known for its work advocating on behalf of irregular women and children in Toronto immigration detention facilities. NOII aimed to sensitize the general public to the plight of irregular migrant detainees, specifically the physical and emotional impact of detention on irregular migrant adults and children (Padgham 2005). From 2004, NOII had been lobbying local public authorities to convince them that irregular migrants should, at minimum, have access to city services without fear of being reported to or apprehended by Canadian immigration authorities. In a 16 July 2014 meeting, S. Hussan, a key NOII organizer, described the origins of the NOII-directed *Access Without Fear* and *Don't Ask, Don't Tell* campaigns thus:

> So, there were 160 women and children in detention in this place, and there is a lot of turnover. So, the question we asked is: what made your life more difficult living as an undocumented person in Toronto. Repeatedly what came up is people saying: "we have fear of accessing services, so we couldn't tell apart who is a transit person, we don't understand who the government is. Who is after us? It is a climate of perpetual fear."
>
> (2014, pers. comm. 16 July).

When the Lizano-Sossa children were detained in May 2006, NOII launched an intense public campaign to draw attention to the difficulties IRCs faced when trying to access Toronto public schools. This action by NOII was, in a sense, a sub-campaign of the AWF movement. S. Hussan recalled the Lizano-Sossa incident thus:

---

conditions of irregular migrants in Canada and in the City of Toronto, in part, because the *Lizano-Sossa apprehension* and the *Portuguese worker incident* took place so close together and drew such widespread media coverage.

> So, we had a meeting with the [Lizano-Sossa] family and some organizers and we decided we would focus on the TDSB [Toronto District School Board]. It's the largest school board in the country. We went to the TDSB and said, "you are turning away students, you are allowing immigration enforcement into your schools, and you need to do something about it."
>
> (2014, pers. comm. 14 July)

NOII was joined by a number of other community organizations, NGOs and unions in their advocacy efforts. These groups sought to force public authorities in federal, provincial and municipal governments, as well as local school boards to take note of the difficulties IRCs were encountering when trying to access public schooling. NOII and their coalition of partners urged public authorities to take action to correct the situation.

TDSB documents and research on the DADT campaign confirm the critical role NOII played in bringing about the DADT policy at the TDSB (TDSB RM 18 April 2007; Nyers 2010; Abji 2013; Fortier 2013).[98] The 18 April 2007 minutes of the TDSB's Program and School Services Committee record the board's decision to consult NOII on the development of a future DADT policy. It was the only organization prominently listed in this way. The minutes read: "[…] when developing the policy and implementation plan, [TDSB] staff consult with relevant organizations such as No One Is Illegal, Toronto" (TDSB RM 18 April 2007). N Sidhu of Social Planning Toronto (SPT)—the author of several reports on access to schooling services by IRCs in Toronto—noted in a 2014 meeting that the SPT's research on access to public education for *non-status immigrants* "came out of the NOII push to get the TDSB to push a Don't Ask, Don't Tell policy in reaction to the apprehension of the students in 2006" (2014, pers. comm. 11 July).[99] Indeed, it is from this moment that the SPT

[98] Craig Fortier observes that, more generally, "the network of No One Is Illegal groups has played a significant role in altering the discursive and political terrain with regard to migration and borders in Canada" (2013, p. 275).

[99] This is also documented in a 2008 research report by Social Planning Toronto on access to public education for non-status immigrants—it states: "TDSB introduced this policy [DADT] following the incidents of April 2006, and in response to the mobilization of community members and activists calling for change, and substantial media attention surrounding the issue" (Sidhu 2008, p. 8).

began conducting research on the accessibility of public schooling by IRCs in Toronto. The SPT's research revealed that non-status immigrant families "experienced denial of enrolment of children and youth in some local schools" (Sidhu 2008, p.1).[100] This points to the existence of problem that had present already in 1992, namely, the lack of a clear, shared understanding amongst school administrators about the obligations and responsibilities vis-à-vis irregular migrant populations. Based on interviews the SPT conducted with irregular migrant families, it concluded "that immigration status came up during the enrolment process" for the majority of respondents (Sidhu 2008, p. 1).

According to NOII organizers, the TDSB was not initially in favour of passing a DADT policy. The NOII organizer Farrah Miranda recalls: "When we first went to the School Board there was a lot of hesitation on the part of the Trustees—many of them were not in favour of passing such a policy. When they saw the overwhelming support, they had no choice" (NOII 2010). Francisco Villegas, a NOII member and then Toronto-based education researcher, participated in meetings of the TDSB when the DADT policy was discussed and concluded that:

> These discussions resulted in a discourse of membership based on a tension between four concerns: legal rights as stipulated by the Ontario Education Act; questions regarding the well-being of children; criminalizing ideas about precarious status migrants; and concerns over the board's potential loss of revenue.
>
> (Villegas 2013, p. 265)

Concerns by the TDSB regarding loss of revenue from international fee-paying students were referenced frequently by federal, provincial and municipal policymakers, suggesting that it was a very serious concern for the TDSB.[101] The views of Education

[100] The Ontario Education Act addresses categories of students that must be charged non-resident tuition fees, and as a result, school boards may insist on knowing details about an individual's residency status (TDSB 2014).

[101] Both federal and provincial policymakers point out that funding streams comprising international student fees were a serious concern for the TDSB—see Sections 4.2, 4.3, and 4.4 in this chapter.

Rights Task Force member Albert Koehl lend weight to this conclusion; he notes that the TDSB:

> […] has sometimes worried more about its ability to identify international fee-paying students than about respecting the education rights of children. […] While a preoccupation with preserving these revenues is understandable, doing so at the expense of the most vulnerable is not.
>
> (Koehl 2007)

Similarly, Bhuyan and Smith-Carrier point out that increasing income from non-resident student fees was a key strategy of the TDSB:

> The levying of international student fees represents a significant funding strategy for both the provincial and municipal governments. The Toronto District School Board policy initiative for 2009–2010 explicitly identified the recruitment of international students as one of their four strategies to ensure financial stability. This initiative aimed to increase enrollment of international students by 150% in 2009, with an anticipated $2 million in tuition revenue.
>
> (2012, p. 212)

In Canada, the TDSB is the school board that receives the highest number of students from other countries (TDSB 2013). Roughly ten percent of the TDSB's funding is derived from tuition fees charged to non-resident pupils (TDSB 2010, p. 99). Table 1, below, gives an indication of the revenue generated from non-resident students between the years 2010 and 2015.

Table 1. Tuition Fee Income Toronto District School Board 2010-2015

	2010-11	2011-12	2012-13	2014-15	% change over five years
Tuition fees	$13,455,289	$16,014,938	$17,465,949	$19,300,000	43.4%

Source: *The 2013-2014 Environmental Scan of the Toronto District School Boa*rd

The preoccupation with international student fees was also confirmed in TDSB policy documents. A TDSB staff report preparing the ground for the DADT policy included the key DADT directive that found its way into the final DADT policy: "Schools

will be instructed not to provide information about a student or his/her family to Immigration authorities, but rather to refer such requests to the Director of Education" (TDSB P.061 SCH 2007). However, the TDSB staff report also suggested that the Board should "retain the right to establish visitor status information […] These children are eligible to attend as visitors upon payment of international student fees" (TDSB PSSC 2007, p. 543). While the TDSB expressed a commitment to an AWF approach to public schooling, they retained the ability to levy admission fees on non-resident students.

In practice, TDSB administrators exercised significant discretion in the enrolment of IRCs. While Sections 49.1 and 49.7 of *The Ontario Education Act* allowed school boards to enrol IRCs in public schools without the imposition of student fees and without documentation, TDSB policy guidance indicated that this accommodation was at the discretion of the school board:[102]

> There are cases in which students living in Canada who request admission to a TDSB school have no documents verifying their legal residency status in Canada. The Board passed a policy in May 2007 that students without immigration status shall be welcomed in our schools and information about them or their families shall not be shared with immigration authorities. *Schools may register the student or may refer these students to the International Students and Admissions Office (ISAO).* [emphasis added]
>
> (TDSB 2014) [103]

TDSB Trustees eventually agreed to pass a DADT policy for its schools—the first such policy at any school board in Canada. On 16 May 2007, the TDSB approved

---

[102] Geraldine Sadoway, Staff Lawyer and Supervisor of the Immigration and Refugee Law Group at Parkdale Community Legal Services, had already drawn attention to the problem of discretionary review by school boards in 2002 when she provided expert testimony to the House of Commons Standing Committee on Citizenship and Immigration on the provisions in Bill C-11. See Section 4.3 (b).

[103] The Canadian Council for Refugees highlights several reasons whey IRCs struggled to access public education in Canada. They note: "In some cases, the problem arises because the law causes schools to ask about the student's or the parent's immigration status. As a result, out-of-status parents may be frightened to register their children. In addition, some refugee claimant children are caught by the provision because they arrive with a visitor visa and are being asked to wait until they are out-of-status before the section applies. In some cases, schools are refusing to admit children of persons without legal status (who should according to the law be authorized to study) on the basis that the children themselves are in Canada on a valid visitor's visa" (CCFR 2004, p. 27).

Policy P.061 SCH—*Students Without Legal Immigration Status* and in so doing made concrete the TDSB's commitment to improving access to Toronto public schools for IRCs. The policy specified that school authorities should not ask about a child's immigration status and should not report their status to immigration officials if it should be discovered that they were in Canada unlawfully. However, as shown above, the policy was not without its flaws. Because the school board retained the ability to charge non-resident fees to children arriving on a visitor's visa, access to public schooling in Toronto was not entirely unfettered. Community legal advisors described being in the "ridiculous situation of having to tell someone to go out of status" in order to access public schooling as an irregular migrant (Sadoway CIMM 19 Feb 2002, 1145).[104] Only in this way could community legal advisors maximize the chances of IRCs accessing public schooling without the imposition of non-resident fees.

It was earlier noted that the key directive in the DADT policy instructed schools not to provide information about a student or his/her family to Canadian immigration authorities. However, the DADT policy did more than this. The policy also highlighted an underlying problem having to do with the way school authorities balanced their professional responsibilities vis-à-vis IRCs with their obligations to other government institutions tasked with enforcing immigration policy. To be sure, the DADT policy aimed to broaden access to classrooms for IRCs, but it also aimed to clarify the obligations school authorities had to IRCs and the limits of their obligation to federal authorities. It is a balancing act made possible by the creation of a firewall between IRCs and Canadian immigration officials.

The philosopher Joseph Carens explains that public authorities normally justify firewall protections on both pragmatic and normative grounds:

---

[104] With the passing of Bill-C11 (IRPA) in 2002 it became increasingly difficult to migrate to Canada to seek asylum protection or to join a family member that was already resident in Canada. Consequently, some individuals resorted to using a visitor's visa to enter Canada and then claimed asylum or remained in an irregular situation once the visa expired. These children could not benefit from the DADT protections while holding a visitor's visa because they were *not yet irregular migrants*.

> The local authorities have taken this approach in part out of a concern for the basic human interests of the migrants themselves and in part out of a concern for the wider public benefits of securing the cooperation of irregular migrants for certain purposes—as, for example, when the police want irregular migrants who have information about a crime to come forward and testify, or when public health officials want to reduce the spread of contagious diseases by getting irregular migrants to participate in vaccination programs. Without this sort of firewall between immigration enforcement and legal rights, irregular migrants enjoy the protection of their basic rights in name only.
>
> (2008, p. 168)[105]

As will be made clear in the next section (4.5 (c)), pragmatic interests certainly did figure in the justifications put forward by public authorities to (a) accommodate IRCs in public schools and (b) protect their identity in the enrolment and education processes. However, statements by TDSB officials and other public authorities indicate that a variety of normative ideas were at play. Four specific normative themes emerge from the statements made by public officials to justify accommodation of IRCs in Toronto schools in the context of the DADT policy: (a) deservingness; (b) innocence; (c) vulnerability; and (d) local responsibility.

During the period 2006 to 2008, the Lizano-Sossa removals were a concern of provincial and federal authorities as well. Indeed, during this period a number of federal and provincial authorities, as well as local authorities, commented on the Lizano-Sossa removals and the broader question of schooling access for IRCs in Ontario and Canada. The Progressive Conservative Minister of Citizenship and Immigration, Monte Solberg, argued that the Lizano-Sossa family wilfully placed themselves ahead of others "who are playing by the rules" and therefore removal from Canada was a warranted outcome" (HC Deb 1 May 2006, 1435). One year later, Ed Komarnicki, Parliamentary Secretary to the Minister of Citizenship and Immigration, added: "This is a serious issue, one involving families and children, but it is not fair to allow some to jump the queue while others who follow the rules have to wait in line. Those who are here [Canada] illegally have violated the values of fairness and respect for the rule of

[105] Joseph Carens has forcefully argued for legal *firewalls* between immigration enforcement and service providers working with irregular migrants (Carens 2010).

law […]" (HC Deb 11 May 2007, 1240). Similarly, in the Ontario Legislature, Progressive Conservative MPP Peter Shurman stated: "Ten thousand kilometres away, families await immigration to Canada who have completed the forms in a legal way, want to come here and obviously they have children who want an education. And the places for those children are being taken by illegals" (Babbage 2008).

These public authorities adopt familiar arguments. One finds the suggestion that the denial of social services is *just deserts* in the case of individuals who flaunt *core Canadian values*, such as respect for the rule of law. It is notable that no distinction was made by these public authorities between irregular migrant adults and children, nor do these public authorities take into account the different impacts denying social services would have on children as opposed to adults. This *law and order* viewpoint emphasized in the positions put forward by some public authorities served to lend moral authority to citizens who would deny welfare services to irregular migrants on grounds that *lawbreakers* were undeserving of social welfare entitlements in Canada.

There was a clear discursive counter-strategy employed by public authorities advocating the inclusion of IRCs in public schools. Liberal MP Andrew Telegdi employed such a strategy, arguing that the CBSA used the Lizano-Sossa children for "ransom" and "bait" against "hardworking parents who are undocumented workers" (HC Deb 1 May 2006, 1430). This was the same strategy of discursive interaction used by Minister Solberg and MPP Shurman; where the latter call upon a shared and broadly held respect for the rule of law in Canada, MP Telegdi called attention to other shared values in Canadian society, namely, *hard work* and *self-reliance.* These qualities were meant to resonate with the Canadian public, which was thought to value a specific image of the productive citizen. A remark by Chris Brillinger in a 2014 meeting clarified the significance of MP Telegdi's remarks: "So the historical settlement narrative in this country is you come here, you work hard, you become one of us, you are one of us. The emerging settlement narrative is you come here, you work hard, you go home" (2014, pers. comm. 15 July). Proponents of greater access to social services argued

that it was unjust to withhold services from individuals that embodied core Canadian values and who endeavoured to make contributions to the national community. Opponents made an appeal to a widely-shared respect for the rule of law, arguing that this was a bedrock principle of Canadian society, one which should not be trumped by other considerations.

Thus, proponents of access put forward representations of the Lizano-Sossa family as one that is deeply committed to Canada, with roots in the country, roots which were being severed by prioritizing federal immigration policy over the culture of inclusivity and welcome school boards, city officials and some policymakers were keen to foster. Federal MPs Boris Wrzesnewskyj and Andrew Telegdi described the Lizano-Sossa family as *hard-working Canadians*, *committed to Canadian values*, "they are exactly the kinds of immigrants Canada wants" they observed (HC Deb 1 May 2006, 1430). The New Democratic Party MP Olivia Chow said of the Lizano-Sossa parents, "if they are good enough to work here, they are good enough to stay in Canada" (HC Deb 11 May 2007, 1220). These remarks emphasize the fact that irregular migrants like the Lizano-Sossa family were thought of as contributing members of Canadian society and thus deserved the right to remain in Canada along with the rights and privileges membership that residence entailed.

Another common argument put forward to justify accommodation was related to the theme of deservingness just discussed. To borrow a phrase from the contemporary political philosopher Seyla Benhabib, "some see undocumented entry into a country as a sort of 'original sin' that cannot be altered" (2012). The metaphor of *sin* was frequently used to describe the presence of irregular migrants in Canada (see Section 4.2 (b)). Irrespective of their actions once resident in Canada (eg the contributions they make), they were demarcated as illegitimate residents who had transgressed membership rules established by the citizenry. When used to describe IRCs, *sin* frequently referred to an act committed by the parent (infraction of law), and underscored the moral significance of this action (a moral wrong) and, finally, the

innocence of the child in spite of their connection to the parent and their shared administrative status (irregularity). This construction of the child as victim of others' choices is strongly paternalistic. It is a homogenising discourse, but unlike homogenising discourse that casts all irregular migrants as *queue jumpers* and *lawbreakers*, this discourse suggests that *all IRCs* were victims of choices others made.

Paradoxically, while the metaphor of sin is used to establish the illegitimacy of the irregular migrant's presence, it was also frequently used to defend access to schooling for IRCs—the suggestion was that these children were innocent of the *sins of their parents*, ie the IRC's condition could not be blamed on the child. New Democratic Party MP Cheri Di Novo defended the DADT policy in this way, arguing: "We need a province-wide policy of 'don't' ask, don't tell'. Our first and only duty, really, should be the education of *our* children. We shouldn't be visiting the sins of the parent, if you will, on their children" [emphasis added] (Babbage 2008).

There is an inherent inconsistency in this form of argument. On the one hand, it was used to justify access to schooling, maintaining that the IRC's presence was wrong or *sinful*, but on the other that this illegitimate presence should not stand in the way of a public education. TDSB Trustee Sheila Ward took aim at this normative construction of the IRC and argued for accommodation of IRCs in Toronto schools thus: "For both the Catholic and public boards, there has never been a question of an illegitimate child in our system. Every child by virtue of being here is entitled to an education" (Jiménez and Alphonso 2006). On this view, the child does not carry the weight of their parents' choices; they are deserving of education by virtue of their presence—their irregular status is not a meaningful factor in making a determination about schooling access.

Public authorities also sometimes emphasized the vulnerability of IRCs to justify access to public schooling. These public authorities argued that IRCs were an especially vulnerable segment of inhabitants that required additional, specific measures of care. They were vulnerable for a variety of reasons; among others, because they lacked the material resources to secure a safe and comfortable life for

themselves and because of their status, which made them fearful of the coercive authority wielded by public authorities in general and immigration officials in particular. Lloyd McKell, Senior Advisor to the Director of the TDSB, described the purpose of the DADT policy thus: “The intent is to ensure that such children [IRCs], who are already vulnerable due to their current life circumstances, are not placed at greater risk by being excluded from our schools” (McKell 2010). Public authorities at the Board articulated a duty to attend to the IRC’s vulnerability; they had the means to alleviate this vulnerability and thus, a responsibility to do so.

Given the context of the AWF campaign, it is unsurprising that some TDSB Trustees focused specifically on the issue of fear. TDSB Trustees indicated that the purpose of adopting DADT was to “protect the rights of children and their families” and also to “ease the fear of admissions most people without status experience” (TDSB RM 18 April 2007 and 16 May 2007). Fear was the *gateway issue* that connected discourse of schooling entitlements to the broader issue of well-being. Toronto City Councillors pointed out that it was impossible for a child to learn if that child was going to school fearing public authorities. Fear was both a source of vulnerability and a mechanism that exacerbated vulnerabilities. Trustees recognized that the absence of regularized status was a pervasive source of vulnerability and fear for irregular migrant adults and children and they had a responsibility to act to mitigate the effects of policies outside the jurisdiction of the school board.

A fourth normative theme that emerged from the discourse of policymakers in the context of DADT relates to responsibility; specifically, the responsibility public authorities have for addressing the welfare needs of IRCs, including their schooling needs.

NOII adopted an explicit agenda to influence the way local policymakers viewed their responsibilities to IRCs in the City of Toronto. One dimension of this strategy was to juxtapose the responsibilities of local authorities with the policy actions of federal authorities. This strategy found fertile ground because there are natural tensions

between state and sub-state authorities in a federated state that NOII was able to exploit. Ayotte notes that there have always been "jurisdictional tensions between federal immigration law and provincial child welfare interests" in Canada (2001, p. 55). She goes on to state that "Federal/provincial tensions have arisen over the costs of supporting refugee claimants in general, and over costs associated with the care of separated asylum-seeking children in particular" (Ayotte 2011, p.4). Craig Fortier describes the purpose of the NOII lobby campaigns initiated in defence of IRCs in Toronto thus: "The campaign breaks from traditional nationalist and transnationalist migrant rights frameworks by seeking to push community workers to intervene directly against immigration enforcement in the city" (Fortier 2013, p. 285).[106] NOII leveraged and exploited the ethical dilemmas that many public authorities faced when they were forced to balance their responsibilities to IRCs with the policy directives of provincial and federal authorities. Villegas adds that:

> [NOII] created a contending discourse of membership based on residence rather than legal policies or immigration status. The fact that an individual currently resides in a particular community is the only prerequisite for membership and having the right to all social goods, including formal citizenship.
>
> (2013, p. 266)

As of 2007, there was already evidence that NOII's message had resonated with some public authorities. In their statements, these public authorities contrasted their responsibility to IRCs with the actions of federal authorities. Moreover, these local public authorities framed their responsibility for the education of IRCs as a particularly stringent obligation, even though it could lead to confrontation with other branches of government. Their statements suggest that they felt compelled to act in inclusive ways vis-à-vis IRCs, irrespective of the inclinations of federal authorities. The sponsor of the

[106] NOII's position is echoed in statements made some municipal authorities. For example, Councillor Joe Mihevic stated: "At the end of the day, they are here. They are here. They're the folks that clean our washrooms, do the jobs that nobody else wants to do, wash our dishes, take care of our kids, build some of the dangerous things related to construction. And their kids go to our schools and they're in our neighborhoods. We're not agents of the federal state" (2014, pers. comm. 19 July).

DADT motion at the TDSB, Trustee Josh Matlow, stated: "We need to show some courage and leadership, that we are not allowing our kids to be used as pawns [by federal authorities]" (Keung 2006). The Liberal Premier of Ontario, Dalton McGuinty, also struck out in favour of DADT and in doing so emphasized the same view of differentiated responsibilities implicit in the statement of Trustee Matlow—McGuinty stated: "If the federal government feels that that child and that family should not be in our province, then that's something they should do something about. But we're not going to start picking and choosing which kids are going to be allowed in the classroom" (Babbage 2008).[107]

The intuition that local public authorities should not be made to serve national immigration policy agendas is significant. It suggests that public authorities at the local level did not view their responsibilities as being congruous with federal priorities. The normative ideas highlighted earlier in this section—deservingness, innocence, and vulnerability—seem to have played a part in the emergence of a different, localized conception of responsibility where IRCs were concerned. Evidence of this ethical reasoning can also be found in the discourse of public authorities at the City of Toronto several years later, when access to public services for all irregular migrants in the city was discussed.

To be sure, the campaign for a DADT policy at the TDSB laid the groundwork for policy developments several years later that would have city-wide impact. The debate of a DADT policy can also be credited with drawing attention to the challenges IRCs faced accessing public education in the City of Toronto. NOII and its coalition of partners remained active in the City of Toronto after the passing of the DADT policy.

[107] Municipal authorities in the City of Toronto were equally weary of being instrumentalised by federal authorities; for instance, by being made to enforce federal immigration policy in the City of Toronto. This theme will be addressed again in the debates amongst policymakers over City Council motions CD18.5 and CD29.11 in the next section.

Thereafter their efforts focused on ensuring that *firewall protections* put in place by the TDSB were replicated across a number of other services in the City of Toronto.

(c) Justifications in practice: *Sanctuary City*

This section focuses on the second notable policy development that occurred within the framework of the AWF campaign that lasted between 2004 and 2014; specifically, it considers two motions passed by Toronto City Council: CD18.5 and CD29.11. Motion CD18.5 (*Undocumented workers in Toronto*) in 2013, *effectively* established the City of Toronto as a sanctuary city, whereas motion CD29.11 reported on the progress Toronto City Council had made implementing the *sanctuary city policy* adopted a year earlier. Key sources of discursive data analysed in this section include the debate in City Council of the motions CD18.5 and CD29.11.

The activities of civil society actors such as NOII, the Education Rights Task Force and Social Planning Toronto did much to change the way public authorities engaged with the issue of schooling rights for IRCs in Toronto, as well as more broadly in Ontario and in Canada.[108] The TDSB's DADT policy was a victory for IRCs in the City of Toronto, as well as for the civil society groups that mobilized for policy change following the arrests of the Lizano-Sossa children. The TDSB's vote for a DADT policy demonstrated that local mobilization could result in concrete policy change, improving the way irregular migrants in the City of Toronto accessed public services.

According to one of its prominent members, NOII did not aim to tackle a single policy, but aimed to instigate a deeper shift in understanding, one that would lead to a

[108] The degree of influence NOII had on the thinking and discourse of policymakers is not something that this research sets out to measure. However, there is a strong body of evidence that suggests this influence was not insignificant. During meetings, S. Hussan and other members of NOII discussed specific tactics used to influence City Councillors, such as differentiated background notes that spoke to issues of concern specific to each Councillor. Moreover, City Councillors that allied with the NOII coalition could be seen wearing distinctive yellow pins in the City Council debate of motion CD18.5. The City Councillors were aware of the presence of NOII members and supporters in the City Council chambers, as the latter frequently interrupted debate of motion CD18.5 with applause and jeers. The claim then that NOII was influential in impacting the discourse of at least some City Councillors seems a reasonable one to make.

reconceptualization of irregular migrants in the city space and in Canada—he stated: "Our campaign started in 2004, called the *Access Without Fear* campaign or the *Don't Ask, Don't Tell* campaign. It was about doing battle at a cultural level. You have to create a cultural shift. We needed to take on fear itself, and so for us the struggle is how do you change fear through policy" (S. Hussan, 2014, pers. comm. 16 July). An opportunity would come to advance its objectives in 2012, when NOII would be asked to engage with Toronto City Council on a Council report addressing services for resident *undocumented workers*.[109]

Temporary resident entries to Toronto were the highest in Canada throughout the period 2001 to 2010 and grew by 23 percent over this same period (CoT 2013b). Temporary residents include visitors, international students and temporary foreign workers. The Toronto Immigration Employment Data Initiative (TIEDI) confirms that in the Toronto Metropolitan Area there had been "a significant increase in the number of temporary residents, including temporary foreign workers and students" (TIEDI 2012).[110]

Over this same period (2001-2010) a second trend is also observed: an increase in the number of new immigrants choosing to live and work in other Canadian provinces. As a result of this second trend, the City of Toronto saw a decrease in its share of federal funding for settlement programmes (CoT 2013b). The fact that Toronto still carried the largest share of temporary residents in Canada—a figure that was increasing steadily, albeit not as fast as some cities in Western Canada—combined with the reduction in federal funding, caused many municipal authorities to focus on the changing immigration trends to Toronto and their impact on the city's demographics and finances. Toronto City Councillor Kristyn Wong-Tam pointed out: "Canada's immigration system is now admitting more people on temporary visas than

[109] NOII's objective for broader social transformation was inspired in part by the sanctuary city policies that had proliferated across the United States.

[110] Data from TIEDI also shows that an increasing number of temporary migrants arrive in the refugee class and *live-in caregiver* class (TIEDI 2012).

as permanent residents. And this is a major change. This is the biggest shift in immigration system in close to 30 years" (CoT Deb CD18.5 21 February 2013).

By the early 2010s, Toronto City Councillors had become concerned about the possible rise in the number of undocumented workers in the City of Toronto. Since the early 1990s, both Liberal and Conservative governments had kept levels of immigration at over 200,000 individuals per year (CIC 2014). In 2002, the Government of Canada expanded its Temporary Foreign Worker Programme (TFWP) to address shortages in low-skilled work across the country, and toward the end of the 2010s, the mix of immigrants to Canada had begun to change markedly to comprise increasing numbers of temporary foreign workers.[111]

According to the Liberal MP Telegdi, then Vice-Chair of the House of Commons Standing Committee on Citizenship and Immigration (CIMM), the expansion of the TFWP in 2002 directly contributed to the rise in the number of individuals that eventually came to find themselves in a situation of irregularity in Canada (HC CIMM Deb 9 April 2008, 1335). In oral testimony before the CIMM, the National President of the Construction Recruitment External Workers Services and Building Industry and Land Development Association, Ramesh K. Dheer, echoed MP Telegdi's views, stating:

> Yes, I have to agree about the guest workers or whatever you want to define them as, illegal workers... You see, the fact is that once they're here for a couple of years or three years, they get used to the lifestyle here, which is of course probably better than in their old country. Until now, there has been no mechanism to give them landed status from within Canada. So now the only option they have is to return to their native country, and the majority of them, probably 95% of them, do not go back.
>
> (HC CIMM Deb 9 April 2008, 1320)

It was not only the change in federal policy to emphasize temporary labour over permanent immigration that concerned City Councillors, but also the changes federal

[111] Luin Goldring observed that between 1980 and 2006, there was a four-fold growth in the number of foreign workers in Canada: from 39,000 in 1980 to 172,000 by 2006 (HC CIMM 9 April 2008, 1315; see, also, Figure 1 in Chapter One).

authorities made to the TFWP in 2011. Most troubling were changes to the TFWP put forward by the Government of Canada in April 2011, which limited the stay of TFWs in Canada to a maximum of four consecutive years (CBC 2015). After this period, TFWs needed to remain outside of Canada for a minimum period of four years before they could attempt to obtain a new temporary work visa for Canada.

Federal authorities that advocated for new rules on temporary labour touted the advantages of the TFWP, namely, the fact that the programme could be tailored to meet a fluctuating labour demand, while minimizing the risks of *crowding out* native workers.[112] Moreover, these temporary labourers contributed to the national purse through income tax and tax on purchased goods, while representing a minimal drain on costly services linked to long-term care (Abella 2016).

Debbie Douglas, Executive Director of the Ontario Council of Agencies Serving Immigrants (OCASI), cast this turn in federal policy as a "turn away from nation-building towards treating immigrants as economic units" (HC CIMM 9 April 2008, 1505). To make sense of this criticism, one must recognize that immigration has always been a crucial part of the Canadian national myth—many view the country as a nation of immigrants. OCASI's disquiet about the changes to the TFWP makes sense within this context, insofar as these changes seemed to undermine Canada's immigrant history and nation-building mythology, where those who wanted to immigrate to Canada, contribute to society and build a home were welcome to do so.

These changes were of grave concern to municipal authorities in the City of Toronto. Discussing the possible impact on the City of Toronto, Chris Brillinger pointed out that it was perfectly reasonable for City Councillors to be concerned about these

[112] Immigrant arrivals have frequently been framed as a threat to citizens when industry and economy are underperforming. Even in times of industry growth, marked by excellent economic performance, fear of competition from foreign nationals may still give rise to apprehension about the loss of native jobs, sometimes stoked by populist political parties. As Gibney notes, these opinions remain persuasive to a segment of the native population even when the data does not support the conclusions promoted by these political parties (2004, p. 216).

changes given that staying *undocumented* in Canada was an option available to all TFWs who would be reaching their four-year limit:

> When it is up [the four-year maximum time] and I'm about to have to go home, depending on the home situation, it might be the most logical decision to stay knowingly and becoming an undocumented Torontonian. And that may be a completely rational decision. It gets framed as an illegal or unlawful act, but it may be a perfectly logical.
>
> (2014, pers. comm. 15 July)

Municipal authorities were especially preoccupied by the effects the new changes to federal legislation relating to TFWs would have on the city's ability to provide services to (undocumented) residents.[113]

Toronto City Councillor Janet Davis was one of many City Councillors to voice concerns about the possibility of increased numbers of irregular migrants in the City as a result of changes to the TFWP—she remarked: "Because temporary visas are now the predominant form of immigration, we will likely see a surge in undocumented residents at the end of the four-year term of [the TFWP]" (CoT Deb CD18.5 21 February 2013). In a 2015 editorial for the National Post entitled, *And just like that, you're an illegal immigrant*, University of Toronto Law Professor Audrey Macklin wrote: "So by April 1, 2015, all temporary foreign workers who arrived on or before April 1, 2011 (no one knows the exact number) are expected to pack up and go home. But some will not go back. They will remain living and working in Canada without legal status" (Macklin 2015). Toronto City Councillor Kristyn Wong-Tam summed up succinctly Macklin's criticism of the 2011 changes to the TFWP when she remarked, "The government is making people 'un-legal'. Many people who are currently in a position of legal status are about to lose their status. You were 'legal', you are about to become 'un-legal'" (CoT Deb CD18.5 21 February 2013). Councillor Wong-Tam

[113] Explaining the reasons why the City of Toronto develops motion CD18.5 (*Undocumented workers in Toronto*), Chris Brillinger recounts: "The reason why I think we pushed on it [CD18.5] so hard is because it's [the population of undocumented persons] going to grow. The numbers are growing now and all indications are that they will continue to grow" (2014, pers. comm. 15 July).

draws out in the statement one of the great ironies of immigration policy in Canada and other migrant-receiving states around the world: the problem of irregular migration is, at root, a problem of positive law, as governments are complicit in *making* migrants *irregular* through immigration policy.

