

The Need for Legal Protection of Children's Rights in Canada

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A summary of the current Canadian legislation governing the rights of children is presented. The power of the parent over the child, the state in the place of the parent, the best interests of the child, and the child as a person before the law are concepts used to explicate the nature of this legislation. It is argued that the focus of legislation dealing with children should shift from the first two adult-oriented principles to the last two child-centred principles. It is proposed that children ought to be provided with the fullest information consistent with their age and be made independent and autonomous in identifying their own interests and understanding of their rights and obligations. Finally, two anticipated objections to this proposal are studied – that such measures would entail greater levels of state interference in private family life and that they would lead to the erosion of the family unit.

L'article commence par un résumé de la législation canadienne qui régit actuellement les droits des enfants. C'est à partir des concepts suivants que la nature de cette législation est expliquée: le pouvoir du parent sur l'enfant, l'appropriation du rôle du parent par l'état, les intérêts de l'enfant, et l'enfant en tant que personne devant la loi. On affirme que la loi devrait désormais s'appuyer sur les deux principes concernant principalement les enfants plutôt que sur ceux qui touchent d'abord les parents. On propose que les enfants aient accès à l'information la plus complète possible en fonction de leur âge et qu'ils puissent identifier leurs propres intérêts de façon autonome et indépendante et comprendre leurs droits ainsi que leurs obligations. On étudie enfin deux objections relatives à cette proposition: de telles mesures pourraient entraîner une plus grande ingérence de l'État dans la vie privée des familles, laquelle mènerait à l'érosion de l'unité familiale.

INTRODUCTION: THE EXTENT OF THE PROBLEM

Most Canadians and most laws of Canada or its provinces assume the home and family to be safe and nurturing, the natural first defence of the rights of the child. In consequence, all our nurturing professions are expected to act *in loco parentis* – as if they were the parents. These ideal conditions do not always obtain. Poverty, illness, or absence may deprive children of a safe, kindly, and nurturing family. Quarrels between parents may cause stress. Family abuse is more frequent and violent than we usually admit. This paper is, therefore, about the need for society to intervene in some cases to protect the child against excesses or neglect at the hands of the parents, step-parents, foster parents, or legal guardians.

The decision to intervene is necessarily a serious legal matter, and it cannot be undertaken at the appropriate time without many persons acting as advisors or consultants to the state on behalf of the child. The fundamental test for when this traumatic decision is justified is *the best interests of the child*. This cuts through folklore and some legal fictions that justify violence against the child and the silence or non-intervention of those who know of the abuse. It also stretches to the utmost our interventionist resources which depend upon a supply of compassionate and resourceful surrogate parents.

The idea of rights for children is a radical one which undercuts many traditional beliefs about the good family and healthy society. We endorse levels of violence within the family that would put the assailant behind bars if committed against a stranger in the street. Hospital records provide grim examples of violence perpetrated against children (Van Stolk, 1978). These atrocities are suffered by many children at the hands not of nasty strangers but of immediate family members and in their own homes. Although most of us would be appalled at such cruelty and violence against young children, we remain at ease with models of discipline based on physical force. As a society, we are not readily amenable to children having real rights within the family – children invoking the machinery of the law against their parents on the basis of an emotionally impoverished environment or harsh disciplinary techniques, for example, would not meet with widespread welcome.

CHILDREN'S RIGHTS AS CURRENTLY DEFINED WITHIN THE CANADIAN LEGAL SYSTEM

Canadian child-related legislation has been divided between the federal and the provincial governments roughly according to the stipulation of the Constitution Act, 1867, with laws dealing with marriage and divorce allocated to the federal government whereas laws dealing with the "solemnization of marriage" (i.e., marriage licensing) as well as laws dealing with education allocated to the provinces (Canadian Council, 1979, p. 5). The bulk of the laws dealing with the needs of children rest with the provinces. The *federal* government's legislation is largely restricted to criminal prohibitions including both juvenile delinquency legislation, which covers crimes committed by young people, and legislation dealing with criminal acts committed against children, such as assault, incest, and neglect (although much of this third category falls under the jurisdiction of the provinces). The federal government is also responsible for such financial assistance programs as health care and social assistance which require federal-provincial agreements. Legislation dealing with the

rights and needs of Inuit and status native children also falls under federal jurisdiction except in Newfoundland. The origin of *provincial* family law statutes may be found in the British North America Act mandate that civil and property rights are provincial matters. However, it is largely the parent's rather than the child's rights that are protected by the provincial legislation in question.

