

"DEBUNKING" PARENTS' RIGHTS IN THE CANADIAN CONSTITUTIONAL CONTEXT

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Parents have gained significant direct and indirect protection under the Canadian Charter of Rights and Freedoms for their claims to be free from state interference in the exercise of authority over their children. In this article I critically examine the most significant Supreme Court of Canada decisions constitutionalizing parental authority over children. I argue that parental rights cannot be reconciled with the theory of individual rights that is embodied by the Charter. More significantly, the case law demonstrates that the recognition of parental rights as Charter values operates at the expense of the recognition of children as full rights-bearing members of our society.

Les parents qui demandent que l'État ne s'ingère pas en matière de l'exercice de leur autorité parentale jouissent d'une protection directe et indirecte substantielle en vertu de la Charte canadienne des droits et libertés. Dans le présent article, je fais l'examen critique de la décision la plus importante de la Cour suprême du Canada portant sur la constitutionnalisation de l'autorité parentale sur les enfants. Je soutiens qu'on ne peut concilier les droits des parents et la théorie sur les droits individuels renfermée dans la Charte. En outre, la jurisprudence démontre que le fait de reconnaître les droits des parents comme valeur garantie par la Charte va à l'encontre de la reconnaissance des enfants en tant que membres de la société bénéficiant de l'ensemble des droits.

1. Introduction

The Supreme Court of Canada's decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*¹ realized concerns of children's rights advocates about the recognition of parental rights under the *Canadian Charter of Rights and Freedoms*.² In the *Foundation* decision, which involved a *Charter* challenge of the *Criminal Code*'s corporal punishment defence,³ the parental and family

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¹ 2004 SCC 4, [2004] 1 S.C.R. 76, 234 D.L.R. (4th) 257 [*Foundation* cited to S.C.R.].

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

³ R.S.C. 1985, c. C-46, s. 43 [*Criminal Code*].

autonomy claims that gained some constitutional respectability nearly a decade earlier in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*⁴ operated to place internal limits on the scope of children's rights claims under the *Charter*. In this article I argue for a reconsideration of the direct and indirect protections that parental rights have received in this case law beginning with the *B.(R.)* decision. As adults, parents already enjoy the full range of *Charter* rights that are afforded to mature individuals. Special rights for parents under the *Charter* can only operate to diminish recognition of children as full rights-bearing members of our society.

Whatever may be said for the concept of parental rights, as a matter of principle these values can not be reconciled with the theory of individual rights and the commitment to the equal worth of every person that is embodied by the *Charter*. As a matter of policy, the constitutional recognition of parental rights is problematic as well. Parental rights claims are asserted only in order to challenge laws or other forms of government activity that restrict parenting practices. The only justifiable standard for assessing the appropriateness of the treatment of children – and, therefore, the appropriateness of legal restrictions on certain parental practices – is whether that treatment is in the best interests of children and how it compares to what their rights claims are or would be if they could make them. If forms of treatment of children are in their best interests, then the fact that such treatment may be consistent with the exercise of what could be identified as parental rights adds nothing to the assessment. Conversely, to allow children to be treated by parents in a manner that is not in their best interests merely because parents assert a right to do so amounts to denying children the most basic of human rights benefits: recognition as full and equal human beings.

The preceding assertions are “academic” in at least two senses. First, in the scholarly sense, these assertions are academic because the suggestion that rights-claims should be rejected on account of their inconsistency with theoretical understandings of the Canadian constitution implies arguments about the nature of rights and the underlying theory of the part of the constitution in question, the *Charter*. To argue that parental rights should not be protected by the *Charter* is also academic in the speculative or hypothetical sense since, as mentioned, some variations of these values have already received *Charter* protection.

In relation to the theoretical implications of the assertion that

⁴ [1995] 1 S.C.R. 315, 122 D.L.R. (4th) 1 [*B.(R.)* cited to S.C.R.].

parental rights should not receive *Charter* protection, in this article I draw upon James G. Dwyer’s attempt at “debunking the doctrine of parents’ rights” in the American context.⁵ I argue that the theoretical aspects of Dwyer’s critique of parental rights apply equally to the Canadian context. A prominent theme of Dwyer’s critique is the way in which the concept of parental rights offends inherent limitations that exist on our understanding of the permissible scope of individual rights. I expand upon Dwyer’s critique by emphasizing as well the extent to which parental rights are a vestige of the very sort of traditional, status-based rights claims that the philosophy of modern liberalism and the bills of rights that reflect this philosophy are designed to oppose. I also advocate for the Canadian context an adaptation of Dwyer’s idea that the activities that are associated with parental rights are better considered “privileges.” Children should be recognized as the only rights-holders in the context of parenting relationships with parents acting as agents for children in the exercise of their rights.

Having addressed the theoretical issues relating to the rejection of parental rights as *Charter*-protected values, I then analyze the two most important cases in which parental rights gained *some considerable direct Charter protection*. *B.(R.)* concerned the religious freedom and liberty rights of parents of the Jehovah’s Witness faith whose child was apprehended by the state in order to administer medically necessary treatment to her which included a blood transfusion, a procedure which is opposed by Jehovah’s Witnesses. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*⁶ the Supreme Court of Canada found that the right of parents to security of the person is infringed by child apprehension hearings and that, in some circumstances, the Constitution mandates that the state provide legal counsel for parents involved in such hearings. I analyze the differences between the rights claims being made by the parents in these cases, arguing that the recognition of parental rights in *B.(R.)* is in greater potential tension with the best interests of children than the successful assertion of parental rights in the *G.(J.)* case.

Finally, I analyze the indirect constitutional protection that was afforded to parental rights in the *Foundation* case. *Foundation* involved a *Charter* challenge, on behalf of children, of the corporal punishment defence contained in s. 43 of the *Criminal Code*. Indeed, the fact that the *Foundation* case did not directly involve parental rights and yet these values underlay the Court’s analysis is central to my concerns about the decision. I suggest that the “respectability” that the *B.(R.)*

⁵ James G. Dwyer, “Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights” (1994) 82 Cal. L. Rev. 1371.

⁶ [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 [*G.(J.)* cited to S.C.R.].

decisions in particular gave to parental rights claims in the constitutional context allowed these values to operate in *Foundation* as limits on children's rights and to distort the assessment of what is in children's best interests.

Insofar as opposition to the Charter protection of parental rights is academic because the courts have already recognized them, I argue by way of conclusion that expansion of these protections should be resisted. This may be achieved by emphasizing both the slimness of the majority ruling in *B.(R.)* and the extent to which *G.(J.)* is best understood as a decision which respects children's rights rather than those of parents. The role played by parental rights in the *Foundation* case, however, can only be characterized as wrong in the context of a legal system and a constitutional order that is committed to the equal respect and dignity of every individual, including children.

2. *Children and the Charter*

The argument that I pursue in this paper against the constitutionalization of parental rights is inspired by concern for the way in which parental claims can undermine constitutional protections that are afforded to children. Accordingly, although it is somewhat secondary to the critique of constitutionalized parental rights, it is my position that children should be recognized as full rights and freedom-bearing members of Canadian society. In this regard Barbara Woodhouse's comments on the American experience operate as a warning:

Since rights are treated as a zero-sum game, each new class of rights-bearers who are able to battle their way into the safe haven of the ... Constitution must become a gate-keeper, excluding those who wish to follow. This is especially evident in the arena of family rights.... In constitutionalizing parental rights, American law ... became trapped in the amber of a specific historical moment By conceptualizing the child as a form of private property, and the parent-child relationship as a private liberty interest of the parent, the Court gave constitutional force to traditional hierarchies of power and erected barriers to the recognition of children's rights that advocates for children are now struggling to dismantle.⁷

Although children do not receive any special direct protections under the *Charter*,⁸ nor are children's rights and freedoms formally

⁷ Barbara Bennett Woodhouse, "The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine" (1999) 2 U. Pa. J. Const. L. 1 at 8.

⁸ Section 15 of the *Charter* protects against discrimination on the basis of age, which is not however specific to young age; see *Charter*, *supra* note 2, s. 15.

limited by the *Charter* in any way. It must be assumed, therefore, that the *Charter* affords to children the same protections as adults enjoy. Any limits that laws place upon children’s rights and freedoms need to be justifiable in accordance with s. 1 of the *Charter*.⁹

My argument reflects what David Archard calls the “child liberationist” perspective¹⁰ or what I would term a strong children’s rights view. The strong children’s rights view operates on the assumption that children have the same rights as adults. According to Archard the “caretaker thesis” stands in opposition to the child liberationist perspective. The caretaker thesis argues that children lack the capacity or competence to engage in the kind of self-determining choices that rights and freedoms facilitate.¹¹

Because the rights of children are not formally limited by the *Charter*, the positive law of the constitution favours the strong children’s rights perspective. From the strong children’s rights perspective, “commonsense” arguments¹² about children’s capacity at various stages of their development should be considered in the context of whether limits on children’s rights and freedoms are reasonable. Issues of capacity and agency should not, however, enter into the basic question as to whether children have rights and freedoms in the first place, or what the scope of those rights and freedoms may be.

Issues of children’s incompetency or incapacity in relation to the exercise of rights and freedoms can be addressed through strategies that take children’s differences into account but which allow us to maintain an understanding of children as full members of our rights- and freedom-respecting society. As will be discussed below, insofar as it is anathema to suggest that mentally or physically incompetent adults do not have full *Charter* protections because they cannot exercise them, it is equally objectionable to suggest that children – “the newest competitors for a place at the table of rights”¹³ – enjoy fewer constitutional protections than adults.