Many public authorities voiced opposition to federal legislation relating to the TFWP, arguing that it was inimical to Canadian values by denying a path to residency and that it would drive up the number of undocumented migrants in Canada. The Province of Ontario was concerned as well, since additional service costs would accrue to the province as well as municipalities. Ontario New Democratic Party MPP Marchese remarked:

> They're [TFWs] on a leash, except for those who eventually break the leash and go underground, and then you've got some undocumented underclass that's running around the country looking for whatever work they can get just to stay here, without any of the rights that most Canadians enjoy.
>
> (LAO Bill 210 Deb 5 November 2009, 1740)

One final contextual issue must be addressed against the backdrop of these changing immigration flows to and within Canada. It was noted above that more immigrants were choosing to move to Canada's Western Provinces around the late 2010s. Immigration patterns began to shift in part because new economic opportunities became available in the Western provinces owing to an increase in production in the oil and natural gas industries. Provincial and municipal authorities were fearful that Ontario and the City of Toronto would be less attractive to prospective immigrants as opportunities multiplied in other parts of Canada. Both the City of Toronto and the Province of Ontario were working to attract new immigrants, as they were seen to be key to the economic vitality of the city and the province.[114] In a 2014 meeting,

[114] Another relevant development during this period is the expansion of the provincial prerogative in the area of immigration, but also the recognition that the City of Toronto should have a role in any discussion regarding immigration to Canada and Ontario. In a 2003 debate in the Ontario Legislative Assembly on new power-sharing arrangements with the federal government in matters of immigration, the Liberal MPP Michael Bryant argued for a greater role for the City of Toronto: "Last year, 60% of all newcomers to Canada settled in Toronto. I would hope that, if we are going to continue with a serious debate on this, we would recognize that

A. Casipullai, Senior Coordinator for Policy and Communications at OCASI, explained that the provincial government was and continued to be focused on competing for immigration with other provinces in Canada that had become equally, if not more, attractive to prospective immigrants:

> Let's put it this way, from the provincial government point of view, their most pressing concern if you look at immigration was how to survive in the national context for immigration. And look, ultimately Canada's immigration programme is about the economy. We can want it to be about other things, but it's about the economy and its about jobs. The provincial and the territorial governments and the federal government are all clear on that. Ontario's biggest concern right now [2014] is that we are losing out on immigration; how do we reassert our priority back to the time when everyone wanted to come to Ontario. That is changing. And their biggest fear is that it will impact the economy, and they are right, it will.
>
> (2014, pers. Comm. 14 July)

This final trend is important because it features in the tactics NOII used to press municipal authorities to adopt a city-wide AWF policy. NOII leveraged the concerns of the province and the city about increased competition for immigration in Canada. They were aware that any perceived hostility to immigrant communities would severely hinder the chances of public officials being re-elected for office. NOII's reframing tactics took as their starting point the discourse of public authorities, which publicly acknowledged and emphasized the importance of appearing to be a *welcoming community for immigrants*. This is unique to the City of Toronto and other globalized cities with large immigrant populations; whereas normally politicians guard against broad accommodation of outsiders to avoid a backlash from the native population, in Toronto that native population and the immigrant population are nearly at par.[115]

---

the city of Toronto has got to be involved in this particular debate, because the city of Toronto is so impacted by any changes to our immigration laws and rules" (LAO Deb 8 May 2003, 1010). The Canada-Ontario Immigration Agreement was signed two years later in 2005, and explicitly recognized the important role of the Province and its municipalities in the integration of immigrants to Canada. Ontario Provincial Nominee Programme (PNP), for instance, allowed Province of Ontario "to nominate, for permanent residence, individuals who have the skills and experience to contribute to Ontario's economy, and assists employers in recruiting and retaining foreign workers" (OINP 2016). Under the PNP, the provinces were given a say in the inward migration to their territories taking into account their prevailing economic needs.

[115] For a discussion of public backlash in the context of immigration see, Gibney 2004, p. 212.

Toronto City Councillor Joe Mihevic explained the thinking of Toronto City Councillors thus:

> If you want to piss off the immigrant community, tell them that this is where the line is: you are in, you are out. It's not a vote getter. It's as bald as that. Understanding and appreciating that Toronto is a very different city than it was 30-40 years ago. Almost 50% of the residents of Toronto are not born in the country.
>
> (2014, pers. comm. 19 July).

It was this understanding that led NOII to link the AWF campaign to the position of City Councillors on matters of immigration. NOII organizer S. Hussan, explained this in a later meeting: "Our whole argument was 'you're anti-immigrant'. So, the whole 'you are anti-immigrant' label isn't anything that somebody wants attached to them" (2014, pers. comm. 17 July).

In 2012, municipal authorities were confronted with changes in federal policy that could result in a swelling of the irregular migrant population in the City of Toronto. The City of Toronto made use of its connections to groups like Social Planning Toronto to try to uncover the extent of the challenge that undocumented workers presented to the city, especially in the area of service provision. NOII was contacted by Social Planning Toronto in 2012 and asked to comment on a draft report commissioned by the City of Toronto on resident *undocumented workers*. This report created an opportunity for NOII to reactivate its AWF campaign and press the City of Toronto to pass a city-wide AWF policy.[116] It is thus that the City of Toronto came to face renewed pressure from civil society actors to provide *all irregular migrants* with social services in 2012 and 2013.

Rather than seek to limit its commitment to a potentially expanded community of service users, Toronto City Council chose to put forward a motion that would to make all city services accessible to irregular migrants *without fear* of city officials revealing

[116] These details were imparted by two individuals in separate meetings in 2014: S. Hussan of NOII, and N. Sidhu of Social Planning Toronto.

their identity to immigration authorities. The reasons for this accommodation are explored next.

When municipal authorities engaged in debate about access to city services for irregular migrants, their comments could be quite far-ranging, as was shown in the previous section in the context of the DADT debate. Similarly, in 2013, City Councillors expressed views on a range of issues connected with, but broader than, the specific issue of *undocumented workers in Toronto* (the title of motion CD18.5) during the course of the debate of motion CD18.5. The reason for this, as explained in the previous section, is that municipal authorities took a holistic view of city services when discussing the social welfare needs of residents, and this means that they frequently commented upon legislation and services outside of their jurisdiction—this was the case, for example, with schooling services.

Access to schooling is regulated by provincial legislation and policies enacted by local school boards, however this did not prevent municipal authorities from also addressing schooling services for IRCs in Toronto. Some municipal authorities viewed schooling services and municipal services as interconnected—the well-being of the city's inhabitants relied, in part, on the delivery of a number of complementary social services. So, access to schooling was connected to library services, health services, police services, and so on. Also, access to schooling was a matter of broader concern—it was matter of equity in the City of Toronto, thus a matter that concerned all municipal authorities, not just school board trustees. Toronto City Councillor Wong-Tam, for example, drew a link between access to city services and their impact on resident families *without status*:

> We know that individuals without status must accept work for low wages. They work in poor and unsafe conditions, and this impacts their mental health as well as their physical well-being. It [irregular status] also comes home into the family structure. It's at the dinner tables, it's at the conversation pieces around the living room. It means that children are growing up in fear. And their families are living in this constant state of fear.
>
> (CoT Deb CD18.5 21 February 2013)

She went on to make specific reference to schooling and connected access to schooling to the motion before City Council (CD18.5):

> The item before us is to ensure that access to services for undocumented residents will allow our city to advocate for undocumented Torontonians at the provincial and federal levels. Support for this [motion] is important to make sure that undocumented workers are not denied some very basic rights: rights to food, *rights to education*, rights to healthcare, simply because they don't have immigration status. [emphasis added]
>
> (Wong-Tam CoT Deb CD18.5 21 February 2013)

It is clear from the early interventions by City Councillors in the debate of motion CD18.5, as well as in the debate of motion CD29.11, that they did not limit themselves to discussing services only within the purview of the city's policymaking authority, but rather sought to address holistically the service needs of irregular migrants in the City of Toronto. The justifications municipal authorities put forward to defend their different conceptions of service access reference several normative ideas, and are explored below.

A common way policymakers justified limitations to public schooling by IRCs was by suggesting that these children formed part of a group of outsiders that were making claims upon the finite resources of a group of insiders. On this account, educational resources should be prioritized for insiders. This partialist form of justification was also prevalent in the discourse of some City Councillors during debate of motions CD18.5 and CD29.11. For example, Toronto City Councillor David Shiner expressed such a view. He introduced his position after first proffering a defence of his viewpoint in a discursive tactic aimed to distance the speaker from a statement that he or she knows may portray him or her in a negative light—Councillor Shiner stated: "So, I'm sorry, I don't mean to be harsh on people who have those problems, but there are ways to become citizens and if you're not, you should not be given the same services and the same respect as those of you who are Canadian citizens" (CoT Deb CD29.11 10 June 2014).

Remarks such as the one made by Councillor Shiner reveal an unwillingness to differentiate between irregular migrant residents that were more in need or less in need of social services. When it came to resident irregular migrants, irregular status took priority over any evaluation of need; their status interrupted the moral impulse to conduct any such evaluation. Paradoxically, it was on the basis of such a distinction that entry was to be offered to those *outside* the state—irregular migrants were occupying the place of *needy individuals* outside, who deserved entry to Canada. This was the case made by Councillor Shiner (but also other critics of irregular migration documented in the preceding sections):

> So, they are here illegally. […] The bottom line is that they are here illegally, unlike people who came here legally. They know they are here illegally. And you said there is not a concrete, clear pathway to get in, but the pathway really was before you came in to the country to either apply to be an immigrant to the country or to make a refugee status claim to be here legally.
>
> (CoT Deb CD18.5 21 February 2013)

It is notable that critics were able and willing to differentiate between the more needful and less needful migrants before entry to the state, but were not sensitive to this distinction once the migrant was present and in a situation of irregularity. Once individuals *became* irregular residents, they were viewed first and foremost as *lawbreakers*.

The claims made by irregular migrants to services in the city were dismissed by a small, but vocal cohort of City Councillors whose statements reinforced a view of the irregular migrant as a wilful cheat. These critics used terminology that encouraged a view of the irregular migrant as a dishonest guest in Canada, one that wilfully sought to maximize personal advantage. Councillor Denzil Minnan-Wong stated: “So, in fact all these people here, some of them have no intention of actually coming here and using the rules, their intention really…they come here to break the rules and not follow the rules, the immigration law” (Minnan-Wong 21 Feb 2013). Audrey Macklin described the use of such language as *cheap* and *easy*—a way of justifying exclusionary policy measures against irregular migrants in Canada (Macklin 2015). Such statements cast

doubt on the reliability of irregular migrants; their statements, actions, concerns were overshowed by a vilifying rhetoric.[117] Shiner's claims suggested that more was at play than simply a reservation about finite material resources in the host community—respect is infinite and yet this too was to be withheld from irregular migrant claimants. Even the lived experience of irregular migrants was delegitimized: they should *rightfully* experience fear of authorities because they were aware they were *lawbreakers* seeking an undeserved benefit. Councillor Shiner stated:

> And you said, that people have a fear of accessing services. But to go back to the point, they don't have a fear because they are uneducated, or other issues. They have a fear because they know they are not entitled to the services because they are here illegally. Is that not right?
>
> (CoT Deb CD18.5 21 February 2013)

The statements from this cohort of Councillors justified the exclusion of irregular migrants from city services on the grounds that doing otherwise would provide entitlements to individuals that had sought to cheat Canadians by evading immigration laws put in place by the citizenry.

This discourse had an impact on the way public authorities discussed the rights of irregular migrants. There is evidence to suggest that policymakers recalibrated their messages to escape the lexical boundaries imposed by those who cast irregular migrants as profiteers. Take for example the remarks made by City Councillor Cesar Palacio, who corrected himself to avoid describing social welfare services as *benefits* for irregular migrants:

> So, most of these people, they work, they don't rely on the system—on the welfare system. They do pay taxes and they are productive members of society, but somehow, they are not able themselves, their families, their children to—I

[117] Audrey Macklin observed in 2015 that: "Migrants without legal status are also easy targets for vilification. The slide from "illegal immigrant" to "criminal" in popular discourse is politically cheap and easy. A government that is looking to supplement the bogus refugee, the marriage fraudster and the foreign terrorist with a new category of bad immigrant and a new excuse to get tough on non-citizens might find it convenient to add "illegal immigrants" to the roster. The government's role in illegalizing these migrants may escape notice" (Macklin 2015). Similarly, City Councillor Mike Layton argued during the debate of motion CD29.11: "the word illegal is trying to vilify these mothers, these fathers, these children, trying to make them criminals" (CoT Deb CD29.11 10 June 2014).

> don't want to use the word 'benefit'—but to have access to essential services that most of us have.
>
> (CoT Deb CD18.5 21 February 2013)

The justifications for inclusion and exclusion put forward by City Councillors during the debates of motions CD18.5 and CD29.11 can be traced to competing notions of inclusivity.[118] These notions played out in the discourse of policymakers in many ways. For instance, notions of inclusivity were referenced in discussions about the responsibility for the welfare of irregular migrant adults and children. Notions of inclusivity also informed the choices individuals made when selecting terminology to describe irregular migrants. Indeed, one of the most notable features about the debate of Toronto's sanctuary city policy was the way discursive strategies and disputes impacted discussion of services for irregular migrants. This was especially clear in choices made on terminology; specifically, how one referred to irregular migrants in the City of Toronto.

NOII and its coalition partners played a part in framing discursive elements of the debate on service provision for irregular migrants by strategically promoting inclusive language to refer to irregular migrants in the City of Toronto. NOII organizer S. Hussan recounts the strategy thus:

> And then we started using language like 'our immigrant residents' or 'undocumented Torontonians'…like your responsibility to city residents. So, we just brainstormed a whole bunch of phrases that either would keep immigration status out and if immigration status had to be part of it [City Council motion CD18.5]; it would focus on city and municipality.
>
> (2014, pers. comm. 17 July)

[118] Recall that motion CD29.11 was the motion presented to Toronto City Council, which simply acknowledged the progress made with the initiatives outlined one year earlier in motion CD18.5. During the debate of motion CD29.11, City Councillors rehearsed many of the same justifications for inclusion and exclusion put forward in February 2013. They were reminded by their Councillor colleagues that the motion was merely a progress report, however, critics of accommodation refused to let an opportunity go by to voice their opposition to the efforts the city was making to extend social services to irregular migrants. City Councillor Karen Stintz remarked: "Councillor Mihevic will say 'It's just a report. It's just a report. It's just one more step in a process we've already started in sanctuary city [sic]'. It's not. It's not. You know what this is: it's not the city's business. It's really not" (CoT Deb CD29.11 10 June 2014).

At the time motion CD18.5 was discussed at City Council, Chris Brillinger served as the City of Toronto staff member responsible for overseeing the research and development of staff reports for the Council. He described the language adopted in the reports that circulated amongst Toronto City Councillors in advance of the debate of motion CD18.5, thus: "So the language we've started to use is 'undocumented Torontonians'. And that's deliberate on my part. Because I'm trying to message to both Council and the rest of the city that we are talking about Torontonians. We're not talking about non-Torontonians" (2014, pers. comm. 15 July). It is not possible to say that City Council adopted this language *because of* the NOII coalition, but it does suggest that advocacy efforts by civil society groups resonated with municipal authorities. An exchange was *performed* on the floor of the City Council chambers in an effort to undermine statements made by critics of motions CD18.5 and CD29.11 who stressed the *non*-membership of irregular migrants in the City of Toronto. In this exchange City Councillor Wong-Tam *interrogated* Chris Brillinger, who was participating in the debate as the city's policy expert on the motion before Council:

> **Wong-Tam:** How long does one need to live in Toronto before they become a Torontonian?
>
> **Brillinger:** I am not aware of a specific definition Councillor. The best we have, and I have referenced it in the report is the City of Toronto Act, which defines the municipality as a collection of its inhabitants.
>
> **Wong Tam:** Do you need to be a Canadian citizen, or hold citizenship in this great nation to be a Torontonian?
>
> **Brillinger**: No.
>
> (CoT Deb CD29.11 10 June 2014)

The deliberate choice of terminology inscribed in the motions put forward by Toronto City Council and which were used in the debate of these very same motions, frames irregular migrants as *inhabitants* of the community to whom public authorities owe equal moral concern and consideration. In a subsequent meeting, Chris Brillinger was able to clarify the statements made on the floor of the City Council chambers—he explained:

> I serve at the pleasure of Council and I serve under the legislative framework of the Province of Ontario, including the City of Toronto Act. […] And that's who the City is accountable to because we are a creature of the province. This did come up on the floor of Council and my response is, 'I have a duty to serve the residents of the City of Toronto, not Canadian citizens, not permanent residents.' It's whoever's here we have a duty to serve. And that's what this is about.
>
> (2014, pers. comm. 15 July)

What is notable from these statements is the emergence of a narrative of municipal membership as something distinct from national membership. Matthew Gibney notes that states "don't normally consider the needs of outsiders as equivalent to the needs of citizens", however the discourse of municipal authorities suggest that some sub-state authorities may have indeed viewed their moral obligations in this way, ie not guided by a requirement of national membership, but guided simply by the fact of local residence (Gibney 2004, p. 197). The latter normative idea is a more capacious conception of moral responsibility that resonates with certain accounts of rights grounded in social membership theory—where membership in the community is distinct from national membership and can serve as the basis of social inclusion, as well as access to rights and entitlements. In a similar *performative* exchange, City Councillor Ana Bailão and Chris Brillinger brought out this view of moral inclusivity:

> **Bailão**: And basically, the only thing that Toronto is doing is…we are not in charge of immigration law, but we are in charge of the people and society in Toronto and we want an inclusive society.
>
> **Brillinger**: That is absolutely correct and our responsibility to provide services to Torontonians.
>
> (CoT Deb CD29.11 10 June 2014)

In a 2014 meeting, City Councillor Mihevic expanded on this view: "But I think those that are thoughtful about it, are trying to struggle with this notion of citizenship that is a federal notion, it's not a city notion. […] Residency is really the fundamental category that operates at the local level" (2014, pers. comm. 19 July).

Once the framing of irregular migrants as *co-constituents* and *co-inhabitants* took root, public authorities articulated their responsibilities to IRCs in inclusive and protective terms. IRCs became "our children", they were to be included in the services

that “all of us” enjoy. Indeed, Toronto City Councillor Adam Vaughn argued that the City should make up for the lack of inclusivity demonstrated by federal policies: “This country, this province, this city stands for opportunity, and if our federal and provincial governments won’t extend it…we must. We should and we will with today’s vote” (CoT Deb CD18.5 21 February 2013).

Many City Councillors recognized that federal and provincial policies have a local face and that municipal authorities had a special responsibility to residents of the city and thus had to engage with the consequences of policies from outside their jurisdiction. They argued they had a unique responsibility to *residents* to do so. This was the view put forward by Councillor Mihevic:

> We are the state at the city level and we have a very different experience of the state than at the federal level, and even frankly at the provincial level. Cities view life from the ground up. View the life from the ground of how people live their life on a day-to-day basis. I understand and respect the role of federal and provincial jurisdictions, but our focus historically, has always been about roads, the sidewalks, it’s about getting water to people’s homes*, it’s about making sure that their kids get an education*. It’s about the stuff of daily life. And I think that that is what is driving this movement of cities to look at undocumented city-dwellers in a different way. [emphasis added]
>
> (2014, pers. comm. 19 July)

In a meeting, Chris Brillinger stated: “What I am very clear about is the City of Toronto does not exist to facilitate the federal government doing its job. That is not our job” (2014, pers. comm. 15 July). Similarly, in a meeting with Councillor Mihevic on 19 July 2014, he suggested that City Councillors had a responsibility to, and frequently did, discuss a range of issues that fell outside their specific jurisdiction, calling attention to weaknesses in federal and provincial policies, for instance. Councillor Mihevic observed:

> Yes, some would say it is [immigration] *ultra vires*—it is not of the stuff that City Council should be dealing with. There might be a strain of that kind of thinking, but I don’t think it is dominant. We have our silos, but people lead unified lives. There aren’t too many federal issues that don’t have a local face to them. We have to find out how to interface with those issues in a helpful, constructive way. And I think most people understand that. Yes, the driver here is federal immigration policy, but the lived reality is the local face of it, and that’s our job to deal with. And most Councillors would agree with that.

(2014, pers. comm. 19 July)

However, there were those in City Council that argued that the city should not be discussing matters of immigration policy. Councillor Minnan-Wong was a vocal advocate of this narrow view of separated jurisdictional responsibilities—he stated: "I believe that in many ways this is the Federal government's responsibility and if members of the Council really want to talk about this, then they are in the wrong forum and they should run for parliament" (CoT Deb CD18.5 21 February 2013). Councillor Minnan-Wong was not the only City Councillor to hold this view, but it remained a minority view amongst Council Councillors, as evidenced by the fact that the vast majority of City Councillors (37 out of 40) voted to transmit the three aforementioned advocacy positions to both federal and provincial policymakers (see p. 168).

Some Councillors took issue with this reframing of irregular migrants proposed by motion CD18.5 and argued that "buzzwords" were being used to obfuscate the real issue. Councillor Minnan-Wong exclaimed: "I just want to be clear, this idea, this buzzword of 'undocumented workers' what they're really called, what they are is illegal immigrants. They are here without status. […]" (CoT Deb CD18.5 21 February 2013). It is notable that opponents of this discursive reframing of irregular migrants rejected the notion that municipal membership was possible, distinct, and somehow a meaningful basis for rights claims by irregular migrants. These critical voices on the Council resisted the actions of other City Councillors who were trying to give the idea of municipal membership a practical form, ie through AWF policies. Several countermotions were presented by Councillors critical of these manoeuvres during the debate of the *sanctuary city policy* (motion CD18.5). For example, Councillor Minnan-Wong proposed to amend recommendation 2 of motion CD18.5, and offered the following replacement text, "City Council endorse and support Canadian government's efforts to facilitate the legal admission of immigrants and the removal of illegal

immigrants". [119] These countermotions demonstrate a narrow scope of ethical obligations to irregular migrants in the City of Toronto by some City Councillors.

To be sure, there was a tension in Toronto City Council between a monolithic conception of national membership and a more nuanced local view of disaggregated, overlapping memberships within the state. The majority of City Councillors took the latter view and argued for greater inclusivity and by extension, accepted a broader scope of responsibility for the welfare of irregular migrants in the City of Toronto. This view was enshrined in the decision to pass motion CD18.5 on 21 February 2013, establishing Canada's first *sanctuary city* for irregular migrants.

(d) Summary

Prompted by the actions of community organizations, public authorities in the City of Toronto engaged in a very public debate about the place of irregular migrants in the municipal community between 2004 and 2014. IRCs figured prominently in this debate, even if they were not always the sole focus of attention. Municipal authorities took a broad, holistic view of this population and their claims to social services.

Two notable policy developments occurred within the framework of the AWF campaign that ran in Toronto between 2004 and 2014. The first was the passing of a *Don't Ask, Don't Tell* policy by the TDSB in May 2007. This policy intended to create a *firewall* between public authorities delivering schooling services to IRCs and federal immigration authorities. In practice, this meant issuing a public and vocal guarantee in the community that IRCs could approach school authorities and their personal information would not be shared with immigration authorities. The DADT policy aimed to ensure that IRCs could access Toronto schools (a) without fear of being reported to federal immigration officials and (b) without fear of removal from Canada. The second

[119] The proposed amendment was to replace Recommendation 2 in motion CD18.5: "City Council request the federal government to establish a regularization program for undocumented residents, and that a letter be sent to the Government and Opposition parties to this end."

notable policy development occurred in 2013, when the Toronto City Council passed motion CD18.5, establishing Toronto as a *sanctuary city*, and one year later when it adopted the progress report (CD29.11) of the sanctuary city policy. These latter motions expanded the *access without fear* policy established by the TDSB beyond IRCs to all irregular migrants in the City of Toronto at service points managed by the city.

It was noted at the outset of this section that the AWF campaign provided a framework for sub-campaigns launched by civil society actors to secure access by irregular migrants to municipal services *without fear*. These civil society actors played an important role driving forward this campaign and for this reason it was necessary to consider their viewpoints alongside the discourse of public authorities; indeed, one finds that a synergistic relationship existed between these two groups which led to a convergence of viewpoints between 2004 and 2014.[120] Civil society actors amplified a new normative framing of IRCs and irregular migrants, one which stressed the irregular migrant's presence in the community as sufficient grounds for equal treatment and equal access to social services. The NOII coalition sought to encourage municipal authorities to resist the notion that they were merely instrumental actors obliged to implement federal immigration policy, but rather that they had a unique responsibility to residents of the City of Toronto.

This view resonated in the public statements made by the majority of City Councillors, municipal authorities and officials of the Toronto School Board. Municipal authorities adopted a narrative that reframed the IRC and irregular migrant as members of the local community, even if not formally recognized as legal members of the national community. Public authorities at the municipal level articulated positions that referenced normative ideas in a theory of social membership, whereby irregular migrants were considered *co-constituents* in the municipality. In so doing they

[120] The sanctuary city movement is very much alive today. Debate amongst public authorities about the mechanisms for implementing sanctuary city policies are regular and heated.

redefined the meaning of membership for irregular migrants as one not defined by national immigration law, but rather defined by social and political practice at the local level. This not only served to broaden the IRC's access to social welfare goods provided by sub-state authorities, but also revealed a willingness by public authorities at the sub-state level to accept obligations to these individuals in spite of their irregular status in Canada. Indeed, one might argue that public authorities accepted an obligation to IRCs and other irregular migrants *because* federal authorities did not recognize them as legal members of the state. This non-acceptance by federal authorities exacerbated the vulnerability of this population of individuals, which in turn fostered a sense of heightened responsibility for their care.

This new conception of membership found its ultimate expression in the passing of the sanctuary city policy in 2013. The sanctuary city policy might be seen, to borrow a phrase from Matthew Gibney, as a legal manifestation of what many considered a fundamental moral duty—to assist the vulnerable in our midst.[121]

4.6. Conclusion

This section provides a concise summary of Chapter Four and reviews the key normative ideas identified as influential in policy debates relating to schooling access for IRCs in the City of Toronto and the Province of Ontario. The section concludes by arguing that the normative ideas referenced by public authorities in practice to justify accommodation of IRCs in public schools may be better captured by a different normative theory; one which provides an improved theoretical framework for the normative ideas inherent in the discourse of policymakers considered in this chapter.

An important, though not central, discussion in the debates on irregular migrant rights in Canada concerned the rights of IRCs to schooling in Canada. This policy issue was frequently overshadowed by other themes in the public debate of irregular

[121] See, Gibney 2004, p. 195.

migration, ie the resilience of Canada's national and sub-national economies, the apprehension of *illegal migrants* and the rights of temporary and foreign workers. It was frequently at the margins of these larger debates that the topic of schooling for IRCs received attention. However, there were four specific moments between 1992 and 2014 when policymakers focused on the accommodation of IRCs in Toronto public schools—these four policy moments provided the structure for this chapter.

Legislation reviewed at each of the four policy moments in this chapter considered some dimension of schooling for IRCs in Canada. Education was the main subject of provincial legislation in policy moments one (1992-1993) and three (2005), whereas in policy moment two (2001-2002), education was a minor part of a larger federal immigration bill. However, debate of legislation at all three policy moments offered unique insights into the way policymakers justified access to or exclusion from Toronto public schools. Each item of legislation created a space for policymakers to express their views on the schooling entitlements of IRCs and by extension, their obligations as public authorities to make schooling available to this population of children.

Bill 24 passed by the Ontario Legislature in 1992 was arguably the most important in respect of schooling access for IRCs in Toronto. It formally recognized the IRC's right to schooling in Ontario. However, this case-study has shown that policymakers also discussed the schooling access for IRCs when legislation did not specifically address this population of children or this specific social service (ie schooling). In the analysis of policy moment two, for example, federal policymakers debated the rights of IRCs in Canada even though the legislation under consideration was much broader and focused on overhauling Canada's immigration regime. Nevertheless, because the legislation touched on the education of children with a complex administrative status, a space was opened for policymakers to consider the broader question of public schooling by foreign nationals and temporary residents.

This pattern was repeated through other policy moments. In 2005, provincial policymakers were not initially expecting to debate the issue of access to Ontario schools by migrant children with irregular status, but when the impermanence of temporary status was pointed out and its linkage to irregular migrant populations made clear, they also seized the opportunity to discuss the place of IRCs in Ontario schools. Policy moment four was a similar case: it was not a debate of one specific item of legislation that created an opportunity to discuss the schooling entitlements of IRCs, but a broader campaign that aimed at ensuring that all irregular migrants could access social services without fear in the City of Toronto. Between 2004 and 2014, civil society actors created a space that facilitated debate of irregular migrant welfare, and their right to access various services within the City of Toronto, including public schooling. The difference in policy moment four was that this debate occurred over a period of time and addressed multiple policies. To be sure, one of the two major policy initiatives passed during the period 2004-2014 did have as its central focus the education of IRCs in Toronto (DADT policy), however the movement that underpinned this policy development was focused on the broader issue of access to social services by the resident irregular migrant population.

From this summary, one can conclude that justifications for accommodating IRCs in public schools were provided in the course of debates on issues connected with, but not always primarily focused on, schooling entitlements for IRCs. Locating these moments of discourse was a first challenge in this research, not least because discourse about responsibility to provide IRCs with schooling was not constrained by jurisdictional boundaries. Policymakers put forward positions addressing policy matters that cross jurisdictions because, they argued, the effects of policy were similarly unconstrained by jurisdictional boundaries.

A host of normative ideas were referenced to defend inclusive and exclusionary practices. Three predominant arguments for inclusion were advanced in the

statements made by policymakers, though it is important to note that these are not necessarily mutually exclusive.

The first justification for accommodation was driven by instrumentalist concerns to do with the economic vitality of the country, province and city—respectively, Canada, Ontario and Toronto. Immigration was crucial to the ensuring that Canadians could continue enjoying the fruits of a prosperous economy. The second justification is a variant on the first, but stresses social membership. Policymakers representing all three government jurisdictions offered justifications grounded in the idea of 'reciprocal benefit': children without status would likely remain in Canada and consequently, the community would benefit from an educated, self-reliant member in the future, as opposed to one reliant on the state for welfare support. On this view, IRCs were both co-constituents and co-beneficiaries of their community's success. Consequently, it made no sense to exclude them from public schooling because it would be harming the community as much as the child. Finally, there was the justification on the basis of individual rights, which was most commonly expressed as a duty to comply with binding international commitments, such as those contained in the UN Convention on the Rights of the Child.

As a policy issue, the schooling of IRCs masks numerous complexities, and this case-study has shown that the policy issue in question is anything but simple or straightforward. A review of public authority discourse over nearly 20 years revealed that accommodation of IRCs in public schooling was very much contested in practice. Policies addressing the schooling for IRCs were part of a more complex debate that brought together a number of different political, economic and ideological concerns. These ranged from nation-building, economic competitiveness, the separation of powers between federal and local levels of government, as well as Canada's obligations under international law and its resilience as a multicultural nation of immigrants. Advocates for inclusion mustered moral, legal and pragmatic arguments to defend accommodation against ideological opponents who believed, sometimes

equally as strongly, that IRCs were not entitled to benefit from free public education. It is hoped that the juxtaposition of discourse provided in this chapter, which brought forward justifications across different government jurisdictions, will have resulted in a fuller, richer account of the normative ideas at play when public authorities debated the inclusion and exclusion of IRCs from public schools in Toronto.

Scope for theoretical innovation

During the course of this research, it became apparent that the normative resources called upon by public authorities to describe their obligations to IRCs were diverse, sometimes overlapping, and often strategically framed (to either undermine opposition positions or bolster the legitimacy of the speaker's own position). Some of the normative ideas put forward fit neatly in the common theoretical approaches outlined in Chapter Three. That is, they mirrored the justifications advanced in normative theoretical frameworks developed in the relevant literature in political and ethical theory. But not all justifications documented fit neatly within the existing theoretical frameworks. Also, even if *some* normative ideas fit in *some* of the existing theoretical frameworks, this does not mean that existing frameworks make the best sense of the justifications advanced by public authorities in practice.

