From Major to Minor: An Historical Overview of Children's Rights and Benefits

Sheena Scott
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INTRODUCTION
This article will examine childhood and adolescence in an historical and social context. At issue are “traditional” views as to when a child is perceived to be “ready” for the adult world and the relationship of these views to the current legal status of, and social benefits available to, youth. This analysis is limited by the fact that it is not cross-cultural. A cross-cultural analysis is appropriate in Canadian society today but was not undertaken here. Such a study would likely reveal very significant differences in the “preparedness” of young people to fully participate in society.

EARLY CIVILIZATION
Divergent practices and attitudes about childhood are evident in ancient greek, spartan, hebrew and roman societies. In Sparta, the state was the primary institution and hence children were raised to be strong soldiers. Girls were raised to be strong, healthy and active so that they would bear strong children. Towards this end girls participated in the same physical training as boys.

* Copyright © 1993 Sheena Scott. Sheena Scott is a staff lawyer at Justice for Children and Youth, a legal aid clinic in Toronto.
Children were examined at birth to see who was fit to live. Those who were not fit were killed. The fit children were raised by nurses for the first seven years of their lives and parents had no role in the children's lives. At the age of 7, boys went into a boarding school for military training, until the age of 20. Respect for elders and the state in general (and not for the parents) was the ideal.\(^1\)

In Greece, little attention was paid to a child under the age of seven as they were seen as uneducable and therefore, presumably, not significant in the learning-based system. In the upper class, it was preferable for young children to reside with the women, away from the male population. Once a child was of school age, he was raised by a companion of the lower class until his teens. The male servant accompanied the child to school and could punish the boy. Children were not to be trusted on their own, until they were "tamed" into accepting society's ways. Once of school age, children were involved in learning adult literature and culture, including music and athletics.\(^2\)

Marriage normally occurred at age 30 for men and at ages 16 to 18 (or younger) for women. Women were confined to the home and only had contact with the small children and girls.\(^3\)

In the lower classes, under one set of laws, a boy had to learn a trade or he would be bound to support his parents.\(^4\)

This system can be contrasted to the hebrew system in which parents, including mothers, played a role in educating their children. Eventually however, education out of the home, at synagogues or schools prevailed. Children were respected as were the teachers of older children. Attendance at school was mandatory in some cases.\(^5\)

In Rome, at least initially, it was the family and not the state that was the focal point of society. Families worshipped their ancestors, lived in extended family situations and devoted time and energy to building up an estate to pass on. Having progeny was important and families would adopt if they could not conceive. The child was viewed as being "fresh and open and unspoiled by wrong".\(^6\)

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2. Ibid. at 28, 29.
3. Ibid. at 32.
4. Ibid. at 29.
5. Ibid. at 35, 36.
The power of the father was absolute and he could kill or sell his children but the power was intended to be utilized for the family good.\textsuperscript{7}

At the age of seven a boy would spend the entire day with his father, socializing with him and attending at his work (even the senate). At 16, the boy was considered an adult and had a ceremony by which he was released into society. He had full citizenship status and wore adult clothing at 16. He was essentially put on probation for one year, during which time he resided with a friend of the family.\textsuperscript{8}

Changes in Rome led to changes in perceptions of childhood. With the expansion of the Roman empire, fathers were forced to be away from home fighting. They became too busy to spend their days with their sons. Rome became an urban centre and leisure time increased. The wealth of the empire led to "self-indulgent" attitudes. Adultery and divorce were common and affected the traditional views of family. Common law relationships were customary and illegitimate children were not necessarily frowned upon.\textsuperscript{9} People no longer concerned themselves with building up an inheritance and family property was no longer sacred. The state had become more important than the family. Under Augustus, laws were introduced to try to reverse these trends such as giving incentives for having children. Tax breaks were given to men with 3 or more children and civil and property rights to women with 3 children. Augustus restricted the grounds for divorce. The state did not wish to revert back to total parental control and set an age limit after which fathers could no longer refuse to consent to a marriage.\textsuperscript{10} Concern for children was reflected by Quintalian who wrote, in "Training the Orator", that,

\begin{quote}
Children are helpless and easily victimized and therefore no one should be given unlimited power over them.
\end{quote}

Quintalian was one of the first to call for schooling for needy children.\textsuperscript{11}

Prior to the introduction of Christianity into Rome children could be treated very poorly: some were sold as concubines, orphans and homeless children could be forced to be gladiators, and brothels of boys were as common as was

\textsuperscript{6} Ibid. at 38.
\textsuperscript{7} Ibid. at 39, 40.
\textsuperscript{8} Ibid. at 39.
\textsuperscript{10} Supra, note 1 at 40 - 42.
\textsuperscript{11} Ibid. at 46 - 47.
infanticide. Constantine, a Christian ruler, encouraged foster homes, forbade the splitting up of slave families and tried to get poor families to put children up for adoption as opposed to selling them.12

In 400 A.D., conflicting views as to the nature of children existed. Christ had portrayed children as innocents and Pelagues wrote that, like Adam, they did not have original sin but were later corrupted. Yet baptism existed and its purpose was uncertain. Augustine painted a picture of children as having original sin, explaining the need for the practice of baptism. According to Augustine, even infants had evil intentions but because they were so small, they could not actualize their desires and thus adults presumed them to lack intent.13 The church accepted Augustine's view but treated children up to the age of seven, if baptized, as being safe from evil influences.14

Education was highly valued by all of the classical societies. There is evidence that during the late 3rd century, parents were concerned that if a son married too early, his marriage would interfere with his studies.15

THE DARK AGES: 5TH TO 10TH CENTURY
With the decline of the roman empire, there was a return to agrarian lifestyles, as well as a family-based economy and living arrangements. The roman empire collapsed in the 5th century, and "civilization" with it. Primitive conditions, a basic economy and a reliance on family labour, led to the strengthening of the family as an institution. With increased family ties, and less state intervention, came greater control over the lives of children. The church survived and preferred the family values espoused by the barbarian tribes to roman self-indulgence and decadence.16

Infanticide did, however, continue to be a practice, despite apparent affection towards children. Wealthy families sent unwanted children to monasteries and convents as opposed to killing them.17 Dowry's were paid by the husband's family to the wife's family in case he were to be killed in battle. Marriages were viewed as a way to create economic/tribal alliances.18 The church became increasingly powerful. It banned infanticide and tried to ban child

12. Ibid. at 47, 49, 50.
13. Supra, note 9 at 28.
14. Supra, note 1 at 53 - 54.
15. Supra, note 9.
16. Supra, note 1 at 57.
17. Ibid. at 59.
marriages. The church succeeded only in limiting the age of marriage to 12 years for girls and 14 years for boys.\textsuperscript{19} The church was also unsuccessful in prohibiting marriages between cousins but did have some success in stopping arranged marriages where the girl had a religious vocation.\textsuperscript{20}

Under barbarian custom, illegitimate children could not inherit. The church courts adopted this practice and also ruled against inheritance and church office for these individuals. However, the wealthy could pay to have an illegitimate child enter church office.\textsuperscript{21}

Education was not valued - other than through the church. Generally, boys learned to serve and fight and girls learned to sew, heal, and entertain with music. Some boys were sent to missionary homes to learn. Other boys were sent to live with their master to learn a trade or craft.\textsuperscript{22}

Childhood as a concept received little attention in this era, other than from the church.\textsuperscript{23}

\textbf{THE MIDDLE AGES}

In the middle ages, childhood was not a focal point in society and the duration of childhood was shorter than it is today.\textsuperscript{24} Some have argued that there was no concept of childhood per se.\textsuperscript{25} It is clear that there was no uniform age of maturity/adulthood among the different regions and classes.\textsuperscript{26} At the age of six or seven children were dressed the same as and mixed with adults. Children lived with adults in communal living situations. Large numbers of individuals, including children, shared living and sleeping space. The family was open and public. The nuclear family, as we know it, did not exist. Children were expected to work and pull their own weight in society in order to survive. Children played adult games with adults and participated in adult pastimes.

\begin{itemize}
  \item 18. Ibid. at 58, 60.
  \item 19. Ibid. at 60.
  \item 20. Ibid. at 60.
  \item 21. Ibid.
  \item 22. Supra, note 1 at 61.
  \item 23. Ibid. at 63.
  \item 26. Supra, note 24 at, 29.
\end{itemize}
Education for children was by way of either apprenticeship or working in the agrarian community.\textsuperscript{27}

