

Centre for Cultural Renewal
Centre pour un Renouveau Culturel



Discussion Paper #3

Protecting Parental Liberty in a Child-Centered
Legal System

by Cindy Silver

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Preface and Summary

Throughout history the relationship between the state and the family and the role and duties assigned to each has been much debated. Some have seen the family as a servant of the state while others have seen the state's role as essentially to provide families with the security they need to do their work as the primary unit for raising children as future citizens. In his book, *The Socialist Phenomenon* (New York: Harper & Row, 1980), Igor Shafarevich, once a professor of mathematics at Moscow University, catalogued the historic tendencies of a certain type of utopian socialism which sought a perfected or utopian state it believed could be achieved if only society was restructured in certain ways. Shafarevich traced this type of socialism through antiquity, the heresies of the Middle Ages and the Reformation, the utopian writings of philosophers such as More and Campanella, the state socialism of the Inca Empire, the 18th Century Jesuit state in Paraguay and the ancient Orient. Over this wide expanse of time and place, Shafarevich noted three trajectories common to utopian restructuring: the abolition of private property, the abolition of religion and the abolition of the family. One does not need to become paranoid in order to notice that in Canada today these three institutions are, in fact, under considerable strain. Particularly with respect to the family, there are signs that it is once again time to renew the discussion about the proper role of the family in a free and democratic society.

There is always a tension between the state and the parts that make it up. The state and its institutions must always be careful to facilitate the function of the family without usurping its proper role. The state has a role to play in ensuring that the lives of children are not threatened by neglect or abuse but must be careful not to tread on the independence of the family. The state exists, so the principle of subsidiarity tells us, to facilitate and assist the smaller units, not to occupy their proper "space" in society.

In past decades, ideological camps have arisen which have called, on occasion, for the abolition of any demarcation between the family and the state. This idea, as old as Plato, threatens the notion that the family is, and ought to be, the first "school of virtue" for citizens. Unfortunately, as virtue itself has slowly evaporated from consciousness (a result of its gradual disappearance from formal education itself), the family's role in the teaching and propagation of a coherent understanding of virtue and character has also become misty. When key aspects of social life cease to be argued for, debated and taught, it is only a question of time before they become threatened by acts of commission or by neglect.

There is growing evidence that this tension between the state and family may be in need of examination and correction at this time. Such correction will involve, as part of its task, the re-articulation of the family, its nature and its



proper place in civil society. If this task of description or re-membling does not occur, there is a risk that those who seek deliberately to weaken the family will triumph, not because their arguments are better but because the rest have lost any sense of what the family's proper role and duties are and how to argue for them. But, prior to any proper prescription, one must first be convinced that the diagnosis is sound.

In this paper Vancouver lawyer Cindy Silver, who has followed developments in this area for some years, has chosen to examine the effects of recent development in national and international law that touch on the issue of "family autonomy". She notes the importance of seeking "the best interests of the child" in certain circumstances but sounds a note of warning lest the ambit of such inquiries extend beyond those where the lives of children are actually at stake. It is not the state's place, for example, to make determinations about the religious education a child gets from its family nor should a family's religious beliefs be a relevant factor in "child apprehension" cases. It will come as a considerable shock to some people to realize that just this sort of inquiry has occurred in Canada in recent years.

We do not need to subscribe to the view that the family is under threat of imminent abolition in Canada in order to decide that it is time to start asking some hard questions. First amongst these are questions that relate to how we are to protect family autonomy in a society that is given over more and more to forms of state control and state regulation that allow less and less scope for the exercise of meaningful family autonomy. It is useful to reflect, for example, on whether parents in Canada at the present time have an effective choice about the type of curriculum their children are going to be taught from in systems supported by their own tax dollars. How accountable is the public school system and what can be done to make it effectively accountable? While these questions are not dealt with in this paper, they arise when its central theme is considered more broadly. Effective family autonomy is not something we can take for granted even within existing institutions in Canada and, as Silver shows in her paper, there is now a sufficient basis in documented cases for politicians and policy makers to take positive steps to ensure that valid concerns about the welfare of children are not used in ways which inject the state and the courts into areas they have no proper place to enter.

Considerable work will be necessary in the future if we are to discover what aspects of civil society need to be strengthened so that families will have the resources they need. It is hoped that by showing some key recent developments that touch on the place of family autonomy in Canadian society, this paper will contribute to a broader discussion of the issues so that the state and the family can begin to occupy their proper places.

1. About the Author: Cindy Silver

Cindy Silver obtained a Bachelor of Arts *cum laude* from the University of Saskatchewan, a law degree from the University of British Columbia and was called to the British Columbia Bar in 1992 as a Barrister and Solicitor. She has worked as a consultant on issues related to public education and matters relating to the status of the family in society.



2. Family Autonomy and the Charter of Rights: Protecting Parental Liberty in a Child-Centered Legal System Protecting Parental Liberty in a Child-Centered Legal System

by Cindy Silver

Recognition of due process and the retained rights of parents promotes values essential to the preservation of human freedom and dignity and to the perpetuation of our democratic society. The family is the principal conservator and transmitter of cherished values and traditions. Any invasion of the sanctity of the family, even for the loftiest motives, unavoidably threatens those traditions and values.