This led to the conclusion that there may, in fact, be another normative theory that could better accommodate many of the normative ideas put forward by public authorities that were either left out of these other theoretical frameworks or simply not grouped together in a compelling way. If these normative ideas could be accommodated in a new theoretical framework, it could potentially illuminate past practice and guide future practice, while enriching the theoretical landscape by making new normative resources available to public authorities, civil society actors and other parties concerned with schooling rights for populations of migrant children with irregular status. Such a theoretical framework would need to bring together several of

the key normative ideas referenced by public authorities when they sought to justify accommodation of IRCs in public schools in practice; to wit:

(a) **Vulnerability**: the justifications put forward attest to the fact that the vulnerability of IRCs, and particularly IRCs kept out of public schooling, was a morally relevant factor motivating public authorities to take action;

(b) **Discretion**: public authorities also acknowledged that they exercised significant discretionary authority which meant they could impact the IRC's key interests; and this, in turn, gave rise to a special responsibility to address their needs even if such action was not compatible with the policy positions of federal policymakers—in other words, the capacity to act was morally relevant;

(c) **Dependence**: public authorities at the provincial and municipal levels recognized that IRCs were dependent on services provided by them, ie that they were uniquely positioned to make certain services available to IRCs, and that this gave rise to a moral obligation to make those services as accessible as possible (access without fear);

(d) **Trust**: public authorities at the provincial and municipal levels were also keen to foster trust amongst IRCs and their families, so that these groups could interact with public authorities without fear of reprisals.

These normative ideas were not the only ones referenced in practice, but they were common, influential and, arguably, inspired a sense of obligation to meet the welfare needs of IRCs. This was not an obligation to act charitably toward IRCs—it was clearly a stronger sense of responsibility. Public authorities articulated a responsibility toward IRCs and their education that was equal to, if not stronger than, the responsibility these same public authorities expressed for legally-resident children. The sense of responsibility expressed by public authorities at the provincial and municipal levels—a sense of special obligation to vulnerable residents—was cast as a

responsibility for vulnerable residents of *their city* and *their province*. The next chapter offers a normative framework that makes sense of these moral intuitions.

5. A fiduciary account of public authority and obligation

5.1. Chapter overview

This chapter sets out to define an alternative ethical basis for the IRC's right to public schooling. The chapter proposes that the best way to conceive of the relationship between public authorities and IRCs is as a relationship between a fiduciary and a beneficiary. Fiduciary theory not only helps explain the political authority of the liberal state, but also the authority of public officials throughout the state and its institutions. In this way, fiduciary theory also provides a conceptual framework for understanding the obligations public authorities have to IRCs at the sub-state level.

This chapter has several goals: (a) to explore the ethical nature of fiduciary relationships; (b) to demonstrate that the justifications for accommodating IRCs in public schooling in practice rely on normative arguments that are best systematized in a fiduciary normative framework; and (c) to advance the argument that public authorities have a special positive duty to provide IRCs with access to schooling on ethical grounds arising from a conceptualization of their relationship with IRCs as one that is fiduciary in form.

5.2. Chapter structure

The chapter begins by briefly clarifying definitional issues that arise in the study of fiduciary duties and fiduciary relationships. An overview of the central arguments is then presented. Once the basic argument structure is clarified, the chapter proceeds to explain the origins of fiduciary obligations in contemporary legal theory. Subsequently, the chapter engages critically with two competing views of fiduciary relationships—the first view argues that these duties stem from voluntary undertakings (a contractual account), whereas the second view suggests that fiduciary duties arise simply from the circumstances in which parties find themselves (a functional account). The chapter goes on to review the circumstances of IRCs in Canada and their specific

relationship with public authorities. It concludes that that IRCs in Canada do in fact count as beneficiaries of a fiduciary relationship with public authorities. Subsequently, it engages with several possible challenges arising from the framing of the relationship between IRCs and public authorities as fiduciary in nature.

The value of a fiduciary approach for theoreticians and practitioners addressing the social welfare rights of child migrants without legal status is discussed at the end of the chapter. It establishes the benefits of a fiduciary approach by reconciling theory with practice, demonstrating that many of the normative ideas public authorities appealed to in practice (to justify inclusion of IRCs in public schools) fit within a fiduciary normative framework. In this way, the approach provides insights into the practice of accommodating IRCs in public schools. In addition, the approach enriches the theoretical landscape by making available the normative resources necessary to provide a strong way of conceptualising the duty of public authorities to educate IRCs.

The ideas in this chapter draw on the work of academics who have developed and applied fiduciary theory in novel ways, shedding light on the theory's philosophical foundations and its wider application to issues of public policy.[122] A substantial part of this chapter draws on Canadian case law, bearing in mind both the fieldwork undertaken in Canada and the degree to which the Canadian courts have enlarged the concept of fiduciary duty.

5.3. A brief definition

A fiduciary is someone who wields significant discretionary control over the interests of another. The other party in a fiduciary relationship is referred to as the beneficiary. The eminent legal scholar Paul Finn, whom many credit with the renaissance of fiduciary theory, summarizes fiduciary relationships in this way:

[122] This includes the work of Paul Finn (1977) Evan Fox-Decent (2005, 2009, 2011), Evan J. Criddle (2006, 2008, 2009, 2010), Ethan J. Leib (2009, 2011), Lorne Sossin (2003), Paul Baron Miller (2008, 2011, 2013) and David L. Ponet (2011, 2014).

> Fiduciary relationships generally can be described as ones in which parties are so circumstanced relative to each other for some purpose, as to give one the right reasonably to expect that the other will act in his or her interests or in their joint interests in discharging that purpose and not in his self-interest.
>
> (Finn 2012, p. 33)

The beneficiary is normally reliant on the fiduciary in some special way. This reliance can be material or psychological, but either way the reliance generates a peculiar vulnerability for the beneficiary since they are dependent on the fiduciary to act in some specific way. Indeed, it can be said that the beneficiary is vulnerable to the fiduciary because they *trust* the fiduciary will act in specific ways and that the fiduciary's actions will reflect ethical conduct.

What arises from a fiduciary relationship are *fiduciary duties*. The fiduciary exercises control over the interests of a beneficiary and is ethically bound to use this discretionary control to advance the beneficiary's interests. The fiduciary cannot exercise the discretionary control at their disposal to advance their own interests—this is referred to as a duty of loyalty. The fiduciary has a duty to be loyal to the beneficiary. Second, the fiduciary is also ethically bound by a duty of care. A duty of care is a positive duty to take affirmative actions to advance the best interests of a beneficiary. In summary, a fiduciary has decision-making power over another's interests and as a consequence is bound to (a) certain ethical standards of conduct and (b) the positive performance of specific duties.

5.4. Argument structure

Chapter Three identified weaknesses in several common theoretical approaches that have been used to undersatnd the issue of schooling rights for IRCs. Amongst these weaknesses, several stood out as being especially problematic:

1) **Immediacy**: The difficulty establishing a right to public schooling for IRCs upon taking up residence in the host community;

2) **Indeterminacy**: The difficulty identifying a specific duty-bearer responsible for meeting the rights claims of IRCs to public schooling;
3) **Priority**: The difficulty prioritizing IRCs interests or bringing them on par with the interests of other groups (ie citizens and legal residents);
4) **Charity**: The difficulty arising from the framing of public schooling for IRCs as a matter of charity and benevolence.

These challenges at the level of theory were reflected in practice, as evidenced by the analysis provided in Chapter Four. A brief, non-exhaustive list of positions articulated by one or more public authorities in Chapter Four is included below to illustrate how discourse in practice mirrored the challenges in theory discussed in Chapter Three:

1) **Immediacy**: Public authorities suggested that irregular migrants in Canada should not benefit from the protection of the Canadian Charter of Rights and Freedoms upon first arrival in Canada. Recall, for instance, the remarks made by Canadian Alliance MP Randy White: "The charter of rights and privileges [sic] must be revisited. […] Charter rights and freedoms shouldn't be for everyone upon first arrival. Individuals coming into the country should have certain rights and privileges but not the same rights, privileges and freedoms as Canadians" (HC Bill C-11 Deb 27 February 2001, 1250). Section 15 of the Canadian Charter of Rights and Freedoms addresses equality rights in Canada. It states that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, *national or ethnic origin*, colour, religion, sex, age or mental or physical disability" [emphasis added] (Charter 1982).
2) **Indeterminacy**: For the most part, public authorities in the Province of Ontario acknowledge that IRCs have a right to education, but some were less willing to acknowledge that their presence imposed an unencumbered obligation on the province to fulfill the IRC's claim to schooling rights. Some proposed a limit to

this obligation, arguing that the responsibility for meeting the needs of IRCs did not lie with the Province of Ontario, but rather with federal authorities as they were responsible for legislation that created this category of *irregular* resident. Recall the remarks of Liberal MPP Beer, who argued that the federal government "is responsible for the refugee system" and therefore it must "help the province, to help the school boards" (LAO Bill 24 Deb 11 June 1992, 1130).

3) **Priority**: Some public authorities argued that accommodation of IRCs in Canada's public schools should not come at the expense of legally-resident children; the needs of legally-resident children and IRCs were not of equal moral weight. Conservative MPP Prue claimed that it could be permissible for IRCs to go to school, but not at the expense of Canadian children: "I want to state that the people I represent and most of the people who have talked to me about immigration over the years want to make sure that it does not come at a cost to their own children or to their own school system […] I would suggest that if they were to see that the money that they think is owed to them and to their children was taken away and given to others, it may cause some difficulty" (LAO Bill 194 Deb 10 May 2005, 1740).
4) **Charity**: Quite frequently the accommodation of IRCs in Canadian public schools is framed as an act of benevolence. While several public authorities advance arguments of this kind, it is perhaps clearest in the following statement by Conservative MPP Prue: "If there is money left over—and if this government has money left over, I'm suggesting it [schooling of IRCs] is a worthwhile expenditure—then you have to look, as you are doing in this bill, to help foreign nationals who happen to be in Canada" (LAO Bill 194 Deb 10 May 2005, 1730).

This chapter will show that framing the relationship between public authorities and IRCs as a fiduciary relationship has three advantages. First, it helps overcome the weaknesses identified in other theoretical approaches from moral and political theory; second, it provides a succinct and systematized framework for some of the arguments

presented in practice for the inclusion of IRCs in public schools; and, finally, it provides a strong way of conceptualising the duty of public authorities to educate IRCs.[123]

As regards the first objective, the theoretical framework elaborated in this chapter seeks to demonstrate that conceptualizing obligations to IRCs as fiduciary duties:

(a) Establishes a need to act in the best interests of IRCs as soon as they are present in the jurisdiction(s) of the state;
(b) Charges *specific* public authorities with a *specific* obligation to advance the welfare of IRCs;
(c) Brings IRCs into the moral scope of concern of public authorities, giving their needs at least the same priority as other groups, but at times priority over the needs of other groups as a result of their unique vulnerabilities and their heightened dependency on public authorities for critical social services;
(d) Establishes that the obligation to IRCs is not one of charity or benevolence but a special positive duty arising from the *special associative relationship* between public authorities and IRCs.

The argument deveoped in this chapter is straightforward. The chapter argues that the ethical basis for the commonly accepted duty of care public authorities have for legally resident children (the *best interests principle*) is, in fact, (a) no different to the ethical duties public authorities have for IRCs because, (b) in both cases the duty is a fiduciary duty and, (c) a child's immigration status does nothing to diminish the ethical strength of this duty.[124] A specific fiduciary relationship with public authorities

[123] To be clear, the fiduciary approach cannot accommodate all justifications and normative ideas put forward in Chapter Four. However, it does provide a framework for several normative ideas that otherwise escape theorizing; for example, justifications that focus on the variables of (a) dependence, (b) vulnerability and (c) discretionary authority.

[124] The most common way of conceiving of the duties public authorities have for legally-resident children is *a duty to pursue their best interests*. Article 3, paragraph 1, of the UN Convention on the Rights of the Child states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*" [emphasis added] (UNCRC 1989). Where legally resident children are concerned this generally proves to be uncontroversial. This chapter proposes to extend that benefit to IRCs. It proposes that the *best interests* principle reflects a fiduciary conception of public authority.

exists irrespective of the migrant child's immigration status and regardless of whether the political community has voluntarily chosen to shoulder responsibility for IRCs.

5.5. Genesis of contemporary fiduciary duties

Fiduciary duty has a long history in legal and political theory. The idea of fiduciary duty can be traced back to the English view that public officials operate on behalf of a trust lent to them by the King and, as such, were held to a certain code of conduct (Finn 2012, p. 32). This code of conduct ensured that the power entrusted to public officials could not be used to oppress those subject to their administrative and legal powers, nor could these powers be used by public officials to enrich themselves. It is from these beginnings that the idea of the public official as *a fiduciary* emerge. Later, many political philosophers took up the idea of political authority as a fiduciary trust between *the people* and their government. John Locke, for instance, espoused the view that political authority was fundamentally *fiduciary* in character. In his Second Treatise on Civil Government he writes:

> Though in a constituted commonwealth […] there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.
>
> (2016, Chap XIII)

This brief historical overview needs to also take into account one other development from the practice of the common law in medieval England. This concerns the role of equity in English courts.

The principles and rules that together form *the common law* practiced in the United Kingdom, Canada, Australia and other parts of the Commonwealth, were at one time handled by separate courts in England. Equity comprised a group of principles considered to be its own domain of law overseen by the Court of Chancery (a court of equity). The purpose of treating equity as distinct from the common law, indeed as a complement to it, was to allow greater flexibility in determining what form of relief was

owed in cases that dealt with matters of equity. The common law was believed to be too rigid to handle cases of equity, and the remedies available too limited.

Today, the role of equity in common law is of notable importance. Leonard Rotman describes the tempering effects of equity in the common law thus:

> Equity is not only a method by which the rigors of the common law are tempered and its gaps filled, nor is it merely a competing system to the positive law. Rather, equity is more appropriately understood as a process by which positive law is brought closer to the human condition.
>
> (2016, p. 501)

Equity makes the law more just by allowing jurists to argue for the application of situation-specific principles of equity—in other words, it allows context to inform decision-making in law, as opposed to a blanket application of rules and precedent to all new cases that come before the courts. When novel circumstances lead to a breach of trust, unfair enrichment or betrayal, the law looks to broad principles of equity to determine a just outcome. Because equitable principles are today subsumed in the common law, contemporary courts are able to respond to new, unique and unforeseen challenges which rules of precedent may not be best equipped to address.[125]

The connection between equity and fiduciary duty lies in the way equitable principles take shape in real-life situations involving individuals in trusting relationships or partnerships. The principles that govern those relations are principles of equity. The relationships themselves—not all, but some—are fiduciary in nature: they are fiduciary relationships.

A hypothetical example helps illustrate the principle. Imagine a real-estate agent representing a client in the purchase of property. The agent locates a property and in the course of the agent's due diligence discovers a wealth of natural resources lying below the ground. Rather than facilitating the acquisition of the property for her client,

[125] See the 1980 Supreme Court of Canada decision *Petkus v Becker*, in which Justice Dickson observed, "the great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice."

the real-estate agent purchases the property herself. The real-estate agent's self-dealing in this case constitutes a breach of an ethical principle, namely, the duty of loyalty to the client and the need to advance her interests *disinterestedly* (ie without regard for the real-estate agent's own interests).[126] The courts in this case would look to principles of equity in the common law to achieve a measure of justice, be it restitution or payment of damages. This example is illustrative of how fiduciary relationships operate on the basis of certain ethical principles that fall within the domain of equity.

Scholars of fiduciary duty have only recently begun applying the principles of fiduciary theory to other types of *trusting relationships* outside of the traditional categories found in a private law context, such as the one described in the example above. Examples of some recent efforts include thinking of friendship as a fiduciary relationship (Leib 2009), parents as fiduciaries (Bryan 1995) and public authorities as fiduciaries of the environment (Coghill et al 2012). Framing the exercise of public authority in this way—that is, viewing the state as a fiduciary—is what gives rise to *fiduciary political theory*.[127]

---

[126] Peter Birks notes in his Lionel Cohen Lecture that "[…] the core fiduciary obligation—the core trust obligation—is the compound obligation to take active care and to do so disinterestedly" (2000, p. 38).

[127] Only a few scholars of fiduciary theory have developed accounts of fiduciary obligation in the context of human rights and migration, but these attempts have generated very interesting insights. Fox-Decent and Criddle have argued that fiduciary relationships constitute a foundation for human rights doctrine and by extension may be useful in a discussion of the rights of citizens and non-citizens (2009, p. 301). In *Sovereignty's Promise*, a volume dedicated to exploring the foundations of fiduciary political theory, Fox-Decent notes that "human rights are best conceived as norms arising from a fiduciary relationship that exists between states (or statelike [sic] actors) and the citizens and noncitizens [sic] subject to their power" (2011, p. 240). Fox-Decent also addresses the duties that the state—conceived of as a fiduciary—has to subjects and strangers, ie citizens and non-citizens. For a discussion of these issues, see Chapter Four of *Sovereignty's Promise* (Fox-Decent 2011). Fox-Decent and Criddle leave open the possibility that the concept of fiduciaries may illuminate other relationships where power is exercised over a vulnerable party (2009). As regards the exercise of fiduciary authority over precarious residents in a state, they observe that "fiduciary theory does not necessarily abolish the traditional distinction between citizens and denizens" rather "it casts the distinction in a new light" (Fox-Decent and Criddle 2009, p. 382). Anna Lise Purkey (2014), building on this account of fiduciary theory, argues that the refugee-host state relationship is one that is best understood through the lens of fiduciary theory; she concludes that the responsibility of states for refugees in protracted refugee situations is one of a fiduciary to a beneficiary.

These interpretations and applications of fiduciary theory set out to demonstrate that fiduciary theory is not merely a formalistic legal approach to relationships in the public domain. This scholarly work has shown how fiduciary theory can also be helpful in explaining the nature of obligations and responsibilities that arise in a number of relationships where one party exercises discretionary control over the interests of another party (Sossin 2003; Fox-Decent and Criddle 2009). As a result of these efforts, new spaces are being identified where the principles of fiduciary theory are influential and constructive.

Canadian courts have made an especially important contribution to the analysis and consolidation of new, progressive interpretations of fiduciary theory.[128] A variety of issues and interests have been "brought within the reach of fiduciary liability due to the initiative of the Supreme Court of Canada," writes Laura Hoyano, including "fundamental human and personal interests" (1997, p. 173). Lorne Sossin credits the Canadian Supreme Court as having been "at the forefront of exploring the many incarnations of fiduciary obligations", and more specifically, having "been instrumental in the recognition of public law fiduciary obligations" (2003, p. 130).[129]

These efforts by Canadian courts have been complemented by those of legal and political theorists, who have argued that fiduciary theory is a capacious normative theory able to illuminate the nature of responsibility in a variety of contexts and relationships outside the private law context. This chapter builds on this view and proposes an application of fiduciary theory to address the question of schooling rights for IRCs. The result is a normative framework that accommodates many of the justifications put forward in practice to accommodate IRCs in public schools in Canada,

[128] Canadian courts are not the only courts engaged in this endeavor—it is a project that has been undertaken across all countries that work within the common law tradition. Courts in the United States, Australia, New Zealand, and the United Kingdom have been active contributors to thinking about the nature of fiduciary obligations.

[129] Paul Baron Miller has offered a more nuanced view of fiduciary law in Canada, stating that it "has been considered something of a mess for well over 30 years, over which time it has continued to elude efforts to subject it to some form of orderly articulation" (2008, p. 1).

but one that is equally relevant to practice outside of Canada, ie in similar contexts where one must articulate the nature of the responsibilities public authorities have for the welfare of IRCs.

5.6. The amorphous nature of fiduciary relationships

The growing scholarship on fiduciary theory is evidence of a great deal of enthusiasm for the conceptual resources the theory offers. In a recent publication, the legal theorist Ethan J. Leib notes that we may be living in "the age of the fiduciary" where an increasing number of societal relations take the fiduciary form (2009, p. 669). It is therefore not surprising to find many new attempts "to expand the reach of the fiduciary concept into new sorts of relationships not generally within the ambit of fiduciary law" (Leib 2009, p. 669). In his 2000 Lionel Cohen Lecture, Peter Birks observed that "fiduciary obligations have achieved a new prominence in the common law world […] They have become as the saying goes, 'all the rage'" (2000, p. 4).

It is consequently somewhat odd to have to begin this explanation of fiduciary theory by pointing out that, in fact, it remains a challenge to locate a single, agreed upon definition of the term *fiduciary* or the ways one might establish the existence of fiduciary relationships (Glover 1997; Gold 2013). There is, to be sure, an ongoing search for conceptual clarity. This effort relates specifically to the identification of groups of fiduciaries and beneficiaries. This is an immensely important effort as there can be no fiduciary obligations if one cannot establish that two parties stand in a *fiduciary relationship*. Rafael Chodos notes that "Fiduciary duty is complicated […] in respect of its ambit, its scope, its termination, and the remedies for its breach" (2010, p. 838). The conclusion one must arrive at, according to Chodos, is that "the notion is fuzzy" (2010, p. 846). Chodos' tentativeness is a notable feature of the literature on fiduciaries.

Significant effort continues to be given over to the study of fiduciary theory and its applications in contemporary society. Motivating these efforts is the view that

fiduciary theory is able to *clarify* important dimensions of responsibility that arise in a number of relationships formed in the course of social life; specifically, relationships that centre around a very high degree of *dependency* and *vulnerability*, such as relationships between a parent and child, a doctor and patient, and relationships between friends.[130] Ethan Leib notes of the central features of fiduciary theory: "[…] the concept is self-consciously open, flexible, and adaptable to new kinds of relationships—and those relationships trade upon high levels of trust and leave one party in a position of domination, inferiority, or vulnerability" (2009, p. 672). In addition to the relationships listed above, it will be argued that fiduciary theory is also able to clarify important dimensions of responsibility that shape the response(s) of public authorities for the welfare of IRCs at the sub-state level.

Setting aside the tentativeness around definitional issues, one can still identify several aspects of fiduciary theory upon which there is widespread agreement. The next section focuses on these elements of consensus.

(a) Areas of definitional consensus

Common across nearly all accounts of fiduciary theory is the idea that fiduciary duties arise in a variety of scenarios where one party, a fiduciary, exercises full or partial discretionary control over the interests of a second party, the beneficiary. The discretionary control available to the fiduciary generates a peculiar vulnerability on the part of the beneficiary. This vulnerability is a function of the expectation held by a beneficiary as to how the fiduciary will exercise discretionary control over their (the beneficiary's) interests.

These expectations are captured in the notion of trust: a fiduciary and a beneficiary stand in a fiduciary relationship built upon a foundation of trust. A beneficiary trusts that the fiduciary will exercise the discretionary power they hold in

[130] See Ethan J Lieb's *Friends as fiduciaries* (2009).

the beneficiary's best interests. This suggests that the fiduciary is beholden by the beneficiary's trust, but it is not always the case. While most often it is a beneficiary that holds an expectation of the fiduciary (the basis for the sense of trust) there are other ways a fiduciary can be so beholden. For example, an analysis after the fact can reveal that a fiduciary relationship existed *because one could reasonably conclude that there was an expectation of trust* even if this expectation was not declared at the outset—it is in other words, an implied trust. An ex post analysis of a relationship can reveal that it was one structured on trust (Leib and Ponet 2011, p.7).[131]

An example borrowed from John McCamus helps make the point. McCamus summarizes the 1981 English case *Chase Manhattan Bank N.A. v Israel-British Bank* in which one bank accidently transferred a multi-million-dollar sum to another bank shortly before the latter filed for bankruptcy (McCamus 2000, p. 188). The bank that made the erroneous payment claimed that it had priority over all other creditors when the insolvent bank paid back its debts. This claim succeeded but it was only possible because the judge in the case determined that making the mistake gave rise to a fiduciary relationship.

This example illustrates how a *trusting relationship* can arise even in situations where neither the fiduciary nor the beneficiary acknowledge such a (trusting) relationship to begin with and where the beneficiary has not explicitly reposed trust in the fiduciary (i.e. it can be a product of circumstance).[132] As Glover points out:

> Whether the beneficiary actually trusts the fiduciary is not critical. He or she can still be in a 'structure of actual trust' and also have a right to trust. Either 'trust in fact' or the 'right to trust' will have as their subject one or more of the beneficiary's interests.
>
> (1997, p. 277)

[131] A bond of trust can exist even where it has not been explicitly reposed by the beneficiary in the fiduciary. This is referred to as *trust in fact* or a *structure of trust* and is discussed later in this section.

[132] Evan Fox-Decent notes that a fiduciary has to act in a manner respectful of the beneficiary's trust "even where the beneficiary has done nothing evident to repose trust, and the alleged fiduciary denies the existence of any kind of trust relationship" (2005, p. 294).

(b) The two duties of fiduciary theory

If the beneficiary is vulnerable to the discretionary power of the fiduciary, the fiduciary, for their part, owes a *duty of loyalty* to the beneficiary since the beneficiary has reposed trust in the fiduciary to act in a specific way. A duty of loyalty is what Andrew Gold, writing in the *The Loyalties of Fiduciary Law,* refers to as the "core minimum" of a fiduciary relationship (2014, p. 190).[133] Loyalty is served when the best interests of the beneficiary guide the fiduciary, not when the fiduciary is guided by her own interests.

In addition to a duty of loyalty—which restricts the behaviour of a fiduciary—fiduciaries also have a *duty of care*. The duty of care can be thought of as complementary to the duty of loyalty. A duty of care requires that a fiduciary adopt the beneficiary's ends or goals and seek to advance them—it is an other-regarding action:

> A duty to adopt an end does not mean that no action is required; it does not mean that aspiring to promote the principal's end is sufficient to uphold one's duty. […] Some concrete action is required—ends imply action […].
>
> (Laby 2008, p. 145)

What a duty of care requires, as this quotation points out, is affirmative action which respects the purpose for which the fiduciary has discretionary authority to begin with—that is, for other-regarding purposes (Leib 2009, p. 675).[134]

(c) Authority and trust

Several additional clarifications are necessary at the outset of this investigation of the normative framework that fiduciary theory provides. The first clarification regards the nature of the authority exercised by the fiduciary; the second regards the claim that trust underpins a relationship between a fiduciary and a beneficiary.

---

[133] Iris Samet echoes this view, stating that the "attitude of selflessness is also what lies at the heart of the fiduciary duty. The requirement to put other people's interest in front of your own interests is basic to the fiduciary duty no matter how it is conceptualized" (2014, p.127).

[134] However, action that serves an other-regarding purpose in a fiduciary relationship is not the same as charitable action. The motivation is normatively different and is discussed in greater length in Section 5.9.

To begin with, it is necessary to specify that the nature of the authority exercised by the fiduciary is of a sort that the beneficiary *cannot exercise* (Fox-Decent 2011). It is generally for this reason that the fiduciary wields such extraordinary discretion over the interests of a reliant beneficiary. The monopoly of a specific competency, skill or administrative power serves, in fact, as one important source of the beneficiary's vulnerability. The beneficiary is reliant upon a specific competency, skill or administrative power which they do not possess. What is meaningful about these specific competencies, skills or administrative powers is that they are needed to secure some interest that is vital to the beneficiary.

Take the example of the doctor-patient relationship. A patient is reliant upon the doctor because the patient lacks the skills that would allow the patient to treat themselves. The patient is therefore at the mercy of the doctor to utilize her knowledge in a manner that respects the reasons for which it was entrusted, ie to heal patients. This is a key principle in medical ethics. The patient is in a situation of vulnerability vis-à-vis the doctor because she is reliant on the doctor's specialized knowledge to advance her interests (ie her health). The fact that a patient is ill to begin with, perhaps too weak to seek out another doctor, is undoubtedly a second source of vulnerability and intensifies the nature of the fiduciary relationship between doctor and patient. What this example tries to make clear is that the beneficiary's vulnerability is *also* a function of her incapacity to exercise the skills and competencies possessed by the fiduciary. From this incapacity emerges a specific reliance on the fiduciary and hence a form of vulnerability. A beneficiary can therefore be in the unfortunate circumstance of suffering multiple vulnerabilities, since they may be vulnerable for other reasons as well (eg lack of material resources, illness, etc).

The second clarification has to do with trust. Trust and reliance are closely connected concepts in fiduciary theory. The beneficiary trusts that the discretionary authority exercised over her interests will be constrained by *purpose*—and in many cases, it is the beneficiary that causes the fiduciary to possess this discretionary

authority.[135] Recall the example the real-estate agent: it is the client that causes the real-estate agent to possess discretionary authority over her interests by entrusting the agent to use her specialized competencies to advance the client's goal of purchasing land. Beneficiaries carry a *presumption of trust* that the discretionary control over their interests will be exercised with solicitude.

Evan Fox-Decent argues that the authority of the state is very much like this: it is fiduciary in character. It is not only that subjects of the state do not possess the sort of lawmaking authority that the state has at its disposal, subjects trust that the state will use its discretionary authority to advance their interests:

> […] the state, through its legislative, judicial and administrative institutions, assumes discretionary power of an administrative nature over the people affected by its power, and […] subjects, as private parties, are not entitled to exercise public powers. It follows that the state's possession of sovereign powers gives rise to a fiduciary obligation.
>
> (Fox-Decent 2011, p. 239)

To recapitulate, fiduciary duties arise when one party exercises overwhelming discretionary control over the interests of a second party. Beneficiaries are reliant upon the specific capacities that fiduciaries possess and which beneficiaries themselves either do not have or cannot exercise. In such relationships, the duty-bearer (the fiduciary) is required to act solicitously toward the beneficiary. This means being loyal to the goals of the beneficiary and taking affirmative action to advance the beneficiary's interests.

On these aspects of fiduciary theory there is broad agreement. What is less clear is how fiduciary relationships come into being—who qualifies as a fiduciary and a beneficiary and why. Indeed, the difficulty of fiduciary duty stems primarily from the multiplicity of ways fiduciary relationships may be formed. Two divergent communities of understanding exist; they are discussed in the next sections.

---

[135] Paul Finn points out that "some, but by no means all, fiduciaries have discretionary powers given to them" (2012, p. 34).

5.7. Contract fiduciary theory: the role of voluntarily undertakings

The complicated nature of fiduciary theory becomes clear when one considers the place of voluntary undertakings in the theory. Voluntarist accounts of obligation (such as when one makes a promise or enters into a contract) are generally quite clear in respect of the obligations that ensue: one is aware of her commitments and obligations, as well as the benefits of the relationship from the outset. Jonathan Seglow refers to duties arising from voluntary undertakings as *agency-based special duties*. Agency-based special duties are a product of the will of a duty-bearer—the person undertaking a commitment—they reflect "what she has chosen or freely undertaken to do with respect to the duty-holder" (Seglow 2013, p. 8).

Each party in a voluntarily undertaking normally enters as a free and equal moral agent on the basis of facts they each deem sufficient to obligate themselves to some action.[136] Accounts of responsibility and obligation rooted in a voluntarist model are also useful in limiting risk, since each party is aware at the outset of the limits of their responsibility. Additionally, they allow both parties to negotiate the terms of the undertaking that binds them. Thus, obligations that arise from voluntary undertakings respect the freedom and autonomy of duty-bearers because they have chosen freely to whom they are bound and whom they will support with their limited time and resources.

Voluntary undertakings have an important place in fiduciary theory—indeed, for many, it is central to the theory. A voluntary undertaking that gives rise to a fiduciary relationship can take various forms: (a) it can be *explicit*, as in a lawyer accepting to represent the interests of his client; or (b) it can be *implicit* by way of acknowledgement, as when a political representative pursues the best interests of her constituency, because the representative acknowledges that these obligations stem from the office

[136] Promises made under duress do not hold the moral force of promises made freely. As Kent Greenawalt observes in *Conflicts of Law and Morality*, "a promise may lack moral force because of the conditions in which it is given or because of some defect in its terms" (1987, p. 77). Equality is used here to mean moral equality, not equality of resources.

she occupies or other relevant background conditions (eg a constitution, legal statutes, etc). For there to be a recognizable *implicit undertaking*, one would need to point to some form of prior *acknowledgement*, that is, to a set of specific circumstances that are acknowledged to give rise to a fiduciary relationship; only then would it be reasonable to hold the expectation of fiduciary obligation.[137] Given the weighty moral obligations fiduciaries incur toward beneficiaries, some argue that consent or a voluntary undertaking is the only way to generate duties of loyalty and care toward a beneficiary.

Australian High Court Justice James Edelman advances such a position. Justice Edelman addresses the issue of voluntary undertakings in his article *The Role of Status in the Law of Obligations*. Citing Australian and Canadian case law, Justice Edelman concludes that fiduciary duties arise on a consensual basis, namely, on the basis of a voluntary undertaking by a fiduciary (2014, p. 21). Several other jurists have arrived at conclusions analogous with those of Justice Edelman. In the 1992 Canadian Supreme Court case *Norberg v Wynrib,* Supreme Court Justice Beverley McLachlin cast doubt on the possibility of fiduciary obligations arising outside voluntary undertakings:

> Inherent in the notion of fiduciary duty . . . is the requirement that the fiduciary have assumed or undertaken to 'look after' the interest of the beneficiary . . . It is not easy to bring relationships within this rubric. Generally people are deemed by the law to be motivated in their relationships by mutual self-interest. The duties of trust are special, confined to the exceptional case where one person assumes the power which would normally reside with the other and undertakes to exercise that power solely for the other's benefit.
>
> (Norberg v Wynrib 1992)

On this account, one cannot proceed directly from the assumption that one party assumes fiduciary duties vis-à-vis a second party simply because of a differential of power and vulnerability. Justices Sopinka and McLachlin noted in their dissenting opinion that:" […] it is the mutual conferring and accepting of power to the knowledge

[137] Obvious candidates are specific legislation, or legal precedents that define circumstances as being of the kind that give rise to a fiduciary relationship (Purkey 2014, p. 696).

of both parties which creates the special and onerous trust obligation, although of course this mutuality of understanding need not reach the standard of a contractual promise" (*Norberg v Wynrib* 1992).