⁹ Section 1 of the *Charter* allows the rights and freedoms set out in it to be “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”; *ibid.*, s. 1.

¹⁰ David Archard, *Children: Rights and Childhood* (New York: Routledge, 1993) at 45.

¹¹ *Ibid.*

¹² William Galston, “When Well-Being Trumps Liberty: Political Theory, Jurisprudence, and Children’s Rights” (2004) 79 *Chicago-Kent L. Rev.* 279 at 281.

¹³ Woodhouse, *supra* note 7 at 7.

3. *Parental Rights and Individual Rights*

In his influential article “Parent’s Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights,”¹⁴ James Dwyer argues against recognizing that parents have legal claims in relation to their children that amount to fundamental constitutional rights. Dwyer identifies an inconsistency between parents’ rights claims and principles that are “deeply embedded in our law and morality.” Dwyer states:

This limitation on legal rights embodies the moral precept that no individual is *entitled* to control the life of another person, free from outside interference, no matter how intimate the relationship between them, and particularly not in ways inimical to the other person’s temporal interests.¹⁵

Despite the fact that the United States Supreme Court has consistently interpreted rights as standards that protect individual self-determination, Dwyer notes, “Curiously ... the Court has also intimated that decisions regarding the education and upbringing of one’s child are in fact aspects of the parents’ self-determination.”¹⁶ In relation to the policy implications of recognizing parental rights, Dwyer characterizes these values as the “greatest legal obstacle to government intervention to protect children from harmful parenting practices and to state efforts to assume greater authority over the care and education of children.”¹⁷

In the Canadian context, the *Charter of Rights and Freedoms* lacks any express protections for parents or for individuals as family members. This absence is to be expected in what is primarily a bill of individual rights. Bills of rights, whether statutory or constitutional in form are inspired by liberal social theory.¹⁸ According to this liberal perspective, the most essential units in society are individuals, considered in isolation from their personal domestic, cultural, and economic contexts. Constitutionally entrenched bills of rights are

¹⁴ Although it does not seem to have garnered much attention from Canadian academics, my characterization of Dwyer’s article as “influential” is based on a Westlaw search indicating that that the piece has been referred to in over 90 academic articles in the American journals; see Dwyer, *supra* note 5.

¹⁵ *Ibid.* at 1373 [emphasis in original].

¹⁶ *Ibid.* at 1410.

¹⁷ *Ibid.* at 1372.

¹⁸ See Mark Carter, “Reconsidering the *Charter* and Electoral Boundaries” (1999) 22 Dal. L.J. 53 at 71 (where I discuss the *Charter* as an artifact of liberal social contract theory); see also, Mark Carter “Blackstoned Again: Common Law Liberties, the Canadian Constitution, and the Principles of Fundamental Justice” (2006) 13 Tex. Wesleyan L. Rev. [Carter, “Blackstoned Again”].

designed to defend the “natural” rights and freedoms of these individuals from restrictive government activity. More to the point for the purposes of this discussion, the modern liberal project, with its emphasis upon the equal worth and dignity of every individual and its identification of entrenched bills of rights as vehicles for protecting these values, was directly inspired by a desire to challenge laws that maintain traditional rights, privileges, and obligations that are based upon social status.¹⁹ Accordingly, as collective, traditional, and status-based entities, families and any rights claims that arise from membership in them occupy a very awkward place in the liberal framework that is supported by the *Charter*.²⁰

In the set of claims that may arise from family relationships, parental rights stand in particularly archaic relief in relation to liberal individual rights. Parental rights involve, almost by definition, a claim to be able to control the lives of children. In Dwyer’s terms parental rights are therefore characterizable as “other-determining” claims²¹ in contrast with the “self-determining” nature of liberal individualist rights. Dwyer points out that other-determining rights are almost exclusively related to legal regimes that recognize property rights in other persons. In the American and British contexts, infamous examples of such institutions include slavery and the common law rights of consortium held by husbands over wives.²²

As the case law reviewed below indicates, however, not only have parental rights managed to find recognition within the *Charter*’s otherwise liberal individualist framework, their archaic character has not translated into any special vulnerability to *Charter* review. On the contrary, leaving aside the use of the *Charter* by litigants in divorce and separation proceedings,²³ parental authority seems to have benefited

¹⁹ For a discussion of how liberal rights theory is “anathema” to social status based claims, see Rhoda E. Howard, “Dignity, Community, and Human Rights” in Abdullahi Ahmed An-Na’im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 81.

²⁰ See Mary Jane Mossman, “Individualism and Community: Family as a Mediating Concept” in Allan C. Hutchinson and Leslie J.M. Green, eds., *Law and the Community: the End of Individualism?* (Toronto: Carswell, 1989) 205.

²¹ Dwyer, *supra* note 5 at 1405.

²² Common law rights of consortium include the husband’s right to claim sexual intercourse and domestic labour from his wife. Concomitantly, upon entering marriage, women lost their rights to sue, including their right to sue their husbands for rape; see *ibid.* at 1413-14.

²³ See Susan B. Boyd, “The Impact of the Charter of Rights and Freedoms on Canadian Family Law” (2000) 17 Can. J. Fam. L. 293 for an overview of the role of the *Charter* in contested custody proceedings as between parents, and in relation to the conduct of parents while exercising access.

from the Supreme Court's concern that spheres of private activity should be insulated from *Charter* review.²⁴ The *Foundation* decision provides a particularly stark example of this phenomenon. The Canadian experience, therefore, parallels Dwyer's observation in relation to the American Supreme Court's tendency to accept that child-rearing is part of the self-determination of parents and should not be intruded upon by state activity or competing rights claims.

In introducing her review of the impact of the *Charter* on Canadian family law throughout the 1990s, Susan B. Boyd provides important theoretical perspective upon the question as to why the *Charter* has not significantly challenged intra-family relations. Professor Boyd writes:

[T]here is ... a deeply held view that there is something about family law, and familial relations, that makes application of the set of public values contained in the Charter more problematic than it might be, say, in criminal law. The rights paradigm – based as it tends to be on a liberal vision of “the citizen” (liberalism’s unencumbered individual) – does not apply easily to the family law field, where individual family members are encumbered with complex interdependencies, needs, and relations of care. Legal arguments based on either individual or group rights do not always work well in the context of the family, when the interests of parents, children, and government/community are often inter-related and/or all at stake in different ways. The powerful familial ideology that prevails in this field, with corresponding expectations that often differ for women and men, complicates the rights framework, which is premised on formal equality, due process, and liberty/autonomy. These values are not always seen as appropriate or workable in the familial context.²⁵

The preceding part of this discussion has argued that, as a matter of theory, parental rights have no place in an individual rights-respecting legal framework such as the *Charter* is expected to provide. Notwithstanding this lack of theoretical “fit,” parental rights have received direct and indirect protection under the constitution. The next part of this discussion will again draw upon the work of James Dwyer to argue that a more appropriate legal approach to child-rearing activity by parents would recognize it as the exercise of privileges rather than rights. Children, instead, should be recognized as the only rights-holders in the context of issues relating to state restrictions on and parenting activity.

²⁴ *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174; in this case the Supreme Court held that the *Charter* does not apply to proceedings between private parties where no legislation defines the rights and obligations as between the parties, and where the only government presence in the proceedings is a court order.

²⁵ Boyd, *supra* note 23 at 297 [footnotes omitted].

4. Children’s Rights and Parental Privileges

James Dwyer draws upon Wesley Hohfeld’s famous analysis of legal relations²⁶ in which the term “right” is reserved for people’s claims that give rise to corresponding duties on the part of other people or the state. A duty may be one of non-interference or of assistance. These duties may be termed negative or positive rights claims respectively. Cast in terms of rights claims with the state owing the duties, parental rights would involve negative claim-rights on the part of parents not to be interfered with by the state in the treatment of their children. Positive parental claim-rights by parents would be satisfied by the state providing assistance to parents.²⁷

A number of Dwyer’s observations in relation to the American experience with the recognition of parental rights bear interesting comparison with the Canadian context. For example, Dwyer states:

That no one has a right to control the life of another adult may seem self-evident. Nevertheless, it is difficult to demonstrate the truth of this proposition due to the lack of clear statements by the judiciary that this is in fact a controlling principle of law in this country.²⁸

The analysis below will demonstrate, however, that in Canada parental religious liberties have been given protection under the *Charter* notwithstanding the Supreme Court’s very direct statements that the definition of freedoms and rights do not extend to practices that harm others or prevent them from holding and manifesting beliefs.²⁹ Without much comment, parental rights have emerged in the last decade as a serious exception to this limiting principle.

The Canadian experience closely reflects the American in relation to the lack of a clear theoretical justification for parental rights.³⁰ The justifications – such as they are – that the Supreme Court of Canada has used to support parental rights reflect heavy reliance on the intuitive, self-evident “correctness” of recognizing a “protected sphere of parental decision-making”³¹ and assuming that the vehicle of parental

²⁶ Wesley N. Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale L.J. 16 at 30.

²⁷ Dwyer, *supra* note 5 at 1376.

²⁸ *Ibid.* at 1406.

²⁹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346-47, 18 D.L.R. (4th) 321 [*Big M*].

³⁰ For a delineation of the American experience on the theoretical justification for parental rights, see Dwyer, *supra* note 5 at 1406.

³¹ *B.(R)*, *supra* note 4 at 372 *per* La Forest J.

rights is necessary to defend this sphere of decision-making. A related judicial tendency that is reflected in the *Foundation* case in particular is the provision of indirect constitutional protection to parental activities based almost entirely on the “traditional” nature of those activities.