Family autonomy helps to assure the diversity characteristic of a free society. There is no surer way to preserve pluralism than to allow parents maximum latitude in rearing their own children. Conversely, there is no surer way to threaten pluralism than to terminate the rights of parents who contradict officially approved values imposed by reformers empowered to determine what is in the 'best interests of the child.'¹

Canadians live in a world where post-modern human rights are now a driving force, challenging the philosophical and legal traditions on which our social institutions are based.² This is nowhere so evident as in the radical restructuring of the roles and relationships of the family and the state, while the state takes an evermore active role in protecting child rights as defined under the United Nations Convention on the Rights of the Child.³ This paper discusses the impact on the family of state attempts to both define and protect "the best interests of the child." In particular, it brings to light internal contradictions in child-rights jurisprudence, particularly when the state's power collides with the parent's right to liberty under Section 7 of the Charter of Rights.

This paper discusses recent ideological and legal developments that challenge the a priori right of parents to nurture, maintain and educate their children free from undue interference of the state. It reviews the macro-social, philosophical and legal traditions that underlie Canada's long-standing policy of respecting the autonomous nature of the nuclear family. It examines changes in federal and provincial policies as a result of Canada's commitment to the United Nations Convention on the Rights of the Child, the plan for which is contained in *Brighter Futures: Canada's Action Plan for Children*.⁴ It discusses the role that non-governmental organizations (N.G.O.s) currently play in initiating policy changes and how this might be affected by a recent Supreme Court of Canada decision that places parental rights squarely within Section 7 of the Charter of Rights.



Deconstructing the Family, Promoting the Child

As Canadian law and policy moves from an implicitly Christian framework to an explicitly secular one, the conceptual roles and legal rights of family members are being redefined. The once implicit right of parents to raise their children free from the undue intervention of the state has become obscured, while the individual rights of children have become a primary focus. Before the Charter, family autonomy and parental rights enjoyed a quasi-constitutional legitimacy. This was derived primarily from the Canadian Bill of Rights, the preamble of which states:

The Parliament of Canada affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions.

Affirming also that men and institutions remain free only when freedom is founded upon respect for social and spiritual values and the rule of law.

As a constitutional document, the Charter of Rights is now primary in determining human-rights issues and, in practical application, prevails over the Canadian Bill of Rights. The Charter's preamble, now the definitive purpose statement for the protection of human rights in Canada, is much shorter and has deleted references to the family: "Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law."

By deleting express reference to the family, the Charter of Rights removed from plain view the grounds for constitutional protection of parental and family rights. This omission has contributed significantly to the demise of family autonomy and the devaluing of the family in law and legislation. Although the Charter failed to mention the family, it did specify age as a prohibited ground for discrimination within Section 15(1), a characteristic not mentioned in the anti-discrimination provisions of the Canadian Bill of Rights. Section 15(1) states:

Every individual is equal before and under the law and has the right to the equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

The inclusion of age as a prohibited ground for discrimination effectively changed the constitutional status of children to one of prima facie equality with adults. Although age-based challenges have proved unlikely to succeed, the fact remains that any legislation that distinguishes children from adults based on age is vulnerable to challenge under Section 15 (1).

Even as the Charter was being developed and implemented in Canada, there was a growing sense elsewhere that the rights of children were being ignored. Initially there was concern that, at the very least, children should be guaranteed protective rights, including the right to proper nutrition, basic medical care, hygiene and literacy, and the right to be protected from child labor, child prostitution, and the atrocities of war. Then, as child-rights theory became more sophisticated, human-rights groups included their concern that



there was an 'epidemic' of family violence, including child abuse, in the developed world.⁵

Child-rights advocates argued that abuse within the family was rooted in and perpetuated by the hierarchical authority structure of the traditional family and by the veil of privacy that discouraged government intervention in family matters. The solution, they believed, was for the state to shift the balance of power in the parent-child relationship through policies that would define and limit the power of the parent while increasing the power of child. This would necessarily include changing the legal status of the child from an integral part of the family unit to an individual rights-possessor, and then conferring on the child explicit decision-making choice rights.

In 1979, the United Nations (U.N.) proclaimed the International Year of the Child, an event that set in motion a ten-year process that culminated in the drafting of the United Nations Convention on the Rights of the Child. The final document reflects an attempt to address all of the concerns raised by child-rights groups. As a result, the U.N. Convention confers both protective rights, and choice rights, thereby establishing a presumption that children should be able to act autonomously whenever possible.

The Convention, which Canada ratified in December, 1991, includes the following choice rights:⁶

Article 13 - the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds...whether orally or in writing, in the form of art...or through any other media of the child's choice.

Article 14 - the right to freedom of thought, conscience and religion.

Article 15 - the right to freedom of association.

Article 16 - the right to privacy.

Article 19 - the right to be free from all forms of physical and mental violence.⁷

The U.N. Convention and the Charter of Rights have become powerful companions for defining the scope of child-rights. Together, these documents function as the reference point for the development of child-rights law in Canada. Both documents emphasize the state's role in protecting the autonomy of the individual against the institutions of society. In functional terms, this has recast the state and its courts as child-advocate against parents.