Justices McLachlin and Sopinka agree on some of the basic indicia of fiduciary theory: the nature of relationships matter, as does the exercise of discretionary authority over another's interests. However, these are necessary, but not sufficient conditions for establishing a fiduciary relationship (Hoyano 1997). Also required is an acknowledgment or a *voluntary commitment* on the part of the fiduciary to bring into existence a relationship of trust and thus, a claim for solicitude in the use of discretionary power. In making their argument, Justices McLachlin and Sopinka rely on a contractarian account of fiduciary theory, where the duty-bearer must *first accept* duties of loyalty and care vis-à-vis a beneficiary; these duties, they argue, cannot simply arise from the circumstances in which two parties find themselves.[138]

A second case is worth considering, since it also focuses on the role of voluntary undertakings in establishing fiduciary relationships. The case in question is *Alberta v Elder Advocates of Alberta Society*, heard by the Supreme Court of Canada in 2011. The case is notable because it did not have to do with an *existing* category of fiduciary relationship already recognized in common law,[139] but rather refers to an attempt to establish an *ad hoc* fiduciary relationship between claimants and the Province of Alberta (the government). The court assessed whether a fiduciary relationship could be established absent a voluntary undertaking by the government—thus generating fiduciary obligations for the government.

---

[138] This is an argument made by many public authorities that leverage normative ideas from a partialist ethical framework, ie the rights and entitlements that derive from legal status in Canada (membership) should be earned over time and after meeting set criteria established by the host community. Individuals can enjoy these entitlements because they *have been accepted into the community*—their presence has been agreed to and therefore the host community accepts obligations to them. The host community, on the voluntarist account, does not accept obligations because individuals are human, needful and present.

[139] Such as the relationship between attorney-client, employee-employer, guardian-ward and physician-patient, to name but a few (Leib 2009, p. 671).

The claim presented by *Elder Advocates* was that the Province of Alberta—responsible for providing healthcare to residents in the province—failed to provide adequate services to nursing home patients. Moreover, the province requested patients in nursing homes to make additional financial contributions to meet the costs of their housing and meals. The claimants characterized these additional payments as a subsidy of the healthcare regime the province was responsible for maintaining. Thus, the claimants argued, the Province of Alberta was in breach of its fiduciary duty to nursing home patients, and moreover, their policy demonstrated negligence, bad faith and unjust enrichment.

The Supreme Court of Canada rejected the claim for breach of fiduciary duty. Its decision is enlightening and goes in the same direction as the cases already discussed in this section. The Supreme Court of Canada argued that three things were required to establish an *ad hoc fiduciary relationship*:

> In cases not covered by an existing category in which a fiduciary duty has been recognized, a claimant must show that (1) the alleged fiduciary has undertaken to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons is vulnerable to a fiduciary's control; and (3) a legal interest or a substantial practical interest of the beneficiary or beneficiaries stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. Vulnerability alone is insufficient to support a fiduciary claim.
>
> (Alberta v Elder Advocates 2011)

The important nuance in this formula is contained in the first criterion: namely, that the alleged fiduciary *has undertaken* to act in the best interests of the alleged beneficiary. This departs from the criteria developed by Justice Bertha Wilson in the Canadian Supreme Court decision *Frame v Smith*, in which Justice Wilson proposes less stringent criteria for establishing a fiduciary relationship: namely, that the fiduciary simply *has scope* for the exercise of some discretion or power (see Section 5.8).[140] However, the decisive legal reasoning in the *Elder Advocates* case was that prior

[140] Justice Wilson's formulation coheres with a functionalist interpretation of fiduciary theory—this is considered in the next section. A functionalist account of fiduciary theory looks to the circumstances of two parties rather than relying on prior agreement.

agreement was required to establish a fiduciary relationship. This has raised the standard that needs to be met to establish an *ad hoc fiduciary relationship* in Canada in the public domain.

There are several significant weaknesses with an account of fiduciary theory that relies so heavily on voluntary undertakings. This account of fiduciary theory is challenged on the grounds that it is incapable of providing a comprehensive account of responsibility in modern society or in the many relationships that have a fiduciary form. This account limits to too great an extent the boundaries of moral responsibility and consequently the possibility of equitable outcomes.

It is notable that the voluntarist approach does not specify the reasons why one should assume obligations to another individual. Indeed, nothing prevents one party from pressing their bargaining advantage in relationships marked by power disparities (Goodin 1985, p. 779). Imagine a scenario where only a doctor and migrant child are on a vessel crossing the sea. The migrant child carries with her sufficient funds to begin a new life at her final destination. However, the child falls ill during the crossing. On a voluntarist account of fiduciary obligation, nothing prevents the doctor from exacting from the migrant child the majority of her funds in exchange for care. Onora O'Neil notes that bargaining of this sort is endemic to relationships built on large power disparities. "Where there are vast differences of power and vulnerability", writes O'Neil, "it is all too easy for the powerful to make the vulnerable 'an offer they cannot refuse'" (1998, p. 108).

Another notable downside to voluntarist accounts of obligation, Robert E. Goodin observes, is that they provide a rationale "for shunning any general social responsibilities over and above those we have explicitly or implicitly assumed" (1985b, p. 29). Henry Shue characterizes the type of moral reflection voluntarist interpretations of fiduciary theory invite, thus: "anything positive I owe may be bestowed at my discretion upon whomever I choose among the suitable people" (1988, p. 688). While not always the case, the voluntarist account of fiduciary theory seems to invite a

calculation of reward for solicitous action. An individual may agree to assist another if some benefit can be ascertained.

As noted at the outset, countervailing opinions exist about the factors that give rise to fiduciary relationships and the role that consent plays in their formation. The fact that such a schism exists amongst fiduciary theorists attests to the amorphous nature of fiduciary theory.

5.8. Functional fiduciary theory: context and relationships

The account of fiduciary theory favoured in this research is a functionalist account. While the voluntarist account stresses the role of voluntary undertakings in grounding special duties of the sort that exist between a fiduciary and a beneficiary, the functionalist account emphasises context, circumstance and the facts that tie parties together. These facts serve as reasons for grounding special duties between a fiduciary and a beneficiary. To be sure, this position is sceptical of the voluntarist account of fiduciary theory sketched above, which relies on explicit or implicit consent as the *sole source* of special duties and the principal way of establishing fiduciary relationships.

The voluntarist account of obligation advanced in the opinions of Justices Edelman, McLachlin and Sopinka carry significant sway in the growing Canadian jurisprudence on fiduciary duty. However, Avihay Dorfman refers to these opinions as representing “a reductionist stance” (2014, p. 339). They reduce the role of *trust* in a fiduciary relationship to a species of voluntary undertaking. Dorfman argues that “reducing the trust to a voluntary undertaking may leave nothing theoretically and doctrinally important to say about the trust form” (2014, p. 360). Evan Fox-Decent goes further, arguing that the Canadian Supreme Court’s orthodox view “underestimates the context-sensitivity of the fiduciary principle” (2011, p. 173). Ethan Leib is similarly critical of the tendency of the Canadian Supreme Court to take a contractual reading of fiduciary obligations, pointing out that the need for *prior acknowledgment* is only one

formal juridical view of the way fiduciary relationships arise (2009, p. 672). A *facts-based analysis* can also be used to reveal the existence of informal or *ad hoc* fiduciary relationships (Leib 2009).[141] For David Hayton, fiduciary relationships are ultimately "relationships imposed by equity, not by agreement of the parties" (1997, p. 293).

Where the facts and circumstances of a relationship between two parties reveal that one party dominates over another because they wield significant discretionary authority of the interests of the second party, and this second party exhibits a reliance on the former to act solicitously, one is in fact speaking of a specific fiduciary form:

> Fiduciary relations arise unilaterally from the trusted parties' possession of power to affect others. Nothing needs to proceed from the trusted party. […] No undertakings are needed. Undertakings may even be denied. Fiduciary relations are more imposed on trusted parties than assumed by them.
>
> (Glover 1997, p. 275)

The functionalist account of fiduciary theory highlights the circumstances of individuals and institutions, their standing vis-à-vis one another and the power differences between them. The theory emerges from a growing body of academic work which forcefully argues that fiduciary obligations can arise non-consensually *and also* from voluntary undertakings. It suggests that people can become morally entangled in relationships that have a fiduciary form. Responsibilities emerge from such entanglements that are not easily ignored.

Functionalist fiduciary theory is sensitive to the roles individuals play in relationships. These roles are frequently defined by circumstance; that is, the circumstances that bring individuals together have morally relevant features.

[141] Indeed, a facts-based approach seems to be the dominant mode of reasoning in Australia, where the courts have decided deductively (on the basis of facts) whether a fiduciary relationship exists at a particular point in time, according to the appropriate tests. The test is undertaken on the basis of relevant fiduciary indicia, but would normally adhere to the formula: a set of circumstances where a principal is reasonably entitled to expect that a fiduciary will act in the principal's interest to the subordination of the fiduciary's own interest. The term *reasonably entitled* is understood broadly and is not limited to voluntary undertakings.

Relationships are "recognized as fiduciary on a case-by-case basis by virtue of their possession of characteristics of fiduciary relationships," writes Paul Miller (2013, p. 50).

Take for instance the relationship between the parent and child. The parent-child relationship is deeply familiar and calls to mind some basic intuitions about moral obligations that arise in relationships not formed through consent or contract. A child can place her parent under an obligation of care because the child could not have consented to the child-parent relationship and is reliant upon the parent for her care. Fox-Decent writes:

> Parents are under a duty to manage and care for the child solicitously because only thus can parent and child stand in a relationship of equal freedom to one another, a relation where neither is subject to the *unilateral* will of the other.
>
> (2014a, p. 373)

The parent-child analogy is also useful in highlighting the importance of looking to the roles people fill as a source of normative value, and not merely the voluntary commitments they make (Baier 1980, p. 173; Smith 1998).[142] The emphasis on context, relationships and roles are some of the most useful features of functionalist fiduciary theory, since it opens the possibility of escaping from the straightjacket of voluntarist accounts of obligation and responsibility, what Robert Goodin has called, the major competing philosophical doctrine to relational accounts of social responsibility (1985b, p. 29).

Among the Canadian Supreme Court justices, Justice Bertha Wilson is widely regarded as a pioneer of fiduciary doctrine, not least because she has put forward one of the most influential accounts of the criteria that give rise to fiduciary relationships

[142] The authority of the liberal state is thought to be akin to this—it is based on a relationship with subjects on the state's territory who could not have consented to the exercise of power over them because their entry to the state (birth) is, more often than not, dictated by chance. Samuel Scheffler (2002) notes that "actual liberal societies attach far more weight to birth than to choice in assigning citizenship and its associated privileges and obligations." Evan Fox-Decent argues that "[…] fiduciary relationships—including the state-subject relationship—rest on a presumption of trust rather than consent" (2011, p. 93). Children in particular must rely on trust to mediate their relationship with the state and its public authorities, given that they do not have the possibility of active political agency and thus cannot consent to the power exercised over their interests.

outside of an expressly acknowledged fiduciary (voluntary) undertaking. These criteria are elaborated in the 1987 Supreme Court judgment *Frame v Smith*. The conditions that establish the existence of a fiduciary relationship according to this prominent functionalist account are presented in Box 1, below. Justice Wilson, writing in the *Frame* case*,* suggested that the indicia constitute "a rough and ready guide" for detecting the existence of a fiduciary relationship between two parties.

Box 1. Conditions establishing a fiduciary relationship[143]

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and,
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

A fiduciary relationship can be said to exist between two parties if the three criteria above can be satisfied. For functionalist fiduciary theory, what matters is the difference in discretionary authority of one party over the interests of a second party together with an assessment of needs and resources. The three criteria used to establish fiduciary relationships and ground fiduciary obligations are: (a) scope of discretionary authority, (b) trust that discretionary authority will be used solicitously, and (c) vulnerability to the fiduciary's discretionary control of resources needed by a beneficiary. It is the *scope for discretion* as opposed to prior agreement that differentiates the functionalist account of fiduciary theory from the contractarian account.

To summarize, on the functionalist view, fiduciary relationships can materialize suddenly or over time and do not require prior consent to establish an obligation on the part of the fiduciary. This view holds that one party can incur obligations to a second

[143] See, *Frame v Smith* (1987).

party without having consented to them, but simply from the facts and circumstances that link them.

5.9. Philosophical foundations

The value of fiduciary theory lies in its focus on constraining discretionary authority in relationships where one party exercises a degree of dominance over the interests of a second party. While the roots of fiduciary theory are in legal theory, the doctrine also draws on a number of moral concepts. This section explains the ethical foundation of fiduciary doctrine by linking it to foundational concepts in moral and political theory.

(a) Foundations

A fundamental principle of liberal theory states that it is necessary to respect the autonomy of human beings and their ability to form plans and projects that they deem valuable. It is for this reason that liberal theory censures acts that subjugate the will of one individual to the will of others. When an individual is subjected to the will of another, she is instrumentalised as a means to another's ends and not treated as a moral agent free to form and pursue her own ends. This violates the fundamental respect for the autonomy of individuals that liberalism requires. As Patricia Smith (1998) observes, "The value of justice in the liberal tradition requires that every individual must be regarded as an end in himself, every human life is intrinsically valuable." Being used as a means to an end implies that one's moral freedom has been curtailed in a significant way.

For Immanuel Kant, moral equality is predicated on respect for individual autonomy—it being the first, necessary characteristic of a moral agent, since autonomy is what permits moral agents to derive moral rules and formulate meaningful projects (1996 [1785], p. 433). Moral autonomy implies the freedom to choose the principles and projects that guide one's life on the basis of reasoned reflection.

Fiduciary obligations arise within a liberal framework and are therefore conditioned by the same respect for moral autonomy that makes liberal theory distinct. Fiduciaries must treat beneficiaries as autonomous moral agents who enjoy equal freedom with other persons. A fiduciary recognizes that it is because of a specific need and thus, reliance upon a fiduciary, that a beneficiary's freedom and autonomy are temporarily constrained. The fiduciary is prohibited from abusing their position of power to advance their own interests, since doing so would take advantage of the beneficiary's temporary vulnerability and would undermine the respect owed for the moral autonomy of another individual. Abuse of discretionary authority would risk subjecting the vulnerable party to the will of the party with discretionary control. Such disregard for the equal moral worth of another individual cannot be countenanced in a normative liberal framework.

This idea of moral autonomy relied upon by fiduciary theory can find different roots in political philosophy. It is a view of human agency which conceives of human beings as autonomous agents who should be allowed to develop specific plans, attachments and interests without subjecting them to a pre-ordained value-system (Blake 2001). This ideal of unconstrained moral autonomy is also the basis for the view that individuals should not be coerced by the arbitrary imposition of another's will. Michael Blake notes that the problem of coercion is that it demonstrates contempt for the individual coerced and consequently, it is forbidden by a liberal principle that demands respect for the conditions of autonomy (2001, p. 268).

At minimum, justice in a liberal state requires that individuals not encroach on the freedom of others. It is a negative duty in that it demands that individuals refrain from acting in particular ways that undermine the moral autonomy of other members of the political community. This is what Samuel Scheffler (2002) refers to as "the moral minimum" needed by individuals in order to lead decent lives.

Just as individuals can impinge upon the autonomy and freedom of others, so too can governments, as they possess a great deal of discretionary authority. While

the liberal state enjoys tremendous discretion in the use of its authority over subjects, the exercise of this authority is not without constraints. The stricture on coercive use of authority by individuals applies to state authority as well—the liberal state cannot use its discretionary authority to coerce subjects unless that use of authority has been made legitimate.

There are several ways of legitimizing political authority in order to avoid coercion, ie limiting the autonomy and freedom of subjects of political authority. Some are rooted in hypothetical consent, others in actual consent via democratic practices.[144] Fiduciary political theory takes the view that the state and public authorities that act on its behalf are constrained by a duty of loyalty to subjects. This loyalty requires that public authorities not act in their own self-interest, but in the best interest of subjects. Thus, the exercise of the state's discretionary authority is constrained and guided by purpose; primarily, to maintain peace and order and ensure conditions for human flourishing. State subjects accept the monopoly of state authority because they *trust* it will be discharged solicitously. This is how discretionary authority is made non-coercive in fiduciary relationships, not through consent, but through its faithful discharge.

Since the political authority of the state is exercised over all *subjects*—not only citizens and legal residents—all subjects are owed the loyalty of the state and the loyalty of public authorities that exercise discretionary authority on its behalf. This is precisely the argument taken forward by a number of fiduciary political theorists:

[144] There are other ways of making political authority legitimate. Consent-based theories presume that either hypothetical consent is given by citizens of a state, which legitimizes authority over them, or that their failure to protest that authority (by leaving or by rejecting authority through some other performance) is tacit agreement to state authority used coercively over them. Democratic consent focuses on public reason-giving and the ability of subjects to elect their representatives, thus validating the policies formulated by those in authority. Once validated, those policies and laws can be used legitimately even if this results in coercing individuals in some aspects of their public and private lives.

> the distinction […] between acting on the basis of consent and acting on the basis of trust implies that it is possible for the fiduciary state to act on the basis of the stranger's trust. The state's power remains irresistible and administrative in nature, and strangers too have an innate right of humanity capable of placing the state under obligation.
>
> (Fox-Decent 2011, p. 109)

Leib and Ponet take a similar view:

> Seen through the lens of the fiduciary principle, political representation takes on a different sheen. The source of representation's legitimacy and its ethical entailments get surprisingly unmoored from the traditional theory of liberal consent and become rooted in the rules of trusting relationships and policing the vulnerabilities therein.
>
> (2011, p. 11)

The fiduciary account of political authority directs moral concern toward the welfare of individuals present within the territory of the state. This is because the state's exercise of authority is most threatening within the territory of the state. It is in this space that state's authority is most pervasive, because subjects of the state must appeal to the government for access to public goods and services, and are reliant upon the state for collective security. Subjects cannot appeal to a neighbouring state for many of these things, unless subjects have the right to make a life elsewhere, they have few other meaningful avenues to seek collective protection or access the sort of public goods that only the state can provide. The lack of recourse or alternatives exacerbates the vulnerability of subjects, be they citizens or strangers, to state authority.

In fiduciary theory, vulnerability does not necessarily result from being resource-poor, but rather from (a) the *trust* reposed in the party with discretionary authority and (b) reliance upon the competencies or administrative powers available to the fiduciary that are unavailable to the beneficiary. The beneficiary is required to trust that discretionary authority available to the fiduciary will be exercised solicitously; the beneficiary is at the mercy of the fiduciary and it is in this sense that she is

vulnerable.[145] Thus, in fiduciary theory vulnerability need not pre-date the relationship between a fiduciary and a beneficiary. This does not mean that individuals are not vulnerable from other causes. Indeed, one would expect that the more resource-poor one is, the more likely it is that they will find themselves in a fiduciary-like relationship with public authorities or individuals that are resource-rich upon whom they will be reliant for solicitous action.[146] In such situations, the fiduciary owes the vulnerable party duties of loyalty and care.

In summary, fiduciary duties are grounded in several normative claims. First, the liberal principle that all human beings are entitled to moral equality and respect for their autonomy. Second, that special duties of loyalty and care arise when this autonomy is constrained by a reliance on another for resources that are vital to one's well-being. Fiduciary theory casts a broad net by highlighting the moral worth of all individuals subject to discretionary authority. A person's administrative status certainly does not have a bearing on what is owed to them morally—what is owed is respect for their moral autonomy, respect for their sphere of self-government, and solicitude in trusting relationships.

(b) General and special duties

Much has been said thus far about fiduciary duties (duties of loyalty and care) and the need for affirmative action by a fiduciary to advance the interests of a beneficiary. As noted at the opening of this chapter, these duties have both a legal and moral dimension. The focus in this section is on refining the understanding of the moral

[145] Fiduciary relationships are trust-like even if "many fiduciary relationships are nonconsensual (eg parent-child, trustee-beneficiary, state-subject). This trust stems from the fact that the beneficiary *must trust* that fiduciary will exercise her power fairly; ultimately they cannot control the fiduciary's power" (Fox-Decent 2011, p. 90).

[146] The Platform for International Cooperation on Undocumented Migrants has pointed out that irregular migrant children are already in a situation of *triple vulnerability*, "as children above all; as migrants; and finally, and this unfortunately is their major vulnerability, as undocumented migrants" (PICUM 2011).

dimension of this affirmative obligation, as there is more to say about the special duties that accrue to fiduciaries.

A common typology of moral duties in normative ethics suggests that a person can have either negative or positive type duties towards others. As discussed earlier, a negative duty requires that a moral agent refrain from some action (eg harming the other person), whereas a positive duty requires that the agent provide something to another individual.[147] Duties can be further broken down into general duties (owed to unspecified persons) or special duties (owed to specific persons for specific reasons), perfect duties (claimable by some persons) or imperfect duties (not easily claimable against a specific duty-bearer) (Goodin 1985; Shue 1988; Smith 1998). Generally speaking, the special duties that emanate from a fiduciary relationship have both positive and negative dimensions; that is, they require both that some action be undertaken to advance the interests of a beneficiary (a duty of care is an affirmative obligation) as well as an injunction against some action (eg advancing one's own interests at the expense of the beneficiary). As Arthur Laby notes,

> The duty of loyalty is a duty of omission, requiring the fiduciary to refrain from conduct harmful to the principal. The duty of care is a duty of commission, requiring the fiduciary to engage in conduct for the benefit of the principal.
>
> (2004, p. 80)

Special positive duties are generally thought to arise from only a very narrow set of circumstances. Given the narrow focus of special duties, not much energy has been devoted to their study in the liberal tradition of political theory (Smith 1998). This is because special positive duties emerge from privileged associations that are thought to exist at the expense of all *non-participants* and, structurally at least, this offends the egalitarian foundations of liberal theory which seeks to treat all individuals equally. For the most part, liberal political theory has focused on what is common and universal

[147] Patricia G. Smith in *Liberalism and Affirmative Obligation* (1998), refers to this as the traditional doctrine of positive and negative duty. Henry Shue (1988) refers to this as the division of moral labor.

amongst humans. It is difficult for an egalitarian liberal ethics to make room for relationships that demand that responsibility, concern and care be prioritized for individuals or groups marked out *as special* (and by extension others not). Indeed, human rights doctrine is the product of years of effort arguing against particularistic attachments of the sort that ground *special positive duties*.

Does this mean that special positive duties do not have a place in a liberal ethical framework? Certainly not. It is commonly accepted that individuals and institutions of the state must, at times, show special concern for individuals that either occupy unique roles (eg parents and their children) or individuals that are worse off, eg some categories of the elderly; people with disabilities; and, children that are wards of the state, to name but a few. In liberal states, the welfare of these groups is prioritized over the welfare of others; these groups are clearly entitled to benefits that others do not enjoy (if one factors in the resources that are dedicated to ensuring their well-being). This is commonly accepted in liberal societies and demonstrates that a liberal society can at once embrace egalitarian ethics, while accepting that concern can be partial in special cases, such as in cases of individuals with special needs or those that are especially vulnerable.[148]

Now, consider the role of *special relationships* in generating special positive duties. As noted above, special positive duties emerge from privileged associations—*special relationships* constitute an association of this kind. Special relationships are a clear case where the tension between general duties (to all humans) and special duties (to particular individuals) plays out. Special relationships (eg between parent and child, members of a club, colleagues, citizens) track the interests of specific agents. The

[148] One way of accommodating partial concern for those with special needs is by arguing that it is a reciprocal benefit, that is, by supporting the vulnerable today, one expects that society will support them should ever a need arise. But this does not stand up to scrutiny in modern liberal societies. Consider for instance that children educated in the Province of Ontario will one day move to another province and make a life there—nobody decries this as immoral, a case of freeloading. Nevertheless, the individual who moved will no longer contribute to the care of others left behind.

interests of agents in special relationships are taken to matter more in a moral sense than, say, the interests of all other human beings qua humans. Another way to say this is to say that there are agent-specific reasons that ground special positive duties. Jonathan Seglow explains the idea thus: “Besides the duties which each of us owes to every other person in the world, such as the duty not to harm them or the duty to come to their aid if they are in dire need, each of us also owes a variety of duties only to particular people or to particular classes of people” (2013, p. 5).

Agent-relative special duties are controversial, as noted earlier, because they give priority to the interests of a discreet set of individuals to the exclusion of others (Scheffler 2002). Agent-relative special duties are also morally demanding—they require a stringent duty of care toward the specific individuals in *special relationships*. This is because agent-relative special duties are duties that one specific party in a defined relationship owes to an identified beneficiary (the counterpart in the relationship). Seglow suggests that “the fabric of [the] world is substantially comprised by the relationships between people who owe one another special duties” (2013, p. 5). It is proposed, following Seglow (2013), that fiduciary duties are special duties that arise from special relationships. Duties that arise from fiduciary relationships are, more specifically, agent-relative special duties.

Agent-relative special duties can be contrasted with imperfect duties of charity, to help make clear what differentiates them. Whereas obligations arising from special duties are not optional, charity is always optional. This chapter has argued that when one party exercises discretionary control over the resources vital to a second party and upon which they are reliant, the obligation that accrues to the party controlling those resources must be stronger than charity. The duty of charity only demands *some action* toward *some party*—it is an imperfect duty directed at no specific individual. What charity lacks is any means of directing moral action.

Charity leaves much of the decision-making with the person in power since there is no need for a relationship of any kind between the donor and recipient in a charitable

undertaking: the donor decides how much, what, and when to give, as well as to whom. Seglow writes, with respect to imperfect duties such as charity, "duty-bearers have considerable discretion over the content of their imperfect duties as well as the regularity with which they meet them" (2013, p. 8). By contrast, in the case of a *special duty*, one can claim that breach of this duty constitutes an onerous offense, an affront to justice, since the source of the special duty is more significant in a moral sense and there is an expectation of some particular act or performance.[149]

The difference between special duties and the imperfect duty of charity is that special duties are not owed to specific people because of a benevolent disposition, but rather, as a matter of justice. Charity merely suggests a re-allocation of resources from a sense of beneficence, but does not demand it as a matter of justice. The duty to advance the interests of a beneficiary in a fiduciary relationship is not owed to *everyone in general*, as in the case of duties arising from charity. Rather, it is an obligation to specific groups and persons. In fiduciary relationships, beneficiaries are owed more than charity, they are owed a special duty of care, which arises from the unique circumstances of their association with a more powerful party.

Next, consider what this means for the fiduciary, ie what actions are required of them. While agent-relative special duties restrict the scope of moral concern it leaves open the question of what is owed: is a specific action owed to a beneficiary or is there discretion in fulfilling the fiduciary obligation to the beneficiary? One must distinguish here between *special perfect duties* and *special imperfect duties* (Lea 2004).

Special perfect duties arise from special particular relationships or associations (hence *special*) and designate duties held by specific parties and owed to equally

[149] *Special relationships* are not the only way of establishing special duties. Another common way of grounding special duties is through voluntary undertakings. A voluntary undertaking leads to a reasonable expectation of fulfillment, such as when a promise is made. Special duties can also be generated in cases where it can be shown that one party is the cause of another party's need, typically referred to as reparative duties or corrective duties. Special duties can also arise in the context of gratitude, where one party feels an obligation to reciprocate some benefit received (Scheffler 2002; Bader 2003; Miller 2007).

specific parties. If one party has a perfect duty to provide something to someone, then the other party has a right to claim that good from that specific provider. Generally speaking, fiduciary duties are not like this, at least not at the broadest level. Recall the case of the real-estate agent. The real-estate agent had a duty to advance her client's goal of securing a decent plot of land, but nothing about the fiduciary relationship dictates how the real-estate agent should go about delivering that goal for her client. This is because the real-estate agent has a *special imperfect duty* to her client. Special imperfect duties arise within relationships but do not give rise to claimable rights. If, however, the client had contracted the real-estate agent to draft a contract to purchase a home, this would give rise to a *special perfect duty*, and the client would have a claim against the real-estate agent. Despite the fact that the real-estate agent has only special imperfect duties to the client in the original scenario, the agent is nevertheless duty-bound to pursue the best interests of the client—this duty stems from their special relationship.

What implications does this have for the claim that public authorities have a fiduciary duty to provide IRCs with access to schooling?

The claim made here is that public authorities have a (agent-relative) *special imperfect duty* to advance the well-being of children in their jurisdiction, but therein lies also a *special perfect duty* to provide them access with schooling. Fiduciary duties broadly conceived are *special* and *imperfect*, but they can have nestled in them more *specific duties*. As Seglow explains, "[…] associative (like other) duties can be very general: nested inside the general associative duty are a number of more specific concrete ones. This gives the duty the appearance of being imperfect" (2013, p. 11).

Take again the paradigmatic example of the special duties a parent owes to a child. The parent has a *special imperfect duty* to advance the welfare of her child, but exercises considerable discretion in the way she will go about achieving this goal. However, the parent has a *special perfect duty* to ensure that her child receives an education because doing otherwise would deal a critical blow to the child's well-being.

To recapitulate, perfect duties have two standard features: they apply to determinate persons and they give rise to correlative rights (Smith 1998). It is possible to claim that the fiduciary duty to provide IRCs with schooling is perfect in this sense: it is a duty owed by public authorities administering the system of public education and, moreover, it is owed to a specific class of individuals (IRCs). The fiduciary obligation offsets a correlative right, ie the IRC's right to education. Viewing all duties that arise in a fiduciary relationship between public authorities and IRCs as imperfect duties, matters solely of conscience, would suggest that a willful disregard for the IRC's development would be permissible—commonsense morality suggests that this is an impermissible conclusion.

(c) Summary

The presentation of the philosophical foundations of fiduciary theory demonstrates that the theory can be capacious: it does not require that individuals that share a special relationship share any specific affiliations (citizenship) or philosophical points of view besides a specific relationship of trust and need. That is to say, *special relationships* can be formed in numerous ways and special situations of vulnerability and trust can generate such relationships, as well as special perfect duties.

5.10. Applying fiduciary theory

The account of normative responsibility outlined in this chapter, as applied to public schooling for IRCs, is unusual or at the very least, uncommon. This is because it is more common to find an argument based on *special duties* used to defend limits to social welfare services for irregular migrants. Such arguments stress the special association amongst *co-members* of a political community as a reason for *not extending* social welfare benefits to outsiders (Wellman 2008; Sandel 2009). However, this defence of priority for co-members looks quite narrowly to the value placed by members of a community on their relationship with other co-members and the obligations they are willing to accept *because of the perceived value of these*

relationships. That is, the reason why one party in such a relationship would see the other party as a source of special claims is because the relationship itself is thought to be meaningful.

This view does not capture all the different ways *special relationships* may arise—the previous section demonstrated that the relationship itself does not need to be meaningful to both parties. One can instead look to the conditions that ground special relationships; that is, what makes those relationships morally unique and demarcates the parties within them as deserving priority to scarce resources. As Scheffler notes: "Sometimes, it may be said, the source of a special responsibility does not lie in the fact that the relationship is one that the bearer has reason to value, but rather in the vulnerability created by the beneficiary's trust in or dependence on the bearer" (2002).

What makes the relationship between a fiduciary and a beneficiary morally unique is the trust that underpins the relationship and the need to police vulnerabilities the beneficiary is exposed to by virtue of their reliance on the fiduciary. A fiduciary can thus incur obligations to a beneficiary without the relationship itself having any particular value to the fiduciary.

In order to establish that IRCs stand in a fiduciary relationship with public authorities in Canada, one would need to highlight certain relevant features in their relationship with public authorities. These features may be common to other groups of individuals as well. So, what defines an IRC as a beneficiary may also be what defines a legally-resident child as a beneficiary of a fiduciary relationship with public authorities. The same may also be said of vulnerable adults. This is not contested; indeed, it is the very point of reframing the normative responsibilities of public authorities in the conceptual framework provided by fiduciary theory. Where some theoretical approaches dismiss the welfare needs of IRCs because they lack political or legal

standing in the community, fiduciary theory argues that their interests count just as much—and at times more—as any other subject.[150]

It follows from the functionalist account of fiduciary theory that one can look to the facts about two parties to ascertain whether a fiduciary relationship can be said to exist. The reference points for establishing a fiduciary relationship are the indicia discussed in Section 5.8. At least three things would need to be established:

> **(a) Discretionary authority:** an imbalance of power between public authorities and IRCs, whereby public authorities have discretionary power to alter the practical interests of IRCs;
>
> **(b) Dependence:** the IRC's dependence on public authorities for certain resources vital to their well-being; and,
>
> **(c) Vulnerability:** a high degree of vulnerability to the discretional authority of public authorities, who control access to resources vital to IRCs, combined with a limited capacity to reduce their vulnerability to this discretionary authority.

