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INTRODUCTION

The idea of according equality rights to children is a relatively recent phenomenon. Historically, society did not accord children rights; children were subject to the unregulated, unscrutinized, unchallenged private power of their parents, especially their fathers. Recently, children's advocates have maintained that children have rights that should be recognized and respected in the legal system. Martha Minow, for example, has reviewed the debates about whether we should recognize children's rights.[1] She rejects the view that rights are limited to claims made by autonomous adult individuals for independence and freedom. Instead, Minow explains how rights "arise in the context of relationships among people who are themselves interdependent and mutually defining,"[2] thus making them more relevant to children's lives. In essence, they can be understood as determining the "legal consequences for particular patterns of human and institutional relationships."[3] Children's rights may take the form of claims for autonomy and noninterference; they may, however, entail claims for care and protection, or claims for relationships with others.[4]

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1. MARTHA MINOW, MAKING ALL THE DIFFERENCE - INCLUSION, EXCLUSION, AND AMERICAN LAW (1990). *See also* Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); Michael S. Wald, *Children's Rights: A Framework for Analysis*, *in* BARBARA LANDAU, CHILDREN'S RIGHTS IN THE PRACTICE OF FAMILY LAW (Toronto: Carswell, 1986).

2. Minow, *Interpreting Rights*, *supra* note 1, at 1884.

3. *Id. See also*, Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, 30 REPRESENTATIONS 162 (1990).

4. Minow, *Interpreting Rights*, *supra* note 1, at 1868; Minow, MAKING ALL THE DIFFERENCE, *supra* note 1, at 289.

Beyond the question of the applicability of rights discourse is the question of the kinds of rights and the content of children's rights. It is in this regard that we need to think about the legal meaning of rights such as "liberty," "security of the person," "freedom of expression," and "equality." When, how, and in what way do these legal concepts apply to children?[5] How do they affect the way we treat children in society and the legal recourse available to them in the face of the infringement of these rights? More specifically, how can we conceptualize equality to make it a meaningful source of legal protection that will help to guide the legal system's treatment of children?

In the Canadian context, there are two major sources of legal protection for equality rights—constitutional and legislative protection. Section 15 of the Canadian Charter of Rights and Freedoms[6] ("Canadian Charter") guarantees individuals the right to equal benefit and equal protection of the law, and the right not to be discriminated against on the basis of "race, national or ethnic origin, color, religion, sex, *age* or mental or physical disability."[7] The explicit inclusion of protection against age discrimination in our Charter directly raises the question of children's equality rights. Human rights legislation, at both the provincial and federal

5. In the Canadian constitutional context, see Nicholas Bala and David Cruickshank, *Children and the Charter of Rights, in* BARBARA LANDAU, *supra* note 1, and Jeffery Wilson, *Children and Equality Rights, in* ANNE BAYEFSKY & MARY EBERTS, EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1985). The United Nations Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, 44 U.N. GAOR. Supp. No. 49, U.N. Doc. A/44/736 (1989) [hereinafter U.N. Resolution], has presented this challenge in the international human rights law arena and prompted academic commentary. *See* Stephen Toope, *The Convention on the Rights of the Child: Implications for Canada* (1992) (discussion paper for the Child, Youth and Family Policy Research Centre, Toronto, Ontario, May 1992); Thomas Hammarberg, *The U.N. Convention on the Rights of the Child — And How to Make it Work*, 12 H.R.Q. 97 (1990).

6. Canadian Charter of Rights and Freedoms, § 15, Part I of the Constitution Act, 1982 [hereinafter Canadian Charter].

7. Section 15(1) (emphasis added). Section 15(2) states: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 1 of the Charter guarantees the rights and freedoms contained in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This provision represents a potential means for limiting constitutional rights and freedoms; it also provides a mechanism for protecting certain collective rights, such as the rights of children. See for example Irwin Toy Ltd. v. Quebec (A.G.), 1 S.C.R. 927 (1989), where the Supreme Court of Canada upheld a law prohibiting commercial advertising directed at children under the age of 13 pursuant to section 1, despite its interference with freedom of expression. The Court expressed concern with the vulnerability of children to manipulation through advertising.

