WHO ARE YOU CALLING A CHILD? THE LIMITS ON STREET-INVOLVED YOUTH USING LEGAL RIGHTS

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ABSTRACT

At any one time there are estimated to be between 300 and 500 young people involved in street life in Vancouver. Although between 40 and 50 per cent leave the street life each year, the overall figure remains much the same. Living on the street increases the chances of the young person being involved in crime, such as prostitution or theft, and of suffering from drug addiction, violent assault or HIV. However, for many young people the street is preferable to what they have left behind. And even when living on the street becomes too difficult, getting off the street often appears impossible.

This thesis considers one way of addressing the problems faced by young people on the street: the use of legal rights. In particular, it considers the limits on such young people using rights. First, under the two main theories of rights for children, the content of the rights is decided by adults on behalf of the child. Second, the liberal form of rights further restricts their use by street-involved youth due to the anti-statist and atomistic nature of this version of rights. Third, the dominant discourse of childhood constrains the use of rights by imposing familial structures on young people on the street and ignoring their views.

Rather than suggesting new rights for street-involved youth, this thesis concentrates on strategies that might be of use for street-involved youth in overcoming these constraints. These are giving an active voice to young people; insisting that the individual characteristics of street-involved youth are taken fully into account; considering a variety
of actions, some of which might seem contradictory, but which allow for maximum flexibility; trusting the decisions of young people on the street; and ensuring that street-involved youth are not seen as an isolated problem, but in the context of a wider picture of other people with similar problems, such as adult street people, lesbian and gay youth, welfare recipients and so on.
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Finally, thanks must go to my partner, Catherine, who has helped me throughout this process. It was her initial idea for me to focus on street-involved youth and her insight has been invaluable throughout.
INTRODUCTION

They tell me
I can be
anything
I want to be.
They tell me
the world
is mine
and I tell them
I am somebody.
I am a street
person.

A Street Kid

Despite the introduction in 1989 of the United Nations Convention on the Rights of the Child and its widespread acceptance throughout the world, children’s rights remain a controversial subject. While the existence of children’s rights can no longer be denied, their theoretical basis is still the subject of debate. This thesis concentrates on the use of rights by one particular group of children, young people living on the street. It considers the ways in which legal rights might be of use to these young people and the limits on their using rights. Finally, it considers strategies that might help to overcome these limits.

At any one time there are estimated to be between 300 and 500 young people involved in

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2 As at June 1997, the latest date available, all but two countries in the world had ratified the Convention. The outstanding countries were Somalia, which has no internationally recognised government to sign, and the USA, which has signed but not ratified the Convention. Accordingly, the Convention is the most widely supported (at least as regards signature) international document in existence.
street life in Vancouver. Although between 40 and 50 per cent. leave the street life each year, the overall figure remains much the same. Living on the street increases the chances of the young person being involved in crime, such as prostitution or theft, and of suffering from drug addiction, violent assault or HIV. However, for many young people the street is preferable to what they have left behind. And even when living on the street becomes too difficult, getting off the street often appears impossible.

In this thesis, rather than considering specific solutions to the problems faced by street-involved youth, I look at one means by which such solutions could be provided. That is the use of legal rights. A right to shelter or to financial assistance might help a young person who leaves home avoid having to live on the streets and the problems associated with this. However, there are limits on the effectiveness of any such rights for street-involved youth.

First, the two main theories of rights, the will theory that respects the choices of the rights-holder and the interest theory that protects the interests of the rights-holder, are both restrictive so far as children are concerned, as the content of the rights are decided not by the child, but by adults on the child’s behalf. So, street-involved youth have a

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4 Ibid., p. 9.
5 Bill McCarthy, On the Streets: Youth in Vancouver (British Columbia: Ministry of Social Services, 1995).
6 Ibid., p. 17.
7 Chand, supra, note 3, p. 9.
number of protective rights, but do not have any say as to whether they wish such rights to apply to them.

Second, the liberal form of rights means that their use is restricted for street-involved youth. In liberal theory, rights are anti-statist; that is, they primarily exist to protect individuals from interference from the state. Rights provide a space within which the individual may act as he or she pleases. However, for young people on the street this can be problematic. They tend to need services from the state, rather than protection against its interference in their lives. Second, rights are atomistic. They are designed to deal with problems one by one, not to look at the interconnected nature of life. As street-involved youth have a number of related problems, such as relationships to their families, relationships with the police and child welfare officials and relationships to other street-involved people, rights are not necessarily the best means to solve these inter-related problems. Rights might be able to deal with each in turn, but not with all of them together. Further, the atomistic nature of rights means that there needs to be an autonomous individual who can exercise the right. Children tend to be seen as dependent and to lack capacity. This means that they are not seen as rights-holders.