In medieval times, there was no concept of childhood innocence: all persons were privy to original sin.\textsuperscript{28} Western society was predominantly catholic and strict controls against heresy were imposed. Children were considered to be less-inclined to sin up until the age of 7, at which time, the tendency to sin was seen to increase and peak from age 14 and upwards. Children were considered a trust from god and thus his property and not that of the parents.\textsuperscript{29}

Children were often betrothed at an early age. Seven was considered the age at which children could express themselves and hence the common age for betrothal.\textsuperscript{30} Generally, "childhood" ended at 12 for girls and 14 for boys. At these ages, children could chose to marry their betrothed. A marriage by someone younger than 12 or 14 respectively, was not binding. Girls at 12 and boys at 14, could be held criminally responsible for their actions. These ages were seen as relating to puberty and hence adulthood. At these ages, youth also took a vow against heresy.\textsuperscript{31}

Seven was considered the appropriate age to attend school for the noble class, or for commoners to work in the fields or to commence vocational training, including training for the priesthood.\textsuperscript{32}

The actual emancipation of the youth depended on his or her economic status, the status of their property, regional laws and customs and individual capacity. For example, in England, an heir to land owned by socage* (Feudal tenure of land by way of service or rent to owner), could be emancipated and inherit at 15, whereas a youth in the city would not inherit until he or she could count money, measure cloth and distinguish counterfeit money. In order to inherit a fief, one had to be 21. Thus the individual capabilities of the merchant child were relevant and acquisition of adult status could vary from person to person.\textsuperscript{33}


\textsuperscript{28} M.D.A. Freeman, \textit{The Rights and Wrongs of Children} (Dover: Pinter, 1983) at 60.

\textsuperscript{29} \textit{Supra}, note 24 at 13, 16.

\textsuperscript{30} \textit{Ibid.} at 24.

\textsuperscript{31} \textit{Ibid.} at 24 - 27.

\textsuperscript{32} \textit{Ibid.}

\textsuperscript{33} \textit{Ibid.} at 29.
Boys of the noble class trained for knighthood at age seven and were removed from the home. At seven a boy would be a page; at 12, have military training and at 15 to 19, become a knight. Some 15 year old youth actually engaged in full battle.34

Girls were trained in households other than their own from the age of seven. Sometimes, girls grew up in the house of their betrothed. Women could inherit land but were not allowed to participate in public life. They had no formal schooling. Instead, they were taught how to be wives. Some girls were sent to convents at early ages.35

As the middle class evolved, brief schooling (8 months) followed by an apprenticeship was the norm. Some youth were bookkeepers at as young as 12. In Tuscany, emancipation was granted to some at age 12. The son was given some property or money and joined a merchants guild. In London, by contrast, some guilds would not even apprentice someone under the age of 16.36

In rural society, children worked with adults from an early age. Their responsibility in the fields increased with strength and individual capacity. A family with many children had more labourers. Large families could do more work and eventually buy more land for their own cultivation hence children were an economic advantage.37 The age of emancipation for poorer property owners ranged from 12 upwards. Factors such as parental willingness to relinquish the property, family structure, the economy and the availability of land were relevant.38

Economic necessity was influential in determining when “the poor” entered adulthood. Orphans with no inheritance had special status and were labourers from very young ages; some guided ploughs, some were servants and some were apprenticed.39 There are records of girls entering domestic service at very young ages. Fifteenth century contracts refer predominantly to youth under the age of 13, two of whom were under 6.40 Marriage occurred sooner for wealthy girls whose dowry provided an incentive. The poor, on the other

34. Ibid. at 210 - 212.
35. Supra, note 24 at 220 - 221.
36. Ibid. at 226.
37. Ibid. at 243 - 246.
38. Ibid. at 247.
39. Ibid. at 246 - 248.
40. Ibid. at 240.
hand, had to work to earn their dowry. Many poor women had children out of wedlock, simply because they could not afford marriage. During the middle ages, individual capabilities likely played more of a role than they would in subsequent eras but ultimately, the status of each person, seems to have been driven by economic factors.

**RENAISSANCE/ENLIGHTENMENT**

The renaissance era was the beginning of the “re-birth” of classical ideals. However, it is suspected that the type of childhood which was portrayed in the art of the time was idealized and unrepresentative. The increasing romanticism surrounding childhood may have had little impact on children of the time.

In the 15th century the family was a valued institution but this did not necessarily involve emotional closeness. Rather, family was important because family entailed an economic regime. The rise of the merchant class led to rival families. Prior to marriage, men involved themselves in trade and education. Consequently men married late, at about the age of 30. Women still married relatively young - 18 and under - and the dowry system took on new, competitive heights.

Since woman were often incompatible with their husbands, they spent more time with their infants. A sort of segregation of women and children, more formal than that of the ancient greeks, became very common. The prevalent view of children was that they belonged not to their parents, but to the larger family unit. Children who were troublesome were emancipated. This freed parents of legal responsibility for such children. Children were important as heirs - in terms of trade and nobility - and not as individuals.

Among the merchant class, the nuclear family evolved as a convenient unit to move to a new city for business purposes. When the husband died; however, the widow, who was often without a larger family network, would have to remarry to provide. Thus it was still desirable to have an extended family if possible.

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42. *Supra,* note 1 at 82, 87.
44. *Ibid.* at 77 - 79.
Children of the merchant class were sent away at birth and nursed by wet nurses. Typically these children were away from the home for most of the first 2 years of their lives. An illegitimate child might be away from the parental home until the age of 10.\textsuperscript{46} Thus, the concept of the "cherished child" did not yet exist, despite the angelic portrayal of children in art.

**ENLIGHTENMENT**

During the enlightenment, classical ideals were reborn and artistic and technological advances occurred. Society was at peace and had leisure time. In the 17th century, children were perceived as being "innocent" beings. This innocence derived from lockean views that the child was a "tabula rasa" and thus, not inherently morally corrupt. The enlightenment, or age of reason, emphasized environment as the means of instilling good in children and led to an acute emphasis on education. As innocents, children were also treated as "play things" by high society. Society began to set up a separate world of play and school for children. The "quarantine" of children, that is, their segregation from adults, became the prevalent practice. Phillip Aries, who examined the history of the family, sees this segregation as being central to the invention of childhood:

> The idea of childhood innocence resulted in two kinds of behaviour to childhood. Special attention had to be given to the upbringing of children to safeguard them against pollution by life, particularly by sexuality and secondly, to strengthen their character and reason. Children had to be subjected to special sort of quarantine before they were allowed to join adult society.\textsuperscript{47}

The reformation of the church, marked by the rise of protestantism under Martin Luther, commenced in the 16th Century. This led to a re-evaluation of ideals and to debate. The rivalry between protestant and catholic philosophies called greater attention to the nature of childhood and the need for new recruits. This led both religions to focus their attentions on children. Protestants believed in original sin but the belief was that anyone could be saved at any time by living a christian life. Further, children were viewed as the potential saviours of the future. As investments in the future, they required greater attention, including guidance and protection from evil influences. Thus, whether one adopted catholic, protestant or lockean views, a more intrusive parenting style was required. Education was also thought to be

\textsuperscript{46} Ibid. at 80.