level, also provides some protection against discrimination on the basis of age.[8] Some statutes limit the protection to certain age groups, effectively excluding either children and/or the elderly—the precise age groups that are often most vulnerable to age-based discrimination.[9] These limits can be explained in part by the significant emphasis on employment issues in human rights legislation. The Quebec Charter of Human Rights and Freedoms prohibits age discrimination except as provided by law.[10]

In the face of explicit protection against age discrimination, the question arises as to how equality rights or non-discrimination protection should be conceptualized vis-a-vis children. It is this question that has not been fully addressed in law. One difficulty that has arisen in applying equality rights to children stems from the tendency to understand equality or non-discrimination as simply mandating that all those who are alike be treated alike. If we limit our definition of equality in this way, there does not seem to be much room for equality for children, given the reality that they are often not the same as adults. It makes sense to treat children differently than adults to the extent that they are different. Thus, being legally bound to treat children and adults the same is inconsistent with the common sense practice of differential treatment based on age. The exceptions to non-discrimination seem to swallow up the rule and we are left wondering if legal protection against age discrimination are more rhetorical than real.

To breathe life into non-discrimination rights for children, therefore, it is necessary to expand and rethink our understanding of equality. At the core of this reconceptualization is an approach to equality that is not premised on treating everyone the same. Instead, it is based on a concern for generating equality of results potentially through the application of differential treatment to respond to the myriad and diverse needs of individuals and groups in

8. *See, e.g.*, Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 3(1); Prince Edward Island Human Rights Act, S.P.E.I. 1988, c. H-12, § 1(1).

9. For example, the Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, § 2(a), limits its protection to those between the ages of 18 and 65. The British Columbia Human Rights Act, (1984) S.B.C. c. 22, § 1, protects only those between the ages of 45 and 65. The New Brunswick Human Rights Code, R.S.N.B. 1973, c. H-11, § 2, defines age as 19 years and older. The Ontario Human Rights Code, R.S.O. 1990, c. H.19, § 10(1), defines age as 18 years or more, except with respect to employment discrimination, where it is defined as 18 years or more and less than 65 years. The upper age limits on the scope of human rights protection were upheld as constitutional in a series of recent mandatory retirement decisions. McKinney v. University of Guelph, 3 S.C.R. 229 (1990); Harrison v. University of British Columbia, 3 S.C.R. 451 (1990).

10. R.S.Q. 1977, c. C-12, § 10, as amended.

society, including children. It also demands reshaping the way we structure society to eradicate systemic inequalities and to make it more accommodating of children's needs. Finally, it is premised on a reconceptualization of equality rights in terms of relationships. To discern the presence or absence of equality, it is helpful to assess the character and quality of particular private and public human relationships.

CHANGING CONCEPTIONS OF EQUALITY IN CANADIAN LAW

While this reconceptualization requires us to erase current conceptions of equality (to the extent they are limited to an individual equal treatment approach) to make it possible to reconstruct an alternative understanding, the ideas I am advocating have already entered into legal discourse about equality rights in Canada. The idea that equality may entail differential treatment to respond to different needs was specifically endorsed by the Supreme Court of Canada in its first major interpretation of the equality guarantees of the Canadian Charter.[11] As Justice McIntyre put it, "the accommodation of differences . . . is the true essence of equality."[12] The Court also explained that "every difference in treatment between individuals under the law will not necessarily result in inequality and, as well that identical treatment may frequently produce serious inequality."[13]

If treating everyone in the same way is not always consistent with equality, how do we know whether or not there is inequality? According to the Supreme Court of Canada, to discern whether or not there is a violation of equality rights, we have to look at the impact of the law, policy, or practice to determine whether it harms or disadvantages individuals from those groups in society that have been powerless historically and subjected to discrimination, prejudice, and exclusion from societal institutions. Thus, in some instances, treating individuals differently because of their group affiliation may result in serious prejudice and discrimination. In other instances, treating everyone the same may disproportionately harm certain groups in society because of their particular needs.[14]

11. Andrews v. Law Soc'y of British Columbia, 1 S.C.R. 143 (1989) (finding a law requiring lawyers to be Canadian citizens discriminatory and contrary to the Charter).