This section assesses the condition of IRCs in Canada to determine whether on account of the fiduciary indicia above they may qualify as beneficiaries of a fiduciary relationship with public authorities.

(a) The fiduciary has scope for the exercise of discretionary authority.

The administrative state is multi-layered; it exists at all sites within the state where public authority is exercised over the interests of individuals. Public authorities stand in a relationship of power asymmetry with IRCs the moment the migrant child enters

[150] With this established one must then attempt to make sense of priority amongst the different competing beneficiaries. Consider for a moment the case of an adopted child. One parent—a callous parent—claims that the adopted child should get less from the family's resources because they do not command the same moral priority as the other two children naturally born to the parents. Does this difference matter in moral terms? On a fiduciary account, it does not. The same special relationship arises between the parent and the naturally-born children as between the parent and the adopted child. In some sense, these children are all beneficiaries in a fiduciary relationship with the parents. If the adopted child should happen to be more vulnerable—assume they have a disability of some sort—that child would rightfully command priority in the allocation of resources between the child beneficiaries.

the territorial space of the state and becomes subject to public authority. This is because federal, provincial and local governments have the discretionary authority to enact legislation and policies that affect the interests of all inhabitants in their respective jurisdictions, including IRCs. As Salina Abji notes, "[…] front-line workers and administrators of public services exercise a great deal of discretionary power in the implementation and/or circumventing of immigration laws, which makes navigating these systems unpredictable and uneven [for irregular migrants]" (2013, p. 326).

Provincial authorities in Canada regulate access to key social welfare goods, such as healthcare and education for all individuals in the territorial space of the provinces. Federal authorities, for their part, control liberty of movement by determining an individual's (residency) status.[151] Where authorities detain IRCs for breach of immigration rules, the scope of the power authorities exercise over the migrant child's interests only intensifies. Municipal authorities and school boards, for their part, regulate access to services that have a bearing on the resident's quality of life, personal safety and development. By virtue of these powers, and the simple fact that few others possess similar authority in these respective jurisdictions, IRCs are subject to the discretionary authority of public authorities.

Moreover, IRCs face persistent knowledge gaps that make the scope of discretionary authority that public authorities exercise over them especially pervasive. IRCs may not be able to obtain information about their rights and the services available to them. This may be because this information is not in a language they understand well, or because of their unfamiliarity with the structure of the administrative state.[152]

---

[151] In Canada, immigration matters have traditionally been considered in the context of administrative law where, Francois Crépeau and Delfine Nakache note, "state authorities have dealt with foreigners with almost complete discretionary powers" (2006, p. 9). However, recent decisions of the Supreme Court of Canada have required that administrative regulations in matters of immigration be interpreted in the context of international legal norms. For instance, in the *Baker* decision, which subjects IRPA regulations to considerations of "the best interests of the child" (*Baker v Canada* [1999]). See also, Section 4.3.

[152] This is not unique to IRCs, irregular migrant adults face similar challenges. The City of Toronto has acknowledged that "in general, undocumented workers are reluctant to report unfair employment practices for fear that bringing themselves to the attention of the authorities

It may also result from a simple reluctance to approach public authorities for information, fearing that authorities will discover their immigration status (Sigona and Hughes 2012).[153] A report from the City of Toronto notes:

> Undocumented residents' fear of being reported, detained or deported profoundly affects their decision making […] Undocumented residents can internalise perceived criminalization and become hyper-vigilant about being reported to authorities. As well, the stigma associated with lacking status can lead to harassment, racism and discrimination by staff […] either through being disrespectful or denial of treatment.
>
> (CoT 2013, p. 14)

The simple act of differentiating public authorities from one another may be beyond the capacities of IRCs; so, for example, IRCs may easily mistake public transit workers for police or immigration enforcement officers. Hudson et al point out that in the City of Toronto: "There are just too many ways that even seemingly commonplace exchanges can be alienating or threatening to non-status migrants" (2017, p. 16). This discourages IRCs from interacting with officials of the state, only further exacerbating the knowledge gaps they experience and their vulnerability to the discretionary authority of public authorities.

To be sure, the passage of time will affect the degree of discretion that public authorities exercise over the interests of IRCs. As IRCs build networks and develop relationships they may find ways of removing themselves from total reliance on the goods and services provided by public authorities.[154] By the same token, the longer an IRC inhabits the municipal space under conditions of power asymmetry, the more

---

may lead to deportation. They may also face language barriers in seeking assistance" (CoT 2005, p. 3).

[153] A 2009 report of the House of Commons Standing Committee on Citizenship and Immigration notes: "Unwillingness to report abuses or to take advantage of protections, and ineligibility for social benefits and supports compound problems. Even the Canadian-born children of non-status workers may suffer if their parents are too scared to take advantage of the services and supports available for their children" (SCCI 2009, p. 48).

[154] A report on access to city services in Toronto by *non-status* immigrants notes that an individual's connectedness to the community "grapevine" will affect how dependent they are on public service providers: "Non-status people often rely on networks of others in the same situation for help rather than turning to the official service sector. And since, as we have seen, many services for non-status people are not advertised, access may be determined by how well connected a non-status person is to 'the grapevine'" (Berinstein et al 2006, p. 20).

they stand to lose, among other reasons, because they can be pulled away from meaningful relationships formed in the community.[155]

(b) The fiduciary can unilaterally exercise her discretionary authority so as to affect the beneficiary's legal or practical interests.

This second criterion of the fiduciary indicia is also readily met. Public authorities are under no obligation to provide justifications to IRCs as regards the types of services they will offer IRCs or the manner in which IRCs will access such services. Federal and sub-state authorities unilaterally set the conditions of access to social services and there are few, if any, opportunities for formal consultation or input by IRCs and/or their guardians. In this way, public authorities not only have the capacity to act (discretionary authority) but also do so unilaterally, thus setting the terms of the relationship with IRCs and limiting the means by which IRCs are able to advance their own interests.

Sub-state authorities in Canada are responsible for managing the services that are of most critical value to IRCs: schooling, healthcare, policing, employment assistance, housing, etc. For example, one might think of the school board administrator that insists on certain forms of identification prior to allowing children to register in schools, or police officers that rely on the same to register complaints, or courts that similarly refuse access without certain forms of identification. Provincial and municipal authorities regulate the forms of identification that one needs in order to access various services, and this can affect everything from the ability of a person to legally operate a vehicle, to access to healthcare, to borrowing a book from a local library. In this way, public authorities act as gatekeepers to information and services that are instrumental to the health, security and well-being of IRCs, along with access to the numerous social welfare goods necessary to living a minimally decent life.

The bedrock of the relationship between public authorities and IRCs takes the form of a presumption of trust: trust that public authorities will act in the best interests

[155] See the discussion of the Lizano-Sossa children detained by the CBSA in Section 4.5.

of IRCs. There are multiple sources for this trust that are identifiable. Certainly, one can make the easier case that public authorities have voluntarily assumed an imposition of a trusting relationship with all resident children. The basis for such a claim could be the ratification of relevant United Nations treaties that specifically articulate the primacy of children's rights and the need to treat all children equally (eg the Convention on the Rights of the Child); or, domestic human rights legislation. But there are other ways of grounding this notion of trust. Guardians of IRCs and the migrant children themselves hold this trust, not because they wish to, but because the nature of relationship with public authorities is such that IRCs and their guardians have no other choice but to trust that public authorities will treat IRCs as equal moral agents entitled to the same basic services that legally resident children enjoy. The lack of options for IRCs generates meaningful expectations of public authorities that do have the capacity to affect their interests.

Public education is the paradigmatic example. IRCs and their guardians can hold the expectation that a liberal society committed to principles of child welfare, individual development, as well as respect for autonomy and freedom, would not deny a child access to a fundamental service, such as schooling. One observes expectations of this sort frequently in the area of healthcare, for instance; irregular migrants appear at hospitals and clinics with an expectation that healthcare services will not be denied to them on the basis of their immigration status; they believe they have a moral claim to such services and that denial of service is an injustice. Research by Brad K Blitz and Miguel Otero-Iglesias has found that irregular migrants can feel like their exclusion from national identify and formal entitlements is arbitrary because they compare themselves to *normal situations* they observe around themselves, which in turn generates expectations to have similar rights and privileges (2011, p. 668).

It is precisely because the provision of so many social welfare services fall to sub-state public authorities that IRCs are uniquely vulnerable to their discretionary authority; these public authorities have the capacity (discretionary authority) to enact

enabling legislation or refuse access by enforcing existing federal immigration legislation. Viewed through the lens of education and schooling services, the extent of this discretionary authority in shaping the lives of IRCs becomes clear. Access to schooling determines in significant ways the development trajectory of children over a lifetime. Limiting access to education either directly (by denying access) or indirectly (by promulgating administrative barriers that have the effect of preventing access) undermines the development of the child now, but also constrains significantly their possibilities later in life. As Pashang points out:

> These children [IRCs] are denied access to both formal and informal power, and, in situations of deportation, they are denied any ability to increase their power in the future.
>
> (Pashang 2011, p. 174)

Public authorities *act on behalf* of IRCs when they decide whether or not to admit IRCs to schools. In doing so, they bind IRCs to a determinate future; decision-making in matters of schooling risk the child migrant's current and future autonomy. This exercise of discretionary authority must be subject to fiduciary constraints.

The unilateral exercise of authority over the interests of another is not permissible in a liberal moral framework—such authority lacks legitimacy. Absent some mechanism of legitimation, the unilateral exercise of authority results in the domination of individuals, curtailing their autonomy and freedom in important ways. IRCs can experience domination in a multitude of ways. First, in a political sense, because they do not have a say in legitimizing or consenting to political power authorities exercise over them. IRCs are subjects of the law, but not co-authors of the law. Second, in a practical but more pervasive sense, they can experience coercion in their interactions with public authorities. In such circumstances, IRCs can experience feelings of shame and embarrassment (Blitz and Otero-Iglesias 2011, p. 666). Their lack of official status makes IRCs vulnerable to coercion and exploitation, since the threat of revealing their location or identity can be used by both private and public

agents to force specific behaviour that jeopardizes their dignity, autonomy, and broader freedom.[156]

(c) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Vulnerability *per se* is not objectionable. A child is vulnerable to a parent's authority. Spouses are vulnerable to one another on the basis of the fidelity they promise each other. One does not decry these situations as unjust. However, what is of concern in the case of IRCs is that they find themselves in situations where their social welfare needs cannot be easily be met by another party, since they cannot easily (if at all) extract themselves from the relationship of dependency they have with public authorities who control the social services they require. The vulnerabilities ascribed to IRCs are therefore two-fold: they *emanate* from the IRC's relationship with public authorities, because IRCs are intensely reliant upon public authorities for services that are vital to their well-being; and, they also arise from the precarious nature of their residency status (irregularity), which often means that assuring a decent standard of living is more complicated (though not impossible).[157]

Also, IRCs do not enjoy the same freedom of mobility as legally resident children. They often lack the forms of identification and the means necessary to undertake to travel. Consequently, IRCs cannot easily access the services they need elsewhere,

---

[156] Cases where IRCs are coerced by means of threats are not uncommon. The threat consists of revealing the IRCs irregular status to immigration authorities and it is a constant source of worry for IRCs. To take an example from a relevant context, consider the comments made by a Trustee of the Toronto Catholic District School Board (TCDSB), Frank D'Amico, to a university social-work student, Nadia Saad, working on behalf of IRCs seeking to access Ontario classrooms. The comments sent to Nadia Saad by email in 2011 were widely circulated and quoted in the Canadian press. The email was in response to concerns raised by Saad, that children of *undocumented immigrants* were unable to access classrooms administered by the TCDSB. The Trustee responded: "If you want to live in Canada, take our Canadian jobs, use our Social Programs and Health Care … I strongly suggest becoming a citizen. I am forwarding your concern to the RCMP [Royal Canadian Mounted Police] and to immigration Canada" (O'Kane 2011).

[157] A foreign student or foreign worker with a lapsed visa will fall into the category of irregular migrant. For some this administrative designation is temporary, for others without access to additional resources, the designation can severely inhibit their independence and well-being.

meaning they are confined to make a life for themselves in sometimes inhospitable environments. The options available to IRCs are few—at least fewer than those available to legally resident children. IRCs are therefore a special case of moral concern.

(d) Summary

This section applied the indicia of fiduciary theory to the case of IRCs to illustrate that IRCs qualify as beneficiaries of a fiduciary relationship with public authorities. It was necessary to show three things: (a) that public authorities have scope for exercising discretionary control over the interests of IRCs; (b) that IRCs are reliant upon public authorities for certain goods valuable to their well-being and that there is a structure of trust between public authorities and IRCs that leads to an expectation of solicitude; and, (c) that these two former conditions give rise to a peculiar vulnerability on the part of IRCs in their relationship with public authorities.

Public authorities have the capacity to respond to the needs of IRCs—it is a function of their discretionary authority—and the argument here is that they have a fiduciary duty to do so. This is because IRCs stand in a trusting relationship with public authorities, and IRCs are especially reliant upon public authorities and the resources at their command. This is not an entirely new obligation being imposed on public authorities and institutions of the state, rather, it is an extension of a duty that already accrues to public authorities vis-à-vis *inhabitants* (not limited by citizenship) in their constituencies. In a sense, one might argue that this duty has been *pre-arranged*. Lorne Sossin explains the nature of the discretionary power available to public authorities at both the federal and sub-state level and connects this discretionary power to a broadly defined constituency of beneficiaries:

> Parliament confers wide discretionary powers on the government of the day, so that they can be used in the nation's and the public's interests. Local authorities have wide discretionary powers conferred upon them so that they can be used in the interest of the locality and those that reside there. (I would not accept that today any group such as the ratepayers can be singled out as

> the beneficiary of local government powers.) The recipients of the powers, whether national or local, are very much in the same position as they would be if they had fiduciary powers conferred upon them. The powers are entrusted to them so that they can exercise them on behalf of the public or a section of the public.
>
> (2003, p. 141)

Public institutions at the sub-state level derive their authority from the authority of state. This authority is meant to be used in the public interest, ie guided by an other-regarding purpose and not limited to rate-payers (taxpayers). When public authorities at the sub-state level control vital social services, they too wield significant discretionary authority and must be guided by ethical decision-making in the use of this authority. The authority concentrated in the institutions of the state at the various sites within the state is fiduciary in nature, a form of public trust exercised on behalf of all *inhabitants*, but which must be discharged fairly and reasonably and with particular regard for the needs of the most vulnerable subjects, ie those that are most reliant upon the solicitude of public authorities.

These facts support the claim that public authorities must advance the best interests of IRCs because, just like citizens and their children, IRCs stand in a relationship of trust and dependence with public authorities. IRCs are fundamentally owed the same respect for moral autonomy as all other human beings, and what makes an IRC *a stranger* has no bearing on the trusting relationship they enjoy with public authorities by virtue of their presence in the various jurisdictions of the state. The basis of the interaction between public authorities and IRCs is faithful service; discharging discretionary authority in keeping with the purposes for which it was entrusted.

Having met the objectives set out for this section, attention will now turn to challenges that can be raised to the framing of the relationship between IRCs and public authorities as a fiduciary relationship.

5.11. Three challenges

This section considers three theory-based challenges to functional fiduciary theory. The first is that functional fiduciary theory places an unfair burden on duty-bearers. The second challenge is that the benefits bestowed upon beneficiaries are unfair—IRCs do not deserve the resources functional fiduciary theory would accord them. The third challenge is that individuals cannot be forced into a trusting relationship against their will, thereby incurring unwanted special duties toward others.

(a) Challenge 1: Fiduciary obligations are freedom-limiting. Citizens of liberal states have a right to be free of imposed obligations.

A first challenge that opponents can level against the functional account of fiduciary theory developed in this chapter is that the functionalist account generates scenarios that are freedom-limiting. Specifically, framing IRCs as beneficiaries of a fiduciary relationship with public authorities limits the freedom of inhabitants in a state's jurisdiction. Freedom is limited through the imposition of *unwanted obligations* to assist others.[158] This is an unfair burden on duty-bearers.

Michael Blake formulates an argument of this sort to defend limits to *unwanted immigration*. He writes:

> […] one who crosses into a jurisdiction places the inhabitants of that territory under an obligation to extend legal protection to that immigrant's basic rights. This obligation, however, limits the freedom of the current inhabitants of that jurisdiction, and as such these current inhabitants are licensed in using force in preventing the entry into that territory of unwanted migrants.
>
> (Blake 2001, p. 104)

Blake attempts to defend immigration controls on grounds that inhabitants of a jurisdiction should be free from imposed liabilities, since any individual entering the jurisdiction of the state immediately benefits from certain rights and privileges, thus

[158] Patricia Smith notes that a similar objection can be made to the duty of rescue: "It is argued that requiring aid is an enforcement of charity that violates moral autonomy. Since morally autonomous individuals are entitled to decide for themselves how they will distribute their resources […]" (1998).

obligating inhabitants to extend support to them. Blake writes, "[…] if one takes the idea of liberty seriously […] someone who imposes an obligation upon me is, in a very limited way, impinging upon my freedom" (2013, p. 115). Blake is referring to the obligation to support institutions of the state that in turn support and defend the rights of jurisdictional inhabitants. By traversing into the territory of the state, newcomers automatically derive a benefit for their effort, but this represents an additional burden for members of the political community already present.

Blake believes that there exists a "presumptive right to be free from others imposing obligations on us without our consent" (Blake 2013, p. 115). This objection amounts to a rejection of unassumed obligations.[159] The imposition of duties not freely chosen by an individual undermines their ability to formulate plans that are meaningful to them, since they are required to redirect energy and resources to causes they have not chosen. This is objectionable if one takes freedom and autonomy to be the main pillars of a just liberal society. Or, put differently by Scheffler: "[…] special responsibilities, unless voluntarily incurred, give other people undue control over one's life […] it would be unfair if such responsibilities could be ascribed to individuals who had done nothing voluntarily to incur them" (Scheffler 2002).

What this first challenge to functional fiduciary theory reveals is a tension at the heart of the debate between partialists and liberals over the nature of responsibilities individuals have to one another. For many liberals, only voluntarily assumed commitments are duty-generating, whereas partialists believe that the ties between people who stand in certain associative relationships can generate special responsibilities. According to Scheffler (2002), voluntarists deny that such responsibilities can exist "simply by virtue of standing in relationships of certain sorts

[159] While Blake recognizes that immigration can limit the freedom of inhabitants, he does not advocate penalizing those that succeed in entering the state. Rather, Blake accepts that an obligation exists the moment immigrants cross into the territory of the state, it "emerges from the simple fact of presence; no particular legal status within the jurisdiction is required" (2013, p. 113).

to other people". However, the voluntarist position exaggerates the scope of individual autonomy in a societal context. It is plausible that voluntarists would accept restrictions to their autonomy in the form of negative duties; for instance, individuals do not need to be offered the opportunity to choose whether or not to harm every individual they encounter as they go through life. In other words, voluntarists accept that a basic respect for the moral worth of all human beings limits their freedom and autonomy (Smith 1998).

In addition, Blake concedes that the character of the one imposing obligations is an important consideration and a possible constraint on voluntarist objections. One might ask what is particular about the character of IRCs that makes the imposition of unassumed obligations morally permissible?

Frequently, the objection to unassumed obligations is formulated as freedom from the capricious choices of others. However, the movement of migrant children is a complex phenomenon and does not lend itself to sweeping generalizations about motivation. IRCs live in a state of limited possibilities. They are generally not self-sufficient and are reliant on others to ensure their well-being. Withholding social welfare goods from children will almost certainly limit their life outcomes. Thus, the mere presence of this group of migrant children in the territory of the state gives rise to special moral responsibilities on the part of public authorities, their actions vis-à-vis IRCs must be guided by a special solicitude.

This claim to special solicitude is underpinned by the same logic built into the doctrine of *parens patriae*, a doctrine accepted by most liberal states.[160] The doctrine proposes that the state must act to protect quasi-sovereign beings unable to secure

[160] The *parens patriae* doctrine refers to the responsibilities of the state to assure the welfare of children. The state is a *substitute* for a guardian and assumes the responsibilities a guardian normally would have. Since the late nineteenth century Canadian courts have recognized the principle of *parens patriae*; as Volpe et al note "although parents still had primary responsibility for children, the state was able to act as a substitute for them under special circumstances. Although the state was not to be fully trusted under this doctrine, it was seen as a vehicle that could be used to help children realize their potential (public education) and to provide protection (child welfare) when the family system became corrupted" (1997, p. 15).

their own well-being, eg children and incapacitated adults. In the case of children, when guardians fail to discharge their duty of care, the state is expected to step in to secure the well-being of children. States that accept the principle of *parens patriae* also must accept the possibility of unassumed obligations.

What the doctrine of *parens patriae* reveals is that there are general moral norms that liberal states accept which give rise to special obligations that neither public authorities nor citizens voluntarily assume. Any number of guardians or parents may ignore their child-rearing responsibilities, and this may generate an unknown quantity of burden for the state as it steps in to make up for the care children do not receive at home. This in turn creates liabilities for all inhabitants that support the institutions of the state—additional burdens to which they did not agree in principle. IRCs are merely another case where public authorities must redirect common resources to support quasi-sovereign individuals who are reliant on (or trust in) the special solicitude of the state. The discharge of *parens patriae* obligations share the fiduciary form: they track and serve the best interests of children that are reliant on the goods made available at the discretion of public authorities working on behalf of the state. In pursuing the child's best interests, public authorities are required to take affirmative steps to advance their well-being.[161]

While there is an intuitive appeal to the claim against unassumed obligations, it is also apparent that unassumed obligations are a common feature of social life in liberal societies. Scheffler (2002) notes that duties that arise from associative relations have always been understood to be "absolutely central to moral life", and their rejection by strict voluntarists is driven by "excess, theory-driven universalism." Individuals are born into networks of overlapping relationships that they have not chosen, but which

[161] This principle is, in fact, explicitly acknowledged in school board policy in the City of Toronto. Policy guidance on the role of school boards states: "A school board and its employees or volunteers are expected to provide the same standard of care for students as would be provided by a reasonably careful or prudent parent in the circumstances. This is commonly referred to as the 'Reasonably Prudent Parent Doctrine'" (OESC 2014).

nevertheless direct them to support causes by devoting time and energy that they may have otherwise spent elsewhere. So, while "the significance of choice and consent in moral contexts is undeniable," Scheffler (2002) writes, it is equally important to bear in mind that "the moral import of our relationships to other people does not derive solely from our own decisions." Rejecting the imposition of fiduciary duties to IRCs on the basis that these duties are overly burdensome and not voluntarily undertaken overlooks the many different ways public authorities—and by proxy, citizens—are already obligated to support one another with time and resources and absent of any voluntary undertaking. The challenge from the claim of limited freedom cannot, on its own, stand as an objection to a positive duty to offer schooling to IRCs.

(b) Challenge 2: Resources are finite. Citizens of liberal states should not be obligated to devote resources to the needs of strangers when other citizens in the state could benefit from those same resources.

If the first challenge to the functional account of fiduciary theory focused on unfair burdens placed upon duty-bearers, the second challenge is concerned with unfair advantages accruing to beneficiaries; the distributive effects of functional fiduciary theory will disadvantage those standing outside of a fiduciary relationship.

This challenge to special duties has been articulated most clearly by Samuel Scheffler in his seminal work *Boundaries and Allegiances*, and is widely cited as *the distributive objection*—Scheffler (2002) defines the distributive objection thus: "The distributive objection sees [associative duties] not as imposing unreasonable burdens on the participants in special relationships, but rather as supplying them with benefits that may be unreasonable."

As discussed above, the mere presence of an IRC in the territory of the state will generate costs because they will enjoy certain procedural protections. The provision of social welfare goods is also costly, and education ranks among the costliest. However, the duty to provide education services generally feels more burdensome since (a) the costs are easier to ascertain and (b) these services are more easily

directed to serve specific ends (such as reproducing a sense of loyalty to the state or for one's compatriots, or training the next generation of productive residents/citizens). Citizens expect to be able to direct the spending of the resources they make available to the state. Re-directing services to meet the needs of IRCs can be viewed as a deviation from the priorities set by members of the political community and thus not only an unassumed obligation, but also an undeserved benefit, or worse, a reward for rule-breaking.

The claim that communal resources should not be extended to resident non-members of the community is based on a view of resource redistribution that prioritizes distribution for contributing co-members of the political community.[162] What this chapter has attempted to illustrate is that IRCs stand in an equal associative relationship with the administrative state—it is a special relationship that gives rise to special duties.

If it is accepted that IRCs should indeed fall within the scope of moral concern of the liberal state, then one needs to reframe this second challenge. The best way to understand this second challenge to functional fiduciary theory is as a case of competing claims by multiple beneficiaries to a single duty-bearer or fiduciary (the administrative state). Fiduciary relationships are the form of relationships that often exist, according to Lorne Sossin, in the "case of administrative decision makers and vulnerable groups affected by their decisions" (2003, p. 129). Leib, Ponet, and Serota describe administrators in state bureaucracies who are charged with allocating public goods as fiduciaries to different, overlapping beneficiaries:

[162] One might argue that diluting the influence of the electorate to determine how tax revenue will be spent and prioritized will undermine the loyalty citizens feel toward the state. However, this relies on an outdated conception of loyalty ill-suited to modern liberal states. As Saskia Sassen notes, "citizens' loyalty may […] be less crucial to the state today than it was at a time of people-intensive and frequent warfare, with its need for loyal citizen-soldiers" (2002, p. 8).

> […] they have relational obligations with their relevant beneficiaries—and the obligations may not be identical […] power is exercised in different ways in […] different sites, and that people are accordingly vulnerable in different ways.
>
> (2014, p. 402)

Overlapping and competing special duties are not uncommon—an individual can have duties to his teammates, colleagues and family that conflict. Conflicting or competing relationships of this sort are especially common in the public sphere. For example, Leib, Ponet and Serota (2014) point to the overlapping fiduciary relationships that political representatives must balance when in political office. A state governor has a fiduciary duty of loyalty to voters in her state, but she also has fiduciary duties to inhabitants of neighbouring jurisdictions since her policies may affect their interests as well (when she votes on national policies, for example). The political representative's duty of loyalty is one that is multi-faceted. The claim to schooling by IRCs can be viewed in this way—IRCs are a class of competing beneficiaries along with all other eligible beneficiaries in the jurisdictions of the state, province and municipality.

Faced with multiple beneficiaries, fiduciaries must adjudicate the claims for public resources in order to ensure equitable outcomes. To be sure, equitable outcomes—that is a fair distribution of social welfare goods—may require asymmetrical treatment amongst groups of beneficiaries. Veit Bader notes that in the case of special associative duties the provision of advantages (in this case, social welfare goods) to one group of individuals over another is "[…] unjustifiable whenever the provision of these additional advantages works to the detriment of people who are needier" (2003, p. 89). What the fiduciary principle requires in arbitrating between different, competing beneficiaries is fairness and reasonableness (Fox-Decent 2011, Finn 1977). The principle also requires that the needier group of beneficiaries is not left worse off.

The distributive objection is principally focused on the unequal distribution of benefits that result from the formation of closed special relationships. Where redistribution results in disadvantages for the worst off, this is indeed a cause for alarm

and would be difficult to reconcile with liberal principles. However, special relationships do not always need to result in accumulation of benefits for groups that are already well off. Parties that are in need or reliant upon duty-bearers may find themselves in a special relationship with duty-bearers not because they seek advantages beyond what others have, but rather to escape a situation where they cannot access the goods and services that are essential to their well-being; that is, they are so reliant on the goods controlled by another that their moral autonomy and freedom are at risk.

There should be no doubt by now that the rights claims of IRCs merit a place in any calculation of equitable distribution of social welfare goods: their interests must be balanced together with the interests of other beneficiaries reliant on special solicitude of the administrative state. Dwyer (2004) cautions against viewing overlapping obligations in a situation of limited resources as trade-offs, where one beneficiary's gain is another's loss; it is rather "a question of choices and priorities". Guiding those choices and priorities must be considerations of distributive fairness. So, while IRCs may be singled out as *priority beneficiaries* for public authorities given the vulnerabilities inherent to their status; as a special case of moral concern, they are perhaps no more important than, say, other children equally reliant on the state, such as orphan children and other children that are wards of the state.

(c) Challenge 3: IRCs do not have bona fide grounds for trusting that public authorities will act in their best interest in the first place.

The third challenge that can be made to the functionalist account of fiduciary responsibility for IRCs is that these children do not have legitimate grounds for claiming to stand in a trusting relationship with public authorities. Or, another way of interpreting this challenge is to state it thus: If public authorities deny standing in the type of special relationship that would generate special and specific duties of care, how can IRCs make a reasonable claim for special solicitude?

The first variant, which focuses on the sentiments and perspective of the child is perhaps the easiest to address, and so this shall be done first. The strongest argument that can be made here is that no-one should take as the sole and primary consideration a child's assessment of power relationships to determine what course of action would be considered best for said child. The child is vulnerable in large part because he/she is dependent on the maturity and experience of others to guide him/her. Acting in a child's best interests may involve consulting a child. However, the actions of the party with discretionary control over the child's wellbeing must be guided, and their actions judged, by criteria that extends beyond the child's own assessment of what would be in his/her own best interest. The child's assessment is one factor, but only one amongst many and even then, only of limited value; that is, when one speaks of children of sufficient maturity to understand complex phenomena. Thus, in the case of children, by virtue of their young age, lack of experience, dependency on others for material and social goods, they have few other options but to trust in those with the discretionary power to secure their well-being. Their presence and status as minors is sufficient grounds to hold those with discretionary power accountable to actions that will serve the best interests of children.

Now consider the second variant of the challenge. The basis of this argument is that a trusting relationship cannot arise from circumstances where one party explicitly denies such a relationship. This move reduces, once again, the moral relevance of special relationships to the constraints of voluntary undertakings. In a first instance, one might point out, as Scheffler does, that there are times when people should value relationships yet fail to do so (Scheffler 2002). That is, there may be strong moral reasons for valuing a relationship, but individuals deny the relationship or its importance. A neglectful father is one such case. A father stands in a relationship of considerable importance vis-à-vis his child, providing for both the child's immediate needs and their development. A father that turns away from the special duties he has

toward his child is thought to be morally negligent. Depending on the extent of the negligence, censure for breach of the duty of care owed to the child can be severe.

In the example above, the duty-bearer had reason to value the relationship with the principal to begin with, ie the relationship had intrinsic value for the duty-bearer and the principal, since a father has reasons to value the relationship with his child. But the intent of the third challenge to functional fiduciary theory is to suggest that the relationship with the IRC is not one that the fiduciary values. However, central to this is the view that individuals *always exercise a kind of normative control over their lives* and choose which relationships are meaningful to them and, by extension, those relationships that are not meaningful and therefore need not be supported with their resources (Hidalgo 2014). The paradox is that liberal societies accept that obligations arise in many contexts where this *normative control is absent* and where a silent retreat from those relationships is impermissible. Scheffler (2002) notes: "We prize our freedom to choose, and thus to control the extent of our duties to others. Yet we are committed to the equality of persons, and are sensitive to claims of need that do not themselves spring from choices we have made."

What needs to be shown is that special duties can still arise even when one or both parties had no intention of associating. It is argued that special duties can be established from relationships where parties have never met or have never had any significant sort of interaction.

Consider the case of moral entanglements, defined by Henry Richardson as "a special obligation to another that one accrues unintendedly and in an unplanned way, without doing any wrong, from an interaction with that other" (2012, p. 24). Imagine the following scenario:

> A neighbor resides down the street from you. You have grown to dislike her because she is disruptive and her pets are a source of frequent aggravation. One evening she arrives at your door and asks to speak to you confidentially about a private matter. She knows that you volunteer in women's shelter's occasionally, having heard as much from others in the neighborhood. You invite the neighbor into your home and she confides in you that she is the victim of

> spousal abuse. She cannot return home fearing retribution from her partner and asks for your help.

Charity does not adequately explain why the appropriate response in this case would be to provide the neighbour with your time and resources, and this despite her prior objectionable behaviour. The neighbour is suddenly reliant upon skills you possess and has made herself vulnerable to you by revealing her predicament. You now wield considerable discretionary authority over her interests and are, arguably, duty-bound to assist her. The neighbour trusts that you will use this authority solicitously on her behalf. You may view this imposition as a nuisance and decide to deny her refuge and any of your time or resources. Commonsense morality would sanction such a move as callous. The only morally permissible act would be to give over your time and resources to pursue the best interests of the neighbour—to adopt her ends as your own for a time. This is an *unassumed imposition of a trusting relationship*.