\textsuperscript{47} Supra, note 28 at 61.
necessary at an earlier age and became valued for all classes as a means of teaching values. 48

Class was of relevance in determining what constituted childhood and to whom. Children in the sixteenth century, who were lower down on the economic scale, experienced more indifference from their parents and hence more freedom in terms of who they married and consequently, what they did with their lives. Many left home out of economic necessity at the age of 10 to work on farms or do domestic labour. 49 With property issues at stake, including issues of dower community standards, the upper class had a greater economic interest in maintaining control over their children. Consequently childhood for those of the noble classes was extended beyond that of the lower classes. For example, a lower class male was considered to be a child until age 14 when he could effectively enter the work force and participate on an economic basis in society. On the other hand, sons of nobles were considered children until the age of 21. The expectations of the children of nobles were different: it was expected that they required higher learning before they could enter society in a significant manner. The economic role of nobles was more closely tied to that of their parents than to necessity, hence the longer span of childhood. 50

With the growth in trade and prosperity, a move away from an agrarian society occurred. The middle class grew; diverging economic structures came into being. The agrarian/rural method of apprenticeship still existed but professions were created. In turn this led to lengthier training processes and the quest for higher education. Individuals who left the farm and moved into the city to go into trade by virtue of having to obtain further skills, remained in a child like state for a longer period than their rural peers. 51

During this time frame and up until the time of the French revolution the trend toward a more caring parent-child relationship developed. Among the middle class, corporal punishment and whipping became less of a daily occurrence. The expectation of the child was "respect" for the parent and no longer complete deference and subservience. Nonetheless, the upper class continued to look on their children as heirs and the lower class continued to rely on children for their labour. 52

48. Supra, note 1 at 80.
49. Supra, note 28 at 63.
50. Ibid. at 59.
51. Supra, note 28 at 61.
52. Ibid. at 63.
THE VICTORIAN ERA AND THE INDUSTRIAL REVOLUTION
The victorian era brought a reversal of permissive attitudes and a repression of children. Children were once again segregated, this time the purpose being to "put them in their place".53 In contrast to the enlightenment, children were no longer considered innocent. In contrast to medieval times, the perceived "evil" of children was not recognized in such a way as to equate children with adults but rather, to set them apart as requiring severe punishments and excessive discipline in order to rid them of their innate evil. The desire to repress children was a consequence, in large part, of puritan ideologies. Children had to be kept from all corrupting knowledge, including sexual knowledge. This is in contrast to medieval times when the communal lifestyle entailed early knowledge of sexual matters.54

The role of children remained closely connected to both parental and social economics. One author noted in 1820 that children were treated:

legally [as] the property of their parents. They were used by them ... as personal or family assets ... among the poor, the labour of the children was exploited: among the rich their marriages were contrived: to alter the economic or social advantage of the parents.55

The industrialization of the economy has been seen as being instrumental in creating adolescence. In France and England, the laws which required tradesmen to hire apprentices with a view to permanent employment and housing were repealed. Employers could instead simply hire children without any enduring responsibility. Children stayed at home while working since they could not afford to live on their own. Therefore, although they had some freedoms, they did not have autonomy from their parents.56

It was also more difficult for the upper class to get into university as the population increased and the system became more competitive. Youth entered university at a later age; 20 instead of 17 as in the 16th century. Standardized tests and the overall change in focus on youth as a separate population, not yet ready to enter the "adult world", led to the grouping of youth together as a class and ignored the individual and class/economic differences which had been factors in the medieval and renaissance transition to adulthood.57

53. Ibid. at 63, 64.
54. Supra, note 28 at 63.
55. Ibid. at 63.
56. Supra, note 1 at 182.
57. Supra, note 1 at 179 - 182.
Exploitation of children during the victorian era was extreme and represents a historical low point. Children paid a high price for industrialization. Mines and factories required little skill or strength of their labour force and hence their needs could be met cheaply by children. Extreme differences in class emerged, with the poor getting poorer. The pauper class increased in size. Families starved and sent their children to work in order to eat. Children as young as 6-9 worked 12 or 13 hour days in mines and factories. Children also worked as chimney sweeps because of their size. It was customary to utilize very young country children as sweeps. This practice was not forbidden until well into the 19th century. Children were also sold in auctions to work houses or sent to orphanages. This kept the poor and “undesirable” “out of the way”. The exploitation of these children was justified in the name of teaching them discipline. Education was not valued for the working class, who received little or none. Overall, the society was a utilitarian one and children had a utilitarian purpose.

**LATE 19TH AND EARLY 20TH CENTURY**

As a backlash to the treatment of children in the victorian era, the “child-saving” movement evolved. As Freeman points out, this approach merely refocused the objectification of the child from an object to be exploited, to one to be pitied and protected. Children were perceived as innocents by members of the protection movement. There was an increasingly romantic view of childhood. By others, children, particularly the poor children, were perceived as being the “problem population”. Children were looked upon by some as the cause of society’s problems. Thus the concept of children as being evil or troublesome had a place in society. This dual view of children and youth still haunts us today.

The goal of society was to create a “better society for the young and the future”. Some saw “family” as the critical variable in determining whether a child would be “good” or “bad”. Therefore, sound family values would save


60. N. Sutherland, *Children in English-Canadian Society* (Toronto: University of Toronto Press, 1976) at 95.

61. *Supra,* note 58 at 326.


children from a life of crime. The family had evolved into a very private institution. Provincial governments in Canada gave complete control over children to the parents with school being the backup. The size of the family had decreased, even in rural areas. The education system was holistic, including lessons on how to be a good wife and housekeeper or an industrious husband and breadwinner. Censorship grew in an attempt to create appropriate environments. Children’s literature and special game and play materials for children increased, as did discussions about childhood per se.

Childhood was viewed as being distinct from adulthood. Children were “potential” or “partially formed” adults/persons. From this “raw material” law-abiding, productive adults had to be moulded. It was at this point in history that the juvenile justice system was established, distinct from the adult justice system. The age of criminal responsibility was seven. From seven to fourteen, a youth was presumed to have innocent intent, unless the contrary was proven. The creation of the juvenile justice system was no doubt to prevent harsh punishments, but at the same time it lead to greater control over children than that exercised over adults in the criminal system. Compulsory education was also imposed. The reason behind the compulsory education laws was to prevent exploitation of children in the work force and also, to ensure that they were raised properly.

State intervention into family life became a way of dealing with society’s concern for children. Truant officers were hired to enforce school attendance. Children were taken from the streets and workhouses and taken to farms. From 1886 to 1919, thousands of children some were sent to the colonies to “save” them from the city. One agency alone sent 24,000 children to the colonies between 1876 and 1914. General concern for workers and the poor was also at the centre of reforms. Some day nurseries were set up for single parents and

64. Supra, note 60 at 91, 92.
65. Ibid. at 14, 92, 93.
66. Ibid. at 11.
67. Ibid. at 98; The Juvenile Delinquents Act, R.S.C. 1970, c.J-3 (“JDA”) was first enacted in 1908.
68. Supra, note 1 at 199, 200. Under the JDA, supra, note 67, a young person could be held for indeterminate periods, up to the age of 21. The offence of juvenile delinquency included being guilty of “sexual immorality or any similar form of vice”.
69. Supra, note 60 at 93.
70. Ibid. at 4, 9, 93; Supra, note 1 at 201.
funds were set up to allow working families time in the country. The notion that environment creates or prevents delinquency was prevalent.\textsuperscript{71}

Orphans who had been institutionalized in the past, were now more likely to have family/foster care. From 1893 to 1895, twenty-nine children's aid societies were set up in Canada.\textsuperscript{72} Unfortunately, the economic nature of many "adoptions" was evident. Older children, 9 to 18, were not adopted in rural Canada but rather, subject to a contract of indenture. Girls were clothed and fed and paid approximately $3.00 per month, whereas boys were paid $30.00 to $70.00 per month. Many applicants for children simply wanted inexpensive labour.\textsuperscript{73}

In 1893, the Ontario Act for Prevention of Cruelty to and Better Protection of Children\textsuperscript{74} was introduced. Children were divided into three categories: neglected children; street youth, homeless, orphans, prostitutes and those whose parents lacked control, dependent children; children with no families who were dependent on the state and delinquent children; those 7 to 14 who committed a crime. A neglected child could be apprehended without a warrant up to the age of 14 in order to get them off the streets.\textsuperscript{75}

However, even in the nineteenth century, those who advocated on behalf of children against exploitation, referred to the preservation of family ties and values. Thus the rights of the child were subject to the prevalent societal perception of what the family is and should be, even if it meant that the child suffered. Freeman cites as one example, a charity organization which opposed free meals on the basis that this would disrupt the solidarity of the family.\textsuperscript{76} The need of the child for food was not seen as being sufficient enough to override the interests of the family.

1920 - 1930

The 1920s and 30s were a time of economic depression. Many youth remained on the streets working as newsboys and girls, or as vendors or messengers. For some youth, street life was a culture; it enabled them to earn a living and to socialize.\textsuperscript{77}

\textsuperscript{71} Supra, note 60 at 93, 97.
\textsuperscript{72} Ibid. at 15.
\textsuperscript{73} Supra, note 60 at 9, 10; Supra, note 1 at 201.
\textsuperscript{74} Act For Prevention of Cruelty to and Better Protection of Children, S.O. 1893, c.45.
\textsuperscript{75} Supra, note 1 at 92 - 98.
\textsuperscript{76} Supra, note 28 at 64.
This was an era in which concern for children had been elevated to the extent of acknowledging the basic rights to be “free from excessive abuse, the right to life, to grow up and the right to a start in life”.