12. *Id.* at 169.

13. *Id.* at 164.

14. This second form of discrimination is referred to as "adverse effect" discrimination. *Id.* at 173 (e.g. height and weight requirements disproportionately screening our female job applicants). In the United States, it is referred to as "disparate impact" dis-

The Supreme Court of Canada has also recognized that inequality is often a systemic problem—it is not simply a problem of unfair or discriminatory individual conduct.[15] Rather, inequalities often result from deeply embedded, institutionalized policies and practices. One significant implication of the recognition of the systemic nature of many problems of inequality is the way it calls into question an individual complaints model for redressing inequality. Systemic problems demand proactive, institutional responses, not individual retroactive responses. The need for special, proactive programs to redress inequalities is explicitly endorsed in the Canadian Charter.[16] A systemic approach to inequality is particularly important in the context of children's rights to equality, given accentuated access problems to obtaining legal redress through litigation.

Finally, the idea of scrutinizing personal and institutional relationships is an implicit dimension of law. Law regulates human relations. Identifying the importance of understanding equality rights in relational terms has been emerging in feminist scholarship in Canada and the United States.[17] From this relational perspective, problems of inequality arise when human differences are viewed hierarchically, along the axes of "dominant/subordinate, good/bad, up/down, superior/inferior."[18] It is this process of labelling those who are different as inferior or abnormal that is at the core of inequality. Thus, one critical insight of this scholarship is the necessity of creating relations of equality across individual and group differences based on respect for diversity.

In considering the implications for children of these developments in equality law, it is helpful to begin by exploring the traditional vision of children in society and the absence of any conception of equality rights for children within this vision. The efforts to apply equality protection and non-discrimination provisions to children within the framework of a formal conception of

crimination. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (invalidating a standardized employment test for disproportionately screening out black applicants).

15. Action travail des femmes v. C.N.R. Co., 1 S.C.R. 1114, 1138-1139 (1987).

16. Canadian Charter, § 15(2) (quoted at note 6).

17. *See* Minow, *Making All the Difference*, *supra* note 1; Audre Lorde, *Age, Race, Sex and Class*, *in* SISTER OUTSIDER - ESSAYS AND SPEECHES BY AUDRE LORDE, at 114-123 (The Crossing Press, Trumansburg, New York 1984); Patricia Monture, *Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Ga*, 2 CANADIAN J. WOMEN'S L. 159 (1986); Nitya Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, 38 BUFF. L. REV. 325 (1990); Brenda Cossman, *A Matter of Difference: Domestic Contracts and Gender Equality*, 28 OSGOODE HALL L.J. 303 (1990).

18. LORDE, *supra* note 17, at 114.

equality as sameness of treatment is then examined. Finally, explored is the application of the reconceptualization of equality rights outlined above. Throughout this process, I have been confronted with the complexity of overlapping discriminations against children (e.g. age, sex, race, disability, religion). Often children, whose lives are subject to greater state intervention, are particularly vulnerable to racism, sexism, and other types of discrimination. In the healthcare context, discrimination against children with disabilities has emerged as a particularly salient concern.

TRADITION AND THE DENIAL OF CHILDREN'S EQUALITY RIGHTS

Pursuant to a traditional, conservative, and hierarchical vision of the family and society, children do not have equality rights. This denial of equality takes two forms: (i) overt unequal treatment, and (ii) paternalistic protection. According to the first, children do not have to be treated the same as adults and the norms of equality are not applicable. Children can be subjected to differential, harmful treatment. For example, the physical punishment of children is permitted pursuant to the Canadian Criminal Code, provided parents or teachers use force for disciplinary reasons and "the force does not exceed what is reasonable under the circumstances."[19] Such corporal punishment would be considered assault if it were done to an adult.

Historically, both the common law and the civil law vested total power and control over children in their fathers. Even today, despite the emergence of child protection laws, children are still widely subjected to physical and sexual abuse by their parents. In their book, *The Child and the Law*, Nicholas Bala and Kenneth L. Clarke trace the mistreatment of children from Ancient Rome up to the Modern Era.[20] They explain that until the 19th century, the child was treated as a possession or chattel of the father. Fathers could physically abuse or even murder their children without legal intervention; children could be sold as slaves by their parents.