Third, the use of rights by young people on the street is restricted by the way in which the dominant discourse of childhood constrains their ability to claim rights beyond those granted to them by adult society. Childhood is not just a biological stage of life through which each of us passes on our way to adulthood. It is also a set of ideas and constructs
that defines the behaviour considered appropriate to children and restricts them from acting in a manner that is inconsistent with such constructed behaviour. Childhood in western society is a time of dependence, particularly dependence on the family; children are regarded as incompetent to make decisions about their lives, in need of protection and, to some extent, innocent. However, the picture painted by this dominant discourse is the opposite of the lives led by young people on the street. These young people have rejected the idea that they should live within a family setting, they have made a decision to live on the streets, they do not consider that they need protection and they are not innocent. Despite the fact that street-involved youth reject the dominant discourse, it still constrains their lives. In particular, it restricts the use of rights by imposing familial structures on their lives and by ignoring their wishes as to what rights they should have.

These are serious limits on the use of rights by young people on the street. However, there are strategies that can help to overcome these limitations. These strategies are aimed both at governments, those who work with young people and the young people themselves. They include giving a true voice to street-involved youth, so that they are included in the process of deciding what rights young people should have; ensuring that young people are not seen as a homogenous whole, but that their differences of race, gender, sexuality, class and age and so on are fully taken into account in providing services; and ensuring that young people are not seen as an isolated problem, but in the context of a wider picture.
CHAPTER ONE – WHY USE RIGHTS?

So You Think This Is Easy

So you think this is easy,
waking up on the cement at 3 a.m.,
the flop house is full again,
and you don’t know where your kids are.

So you think this is easy,
waking up to the news
that another brother is dead.

So you think this is easy,
waking up to hear a sister sobbing,
her old man in jail,
no food in the house and the rent is due.

So you think this is easy,
asking for money from people
with disdain in their eyes,
so you can have one more meal in your belly.

So you think this is easy.
Come with me for one day
and see the life I choose,
then say this is easy.

John

This thesis addresses the limitations on street-involved youth using legal rights. As a starting point, I wish to consider why such young people might wish to use rights at all.

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8 Out in the Open, supra, note 1.
Young People on the Street in Vancouver

To give a brief picture of the position of street-involved youth in Vancouver I have referred to a 1992 study of street youth in Vancouver, being the most recent comprehensive study of street-involved youth in Vancouver. The results of this study show that 58 per cent. of the youth were male and 42 per cent. female, 67 per cent. were under 19, 9 32 per cent. were First Nations (with only 1 per cent. of the relevant school population being First Nations). 10 Sixty-three per cent. considered that they had no choice but to leave home. 11 Of those who felt they had no choice, the following was a typical comment,

My dad’s an alcoholic so he always abused me. Punch me and stuff like that. Throw me up against the walls. Once the cops came and they took him and they said, ‘you can go live with your mother, right?’ My mother said, ‘well, we don’t want you.’ So, I went out in the streets. 12

A further 19 per cent. considered that they had left of their own choice. However, this comment from one such youth shows that even this choice was constrained:

[My father] we both argue, and you know we just walk away in frustration, [and when] I turned 16, my father, like said, ‘its time for you to leave’. 13

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9 With 41 per cent. being between 16 and 19 and 26 per cent. below 16. Chand’s study, You Have Heard This Before, supra, note 3, reports that “the age of intravenous drug users is dropping from 12 – 15 years old” and that “more 14 – 15 year olds are involved in the sex trade.” (At p. 4.)
10 McCarthy, supra, note 5, p. 4.
11 Ibid., p. 17.
12 Ibid., p. 17.
13 Ibid., p. 17.
Only 18% of the youth had worked since going onto the street, in contrast to the fact that about 80% of them had worked while living at home. Other sources of income that the youth had used at least once were social assistance (66%), panhandling (71%) and crime (94%). The crimes involved included theft, drug selling and prostitution.

It is worth quoting the conclusion to the study in full, as it neatly summarizes the position of street-involved youth in Vancouver from June 1992:

The data in this study demonstrate that, compared with school youth, youth who live on the street report disproportionately higher levels of family physical and sexual abuse. They are also more likely to have left families in which parents had substance abuse problems and had negative encounters with police. Street youth also report having had more problems in school than other youth.

Once on the street, most youth spend much of their time searching for food, shelter, and employment. Unfortunately, these searches are often unsuccessful and a majority of street youth frequently go hungry and sleep in unsafe places. These experiences left many of these youth shaken and scared. As one youth recalled,

Just the things that we had to do ... panhandling, stuff like that. It was scary, not knowing where we were gonna sleep, not knowing who was going to hurt us, or who didn’t want to hurt us, or where we were going to be able to bathe next, or where we were going to get clothes or money or food, or a place to stay... just not being sure about anything was scary.

Street youth also experience greater exposure to crime through their associations with other street people, and many report considerable involvement in theft, drug-selling, prostitution, and violent crimes. Although involvement in crime is influenced by physical and sexual abuse and other dysfunctional behaviours with families (e.g., parental drug and...
alcohol abuse), it is also strongly affected by street experience, including exposure to offenders and the lack of basic necessities (i.e., hunger, sleeping in parks, abandoned buildings, and walking the streets). Comparative data with street youth in Toronto indicate that Vancouver youth report greater involvement in street crime. Significantly, Vancouver has far fewer services for street youth.