In a recent article, Iain Benson, Executive Director of the Centre for Cultural Renewal, discusses the theoretical and functional chaos that is being created as our society attempts to separate the technique of the academic disciplines from a shared understanding as to their purpose within the social good.⁸

Recent developments in child-rights law illustrate the problem Benson describes. The technique, or theory, that defines child rights has expanded and become more sophisticated, while a shared understanding as to the purpose of child rights as components of the social good has become increasingly narrow. This separation of technique and purpose largely explains the present confusion as to the goals of child-rights law reform, not only among academics but among the offices of government and the courts. Having severed the connection between its technique and its purpose, child-



rights theory, policy and law are in chaos; our society is trying to define child rights without clear reference to family autonomy or parental rights, and without deference to the best interests of society. This is a no-win situation, analogous to placing children in a speeding vehicle on an unmarked road with no clear destination.

Constitutional Challenges and the Role of N.G.O.s

A brief review of a few recent cases best illustrates the present chaos in child-rights law reform. In May 1995, in the case of *R. v. Carmen M.*, the Ontario Court of Appeal struck down Section 159 of the Criminal Code after the defendant argued successfully that this section violated Section 15(1) of the Charter of Rights.⁹ In this case, the defendant was charged under Section 159 for engaging in anal sex with a fourteen-year-old youth. Section 159 made it a criminal offense to engage in anal sex unless both parties consented and were at least 18 years-old or married. In contrast, the age of consent for heterosexual sex was 14 years. Focusing on the discrepancy in the law regarding the age of consent, the accused argued that this section violated the equality rights of youth to consent to anal sex after age 14. The Crown conceded that the age distinction created by Section 159 was discriminatory, but argued that the distinction was justified under Section 1 of the Charter. They argued that the section had a legitimate objective in protecting young persons from engaging in a specific form of sexual activity, anal intercourse, for which there were increased risks of physical and psychological problems, including the transmission of HIV. However, Madame Justice Russell, relying on the recent federal court decision in *Halm v. Canada*, struck down the law on the grounds that it discriminated on the basis of both age and sexual orientation.¹⁰ In *Halm v. Canada*, Mr. Halm was denied immigrant status and faced extradition after authorities learned that he had recently failed to appear for sentencing after being convicted of ten sex offenses in New York State, including five counts of sodomy and three counts of endangering the welfare of a child.¹¹ Halm appealed Canada's decision to deport him back to New York State for sentencing. He argued that Section 159, the Canadian equivalent of the charge for which he had been convicted, contained an age discrepancy that violated Section 15(1) of the Charter, therefore rendering the section unconstitutional and invalid. He argued that, in the absence of Section 159, the acts for which he was convicted would have been legal if they had occurred in Canada, therefore the immigration officials lacked the grounds necessary to deport him.

In *Halm v. Canada*, Madame Justice Reed held that Section 159 violated the Charter on both the enumerated ground of age and the analogous ground of sexual orientation. Like Madame Justice Russell in *Carmen M.*, she rejected the government's argument that the section served three legitimate objectives, reinforcing moral precepts, inhibiting youth from engaging in anal sexual activity and protecting youth from the increased risk of HIV transmission.

In rejecting the first objective, Madame Justice Reed stated:

I agree that there has always been a close connection between the Criminal Code and moral values. That does not mean, however, that today in our pluralistic society, moral values alone can justify making an activity criminal. If it could, one immediately has to ask, by whose moral values is the state to be guided? I am not persuaded that in a free



and democratic society it is justifiable to make an activity criminal merely because a segment, indeed maybe a majority, of the citizenry consider it to be immoral.¹²

Responding to the second and third legislative objectives, to discourage anal sex and prevent HIV transmission among youth, Madame Justice Reed stated:

All of the evidence indicates that AIDS is spread by a number of activities (sharing needles among drug users, blood transfusions, both anal and vaginal sex). In absolute numbers, it would appear that anal sex is the least frequent method of transmission. It is not rational to make one such activity a criminal offense and not the others. Also, while unprotected anal sex may be riskier, as a potential conduit for HIV transmission than vaginal sex, in both cases it is unprotected sex which is the cause, not the activity itself.¹³

In both *Halm* and *Carmen M.*, the government did not appeal, notwithstanding the fact that a Quebec court facing the same issue that year upheld Section 159 in a well-reasoned judgement.¹⁴ Several child-rights groups, including a government-funded N.G.O. called Justice for Children and Youth, intervened in *Carmen M.* to strike down Section 159. The final ruling of the court was described by the intervenors as a victory for the right of youth to make sexual choices and to have equal legal access to all sexual activity.

It is difficult to understand how this could be construed as a significant advance for children's rights as contemplated by early proponents of protective rights for children. However, the issue in this case was one of choice rights and was based on an unqualified concept of youth as individual rights-possessors. This accounts for the complete failure of the court to justify its decision in terms of the "best interests of the child," or to refer anywhere to the autonomy of the family or to the interests of parents in policy issues that could potentially effect their children.

Justice for Children and Youth is one of several child-rights N.G.O.s presently playing a leading role in child-rights law reform in Canada. This is unsettling given that the ideology of many influential child-rights N.G.O.s is not only inordinately child-centered, but in many cases, antipathetic to established authority. The focus of these organizations is too often on defending the child against authority, whether exercised by social agents or parents.