In Dwyer’s analysis, parental rights claims in relation to child-rearing activities are better understood as “privileges.” Privileges are the ability to engage in activities, not because a duty is owed by another party to allow or to facilitate that activity (negative or positive claim-rights), but merely because there is an absence of any duty on the actor to refrain from that activity. As privileges, what would otherwise be characterized as parental rights are, instead, the mere legal ability of parents to engage in child-rearing activities. The general permissibility of this activity is modified somewhat to the extent that parents would enjoy some exemption from duties that adults otherwise owe to children in general.³²

Parental privileges – in contrast to rights – do not provide parents with a legal vehicle for preventing the state from engaging in efforts to restrict parenting practices or the decision-making authority of parents. A subtle but important distinction in Dwyer’s proposed legal regime, however, lies in the fact that children have the right to challenge “inappropriate state interference with child-rearing practices” and parents have the authority to act as agents for their children in asserting these rights.³³ The significant difference between parents enforcing their own parental rights and, on the other hand, acting as agents in the enforcement of their children’s rights lies in the way that conflict over child-rearing practices between parents and society would be analyzed. Dwyer writes:

³² Dwyer, *supra* note 5 at 1375-76, n. 12. The example that Dwyer uses in this note of an exemption that parents have from a duty that adults owe to children generally is the negative duty to refrain from conduct that would constitute kidnapping. In the Canadian context kidnapping is defined in the *Criminal Code* 279(1)(a) (*supra* note 3) as the intentional confinement of a person against the person’s will. There is no express defence for parents who might, for example, effectively “confine” children to prevent them from wandering the streets at night. Dwyer indicates:

In the present legal environment, such [negative] duties also arise as the corollary to the exclusive right of parents to perform child-rearing functions free from interference by other adults. In the legal regime advocated here, [i.e. one that recognizes parental child-rearing practices as a privilege rather than a right] these duties would instead be a corollary to the rights of children to be under the continuous care of a parent, free from interference by other adults.

³³ *Ibid.* at 1376.

Rather than balancing parents’ rights against state interests in the care and education of children, as presently occurs, judges would decide these conflicts solely on the basis of children’s welfare interests. Doing so would be likely, in turn, to alter the precise limits of parental freedom and authority and to shift the boundary between permissible and impermissible state interventions.³⁴

Dwyer’s suggested approach recommends itself by the extent to which it relieves advocates of state restrictions on parental activity from the burden of establishing that the interests of the children and society (reflected in state activity) outweigh the rights of parents. Recognizing child-rearing by parents as a privilege and accepting that all rights in relation to this activity repose in the children allows the debate in relation to proposed restrictions upon parental activity to be focused exclusively upon the interests of the children: would the harm to the child be greater if the state did or did not intervene?³⁵

Dwyer anticipates the alarmed response by advocates of parents’ rights to this shift of focus to the rights of children. These responses include the way in which a focus on children’s rights will lead to the end of the family and collectivized child-rearing. Dwyer convincingly responds to these scenarios by reminding us of the general understanding that the healthy development of children depends upon guidance and non-violent discipline by parents. Accordingly “it would be senseless and improper to attribute to children rights against all forms of parental control, or to exclude appropriate discipline from the scope of duties parents owe to their children.”³⁶

5. *Children’s Rights and Individual Rights*

I have argued that parental rights in particular, but family-based rights in general, cannot be reconciled with modern liberal rights theory and the nature of the protections that the *Charter* is expected to provide. The argument in favour of recognizing that children have rights in relation to parenting activity is in some tension with the general concern about family status-based rights. In fact, however, the argument in favour of recognizing the right of children to receive parenting is more dependent upon an understanding of children’s actual needs as individuals than it is upon respect for a social institution and the relationships of status that comprise that institution. For children, survival itself as well as emotional health depends upon them being provided with the care and attention that is involved with conscientious

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

child-rearing activity.³⁷ Biological or adoptive parents generally take on parenting responsibilities as a matter of cultural practice which is reinforced by legal expectations.³⁸ Accordingly, although it happens to be the case that in our society, the right of children to prevent the state from interfering with their ability to receive parenting is connected to family relationships, this connection to the family institution is incidental to their need to receive parenting for self-determination which is a central rationale of liberal rights theory.³⁹

Another challenge for the argument that children have a right to prevent the state from interfering with their receipt of adequate parenting is the extent to which it represents an “other-determining” claim of the sort that disqualifies parents’ rights from the universe of liberal individualist rights. In response to this criticism, Dwyer emphasizes the extent to which the assertion of children’s rights does not, in fact, involve dictating the conduct of particular parents except insofar as parents are willing to undertake those duties. Unlike the assertion of parents’ rights over children, the assertion of children’s rights involves voluntary activity by parents.⁴⁰ In emphasizing the non-determining nature of children’s rights claims in contrast with parental rights claims, Dwyer notes that “children have no right to determine which faith their parents will adopt, what schooling their parents will receive, where and whether their parents will work, or what medical treatment their parents will undergo.”

³⁷ In *ibid.* at 1429, Dwyer writes:

All of the important interests one might attribute to children can give rise to a right of one kind or another residing in the child. For example, we could attribute to children a positive claim-right to the exclusive and continuous care, protection, and guidance of a single set of parents, as well as to equal educational opportunity and medical care.

We could also grant children a negative claim-right against any interference by the State in the parent-child relationship that would do more harm than good to the child.

³⁸ See e.g. *Criminal Code*, *supra* note 3, s.215(1)(a); among the few positive duties imposed by the *Criminal Code* is the duty of parents to provide the necessities of life for their children under the age of sixteen years.

³⁹ See especially *Re T.(R.)*, 2004 SKQB 503, (2005) 248 D.L.R. (4th) 303, 259 Sask. R. 122, (Sask. Q.B.); the case involved a successful argument by five children that their right to security of the person under s. 7 of the *Charter* was infringed by a Department of Community Resources and Employment for Saskatchewan policy whereby First Nations children would not be placed for adoption without the consent of their First Nation. This consent had not been forthcoming and the children were, accordingly, caught in the foster care system indefinitely.

⁴⁰ Dwyer, *supra* note 5 at 1423 observes:

[T]he adults who bear the duties corresponding to children’s claim-rights have, as far as the law is concerned, undertaken these duties voluntarily. Those adults who do not wish to shoulder the obligations of parenthood are legally free not to conceive children, to abort a fetus before the stage of viability, or to give up a child for adoption

6. Parental Rights and the Charter: Overview of the Case Law

a) *B.(R.) v. Children’s Aid Society of Metro Toronto*⁴¹

This discussion focuses upon three Supreme Court of Canada decisions that represent milestones in the direct and indirect constitutionalization of parental rights. In *B.(R.)*, the Children’s Aid Society sought a temporary wardship order of a prematurely born infant. In the opinion of attending physicians the child was in need of blood transfusions in connection with various necessary medical procedures. As Jehovah’s Witnesses, the child’s parents were opposed to the procedure for religious reasons. The Society’s application for temporary wardship was granted by the Ontario Provincial Court (Family Division). The Society consented to the transfusion after which that Court terminated the wardship and the child was returned to her parents.

On appeal to the Supreme Court of Canada, the parents in *B.(R.)* argued that the relevant sections of Ontario’s *Child Welfare Act*⁴² which allowed for the apprehension of their child and for the Ministry to consent to medical treatment, infringed their *Charter* rights as parents. The parents were most successful in relation to their freedom of religion argument. Section 2(a) of the *Charter* guarantees that “[e]veryone has the following freedoms: (a) freedom of conscience and religion.”⁴³ La Forest J. and four other judges⁴⁴ gave parental rights their first clear constitutional recognition in a majority ruling under the *Charter* by accepting that the freedom of religion of parents is seriously infringed by the imposition of medical procedures upon their children in contravention of their religious beliefs. The procedure under review in *B.(R.)* was upheld, however, as a reasonable infringement of the parents’ rights under section 1 of the *Charter*.

The *B.(R.)* decision provided somewhat less conclusive support for the argument that parents’ liberty interests under section 7 of the *Charter* are also infringed by the apprehension of their children for the purposes of administering medically necessary treatment. Section 7 of the *Charter* recognizes that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁴⁵ La Forest J.

or care by the State. Children, therefore, do not possess rights of control over non-consenting adults.

⁴¹ *Supra* note 4.

⁴² R.S.O. 1980, c. 66.

⁴³ *Charter*, *supra* note 2, s. 2(a).

⁴⁴ L’Heureux-Dubé, Gonthier, McLachlin and Cory JJ.

⁴⁵ *Charter*, *supra* note 2, s.7.

attracted the support of three other members of the Court⁴⁶ in his determination that “the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent.”⁴⁷ The La Forest faction in the decision held, however, that the apprehension of the child and the imposed medical procedures were in accordance with the principles of fundamental justice and that the parents’ overall section 7 rights were thus not infringed. Sopinka J. did not commit himself in relation to the parental liberty issue, determining instead that the apprehension and medical operation were consistent with fundamental justice whether or not they infringed parents’ rights. Four judges⁴⁸ found no infringement of the parents’ liberty rights.

*b) New Brunswick v. G.(J.)*⁴⁹

The issue in *G.(J.)* was whether a wardship application by the Minister of Health and Community Services infringed the mother’s right to life, liberty or security of the person in a manner that was not in accordance with the principles of fundamental justice under section 7 of the *Charter*. On the first point, the Supreme Court of Canada was unanimous in holding that the application to remove the mother’s children from her custody infringed her right to security of the person. The Court was also unanimous in its determination that, in light of the applicant’s particular circumstances, the principles of fundamental justice placed a positive obligation on the state to provide counsel for the mother.⁵⁰ Representation was required in order to ensure fairness in the context of the complex adversarial court proceedings in which all parties apart from the parent were represented by counsel.