In Quebec, the Roman concept of *patria potestas*, which gave fathers absolute power over their children, was incorporated into the 1866 Civil Code under the rubric of the concept of "paternal

19. R.S.C. 1985, c. C-46, § 43.

20. NICHOLAS BALA & KENNETH L. CLARKE, THE CHILD AND THE LAW (1981). *See also*, Yo Kubota, *The Protection of Children's Rights in United Nations*, INTERNATIONAL REVIEW OF CRIMINAL POLICY, Nos. 39 & 40 (New York: Centre for Social Development and Human Affairs, 1990).

authority."[21] It was not until 1977 that legal sanctioning of unscrutinized paternal power was replaced with the current notion of "parental authority," to be exercised jointly by the mother and the father. Moreover, the 1977 amendments allowed courts to intervene on behalf of children and deprive parents of their parental authority if they were not fulfilling their parental obligations.[22]

In terms of healthcare issues, denying equality rights to children has often translated into according total power and control regarding children's health to parents. The ideology of the private sphere of the family into which the law should not intrude has functioned to reinforce traditional, hierarchical relations within the family.[23] Accordingly, requiring parental consent before a young woman can obtain an abortion or deferring to parental decisions regarding their children's medical treatment, regardless of whether or not the parents have demonstrated their concern and commitment to the best interests of the child, would be consistent with a traditional-conservative approach that favors parental rather than children's rights. Nevertheless, the law has tempered the historical power of parents by affirming the inherent *parens patriae* jurisdiction of the state to protect the best interests of the child.[24]

The second form of inequality, paternalistic protection, is most problematic from an ideological perspective. In the late 19th Century, special protective legislation was introduced in Canada to redress some of the most egregious forms of child exploitation, such as child prostitution, exploitation in industrial work, and physical abuse. The protective legislation was specifically directed at child welfare, compulsory education, restrictions on child labor, and special juvenile corrections institutions.[25] What is significant about these protections in terms of equality and children's rights is that they were premised on the idea that children are not equal to adults. Because of their vulnerability, children were considered in

21. Bartha Knoppers, *From Parental Authority to Judicial Interventionism: The New Family Law of Quebec*, *in* CONTEMPORARY TRENDS IN FAMILY LAW: A NATIONAL PERSPECTIVE 205, 205-206 (K.Connell-Thouez & B. Knoppers, eds., Toronto: Carswell 1984). *See also* Frances Schanfield Freedman, *The Status, Rights and Protection of the Child in Quebec*, 38 R. DU B. 715 (1978).

22. Knoppers, *supra* note 21, at 206-207. Quebec also introduced youth protection legislation in 1964. Youth Protection Act, R.S.Q. 1964, c. 220.

23. *See* Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 845-848 (1985).

24. For a judicial discussion of the origins of the *parens patriae* jurisdiction, see E. v. Eve, 2 S.C.R. 388, 407-409 (1986). *See also* Bernard M. Dickens, *The Modern Function and Limits of Parental Rights*, 97 L.Q. REV. 462 (1981).

25. BALA & CLARKE, *supra* note 20, at 2.

need of special protective legislation. Although the legal reforms for children in most instances provided important and much needed protection, they were based on a paternalistic ideology that reinforced the inequality of children, not on any conception of equality rights for children.

FORMAL EQUALITY AND CHILDREN'S RIGHTS

There have been developments in the law on children's equality rights; however, these developments tend to be limited to treating as adults those children who can show that they are more adult-like. In other words, children who are basically the same as adults are entitled to be treated the same as adults. While this conception of equality limits its applicability to only a small portion of youths (i.e. those who are almost adults), it is nevertheless important. A few cases in the healthcare area illustrate how equal treatment to adults is precisely what some minors want and deserve.