The rise in child psychology and child “experts” had several consequences. First, some argued that children had a right to a healthy emotional life as persons. This did not meet with overall acceptance as it tread on the toes of parental control. Second, “expertise” led to an increased focus on children and contributed to singling them out as a class apart. Third, standardized testing, further “homogenized” young people by setting up certain expectations for certain ages. Some youth were kept back or pushed ahead on the basis of these generalized expectations which ignored different capabilities.

The duration of childhood increased with an increased focus on education. This applied even to women. More women obtained educations which led to them leave home to go to college and to work. Hence, they entered the adult world at a later stage.

Women who were away from home also had increased freedom in dating. The economy was also instrumental in developing the concept of “dating”. Many families did not have a parlour in which young men could be entertained. Girls therefore left their crowded homes to date in the community. Dating became regulated by the young and parents lost power in this arena. Peer groups became increasingly more important, generally and in terms of choosing a spouse. Youth were more actively participating in creating their own subculture and hence, prolonging childhood.

1930 TO 1945
In the 1930s and 1940s, a migrant, rural lifestyle became a necessity for many families and a return to family-based living occurred for these groups. Those who remained in the city, faced starvation and unemployment. Women were forced to enter the work force during the wars and many wished to remain employed, but were often given menial jobs. Propaganda was put in place to try to get women to leave the workforce, in order to ensure jobs for returning soldiers. Mothers were told that children had a right to have them at home and

77. J. Hawes, Children’s Rights Movement (Boston: Twain Publishers, 1991) at 56.
78. Ibid. at 54.
79. Ibid. at 54, 55.
80. Supra, note 77 at 63.
81. Ibid. at 63 - 64.
the role of mother as housepersons was emphasized. But the workforce landscape had been altered and some programs had been put in place for working mothers, such as daycare. One of the ways women were lured back to the home was to stress the importance of the environment in raising children. Increases in juvenile crime were exaggerated to illustrate that when women worked the juvenile crime rate increased. Nonetheless, the role of women in the workplace would continue to affect society and the relationship between child and family.

**POST WORLD WAR II 1945 - 1960**

After world war II, Americans and Canadians settled into an era of peace and economic prosperity. The small, nuclear family was emphasized as the desired norm. The state showed concern for children but the presumption was that parents had their children’s best interests at heart. The baby boom and the fears of the breakdown of the family associated with the war and depression contributed to a return to traditional values. In the United States, one third of women now worked outside of the home but society continued to portray the “ideal” image of women at home raising their families. Children’s individual rights were lost in the renewed focus on the family, which was itself largely a reactionary response to the changing role of women. The economy was on the upswing and social programs lacking. In the U.S. some families were denied assistance if the home was not “fit” for the child. Under this approach, social standards for raising children prevailed over the economic needs of families and children.

Nonetheless, the wars and the depression did lead to some international recognition of basic human rights. The concern over the poor which had stemmed from the industrial revolution was revived by the depression and by both world wars. World Wars I and II resulted in extensive destruction of property and infringements of human rights. Consequently, the *Universal Declaration of Human Rights* was proclaimed in 1948. The declaration sets out the right of all members of society to social security in Article 22 and a right to a standard of living adequate for health and well being, including food, clothing, housing and medical care and necessary social services in Article 25.

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82. *Supra*, note 77 at 80 - 84.
84. *Ibid.* at 89.
While this declaration does not specifically mention children, they are not excluded therefrom.

In 1959, the Declaration of The Rights of The Child\textsuperscript{86} was proclaimed. Pursuant to this convention, children are entitled to benefit from social security and have the right to adequate nutrition, housing, recreational and medical service. The preamble of the Canadian Charter of Rights and Freedoms ("Charter")\textsuperscript{87} emphasizes the "fundamental human rights" and "in the dignity of the person". The promotion of social progress, better standards of living and larger freedoms are the primary aims of the declaration. The 1966 International Covenant on Economic, Social and Cultural Rights,\textsuperscript{88} recognizes the right to self determination in Article 1 and the right to an adequate standard of living in Article 11. These rights to basic standards do not deal with the issue of youth autonomy. Nonetheless, "self determination" is specifically provided for in the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{89} Since this covenant is not targeted at children, the application of this standard is vague. Overall, these covenants had little impact on the day to day lives of most young people throughout the world. Nonetheless, these Covenants represent the early inroads into children's rights and interestingly enough, tie these rights to economic needs. The Convention on The Rights of The Child\textsuperscript{90}, which was proclaimed in 1990, is a more comprehensive document which also deals with family situations and will be discussed below.

\textbf{1960 TO 1980}

During this time frame, the nuclear family was still an important institution but individual rights began to receive more attention. The civil rights movement acted as a model for social change in relation to the women’s and children’s rights movements. The latter two movements tended to conflict as some children’s advocates felt that the mother’s place was in the home. But ultimately, the women’s movement challenged the assumptions underlying marriage, the family and the workplace.

\textsuperscript{86.} Declaration of the Rights of the Child, U.N. General Assembly, Resolution 1386 XIV (November 20, 1959)


\textsuperscript{88.} International Covenant on Economic, Social and Cultural Rights, U.N. General Assembly, Resolution 2200A XXI (December 16, 1966)

\textsuperscript{89.} Ibid.

Social assistance legislation was put in place in the context of high employment rates and overall prosperity. General welfare assistance set up family benefits to assist a small fraction of society: the temporarily unemployed and single mothers. Legal gains for children began to appear in a hit and miss fashion. For example, in 1967, the U.S. Supreme Court held that children had rights under the Constitution and the Bill of Rights. The court ordered that children should have due process in juvenile delinquency proceedings. Basic and due process rights which applied to adults in criminal trials were held to apply to children. In 1969, the U.S. Supreme Court further confirmed that children were entitled to constitutional protection and in particular, to freedom of expression. However, as Freeman points out, constitutional adjudication in the U.S. has been piecemeal and not all constitutional rights have been applied equally. For example, corporal punishment is not a violation of the protection against cruel and unusual punishment.

In 1971 in Ontario, the age of majority was reduced from 21 to 18 and the term “minor” was used to replace “infant” when referring to a person who was not of full age. Some laws in place in the 1960s and 1970s are still in place today. Social assistance laws, for example, have changed little in relation to adult status, since 1960.

1980 AND 1990
In the last decade, society has become more tolerant of different family structures. Single parents, common law relationships, same sex couples and as well as youth who leave their family situation to avoid abuse are all receiving more acceptance. Woman are no longer expected to remain in the home and they seek careers outside of the home, before or after having a family. The role of marriage has changed from being a child/progeny focused union, to being relationship focused. The fact that many relationships do not work out and that couples separate and should not necessarily stay together for the “sake of the child” is reflected in the Divorce Act, which broadened and simplified the grounds for divorce. Parents retain their rights and obligations to children,

94. Supra, note 28 at 130.
96. Divorce Act, R.S.C. 1985, c. 3.
irrespective of marital status.\textsuperscript{97} Woman are no longer considered spousal property and hence their transition to “adult” society depends on factors other than marriage and child birth.

The nuclear family however, still represents the ideal. The contemporary family, like that of the 18th and 19th centuries is still a very private institution. As in late roman times, the birth rate is declining and society tends towards individual interests and rights. A societal pessimism has led to concerns over the destruction of the nuclear family. This overall pessimism for the future has been seen to influence all facets of society, including education. Education is highly valued and, some would say, unnecessarily prolonged.\textsuperscript{98} Many young people who go to college do not know what their vocation will be. This is in contrast to the apprenticeship process which dominated the middle ages. The 1980s and 90s have been a time of economic recession. High unemployment rates prevail and many school graduates cannot find jobs. Children and youth are viewed with an ambiguity in terms of their penchant for good versus evil. They are no longer the saviours of our pessimistic future and it has become more difficult to view them as “innocent and refreshing”. In fact, Sommerville posits that in times of economic decline we focus on children’s negative attributes: we view children as “messy, tiresome and cruel”.