The activities of organizations such as Justice for Children and Youth illustrate the functional chaos that is resulting as the Canadian government funds and mobilizes N.G.O.s in order to promote child rights without a contextual framework that gives due weight to parental rights. Since 1992, the federal government has allocated \$459 million toward conforming Canada's law and policy to the provisions of the U.N. Convention. Part of this amount was used in 1992 to create the Children's Bureau of Health Canada, whose mandate is to "ensure consistency and coordination for all federal programs and policies for children."¹⁵ From its inception, the Children's Bureau has worked with federal and provincial N.G.O.s to develop and implement Brighter Futures: Canada's Action Plan for Children, which is a massive effort "to work through all sectors of society - business, labor, communities, other governments, N.G.O.s, families and individuals -- to improve the lives of children."¹⁶ Most state intervention in the parent-child relationship occurs at the provincial level. Provincial legislation empowers social workers to undertake measures



that intrude on the autonomy of the family and the rights of the parents. For example, social workers are empowered to conduct inquiries and petition the court for a variety of orders with regard to a family under investigation. The court may give child protection authorities supervisory powers over the family, including unannounced "spot visits" to the family home, the power to interview children on demand or in the absence of a parent, and the power to require a suspect parent to attend one or more counseling programs. As well, the authorities may seek an order restraining a parent from being alone with the child, or having any direct contact with the child, or returning to the family home. It may make recommendations to the court regarding parental access to, and alternative placement of, the child. Finally, the child protection agency may seek an order for wardship of the child.

The powers of government authorities in child protection proceedings are manifold compared to those of the parent. The state, with all of its personnel and money, is pitted directly against the parent. Yet the procedural safeguards are minimal. The cases indicate that even though protection authorities exercise quasi-judicial powers, the standard of proof in child protection proceedings is, at best, based on a balance of probabilities.¹⁷ Under provincial law, all that authorities require before initiating an intrusive investigation of a family is one complaint by an anonymous third party. Under provincial legislation, a child may be apprehended if the social worker decides they fit within the catch-all term a "child in need of protection". Although this term is well defined by the legislation, unclear procedural and evidentiary standards often mean that state interference in the family is based on assumptions rather than facts, leaving a disquieting margin for error.¹⁸ The powers of social workers might be necessary, but it is imperative that these powers expressly require not only justification and responsibility but procedural safeguards as well.

The following cases illustrate the tragic impact this can have on a family. Until February, 1995, Charles and Sandra Butler home-schooled their children, ages eleven, eight and five.¹⁹ According to Newfoundland law, parents are allowed to home-educate their children as long as the curriculum they use is accredited by the district school board. The Butlers followed a home-school curriculum developed by the Seventh Day Adventist Church, one that the school board had refused to accredit. The family had no past history of neglect or abuse.

In February 1995, the Department of Social Services decided that the Butler children were in need of protection as contemplated by the province's Child Welfare Act on the ground that the Butlers had neglected to provide adequately for the education of their children. However, within hours of apprehending the children, the Butlers realized that their five-year-old was not required by law to begin school until September; therefore, the grounds for apprehension could not rightly apply to her. Not wanting to release any of the children without further investigation, Social Services reapplied to the court to amend the application. Four days after the initial apprehension, Mr. Justice Handrigan granted Social Services four months temporary custody of the children based on an expanded list of grounds. These included, not only concerns about the education of the children, but also concerns about the children's health and medical care, the possibility of physical and / or mental abuse of the children and the religious zealotry and fervor of the parents. The Butlers retained counsel and appealed the order on several grounds: that



the judge applied an improper standard of proof, that he relied on inadmissible evidence and hearsay, and that the hearing violated the principles of fundamental justice in that the appellants were unrepresented, were not properly informed of the nature of the hearing, and were not given an opportunity to call evidence.²⁰ On appeal, Dunn J. reviewed the evidence that the trial judge had relied on:

[The Butlers] are adherents to a breakaway sect of the Seventh Day Adventist Church. They associate with people of like religious views and practice a lifestyle which may be regarded, by some, as out of the norm. They are vegetarians and follow a strict dietary regime. The children are permitted two meals a day. They are not allowed liquids with their meals or for one hour prior to and one hour after same. The children have not been immunized as recommended by the Department of Health, Newfoundland. Instilling certain religious beliefs in reference to the Bible is fundamental to the lifestyle of the appellants. For example, they believe that the end of the world is fast approaching and are teaching their children to expect and prepare for same.

In December 1995, the court granted the Butler's appeal and ordered that the children be immediately returned to their parents. In her conclusions, Dunn J. found that the Butler's parental rights under Section 7 of the Charter of Rights had been violated. She concluded that the children's academic abilities seemed normal for their age, they appeared well-adjusted, were physically healthy, were rarely sick and that there was absolutely no evidence that the parents physically or mentally abused the children. In response to the Butler's claims of fundamental and procedural injustice, Dunn J. stated:

Where parental rights to custody of children and the possible deprivation of such custody are at issue, proper procedure and reasonable notice are essential to the process. The application was not conducted in a manner in keeping with the principles of fundamental justice and on this basis alone I would have been prepared to grant the appeal.²¹

Although the Butler children were eventually returned to their parents, they had spent more than six months in foster care. The devastating results that this has had, and will continue to have, on the family and on their relationship to their community cannot be underestimated.