Consider a second example, one that is inspired by the research of Henry Richardson (2012). Richardson considers duties of ancillary-care owed by doctors to their research subjects. Imagine that during the course of clinical research a doctor discovers that her subject has a completely unrelated ailment that the doctor would be in a position to treat. It is proposed that discovery of this ailment gives rise to a special obligation to treat the research subject. What is more, this moral obligation exists even if the research subject originally accepted that no such obligation should ever arise. Richardson (2012) notes that frequently when a research subject consents to clinical research they specifically accept that doctors do not have an obligation of ancillary-care (to treat any ailments they should come to learn of during the course of their research), nevertheless, doctors may still have a normative responsibility to provide care to the research subject: “[…] even if they sign a waiver agreeing beforehand that a researcher has no legal obligation to provide ancillary-care regardless of what they find, the researcher will still have a moral obligation to do so” (Simkulet 2013, p. 1).

As noted previously, while most often it is a beneficiary that holds an expectation of trust, it is not necessarily always the case that this expectation was always present or always clear. The research subject in the example above denied that a relationship of trust would arise if the doctor uncovered an unrelated malady during the course of her research. However, an ex post analysis of the relationship between the doctor and the research subject suggests that upon discovery of the malady, and irrespective of the research subject's wishes, the relationship between the doctor and patient transformed to one *structured by trust*—a trust that the expertise available to the doctor would be used to pursue the patient's best interests and thus, a course of treatment.

What can be extrapolated from this second case? First, it matters that one becomes aware of a particular need; that this information becomes known through discovery, a confidence shared, or via a third party does not matter. Knowledge of another's need can generate intimacy of the sort that grounds special obligations. Another lesson to draw is that one can find themselves morally entangled through no fault of their own and, as a result, *acquire special duties to another individual*.

The thrust of the rebuttal to this third challenge is that one does not always control the circumstances of one's surroundings, and at times, those circumstances can lead to situations where others hold expectations that some act will be performed, or some good or service rendered. To be sure, not all expectations are justified simply because another person holds an expectation of some behaviour. The purpose of this rebuttal is to highlight that occasions arise when it is *possible* that, through no voluntary decision, one can still find oneself in a relationship where a reasonable expectation of action arises. For this reason, one cannot reject outright the random formation of trusting relationships on the basis that one did not choose to enter into such relationships. It is generally accepted that an active role in the social life of a community may generate moral entanglements of this kind.

(d) Summary

This section has considered three possible objections to functionalist fiduciary theory: (a) that the theory places unfair burdens on duty-bearers, (b) that beneficiaries derive disproportionate benefits, and (c) that no trusting relationship can form absent consent from duty-bearers. These three challenges, as this section proves, do not undermine the claims advanced in this chapter, namely, that the relationship between public authorities and IRCs is fiduciary in form and gives rise to special duties of loyalty and care. It was also shown that unassumed obligations are a common feature of social life in liberal societies and are permitted on grounds of common-sense morality.

5.12. Value of a fiduciary approach: reconciling theory with practice

Framing the normative responsibilities of public authorities to provide schooling to IRCs as a fiduciary obligation is beneficial for several reasons. This section will show that the normative framework provided by fiduciary theory provides a means of systematizing some of the key normative ideas that are put forward in practice to justify accommodation of IRCs in public schools. In doing so, it will show that the approach from fiduciary theory can overcome the weaknesses identified in other normative theoretical approaches addressing the schooling rights of IRCs; namely, weaknesses stemming from (a) immediacy, (b) indeterminacy, (c) priority, and (d) charity. This section undertakes both these tasks simultaneously.

(a) Immediacy

The presence of IRCs in the City of Toronto and the Province of Ontario was meaningful for policymakers in a normative sense. This was more often the case for policymakers at sub-state level than for policymakers at the federal level. Sub-state public authorities frequently signalled that the IRC's *presence* mattered in their ethical decision-making; the IRC's presence triggered a moral responsibility to attend to their schooling and other welfare needs. For many, this was an automatic obligation the

moment the IRC was present in the community; that is, it was not subject to the IRC committing to a measure of time in the community, nor was it a pre-requisite that the community acquiesce to the IRC's entry. For some, presence was morally meaningful and a sufficient justification for extending access to schooling. Fiduciary theory can explain why presence in the jurisdiction of the state matters in establishing obligations to meet the social welfare needs of IRCs.

Provincial and municipal authorities acknowledge and underscore the IRC's dependence on public authorities for access to public schooling and other social services, thus drawing attention to the discretionary authority public authorities exercise in distributing access to these social goods. The needs of IRCs were framed as immediate and pressing the moment the IRC entered into a relationship with public authorities through their presence in the respective government jurisdictions. This is in part because public authorities acknowledge that IRCs have few other sources to turn to for the social goods they make available, but it is also an acknowledgement of the fact that public authorities have the discretionary authority to affect the IRC's practical interests and well-being.[163] The remarks by Toronto City Councillor Gord Perks are instructive:

> I take these, as things that Canadians have proudly achieved—on the belief that everyone should have access to security and to those kinds of social services that we share together: to healthcare, to education. I don't believe for a moment that you should have access to those because you have chosen your country of birth wisely, you chose your parents cleverly. This is not the test we should apply to determine whether or not you live with security, prosperity, opportunity and access to a marvelous healthcare and education system. If a person is here, we should extend those rights, because we know those rights were not won jealously, but won by a sense of association, a sense of empathy, a sense of common purpose. [..] We don't have the authority or the ability to extend those privileges, those freedoms, that prosperity, that opportunity, that security around the whole world, but we sure as hell have the ability to extend some of those privileges here, to everyone who lives in our city.

[163] This monopoly of social goods is not greatly impacted by the passage of time, except insofar as the migrant child ages and therefore is less needful of these social goods, or may acquire sufficient resources to access these goods from private sources (ie private schooling). Barring these scenarios, public authorities are a significant source, indeed, the primary source for many social goods.

(CoT Deb CD29.11 10 June 2014)

The Toronto District School Board argued for inclusion on similar terms—TDSB Trustee Sheila Ward defended accommodation of IRCs in Toronto schools thus: "For both the Catholic and public boards, there has never been a question of an illegitimate child in our system. Every child by virtue of being here is entitled to an education" (Jiménez and Alphonso 2006).

As discussed in Chapter Four, the City Council of Toronto chose to draw attention to and stress specific aspects of the City of Toronto Act in order to foreground a particular interpretation of its relationship with the *inhabitants of the city*. Specifically, they pointed to paragraph 125 (1) of the *City of Toronto Act* states that "The City of Toronto is hereby continued as a body corporate that is composed of the inhabitants of its geographic area" (CoT Act 2006). The emphasis on the *inhabitants of a jurisdiction* (ie Torontonians), without reference to immigration status, was seized upon deliberately by the Social Development Finance and Administration arm of the city authority in an effort to proactively underscore the responsibility of municipal authorities for persons with an irregular status.[164] The City of Toronto then purposefully adopted the term *undocumented Torontonians* in Toronto City Council motions, and put forward the following rationale for having shifted to the use of this term:

> In recognition of its responsibility to serve all Torontonians, Council has taken a proactive policy position committing to ensuring that immigrants without full status or full status documents have access to City services without fear.
>
> (CoT 2014, p. 4)

The language used to describe the responsibility of the City of Toronto for irregular migrants was noteworthy. By putting forward and embracing terminology such

[164] Several cases have been argued before Canadian courts that have helped determine whether municipal authorities have fiduciary obligations, and if so, to whom. The volume of case law is considerable. In this case law, the definition of a beneficiary has varied over time. In some cases, the beneficiary has been defined as the taxpayer (*MacIlReith v Hart*), in others it is the electorate (*Toronto Party for a Better City v Toronto*), and still in others it is the inhabitants of a city (*Bowes v City of Toronto*).

as *undocumented Torontonians*, the City of Toronto exercised its discretion in framing the relationship between the city and those it was responsible for; that is, it redefined the significance of community membership and in so doing broadened the scope of its responsibility to include IRCs specifically. Moreover, the City of Toronto took a proactive approach to address the needs of IRCs and instructed all administrators to do similar:

> In recognition of its *responsibility* to serve *all Torontonians*, Council has taken a *proactive policy position* committing to ensuring that immigrants without full status or full status documents have access to City services without fear. Council further directed staff to take a proactive approach to review current service provision and identify opportunities to increase accessibility to City services to undocumented Torontonians. [emphasis added]
>
> (CoT 2014)

The term *undocumented Torontonians* became commonplace after its introduction in City Council motions beginning in 2013, signalling that the geographical space the undocumented inhabit was morally significant; it placed them within the city's scope of concern. This was the same strategy adopted by some provincial authorities who reframed their obligations to provide education to IRCs as an obligation to *constituents*. Fiduciary theory would point to the fact that public authorities recognized implicitly that they stood in a special moral relationship with inhabitants of their jurisdictional spaces—this moral relationship was predicated on a responsibility to use their discretionary authority to meet the critical social welfare needs of those immediately present, who were, by extension, especially reliant on public authorities for doing so.

(b) Indeterminacy

Identifying a duty-bearer in the context of rights claims is not an easy task. This has proven especially difficult where the rights of irregular migrants are concerned. Marit Hovdal Moan has observed that it is quite common to simply deny that states have any special duties to irregular migrants:

> European states broadly deny that they have a special, positive obligation to provide irregular migrants with subsistence benefits, such as food, clothes, and social housing, or that they are under a special obligation to provide them with preventative and curative health treatment, education […]
>
> (2012, p. 1227)

David Miller has written that in a world of strangers there is "an absence of mechanisms that tell us who is responsible for meeting the needs of particular others" (2013b, p. 205). Contrast this statement from Miller with one by Joseph Carens, writing on the schooling rights of IRCs:

> A basic education is […] a fundamental need, and it is one that must normally be met by the society in which the child lives. Where the child lives is a matter of fact. If she is living inside a state's territory, that state must provide her with an education that will enable her to function later in life, regardless of whether she is legally entitled to live there.
>
> (2008, p. 170)

The arguments developed in this chapter are clearly sympathetic to the position advanced by Carens, above. However, Carens never formulates a reason for holding public authorities accountable for the education of IRCs—he merely states this as an obvious fact, leaving unexplored the problem highlighted by Miller: how does one identify who is responsible for meeting the specific needs of IRCs? As Marit Hovdal Moan rightly observes, in order to sustain a claim to rights in a liberal state: "[…] one must show that there is a morally relevant connection between the irregular migrants and the state, which obliges the state to meet their human right to have their basic needs met" (2009, p. 321).

The problem of indeterminacy was apparent in the discourse of public authorities debating the extent of their responsibilities for IRCs. A frequent form of argument was to suggest that IRCs had legitimate rights claims, but that these were not the responsibility of public authorities in the speaker's jurisdiction. Thus, provincial authorities frequently argued that it was a problem generated by federal immigration policy and therefore the responsibility for the needs of IRCs (including schooling) was a matter for federal authorities to address. Others argued that this was not a responsibility of Canadian authorities at all because these children should not have

been in Canada in the first place—they may have a right to education, but that did not mean that Canadian taxpayers had an obligation to fulfil that right claim. On the latter account, irregular status served as a moral trump to other rights claims, because withholding services was thought to be just desserts for rule-breaking.

Fiduciary theory provides the resources to explain some of the reasons why other public authorities opted instead to redefine their responsibility to this population of children and provide them with access to social services, including schooling services. By addressing the problem of indeterminacy, fiduciary theory fills a gap that hinders other rights-based approaches that seek to establish a right to schooling for IRCs.

Fiduciary theory proceeds from a theory of obligation, locating a duty-bearer responsible for advancing the well-being of IRCs. The theory puts forward moral reasons for grounding *special positive duties* to IRCs, and identifies those who bear the normative responsibility for carrying out those duties. The special duty to provide IRCs with public education is not indeterminate in the sense that one is left questioning who has the moral responsibility to provide these children with a public education. Fiduciary theory clearly identifies the public authorities responsible for regulating access to schooling, and argues that they have a *special perfect duty* toward IRCs. These public authorities find themselves in a fiduciary relationship with IRCs on account of the fact that they (a) exercise overwhelming discretionary authority over the IRCs' interests; (b) control the social goods that are especially valuable to IRCs; and (c) because IRCs are especially vulnerable to the way(s) public authorities decide to exercise their discretionary authority. A broader, *special imperfect duty*, accrues to other public authorities in the state because fiduciary theory makes clear that the responsibility for the welfare of IRCs is shared: it does not accrue only to the state and other federal authorities but to a range of public officials exercising authority on behalf of the state. As Leib, Ponet and Serota point out, the modern liberal state is built on "intricate network of nested fiduciary relations" (2014, p. 397). Public authorities

ranging from policymakers to administrators recognize a duty of this kind to IRCs in practice. This is expressed most clearly in the sub-state space where policymakers have argued that it is their duty to ensure that irregular migrant families, workers, and children can access services without fear. This duty stems from a recognition that they stand in a position to affect the practical interests of these individuals, these individuals require goods that they control (access to services), and they have the discretionary authority (capacity) to act to alleviate the vulnerability that irregular migrants experience as a result of this relationship of power asymmetry and dependence.

(c) Priority

Another challenge highlighted in Chapter Three related to difficulty prioritising the needs of strangers—prioritizing can mean bringing them on par with the needs of *insiders* (co-constituents, legally resident children, co-members of a political or social community) or giving them priority over the needs of insiders. There was significant debate amongst public authorities regarding their obligations to address the needs of irregular migrants and IRCs (*strangers*), ie whether or not their needs should command equal priority in the moral deliberations of bounded communities and by proxy, their elected officials.

Political philosophers have generally made use of agent-relative associative duties to argue that IRCs should be excluded from the regime of social benefits available in liberal states. The special bonds that arise in the association of members of a political community are taken to ground special obligations to co-members that supersede general obligations that are owed to other individuals qua humans. Iris Young (1998) summarizes this position—she observes: “Legal immigrants have been admitted to the society, […] but illegal immigrants have not. We have a right to deport them simply because they are not members of the society, and for the same reason we have a right to deny them social benefits.”

There were numerous examples of this form of justification that were marshalled to defend limited moral obligations to IRCs, which translated into a defence of truncated access to social services. Conservative MPP Prue argued that changes to provincial legislation in 2005 would result in broadening access to education for *bogus* asylum seeking children who were destined to become irregular migrants in the province; the province had no moral obligation to provide access to schooling services to such children: "I, for one, have to question whether it is within all of our hearts to allow not only a bogus refugee claim to be made that we know is blatantly false and has no chance of success, but also to spend taxpayers' money to encourage it" (Prue Bill 194 Deb 10 May 2005, 1740). In another instance, provincial authorities argued that it was justified to deport IRCs already enrolled in Canadian schools because they (*illegal outsiders*) were availing themselves of a benefit they did not have a moral claim to; Conservative MPP Peter Shurman stated: "Ten thousand kilometres away, families await immigration to Canada who have completed the forms in a legal way, want to come here and obviously they have children who want an education. And the places for those children are being taken by illegals" (Babbage 2008). As Pashang observes, "CBSA raids on schools and the detention of non-status minors not only creates fear among pupils; it also constructs a hierarchy between children with status and non-status children" (2011, p. 173).

Fiduciary theory turns the priority argument on its head. It does so by turning a normative argument commonly used to defend restrictions to the social welfare goods of the state into an argument that is accommodating of strangers.

Fiduciary theory adopts the same structure of argument partialists use in defending a right to exclude IRCs and irregular migrants from social welfare regimes. Central to the accounts of responsibility and duty developed by partialists and fiduciary theorists is a focus on a set of discreet relationships and the roles people play in those relationships. Whereas communitarians and liberal nationalists believe the relationships are valuable because of a shared history, or shared sense of culture,

nation and destiny, fiduciary theorists view these relationships as special because they are able to identify in these relationships fiduciary characteristics: dependence, trust and vulnerability to discretionary authority. It was shown in Section 5.10 that both legally resident children and IRCs can be accommodated in this definition of fiduciary relationships; it follows that duties of loyalty are owed to both legally resident children and IRCs.

Indeed, fiduciary theory disrupts common understandings of loyalty by placing IRCs in the same category of moral concern as legally resident children. This normative argument in theory found expression in practice as well, such as when Liberal MPP Dave Levac argued that the education of IRCs should be prioritized irrespective of whether they choose to make a life in the Province of Ontario or elsewhere—this carried no moral relevance to the distribution of education services: "Even if they leave us, they're leaving us with some more education and a good feeling about what Canada is all about, what Ontario is all about. We're sending a signal that we prioritize our children's education as the number one thing in this province" (LAO Bill 194 Deb 10 May 2005, 1720).

(d) Charity

Another reason the approach from fiduciary theory is valuable is because it dislodges the notion that what is owed to irregular migrants and IRCs is merely charity. Charity is a freely chosen commitment to expend time and resources in a particular way for the benefit of another individual. Thus, it is an obligation voluntarily accepted. The normative responsibilities public authorities have for IRCs do not arise in this manner.[165]

[165] As Criddle points out, "Agency regulators must respect the state's subjects as free and equal autonomous agents, and act to promote the public welfare, not necessarily the public will" (2009, p. 466).

There are numerous situations where important interests may be at stake, yet parties with discretionary authority refuse to recognize their role in achieving fair outcomes. For example, there is evidence that sub-state authorities at times attempt to limit their obligations to IRCs. This can be for many reasons, but one common reason is to protest policymaking not directly under their control. This is the case, for example, when local authorities attempt to protest national immigration policies by refusing to deliver services to irregular migrant populations.[166] In such cases, the presence of irregular migrants is seen as an imposition, an unwanted burden.

In matters of immigration, the demands of morality are typically seen as being of lesser importance, taking a back seat to the more expedient demands of politics. Consider how difficult it would be to ground duties of assistance for IRCs in an environment where racist and exclusionary rhetoric permeate public discourse. The data presented in Chapter Four indicates that strands of such discourse exist in Canada and have shaped views about the obligations public authorities have to needful foreigners. The Bloc Quebecois MP Bernard Bigras observed:

> "[…] these people in distress, who are largely from southern countries and therefore more visible than those who came [to Canada] in previous decades, because of their unfamiliar cultural and linguistic profiles, did disturb government authorities and the public in general. That is when we politicians, the media and the public, in Quebec and throughout Canada, began using expressions such as phony refugees, abusers of the system and cheaters.
>
> (HC Bill C-11 Deb 26 February 2001, 1805)

This is where a fiduciary conception of public authority can be particularly helpful, since it clarifies *the extent of the obligations* public authorities have to this population of migrant children. Fiduciary theory side-steps the reliance on voluntary obligations to establish special positive duties of assistance for IRCs. The theory explains why one

[166] Owen Fiss (1998) describes the kinds of *social disabilities* imposed by local authorities when they deny irregular migrants social services as a form of opposition to federal immigration policies: "In America, both the formulation and implementation of immigration policy are in the hands of the federal government. Social services are generally provided by the states, and a number of states, principally California and Texas, imposed social disabilities on illegal aliens as a way of financially protecting themselves from the failure of the federal government to adequately police the border".

party that has no reason or desire to associate with a second party may still accrue onerous obligations to support them. Fiduciary theory achieves this objective by demonstrating that fiduciary relationships can arise between public authorities and IRCs even if public authorities deny the existence of such a relationship (see Section 5.11). Moreover, once a fiduciary relationship is established with IRCs it carries the onerous obligation of *pursuing the child's best interests*. This is a key principle in international human rights law, codified most explicitly in the UN Convention on the Rights of the Child. General Comment 14 issued by the Committee on the Rights of the Children states:

> The best interests of a child shall be a primary consideration in the adoption of all measures of implementation. The words "shall be" place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.
>
> (CRC 2013)

The value of fiduciary theory is in explaining the normative reasons why a child's best interests merit primacy in moral and political decision-making. It is because those who stand in a fiduciary relationship with others must adopt their ends as their own and seek to advance those ends disinterestedly. There is evidence that public authorities advocating for the inclusion of IRCs in Canada's public schools are doing precisely this—adopting the IRC's goals or ends as their own and determining that these are worth advancing irrespective of the child's immigration status. This is captured in the remarks of MPP Levac cited earlier, but also in the following passage from MPP Cheri Di Novo who defended Toronto's 2007 *Don't Ask, Don't Tell* policy in this way: "We need a province-wide policy of 'don't' ask, don't tell'. Our first and only duty, really, should be the education of *our* children. We shouldn't be visiting the sins of the parent, if you will, on their children" [emphasis added] (Babbage 2008).

Loyalty to the ends valued by beneficiaries is what holds public authorities accountable in a relationship where their authority dominates so thoroughly. The inability of IRCs to hold accountable those with discretionary power over their interests

was also highlighted in this chapter. IRCs face two significant constraints in respect of accountability: the first arising from their precarious administrative status within the state and the second from their status as quasi-sovereign individuals (ie children). The fiduciary principle suggests that public authorities must adopt the IRC's goals or ends as their own and take affirmative actions to advance them. Illingworth notes:

> […] duties of fidelity are often invoked in relationships where there is an imbalance of power. In these cases, they can act as a substitute for the monitoring mechanisms that might otherwise oversee the conduct of the person who holds power.
>
> (2005, p. 23)

Commenting on the predicament of irregular migrants in Toronto, Canada, Berinstein et al observe:

> For non-status immigrants, the borderline is not just at physical entry points at ports, airports, and land crossings. Rather, the border exists wherever and whenever they try to access social services.
>
> (Berinstein et al 2006, p. 9)

For irregular migrants and IRCs, interactions with public authorities can be unsettling—the administrative state is a labyrinth that needs to be negotiated at every new turn. Fiduciary theory minimizes the uncertainty that colours the IRCs interactions with the administrative state by subjecting the discretionary authority of public authority to fiduciary constraints.

(e) Summary

The value of fiduciary theory lies in reframing the relationship between public authorities and IRCs from a relationship primarily viewed through the prism of needful outsiders making claims on the goods of insiders, to one that situates IRCs as a special group of beneficiaries in a fiduciary relationship with public authorities. In this relationship, IRCs, like other groups of beneficiaries, make claims to special solicitude, loyalty and care on public authorities.

Action motivated by fiduciary duty can take a number of forms, but it is guided by the overarching principle of pursuing the beneficiary's best interests. One can map those interests on to a human rights framework and see fiduciary duty as the missing link that motivates action at different levels within the state. Thus, fiduciary theory can helpfully complement a human rights framework by providing the conceptual tools for resolving the challenges discussed in the preceding sections related to (a) immediacy; (b) indeterminacy; (c) priority; and, (c) charity. Meanwhile, a human rights framework complements fiduciary theory by suggesting what the fiduciary must do once a fiduciary is identified and her responsibilities for action elucidated.

Fiduciary theory builds on the foundations of liberal political theory, adding a valuable extension which connects liberal theory with the practical exercise of authority by public authorities within a federalist state. In seeking to better understand their obligations to IRCs, public authorities may very well benefit from the framing provided by fiduciary theory. Indeed, the hope is that the approach from fiduciary theory will support ethical decision-making by public authorities in their interactions with this unique population of children.

5.13.Conclusion

This chapter began by reviewing the definition and origins of fiduciary theory, as well as the conditions that give rise to fiduciary relationships. It noted that fiduciary theory has generated much commentary and some disagreement in relation to its definition, as well as the scope of its applicability to issues outside the private law. Nevertheless, an increasing number of scholars were making use of the theory to better understand the boundaries of responsibility and obligation in certain kinds of relationships in the public domain.

A general consensus has emerged on the key indicia of fiduciary relationships—the criteria that demarcate a relationship as being fiduciary in nature: (a) one party's discretionary power over the interests of a second party; (b) trust that the discretionary

power will be used solicitously on behalf of the vulnerable party; and (c) vulnerability to the controlling party's discretionary control over the resources needed by the vulnerable party. Even with general agreement on these core tenets of fiduciary theory, different views persist as to the way(s) fiduciary relationships come into being.

Communities of understanding have formed around two different views: a functionalist view that stresses contextual factors, and a contractual view that stresses voluntary undertakings. The latter account has been rejected as a comprehensive explanation for the ways fiduciary relationships arise in social life. It was shown that the voluntarist account limits too greatly the scope of moral concern when it comes to addressing the needs of those reliant upon a party that exercises discretionary control over interests vital to their well-being. The functional account was shown to provide a more robust and flexible explanation of the different ways trusting relationships can be established and the duties that arise in those relationships.

The formal structure of fiduciary theory explicated, the chapter then investigated its moral and philosophical foundations. The foundation of a fiduciary's obligation to a beneficiary is respect for their moral autonomy. It is because a beneficiary is reliant on the solicitous use of the fiduciary's power that their freedom and autonomy is constrained. Public authorities, in the role of fiduciaries, must be mindful of the ways their power constrains autonomy and freedom.

The central thesis of the chapter was then defended, namely, that the relationship between IRCs and public authorities should be thought of as a fiduciary relationship. It was argued that this was not only the best way to conceive of the public authority exercised over IRCs, but also that it provides a succinct and systematized framework for some of the normative arguments presented in practice for the inclusion of IRCs in public schools. That is, public authorities already act upon the principles that comprise a fiduciary normative framework; they recognize their unique capacity to act, the presence of individuals needful of resources they control, the vulnerability of these individuals stemming from the way public authorities exercise their discretionary

authority (ie reporting individuals at service points to immigration authorities or, alternatively, endeavouring to pass policy that ensures that services can be accessed without fear).[167] While public authorities reference these normative ideas and act upon them practice, they have heretofore not been brought within the aegis of a single normative framework.

Up until now it was unclear on what basis one might include IRCs within the scope of duty that public authorities are recognized to have vis-à-vis legally resident children. This chapter has demonstrated that IRCs qualify as beneficiaries of the same narrow fiduciary duties of loyalty and care owed by public authorities to legally resident children. What is more, IRCs may have an even stronger claim to solicitude because of the distinct features of their relationship with public authorities: public authorities at the sub-state level have both the power and discretion to affect the vital interests of IRCs and it is a relationship that IRCs cannot easily exit. A responsibility therefore accrues to sub-state authorities to address the needs of IRCs, whether or not they wish them to be there.

The issue of social welfare rights for irregular migrants is not confined by debates about borders and membership. As Meghan Benton writes, any theoretical project should not be limited to determining who should be let in, but also "examining who has always been on the inside and to whom we need to justify their continued exclusion" (2011, p. 59). By recasting the claims of IRCs as claims between beneficiaries and fiduciaries, fiduciary theory reveals that a bias for the welfare of legally resident children to the exclusion of the welfare of IRCs is morally impermissible. The needs of legally resident children are no more important, nor do they come prior to the needs of

[167] Further evidence of this can be found from recent policy actions in the City of Toronto. The City of Toronto has recently framed its obligations to the irregular migrant population in Toronto as a moral imperative: "And we have a moral obligation to speak up when a government declares lawful refugees, visitors and even its own permanent residents inadmissible and unwelcome" (CoT 2017b).

IRCs, since the relationship of both groups to public authorities share the same normative foundation.

6. Conclusion

6.1. Overview of the research and its conclusions

This thesis has put forward *fiduciary theory* as a novel normative framework that elucidates the moral basis for accommodating IRCs in Canadian public schools. Many normative theorists have attempted to elaborate foundations of a moral duty to assist IRCs, and this research furthers this endeavour. The argument advanced in this thesis is that public education must be provided to children the moment they arrive in the state, because the law must prioritize a child's *best interests* without regard to their immigration status. What is at stake is nothing less than the migrant child's future development.

The central arguments have been developed over three chapters. In Chapter Three, a critical review was undertaken of normative justifications developed in the relevant philosophical literature for extending schooling rights to IRCs in liberal states. The chapter contrasted three normative justifications for the accommodation of IRCs in public schools: a social membership justification, a partialist justification, and several rights-based justifications. These theoretical frameworks offered contrasting assessments of the obligations public authorities have to IRCs. Tracing the points of difference and commonality across these normative frameworks was necessary to understand what normative resources were available to public authorities reckoning with the claim to public schooling made by IRCs.

In Chapter Four, the arguments put forward by public authorities in Canada for extending or limiting schooling rights were systematically analysed. Four specific policy moments were identified when public authorities addressed the IRC's right to schooling. The dominant normative ideas referenced by public authorities were catalogued and linked to the normative theories in Chapter Three to see if discourse in practice mirrored justifications at the level of normative theory. This analysis found that several normative ideas were regularly invoked by public authorities which were not

systematically captured in the normative frameworks common to the relevant literature. Specifically, these normative ideas focused on the (a) presence of IRCs as a morally relevant variable in determining what was owed to them, (b) the vulnerability of IRCs arising from their dependence on public authorities for unfettered access to the specific social goods they control (eg education), and (c) a recognition by public authorities that they possess the discretionary authority to address the needs of IRCs by either facilitating or stymying access to social services.

A final set of arguments was developed in Chapter Five, which accomplished multiple objectives. First, it provided a general theoretical account to fit the normative ideas that policymakers referenced in practice when debating the accommodation of irregular migrant children in public schools. These normative ideas were systematized in the idea of fiduciary theory. It was then argued that fiduciary theory provides the normative resources necessary to provide a strong way of conceptualising the duty of public authorities to educate IRCs.

6.2. Reviewing the policy challenge

The existing body of research on the rights of migrants is overwhelmingly focused on economic migrants, refugees and asylum-seekers, with comparatively little scholarship addressing the needs of *irregular migrants.* When research does address the plight of irregular migrants, it tends to consider the experience of adults, not children. This research makes its first contribution by adding to the nascent body of scholarly work focused on the rights of irregular migrant children to social welfare services (Gibney 2006, 2009; Carens 2008; Goldring et al 2009; Sigona and Hughes 2012; Spencer 2016).

The IRC's claim to public education in a liberal state like Canada is not without both practical and ethical challenges at the level of theory and practice. This is because the IRC's claim to education engages two policy agendas that work at cross-purposes:

child welfare policy and immigration policy, which is by its very nature protectionist and exclusionary.

Irregular migrant children occupy a unique and controversial place within this debate. As *children*, they enjoy specific rights that adults do not. These rights are usually considered inviolable: they accrue to children by virtue of their status as minors, not their citizenship status. However, as *irregular migrants*, their claim to rights and social goods is tenuous because the provision of social goods would deepen the IRC's ties to the host community and strengthen their moral claim to membership. While public authorities charged with implementing immigration policy are actively seeking to remove these children, educators are quietly facilitating their integration into society.

Where to begin then to resolve the question of schooling rights for IRCs? One might begin with a question of membership—who *should* and *should not* be present (to access social goods) in a community. A great deal of effort has been spent adjudicating this question in the theoretical literature, however, this is not the precise question that must be asked in this case. This research focused on a different normative question; not why an individual should or should not be permitted to enter a state, but rather, what is owed to that individual once they are within the state. As Matthew Gibney observes:

> Clearly, the nature and scope of the (moral) right of states to control the admission of non-citizens to their territory is a controversial one. But the question of what obligations are owed to those who have already arrived in the state is perhaps even thornier. While entrance controls prevent individuals from realising their goals, those who have arrived already live under the authority of the state, and this will shape their destiny in unique and profound ways.
>
> (2009, p. 9)

The IRC's claim to social services generates moral and practical problems for a country like Canada. At the level of morality, it is a problem because Canada is a liberal state that adheres to liberal principles that demand equality for all persons. Immigration restrictions of the sort currently in place are very difficult to justify in a liberal normative framework (Cole 2000). The challenge at the level of practice arises from the fact that

schooling serves to deepen the attachment of IRCs to the communities in which they reside, which in turn makes the enforcement of immigration law more difficult. Modern liberal states are founded on ideals of impartiality, equality and fairness. However, these states also privilege the needs of citizens over outsiders. These divergent orientations give rise to a complex set of ethical dilemmas.

Those that are most frequently confronted with these ethical dilemmas are policymakers and public authorities in charge of service provision, ie front-line workers. This is especially the case for public authorities in sub-state jurisdictions; they have no control over federal immigration policy, but must nevertheless reconcile immigration policy with their ethical responsibility to provide critical social services to a vulnerable population. They are caught between a sense of ethical obligation to aid this population of children and federal legislation that compels them to treat IRCs as deserving less than Canadian citizens. As Abji observes, the welfare of migrants in Canada is affected by "the vagaries of the labour market, the 'good intentions' of governments to implement regularization programmes, and the discretionary powers of front-line agents, who may 'take liberties' with their power depending on who is or is not paying attention" (2013, p. 333).