There are young people in our society who are living independently. Some youth are refugee claimants whose parents are not in this country, some have been expelled from their homes, some have left home to work, to escape family conflict and some, to exercise their independence.\textsuperscript{99} Figures referred to by the Children’s Aid Society of Metro Toronto indicate that there are 100,000 to 2,000,000 persons under the age of 24 living on the streets. Further, most such youth first leave home when they are under 16 years of age.\textsuperscript{100} Canadian census data indicates that in 1986, there were 360 persons aged 15 to 19 living away from home and that in 1991, the number had increased to 750.\textsuperscript{101}

Our society does continue to show concern for children through state alternatives to parental care, including adoption. Informal care givers and

\textsuperscript{97} Children’s Law Reform Act, R.S.O. 1990, c. C-12 (“CLRA”), s.1(4).

\textsuperscript{98} Supra, note 1 at 9, 13.

\textsuperscript{99} See for example, SARB K-09-03-22 (20 July 1992; Draper) and SARB G-12-08-21 (January 1991; McCormick).

\textsuperscript{100} Children’s Aid Society of Metro Toronto, Servicing Street Youth (Toronto: June 1990) at ii; Q.M. McCullagh and M. Greco, (Draft) Inter-Agency Project on Homeless and Runaway Youth (Toronto: November 1992) at 6.

\textsuperscript{101} Statistics Canada, 1992; Families: Number, Type and Structures, at 125.
independent youth are not sufficiently recognized, given our penchant for bureaucracy and the perceived notion that children, akin to “property” need a “legal custodian”.102

The role of the television in influencing the lives of children has gained in significance. In a visual, information-based society, children were and are exposed to information and life situations which they might have been “protected” from in the 1950s. Children have become increasingly aware of what was previously dealt with as “adult” information. Censorship and control over children’s learning has become an increasingly difficult task. To some extent, the media has likely contributed to children of the 1990s “growing up” more quickly than their predecessors.103

Many of our current laws attempt to balance notions of children’s autonomy with broader societal interests. The Charter is an important example of our current focus on individual rights balanced against the interests of society. The Charter does not exclude children from protection against age discrimination.104 Clearly the federal legislators turned their mind to this issue as had they wished to exclude children from this protection, they would have done so as in the case of the Ontario Human Rights Code.105 Constitutional litigation in the area of age discrimination and youth is sparse. The significant age discrimination cases have been in relation to seniors.106 The Tax Court had occasion to deal with presumptions about when a person should leave home in the tax context.107 In Mercier v. Canada, the court held that benefits in relation to a 21 year old, who was in fact still living with and dependent on his mother, should not be cut off automatically when he turns 18.108

102. See for example the Education Act, R.S.O. 1990 c. E.2 which does not recognize the autonomy of 16 and 17 year old youth living independently.
103. Lecture from Joshua Meyerail at University of Toronto Centre for Criminology, Fall of 1992.
104. Supra, note 87, s. 15.
105. Human Rights Code, R.S.O. 1990, c. H.19, s. 10(1). The Code does not protect persons under the age of 18 against age discrimination, subject to the provisions which protect 16 and 17 year old youth in relation to accommodation.
108. Ibid.
In *Salmon and Dudnick et al.*, the Ontario Human Rights Commission found that the Human Rights Code violated the *Charter* by excluding persons 16 years of age and under from protection against discrimination in housing. The commission concluded further that adult only housing constituted age discrimination. The Divisional Court, on appeal, did not find it necessary to deal with the issue of age discrimination and held that adult only housing violated the son’s “family status” rights.

The British experience may also be helpful in addressing issues of youth autonomy. In the 1970s, Britain gave children pre-trial, trial and post-trial procedural rights. While this move attracted more attention to children as persons, the real focus was on the role of the substitute or foster family. The British courts have had occasion to deal with issues of mature minors and the nature of the parent-child relationship. In the case of *Hewer v. Bryant* (1985), the House of Lords dealt with whether or not a 15 year old who had resided with another family and worked on a farm away from his parents, was in the custody of a parent. The court found that the young man was not in the custody of a parent and held that custody:

... is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advise.”

The court commented that the common law should keep pace with the times and felt that custody could lapse by way of a parent ceasing to exercise control, in matter of fact. The court commented that had the father in this case applied for custody, he would not have succeeded. In the 1985 *Gillick v. West Norfolk* case, the House of Lords adapted its earlier reasoning in *Hewer* and would not accept the position that a young person remains under the complete control of the parent until he or she reaches the age of majority. The court found that such a notion

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111. Supra, note 28 at 171.
112. Ibid.
114. Ibid. at 582.
115. Ibid. at 582, 585, 588.
was “contrary to ordinary experience of mankind at least in Western Europe in the present century”. 117

Emancipation at common law or under statute is also a significant practice. Emancipation refers to freedom from parental control and is the means by which a person gains independent legal status. It is also the means by which a parent can avoid responsibility for an independent youth. Those states and jurisdictions with emancipation legislation are attempting to strike a balance between reality and tradition.

Emancipation has different consequences depending on the jurisdiction. Partial emancipation will allow a young person to sue for parental support whereas complete emancipation would preclude this in jurisdictions such as Boston and others. 118 Different states have different ages at which emancipation legislation will apply; for example in California, the age is 14 and in Alabama it is 16. 119 Quebec allows for emancipation at any age but social assistance benefits are not tied to whether or not an individual is emancipated. The welfare legislation precludes “independent, adult” minors from the receipt of assistance. 120 The consequences of emancipation in Quebec do not include all of the rights of majority and do not include the right to marriage without consent of a “curator”. 121

A youth may be emancipated under the common law, on application by the parents as a defence to relieve parents of responsibility for the youth, or on application by the youth as a means of “freeing” the youth from parental controls. Factors such as whether the child resides at home, whether the child is financially independent (including the receipt of welfare) and whether the parents discipline or otherwise “control” the child are among those considered. 122 Cases are decided on their individual merits. Ironically, it may be the legal context of the action and not the facts such as a defence raised by parents or motion by the child which drives the finding of emancipation. 123

117. Ibid. at 410 - 411.
121. Civil Code of Quebec, S.Q. 1991, c.64 at Articles 315-340; Article 120; Article 138.
122. Supra, note 118 at 294.
123. Ibid. at 295.
At common law, a young person can contract for and thus be liable for necessaries. A contract for non-necessaries may be binding on the young person if it is beneficial to them. A minor is therefore in a position to sign a lease and be responsible for it. The Human Rights Code protects 16 and 17 year olds with respect to the occupancy of and contracting for accommodation. Section 4 specifically provides that a lease is binding on this age group. A youth aged 15 and under may still contract for necessaries but will not be provided the protection of the Human Rights Code. The contractual rights and responsibilities of minors can put them in a position to enter into society at any age depending on their own maturity and level of understanding. However, due to the lack of availability of financial resources, minors are basically precluded from entering society in a legitimized fashion.

Under the common law, an individual of any age can consent to medical treatment if they understand the nature and consequences of the treatment. The only exception to this rule in Ontario is that under the regulations to the Public Hospital's Act, an individual must be 16 years of age before they can consent to surgery in a public hospital. The Consent to Treatment Act which was recently proclaimed, codifies the common law in that individual capacity to consent and not age, is determinative. Further, when a young person reaches the age of 14, they are entitled to be advised of the right to appeal a finding of incapacity and of their right to have a rights advisor. This does not mean that an individual under the age of 14 cannot appeal a finding of incompetence, but rather, that they are less likely to know of their rights and therefore, exercise them. This is likely a form of constructive discrimination. The new legislation adds to the common law a process whereby an individual can appeal a finding of incapacity by a doctor. The codification of the law and the appeal process will result in more equitable treatment for young people on the issues of consent and refusal of treatment. In relation to their bodily integrity, our lawmakers are sensitive to issues of touching without consent, subject of course to the defence to corporal punishment discussed below.

Pursuant to the Succession Law Reform Act, a youth cannot make a will unless he or she is 18 or married or in the armed forces. As was the case in the middle ages, marriage or military service act as automatic "emancipators".

124. Supra, note 27 at 276 - 282.
125. Supra, note 105, s.4.
127. Consent to Treatment Act, S.O. 1992, c.31 ("CTA").
The *Succession Law Reform Act*\(^{129}\) is out of step with society’s recognition of common law spouses and interestingly enough, unlike other benefits, parenthood does not trigger the right to participate in this “adult” activity.