The concepts underlying the socio-legal status of the child in Canada have been outlined by the Canadian Council on Children and Youth (1979, p. 6). Because of their centrality in this paper, they are cited in full:

Patria potestas: The power of the father which continues to be recognized in today's society along with the integrity and power of the family, so that society is reluctant to interfere in family matters except in extraordinary circumstances.

Parens patriae: The state as parent which is the concept invoked today as the authority of certain courts to make decisions on behalf of those who cannot act for themselves.

The best interests of the child: A concept arising out of custody disputes which has in the past been used to justify state intervention in child neglect and delinquency and which is now undergoing reconsideration as to its usefulness as a test in those situations.

The child as a person before the law.

Important federal legislation on this topic includes certain portions of the Indian Act and the Young Offenders Act. The clauses of the Indian Act (1970) specify that status Indian children will lose their status if: the child is illegitimate and the Indian registrar believes that the child's father is not a status Indian; the mother is married to a non-status man, in which case the Indian woman loses her status as well; or the child's father applies for loss of Indian status (or enfranchisement), in which case the man's wife also automatically loses her status unless she is living apart from her husband (Indian Act, R. S. C., 1970, Ch. 1-6, s. 10, 12(1)(b) and (2), 14, and 109(2) and (3), pp. 4254-4256, 4297). Since status Indians generally enjoy many more privileges and benefits than non-status Indians, this is a clear example of the principle of the father's power taking precedence over both the best interests of the child and the child as a person before the law. (It is important to note that these portions of the Indian Act remained in force in this country until 1985, when international pressure led to their repeal. The most current legislation (1985) is open to considerable interpretation; it is not yet clear how its recommendations regarding acquisition and loss of Indian status will be interpreted by the various Indian bands and whether women will in fact now receive equitable treatment with men in this regard.) A similar principle is reflected in provincial acts which deal with placement of children who are removed from their home, specifying that the religion of the children is a

factor to be considered when placing them. "A legitimate child is presumed to have the religion of his father, an illegitimate child the religion of his mother" (Children in Need, 1982).

The Young Offenders Act addresses itself to criminal offences committed by young people. This act is very recent, having come into force on 2 April, 1984, and it replaces the former Juvenile Delinquents Act. The Young Offenders Act designates 12 years to be the minimum age of criminal responsibility. Children younger than 12 who commit crimes "may only be dealt with in non-criminal proceedings under provincial law" (Young Offenders, 1984, pp. 2651–2653). Under the Juvenile Delinquents Act, a child of 7 years of age was held responsible for any crime committed. The maximum age of a person over whom the Young Offenders Act had jurisdiction originally depended on provincial definitions of "young person" and hence varied from province to province. As of April 1985, these provincial variations in the jurisdiction of the act were eliminated, and the act now applies to all persons between 12 and 18 years of age at the time of the criminal offence.

The administration of federal legislation regarding criminal behaviour of young people has provided us with some strange contradictions. Young people have, for example, been sentenced to significantly longer terms of detention than would adults for the same crime. This extra heavy sentencing was possible because the Supreme Court of Canada excluded adolescents from the equality under the law guaranteed to adults by the Canadian *Bill of Rights*. It is interesting that the court justified its penalty in terms of the interests of the youth – that is, the court claimed that the long detention period was in the young person's best interest as it would help ensure the youth's "opportunity to play a useful and profitable role in society and to avoid the risk of maturing into [a] hardened criminal" (Cruickshank, 1979)! Whereas the remediation meted out to adults is made to "fit" the crime, young offenders are not protected by such a principle.