In *C. (J.S.) v. Wren*,[26] for example, a 16 year-old girl became pregnant and obtained medical approval for an abortion. Her parents, however, opposed the abortion and sought an injunction to prevent it from being performed. Her parents argued that "children should obey their parents and the courts should intervene to prevent others from interfering with parental control . . . ."[27] However, the Court concluded that parental control decreases as the child matures through adolescence and upheld the young woman's right to make her own decision, writing: "We infer that she did have sufficient intelligence and understanding to make up her own mind and did so. At her age and level of understanding, the law is that she is to be permitted to do so."[28]

In an Ontario case involving a 12 year-old girl, Lisa Dorothy K., a court was faced with the difficult decision of whether to respect the wishes of the young girl not to undergo chemotherapy.[29] Lisa was suffering from leukemia and the recommended chemotherapy treatment would require blood transfusions. Because the girl and

26. 49 Alta. L.R. (2d) 289 (1986).

27. *Id.* at 291.

28. *Id.* at 292. In reaching this conclusion, the Alberta Court of Appeal relied heavily on Gillick v. West Norfold & Wisbech Area Health Authority, 3 All E.R. 402 (1985) (allowing a physician to prescribe contraceptives to a girl under age 16 without parental consent). *See also*, Catholic Children's Aid Soc'y v. N.R., 47 R.F.L.(2d) 361 (1985); Edward W. Keyserlingk, *The Adolescent Patient and the Family: Some Ethical and Legal Considerations* (from the Proceedings of the 8th Canadian Conference on Pediatrics, Canadian Pediatrics Society, April, 1990).

29. Re L.D.K.: C.A.S. v. K.[Ont.], 48 R.F.L. 164 (Prov. Ct., Fam. Div. 1985).

her parents were Jehovah's Witnesses, they refused to consent to any treatment that would involve blood transfusions. They wanted to pursue a mega-vitamin home treatment instead. It was in this context that proceedings were brought to have the child declared in need of protection so that the Children's Aid Society could give the requisite consent for chemotherapy. The girl had already received one blood transfusion without her consent.

The Court began by making it clear that the girl was firmly opposed to blood transfusions.

> L. has told this court clearly and in a matter-of-fact way that, if an attempt is made to transfuse her with blood, she will fight that transfusion with all of the strength that she can muster. She has said and I believe her, that she will scream and struggle and that she will pull the injecting device out of her arm and will attempt to destroy the blood in the bag over her bed. I refuse to make any order which would put this child through that ordeal . . . . I am satisfied . . . that the emotional trauma which she would experience . . . could have nothing but a negative effect on any treatment being undertaken.[30]

In ruling that L. was entitled to make her own decision, Provicial Court Judge Main stated:

> L. is a beautiful, extremely intelligent, articulate, courteous, sensitive and, most importantly, a courageous person. She has a wisdom and maturity well beyond her years and I think it would be safe to say that she has all of the positive attributes that any parent would want in a child. She has a well thought out, firm and clear religious belief. In my view, no amount of counselling from whatever source or pressure from her parents or anyone else, including an order of this court, would shake or alter her religious beliefs.
>
> I believe that L.K. should be given the opportunity to fight this disease with dignity and peace of mind. That can only be achieved by acceptance of the plan put forward by her and her parents.[31]

In commenting on the fact that L. had received a blood transfusion against her wishes, the Court referred explicitly to the violation this entailed of the girl's right to "security of the person"[32] and her

30. *Id.* at 169. In this regard, it is important to note that the Court considered the benefits of the chemotherapy to be uncertain and held that the child's life was equally in danger whichever treatment was pursued. *Id.* at 170. Moreover, the Court maintained that the proposed hospital treatment "fails to address her emotional needs and her religious beliefs. It fails to treat the whole person." *Id.* at 169.

31. *Id.* at 171.

32. Section 7 of the Canadian Charter states: "Everyone has the right to life, liberty

right not to be discriminated against on the basis of religion and age.