Children can own property, including gifts from parents. Unlike in the United States, Canadian parents are not entitled to their children’s wages.\(^{130}\) *The Children’s Law Reform Act* (“CLRA”) sets up a system of guardianship for property.\(^{131}\) While children own property, our society sets up barriers to their dealing with it. A parent is not automatically the guardian of a child’s property whereas they automatically have custody or “own” the child. If a parent acts as a guardian and is appointed guardian, they must act in the interests of the child. Once a child reaches the age of 18, their property must be handed over to them.\(^{132}\)

The legal age for marriage is 18. At 16, a youth can marry with parental consent, with a court order or a letter from the Minister of Consumer and Commercial Relations dispensing with parental consent.\(^{133}\) Common law marriages have been recognized at as early as age 12 for girls and age 14 for boys and are subject to basic contractual laws in terms of force and effect.\(^{134}\)

Children remain the only segment of society that one can apply for custody of.\(^{135}\) Custody as a concept is akin to ownership as it involves notions of the child as property, under the control and direction of the parent. Parents go to court to resolve who gets the house, the car and the children. Formerly, slaves and women were considered property, without individual legal capacity. Further, children remain the only class in society which can be punished physically with some impunity. Section 43 of the *Criminal Code* provides a defence to assault on a child in given circumstances. This defence is available to parents and teachers using reasonable force for the purpose of correction.\(^{136}\)

Pursuant to family law legislation, which regulates the relationship between the parent and the child, the length of childhood is, in practice, up to the age of

\(^{129}\) Ibid.

\(^{130}\) *Supra*, note 27.

\(^{131}\) *Supra*, note 97.

\(^{132}\) *Supra*, note 27 at 282 - 293.


\(^{135}\) CLRA, *supra*, note 97; *Divorce Act*, *supra*, note 96.

\(^{136}\) *Criminal Code*, R.S.C. 1970, c.C.34, s. 43.
16. At that age, a child can leave home without being forced to return to the home.\textsuperscript{137} Although a custody order may be made in respect of the youth up until the age of 17 or older, the fact that they can leave their respective homes, might render such an order pointless.\textsuperscript{138} A child can be apprehended (physically taken to a safe place) by a Children's Aid Society up to the age of 16 and under a parental warrant \textit{if unsafe}.\textsuperscript{139} This does not mean that a child younger than the age of 16 could not leave home and be emancipated \textit{in fact} or by an application under the CLRA that the child be placed in their own custody.\textsuperscript{140} Further, at 14, a child can leave home and reside with an adult, without rendering the adult criminally liable.\textsuperscript{141} A child can no longer be arrested in Ontario for a “status offence”, such as being unsupervised on the street, out of school, or involved in immoral sexual behaviour. This change, which occurred in 1985, is a significant acknowledgement of children as persons.\textsuperscript{142} Where there is a legitimate protection concern, the \textit{Child and Family Services Act}, R.S.O. 1990, c.C.11\textsuperscript{143} (“CFSA”) (non criminal legislation) can be invoked.

Child welfare legislation, which regulates the relationship of parents and children and the state and which may also involve an alternate care giver, attempts to balance principles of least-intrusiveness into the family situation, with the principle of the best interest of the child.\textsuperscript{144} Children have certain rights under the legislation, but ultimately the court decides what is in their interests. At the age of 12 however, the child’s consent is needed for voluntary care agreement and is also needed for consensual application before the court.\textsuperscript{145} A child aged 16 or over cannot be apprehended or taken into care by way of application.\textsuperscript{146} A young person who is already in care, will remain in care until the age of 18 at which time the care is terminated. The Children's Aid

\textsuperscript{137} \textit{Family Law Act}, R.S.O. 1990, c.F.3 ("FLA") s. 31(1); CLRA supra, note 97, s. 65.

\textsuperscript{138} \textit{Supra}, note 97, s. 18(2).

\textsuperscript{139} \textit{Child and Family Services Act}, R.S.O. 1990, c. C.11 ("CFSA"), s. 41(1); CLRA, \textit{supra}, note 97, s.65.

\textsuperscript{140} \textit{Supra}, note 97, s.21.

\textsuperscript{141} \textit{Supra}, note 136, s. 280 - 284.

\textsuperscript{142} See the \textit{Young Offenders Act}, R.S.C. 1985 c. Y-1 ("YOA"); and CFSA, \textit{supra}, note 139, as compared to the \textit{JDA, supra}, note 67 and the \textit{Child Welfare Act} R.S.O., 1980 c.66.

\textsuperscript{143} \textit{Supra}, note 139.

\textsuperscript{144} \textit{Ibid}.

\textsuperscript{145} \textit{Ibid}. s. 29(2)(b); s. 37(2)(e).

\textsuperscript{146} \textit{Ibid}. s. 37(1).
Society may voluntarily extend care of the young person until the age of 21, reflecting the role of education in our society as being a determinant of when a young person effectively enters into the world on an economic basis.\(^{147}\)

While the child is still objectified under the CFSA, their status as a person is recognized through procedural rights and certain rights while in care.\(^{148}\) An Ontario Court, Provincial Division, has held that a child is a “person” under the CFSA, for the purposes of bringing a protection application where a CAS has refused to do so.\(^{149}\) The ultimate consequence of a successful child protection application is that the CAS “owns” the child, but only to the extent regulated in the CFSA. The CAS also acquires parental rights but where these rights are limited (eg. medical consent) the power of the society is limited.\(^{150}\)

The Young Offenders Act (“YOA”) represents a move away from the rehabilitation focus of the Juvenile Delinquents Act (“JDA”).\(^{151}\) The YOA emphasizes individual accountability for action and balances this against the special needs of the child and society. The YOA represents a move towards a recognition of the individual, imposing principles of more adult-type criminal accountability, into its application. The YOA is one of the better examples of a balancing act between rights and responsibilities. The age for criminal liability is twelve and the YOA applies to procedures and dispositions until the young person reaches the age of 17. At 14, the youth can be transferred to adult court and if found guilty, be held in an adult facility.\(^{152}\) The YOA also provides that a youth who is transferred may serve some of their disposition in a youth facility. If an individual is involved in serious criminal activity and is under the age of 12, the CFSA can be invoked.\(^{153}\)

In Ontario, the compulsory age for school attendance is from 6 to 16 at the end of the school year in which the child has turned 16.\(^{154}\) A young person can work after hours or on weekends, as long as they do not work during school hours, before they turn 16.\(^{155}\) At 14 with parental permission however, a

\(^{147}\) Supra, note 139, s. 71.
\(^{148}\) Ibid. s. 105, 107, 108.
\(^{150}\) Supra, note 139, s. 65.
\(^{151}\) YOA, supra, note 142; JDA, supra, note 67.
\(^{152}\) Supra, note 142, s. 16.
\(^{153}\) Supra, note 139, s. 37(2)(j), (k).
\(^{154}\) Supra, note 102, s. 21.
young person can enter an early school leaving program similar to an apprenticeship or co-op program.\textsuperscript{156} Although a child could be working full time at the age of 16, he/she is not entitled to a higher level of minimum wage until the age of 18.\textsuperscript{157}

Both the federal and provincial governments in Ontario charge sales tax on consumer items, including food and clothing, even for low income people. Sales tax rebates or credits have been designed to provide some relief, after the fact, for low income consumers. While youth are probably one of the largest consumer groups in society and are the target of much of our advertising, they have limited access to these rebates, based on age and not income criteria. A parent is entitled to claim the credit for the dependant child, but a child living out of the home, with increased expenses, cannot claim the credit.

In Ontario, an individual for tax purposes is defined as someone aged 16 or older.\textsuperscript{158} Thus, the Ontario tax credit refund is available to those aged 16 and up. This seems consistent with the \textit{Education Act}.\textsuperscript{159} It is not clear whether a 15 year old who worked part time and whose income exceeded certain limits would have to pay tax. In any case, since the refund is designed for consumers and not just tax payers, it would make more sense to exempt those not entitled to the refund (i.e. independent 15 year olds) from paying provincial sales tax.

A young person who is a consumer and who may be in the work force and pays taxes, will not receive the Goods and Services Tax (GST) refund credit until they are 19 years of age, married or a parent.\textsuperscript{160} Interestingly enough, when the legislature imposed the GST credit refund, it did not even consider to what age group it should be given. The imposition of the age of 19 was completely arbitrary. The sole criteria before Parliament was the level of income at which a person should be entitled to the refund.\textsuperscript{161} That being the only relevant

\textsuperscript{155.} Re Bruyne v. Director of Vocational Rehabilitation Services Branch (1975), 25 R.F.L. 159 (Ont. Div. Ct.).
\textsuperscript{156.} \textit{Education Act} Regulations, O.Reg. 523/82.
\textsuperscript{157.} \textit{Employment Standards Act}, R.S.O. 1990, c. E.14, s. 10(1)(3).
\textsuperscript{159.} \textit{Supra}, note 102.
\textsuperscript{160.} \textit{Income Tax Act}, R.S.C. 1952, c.148, s. 122.5.
criteria, it is curious that age-based biases crept into the provision of the benefit.