The Butler's case is not isolated. Similar incidents are occurring across Canada. In June 1995, for example, a Nanaimo couple's three children were apprehended by Social Services on grounds later described by an attending psychiatrist as diagnostic speculations. The event occurred after Terry and Lisa Neave's two-year-old daughter, Karianna, was transferred from Nanaimo General Hospital to B.C. Children's Hospital in Vancouver for testing and treatment of a choking disorder. One day before the transfer, the Nanaimo pediatrician taught Mrs. Neave a jaw-thrust manoeuvre that would clear her daughter's airway when she was choking. This manoeuvre involved raising the child's jaw with a hand at her neck.

At Children's Hospital, Lisa and Karianna Neave were assigned to a double room, which they shared with another mother and her sick child. The mother



observed Mrs. Neave perform the manoeuvre during Karianna's choking episodes, suspected that this was abuse and reported her suspicions to hospital authorities. Soon after, the head of the hospital's child protection unit (C.P.U.), together with a social worker, questioned Lisa Neave, at which time she explained her doctor's instructions. The C.P.U. director did not contact the Neave's pediatrician or family doctor because, as she later told the court, it was not her responsibility to do a thorough investigation. She diagnosed Mrs. Neave as having Munchausen by Proxy Syndrome (M.P.S.), an unusual form of child abuse in which a parent fabricates an illness for their child and allows multiple unnecessary investigations and treatments. The next day, social services apprehended all three of the Neave's children. Later, in family court, the judge accepted the social worker's recommendation that Mrs. Neave was high-risk and that the children should be temporarily placed with their grandparents. The order allowed Mrs. Neave to visit her children under supervision, but she could not be alone with them. The only evidence before the court was the C.P.U. director's diagnosis and an affidavit by Mrs. Neave's cousin, a social worker, who stated that Mrs. Neave was "emotionally troubled and a good person struggling with huge problems...who may very well be crying out for help in the only way she knew how." At trial, the cousin conceded that he had never seen Mrs. Neave do anything in his presence that could be misconstrued as abuse. In fact, no one had ever seen Mrs. Neave abuse her children. In the meantime, the Neave's family doctor and pediatrician tried to contact the acting social worker but reported that their calls were not returned. In December, the children were allowed to come home, with Mr. Neave acting as supervisor over his wife. In January, the results of a court-ordered psychiatric assessment of Mrs. Neave concluded that Mrs. Neave's only psychological problem was caused by the apprehension of her children and by an R.C.M.P. interrogation shortly thereafter. In February, the Ministry of Social Services applied to the court to have all orders against Mrs. Neave set aside. At the time the orders were set aside, the Neave children had lived away from home for five months and the Neave's legal bills exceeded \$10,000.

As these cases illustrate, the margin for error in Canada's child protection laws place families in a vulnerable position. This is not to say that the state has no role in protecting children. Society has a vested interest in ensuring that a child's best interests are served. There are times when the state's power to intervene in cases of genuine physical or sexual abuse or neglect are crucial. A parent's rights do not trump the rights of their child. Neither are the two necessarily opposed. The rights of the child must be paramount. However, where the parent and the state disagree on the child's best interests, the law must begin with the presumption that the parent, and not the state, is right. Beginning at this point places the onus on the state to rebut the presumption according to the principles of fundamental justice. For example, when a parent administers corporal discipline in a manner that a child-protection worker decides is abusive, but which the parent believes is appropriate in the circumstances, it should be presumed that the parent is in the best position to assess the situation and act with the child's best interests in mind. In *Ogg-Moss v. R* (1983), 41 C.R. 297 (S.C.C.), the Supreme Court concluded that if corporal discipline was administered reasonably, and was intended for the benefit and education of the child, this constitutes legitimate discipline falling within Section 43 of the Criminal Code. A chronological study of the case law suggests that the risk of successfully invoking Section 43 to



justify physical injury to a child is steadily diminishing. Prosecutors and judges are more aware of child abuse and are more responsive to protecting children's rights than were earlier courts. This observation was recently made by one of Canada's leading authorities on family rights, Queen's University law professor Nicholas Bala. In a presentation made to the Consultation on Section 43 of the Criminal Code, Professor Bala stated that:

The law and its application has clearly changed in the last two or three years. Court decisions interpreting Section 43 are moving away from tolerating the levels of physical injury to children cited from earlier years. While there are differences between judges and even between the courts of appeal of the different provinces, positive change may best come about through the development of case law to reflect changing attitudes toward the acceptance of severe corporal punishment of children.²²

It then becomes incumbent on the child protection worker to rebut the presumption with evidence that is directly probative of the ultimate question, is this child in need of protection as contemplated by the legislation? Speculative allegations would not in and of themselves be sufficiently probative to justify apprehension.