> Given the intelligence, state of mind and position taken by L., all of which were known to this hospital, she ought to have been consulted before being transfused. She was not. I must find that she has been discriminated against on the basis of her religion and her age pursuant to s. 15(1).[33]

The general approach to child consent in medical law is consistent with the basic tenor of these decisions. The law requires parental consent when very young children need medical treatment, but acknowledges the rights of children to have input into the decision in accordance with their level of maturity. As Ellen Picard has noted: "A person under the age of majority can consent to medical or dental treatment for his benefit provided he is capable of appreciating fully the nature and consequences of the particular treatment."[34] This legal principle is often referred to as the "mature minor rule." In addition, "emancipated minors," young persons who are either married, living on their own, or independent of their parents, are often considered capable of consenting to medical treatment.[35] In some jurisdictions, specific statutory rules delineate at what age minors are entitled to give consent to medical treatment.[36] Of note is the particularly young age of 14, codified in Quebec, as the age when a minor is competent to give consent to medical treatment.[37]

The division of childhood into various phases of increased maturity reflects an understanding of growing up as a gradual and linear process. A child begins as a total dependent, but gradually becomes mature and equal to a responsible adult. While there is no doubt a lot of common sense truth in this depiction of the maturation process, it may also be the case that children have special capacities that they lose as they grow older. Arlene Skolnick, in an article entitled *The Limits of Childhood: Conceptions of Child De-*

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and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

33. 48 R.F.L. at 171.

34. ELLEN I. PICARD, LEGAL LIABILITY OF DOCTORS AND HOSPITALS IN CANADA 55 (2d ed., Calgary: Carswell 1984).

35. *See generally id.*; BERNARD M. DICKENS, MEDICO-LEGAL ASPECTS OF FAMILY LAW, ch. 6 (Toronto: Butterworths 1979); Philip H. Osborne, *The Consent of Minors, in* BARNEY SNEIDERMAN, JOHN C. IRVINE & PHILIP H. OSBORNE, CANADIAN MEDICAL LAW, at 35 (Toronto: Carswell 1989); LORNE E. ROZOVSKY & FAY A. ROZOVSKY, THE CANADIAN LAW OF CONSENT TO TREATMENT (Toronto: Butterworths 1990).

36. *See* ROZOVSKY & ROZOVSKY, *supra* note 35, at 57-62.

37. Public Health Protection Act, R.S.Q. 1977, c. P-35, § 42.

velopment and Social Context,[38] suggests that in the psychological models of child development "the adult has been taken as the measure of the child."[39] The adult is assumed to be the fully functioning human being; children are considered to be less than fully competent individuals.

Such an approach to childhood and growing up has been very influential in legal thinking. For example, as Justice Wilson of the Supreme Court of Canada noted in a case involving a young accused person:

> [I]f the legal system is to reflect accurately the view of children as being in the developmental stages *en route* to full functioning capacity as adults, the standard against which children's actions are measured must be such as can logically culminate in the objective standard of the ordinary person upon arrival at full adulthood.[40]

Some psychologists, however, have questioned the linearity of the developmental model, suggesting that "growing up involves losses as well as gains—that becoming an adult involves a progressive impoverishment of the capacity to perceive the world, as one learns to deaden and distort experience by translating it into the conventional patterns of the culture."[41]

Reconceptualizing Equality for Children

While the formal equal treatment model of equality does provide some important safeguards in the context of age and other types of discrimination, what about the children who are not mature or emancipated minors—who are not almost adults, or like adults? Does the concept of equality have any relevance for them? Pursuant to the equal treatment model, it does not, since treating children differently than adults seems to make sense in many contexts. According to the similarly situated formula of equality, children who are not similarly situated to adults need not be treated similarly. If we want to make equality rights relevant to the lives of the very young—the immature minors—the majority of children—we need to move towards the reconceptualized notion of equality discussed above.

The first dimension of such a reconceptualization is recognition that differential treatment may be needed to secure equality of outcomes. Acknowledging the unequal impact of certain policies and

38. 39 Law & Contemp. Probs. 38 (1975).
39. *Id.* at 55.
40. R. v. Hill, 1 S.C.R. 313, 350 (1986).
41. *See* Skolnick, *supra* note 38, at 55.

accommodating differences has been recognized as integral to equality. In the context of children's lives generally, this means that special protective laws and policies for children can be understood actually as a component of equality, not as an exception to it. Special protection for children recognizes their vulnerability and lack of power in society. Protective measures are premised on children's rights and entitlement to have their special needs and concerns met. Protective measures are not paternalistic privileges that reinforce the alleged inequality of children.