Similar biases have crept into the provision of social assistance. A young person under the age of 16 will not receive general welfare assistance in their own right. 162 Accordingly, for people under 16 the only means of accessing assistance is through an adult. If the youth resides with a third party adult, even in a non-parental relationship, they can only receive benefits as a so called "foster child" of that person. 163 In many instances, an artificial relationship is imposed on the youth and the adult.

Youth aged 16 and 17 will receive general welfare assistance only if they can prove "special circumstances". 164 "Special circumstances" are not defined in the General Welfare Assistance Act ("GWAA"). The term "special circumstances" has been given a variety of interpretations. It is now clear that special circumstances will include a broad spectrum of situations and are not limited to those situations involving physical violence. 165 Despite the child's legal right to do so, special circumstances has not yet been interpreted by welfare administrators to extend to situations in which the child simply chooses to leave the home.

Under Transitions, the Report of the Social Assistance Review Committee issued in 1988, it was recommended that 16 and 17 year olds receive assistance, as adults, without having to prove special circumstances. 166 It was recommended that this age group participate in opportunity planning earlier than older individuals. Transitions acknowledged that the age limit was inequitable. In Back on Track, a report issued in 1991, the Social Assistance Advisory Group back peddled on the recommendation in Transitions. The Back on Track Advisory Group recommended that the onus for proving that a youth did not have special circumstances should rest with the administrator. 167

4768, 5892, 6473, 6474, 6502, 6514; vol VI at 7372, 7740; vol. VII at 8828; vol. X at 11868; vol. XII at 14483; vol. XIV at 17831.

162. SARB G-12-08-21, supra, note 99.


164. General Welfare Assistance Regulations, O. Reg. 590/87, s.7(4).

165. Ontario, Ministry of Community and Social Services, Eligibility for 16 and 17 Year Old Persons: Directive (Toronto: July 1993).

166. Supra, note 91, Recommendation 3 at 141.

This would likely have made little difference in practice. In *Time for Action*, a report issued by the same Advisory Group in 1992, the Advisory Group pulled back even further and recommended that for 16 and 17 year old youth, the emphasis be placed on individual assessments of circumstances.\(^{168}\) The most recent “White Paper on Social Assistance” issued in August 1993, *Turning Point*, purports to set up a new system of social assistance in the nature of a benefit package.\(^{169}\) The recommendations create two benefits: one for families with children, “the Ontario Child Income Program” (OCIP) and the “Ontario Adult Benefits” (OAB). The paper does not clarify the age at which an individual will be entitled to adult benefits and does not address the issue of youth living out of family home.

Under the *General Welfare Assistance Act* (GWAA)\(^ {170}\) an individual who lives at home with his/her parents, will be considered a beneficiary up to the age of 21. At the age of 21, they are automatically entitled to non-dependant benefits.\(^ {171}\) Again, the age is an arbitrary one, likely based on an assumption about the age at which youth leave home.\(^ {172}\) Recent recommendations for social assistance reform, in the Time for Action suggested that the age of dependency should be reduced to reflect the age of majority and that persons living at home at age 18 should receive independent benefits.\(^ {173}\)

As a single parent, an individual of any age is entitled to general welfare assistance.\(^ {174}\) This reflects the notion also seen in the GST credit refund, that as a parent, one is automatically an adult, regardless of individual maturity. The *Family Benefits Act* (“FBA”)\(^ {175}\) which provides long-term assistance to single parents, in recognition of the importance of the parent remaining in the home of the child, is a confusing piece of legislation which has been altered as

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171. *General Welfare Assistance Act Regulations*, O.Reg. 221/87, s. 1 (the definition of “single person excludes employable persons under 21 living with parents or with a person with a parental role.”)


174. *GWAA*, *supra*, note 163; *General Welfare Assistance Regulations*, O.Reg. 590/87, s. 12(1); 7(4).

a result of inherent biases.\textsuperscript{176} The \textit{FBA} originally only applied to single women and did not acknowledge that a single parent might include a father. Further, the \textit{FBA} distinguishes between children born in and out of wedlock requiring unwed mothers to be at least 16 years of age before they can receive benefits. These inequities in the legislation have been cured through amendments to the regulations, some as recently as 1991.\textsuperscript{177}

While single parenthood emancipates a youth for social assistance purposes, it is not clear whether marriage does the same. A married 16 year old applying for general welfare assistance would likely still have to establish "special circumstances". The status of two 14 year old youth who declare themselves spouses under the \textit{GWAA} or the \textit{FBA} is uncertain. Both pieces of legislation include in their definition of spouse, persons (without reference to age) who declare themselves spouses.\textsuperscript{178} For a common law relationship to be recognized, a three year cohabitation period is utilized. A "married" person under the \textit{FBA} is a married adult; "adult" is not defined. But arguably, one can still be a deserted spouse without being legally married.\textsuperscript{179}

Both the \textit{FBA} and the \textit{GWAA} recognize alternate care givers as both allow for a benefit payable to a person who cares for the child of someone else. The foster parent benefit is based on the child's income and the support obligations of the natural parents. The \textit{FBA} defines parent broadly enough to recognize a de facto custodian.\textsuperscript{180}

Other pieces of legislation which give benefits to parents and/or care givers, do not deal with the issue of independent youth. The federal child tax credit is only available to parents and not to the child living independently.\textsuperscript{181} The benefit seems to be available only to the actual custodian. If the benefit is conferred with the intention of providing for the extra needs of a minor up until the age of majority, there is no rational basis for preventing the independent minor from receiving it. Under the predecessor to the child tax credit, the family allowance regime, if the child moved out of the home, the parent could

\begin{itemize}
\item \textit{Ibid.}
\item \textit{Supra}, note 175; \textit{Family Benefits Regulations}, O.Reg. 631/91, s. 2(7).
\item \textit{FBA}, \textit{supra}, note 175; \textit{Family Benefits Regulations}, O.Reg. 631/91, s.1(1)(a); \textit{General Welfare Assistance Regulations}, O.Reg. 590/87, s. 1(1)(a).
\item \textit{FBA}, \textit{supra}, note 175; \textit{Family Benefits Regulations}, O.Reg. 638/86; 589/87, s.1; O.Reg. 631/91, s.2(7)(b).
\item \textit{GWAA}, \textit{supra}, note 163; \textit{General Welfare Assistance Regulations}, O.Reg. 708/84, s. 1; \textit{Family Benefits Regulations}, O.Reg. 631/91, s. 2(8).
\item \textit{Supra}, note 160.
\end{itemize}
theoretically continue to receive the benefit. The child could not apply for the benefit in their own right. If the child were living with an adult, that adult could apply for the family allowance. Yet a child living on their own with increased needs, would not receive the benefit of the allowance.

Under the *Canada Pension Plan*, an orphan is entitled to orphan’s benefits. As in the case of the other federal allowances, the child living independently is not entitled to receive the benefit. A minor can apply for the benefit, but only a legal custodian or person approved by the Minister may receive it. In this case, the benefit which is direct compensation for the orphan’s loss of a parent’s contribution to the child, should in no way relate to who is the child’s current care giver or whether or not the child is independent, particularly since the parent paid into the plan when alive. Understandably, a third party who is caring for the child should be entitled to some compensation and this should not be left to ministerial discretion. Further, if the child is assuming their own care then they should also be entitled to the benefit directly.

The financial benefits discussed above are all government benefits, but in keeping with the significance of the family to the child, it is parental obligations which are paramount. Under the *Family Law Act* ("FLA") and the *Criminal Code*, a parent must provide the necessities of life to their children up to the age of 16. Once a youth reaches the age of 16, if they leave home and sue for support, the parents can assert, as a defence, that the child left home voluntarily. The court will examine the family situation to determine the issue. If a child leaves home voluntarily and cannot receive parental support, it is not clear whether they would have “special circumstances” under the *GWAA*. To date, there appear to be no cases on point.