For example, any committal to a training school, *regardless of the nature of the offence*, is for an indefinite period of time, that is, a period that may extend until the young person reaches the age at which release is required by law. (Wilson, 1980, p. 151)

This so-called justification would be laughable were its consequences for the young people involved not so drastic. Harsher treatment of children from broken homes by police officers is frequently accompanied by a similar "justification." It is assumed that "firm discipline and guidance" is in the best interests of the child, and that when this requisite discipline is absent from the child's home life, the officer must provide it (Moyer, 1980, pp. 20–21). Children from broken homes or single parent families

are also more likely *not* to be diverted out of the formal juvenile justice system and into informal remedial measures frequently available to young offenders (Moyer, 1980, pp. 44, 87). It remains to be seen if the Canadian *Charter of Rights and Freedoms* will be similarly interpreted to support correction rather than protection of youth.

Legislation relating to the child's need for economic support is divided between the federal and provincial governments. The Divorce Act, the Family Allowances Act, and the Criminal Code are federal enactments; but the bulk of legislation for economic support is provincial, and each province or territory has its own welfare act or legislation providing for maintenance orders.

In 1976, the Law Reform Commission of Canada emphasized the importance of a consensual approach to family problems, as opposed to the confrontational approach traditionally fostered by the judicial system. It further suggested that a punitive model of social justice is inappropriate in dealing with family matters. In terms of this paper, the most important recommendation of the Law Reform Commission was that children be rendered capable of making independent legal claims. This endorsement of the fourth of our concepts listed earlier – the child as a person before the law – was a truly radical recommendation for the time, confronting a historical context in which children's well-being was handled judicially via a set of parental and social obligations (Canadian Council, 1979, p. 8). The degree to which these recommendations have been implemented gives us little cause for optimism however.

At present, no minimal standards of economic support exist for children. The principle determining child support, along with most other things in our society, goes in the opposite direction, from adult to child. Hence, child support payments are frequently calculated according to the adult's ability to pay rather than the child's need. Although there is a plausible rationale in gauging the amount of support according to the parent's ability to pay, this nevertheless demonstrates the perceived second-order nature of the child's need. In many provinces, children are maintained through statutes addressing the deserted wife, thus pushing back children's needs one step further.

Legislation regarding the child's need for education is strictly a provincial matter, as is spelled out by the Canadian constitution. Nevertheless, the federal government's provision for "language equality and equal access to basic services" (Canadian Council, 1979, p. 85) is incompatible with the education policies of particular provinces.

The child's need for health care, like education, is largely a provincial matter in Canada, although there has been more federal input and less federal-provincial controversy in the area of health. Formal government

recognition of the child's need for health care sprang out of "the creation in 1920 of the division of child welfare in the newly-established federal Department of Health" (Canadian Council, 1979, p. 43). This division was created in the wake of a shocking infant mortality rate of one in five at the turn of the century. This division encouraged and supported provincial and municipal programs for improving health services for children. The co-operation of schools was enlisted in an attempt to mete out minimal health protection to children living in rural and small urban areas in particular, children who might otherwise not have had access to such life-saving measures as smallpox vaccinations.

It is interesting to note that, with regard to these sorts of public health measures, clearly the third of the four concepts listed earlier – the best interests of the child – is being promoted. Furthermore, in many instances of conflict between this principle and the power of the father over the family, the best interests of the child take precedence. Under a clause of the Child and Family Services Act, for example, a sufficient condition for a child to be deemed in need of protection occurs when:

the child requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, the treatment. (The Child and Family Services Act, 1984, S. C. 55, Sect. 37, (2) (e))

A child deemed thus in need of protection may be removed from the parental home and made a temporary ward of a society, such as the Ontario Children's Aid Society, whereupon the society itself will consent to the necessary medical treatment. This mechanism was invoked when the province overrode parental refusal to sanction a blood transfusion for a child on religious grounds, and it illustrates an interplay between the first three concepts listed earlier – the power of the father is subordinated to the best interests of the child, but this is accomplished via the transfer of parental power to the state.