*c) Foundation for Youth, Children and the Law v. Canada (Attorney General)*⁵¹

The *Foundation* case concerned a constitutional challenge to the corporal punishment defence contained in section 43 of the *Criminal Code*. The action was launched by the Foundation for Youth, Children

⁴⁶ L’Heureux-Dubé, Gonthier and McLachlin JJ. concurred.

⁴⁷ *B.(R.)*, *supra* note 4 at 370.

⁴⁸ Iacobucci, Major and Cory JJ. as well as Lamer C.J.C..

⁴⁹ *Supra* note 6.

⁵⁰ *R. v. Matheson*, [1994] 3 S.C.R. 328, 118 D.L.R. (4th); the *Charter* in s. 10(b) provides any person who has been arrested or detained has the right to retain and instruct counsel. Not only is this right specific to criminal proceedings, but the courts have also held that it does not impose a positive duty on the government to provide counsel.

⁵¹ *Supra* note 1.

and the Law, a non-profit group dedicated to advocating for children’s rights, and employed the special public interest litigation provisions of Ontario’s *Rules of Civil Procedure*.⁵² In contrast to the *B.(R.)* and *G.(J.)* cases, therefore, there was no factual context for the decision.

Section 43 of the *Criminal Code* provides:

Every schoolteacher, parent or person standing in the place 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.⁵³

The Foundation argued that section 43 infringes children’s right to security of the person under section 7 of the *Charter* in a manner that is inconsistent with the principles of fundamental justice and unreasonable under section 1. The Foundation also argued that the corporal punishment defence gives state sanction to cruel and unusual treatment or punishment against which everyone is protected under section 12 of the *Charter*. Finally the Foundation argued that section 43 of the *Criminal Code* represents unreasonable discrimination on the basis of age under section 15 of the *Charter*.

The majority decision by McLachlin C.J.C.⁵⁴ followed the pattern of the lower court decision in the case, rejecting all of the Foundation’s arguments. In dissenting reasons, Arbour J. found that section 43 was unconstitutionally vague under section 7 of the *Charter* and would have struck the section down. Deschamps and LeBel JJ. both found that section 43 represented discrimination on the basis of age that offended section 15 of the *Charter* although only Deschamps J. would have declared the section of no force and effect in that regard. LeBel J. held that the section was a reasonable infringement of children’s equality rights under section 1 of the *Charter*.

The *Foundation* case was initiated in response to concerns about the extent to which children’s *Charter* rights are infringed by a *Criminal Code* provision which “justifies” violent conduct toward them by parents and teachers. Notwithstanding the Foundation’s attempt to keep the children’s perspective before the Court, however, the parental perspective was consistently relied upon by the majority to justify its extraordinary refusal to recognize that the *Charter* is offended by section 43.

⁵² R.R.O. 1990, Reg. 194, rule 14.05(3)(g.1).

⁵³ *Supra* note 3.

⁵⁴ Gonthier, Iacobucci, Major, Bastarache and LeBel JJ. concurring.

7. Analysis

a) Parental Rights and Freedom of Religion in B.(R.) v. Children's Aid Society of Metro Toronto

1) The Majority Decision

The Supreme Court of Canada's earliest decisions interpreting the *Charter* reflect a determination to break the restrictive approach that had been taken in interpreting the *Canadian Bill of Rights*.⁵⁵ In *Hunter v. Southam Inc.*⁵⁶ Dickson C.J.C. declared the need for the judiciary to take a "broad, purposive" approach when interpreting the scope of *Charter* guarantees and the concomitant restrictions that they place upon government activity. In the Court's first consideration of the scope of freedom of religion in *R. v. Big M Drug Mart*⁵⁷ Dickson C.J.C. referenced his reasons in *Hunter v. Southam* stating:

[T]he proper approach to the definition of the rights and freedoms guaranteed by the Charter [is] a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect.⁵⁸

Supreme Court decisions often suggest that the purposive approach to *Charter* interpretation is synonymous with a broad or "generous" interpretation as was suggested in *Hunter v. Southam*.⁵⁹ It is not clearly the case, however, that the purposive interpretation strategy must result in *the* most generous interpretation of the scope of a right. This is particularly the case when the purpose of a guarantee suggests some limits. In *Big M Drug Mart* Dickson C.J.C. recognized that "it is

⁵⁵ R.S.C. 1970, App. III. In *R. v. Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655, Le Dain J. stated at 638-39 of S.C.R.:

[O]n the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate [to limit]... the traditional sovereignty of Parliament. The significance of the new constitutional mandate for judicial review provided by the *Charter* was emphasized by this Court in ...*Hunter v. Southam*.

⁵⁶ [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [*Hunter v. Southam* cited to S.C.R.].

⁵⁷ *Big M*, *supra* note 29.

⁵⁸ *Ibid.* at 344.

⁵⁹ See e.g. *ibid.* at 344 where Dickson J. commented that "[t]he interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one"; see also *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 499 [*B.C. Motor*]; and *Eldridge v. B.C.*, [1997] 3 S.C.R. 624 at 666.

important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, *philosophic and historical contexts*.”⁶⁰

In an earlier part of this paper I argued that the philosophical and historical contexts for constitutionally entrenched bills of individual rights in general, and the *Charter* in particular, embrace claims that respect the equal worth of every individual and protect self-determining activity from government restrictions. On this account, the “other-determining” nature of parental rights claims places them outside the purposes that are served by the *Charter*’s protections. This is particularly the case in situations where the attempt to determine what happens to a third party would be harmful to that person. In *Big M Drug Mart* Dickson C.J.C. specifically recognized that an internal limit exists on the scope of freedom of conscience and religion under section 2(a) of the *Charter*, preventing it from protecting other-determining manifestations of faith:

The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.⁶¹

The important limitation that Dickson C.J.C. identified for the scope of freedom of religion in *Big M* was if not completely “abandoned”⁶² then at least seriously undermined by the majority’s approval of the parents’ freedom of religion argument in *B.(R.)*. Children’s rights advocates will take some comfort in the fact that the Court in *B.(R.)* upheld the constitutionality of the apprehension of the infant Sheena and the provision of medically necessary treatment under section 1 of the *Charter*. Notwithstanding the section 1 “victory,” however, the *B.(R.)* decision gives some significant constitutional credit to the idea that children can be denied medically necessary treatment on the basis of religious beliefs that are not their own. This brings into the calculation of what is best for children entirely irrelevant considerations from a modern human rights perspective.

⁶⁰ *Big M*, *supra* note 29 at 344 [emphasis added].

⁶¹ *Ibid.* at 346.

⁶² This is Peter Hogg’s estimation of the significance of the majority ruling in *B.(R.)*; see Peter Hogg, *Constitutional Law of Canada*, 4th ed. (looseleaf), (Toronto: Thomson Carswell, 1997) at 39-8.

There is some unfortunate irony in the fact that La Forest J. seems to have drawn strength for his championing of parental religious freedoms in *B.(R.)* from the fact that Sheena was too young to have religious beliefs herself. Justice La Forest emphasized “at the outset that it is the freedom of religion of...Sheena’s parents ... that is at stake...not that of the child herself.”⁶³ La Forest J. seems to suggest that, depending upon the age of the child, there exists a kind of sliding scale of unity of children’s interests – and perhaps even their personhoods – with that of their parents. Thus La Forest J. continues:

While it may be conceivable to ground a claim on a child’s own freedom of religion, the child must be old enough to entertain some religious beliefs in order to do so. Sheena was only a few weeks old at the time of the transfusion.⁶⁴

The boldness of the step into the dizzying world of developmental religious psychology that the majority in *B.(R.)* seemed willing to take is matched only by the significance of the constitutional implications. If, on account of young age, a child has not yet entertained any religious beliefs, then that void is filled by the religious beliefs of his or her parents, even when the exercise of that freedom could be life-threatening. The majority provides no principled defence of this unity of religious belief theory apart from fuzzy allusions to self-evident truths that run squarely against human rights theory’s rejection of claims that affect non-consenting third parties. Thus La Forest J. states: “It seems to me that the right of parents to rear their children according to their religious beliefs, including choosing medical and other treatment, is [a ...] fundamental aspect of freedom of religion.”⁶⁵

Dwyer addresses the issue of infant children’s incapacity in a manner that applies to the religious incapacity that La Forest J. highlights. As an initial matter Dwyer suggests that “it is fitting to ask why, if what we are most concerned with is protecting children’s interests, we do not grant children themselves the rights necessary to protect those interests. Why, instead, do we rely on the conceptually awkward notion of parents’ rights?”⁶⁶ Rather than assuming a unity of interest between parents and their children in situations where a child has not yet developed intellectual capacities – religious or otherwise – the application of Dwyer’s theory of children’s rights and parental privileges suggests that the most appropriate parallel is with incompetent adults. Indeed, Dwyer suggests, the argument that

⁶³ *B.(R.)*, *supra* note 4 at 381.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 382.