Placing family autonomy and parental rights squarely within Section 7 of the Charter of Rights would be a significant step toward ensuring a more equitable child-protection system. Deference to parental rights would not detract from the rights of the child; it would protect the child against the trauma that accompanies wrongful apprehension and temporary placement away from home and family. In addition, it would provide some protection to parents against the formidable powers of the state, which are sometimes exercised in ways that do not comply with the principles of natural justice.

In December 1994, for example, the Children's Aid Society (C.A.S) began to investigate an Ontario family after someone in the change room of a local swimming pool noticed a bruise on the boy's bottom. A C.A.S worker requested that she be allowed to come into the family home and examine the child. The parents refused, insisting instead that they would have their family doctor examine the child as quickly as possible and submit a report to the C.A.S. The doctor's report indicated that there was a transient bruise on the boy's bottom. The father readily admitted to the C.A.S. worker that he had spanked his son after the boy kicked the family cat and then refused to go to his room. The father explained that he had carried his son, kicking and screaming, to the boy's bedroom, where he proceeded to smack the boy's bottom with a belt. The father acknowledged that the spanking in question was excessive and that bruising a child was not within the purview of reasonable corporal discipline. However, he maintained that this was an isolated incident, unlikely to recur.²³

The C.A.S. tried to have the couple sign a contract agreeing to refrain from using corporal punishment to discipline their children. The couple had six children between one and nine years of age. This was the first allegation of abuse against either parent. The couple refused, stating that they believed corporal punishment was an appropriate form of discipline reserved for instances of blatant disobedience or defiance. They retained a lawyer and attempted to negotiate with the C.A.S. The next day, with no advance warning to the father, two police officers arrested him at his place of work. In



the presence of his co-workers, the father was charged with assault causing bodily harm and assault with a weapon. He was handcuffed and taken into custody pending a bail hearing.

In May 1995, six months and eight court appearances after the father was charged, the Crown, without explanation, asked the court to stay the proceedings. By this time, the family had incurred approximately \$8,000 in legal fees and much emotional stress. As a result of the ordeal, the husband believed his opportunities for advancement with his employer had been seriously undermined.

This case, like *Butler and Neave*, raises questions about fundamental justice and procedural fairness in child-protection cases. Much of what occurred would not have, if family autonomy and parental rights were clearly understood to be within the scope of Section 7 of the Charter.

The theoretical and functional chaos that characterizes much of Canada's child-rights policies is due in large part to Parliament's failure to ensure that the Charter of Rights expressly protects family autonomy and parental rights. In order to reintroduce the contextual purpose into child-rights theory, policy-makers must recognize again that protecting family autonomy is foundational to ensuring the best interests of the child.

Recently, the Supreme Court of Canada took steps to initiate the recognition of family autonomy by importing American jurisprudence that supports the inclusion of both parental rights and family autonomy as protected liberties within the meaning of Section 7 of the Charter.

What is Family Autonomy?

In 1982, the Utah Supreme Court provided that family autonomy should be among the primary objectives of the state:

The parental liberty right at issue...is fundamental to the existence of the institution of the family...Recognition of the due process and retained right of parents promotes values [that are] essential to the preservation of human freedom and dignity and to the perpetuation of our democratic society. The family is the principal conservator and transmitter of cherished values and traditions . . . Any invasion of the sanctity of the family, even with the loftiest motives, unavoidably threatens those traditions and values.²⁴

Family autonomy is recognized and protected in several international human-rights documents of which Canada is a signatory. For example, the Universal Declaration of Human Rights provides:

Art. 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.... Everyone has the right to the protection of the law against such interference.²⁵

Similarly, the International Covenant on Civil and Political Rights provides:

Art. 23.1 The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.²⁶

As referred to earlier, the Canadian Bill of Rights states in its preamble:



The Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions.²⁷

In addition, the United Nations Convention on the Rights of the Child states in its preamble:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities in the community.²⁸

The pro-family provisions of these documents reflect an age-old philosophical tradition that it is in the public interest to support and protect the family. This tradition has developed out of the commonly-held belief of societies throughout history that the family is the principal social institution, uniquely equipped to carry out various functions that advance the public interest (including care for the physical, economic and relational needs of its members) with minimal reliance on the state.²⁹

Today, child-rights advocates argue against using the traditional concept of family. They want to change what they consider as blatant inequalities and injustices within the traditional family structure. It is increasingly common for child-rights groups to call on the state to invoke its *parens patriae* jurisdiction in order to remedy these injustices.³⁰

Events of the U.N. Fourth World Conference on Women, held recently in Beijing, illustrate this ideology in action on an international level. In 1948, the Universal Declaration of Human Rights defined the family as "the natural and fundamental group unit of society...entitled to protection by society and the state." Contrast that statement with the dismissive mention of the family in the conference's Platform for Action: "In many cases, violence against women and girls occurs in the family or in the home...violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices. . ."