Such transfers are complicated by provincial differences in the maximum age at which the state can intervene in such medical matters. Such intervention is permitted in Saskatchewan, Ontario, Nova Scotia, Newfoundland, and the Northwest Territories if the child is under 16 years of age; in Alberta, Manitoba, Prince Edward Island and the Yukon if the child is under 18 years of age; and in British Columbia and New Brunswick if the child is under 19 years of age. The age of majority similarly receives different definitions, fluctuating between 18 and 19 depending on the particular province (Canadian Council, 1979, p. 45). Adolescents above the maximum age stipulated provincially for state intervention in medical matters but under the age of majority are in a kind

of medical limbo for, in their case, parental objection to medical treatment cannot be overridden by the state, even in life-threatening circumstances. In one instance in Ontario in which a mother refused to authorize her 17-year-old son's blood transfusion, it was necessary to grant official custody of the boy to his grandmother in order to authorize the medical treatments on which the boy's life depended (Children in Need, p. 2512). An attempt was made in 1975 to introduce uniformity into these provincial discrepancies when it was recommended by the Uniform Law Conference that 16 be the nation-wide age of consent for medical treatment. As of August 1984, only New Brunswick had adopted this recommendation (Medical Consent of Minors Act, 1976, ch. M-6.1).

Putting the child's interests uppermost in matters of health care does not extend to allowing adolescents access to birth control measures in the face of parental opposition. There is little doubt that access to birth control is in the best interests of the sexually active adolescent, but in this case paternal power has *not* been over-ridden by transferring the right to make such a medical decision to some other social body.

What is conspicuously absent in these cases affecting young adults is any notion of children as persons before the law, entitled to decide what is in their own best interests. The traditional argument for denying minors the right to make their own decisions with regard to medical procedures is that they are incapable of *informed* consent because they are not sufficiently mature and lack experience on which to base an informed judgement. While this argument makes sense in the case of a very young child, it is much less compelling in the case of a teenager. Furthermore, the ability of many adults to make an informed judgement in such matters is open to question. Nevertheless, linking consent to the ability to make a mature informed judgement has much to recommend it, and it can become a legitimate basis for instituting children's rights.

The final category of legislation to be considered is the child's need for protection. For the most part, this legislation is provincial although such federal legislation as the Criminal Code and the Young Offenders Act will also apply in some instances. As already seen, a parent or guardian's failure to provide requisite medical treatment is one of the criteria for identifying a child as being in need of protection. The full list of criteria varies somewhat from province to province and statute to statute. In general, it could be said that a child is in need of protection if in "physical, emotional or moral danger" (Children in Need, 1982, p. 2502). More specifically, a child is deemed to need of protection in any of the following circumstances: a child whose parent or guardian cannot care for him properly because of sickness, misfortune, incompetence or imprisonment; who is abandoned or deserted by that parent or guardian; living in

an unfit or improper place; associating with an unfit or improper person; found begging in public; without proper control, or tending to be idle or dissolute; who is frequently absent from school without sufficient cause; whose life, health or morals are or may be endangered by parent's or guardian's conduct (Children in Need, 1982).

Some provinces include loitering, "working in an unsavoury occupation at night", or committing an offence as additional criteria for identifying a child in need of protection. All provinces except Nova Scotia have acts which "provide a penalty for the offence of ill-treating a child" (Children in Need, 1982, p. 2541). The interpretation of ill-treatment differs from province to province, but leaving a child unattended for an unreasonable period constitutes ill-treatment in most provinces. More serious crimes against children are covered in the federal Criminal Code. Abandonment, assault, homicide, infanticide, and sexual abuse are all dealt with by the Criminal Code. British Columbia, Ontario, New Brunswick, Prince Edward Island, and Newfoundland deem it an offence for professional child care personnel (e.g., teachers and social workers) to fail to report suspected cases of child abuse or neglect. In Nova Scotia, such failure to report "is an offence if the failure results or is likely to result in the child being deemed to be a child in need or protection" (Children in Need, 1982, p. 2540). It is not considered an offence in Ontario for a non-professional to fail to report suspected child abuse or neglect.

Children are usually found in need of protection when their physical or emotional or moral welfare appears seriously jeopardized by the close presence of parents or guardians. If a child-care worker or police officer suspects abuse of this sort, the child is to be "apprehended" or removed from the home. In the presence of the parents, a Family Court judge must decide if the child needs protection, in which case the judge must decide the care best for the child. A shortage of proper alternative facilities creates a serious problem in coping with children thus removed from the parental home. Very often the same facility that houses young offenders doubles as a home for children in need of protection. Given the obvious potential for harm that such an arrangement holds for children in need of protection, it is not surprising that these children are removed from their homes only as a last resort. Indeed, it is preferable to assist the family in coping with the situation, if possible, so that the child not be removed.