A clear example of how differential treatment can be essential to equality in the context of discrimination on the basis of physical disability is provided by a human rights case involving Tammy McLeod, an 11 year-old girl with cerebral palsy.[42] Although Tammy used a wheel chair, she was able to participate in community bowling with the assistance of a special wooden ramp, until the local Bowling Association decided to prohibit her participation because she needed to use the assistive device.[43] Tammy and her mother filed a human rights complaint alleging discrimination on the basis of physical disability. In concluding that Tammy should be allowed to participate in competitive bowling with the "ramp assist," both the human rights Board of Inquiry and the Ontario Divisional Court agreed that the rule prohibiting assistive devices discriminated against persons with physical disabilities. To give Tammy an equal right to participate with other children in bowling meant accommodating her special needs by allowing her to use the wooden ramp.

A second dimension of an approach to equality that goes beyond the individual equal treatment model is to focus on the institutionalized and systemic manifestations of inequality. Perhaps the most obvious systemic contributor to inequality is poverty. For children, poverty is widespread. Both Canada and the United States have high child poverty rates of 16 per cent and 20 per cent respectively. These figures are not inevitable and contrast markedly with the much lower poverty rates in Norway and Sweden (5.6 per cent and 5.2 per cent respectively).[44] In other words, in 1988, there were approximately one million or one in six children living in poverty in Canada.[45] Poverty is even more prevalent among First Na-

42. Youth Bowling Council of Ontario v. McLeod, 75 O.R. (2d) 451 (1990).

43. It is noteworthy and reassuring that none of the children complained about Tammy's use of the wooden ramp.

44. *See Children in Poverty: Toward a Better Future*, at 5 (Standing Senate Committee on Social Affairs, Science and Technology, Jan., 1991).

45. *Id.* at 3-4.

tions children, with approximately 51% of First Nations children in Canada living below the poverty line.[46] In health terms, this translates into inadequate housing, inadequate and insufficient food, a higher risk of being born with a low birth weight, higher infant mortality rates, and inadequate access to healthcare. Redressing such forms of systemic inequality requires a commitment of collective resources and proactive institutional initiatives.

The final aspect of a reconceptualized equality right raised is a relational approach to equality. A relational approach is premised on the idea that we need to be attentive to the dynamics of personal and institutional relationships in trying to identify and remedy problems of inequality. Relations of equality are characterized by respect for differences and a rejection of the labelling of those who are different from oneself as either inferior or abnormal. Children are not inferior to adults—they are different—they have different incapacities and capacities. We need to respect their differences and acknowledge their special capacities. We also need to respect other differences, such as those between boys and girls, between children without physical disabilities and those with physical disabilities, and between children from different cultural, ethnic, and religious communities. As noted in the *United Nations Convention on the Rights of the Child*, the education of the child should include "preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin."[47]

It is also helpful to acknowledge the connection between relations of equality and human caring.[48] To care for someone in a way that enhances equality is to provide support, assistance, advice, and protection, when it is needed, while teaching the person being cared for to develop his or her own skills, abilities, sense of responsibility, and judgment. Paternalism, arguably, provides protection while entrenching helplessness. An egalitarian conception of caring provides protection while promoting the development of the person being cared for. It acknowledges human interdependency as an integral dimension of social life.[49]

The case of Justin Clark illustrates how equality rights need to

46. *Id.* at 9-11.