This statement would be fine if it were clear that traditional and customary practices referred to such things as genital mutilation, female infanticide, and child marriage. When read within the context of the Platform for Action though, this statement has a wider application which includes the traditional family structure. Mary Ann Glendon, Learned Hand Professor of Law at Harvard University and leader of the Vatican delegation to the Beijing Conference, made the following observations about the treatment of the family and the role of the parent in the Platform for Action, "The documents barely mention marriage, motherhood, and the family - except negatively as impediments to women's self actualization (and as associated with violence and oppression)."³¹

Professor Glendon also noted that a coalition of countries, including Canada, opposed any affirmation of parental rights. "Though the Beijing documents had identified the situation of the 'girl child' as a 'critical area', the coalition attempted to eliminate all recognition of parental rights and duties from the draft.... They seemed indifferent to the fact that the Universal Declaration of



Human Rights and subsequent human rights documents have consistently protected the parent-child relationship from outside intrusion."³²

**Conclusion:
Extending Charter Protection to the Family**

In January 1995, in *R (B.) v. Metro Toronto Children's Aid Society*, the Supreme Court of Canada undertook an in-depth analysis of the liberty right referred to in Section 7 of the Charter of Rights and its application to family autonomy and parental rights. In this case, the appellants, Jehovah's Witnesses, declined to allow their infant daughter to receive blood transfusions which the attending medical doctors believed necessary to preserve the child's life. Responding to their refusal, the C.A.S. secured an order for temporary wardship of the child and authorized the hospital to perform the transfusions. Authorities returned the infant to her parents once the transfusions were complete. The appellants challenged the Ontario Child Welfare Act, arguing that its power to force temporary wardship of their child, based only on their refusal to consent to a blood transfusion, infringed the appellants' right to choose medical treatment for their infant, contrary to Section 7 of the Charter of Rights.

Although the Supreme Court of Canada rightly rejected the appeal on the ground that the child's right to life will always supersede the parent's right to make medical decisions for the child, this case is extremely significant for what it says about parental rights and family autonomy. The court considered "instructive" a series of court decisions defining the relationship between family autonomy and liberty in the American Bill of Rights. The court followed the reasoning in these cases to conclude that the liberty right in Section 7 of the Charter includes the right of individuals to pursue family life free from undue interference by the state. The court concluded that the individual's right to pursue family life included the right of parents to make decisions on matters that affect their children. Writing for Gonthier, McLachlin, L'Heureux-Dube, JJ. and himself, Mr. Justice LaForest made the following statement:

...the American experience can give us valuable guidance as to the proper meaning and limits of liberty. The United States Supreme Court has given a liberal interpretation to the concept of liberty, as it relates to family matters. It has elevated both the notion of the integrity of the family unit and that of parental rights to the status of constitutional values through its interpretation of the Fifth and Fourteenth Amendments.... Although [in Canada the parents'] liberty interest is not a parental right tantamount to a right of property in children, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself.

...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. We must accept that parents can, at times, make decisions contrary to their children's wishes -- and rights -- as long as they do not exceed the threshold dictated by public policy, in its broadest context.³³

In conclusion, the chaos that characterizes child-rights law reform can be remedied only by substantive and procedural recognition of the value of the family and the importance of its autonomy within society. This requires recognition that the present direction of child-rights law is in some respects unbalanced and thus corrosive of the importance of the family in society. The way to affirm its importance would be to, once again, give it explicit recognition within the Canadian constitution. This would be best achieved by an amendment to the Charter of Rights to include the family, and continued development of case law built on the Supreme Court of Canada's judgement in R.(B.). The former could be done in tandem with provincial measures to affirm the importance of the family in provincial human-rights legislation or in separate legislation for that purpose. Amendment of the Federal Human Rights Act could be important to clarify Justice Minister Rock's assurances that the recent inclusion of "sexual orientation" as an enumerated ground for the purpose of protection from discrimination was not intended to indicate any alteration to definitions of "spouse" or "family" for matters under federal jurisdiction (this would be in line with the decision of the Supreme Court of Canada in Egan v. Canada).³⁴

By extending Charter protection to parental rights and family autonomy, the Supreme Court of Canada has laid a foundation for renewing the constitutional status of the family. It is significant that in *Butler and Butler*, the Newfoundland Supreme Court relied on the majority judgement in R. (B.), and quoted the words of Mr. Justice LaForest as authority for the protection of parental rights within Section 7 of the Charter of Rights. At best, this renewed recognition of the family could restore a much-needed balance to the administrative and judicial policies of the state on matters relating to the parent-child relationship.