⁶⁶ Dwyer, *supra* note 5 at 1429.

children’s rights and liberty claims should be subsumed within the claims of their parents “has no greater force in the case of children than it does in the case of incompetent adults.”⁶⁷ Dwyer’s alternative concept directly addresses the majority’s reasoning in *B.(R.)*:

Thus, in a world without parents’ rights but with an appropriate set of children’s rights, the law could recognize parents as their children’s agents, with the responsibility to assert the children’s rights and invoke the necessary institutional mechanisms when actions by third parties threaten the children’s interests. Such actions would include unwarranted attempts by the State to intervene to protect what it mistakenly perceives to be the temporal interests of the child. If a conflict over child-rearing practices were to arise between parents and the State under this legal regime, *courts would not balance the child’s interests against the parents’ child-rearing rights, because the parents would have no such rights. Rather, courts would determine as best they could which outcome – that which the parent recommends or that which the State recommends – is more consistent with the rights of the child.*⁶⁸

In *B.(R.)* the majority side-stepped, without directly rejecting, the sound limitation that Dickson C.J.C. placed on the scope of freedom of religion in *Big M. La Forest J.* quoted directly and with approval from the decision in *Big M* with specific reference to the need to limit the freedom to practice religion in the interests of the “health” of others. La Forest J. also quoted with approval L’Heureux-Dubé J.’s *obiter* comments in *P.(D.) v. S.(C.)*.⁶⁹ indicating that parents’ freedom to practice their religion is “inherently limited” to conduct that does not infringe their children’s best interests.⁷⁰

Strangely, however, the situation of the infant Sheena with her need for a blood transfusion in the *B.(R.)* case was not included within the “health” or “child’s best interests” restrictions on the religious freedom of parents because the legislation in question is aimed at ensuring those very child-centered values. La Forest J. suggested that the case falls within a special category:

A more difficult issue is whether the freedom of religion of the appellants is intrinsically limited by the very reasons underlying the state’s intervention, namely the protection of the health and well-being of Sheena, or whether further analysis should be carried out under s. 1 of the Charter.⁷¹

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at 1429-30 [footnotes omitted, emphasis added].

⁶⁹ [1993] 4 S.C.R. 141, 108 D.L.R. (4th) 287.

⁷⁰ *B.(R.)*, *supra* note 4 at 383.

⁷¹ *Ibid.*

Because the response given to La Forest J.'s rhetorical question is that parents' religious freedom is not "intrinsically limited" by legislation that is aimed at securing the health and well-being of children, the majority decision stands for the proposition that such legislation automatically infringes parents' religious freedom. Among the implications of La Forest J.'s comments is that we must accept the *prima facie* unconstitutionality of all legislation that is aimed at protecting children, if the legislation incidentally restricts religiously-motivated acts or, in the *B.(R.)* example, omissions by parents.

La Forest J.'s "presumption of unconstitutionality argument" might not seem extraordinary in relation to provincial legislation schemes that allow for child apprehensions, the reasonableness of which the state should always have to defend. Child-centered legislative initiatives are not, however, restricted to provincial child protection legislation. Denial of medically necessary treatment to a child could, for example, represent the failure by a parent to provide the necessities of life for a child which is an offence under section 215 of the *Criminal Code*.⁷² Section 215 is also the potential basis for criminal negligence offences under sections 219, 220 and 221 of the *Code*.⁷³ Another *Criminal Code* provision which is *prima facie* unconstitutional because it is aimed at the "health and well-being" of children is section 268(1)(3) of the *Criminal Code* which recognizes as a form of aggravated assault non-medical female genital circumcision of people under eighteen years of age.⁷⁴

As long as the courts respected the internal limits established in *Big M* on claims under section 2(a) of the *Charter*, the constitutionality of child-centered provisions that protect children from neglect and violence could not be challenged on a religious basis. It is necessary to accept that many restrictions on an individual's activity which serve worthy objectives may be in tension with claims of rights and freedoms that, for better or for worse, fall within the concept of individual rights that the *Charter* protects. It seems tragic, however, that laws which are aimed at children's health and well-being should be constitutionally suspect on the basis of claims that fall so firmly outside of modern rights theory as do the religious rights of parents over their children.

2) *The Dissenting Opinion*

Iacobucci and Major JJ.'s dissenting opinion (Lamer C.J.C. and Cory J. concurring) on the section 2(a) issue in *B.(R.)* supports the suggestion that

⁷² *Criminal Code*, *supra* note 3, s. 215.

⁷³ *Ibid.*, ss. 219, 220, 221.

⁷⁴ *Ibid.*, s. 268(1)(3).

theoretical inquiry is important to an understanding of the most appropriate scope for the freedom of religion. Recognizing, as did La Forest J., that freedom of religion is not absolute, Iacobucci and Major JJ. rejected La Forest J.’s conclusion that a generous and purposive interpretation therefore required that all limits to freedom of religion be established in the context of section 1 analysis, stating:

[W]e are of the view that the right [or freedom] itself must have a definition, and even if a broad and flexible definition is appropriate, there must be an outer boundary. Conduct which lies outside that boundary is not protected by the Charter. That boundary is reached in the circumstances of this case.⁷⁵

Articulating an understanding of the scope of section 2(a) that is consistent with individual rights theory and Dickson C.J.C.’s framework from *Big M*, the dissenting opinion held that “a parent’s freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health or life of the child.”⁷⁶

In relation to the infant’s unity of interest with her parents on account of her incapacity to entertain religious beliefs, Iacobucci and Major JJ. characterized this as an assumption that Sheena shares their religion “[y]et, Sheena has never expressed any agreement with the Jehovah’s Witness faith, nor for that matter, with any religion.”⁷⁷ Furthermore, we are reminded by the dissenting opinion that section 2(a) recognizes freedom of conscience as well as religion. In the dissenters’ analysis, allowing parental religious freedom to embrace religiously-motivated decision-making in relation to medically necessary procedures for their children automatically infringes the children’s freedom of conscience. Iacobucci and Major JJ. asserted that “Sheena’s freedom of conscience ... arguably includes the right to live long enough to make one’s own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief.”⁷⁸

In Iacobucci and Major JJ.’s view, the Court’s obligation to concern itself with children’s freedom of conscience requires the Court to interpret section 2(a) values in the family context in such a way as to avoid as much conflict as possible. The best way of avoiding conflict is to exclude family status as a consideration. Rather than denying infants a place apart from their parents within section 2(a) analysis, the freedoms guaranteed by that section must be interpreted in a manner that respects the autonomy of children and parents primarily as individuals rather than members of families. To concede

⁷⁵ *B.(R.)*, *supra* note 4 at 435.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 437.

⁷⁸ *Ibid.*

that laws that protect children's interests are in automatic tension with parental religious freedoms and must be justified under section 1 of the *Charter* is to subsume children's interests with those of the state in a manner that is as invidious as the majority's decision to deny infants any section 2(a) protections that are distinguishable from their parents.⁷⁹

In his comment on the *B.(R.)* decision Rollie Thompson argued that the dissenting opinion's concern for children's rights is undermined by the practicalities that would be involved in representing an infants' interests.⁸⁰ According to Thompson, Iacobucci and Major JJ. provide "little explanation of how decisions should be made for an infant, who cannot speak...."⁸¹ The implication of Thompson's point is that human rights should be recognized only when they are easily enforced. In fact the historic lack of adequate recognition of rights for children and other relatively powerless people, *as well as* the lack of an ability to enforce those rights are central reasons for having a *Charter*.

Thompson supports La Forest J.'s critique of the dissenters' position in *B.(R.)* that "what is attempted is to limit a right by another, with no stated mechanism for judicially determining just when, on the facts, the first right is overridden."⁸² In this regard, circularity infects La Forest J.'s reasoning. If children's rights cannot be recognized by judges because there is no mechanism for judicially determining when those rights override other rights, then this suggests that judges need to develop such a mechanism, rather than merely denying that children have rights. In fact, the mechanism that recommends itself is one that rejects the constitutional protection of parents' rights over children's rights.

b) Parental Rights and Section 7 of the Charter in B.(R.) v. Children's Aid Society of Metro Toronto and New Brunswick v. G.(J.)

1) Parental Rights and the Right to Liberty

In *B.(R.)* La Forest J. attracted only minority support⁸³ for the identification of parental rights within the liberty guarantee contained

⁷⁹ See Shauna Van Praagh, "Faith, Belonging, and the Protection of 'Our' Children" (1999) 17 Windsor Y.B. Access Just. 154 for an academic argument in favour of the parents' religious freedom claim and allowing limitations upon that claim to be drawn under s. 1 of the *Charter*.

⁸⁰ D.A. Rollie Thompson "Case Comment: *B.(R.) v. Children's Aid Society of Metropolitan Toronto*" (1995), 9 R.F.L. (4th) 345.

⁸¹ *Ibid.* at 347.

⁸² *B.(R.)*, *supra* note 4 at 388.

⁸³ L'Heureux-Dubé, Gonthier and McLachlin JJ. concurred.

in section 7 of the *Charter*. As a preliminary issue, La Forest J. rejected a necessary relationship between the liberty interest in section 7 and the criminal law process, stating that “liberty does not mean mere freedom from physical restraint”⁸⁴ as would be the case if section 7 was only concerned with detention by the police and subsequent incarceration. Having pushed liberty beyond the criminal law barrier, La Forest J. again relied upon largely self-evident reasoning to extend the guarantee to include parental liberty: “...I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent.”⁸⁵

In relation to the historical association of status-based rights with such institutions as slavery and consortium, La Forest J. simply asserted that the parental liberty interest under s. 7 is “not a parental right tantamount to a right of property in children.” The confusion of the theoretical analysis in La Forest J.’s championing of parental liberties was compounded by the immediately preceding passage in the decision where he stated:

While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society.⁸⁶

In the context of individual rights thought, it is extraordinary to suggest that a test of the state’s respect for “personal autonomy” is the extent to which it allows individuals with a superior status – parents – to determine the lives of individuals with an inferior status – children. Despite La Forest J.’s insistence to the contrary, the connection of personal autonomy with the ability to control others is inseparable from the defence of legal institutions that recognize the property rights of some individuals in others.