The most obvious obstacle facing IRCs is that their residence constitutes a violation of administrative rules set by the state. This affects how public authorities think about their obligations to them. It has been argued that immigration policy interferes with the moral responsibilities public authorities have to their constituents and clients. Immigration policy may prompt service providers to police individuals within the boundaries of the state. As Fortier notes, this moves the border of the state from ports, airports, or land crossings to spaces within the state: "the border exists where and whenever they try to access social services" (2013 p. 275). At the very least, immigration policy risks placing public authorities in "an awkward position", as noted Toronto City Councillor Shelly Carroll:

> But in some respects, whether it's due to a Hippocratic oath in the case of our medical and healthcare professionals or, simply…humanity, are not some of these people being served now without this strategy in place and some of its recommendations that puts our staff in an awkward position? [The policy] puts our staff in a better position of doing the work they are going about now…sometimes out of conscience, sometimes out of Hippocratic oath. […] It's what our staff do and are bound to do [for those resident], and that's all this strategy addresses.
>
> (CoT Deb CD29.11 10 June 2014)

Some public authorities have approached this dilemma with an attitude of ambivalence. As IRCs are *irregular*—though frequently labelled *lawbreakers* or *bogus*—an assessment of their needs is not deemed important. Jacqueline Bhabha believes that the lack of protection for child migrants results not from their invisibility to policymakers, but from "an unresolved ambivalence about the legitimacy of according protection to migrant children without a legal status" (2014, p. 11). These public authorities are aware of the presence of IRCs, but choose to assess their needs differently (ie not as equal to the needs of Canadian children) and conclude that IRCs should not be able to avail themselves of similar social entitlements and benefits as legally resident children in Canada.

6.3. Addressing the policy challenge in practice

Public authorities put forward a number of different arguments to justify the accommodation of IRCs in public schools as well as limits to this accommodation. These are briefly reviewed hereunder.

Proponents of inclusion frequently drew on notions of social membership to justify access. They argued that educating IRCs was an investment in their communities and more specifically, *future members* of their communities over the long-term—public education was thus to be provided as a reciprocal benefit. This justification of access from social membership stresses the contributions that IRCs can make to the community, thus enriching communal life in ways that, over time, are indistinguishable from the contributions made by legal residents. Some argued that this policy of inclusiveness should begin right away, while others argued that it should

begin only after the IRC has spent a certain amount of time in the community. This has implications for the exercise of immigration authority, since some may feel more strongly that the longer an IRC is present the stronger the moral justification for inclusion in the schooling system. An argument of this variety can be gleaned from the remarks of Bloc Quebecois MP Dalphond-Guiral:

> If I were an illegal immigrant and went about my business fully aware of the situation, and if I were caught after a few weeks, there would not be an issue of becoming acclimatized to a new country. But for children, it does become an important issue if they have been living in Toronto, Montreal or Vancouver for the last five years.
>
> (HC CIMM Bill C-11 19 February 2002)

Others justified access by drawing upon a different moral register—they argued that what was being extended to IRCs was *a privilege*—the privilege of joining the community and by extension gaining access to its social goods (education). Insofar as these normative positions rely on the idea of a community of insiders agreeing to share their resources with this community of *resident outsiders*, they can be said to be drawing upon normative resources in a partialist theory—it is a justification for inclusion with limits.

Some drew upon a rights perspective to justify accommodation and argued that education was an entitlement that accrued to *all children*. Frequently such arguments drew a link to normative principles codified in international law, such as those inscribed in the UN Convention on the Rights of the Child. In such cases, public authorities did not so much stress the underlying moral principles in human rights norms (ie that the child possesses inherent moral worth and dignity that should be the object of respect), rather they stressed compliance, ie that policymakers were morally bound to adhere to the commitments Canada had made in the international arena. Domestic policies that did not align with these fundamental international norms, they argued, should be revised. Certainly much stronger arguments could have been presented from a rights perspective by stressing the inherent moral worth of the child migrant, instead of their instrumental value to the host society. Only a minority of public authorities did put

forward such arguments, and when they did, it took the form of suggesting that educating IRCs was a *contribution* that the host society makes to humanity at large.

There are also those that suggested that IRCs should not have unfettered access to free public education in Toronto, Ontario or Canada. One reason for this was that *insiders* should not be obliged to make resources available to individuals that were not *deserving*. They may be undeserving for a variety of reasons, though amongst the most common cited were *rulebreaking* and an unreasonable redistribution of resources. In a remarkable declaration—amidst a debate on access to social services in Toronto—Toronto City Councillor Minnan-Wong stated:

> Undocumented workers, illegal immigrants are subject to removal orders, deportation orders. They should be removed, we should not encourage them, we should not help them, we should not facilitate them. They are an insult to every immigrant who played by the rules to get into this country. They are an insult to every immigrant who is waiting to enter this country legally. It sends a message to the world that it is okay to break the law to come into Canada. And it says that the City of Toronto is an accomplice to this law-breaking.
>
> (CoT Deb CD18.5 21 February 2013)

Being irregular is seen as a barrier to further ethical obligations—denial of social services is the just desserts for the infraction of immigration rules. Some claimed that it was unfair for the host community to be forced to share costly services with non-members, as this would disadvantage members with legal status. Such arguments shared a few general features that are morally relevant. IRCs were considered strangers in a first instance and necessitous children only in the second instance. Once IRCs were so-defined it became easier to justify limited responsibility for their welfare. As Gary Freeman notes, "national welfare states are compelled by their logic to be closed systems that seek to insulate themselves from external pressures and […] restrict rights and benefits to members" (1986, p. 51). On such accounts, social goods like education should be reserved for citizens and legal residents.[168]

[168] Note, for instance, the comments of the Canadian Alliance Member of Parliament Randy White referring to asylum-seekers who have not yet been granted refugee status and those that have been denied asylum: "Individuals coming into the country should have certain rights

6.4. Distinctiveness and impact of the fiduciary approach

(a) Recognition in discourse and practice

This thesis found multiple justifications put forward by public authorities to accommodate IRCs in Canadian public school that referenced ideas belonging to common, easily identifiable normative theories frequently discussed by theorists in the context of irregular migrant rights. Several other normative ideas seemed to be prevalent in practice which heretofore did not co-exist in a single, coherent normative framework. This section briefly considers those normative ideas and the way they come together in the conceptual framework provided by fiduciary theory.

In justifying access to schooling for IRCs some public authorities were drawn to specific features of the policy problem. For instance, they point to the injustice of IRCs fearing contact with public authorities, the same individuals who are responsible for providing critical social services to these children. Some public authorities recognize differences in the basic needs of children arising from their different stages of development and their heightened dependency on others to secure basic conditions of survival and development. They recognized that IRCs were already in a vulnerable position as children, migrants, and individuals living with a precarious status. Denying these children access to schooling only further exacerbated their existing vulnerabilities. Moreover, public authorities recognized that they had the capacity to do something about this—they possessed sufficient discretionary authority to alter the situation. The evidence in Chapter Four shows that certain public authorities recognize vulnerability, dependence and discretionary authority as meaningful moral factors and cite them when advocating for policies that would facilitate inclusion of IRCs in the public schooling system.

---

and privileges but not the same rights, privileges and freedoms as Canadians" (HC Bill C-11 Deb 27 February 2001, 1250).

The actions taken by the Province of Ontario and the City of Toronto between 1992 and 2014 went a long way in recognizing that IRCs deserve equal moral consideration, on par with other legally resident children. The acknowledgement of IRCs as beneficiaries of equal moral concern in the Province of Ontario and the City of Toronto is in and of itself not evidence that public authorities acted upon the normative ideas that together make-up a fiduciary framework. However, they used their discretionary authority to put in place firewall policies to facilitate access to a social good that they have a responsibility to provide and upon which IRCs are uniquely dependent. Such policies actively frustrate other branches of government seeking to discover and remove IRCs. This policy and the justifications for it suggest an acceptance and defence of the principles that make-up a fiduciary normative framework. The idea of making access to services available to IRCs *without fear* is one that is motivated by a recognition that public authorities have a responsibility to use their discretionary authority to advance the interests of those who stand in a vulnerable position with them.

This observation that public authorities need to act on behalf of all state subjects and not merely that of legal residents is consequential. Normative accounts of obligation that rely on the host community first extending to IRCs, limits the possibility of equitable outcomes for IRCs. Where a finite amount of resources is concerned, as well as multiple beneficiaries laying claims to these limited resources, the doctrine of fiduciary duty demands that equity and reasonableness guide the fiduciary in adjudicating between the *best interests* of the various beneficiaries.

(b) Research contribution: the added value of fiduciary theory

Traditionally, states have been seen as unified entities that act with authority over all citizens—they establish rules of membership, ensure peace and security, and claim a monopoly on the use force. From this emerges a particular conception of justice that centres on state power and authority. However, this is not the only way to conceive of

the exercise of public authority within a state. The state is merely one expression of political authority, but it is not monolithic and it certainly does not act alone in the pursuit of a more justice society. State authority is discharged in a variety of ways, at a number of sites within the state and by a variety of actors. Sub-state authorities—like cities, provinces and regions—have recently problematized this state-centred view of authority. This research has argued that sub-state authorities have differentiated responsibilities for the well-being of IRCs that arise from their unique relationship with them. To borrow a phrase from the contemporary philosopher Onora O'Neil, there may be many "agents of justice" within the liberal state; their powers "are multiple, varied, and often highly specific" (2001, p. 189). Indeed, some sub-state authorities have recast themselves as moral agents capable of responding to the needs of vulnerable outsiders where the state is either incapable or refuses to do so.

It has been argued in this thesis that the relationship between public authorities and IRCs is best understood as one between a fiduciary and a beneficiary. This framing not only coheres with the way public authorities describe their responsibilities to IRCs in practice, but also provides normative resources necessary to provide a strong way of conceptualising the duty of public authorities to educate IRCs.

Conceptualizing the relationship between public authorities and IRCs as fiduciary in nature helps clarify the responsibilities of public authorities toward this unique population of children. In order to establish that IRCs stand in a fiduciary relationship with public authorities in Canada, it was necessary to highlight certain relevant features in their relationship with public authorities. This was accomplished in Sections 5.10, 5.12, and 6.4 (a). It was concluded that IRCs are beneficiaries of a fiduciary relationship with public authorities and that this is clearest at the sub-state level where public authorities exercise vast discretionary control over the social services that are most critical to the development of the migrant child. After this was established, the thesis then elaborated the value of fiduciary theory both for practice and theory in Canada and beyond.

Some public authorities would choose to limit their obligations to IRCs. Fiduciary theory helped explain why the goods that public authorities extend to IRCs should not be considered *charity* or *a privilege*, but rather an entitlement that IRCs are justified in claiming and which public authorities are duty-bound to provide. This is because public authorities and IRCs share a *special associative relationship* that carries a positive duty of care.

The responsibilities public authorities have to IRCs are not of an *imperfect* sort, ie one that could be claimed by a large number of undefined, unknowable recipients, none of whom have a direct claim on the resources at stake. IRCs are owed equal moral consideration and equal effort from public authorities to advance their most critical interests. This is the core of fiduciary duty—it is what is meant by a duty of care. As the fiduciary scholar Evan Fox-Decent argues, fiduciary theory denies that "unfettered discretion may prevail" in matters where important interests are at stake (Fox-Decent 2011, p. 174). This is not an entirely novel argument—it shares the same form as the *best interest* principle so widely cited in international human rights law. However, acceptance of the *best interests* principle requires that a political community accept a norm that originates outside the community. By contrast, fiduciary theory looks to moral principles that inhere in common relationships in liberal political communities and merely extends those moral principles to IRCs.

While fiduciary theory has also proven useful in overcoming the challenges that emerge from other normative frameworks it is not diametrically opposed to them. Rather, fiduciary theory builds bridges to connect normative frameworks. For example, fiduciary theory overlaps with notions of inclusivity from social membership theory and the strong sense of responsibility that emerges from special associative duties found in partialist normative frameworks, and finally, connects these to rights based approaches. Fiduciary theory provides a normative framework that empowers IRCs to claim education rights as a matter of justice. It answers the riddle of human rights frameworks: if one has rights, then someone must satisfy those rights claims.

Traditionally, it has been difficult to identify those who have a moral responsibility to satisfy the rights claims of IRCs. Fiduciary theory responds to a lacuna in human rights doctrine; namely, the absence of "a morally relevant connection to the state" (Moan 2009, p. 321). Fiduciary theory explains why public authorities serve as moral agents responsible for meeting the positive rights claims brought by IRCs. Moan writes, "Claims of state responsibility to provide for irregular migrants in need rely for their normative force on the ability of its proponents to provide an account of duties to assist strangers in need" (2009, p. 323). This is what fiduciary theory provides: a novel account of obligation to assist the vulnerable *outsiders* within. This challenge is one that has concerned many academics working at the intersection of migration and ethics. Brad K Blitz asserts that there are "important normative challenges to restrictive definitions of citizenship that seek to distinguish between 'insiders' and 'outsiders'" (2006, p. 455). The fiduciary approach opens new possibilities for challenging practices that keep IRCs in a perpetual state of disenfranchisement and casts doubt on the moral permissibility of pernicious practices such as detention and deportation.

With these understandings in place, there is scope to reimagine what a future dialogue across the various government jurisdictions might look like. Armed with the conceptual resources and arguments that fiduciary theory makes available, service providers at the sub-state level can make a novel and persuasive argument for the redistribution of resources commensurate with the extent of their moral obligations to resident irregular populations. Moreover, understanding how sub-state authorities are bound through fiduciary duties to respond to the needs and best interests of IRCs may prompt federal authorities responsible for devising immigration policy to reflect on novel downstream consequences of policies ranging from temporary labour migration to immigration detention. There are clear opportunities for policy innovation at the federal level of government where temporary labour legislation originates, which can ease the burden on sub-state authorities who address the day-to-day social welfare

needs of these migrants when they are in Canada legally, and also if they remain beyond their permitted stay.

What is clear is that there is a re-emergence of an old conception of the city-space as an active site of democracy, a space that should reclaim (degrees of) sovereignty. Increasingly inhabitants of city spaces like Toronto, articulate their claims in a language that makes clear a desire for more direct control over the composition of their community and the resources required to nurture it. Whether the city space can transform itself in the necessary ways to realize the objectives of progressive change that it so often incubates is a matter for open speculation. What is less speculative is that city spaces in Canada remain, as Engin Isin described them, "the site and incubator of the most critical and progressive movements in the last two decades" (1998, p. 186).

6.5. Limitations

There are several limitations that should be addressed before concluding. In exploring fiduciary theory, resources from both legal and ethical theory have been used. It stands to reason that the fiduciary duties that arise from a fiduciary relationship can also be understood in both legal and ethical terms. This thesis did not, however, aim prove that IRCs have a legal claim against public authorities on the basis of their standing in a fiduciary relationship with them. It may be possible to make such a claim, but such considerations are beyond the scope of this thesis.[169]

Furthermore, as already pointed out, this research project takes some variables as given. For example, that states have a right to control membership rules to their communities and a right to manage their borders. This is not to suggest agreement

[169] General Comment 14 (2013) issued by the Committee on the Rights of the Child states that the *best interests [of the child] principle* can be invoked before a court of law. It is a "fundamental, interpretive legal principle" (CRC 2013, p. 4). Sections 5.10 and 5.12 argue that the *best interests principle* reflects a fiduciary conception of public authority.

about these facts, merely to point out that the research focus in this thesis has been on the conditions of individuals within the state and what is owed to these individuals.

Finally, fiduciary theory does not propose that all the resources of the host community need to be expended to accommodate the needs of outsiders. The claim to those resources is subject to some constraints, namely, that resources be distributed on the basis of a reasonable evaluation of need, dependence, and vulnerability. The result of an application of fiduciary theory must be more, not less, equitable outcomes for the worst off—they cannot be left further impoverished. This thought was captured quite succinctly in a remark by Toronto City Councillor Mike Layton discussing the needs of irregular migrants in the City of Toronto:

> Our city struggles with a lot of issues; we have a lot of things we have to invest in, we have a lot of problems we need to solve. There's a lot of people out there in need. But that one of our top priorities shouldn't be to protect those that are most vulnerable is a grave, grave error. That is missing the point of why we are here entirely.
>
> (CoT Deb CD29.11 10 June 2014)

6.6. Closing statement

This research has developed an account of fiduciary theory that improves upon current understandings of responsibility, obligation and duty. Fiduciary theory provides the normative resources necessary for public authorities to coalesce around new understandings of responsibility, which may in turn lead to more equitable policy outcomes for IRCs.

In closing, one might return and consider the central reason for educating children in liberal societies, that is, to ensure that they can exercise autonomy and enjoy unfettered freedom as rational adults. The vision of the unencumbered individual is of one able to choose ends for herself. "For the unencumbered self, what matters above all, what is most essential to our personhood, are not the ends we choose but our capacity to choose them" writes Michael Sandel (2005, p. 162). A liberal society that removes this possibility undermines one of its core principles. The case made in

this thesis is basic; it concerns the moral autonomy of a child and her proper development. This is the first trust that is reposed in the institutions of the state responsible for educating future populations.

7. References

(a) Academic articles, books, periodicals and reports

Abella, M. (2017). Needed but not wanted: temporary foreign workers. September 16. Canadian Filipino News.

Abizadeh, A. (2008). Democratic theory and border coercion: no right to unilaterally control your own borders. *Political theory*, 36(1), 37-65.

Abji, S. (2012). Post-nationalism re-considered: a case study of the “No One Is Illegal” movement in Canada. *Citizenship Studies*, 17(3–4), 322–338.

AG (2013). Office of the Auditor General of Canada. *2013 Fall report of the Auditor General of Canada*. Retrieved from Government of Canada website: http://www.oag-bvg.gc.ca/internet/English/parl_oag_201311_05_e_38799.html

Ajuntament de Barcelona. (2014). *City responses to irregular migrants*. Retrieved from http://www.slideshare.net/nevenoe/report-on-barcelona-roundtable-on-city-responses-to-irregular-migrants

Aleinikoff, A. (1998). Forum response: the immigrant as pariah. October/November 1. *Boston Review*.

AMSSA (2014). The Affiliation of Multicultural Societies and Service Agencies. Info sheet-sanctuary cities. *AMSSA*, March 21 (13).

Amuchastegui, M. (2004). Shadowy survival: Feds forcing city to snitch on illegals using social services. July 29. *NOW Magazine*.

Appiah, A. (2006). *Cosmopolitanism: Ethics in a world of strangers*. Princeton, NJ: W. W. Norton & Company.

Arneson, R. J. (2000). Perfectionism and politics. *Ethics*, 111(1), 37-63.

Ayotte, W. (2001). *Separated children seeking asylum in Canada*. Ottawa: UNHCR-United Nations High Commissioner for Refugees Branch Office for Canada.

Azaad, S. (1991). *Resolving the backlog: An analysis of Canada's refugee backlog clearance program*. York University.

Babbage, M. (2008). Ont. schools shouldn't 'pick and choose' with illegal immigrant kids: McGuinty. June 11. *The Canadian Press*.

Bacchi, C. (2009). *Analyzing policy: what's the problem represented to be?* Frenchs Forest: Pearson.

Bader, V. (2003). Reasonable Impartiality and Priority for Compatriots. A Criticism of Liberal Nationalism’s Main flaws. *Ethical Theory and Moral Practice*, 8(1–2), 83–103.

Bader, V. (2005). The ethics of immigration. *Constellations*, *12*(3), 331-361.

Baier, A. (1981). The Rights of Past and Future Persons. In: E. Partridge, ed., *Responsibilities to Future Generations*. Buffalo: Prometheus Press, 171–83.

Barry, B. (1992). A reader’s guide. In: Brian Barry & Robert E. Goodin, eds., *Free Movement*. Penn State Press.

Bauböck, R. (2008). *Stakeholder citizenship: an idea whose time has come?* Migration Policy Institute.

Bell, D. A. (2005). A communitarian critique of liberalism. *Analyse & Kritik*, *27*(2), 215-238.

Benhabib, S. (2012). The morality of migration. July 29. *The New York Times* [New York].

Berinstein, C., McDonald, J., Nyers, P., Wright, C., & Zerehi, S. (2006). *Access not fear': Non-status immigrants and city services*. Toronto: Social Planning Toronto.

Bevir, M., & Rhodes, R. A. (2002). Interpretive theory. *Theory and methods in political science*, *1*.

Bhabha, J. (2009). Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights? *Human Rights Quarterly* 31(2), 410-451.

Bhabha, J. (2014). *Child migration and human rights in a global age*. Princeton, NJ: Princeton University Press.

Bhuyan, R., & Smith-Carrier, T. (2012). Constructions of migrant rights in Canada: Is subnational citizenship possible?. *Citizenship Studies*, *16*(2), 203-221.

Birks, P. (2000). Lionel Cohen Lecture: The Content of Fiduciary Obligation. *Israel Law Review*, *34*(1), 3-38.

Blake, M. (2001). Distributive justice, state coercion, and autonomy. *Philosophy & public affairs*, *30*(3), 257-296.

Blake, M. (2013). Immigration, jurisdiction, and exclusion. *Philosophy & Public Affairs*, *41*(2), 103-130.

Blitz, B. K. (2006). Statelessness and the social (de) construction of citizenship: political restructuring and ethnic discrimination in Slovenia. *Journal of human rights*, *5*(4), 453-479.

Blitz, B. K., & Lynch, M. (2009). *Statelessness and the benefits of citizenship: A comparative study*. Oxford: Oxford Brookes University.

Blitz, B. K., & Otero-Iglesias, M. (2011). Stateless by any other name: refused asylum-seekers in the United Kingdom. *Journal of Ethnic and Migration Studies*, *37*(4), 657-573.

Bloch, A., Sigona, N., & Zetter, R. (2009). *'No right to dream': the social and economic lives of young undocumented migrants in Britain*. Paul Hamlyn Foundation.

Bloch, A., Sigona, N., & Zetter, R. (2011). Migration routes and strategies of young undocumented migrants in England: a qualitative perspective. *Ethnic and Racial Studies*, 34(8), 1286–1302.

Bohman, J. (2010). Children and the Rights of Citizens: Nondomination and Intergenerational Justice. *The ANNALS of the American Academy of Political and Social Science*, 633(1), 128–140.

Bonfanti, S. (2013). "New Rules for Labour Immigration": Delving into the 2008 Swedish Reform of Labour Migration and Its Effects on Migrants' Well-Being. *Journal of International Migration and Integration*, 15(3), 371–386.

Bordieu, P. and Passeron, P. (1990 [1977]). *Reproduction in Education, Society and Culture*. London: Sage publications.

Bosniak, L. (2006). *The citizen and the alien: Dilemmas of contemporary membership*. Princeton, New Jersey: Princeton University Press.

Boswell, C. (2008). The elusive rights of an invisible population. *Ethics & International Affairs*, *22*(2), 187-192.

Briggs, V. M. (1993). Immigrant labor and the issue of “dirty work" in advanced industrial societies. *Population & Environment*, *14*(6), 503-514.

Bryan, M. (1995). Parents as fiduciaries: A special place in equity. *International Journal of Children’s Rights*, *3*, 227.

Buchanan, A. E. (1989). Assessing the communitarian critique of liberalism. *Ethics*, *99*(4), 852-882.

Calabrese, D. (2014, June 10). City council votes overwhelmingly to cement Toronto's status as a 'sanctuary city' for illegals. *National Post* [Toronto].

Carens, J. H. (2005). *On belonging: what we owe people who stay*.

Carens, J. H. (2008). The Rights of Irregular Migrants. *Ethics & International Affairs*, 22(2), 163–186.

Carens, J. H. (2008b). Live-in Domestics, Seasonal Workers, and Others Hard to Locate on the Map of Democracy. Journal of Political Philosophy, 16(4), 419–445.

Carens, J. H. (2010). *Immigrants and the Right to Stay*. MIT Press.

Carens, J. H. (2013). *The ethics of immigration*. Oxford University Press.

Castles, S. (2000). *International migration at the beginning of the twenty-first century: global trends and issues*. UNESCO-United Nations Educational, Scientific and Cultural Organization.

Castles, S., & Miller, M. (2009). *The age of migration: international population movements in the modern world* (4th ed.). Basingstoke: Palgrave MacMillan.

CBC (1999). Canada Broadcasting Corporation. Chinese boat people: human cargo. *News in Review*.

CBC (2015). Canada Broadcasting Corporation. Temporary foreign workers forced out of workforce by '4 in and 4 out' rule: advocate. March 12. *CBC News*.

CCFR (2004). Canadian Council for Refugees. *Impacts on children of the Immigration and Refugee Protection Act*. Canadian Council for Refugees.

CCR (2008). Canadian Council for Refugees. *30 Years of the Canadian Council for Refugees: a brief historical overview*. Canadian Council for Refugees.

Chan, W. (2005). Undocumented Migrants and Bill C-11: The Criminalization of Race. *What Is a Crime?: Defining Criminal Conduct in Contemporary Society*, 34.

Charusheela, S. (2008). Social analysis and the capabilities approach: a limit to Martha Nussbaum's universalist ethics. *Cambridge Journal of Economics*, *33*(6), 1135-1152.

Chodos, R. (2010). The nature of fiduciary law and its relationship to other legal doctrines and categories. *Boston University Law Review*, 91, 837.

Cholewinski, R. I. (2005). *Study on obstacles to effective access of irregular migrants to minimum social rights*. Council of Europe.

CIC (2009). Citizenship and Immigration Canada. *Canada facts and figures: immigrant overview permanent and temporary residents*. Government of Canada.

CIC (2010). Citizenship and Immigration Canada. *Canada facts and figures: immigration overview permanent and temporary residents 2010*. Government of Canada.

CIC (2012). Citizenship and Immigration Canada. *Canada facts and figures: immigration overview permanent and temporary residents*. Government of Canada.

CIC (2013). Citizenship and Immigration Canada. *Canada facts and figures: immigrant overview temporary residents 2013*. Government of Canada.

CIC (2014). Citizenship and Immigration Canada. *Canada facts and figures: immigrant overview permanent residents 2014*. Government of Canada.

CIMM (2009). House of Commons Standing Committee on Citizenship and Immigration. *Temporary and foreign workers and non-status workers* (7). House of Commons of Canada.

Clarke, J., Hogarth, J. & Salt, J. (2004). *Migration policies and trends: international comparisons*. London: Migration Research Unit (UCL).

Coghill, K., Sampford, C. J., & Smith, T. (Eds.). (2012). *Fiduciary duty and the atmospheric trust*. Ashgate Publishing, Ltd.

Cole, P. (2000). *Philosophies of exclusion: Liberal political theory and immigration*. Edinburgh: Edinburgh Press.

Crépeau, F., & Nakache, D. (2006). Controlling irregular migration in Canada: Reconciling security concerns with human rights protection. IRPP Choices, 12(1).

Criddle, E. J. (2006). Fiduciary foundations of administrative law. *UCLA L. Rev.*, *54*, 117.

Criddle, E. J. (2009). Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking.

CUPE (2014). Canadian Union of Public Employees. Creating immigrant friendly cities: a programme for Toronto. Toronto: CUPE.

Dalal, J. (2016). Pierre Bourdieu: the sociologist of education. *Contemporary Educaiton Dialogue*, 13(2), 231-250.

Da Lomba, S. (2004). Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England. In: B. Bogusz, ed., *Irregular migration and Human Rights: Theoretical, European and International Perspectives*, 1st ed. Oxford: Routledge.

Dauvergne, C. (2004). Sovereignty, migration and the rule of law in global times. *The Modern Law Review*, *67*(4), 588-615.

DePalma, A. (1999). Canada seizes Chinese boat smuggling in 100 immigrants. July 22. *The New York Times.*

DESA (2013). UN Department of Economic and Social Affairs. International migration report 2013. United Nations.

Donnelly, J. (1989). *Universal human rights in theory and practice*. Cornell University Press.

Dorfman, A. (2014). On Trust and Transubstantiation: Mitigating the Excesses of Ownership. In: Andrew S. Gold & Paul B. Miller, eds., *Philosophical Foundations of Fiduciary* Law. Oxford: Oxford University Press.

Duvell, F., Triandafyllidou, A., & Vollmer, B. (2008). Ethical issues in irregular migration research. Brussels: European Commission (Clandestino).

Dwyer, J. (2004). Illegal immigrants, health care, and social responsibility. *Hastings Center Report*, *34*(1), 34-41.

Edelman, J. (2014). The Role of Status in the Law of Obligations: Lessons for Fiduciary Duties. In: Andrew S. Gold & Paul B. Miller, eds., *Philosophical Foundations of Fiduciary Law*. Oxford: Oxford University Press.

Exdell, J. (2009). Immigration, nationalism, and human rights. *Metaphilosophy*, *40*(1), 131-146.

Feinberg, J. (2007 [1980]). The Child's Right to an Open Future. In: R. Curren, ed., *Philosophy of Education*. Oxford: Blackwell Publishing.

Finn, P. (1977). *Fiduciary obligations.* Law Book Company.

Finn, P. (2012). Public trusts and fiduciary relations. *Fiduciary Duty and the Atmospheric Trust*, edited by Ken Coghill, Charles J. Sampford, and Tim Smith. Farnham, England and Burlington, VT: Ashgate Publishing, Ltd, 31-42.

Fischer, F. (1993). Policy discourse and the politics of Washington think tanks. In: F. Fischer, & J. Forester eds., *The argumentative turn in policy analysis and planning*. Durham: Duke University Press.

Fiss, O. (1998). The Immigrant as Pariah. Boston Review.

Focus Migration. (2007). Country profile: Canada. Netzwerk Migration in Europa.

Forsythe, D. P. (2006). *Human rights in international relations*. Cambridge University Press.

Fortier, C. (2013). 14 No One Is Illegal Movements and Anti-colonial Struggles from within the. *Producing and negotiating non-citizenship: Precarious legal status in Canada*, 274.

Fowler, T. (2011). The limits of civic education: The divergent implications of political and comprehensive liberalism. *School Field*, *9*(1), 87-100.

Fox-Decent, E. (2005). The fiduciary nature of state legal authority. *Queen's LJ*, *31*, 259.

Fox-Decent, E. (2011). *Sovereignty's promise: The state as fiduciary*. Oxford: Oxford University Press.

Fox-Decent, E. (2014). Fiduciary Authority and the Service Conception. In: Andrew S. Gold & Paul B. Miller, eds., *Philosophical Foundations of Fiduciary Law*. Oxford: Oxford University Press.

Fox-Decent, E., & Criddle, E. J. (2009). The fiduciary constitution of human rights. *Legal Theory*, *15*(4), 301-336.

Freeden, M. (2008). Thinking politically and thinking about politics: language, interpretation, and ideology. In: D. Leopold & M. Stears, eds., *Political Theory: methods and approaches.* Oxford: Oxford University Press.

Freeman, G. P. (1986). Migration and the political economy of the welfare state. *The Annals of the American Academy of Political and Social Science*, *485*(1), 51-63.

Freeman, G. & Ögelman, N. (2000) State Regulatory Regimes and Immigrants' Informal Economic Activity. In*:* J. Rath, ed., *Immigrant business: the economic, political and social environment.* Houndmills: MacMillan.

Friedman, M. (2007). The role of government in education. In: R. Curren, ed., *Philosophy of Education*. Oxford: Blackwell Publishing.

Gans, C. (1998). Nationalism and immigration. *Ethical Theory and Moral Practice*, *1*(2), 159-180.

Ghosh, B. (1998). *Huddled masses and uncertain shores: insights into irregular migration.* The Hague: Martinus Nihoff Publishers.

Gibney, M. J. (2004). *The ethics and politics of asylum: Liberal democracy and the response to refugees.* Cambridge: Cambridge University Press.

Gibney, M. J. (2006). Who should be included? Non-citizens, conflict and the constitution of the citizenry. Oxford: Centre for Research on Inequality, Human Security and Ethnicity.

Gibney, M. J. (2009). Precarious residents: migration control, membership and the rights of non-citizens (10). UNDP-United Nations Development Programme.

Giner, C. (2007). The politics of childhood and asylum in the UK. *Children and Society*, 21, 249-260.

Glover, J. (1997). The Identification of Fiduciaries. In: P. Birks, *Privacy and Loyalty*. Oxford: Clarendon Press.

Gold, A. S. (2013). Reflections on the State as Fiduciary. *University of Toronto Law Journal*, *63*(4), 655-670.

Gold, A. S. (2014). The loyalties of fiduciary law. In: Andrew S. Gold & Paul B. Miller, eds., *Philosophical Foundations of Fiduciary Law*. Oxford: Oxford University Press.

Goldring, L., Berinstein, C. & Bernhard, J. K. (2009). Institutionalizing precarious migratory status in Canada. *Citizenship Studies*, 13, 239-265.

Goldring, L., & Landolt, P. (Eds.). (2013). *Producing and negotiating non-citizenship: Precarious legal status in Canada*. University of Toronto Press.