Endnotes

1. 1. Re J.P., 648 P. 2d 1364 at 1375-76 (Utah 1982). Quoted in Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights, Nicholas Bala and J. Douglas Redfearn, 15 Ottawa L. Review 274.
2. I use the term "post-modern human rights" to distinguish the present objectives of human-rights initiatives from those of 1948. According to the United Nation's 50th anniversary report, Our Global Neighborhood, the post-war objective was to develop an international community to foster commonality on economic and social matters. The guiding principles were general and included a respect for life, a sense of liberty, justice, equity, and integrity, and a commitment to mutual caring. This contrasts with post-modern human rights theory in which the focus is on protecting individual autonomy and eliminating perceived inequalities between social groups.
3. Convention on the Rights of the Child, Can. T.S. 1992 No. 3 Art. 1-54.
4. This document is available free of charge upon request from the Human Rights Directorate, Department of Canadian Heritage, Ottawa.
5. *Children's Rights as Communication: "Reflections on Autopoietic Theory and the United Nations Convention,"* The Modern Law Review, 1994, Vol. 54, at 385.
6. *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 1 - 54.
7. Article 19 has been interpreted by the U.N. Convention Review Committee to include freedom from reasonable corporal discipline by a parent for the purpose of correction. In its report, entitled Concluding Observations of the Committee on the Rights of the Child: Canada, June 19, 1995, available from Heritage Canada, the Committee criticizes Canada for failing to repeal Section 43 of the Criminal Code, the section that allows parents to use corporal discipline reasonable in the circumstances to correct their children. In this document, the Committee specifically recommends that Canada prohibit all corporal discipline of children. Lobby groups within Canada, including the Canadian Coalition on the Rights of the Child and the Repeal 43 Committee, have relied on the Committee's recommendation to argue that the government is obliged to repeal Section 43 in order to fulfill its commitments under the Convention. In fact, neither the Convention nor the Committee's recommendations have legal force in Canadian law. However, they have added considerable political and persuasive weight to the arguments of no-spank lobbyists.
8. 8. Iain Benson, "The Meaning of Renewal," *Centrepints*, September 1995, Vol.1 No.2, p. 1.
9. 9. Indexed as *R. v. M. (C.)*, 23 O.R. (3d) at 629.
10. *Halm v. Canada* (Minister of Employment and Immigration) 27 C.R.R. (2d) 23.
11. Ibid.
12. *Halm v. Canada*, p. 32.
13. Ibid., p. 33.
14. *R. v. Roy (C.Q.)* [1995] R.J.Q. 282. This case contains a careful analysis of the law, and it comes to the conclusion that Section 159 does not violate the Charter.



15. *Convention on the Rights of the Child: First Report of Canada*, May, 1994, Human Rights Directorate, Department of Canadian Heritage, Ottawa.
16. *Ibid.*, p. 5.
17. Some academics recommend that the evidence against a parent be "clear and convincing," a degree higher than a mere balance of probabilities, but not as strict as the "beyond a reasonable doubt" standard. See "Family Law and the Liberty Interest: Section 7 of the Canadian Charter of Rights", Nicholas Bala and J. Douglas Redfearn, 15 *Ottawa Law Review* 274.
18. For further analysis of potential parental rights violations under provincial child-protection legislation, see "A Family Law Hitchhiker's Guide to the Charter Galaxy," D.A. Rollie Thompson, [1989], 3 *C.F.L.Q.* 314, 327-339.
19. *The Director of Child Welfare v. Butler and Butler*, Provincial Court of Newfoundland, Family Division, March 23, 1995, File No. 015, unreported. Appeal decision, *Butler and Butler v. The Director of Child Welfare*, Supreme Court of Newfoundland, Trial Division, December 15, 1995. File # G.B. No. 46, unreported.
20. *Butler and Butler v. The Director of Child Welfare*, *supra*, at 1-2.
21. *Ibid.*, p.27.
22. *Final Report -- Consultation on Section 43, 31 March 1994: An Examination of Physical Interventions with Children Summary Paper*, p.6, presented by The Canadian Coalition for the Rights of the Child to the Children's Bureau, March 31, 1994.
23. *R v. Joseph Cleary*, Ontario Court, Provincial Division, December 15, 1994.
24. *Supra*, see note 1.
25. *The Universal Declaration of Human Rights*, as adopted by the United Nations General Assembly , Resolution 217A (111), 10th December, 1948
26. *The International Covenant on Civil and Political Rights*, U.N. General Assembly, Resolutions, reported in 21 *C.A.O.R. Supp.* 16, U.N. Document A/6316 (1966).
27. *The Canadian Bill of Rights*, 8-9 Elizabeth II, c. 44 (Canada), assented to 10th August, 1960.
28. *supra*, see note 6.
29. There is a wealth of scholarly research to support the primacy of the family throughout history. For instance, Max Rheinstein, the comparative law scholar from the University of Chicago, in an article in *The International Encyclopedia of Comparative Law* describes the family as "pre-legal," noting that, for most of history, the state existed not as an aggregate of individuals, but of "family clans" or "houses."
30. *Parens patriae*, translated into English means "the state is the parent of society." However, child-rights groups advocating greater state control of the family stretch the doctrine of *parens patriae* beyond what the jurisprudence can support. In *Hepton v Matt*, [1957] *S.C.R.* 606 at 607-08, Mr. Justice Rand made clear that *parens patriae* was never intended or used to justify the broad regulation of family life by the state. The kind of state authority that child-rights advocates promote more accurately describes what some academics have termed the therapeutic state. The therapeutic state refers to a government structure in which the casework method of social philanthropy is linked



to the coercive power of the state, with the result that "there are no rights except those of individuals and the state." See Mary Ann Glendon, *The Transformation of Family Law*, Chicago: University of Chicago Press, 1989.

31. What Happened at Beijing, Mary Ann Glendon, *First Things*, January 1996, Number 59, p. 31.
 32. *Ibid.*, p. 32. The coalition referred to included the fifteen-member European Union, Barbados, Canada, Namibia, and South Africa.
 33. *R (B.) v. Metro Toronto Children's Aid Society et al.*, 1995 1 S.C.R. 315.
 34. *Egan et al v. Canada* (1995), 124 D. L. R. 609 (S.C.C.).
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