Parents’ rights to determine the lives of their children must, however, be distinguished from their obligation to care for them in the best manner possible. In this regard, the relationship that La Forest J. identifies between obligations and rights is, as Dwyer suggests, “simply flawed.” Dwyer states:

[T]he maxim that “ought implies can,” contends that because the law imposes on parents substantial duties of care with respect to their children, parents must also have

⁸⁴ *B.(R.)*, *supra* note 4 at 368.

⁸⁵ *Ibid.* at 370.

⁸⁶ *Ibid.* at 372.

substantial child-rearing rights, in order to be able to fulfill their duties. Importantly, this argument would justify a set of parental rights that extended only as far as parents' legal obligations. It thus clearly would not support rights to ... refuse necessary medical treatment for a child. Moreover, apart from this issue of scope, the reasoning of this argument is simply flawed.

The fact that one person owes duties to another person certainly does not logically entail that the first person has any rights – not even rights that might be necessary as a practical matter to fulfill her duties.⁸⁷

Lamer C.J.C.'s rejection of the parental liberty claim in *B.(R.)* is characterized by his concern to draw clear boundaries around the scope of review that section 7 of the *Charter* allows. Lamer C.J.C. insisted that the principles of fundamental justice in section 7 “pertain to the justice system”⁸⁸ and, therefore, “...the type of liberty s. 7 refers to must be the liberty that may be taken away or limited by a court or by another agency on which the state confers a coercive power to enforce its laws.”⁸⁹

As with their freedom of religion analysis, Iacobucci and Major JJ.'s section 7 analysis in *B.(R.)* emphasizes the need to observe theoretically-imposed limits on the scope of *Charter* guarantees. While not necessarily being concerned to keep section 7 connected to the criminal law or, at least, adjudicative contexts, they were anxious to ensure that the liberty right in that section 7 does not allow individuals, in the words of John Stuart Mill, “to deprive others of [their own good] or impede their efforts to obtain it.”⁹⁰ Nor were Iacobucci and Major JJ. convinced that the parental liberty argument in the case was as clearly distinguishable from archaic status-based claims as *La Forest J.* maintained:

The suggestion that parents have the ability to refuse their children medical procedures such as blood transfusions in situations where such a transfusion is necessary to sustain that child's health is consistent with *the view, now long gone, that parents have some sort of “property interest” in their children.* Indeed, in recent years, this Court has emphasized that parental duties are to be discharged according to the “best interests” of the child...⁹¹

2) Parental Rights and the Right to Security of the Person

As noted in the overview of the case law, the Supreme Court of Canada's decision in *G.(J.)* established that parents' security of the person is

⁸⁷ Dwyer, *supra* note 5 at 1435-36.

⁸⁸ *B.(R.)*, *supra* note 4 at 339.

⁸⁹ *Ibid.* at 340.

⁹⁰ *Ibid.* at 365, *per La Forest, J.* citing the dissent of Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569 at 318 of S.C.R..

⁹¹ *B.(R.)*, *ibid.* at 432-33 [emphasis added].

automatically infringed by child protection proceedings. The Supreme Court also held, on the facts of the case, that the principles of fundamental justice require that the government provide the mother with state-funded counsel. The security of the person analysis in *G.(J.)* built upon earlier Supreme Court authority recognizing that security of the person extends beyond physical security to include “psychological integrity.”⁹² In *G.(J.)*, Lamer C.J.C. held:

I have little doubt that removal of a child from parental custody pursuant to the state’s *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent.⁹³

As compared to the *B.(R.)* case, the *G.(J.)* decision sits fairly comfortably within Dwyer’s framework of parental privilege and children’s rights. The applicant’s claim in *G.(J.)* that her security of the person was infringed by the wardship hearing did not involve any claim that she had a right to direct the life of her children. In this regard, although the applicant’s claim was necessarily connected to her status as a parent, the claim was entirely self-determining. As Lamer C.J.C. observed,

The [applicant] did not contest the legitimacy of the principle that the state may relieve a parent of custody to protect the child’s health and safety. Rather, she took issue with the fairness of the procedure in this case.⁹⁴

The contrast between this position and the situation in *B.(R.)* is stark. In *G.(J.)* the applicant’s “parental” *Charter* argument received wide support because, rather than challenging the legislation’s purpose of protecting children, she claimed a self-determining right to full participation in that process. In *B.(R.)*, on the other hand, it was the legislation’s objectives of protecting children itself that gave rise to the parental rights claim.

Furthermore, although the action in *G.(J.)* was framed as a parental rights claim, the individual rights of infant children were also served by ensuring that their parents could fully participate in child apprehension hearings, whatever the outcome of those hearings might be. Accordingly, in contrast with *B.(R.)*, where the successful parental rights claim required denying the child’s personhood from a human rights standpoint, the *G.(J.)* case represents a concurrence of parental and child rights.

⁹² *G.(J.)*, *supra* note 6 at 79.

⁹³ *Ibid.* at 78.

⁹⁴ *Ibid.* at 81-82.

c) Parental Rights in Foundation for Youth, Children and the Law v. Canada (Attorney General)

In the *Foundation* decision, concern for parental rights once again undermined recognition of children's *Charter* rights notwithstanding the fact that the *Foundation* case was argued on behalf of children rather than parents. By finding that the corporal punishment defence did not offend any of the *Charter* sections that were raised in opposition to it, the majority gave as much indirect *Charter* protection as possible to parental authority, while avoiding what would have been the embarrassing spectacle of having to identify the "pressing and substantial objective" of allowing adults to assault children under the section 1 test.⁹⁵ The Court even refused to recognize that the corporal punishment defence represents age discrimination under section 15 of the *Charter* although a clearer example is impossible to imagine.

The kind of other-determining parental rights claims that received constitutional protection in the *B.(R.)* decision operated indirectly, but significantly, in the *Foundation* case. A concern for the maintenance of parental authority informs the majority decision in such a way as to prevent the rights arguments made on behalf of children from being realized. In *B.(R.)*, La Forest J. assured that recognition of parental rights did not amount to a form of property right in children – a point that failed to convince Iacobucci and Major JJ. The *Foundation* decision established that La Forest J. "did protest too much" and that Iacobucci and Major JJ. were correct to worry. Employing reasoning that gives the same priority to the interests of parents as characterized the *B.(R.)* case, the majority insulated from *Charter* scrutiny a practice that is incontrovertibly connected to the tradition of parental ownership of children.⁹⁶

The following analysis of the *Foundation* decision focuses upon McLachlin C.J.C.'s treatment of the section 7 and section 15 issues which most clearly illustrate the way in which a concern for parental rights undermines the majority's focus upon the *Charter* rights of children. Although section 43 of the *Criminal Code* also extends the corporal punishment defence to schoolteachers and persons standing in the place of parents, in light of the theme of this article I concentrate my

⁹⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200; to satisfy the first step in the "Oakes test" for assessing whether laws that infringe *Charter* guarantees are justified under s. 1, the government must establish that the law serves a pressing and substantial purpose.

⁹⁶ See Anne McGillivray, "R. v. K. (M.): Legitimizing Brutality" (1993) 16 C.R. (4th) 125 at 127-28.

analysis upon use of the defence by parents.⁹⁷

1) The Section 7 Arguments

In the *Foundation* case the Crown conceded that section 43 of the *Criminal Code* infringes children’s security of the person under section 7 of the *Charter*. The central section 7 issue, therefore, was whether the corporal punishment defence is consistent with the principles of fundamental justice. One of the several arguments raised by the Foundation in relation to the principles of fundamental justice was that the concept of “reasonable force” in section 43 of the *Criminal Code* is unconstitutionally vague.

The Supreme Court has recognized that fundamental justice under section 7 requires that criminal offences be defined with sufficient precision to avoid being declared void for vagueness. The “vagueness doctrine” has developed to ensure that people who will be subject to punishment if they do not follow the law are aware of the area or “zone” of risk in relation to the activity that is proscribed. Statutory provisions which create offences, therefore, must be sufficiently clear in relation to prohibited conduct to give people fair notice and to limit the discretion of law enforcement officials.⁹⁸ In accordance with this framework for the vagueness doctrine, the Foundation argued that the allusion to “reasonable force” in section 43 fails to provide adequate notice in relation to the kind of violent conduct toward children that will or will not constitute assault, further noting that the corporal punishment defence does not constrain discretion in enforcement.⁹⁹

In fact, it may have been a strategic mistake on the Foundation’s part to attempt to fashion their vagueness argument in response to doctrine that has developed in the context of analyses of criminal offences and attempts by people to challenge the constitutionality of those offences. Entirely different vagueness concerns attend section 43 of the *Criminal Code* which is unlike an offence section. The way in which section 43 sanctions violence by private individuals – parents and others – on helpless children makes it the last vestige in the our criminal law of archaic provisions allowing the corporal punishment by husbands, masters, and others of

⁹⁷ For a more extensive critical review of the *Foundation* decision, see Mark Carter, “The Constitutional Validity of the Corporal Punishment Defence in Canada: A Critical Analysis of Canadian *Foundation for Children, Youth and the Law v. Canada (Attorney General)*” (2005) 12 *International Review of Victimology* 189.

⁹⁸ *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 639-40, 93 D.L.R. (4th) 36.