Goodin, R. E. (1985). Vulnerabilities and responsibilities: an ethical defense of the welfare state. *American Political Science Review*, *79*(3), 775-787.

Goodin, R. E. (1985b). *Protecting the vulnerable: A re-analysis of our social responsibilities*. University of Chicago Press.

Goodin, R. E. (1988). *What is so special about our fellow countrymen?*. *Ethics*, 98(4), 663-686.

Goodwin, S. (2011). Policy as discourse analysis. Analysing Policy as Discourse: Methodological Advances in Policy Analysis. In *Methodological Choice and Design*, 167–180. Springer Netherlands.

Greenawalt, K. (1987). *Conflicts of law and morality*. Oxford: Oxford University Press.

Griffin, J. (2001). The Presidential Address: Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights. In *Proceedings of the Aristotelian Society*, Vol. 101(1), 1-28. Oxford: Oxford University Press.

Guskin, E. (2013). 'Illegal,' 'undocumented,' 'unauthorized': News media shift language on immigration. June 17. Pew Research Center.

Gutmann, A. (1987). *Democratic Education*. New Jersey: Princeton Univesity Press.

Gutmann, A. (2003). Introduction. In: Ignatieff, M. *Human rights as politics and idolatry*. Princeton, NJ: Princeton University Press.

Habermas, J. (1994). Three normative models of democracy. *Constellations,* 1**,** 1-10.

Hannan, C., & Bauder, H. (2015). Towards a sanctuary province (2015-3). Toronto: Ryerson Centre for Immigration and Settlement.

Hayton, D. (1997). Fiduciaries in Context: An Overview. In: Peter Birks, ed. Privacy and Loyalty. Oxford: Clarendon Press.

Hidalgo, J. (2015). Resistance to Unjust Immigration Restrictions. *Journal of Political Philosophy*, 23(4), 450-470.

Holzscheiter, A. (2010). *Children's rights in international politics: the transformative power of discourse*. Springer.

Hoyano, L. (1997). The Flight to the Fiduciary Haven. In: Peter Birks, ed. *Privacy and Loyalty*. Oxford: Clarendon Press.

Hudson, G., Atak, I., Manocchi, M., & Hannan, C. (2017). (No) Access T.O.: A pilot study on sanctuary city policy in Toronto, Canada. Toronto: Ryerson Centre for Immigration and Settlement.

Huot, S., Bobadilla, A., Bailliard, A., & Laliberte Rudman, D. (2015). Constructing undesirables: A critical discourse analysis of “othering” within the Protecting Canada’s Immigration System Act. *International Migration*, 54(2), 131–143.

ICHRP (2010). International Council on Human Rights Policy. Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence. International Council on Human Rights Policy.

IDC (2012). International Detention Coalition. Captured childhood. Victoria: International Detention Coalition.

Ignatieff, M. (2001). *Human rights as politics and idolatry*. Princeton, NJ: Princeton University Press.

Illingworth, P. M. (2005). *Trusting medicine: The moral costs of managed care*. Psychology Press.

IPPR (2006). Institute for public policy research. Irregular migration in the UK. London: Institute for public policy research.

Isin, E. (1998). Governing Toronto Without Government: Liberalism and Neoliberalism. *Studies in Political Economy*, 56.

Isin, E., & Siemiatycki, M. (1999). Fate and faith: Claiming urban citizenship in immigrant Toronto (8). Toronto: CERIS-Joint Centre of Excellence for Research on Immigration and Settlement.

Isin, E. (2008). Theorizing acts of citizenship. In: E. F. Isin & G. M. Nielsen, ed., *Acts of Citizenship.* New York: Zed Books.

Isin, E. (2013). Two regimes of rights? In: X. Guillaume & J. Huysmans, eds., *Citizenship and Security: the constitution of political being.* Oxford: Routledge.

JCHR (2007). Joint Committee on Human Rights. The treatment of asylum seekers (Vol I). House of Lords.

Jencks, C. (2007). Whom must we treat equally for educational opportunity to be equal? In: R. Curren, ed., *Philosophy of Education*. Oxford: Blackwell Publishing.

Jiménez, M., & Alphonso, C. (2006). Pupils held in asylum case spark review. May 2. *The Globe and Mail* [Toronto].

Kant, I. (1996 [1785]). *The metaphysics of morals.* Cambridge University Press.

Keung, N. (2013). Toronto declared 'sanctuary city' to non-status migrants. February 21. *The Toronto Star* [Toronto].

Koehl, A. (2010). Unlocking the school door: immigration status and the right to learn. Canadian Education Association.

Koehl, A. (2014). Board scores one for immigrants. June 14. NOW Magazine.

Koser, K. (2005). Irregular migration, state security and human security. London: University College London.

Koser, K., & Pinkerton, C. (2002). The social networks of asylum seekers and the dissemination of information about countries of asylum. London: UK Home Office.

Kymlicka, W. (2003). Immigration, Citizenship, Multiculturalism: Exploring the Links. *The Political Quarterly*, 74(1), 195-208.

Kymlicka, W. (2006). *Liberal Nationalism and Cosmopolitan Justice*. Oxford: Oxford University Press.

Kymlicka, W. (2006b). Justice and minority rights. In: R. E. Goodin & P. Pettit, eds., *Contemporary Political Philosophy*. Oxford: Blackwell Publishing.

Laby, A. B. (2004). Resolving conflicts of duty in fiduciary relationships. *Am. UL Rev.*, *54*, 75.

Laby, A. B. (2008). Fiduciary Obligation as the Adoption of Ends, The. *Buff. L. Rev.*, *56*, 99.

Landolt, P., Villegas, P. E., & Villegas, F. J. (2012). Patchwork of access: Education and healthcare for immigrants without legal status. CERIS-The Ontario Metropolis Centre.

Lea, D. (2004). The imperfect nature of corporate responsibilities to stakeholders. *Business Ethics Quarterly*, *14*(2), 201-217.

Leib, E. J. (2009). Friends as Fiduciaries. *Wash UL Rev*, *86*, 665.

Leib, E. J., & Ponet, D. L. (2011). Fiduciary Representation and Deliberative Engagement with Children. *Journal of Political Philosophy*, *20*(2), 178-201.

Leib, E. J., & Ponet, D. L., Serota, M. (2014). Mapping Public Fiduciary Relationships. In: Andrew S. Gold & Paul B. Miller, eds., *Philosophical Foundations of Fiduciary* Law. Oxford: Oxford University Press.

Locke, J. (2016). *Second treatise of government and a letter concerning toleration*. Oxford: Oxford University Press.

Macklin, A. (2015). And just like that, you're an illegal immigrant. April 1. *National Post*.

Magalhaes, L., Carrasco, C., & Gastaldo, D. (2009). Undocumented Migrants in Canada: A Scope Literature Review on Health, Access to Services, and Working Conditions. Journal of Immigrant and Minority Health, 12(1), 132–151.

McCamus, J. D. (2000). The Evolving Role of Fiduciary Obligation. *Meredith Memorial Lectures 1998-1999*.

McKell, L. (2010). Students without immigration status: student admission process guidelines for school office staff. Toronto District School Board.

McNeil, K. (2016). Fiduciary Obligations and Aboriginal Peoples. In: J. B. Berryman, M. R. Gillen, & F. Woodman, eds., *The Law of Trusts: A Contextual Approach*, 2nd Edition. Toronto: Edmond Montgomery.

Migration News. (2000). Canada: Chinese, Quebec. Migration Dialogue.

Miller, D. (2007). *National Responsibility and Global Justice.* Oxford: Oxford University Press.

Miller, D. (2008). Irregular migrants: an alternative perspective. *Ethics & international affairs*, *22*(2), 193-197.

Miller, D. (2013b). *Justice for earthlings: Essays in political philosophy*. Cambridge University Press.

Miller, P. (2013). Justifying Fiduciary Duties. *McGill Law Journal*, 58(4), 969.

Moan, M. H. (2008). Immigration Policy and “Immanent Critique”. *Ethics & International Affairs*, *22*(2), 205-211.

Moan, M. H. (2009). Justifying claims of state responsibility to meet the needs of irregular migrants: The problem with proceeding from human rights. In: J. Gunning & H. Soeren eds., *Ethics, Law and Society*. Aldershot: Ashgate.

Moan, M. H. (2012). Borders as a Space of Interaction. *American Behavioral Scientist*, 56(9), 1223–1240.

Mutua, M. (2002). Human rights: a political and cultural critique. Philadelphia: University of Pennsylvania Press.

Ngai, M. (2004). Impossible subjects: Illegal aliens and the making of modern America. Princeton, New Jersey: Princeton University Press.

NOII-No One Is Illegal Toronto. (n.d.). About No One Is Illegal-Toronto. Retrieved from http://toronto.nooneisillegal.org/about

Noll, G. (2010). Why human rights fail to protect undocumented migrants. *European journal of migration and law*, *12*(2), 241-272.

Nussbaum, M. C. (2000). *Women and human development: The capabilities approach*. Cambridge: Cambridge University Press.

Nussbaum, M. (2003). Capabilities as fundamental entitlements: Sen and social justice. *Feminist economics*, *9*(2-3), 33-59.

Nussbaum, M. (2007). Human rights and human capabilities. *Harv. Hum. Rts. J.*, *20*, 21.

Nyers, P. (2007). Why citizenship studies. *Citizenship Studies*, 11(1), 1-4.

Nyers, P. (2010). No One is Illegal between city and nation. *Studies in Social Justice*, 4(2), 127-143.

Nyers, P. (2010b). Abject cosmopolitanism: the politics of protection in the anti-deportation movement. *Third World Quarterly*, 24(6), 1069-1093).

Nyers, P. (2011). Alien Equality. *Issues in Legal Scholarship*, 9(1).

OCASI (2004). Ontario Council of Agencies Serving Immigrants. *The regularization of non-status immigrants in Canada 1960-2004*. Ontario Council of Agencies Serving Immigrants.

OESC (2014). Ontario Education Services Corporation. *Good governance: a guide for trustees, school boards, directors of education and communities*. Toronto: Ontario Education Services Corporation.

OHCHR (2014). Office of the High Commissioner for Human Rights. *Europe/Migrants: "Let them die, this is good deterrence" - UN human rights expert*. October 30. Office of the High Commissioner for Human Rights [Geneva].

OHCHR (2014b). Office of the High Commissioner for Human Rights. *Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights at Session II – Migration across the post-2015 agenda*. IOM New York Migration Series "Defining the role of migration in the Post-2015 UN Development Agenda". Office of the High Commissioner for Human Rights.

O'Kane, J. (2011). Catholic trustee slams undocumented student in e-mail. June 22. *The Globe and Mail* [Toronto].

O'Neil, O. (1998). Rights, Obligations, and Needs. In: G. Brook, ed., *Necessary Goods*, 1st ed. Lanham: Rowman & Littlefield.

O'Neill, O. (2001). Agents of justice. *Metaphilosophy*, *32*(1-2), 180-195.

Padgham, O. (2005). Drawing detention, creating connections: an interview with the No One Is Illegal Arts in Detention Group. June. FUSE Magazine.

Papademetriou, D. (2005). The global struggle with illegal migration: no end in sight. Washington: Migration Policy Institute.

Perry, M. J. (2010). *The political morality of liberal democracy*. Cambridge: Cambridge University Press.

PICUM (2011). Platform for International Cooperation on Undocumented Migrants. *Building strategies to protect children in an irregular migration situation in Europe*. Platform for International Cooperation on Undocumented Migrants.

Pinson, H., Arnot, M. & Candappa, M. (2010). Education, Asylum and the 'Non-Citizen' Child: The politics of compassion and belonging. London: Palgrave Macmillan.

Pogge, T. W. (2002). *World poverty and human rights*. Polity.

Pogge, T. W., & Moellendorf, D. (2008). *Global justice: seminal essays*. St. Paul: Paragon House.

Purkey, A. L. (2014). Questioning governance in protracted refugee situations: The fiduciary nature of the state-refugee relationship. *International Journal of Refugee Law*, *25*(4), 693-716.

Rawls, J. (1993). The law of peoples. *Critical Inquiry*, *20*(1), 36-68.

Raz, J. (2007). Human rights without foundations. University of Oxford Faculty of Law Legal Studies Research Paper Series. Working Paper No 14/2007.

Raz, J. (2010). “Human Rights without Foundations”, In: S. Besson and J. Tasioulas, Eds. *The Philosophy of International Law*. Oxford: Oxford University Press.

RCOL (1994). Royal Commission on Learning. *For the love of learning*. Ontario Executive Council.

Richardson, H. S. (2012). *Moral entanglements: the ancillary-care obligations of medical researchers*. Oxford: Oxford University Press.

Rotman, L. I. (2016). The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters.

Ruiz, J. (2009). Sociological discourse analysis: methods and logic. *Qualitative Social Research*, 10(2).

Rutter, J. (1999). *Refugee Children in the UK*. New York: Open University Press.

Samet, I. (2014). Fiduciary loyalty as Kantian virtue. In: A. S. Gold & P. B. Miller, eds., *Philosophical Foundations of Fiduciary Law*. Oxford: Oxford University Press.

Sandel, M. (2005). *Public philosophy: Essays on morality in politics*. Harvard University Press.

Sandel, M. (2009). *Justice: What’s the Right Thing to Do?*. New York: Farrar, Straus, and Giroux.

Sassen, S. (2002). The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics. *CR: The New Centennial Review*, 3(2), pp.41-66.

Sassen, S. (2003). *The repositioning of citizenship: emergent subjects and spaces for politics*. Michigan: Michigan State University Press.

SCCI (2002). House of Commons Standing Committee on Citizenship and Immigration. *The regulation under the Immigration and Refugee Protection Act*. Government of Canada.

SCCI (2009). House Standing Committee on Citizenship and Immigration. *Temporary foreign workers and non-status workers*. Government of Canada.

Scheffler, S. (2002). Boundaries and allegiances: Problems of justice and responsibility in liberal thought [Kindle Edition].

SCHR (2001). Standing Senate Committee for Human Rights. *Promises to keep: implementing Canada's human rights obligations.* Government of Canada.

SCHR (2005). Standing Senate Committee for Human Rights. *Who's in charge here? Effective implementation of Canada's international obligations with respect to the rights of children.* Government of Canada.

SCHR (2007). Standing Senate Committee on Human Rights. *Children: the silenced citizens.* Government of Canada.

Seglow, J. (2013). *Defending associative duties*. Routledge.

Sen, A. (1992). *Inequality reexamined*. Clarendon Press.

Sen, A. (2005). Human rights and capabilities. *Journal of human development*, *6*(2), 151-166.

Shue, H. (1988). Mediating duties. *Ethics*, *98*(4), 687-704.

Sidhu, N. (2008). The Right to Learn: Access to public education for non-status immigrants. Social Planning Toronto.

Sidhu, N. (2013). Accessing community programs and services for non-status immigrants in Toronto. Social Planning Toronto.

Sigona, N. (2010). Triple vulnerability: the lives of Britain's undocumented migrant children. November 9. openDemocracy.

Sigona, N. & Hughes, V. (2010). Being children and undocumented in the UK: A background paper. *COMPAS Working Paper.* Oxford: Centre on Migration, Policy and Society.

Sigona, N. & Hughes, V. (2012). No Way Out, No Way In. Oxford: ESRC Centre on Migration, Policy and Society.

Silverman, S. J. (2014). In the wake of irregular arrivals: Changes to the Canadian immigration detention system. *Refuge,* Volume 30(2), 27-34.

Simkulet, W. (2013). Review of Moral Entanglements: The Ancillary-Care Obligations of Medical Researchers by Henry S. Richardson. *Metaphsychology Reviews*.

Smith, P. G. (1998). *Liberalism and Affirmative Obligation*. Oxford University Press on Demand. [Kindle Edition]

Solidarity City Network. (2013). Towards a sanctuary city: assessment and recommendations on municipal service provision to undocumented residents in Toronto. Available from: http://solidaritycity.net

Sossin, L. An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002). *Queen's LJ*, *28*, 809.

Sossin, L. (2003). Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law. *Sask. L. Rev.*, *66*, 129.

Soysal, Y. N. (1994). *Limits of citizenship: migrants and postnational membership in Europe*. Chicago: Univiversity of Chicago Press.

Spencer, S. (2011). *The migration debate*. Policy Press.

Spencer, J., Grove-White, R., Deakin, J., Dewhurst, E., Fox, C., & Bragg, J. (2014). Law, order and irregularity: Undocumented migrants and UK immigration policy (Policy Briefing). Manchester: Migrants' Rights Network.

Spencer, S. & Pobjoy, J. (2011). The relationship between immigration status and rights in the UK: Exploring the rationale. *COMPAS Working Paper.* Oxford: Centre on Migration, Policy and Society.

Spencer, S. (2016). Postcode Lottery for Europe's Undocumented Children. *American Behavioral Scientist,* 60(13), 1613–1628.

Statistics Canada. (2016). Permanent and temporary immigration to Canada from 2012 to 2014. Government of Canada.

Stoffman, D. (2006). San Paulo of the North: The effects of mass immigration on our cities. *CBC News* [Online]. Available: http://www.cbc.ca/news/background/canada2020/essay-stoffman.html

Swift, A., & White, S. In: D. Leopold & M. Stears, eds., *Political theory: methods and approaches*. Oxford University Press.

Tamara Lenard, P., Straehle, C., & Ypi, L. (2010). Global Solidarity. *Contemporary Political Theory*, 9(1), 99–130.

Tamir, Y. (1993). *Liberal Nationalism.* Princeton, New Jersey: Princeton University Press.

Taylor, C. (1994). Can liberalism be communitarian? *Critical Review*, *8*(2), 257-262.

Taylor, C. (2012). Interculturalism or multiculturalism. *Philosophy and Social Criticism*, 38(4-5), 413-423.

TDSB (2010). Toronto District School Board. *Environmental scan 2010-2011*. Toronto District School Board.

TDSB (2013). Toronto District School Board. *Environmental scan 2013-2014*. Toronto District School Board.

TIEDI (2012). Toronto Immigrant Employment Data Initiative. *Pathways to permanent residence: the impact of changes to immigration policies and categories on immigrant service providers*. Toronto.

Van Dijk, T. A. (1995). Ideological discourse analysis. *New Courant*, *4*, 135-161.

Van Dijk, T.A. (2000). On the Analysis of Parliamentary Debates on Immigration. In: M. Reisigl & R. Wodak, eds, *The Semiotics of Racism: Approaches in Critical Discourse Analysis*. Vienna: Passagen Verlag.

Villegas, F. (2013). Getting to "Don't Ask Don't Tell" at the Toronto District School Board: Mapping the Competing Discourses of Rights and Membership. In L. Goldring and P. Landold, eds. *Producing and negotiating Non-citizenship: Precarious legal status in Canada*. University of Toronto Press, 258-273.

Vincent, D. (2013). Polling firm head says survey shows council out of step on sanctuary city. February 24. *The Toronto Star* [Toronto].

Volpe, R., Cox, S., Goddard, L., & Tilleczek, K. (1997). Children's rights in Canada: a review of provincial policies. University of Toronto.

Walzer, M. (1983). *Spheres of justice: A defense of pluralism and equality.* New York: Basic Books.

Watters, C. (2008). *Refugee Children: Towards the next horizon.* Abingdon: Routledge.

Wellman, C. H. (2008). Immigration and freedom of association. *Ethics*, *119*(1), 109-141.

Wellman, C. H. (2010). *The moral dimensions of human rights*. Oxford: Oxford University Press.

Weissbrodt, D. S. (2008). *The human rights of non-citizens*. Oxford University Press, USA.

West, E. G. (1966). The uneasy case for state education. *New Individualist Review*.

Wilson, M. (2009). Access to postsecondary education for undocumented immigrants (Unpublished doctoral dissertation). Parkdale Community Legal Services, Toronto, Canada.

Wong, V. (2002). Globalization and migration: Canada's response to the Chinese boat refugees (DDR/9). Economic Commission for Latin America and the Caribbean.

Young, I. (1998). Forum response: the immigrant as pariah. October/November 1. *Boston Review.*

Ypi, L. (2016) The moral dilemmas of guestworker programs. In: S. Fine & L. Ypi, eds., *Migration in Polital Theory: The ethics of movement and membership*. Oxford: Oxford University Press.

Young, R. (2013). Multilevel governance and public policy in Canadian municipalities. Victoria: Canadian Political Science Association.

(b) Legal instruments, legislation, policies, memoranda, minutes

CCPR (1986). *General Comment No. 15: The position of aliens under the Covenant*. Office for the High Commissioner for Human Rights. Available from: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument

CESCR (1999). *General Comment No. 13: The right to education*. Economic and Social Council. Available from: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/462/16/PDF/G9946216.pdf?OpenElement

CoT (2005). City of Toronto. *Council resolution on support for undocumented workers*. City of Toronto. Available from: http://www.toronto.ca/legdocs/2005/agendas/council/cc050719/adm6rpt/cl003.pdf

CoT (2006). City of Toronto. *City of Toronto Act*, S.O. C.11. Accessible from: https://www.ontario.ca/laws/statute/06c11

CoT SCPD (2007). City of Toronto Strategic and Corporate Policy Division. *2007 Ontario general election: party platform positions of interest to Toronto*. City of Toronto. Available from: http://www.toronto.ca/legdocs/mmis/2007/ex/bgrd/backgroundfile-7811.pdf

CoT (2012). City of Toronto. *Undocumented workers in Toronto* (15467). Community Development and Recreation Committee. Available from: http://www.toronto.ca/legdocs/mmis/2013/cd/bgrd/backgroundfile-55291.pdf

CoT (2013). City of Toronto. *Medically uninsured residents in Toronto*. Toronto Board of Health. Available from: http://www.toronto.ca/legdocs/mmis/2013/hl/bgrd/backgroundfile-57588.pdf

CoT (2013b). City of Toronto. *Federal changes in immigration legislation and policy* (AFS 16959). Community Development and Recreation Committee. Available from: http://www.toronto.ca/legdocs/mmis/2013/cd/bgrd/backgroundfile-55343.pdf

CoT (2013). City of Toronto. *Motion CD 18.5: Undocumented Workers in Toronto*. Accessible from: http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.CD18.5

CoT (2014). City of Toronto. *Access to city services for undocumented Torontonians* (18943). Community Development and Recreation Committee. Available from: http://www.toronto.ca/legdocs/mmis/2014/cd/bgrd/backgroundfile-69193.pdf

CoT (2014b). City of Toronto. *Motion CD29.11: Access to City Services for Undocumented Torontonians*. Available from: http://www.toronto.ca/legdocs/mmis/2015/cd/comm/communicationfile-52767.pdf

CoT (2017). City of Toronto. *Motion CD19.9: Refugees, Refugee Claimants and Undocumented Torontonians - Recent Trends and Issues*. Available from: http://www.toronto.ca/legdocs/mmis/2017/cd/bgrd/backgroundfile-102520.pdf

CoT (2017b). City of Toronto. *Motion MM24.23: Toronto for all - United as an Inclusive Sanctuary City*. Available from: http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.MM24.23

CRC (2013). *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration.* Committee on the Rights of the Children.

Government of Canada (1976). *The Immigration Act*, c. 52, s. 1. Available from: http://www.refworld.org/docid/3ae6b5c60.html

Government of Canada (1982). *Constitution Act Schedule B, Canadian Charter of Rights and Freedoms*. Available from: https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html

Government of Canada (1992). *BillC-86: An act to amend the immigration act and other acts in consequence thereof*. Available from: http://www.publications.gc.ca/site/eng/9.522156/publication.html

Government of Canada (2002). *Bill C-11: The Immigration and Refugee Protection Act*. Available from: https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C11&Parl=37&Ses=1&source=library_prb https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language=E&ls=C11&Parl=37&Ses=1&source=library_prb

Government of Ontario (1990). *The Ontario Education Act*. RSO c. E.2 Available from: https://www.ontario.ca/laws/statute/90e02

Government of Ontario (1992). *Bill 24: An Act to Amend the Ontario Education Act*. Available from: https://archive.org/details/v1ontariobills1992ontauoft

Government of Ontario (1993). *Bill 4: An Act to Amend Certain Acts Relating to Education*. Available from: https://archive.org/details/v1billsasenacted199394ontauoft

Government of Ontario (2005). *Bill 194: An Act to Amend the Education Act*. Available from: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=175&ParlSessionID=38:1&isCurrent=false

Government of Ontario. (2016). About Ontario Immigrant Nominee Program (OINP). Retrieved from: http://www.ontarioimmigration.ca/en/pnp/OI_PNPABOUT.html

ICCPR (1966). *International Covenant on Civil and Political Rights*. Office of the United Nations High Commissioner for Human Rights. Available from: http://www2.ohchr.org/english/law/ccpr.htm

ICESCR (1966). *International Covenant on Economic, Social and Cultural Rights*. Office of the United Nations High Commissioner for Human Rights. Available from: http://www2.ohchr.org/english/law/cescr.htm

ICRMW (1990). *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. Office of the United Nations High Commissioner for Human Rights. Available from: http://www2.ohchr.org/english/law/cmw.htm

Ontario Ministry of Education (2004). *Policy/Program Memorandum No. 136: Clarification of Section 49.1 of the Education Act: Education of persons unlawfully in Canada*. Available from: http://www.edu.gov.on.ca/extra/eng/ppm/136.pdf

TDSB (2014). Toronto District School Board. *Operational Procedure PR518: Admission Eligibility Requirements*. Available from: http://www2.tdsb.on.ca/ppf/uploads/files/live/98/1635.pdf

TDSB RM (2007, 18 April). Toronto District School Board Regular Meeting. *Minutes of the Regular Meeting of the Board*. Toronto District School Board Regular Meeting.

TDSB RM (2007, 16 May). Toronto District School Board Regular Meeting. *Minutes of the Regular Meeting of the Board*. Toronto District School Board Regular Meeting.

TDSB (2007). Toronto District School Board. *Policy P.061 SCH: Students Without Legal Immigration Status*. Available from: http://www2.tdsb.on.ca/ppf/uploads/files/live/98/1555.pdf

UNCRC (1989). *United Nations Convention on the Rights of the Child*. Office of the United Nations High Commissioner for Human Rights. Available from: http://www2.ohchr.org/english/law/crc.htm

UNDHR (1948). *The Universal Declaration of Human Rights*. United Nations. Available from: http://www.un.org/en/documents/udhr/index.shtml

(c) Case law

Alberta v Elder Advocates of Alberta Society (2011) 2 S.C.R. 261.

Baker v Canada (1999) 2 S.C.R. 817.

Bowes v City of Toronto (1858). XI Moo PC 463.

Canada v Chiarelli (1992) 1 S.C.R. 711.

Frame v Smith. (1987) 2 S.C.R. 99.

Guerin v The Queen [1984] 2 S.C.R. 335

MacIlReith v Hart (1908) 39 S.C.R. 657

Norberg v Wynrib (1982) 2 S.C.R. 226.

Petkus v Becker (1980) 2 S.C.R. 834.

Plyer v Doe (1982) 457 U.S. 202.

Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159

Toronto Party for a Better City v Toronto (City) (2013) ONCA. 327.

R v Secretary of State, Ex parte Gangadeen (1997) United Kingdom: Court of Appeal.

(d) Legislative references

Federal

SN- Senate. *33rd Parliament 2nd Session*. Bill C-84 Debate, 26 July 1988.

HC- House of Commons. *37th Parliament 1st Session*. Bill C-11 Debate, 26 February 2001.

HC- House of Commons. *37th Parliament 1st Session*. Bill C-11 Debate, 27 February 2001.

HC CIMM- House of Commons Standing Committee on Citizenship and Immigration. *37th Parliament 1st Session*. Bill C-11 Debate, 1 May 2001.

HC CIMM- House of Commons Standing Committee on Citizenship and Immigration. *37th Parliament 1st Session*. Bill C-11 Debate, 15 May 2001.

HC- House of Commons. *37th Parliament 1st Session*. Bill C-11 Debate, 13 June 2001.

SN- Senate. *37th Parliament 1st Session*. Bill C-11 Debate, 19 September 2001.

SN- Senate. *37th Parliament 1st Session*. Bill C-11 Debate, 25 September 2001.

SN- Senate. *37th Parliament 1st Session*. Bill C-11 Debate, 25 October 2001.

HC CIMM- House of Commons Standing Committee on Citizenship and Immigration. *37th Parliament 1st Session*. Bill C-11 Debate, 19 February 2002.

SN- Senate. *37th Parliament 2nd Session*. Bill C-11 Debate, 3 October 2003.

HC- House of Commons. *39th Parliament 1st Session*. Debate, 1 May 2006.

HC- House of Commons. *39th Parliament 1st Session*. Debate, 11 May 2007.

HC CIMM- House of Commons Standing Committee on Citizenship and Immigration. *39th Parliament 2nd Session*. Debate, 9 April 2008.

Provincial

LAO- Legislative Assembly of Ontario. *35th Parliament 2nd Session*. Bill 24 Debate, 27 May 1992.

LAO- Legislative Assembly of Ontario. *35th Parliament 2nd Session*. Bill 24 Debate, 11 June 1992.

LAO- Legislative Assembly of Ontario. *37th Parliament 3rd Session*. General debate, 8 May 2003.

LAO- Legislative Assembly of Ontario. *38th Parliament 1st Session*. Bill 194 Debate, 1 May 2005.

LAO- Legislative Assembly of Ontario. *38th Parliament 1st Session*. Bill 194 Debate, 4 May 2005.

LAO- Legislative Assembly of Ontario. *38th Parliament 1st Session*. Bill 194 Debate, 10 May 2005.

LAO- Legislative Assembly of Ontario. *38th Parliament 1st Session*. Bill 194 Debate, 18 May 2005.

LAO- Legislative Assembly of Ontario. *39th Parliament 1st Session*. Bill 210 Debate, 5 November 2009.

LAO- Legislative Assembly of Ontario. *39th Parliament 2nd Session*. General debate, 24 November 2010.

(e) Media

Toronto City Council. Motion CD18.5 Debate, 21 February 2013. Video. Available from: http://www.rogerstv.com/show?lid=12&rid=16&sid=1030&gid=108654 [Accessed 22 January 2013]

Toronto City Council. Motion CD29.11 Debate, 10 June 2014. Video. Available from: http://www.rogerstv.com/show?lid=16&rid=16&tid=40955 [Accessed 22 January 2013]

(f) Other

Benton, M. (2010). *A theory of denizenship* (Doctoral dissertation, University College London, London).

Marsden, S. (2013). Law's permissions, law's exclusions: precarious migration status in Canada (Doctoral dissertation, University of British Columbia, Vancouver).

Miller, P. (2008). Essays toward a theory of fiduciary law (Doctoral dissertation, University of Toronto, Toronto).

Pashang, S. (2011). Non-status women: invisible residents and underground resilience (Doctoral dissertation, University of Toronto, Toronto).

Villegas, F. (2014). The politics of 'access': undocumented students and enrollment in Toronto schools (Doctoral dissertation, University of Toronto, Toronto).

8. Annex I

Witness testimony given on 31 January 2013 before the Community Development and Recreation Committee (CDRC) of the Toronto City Council on the motion CD18.5 *Undocumented Workers in Toronto*. Available from: https://www.youtube.com/playlist?list=PLi0vNBzUdIovL2_1VxHvi3sPPoIvZj0KV

- Mr. Sriram Ananth, No One Is Illegal (Toronto), witness testimony on Access Without Fear (Sanctuary City) policies;
- Ms. Gina Csanyi-Robah, Executive Director of the Roma Community Centre, witness testimony on lack of access to services for the Roma community in Toronto;
- Ms. Sonia Singh, Workers Action Centre and the Migrant Workers Alliance for Change, witness testimony on lack of city services for undocumented workers in Toronto;
- Ms. Karin Baqi, South Asian Legal Clinic of Ontario, witness testimony on access to city services by low-income South-Asians in Toronto;
- Ms. Ayesha Basit, reading a statement on behalf of Ms. Sultana Jehangir, Executive Director of South Asian Women's Rights Organization, on the lack of city services for women;
- Ms. Anna Willats, The Assaulted Women's and Children's Counsellor/Advocate Program at George Brown College, witness testimony on the lack of city services for women;
- Mr. Macdonald Scott, Immigration Legal Committee and Law Union of Ontario, witness testimony on the need for greater Toronto advocacy by the City of Toronto vis-à-vis provincial and federal governments;
- Ms. Swathi Sekhar, Law Union of Ontario and the Immigration Legal Committee, witness testimony on changes to Canada's immigration and refugee determination system;
- Mr. Navjeet Sidhu, Social Planning Toronto, deputes on barriers to education services and other services in the City of Toronto;
- Mr. Francisco Villegas, PhD Candidate (Ontario Institute for Studies in Education – OISE), witness testimony on the problems with the Don't Ask Don't Tell policy passed by the Toronto District School Board; and,
- Eva Chan, Community Legal Aids Services, witness testimony on access to city services by non-status individuals.