Scarcity of alternative facilities is not the main reason for leaving the child at home unless all else fails however. The notion of parental rights is deeply engrained in our society and the sanctioning of parental autonomy without state interference has a long history. In general, the rights of the

natural parents to the child will be regarded as paramount unless it can be established that the parental care falls below a basic minimum required for the child's health. In other words, that it would be *more* in the child's interests to be placed in a foster home is not considered sufficient grounds for interfering with parents' natural right to raise their children (Canadian Council, 1979, pp. 60–63).

An example is provided by a Canadian woman who voluntarily relinquished her two children, born out of wedlock, to the Director of Child Welfare. At a later date, now married and living in another province, she applied for custody of the children. Although the foster parents had done a good job, and in 1976 the court believed the foster home superior to that which the natural mother could provide, it was held "that the onus was on the Director to prove that the continued protection of the children required the making of a permanent care order" (Children in Need, 1982, p. 2509). In 1975, a court reluctantly decided to remove children from the home of their mentally retarded parents; in this case, it was judged that the care received from the natural parents would fall below the required minimum. The court was clear that it was for this reason that they were removed, not because some other institution might "be able to offer a greater opportunity to the children to achieve their potential" (p. 2506).

This tradition of the overriding right of the natural parent except in circumstances seriously endangering the child has taken a very heavy toll on the lives of children. It is time that we rethought the *a priori* sanctity of the family.

SOME RECOMMENDATIONS FOR CHANGE

This paper provided earlier a reminder of violence against children in our society. The fact that, in many parts of Canada, ordinary citizens are not even legally required to report firm suspicions that children are being dangerously neglected, assaulted, incestuously abused, cruelly punished, or brutalized in other ways is an index of our unbelievable tolerance for family violence. The fact that rape in marriage was not legally outlawed in Canada until January 1982 is another indicator.

The legislation dealing with the protection of children is essentially negative in its stipulations. That is, the various acts specify that children must be protected from physical danger, from living in an improper place, from association with an unfit person, and so on. But the legislation does not specify what would constitute a reasonable degree of safety or propriety in the child's environment or what qualities a person should have as a fit associate for a child. The positive criteria of well-being would

clearly be harder to establish than the negative and would be subject to more controversy, but it is in the interest of children that they be deemed entitled to certain clear standards of physical safety and comfort rather than simply protected from life- and health-threatening situations.

Furthermore, family legislation tends to be parent-oriented, frequently at the expense of the child. It is clearly in parental interests that no exacting positive standards assess quality in child rearing; a parent must merely avoid such extremes as sexually abusing or battering children, leaving them unattended for unreasonable periods of time, or denying them necessary medical treatment. And, as we have seen, a court's interpretation of family-related legislation frequently favours the right of the natural parent to the child over the best interests of the child.

It is also symptomatic of our society's view of the role of the family that a child is deemed in need of protection if lacking "proper control" (Children in Need, 1982, p. 2502). The exact nature of "proper control" is not spelled out, but one suspects that it concerns compliance and obedience and that the *Criminal Code* facilitates maintenance of this control by its stipulation that:

Every school teacher, parent or person standing in the way of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances. (*Criminal Code*, 1970, Ch. C-34, Sect. 43)

In 1978, the Alberta Juvenile Court dismissed a complaint of an Alberta girl that she and her two siblings were being physically abused by their parents. The girl who registered the complaint had attempted to commit suicide. Although all three children had been beaten many times, the court decided that the physical discipline was carried out "in a meaningful manner" (Children in Need, 1982, p. 2511) and cleared the parents. The complainant, however, was judged to be a "child in need of protection because of her self-destructive tendencies," and she was removed from the home. The other two children remained.

The inclusion of lack of control as a criterion for identifying a child in need of protection has direct social ramifications. For it is mainly on the basis of this feature that parents initiate charges of delinquency against their own children. This accounts for a small proportion of delinquency charges – "less than 1% in Canada in 1973" (Moyer, 1980, p. 5) – but it nevertheless provides parents with a figurative stick to hold over their children's heads, a stick clearly sanctioned by the federal government and the courts as a prerogative of parenting. It is instructive that one of the characteristics cited as typical of child abusers is that they cannot tolerate any "threat to their authority" (Van Stolk, 1978, p. 31). Complete control

over the child's behaviour is perceived by these people as the ideal of good parenting. This would be less tragic if they were generally not characterized by a second feature – the inability to empathize with the child, to understand the child's capacities or the impact of the abusive behaviour on the feelings of the child. In other words, the abuser cannot perceive the child as a human being.