⁹⁹ *Foundation*, *supra* note 1 at 95.

people who stood in positions of inferior legal and social status to themselves.¹⁰⁰

From the perspective of the children on whose behalf the vagueness argument was being pursued, and who are at the receiving end of the violence that section 43 sanctions, precision in relation to the “zone of risk” that marks “reasonable” violence from the kind that may be prosecuted as assault is irrelevant. The zone of risk issue is, however, highly relevant from the perspective of parents who want to engage in corporal punishment of their children and who want to avoid being prosecuted for assault. Accordingly, the *Charter* challenge of the corporal punishment defence that was pursued in the *Foundation* case on behalf of children was analyzed by the Court in a manner that places priority on the liberty interests of parents.

For children, what is objectionably vague about section 43 of the *Criminal Code* is not so much the level of violence that parents can get away with without being convicted of assault. What is vague is the entire rationale – or, more accurately, the lack of a rationale – for the on-going existence of the corporal punishment defence. Insofar as parental and family autonomy rights arguments can be made in favour of the corporal punishment defence,¹⁰¹ these arguments reflect the same other-determining character that should have excluded parental religious freedom from receiving constitutional recognition in the *B.(R.)* case.

Although it is not part of the section 7 analysis, McLachlin C.J.C.’s decision for the majority in the *Foundation* case provides some basis for an argument that children’s interests are, in fact, served by the corporal punishment defence. As part of her section 15 analysis, the Chief Justice recognized Parliament’s pragmatic decision to “declin[e] to bring the blunt hand of the criminal law down on minor disciplinary contacts ... [to avoid] the resultant impact [that] this would have on the interests of the child...”¹⁰² In fact, however, within the family context, police and prosecutorial discretion – rather than formal defences – are relied upon to deal with all other examples of minor engagement in conduct that is technically criminal.¹⁰³ Only corporal punishment has its own formal

¹⁰⁰ See Mark Carter, “The Corrective Force Defence (section 43) and Sexual Assault” (2001) 6 Can. Crim. L. Rev. 35.

¹⁰¹ I take this to be Ted DeCoste’s point in his critique of the *Foundation* decision with his concern that the majority’s attempt to define “reasonable force” challenges parental and family autonomy; see F.C. DeCoste, “On ‘Educating Parents’: State and Family in *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*” (2004) 41 Alta. L. Rev. 879.

¹⁰² *Foundation*, *supra* note 1 at 109.

¹⁰³ Consider the kidnapping example drawn from Dwyer, *supra* note 32; minor

defence which, in addition to its objectionable symbolism, has repeatedly excused seriously violent conduct against children regardless of the best efforts of courts of appeal to keep the defence restricted to only minor uses of force.

The extent to which the vagueness analysis in the majority decision in *Foundation* is characterized by a concern for parents’ interests rather than children’s rights is captured by McLachlin C.J.C.’s conclusion that the words of section 43 and the judicial treatment of that section allow “[p]eople ... to assess when conduct approaches the boundaries of the sphere that s. 43 provides.”¹⁰⁴ Again, from a child’s perspective, on whatever side of “the boundary” the conduct in question may fall – criminal assault or “merely” corrective force – that conduct would represent a criminal offence if the perpetrator of the violence was not the child’s parent.

The Chief Justice’s conclusion that section 43 allows parents to know when their conduct is unreasonable and therefore an assault is arrived after reviewing case law and other sources.¹⁰⁵ The weight of the majority decision’s vagueness analysis falls upon the words “by way of correction” and “reasonable in the circumstances.” McLachlin C.J.C. was able to find within the case law a “solid core of meaning” that brought to section 43 sufficient precision to allow it to withstand constitutional scrutiny.¹⁰⁶

In fact, attempts by Canadian courts to provide content to section 43’s vague terms and to restrict the use of the defence to minor forms of conduct have been notoriously unsuccessful. In her dissenting

“theft” from family members and “assaults” between siblings would also be examples. See also Mark Carter, “Corporal Punishment and Prosecutorial Discretion in Canada” (2004) 12 *International Journal of Children’s Rights* 41.

¹⁰⁴ *Foundation*, *supra* note 1 at 97.

¹⁰⁵ *Ibid.* at 101-02; these sources included the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, neither of which, as McLachlin C.J. points out, explicitly require signatory countries such as Canada to ban all corporal punishment of children.

¹⁰⁶ *Foundation*, *ibid.* at 105; see also Cheryl Milne, “The Limits of Children’s Rights under Section 7 of the Charter: Life, No Liberty and Minimal Security of the Person” (2005) 17 *Nat’l J. Const. L.* 199 at 208-09. Cheryl Milne was co-counsel for the Foundation. She emphasizes: “Despite ample evidence from cases at all levels of courts in the country that the interpretation of the phrase ‘reasonable force by way of correction’ was all over the map after over 100 years of jurisprudence, each level of court in the *Canadian Foundation* case was certain that it could interpret what was reasonable in the circumstances.”

opinion, Arbour J. referred to case law in which the corporal punishment defence was successfully invoked to justify the use of electrical tape, horse harnesses and karate moves which, along with other methods of “discipline” left serious welts and bruises on the subjected children.¹⁰⁷ Significantly, these examples occurred after both the Supreme Court of Canada’s decision in *R. v. Ogg-Moss*¹⁰⁸ and that of the Saskatchewan Court of Appeal in *R. v. Dupperon*.¹⁰⁹ Both of these decisions sought to put limits on the kind of conduct that would fall under section 43 and both of them should have prevented section 43 from applying to the conduct that was allowed in the case law referenced by Arbour J.

The failure of past attempts did not, however, deter McLachlin C.J.C. from trying again to consolidate the authorities so as to confine the defence to the least harmful forms of corporal punishment. The Chief Justice stated:

Generally, s. 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. ... [T]he conduct must be corrective, which rules out conduct stemming from the caregiver’s frustration, loss of temper or abusive personality...¹¹⁰

Among the objective factors identified by McLachlin C.J.C., the eleven-year window of vulnerability to corporal punishment that the majority leaves open for children ages two to twelve deserves special consideration for the extent to which it represents an absolute low point in the history of attempts to use the *Charter* to protect the rights of the most vulnerable people in our society. McLachlin C.J.C.’s concentration upon “current expert consensus” that children who are not yet one year old and those who are teenagers do not benefit from receiving corporal punishment allows for the implication there is some consensus among experts that corporal punishment can benefit children of the ages two to twelve. In fact, there is no such consensus¹¹¹ and the

¹⁰⁷ *Foundation, ibid.* at 49-56.

¹⁰⁸ [1984] 2 S.C.R. 173, 11 D.L.R. (4th) 549.

¹⁰⁹ [1985] 16 C.C.C. (3d) 453, 37 Sask R. 84 (Sask.C.A.).

¹¹⁰ *Foundation, supra* note 1 at 105.

¹¹¹ See e.g. Elizabeth Gershoff, “Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review” (2002) 128 *Psychological Bulletin* 539; and Murray A. Straus, David B. Sugarman, and Jean Giles-Sims, “Spanking by Parents and Subsequent Antisocial Behavior of Children” (1997) 151 *Archives of Pediatrics and Adolescent Medicine* 761.

majority’s avoidance of this point is astounding. As Cheryl Milne, co-counsel for the Foundation for Children Youth and the Law at all levels of the case states:

[T]he Court had no evidence whatsoever that the practice protected by the section was in any way beneficial to children. In fact, this was one of the points of agreement among the experts that was conveniently left off the list adopted from McCombs J.’s judgment at the lower court. ... The reality in this case was that the court focused, not on children, but on the adults who they deemed to be in need of protection from state interference.¹¹²

As a concession to parental rights claims, therefore, the majority decision in *Foundation* maintained the vulnerability to corporal punishment of the unlucky post-infant, preteen age group. Such vulnerability is maintained notwithstanding overwhelming evidence that at best the effects of corporal punishment are neutral, but that many children will be harmed by it, and none will benefit from it.

2) *The Best Interests of the Child*

As indicated above, Dwyer notes that the mere allusion to tradition operates as a prime rationale for the recognition of parental rights in the American constitutional context.¹¹³ In the Canadian context, the rejection by the majority of the “best interests of the child” as a principle of fundamental justice will stand as a classic example of a similar kind of common law traditionalism that has characterized the Supreme Court’s section 7 jurisprudence.¹¹⁴ This form of traditionalism asserts that the common law has an underlying rational structure¹¹⁵ which exists even when the principles that define that structure are not clear. Sir William Blackstone, who popularized this view of the common law in the seventeenth century, famously admonished that

¹¹² Milne, *supra* note 106 at 208-09.

¹¹³ In Dwyer, *supra* note 5 at 1424 the author states:

The main rationale the courts have offered for according rights of parental control protection under either the Free Exercise Clause or the Due Process Clause is simply that parents have traditionally held such rights. That some practice or rule has a long tradition does not, however, mean that it is in *anyone’s* interest; a tradition might persist even though on the whole it diminishes the well-being of all concerned parties, including those who appear to be its beneficiaries [emphasis in original; footnotes omitted].

¹¹⁴ See Carter, “Blackstoned Again,” *supra* note 18.