1991 was declared the year of the child. An examination of *The United Nations Convention on the Rights of the Child*, brings us up to date in terms of children’s rights in a global scale. This convention is a balancing act between state, parent, child, alternate care givers and the basic needs of the children. It has evolved from the early human rights articles in that it expressly states in

185. *FLA, supra*, note 137.
188. *Supra*, note 90.
Article 12, that the child’s views are to be considered and given due weight in accordance with the age and maturity of the child. In theory, the convention is important because it provides for an adequate standard of living; the right to benefit from social security, and accordingly it seems to permit applications for social security by the child directly. The convention seems based on concern for the child and not individual autonomy, harkening back to the early 20th century and to earlier international conventions. The practical impact of this convention has yet to be tested.

CONCLUSION

If we look back on the history of childhood and children’s rights, the concept of the child has unfolded in almost an accordion-like fashion. At some points, children have lacked significance as a distinct group; mixed with adults at other points, children have been segregated and subject to special treatment only to fade into the background again.

“Age” has been one of the significant determinants of adulthood. Certain “ages” have remained as consistent milestones for children and youth. It is important to note that any given “age” reflects adult perceptions of the time. A subsequent reliance on any one age could reflect habit, tradition or a failure to address out-dated laws. For example, the age of seven was significant throughout history as the age at which children were presumed to have or be capable of negative intent. Seven was also the age at which medieval children would join in adult life and work environments. Similarly, seven year old Roman boys were invited to observe at fathers’ workplace. The age of twelve has also been significant, historically, as the age at which many women got married. This age, it has been acknowledged, was associated with the onset of puberty. Since man matured physically later, the adult age for boys was seen as being fourteen. Currently, the age of twelve is significant in terms of procedural rights under the CFSA and as the age of criminal responsibility. Between the ages of twelve and sixteen, there is some balance between autonomy and society’s desire to protect children, however, in the cases of serious abuse, society’s concern to protect children takes precedence. The age of fourteen was considered the “age of discretion” at common law. In relation to the first status offences, an individual fourteen or over could not be picked up. Currently, fourteen is the age at which an individual in Ontario can likely leave home without being forced to return, provided they are safe. Furthermore, the age of fourteen is the age at which a person is advised of their rights in the medical-consent context.

The age of sixteen, which had significance in roman times as the age at which a young man entered adulthood, is the age at which youth today have many
rights of autonomy. This autonomy, however, is not acquired without restrictions. Youth are not considered full adults and while they can work, they cannot vote and do not get adult wages. If a young person chooses to leave home and obtain financial assistance, they must demonstrate to either a family court or a social assistance tribunal, that they left home for a good reason. This inevitably leads to conflict between child and parents and to an examination of "fault", a concept which has been carefully removed from the focus of divorce proceedings. A single 16 year old who is living independently can receive the Ontario Sales Tax Credit but not the Goods and Service Tax (GST) refund, the Canada Pension Plan, orphan's benefits or the child tax credit. Currently the age of 18, as the age of majority, has much more significance then in earlier time periods.

In addition to age-based criteria, many of our current laws, carry with them assumptions about when a child becomes an adult and more specifically, when they are perceived to be able to - in fact or practice - set up their own household. These assumptions are bound up in our tendency to view young people as they relate to a family: their parent's family or their own family. The one fairly consistent theme throughout history is that marriage emancipates the youth from the parents (whether the woman became someone else's chattel is another issue). The age at which youth marry has, however, altered through the ages and while puberty was a major determinant in medieval times, economic and educational factors have ruled the day. Today, the significance of marriage is evidenced in social assistance legislation and the GST credit, although common law relationships have somewhat clouded the issue. As the GST credit, family benefits and general welfare assistance scheme indicate, parenthood is currently determinative in terms of treating the parent and child as an economic unit. This was not necessarily the case when extended communal families were the norm. Since parenthood can come with puberty, it is ironic that a mature single 15 year old is excluded from our concept of who can head their own household.

Religion has also played a significant role in painting children as good or evil or both. This in turn, has influenced the type and duration of education that each given era has proscribed. The duration of education affects the youth's entry into the workforce, which has been a critical factor in determining de facto emancipation.

Factors such as age, parenthood, marriage, higher education and employment can be described as "triggers" of adulthood. What is evident from an examination of current society is that we do not know how to react when, as is common today, there is no "magic trigger". Youth often leave home at a range of ages without a specific direction in mind. Events such as marriage are often put off
with a view of education. Yet, high unemployment rates, education without direction and an acknowledgment of varying individual capabilities, have altered the social context in which youth grow up and move out. The fact that traditional “triggers” of adulthood are still heavily relied upon, indicates the need to re-think the legal status of the child.

The relationship of the child to the family has been one of the most influential factors in determining when a youth is emancipated. One author has cynically pointed out that in our society:

a baby completes a family, rather like a T.V. set or fridge ... [and] a child belongs to his parents like other possessions over which they may exercise exclusive rights."\textsuperscript{189}

Currently, while notions as to the paramountcy of the family remain in our society, we are faced with opposing assertions as to what priority society should give ideas about autonomy. We now have authors such as Roche who profess that “… especially where older children are involved, family should mean more than parents and “harmony” should mean more than control”.\textsuperscript{190} Yet, as in the 19th century, when issues as to the extent of providing for children’s rights arose, concerns about the preservation of the family are likely to be raised. These concerns beg the questions: what is the family? and how do we analyze the dissolution of the family in a complex society? Those who raise these questions ignore the fact that we accept that “adults” can leave home and remain on good terms with their families. Leaving home need not be associated with family dissolution. As Freeman points out, those who assert that providing children with rights enhancing their independence, will necessarily lead to the destruction of the family, have failed to prove this assertion or to document it in any way. He points out that in the United States, immigration laws are constantly leading to the dissolution of the family.\textsuperscript{191} Under our immigration system, families are prevented from reuniting. In other instances, one party is deported and others remain behind. There appears to be a disproportionate amount of concern over giving youth independence, as opposed to the effects of other processes.

A similar comment could be made about custodial disputes between parents. Family breakups between parents have an effect on young people and an obvious effect on the family and yet no one attempts to prohibit these things

\textsuperscript{189} Supra, note 28 at 64.


\textsuperscript{191} Supra, note 28 at 69.
from occurring. The self-determination rights of both adults are honoured in spite of family responsibilities. The courts struggle to define which home is better for the child, but do not have the authority to dictate that the home must remain united based on the assumption that a united home is better for this child. In reality then, the issue in custodial disputes is one of parental control, not sanctity of the family unit which is "eroding" or changing in any case.

The "segregation" of children has also had profound affects on "childhood", our laws and our attitudes. First, we ignored children, then we called attention to them, creating a distinct group. We then proceeded to make assumptions about them, some founded, others not, all based on identification as a group and not based on individual capabilities. This is the language of "discrimination" against which, theoretically, children in Canada are protected. Our laws and attitudes still reflect biases based on our perception of the dependency of this group, as opposed to individual preparedness. This is unfair since, to some extent, we have created and fostered that dependency. The trend towards recognizing individual rights and the potential for Charter challenges of the denial to youth of benefits because of age both hold out some hope for a more reflective, fair and realistic treatment of "minors". It remains uncertain which presumptions about age and youth will be viewed as discriminatory or unjustifiable by the courts/tribunals. We do not know to what extent decision makers will acknowledge the self determination of youth or the reality of any given situation. The common law doctrine of emancipation is significant in that it does show some sensitivity by the courts to these matters. Ironically, however, "emancipation" is often driven by the parent's desire to avoid financial responsibility for the youth.

In examining the legal status of young people and the protection and benefits available to them, we cannot underestimate the importance of the special treatment given to them in certain contexts. Some rights were given to children due to their status as an historically disadvantaged group. If excessive exploitation and physical abuse of children had not been prevalent in the 1900s, special protection provisions would not have been put in place. Exploitation and abuse have led to the need for laws to bring children's rights into line with those already enjoyed by the rest of society. Yet, in attempting to equalize these rights, we have often lost track of the child and instead, the interests of fostering dependence so as to fit society's agenda have often taken over. The status of the child is still something less than that of an adult and we have not moved very far away from the concept of the child as property.
Those youth who have been compelled by necessity, individual preparedness, or culture, to encompass an adult lifestyle such as street youth, youth living independently and/or refugees, are in no different position than their medieval predecessors. Our economic benefits should be available on the basis of relevant factors and not age or situation-based assumptions about when a person sets up their own household. Our laws should keep up with reality and allow for more flexibility for those individuals who have broken away from the mould of childhood that western society has created.