If there is too much that is *a priori* in our cherishing the sanctity of the family, too much emphasis on the role of the parent in controlling the child, and too little emphasis on facilitating the child's development into a compassionate, clear-thinking, independent human being, what can bring about a positive change in child rearing? Essentially, among the four concepts which underlie our laws and social practices as these concern children, we need to shift from the traditional focus on the power of the father and possible transfer of parental power to the state to a new emphasis upon the best interests of the child and the consideration of the child as a person before the law. We should not underestimate the difficulty entailed in this shift. The notion of the right of the father to govern his family is historically rooted in a father's actual ownership of his wife and children and his consequent right to the fruits of all their labours, his right to sell them, his right to beat them as he saw fit, and even his right to have them put to death. Although we now reject these excesses, we still observe some of the historical trappings of the family. Generally, a parent's right and ability to decide what is in the best interests of the child goes unquestioned. In other words, there is very seldom a perceived conflict between parental rights and children's interests. Nor are they necessarily antithetical. Under many if not most circumstances, a parent can best make an informed judgement about the best interests of a child. Very young children and infants are often incapable of an informed judgement as to what constitutes their best interests, and they ought to be prevented from following their own judgements if the consequences of doing so would threaten their health or well-being in some serious way.

But this raises an interesting question about the third concept – the best interests of the child. Is there any general rule about who decides this? I believe the child should decide, other things being equal. Even infants have certain notions about their best interests after spitting and gagging on pureed peas, for example. Unless it is clear that the infant's health will be endangered by temporarily deleting peas from the diet, the parent should accept the infant's expression of distaste. This is not an argument for allowing infants to eat only chocolate pudding, no matter how much distaste they may express for "inferior" culinary items, because in this case other things are not equal and the infant's nutritional requirements would not be met.

There is also a strong argument for fostering children's *ability* to decide about what is in their own best interests. Practice will be important in developing this, as with any ability. The consequences of a mistaken judgement are rarely disastrous; the child is likely to learn from mistakes. As adults, we can learn from our mistakes. Unless the seriousness of the consequences rules this out, children should similarly be allowed to learn from their mistakes. It *is* in children's best interests to be able to make sensible, informed, independent judgements about what is in their best interests; it is equally clear that it is *not* in a child's best interests to depend totally on other people's views of what constitutes these best interests. This provides us with a powerful meta-argument for teaching children to make personal decisions about their best interests with as full information as possible, with sensitivity to the impact of these decisions on other people, and with cognizance of the possible short- and long-term personal consequences. This kind of decision making, difficult enough for adults, will be more so for children and will flourish only in the context of a non-threatening, encouraging support network, whether in the family or school.

Accepting the child as a person before the law means that children, like all persons, have certain basic rights to be recognized and enforced by the law. One such example is that a child has the right not to be battered by another human being. Although children differ from adults in ways relevant to identifying particular rights, this example clearly shows a general human right equally applicable to child or adult.

The educational issue of overriding importance here is that the child must develop an understanding of rights and responsibilities. Children have the right to be cognizant of their rights. Although in the case of infants such cognizance will be clearly precluded, even very young children are capable of deeper levels of understanding than we commonly credit to them. The use of sexually explicit dolls has been an extremely effective technique in enabling young children to recognize and report their victimization in instances of incestuous abuse. Similar techniques could be used to help them identify other forms of intolerable abuse and violence. It is imperative that our children know what sorts of behaviour they have the right not to tolerate and where they can go for help if subjected to unacceptable treatment. For obvious reasons, we cannot depend on all parents to provide this knowledge. The classroom and education television recommend themselves as reasonable vehicles. Clearly, parents, as well as children, must be educated about these issues before we can hope for any long-term improvement in the situation. It is also true that many abusive parents are themselves victims in many senses and are not necessarily engaging in intentional maliciousness against their children. Some love their children deeply and are actually behaving in

ways which they perceive as being in their child's best interests. In the short run, many children may need rescue, temporarily or permanently, from abusive parents. In the long run, the parents will need rescue too.