47. U.N. Resolution, *supra* note 5, article 29, § 1(d).

48. Monture, *supra* note 17, at 159.

49. *See* JEAN BAKER MILLER, TOWARDS A NEW PSYCHOLOGY OF WOMEN (2d ed., Boston: Beacon Press 1986).

be acknowledged in the face of human dependence.[50] Shortly after his birth, Justin was diagnosed as severely mentally and physically disabled. He was institutionalized, confined to a bed or wheelchair, had very limited upper body mobility, and could not speak. At the age of 13, Justin was instructed in a special communications system that opened up an entirely new world for him. In his instructor's words:

> [h]e taught me—a lot more than I ever taught him initially and that continued over the years that we worked together. He was like a sponge. His progress in terms of cognitive development, his development in terms of perceptions of things was really quite amazing. He had many, many, many questions that obviously had been stored up for a lot of years.[51]

By the age of 18, Justin was recommended for community placement and had arranged to begin visiting possible group homes when his parents intervened and opposed any community placement. They maintained that Justin was not mentally competent to consent to community placement. The case then proceeded to litigation on the issue of mental competency. In finding in favor of Justin, Judge Matheson concluded:

> We have, all of us, recognized a gentle, trusting, believing spirit and very much a thinking human being who has his unique part to play in our compassionate interdependent society.
>
> And so, in the spirit of that liberty which learned hand tells us seeks to understand the minds of other men, and remembers that not even a sparrow falls to earth unheeded, I find and I declare Matthew Justin Clark to be mentally competent.[52]

Though not decided in terms of equality rights, the judicial outcome in this case implicitly recognized how equality can flourish despite dependence and largely depends on human relations for its safeguarding. Thus, it is critical to scrutinize personal, familial, and institutional relations to discern a complete absence of care or protection, paternalistic protection that reinforce inequality, or caring protection that recognizes the interdependency of human beings, while affirming the possibility of self-realization.

The notion of caring has also been instrumental in deciding who should be entitled make medical treatment decisions on behalf of very young children (e.g. family members, physicians, judges). When the familial relations are caring and loving, and the medical treatment uncertain, courts are more inclined to defer to the wishes

50. Clark v. Clark, 40 O.R. (2d) 383 (1982).
51. *Id.* at 386.
52. *Id.* at 392.

of family members.[53] Within a relational discourse of equality, such an outcome may well be consistent with enhancing the equality of the young child. It also ensures that difficult medical decisions will be made with an appreciation of the contextual realities of the quality of life, pain, and human dignity.

CONCLUSION

Although the concept of equality has not been relied upon extensively in litigation on behalf of children, it is a concept that has constitutional and statutory recognition. Articulating its meaning and applying it in our advocacy is a task that awaits us. I have tried to canvass the range of meanings that can be attributed to equality and assessed the implications of each on children's lives. While the most conceptually straightforward approach is the formal equality model, whereby children who can prove their likeness to adults are treated like adults, such a model is unduly limited. It only provides protection to a minority of older youths and it fails to challenge adulthood as the standard of normalcy. It also requires children to fit into adult norms, even if these are inappropriate and not quite true to the experience of adolescence. Thus, it is important to take the egalitarian impulse of equality rights beyond its formal equality mold to make it meaningful for all children. As a normative principle and legal entitlement, equality demands a safe, healthy, and loving environment within which children can grow, learn, create, express themselves fully, and continue to teach us the importance of living in the present.

53. *See, e.g.*, Couture-Jacquet v. Montreal Children's Hosp., 1 R.J.Q. 1221 (1986); Re L.D.K.: C.A.S. v. K. [Ont.], 48 R.F.L. 164 (Prov. Ct., Fam. Div. 1985); Saskatchewan (Ministry of Social Serv.) v. P.(F.), 69 D.L.R. (4th) 134 (1990) (the parents' refusal to consent was upheld by the courts). In other cases, where there is less evidence of a close and continuing relationship, courts have ordered treatment. *See, e.g.*, Re S.D. [B.C.], 3 W.W.R. 618 (B.C.S.C. 1983). In some cases where treatment is ordered despite parental refusal to give consent, principles of non-discrimination against disabled children and a more absolutist conception of the right to life have been invoked. *See, e.g.*, Re S.D. [B.C.]; Goyette (In Re:): Centre de Services Sociaux du Montreal Metropolitain, [1983] C.S. 429; New Brunswick (Min. of Health & Community Serv.) v. B.(R.), 70 D.L.R. (4th) 568 (1990). *See generally* MINOW, MAKING ALL THE DIFFERENCE, *supra* note 1, at 312-349; Dickens, *supra* note 24.