¹¹⁵ Sir William Blackstone, Knt., *Commentaries on the Laws of England, In Four Books* (Philadelphia: Robert Bell, 1771) vol. 1 at 70, where the author adds “[T]he law is the perfection of reason...it always intends to conform thereto, ... what is not reason is not law.”

deference needs to be shown to longstanding rules and practices that are rooted in the common law: “[T]hough their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted without consideration.”¹¹⁶

By equating the principles of fundamental justice with the basic tenets of our legal system,¹¹⁷ the Supreme Court necessarily connected this part of the *Charter* with the common law from which those tenets evolved. Therefore, in the search for the principles that comprise fundamental justice, a premium is placed upon those principles that are consistent with longstanding common law rules and practices. In the absence of certainty as to what the precise principles of fundamental justice are, the longstanding rules and practices themselves are treated as evidence of what they “must” be or, conversely, what they must not be. Principles will be ruled out as candidates for fundamental justice if they do not accord with long-standing legal rules.¹¹⁸

In the context of this common law reasoning strategy, the “best interests of the child” principle hardly stood a chance. Children’s rights advocates want the principle to receive constitutional status for the very reason that it was rejected. Our legal system has always had, and continues to have, many laws which are not consistent with the best interests of the child principle, including many of the laws that recognize parental authority over children.¹¹⁹ Therefore, the best interests of the child cannot be a basic tenet of our legal system because it would operate to undermine laws that maintain the longstanding

¹¹⁶ *Ibid.*

¹¹⁷ *B.C. Motor*, *supra* note 55 at 513.

¹¹⁸ See e.g. *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, 233 D.L.R. (4th) 415; *Malmo-Levine*, who was charged with possession of a narcotic, argued *inter alia* that the principles of fundamental justice include the “harm principle” according to which the state may not criminalize activity (and therefore deprive people of their liberty under s. 7) for engaging in activity that does not harm others. While the Supreme Court in its majority decision did not concede that the offence in question was harmless, it also reasoned that it was not necessarily unconstitutional for the state to criminalize activity that does not harm others. The Court provided examples of such offences (cannibalism, bestiality (at 635)) holding in effect that since these long-standing offences exist, the harm principle cannot be a constitutional restriction on the power of the state.

¹¹⁹ See *Foundation*, *supra* note 1 at 94-95; McLachlin C.J.C. suggested that, were the best interests of the child a principle of fundamental justice, the law would not subject parents to treatment that is bad for their children. Accordingly, the fact that “a person convicted of a crime may be sentenced to prison even where it may not be in his or her child’s best interests” indicates that the best interests of the child is not a principle of fundamental justice that restricts the state’s power to deprive parents of their liberty.

authority of parents over their children, including the ability of parents to assault their children.

The majority decision on the section 7 issues in the *Foundation* case provides children’s rights activists with something of a pyrrhic victory. McLachlin C.J.C.’s analysis accepted – as it had to in light of the crown’s concession of the point – that section 43 of the *Criminal Code* infringes children’s rights of security of the person. Also, although the majority dealt cavalierly with the “expert evidence” issue, nothing in the decision of the majority says directly that corporal punishment is in the best interests of children. We are left, therefore, with a uniquely Canadian constitutional anomaly. The *Charter* is not offended by the state’s permission to parents to engage in violent conduct against their children, even though the courts themselves concede that corporal punishment infringes the security of children’s persons and it is not in children’s best interests to be subjected to it. Most tragically of all, no one on the Court denied that corporal punishment is entirely unnecessary and preventable.

3) How the Corporal Punishment Defence Advances Children’s Equality

The Foundation’s best argument coming into the *Foundation* case seemed to be that the corporal punishment defence under section 43 of the *Criminal Code* is a form of age discrimination that offends section 15 of the *Charter*. In the result, however, the powerful ideology of the traditional family and parental autonomy operated, once again, to deny children the status of individuals, the core value of the human rights project that the *Charter* is expected to advance.

Section 15 (1) of the *Charter* provides:

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 ... age....¹²⁰

The majority decision in the *Foundation* case discussed the corporal punishment defence within the context of the four contextual factors that were established for section 15 analysis in *Law v. Canada (Minister of Human Resources Development)*.¹²¹ McLachlin C.J.C. accepted that the

¹²⁰ *Charter*, *supra* note 2, s. 15(1).

¹²¹ [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1; the four contextual factors are relevant to the question as to whether a legal distinction that is based on one of section 15’s enumerated or analogous grounds represents a violation of human dignity which is the *sine qua non* of discrimination. Laws are presumptively discriminatory if they exacerbate the pre-existing disadvantage that is suffered by a claimant or the group to which a claimant

corporal punishment defence exacerbates children's pre-existing disadvantage, serves no ameliorative purpose and deals with an interest – children's security – which warrants constitutional attention.¹²² In the majority's estimation, however, the corporal punishment defence is not discriminatory because it corresponds with children's actual characteristics or circumstances.

Predictably the characteristics or circumstances that prevent children's unique vulnerability to legally-sanctioned violence from being characterized as a form of discrimination are not their own interests, but those of their parents. In what can only be seen as a subversion of the language of substantive equality, the Chief Justice characterized the Foundation's demand that the law should not make children more vulnerable to violence than anyone else as a faulty "equation of equal treatment with identical treatment, a proposition which our jurisprudence has consistently rejected."¹²³ It is true that from its earliest decision on the nature of discrimination under section 15¹²⁴ the Supreme Court recognized that equality sometimes demands different treatment. This does not mean that equality *never* requires the same treatment. The kind of different treatment that does not offend notions of substantive equality, however, is ameliorative in nature, aimed at improving the situation of disadvantaged groups.¹²⁵ Nothing in the philosophy of substantive equality allows that disadvantaged groups should be treated more harshly than others, so as retain the privileges of more advantaged groups.

Ultimately, even the majority was not able to sustain the fiction that the corporal punishment defence serves the interests of children's equality. Using the kind of balancing of interests analysis that belongs only under section 1 of the *Charter*, the majority explained that the corporal punishment defence is the price that children alone have to pay in order to avoid "ruining lives and breaking up families."¹²⁶ While McLachlin C.J.C.

belongs. The second and third factors weigh against the potential discriminatory character of a law. Laws that treat people differently may do so in response to the actual circumstances or characteristics of those people. Also, people may not receive equal benefit from a law because it is designed to or has the effect of assisting less advantaged groups of people. The fourth consideration under the *Law* test for discrimination is whether the interest that is affected is significant enough to warrant constitutional attention.

¹²² *Foundation*, *supra* note 1 at 110-11.

¹²³ *Ibid.* at 109.

¹²⁴ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

¹²⁵ Martha Minow, *Making All the Difference* (Ithaca: Cornell University Press, 1990).

¹²⁶ *Foundation*, *supra* note 1 at 113.

refused to find that section 43 of the *Criminal Code* offends section 15 of the *Charter*, she made it clear that the “unique circumstances” that justify the kind of different treatment allowed by the corporal punishment defence are the circumstances not of children, but of the parents who want to use force against them.

8. Conclusion

From the perspective of the counsel for the appellant Foundation, the Supreme Court of Canada’s decision in the *Foundation* case “left a huge gaping hole in children’s rights jurisprudence.”¹²⁷ Responsibility for this hole in the protection that the *Charter* affords to children is largely attributable to the direct and indirect constitutional protection that the Supreme Court has been prepared to provide to the concept of parental freedoms and rights. The impact of the direct protection of parental claims to determine the lives and threaten the security of their children that received narrow majority support in *B.(R.)* was minimized in that case by the limiting power of section 1 of the *Charter*. The *Foundation* decision, however, fully realized the negative potential for children’s rights of these other-determining parental claims which had been unfortunately introduced into the Canadian constitutional debate almost a decade earlier.

Drawing upon the work of James G. Dwyer, I have argued that not only has it been a mistake to give parental rights over children constitutional protection, but also that a reconceptualization of parenting activity as a privilege rather than a right could respond to both the interests of parents and the rights of children. The experiment with constitutionalized parental rights claims is still in its infancy. The most extreme claims for direct and indirect recognition of parental rights have so far garnered only limited support from the Supreme Court and have produced dissenting opinions that have seen the claims for what they are: throwbacks to the era of status-based property rights claims in other human beings.

With respect to the case law that has been discussed in this article, the thinness of the majority decision on the freedom of religion point in *B.(R.)* suggests that, in the future, some of the considerations that were dealt with under section 1 of the *Charter* might be imported back into the first stage of section 2(a) analysis. This might signal a return to recognition of the internal limit on the scope of freedom of religion that Dickson C.J. recommended in *Big M*.

¹²⁷ Milne, *supra* note 106 at 210.

The *G.(J.)* case¹²⁸ may provide something of a template for understanding the relationship between legitimate parental claims and children's rights. The objectionable characteristic of the parental rights claim that has been focused on in this article is that it presumes to allow the determination of other people's lives, which should exclude parental rights from the protection that the *Charter* guarantees to individual rights. In fact the parent's application in *G.(J.)* may be distinguished from these other-determining kinds of claims. The applicant in *G.(J.)* did not argue that she had a right to determine the outcome of a wardship hearing, but only that she had a right to be allowed to participate in it as fully and effectively as possible which, under the circumstances, required the provision of legal counsel to the parent. *G.(J.)* demonstrates that some claims based on the fact of parental status can be entirely self-determining. More to the point, although framed in terms of a parental rights claim, the provision of counsel to a parent to allow her to participate fully and effectively in a wardship hearing may be understood as an indirect way of realizing the children's right to have their parent's claim to look after them fully considered. Ideally, a scheme that recognized parental privileges and children's rights would allow a parent to make this kind of claim as the agent of the child.

Very little that is hopeful can be drawn from the *Foundation* decision apart from the pyrrhic victory mentioned earlier, whereby children's rights advocates can at least claim that a majority of the Supreme Court recognized that children's rights of security of the person are infringed by the corporal punishment defence and that the defence is not in children's best interests. Unfortunately we also have to accept that our constitutional order is currently indifferent to these findings. One can only hope that the *Foundation* case, with its majority support for a version of children's rights that are circumscribed by parental claims, will come to be seen as an unfortunate anomaly in our progress towards a brighter future where children are recognized as full rights-bearing members of our community and recipients of *Charter* protection.

¹²⁸ *Supra* note 4.