CONCLUSION: POTENTIAL OBJECTIONS AND RESPONSES

This analysis concludes with a proposal to provide children with the fullest amount of information consistent with their age and to make them as independent and autonomous as possible in identifying their own best interests and in understanding their rights and obligations. There are two serious objections to this proposal.

First, such measures would entail greater levels of state interference in private family life. The problem is that things are not equal: a balance of power which endorses the parental deployment of physical force against children in the Canadian Criminal Code sets the scene for emotionally, morally, and physically abused children. Such abuse can no longer be allowed to flourish behind our own front doors. Family privacy must give way to child protection, however painful this may be. We not only tolerate but welcome state interference when a person assaults a stranger on the street; it is inconsistent to deny children in their own homes a similar level of protection from their families. One begins to wonder what it is about the family that we are so afraid of exposing to public scrutiny. John Stuart Mill captured this feature when he wrote, in 1869, that "the family is a school of despotism, in which the virtues of despotism, but also its vices, are largely nourished" (Rossi, 1970, p. 174).

The second objection is related to the first but somewhat more complex. By encouraging children to inform some outside person or group about battery or abuse, will we not be sewing seeds of destruction for the family? Will we not be prompting children to "turn their parents in"? I think this raises deeper questions. Do we anticipate that the family unit would fall apart if all members enjoyed enforceable rights of which they were fully apprised? Do friendships, love relationships between adults, or business associations fall apart for this reason? Would children who knew their rights and felt free to voice these love their parents less? If it is only by keeping certain classes of people (namely, young people) ignorant of their rights and by denying them any real alternatives that the family remains intact as a social unit, we must face the question whether it is an institution worth preserving.

If we identify the family as a collective group of people who, in living together, love, support, encourage, and give solace to one another as occasions require, then I want to identify myself as a staunch family supporter. Such an institution would be worth preserving at almost any

cost. And, for the sake of the next generation of potentially abused children, I hope that we can move with great speed to the realization of such good.

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Eine Übersicht von gegenwärtiger kanadischer Gesetzgebung, die die Rechte von Kindern regiert, wird vorgelegt. Die Art dieser Gesetzgebung wird durch Gesamtbegriffe erklärt, so wie zum Beispiel die Herrschaft der Eltern über das Kind, der Staat an Stelle von den Eltern, die Interesse des Kindes, und das Kind als Person vor dem Gesetz. Es wird vorgeschlagen, daß das Ziel der Gesetzgebung, die mit Kindern zu tun hat, sich nach den beiden letzten Gesamtbegriffen, die Kinder in Betracht ziehen, orientieren solle, anstatt auf den beiden ersten, wo es sich eher um Eltern handelt. Die Autorin schlägt vor, daß man Kindern mit der vollkommensten Benachrichtigung in Einklang mit ihrem Lebensalter versehen solle und, daß man ihnen die Unabhängigkeit und Selbstständigkeit gewähren solle, um ihre eigenen Interessen sowie ihre Rechte und Pflichten zu identifizieren. Schließlich werden zwei vorsehene Einwände gegen diesen Vorschlag studiert: -daß solche Maßnahmen größere Eingriffe des Staates ins private Familienleben zu Folge haben würden und daß sie ein Zerfressen der Familieneinheit hervorbringen würden.

El estudio se inicia con un resumen de la legislación Canadiense actual que rige los derechos del niño. Se explica el origen de ésta a partir de conceptos tales como: el poder del padre

sobre el niño, la función de padre que el estado ejerce, los intereses del niño, y el niño como persona delante de la ley. Dicha legislación, argumenta la autora, debería enfocar los dos últimos principios que se centran en el niño, en lugar de los dos primeros orientados hacia el adulto. Se expone la necesidad de suplir al niño de información consistente con su edad, y de formarlo independiente y autónomo en la identificación de sus intereses, derechos, y obligaciones. Finalmente, se anticipan dos objeciones: los niveles de interferencia que tales medidas traerían a la vida familiar privada y la posible erosión de la unidad familiar.

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