Overall, these data suggest that policies that reduce the amount of time homeless youth spend on the street will greatly affect street youth's involvement in street crime. Providing alternatives to parks, squats, and associations with other people on the street should decrease street youth's involvement in high risk activities.16

It is clear from this summary that young people on the street face a number of problems. Whilst they might not agree with the solutions offered by this particular study, it does show that some assistance is needed for such young people to help deal with these problems. In the only recent consultation carried out directly with street-involved youth, Cherry Kingsley asked what supports were needed to assist such young people in reaching independence. The answers were,

Twelve participants said they need support for housing, and 12 said that they need support for day care and/or parenting. Eight said job training or placement assistance would help, another eight asked for healing and seven said education is essential.17

Securing a legal right to services is one potential means of obtaining the services needed by street-involved youth. Others would be political campaigning for increased funding for such services and more non-governmental services. While this thesis concentrates on the

16 Ibid., p. 47.
question of legal rights, I do not mean to exclude these other routes as alternative strategies that could be pursued at the same time as seeking rights.

**Definitions and Issues Involved in Studying Street-Involved Youth**

A number of issues arise in the area of studying young people on the street. The first is one of definition. What do I mean when I refer to 'young people on the street' or 'street-involved youth'? The four studies of street-involved youth in Vancouver in the past ten years used a variety of definitions. A 1989 study carried out by CS\Resors defined street youth as 'young people under the age of 19 who live and support themselves on the streets of Vancouver.'\(^{18}\) The 1992 study referred to above referred to 'to people, aged 14 to 24 years, who do not have regular access to permanent shelter.'\(^{19}\) A 1993 study by the McCreary Centre Society involved participants who were 'under 19 years of age, someone who uses or has used a street youth agency, or someone who meets two of the following three conditions: 1) have run away or been thrown out of his/her home for at least a two day period; 2) have dropped out of school; 3) have hung out on the streets and taken part in a street lifestyle within the last year (e.g., being homeless, panhandling, prostitution, selling or using drugs, engaging in criminal activities).'\(^{20}\) Finally, a 1997


\(^{19}\) Supra, note 5, p. 1.

\(^{20}\) Adolescent Health Survey: Street Youth in Vancouver, prepared by Larry Peters and Aileen Murphy, (Burnaby: The McCreary Centre Society, 1994), p. 3.
study carried out following a request made by the British Columbia's Children's Commission to the Ministry of Children and Families defined street-involved youth as those between the ages of 12 and 19, "who have lost their family ties and social support systems, lack dependable sources of food and shelter, and have gravitated to the urban downtown as a last resort for survival and freedom and youth who have grown up in the urban Downtown and become involved in street life." The lack of a consensus on definitions makes it difficult to compare the results of any two studies on street-involved youth.

Further, the categories of youths living away from home do not fit easily into neat boxes. The first category that could be looked at is that of runaways and missing children. However, this category is wider than the group I have studied, as it includes those who have been abducted from their homes. The group of 'runaways' itself is also wide. It includes those who run from their homes periodically, spending from a few hours to a few days on the street, but then return to parental care. This group makes up the greater part of the runaway population; police data from Toronto, Montreal, Surrey and Edmonton shows that 52 per cent. of children on the streets were away from home for a day or less and 72 per cent. for less than three days.

21 You Have Heard this Before, supra, note 3, p. 4.
Brannigan and Caputo\textsuperscript{23} suggest that the best way to categorise street-involved youth is to take two variables, the length of time spent on the street and the nature of the youth's participation in street culture. There are then four sectors. The first is those who are seldom on the street and have very little contact with street culture.\textsuperscript{24} Second there are those who spend a lot of time on the street, but are not involved in hazardous activities. Brannigan and Caputo categorise these as 'victims'. Thirdly there are those who are still mainly living at home, but who take part in street culture. They may be gang members or petty criminals. Finally, there are those who live mainly on the streets and are heavily involved in street culture. Using this model, I have concentrated on those in the second and fourth sectors. My prime interest is in those who have left parental and other adult control and how legal rights might be of use to them.

Linked to this question is what age group to study. Young people do not become of age for civil purposes in British Columbia until they are 19.\textsuperscript{25} However, the Federal \textit{Young Offenders Act}\textsuperscript{26} only applies to those under the age of 18. Further, the studies of street-involved youth have each tended to look at different age groups. For example, the British Columbia studies referred to above dealt with youth under 19,\textsuperscript{27} from 14 to 24,\textsuperscript{28} and from

\textsuperscript{23} \textit{Ibid.}, at 102 to 106.
\textsuperscript{24} These are not strictly 'street-involved youth', although they may very occasionally hang out with those who spend more time on the street.
\textsuperscript{25} \textit{Age of Majority Act} R.S.B.C. 1996, c. 7, section 1.
\textsuperscript{26} \textit{Young Offenders Act}, R.S.C. 1985, c. Y-1.
\textsuperscript{27} The CS\textsc{S}Resors study, note 18 and the McCreary Centre Society study, note 20.
\textsuperscript{28} The McCarthy study, note 5.
12 to 19. In this thesis I focus on those who are considered by the law to be children. In so far as my research is concentrated on British Columbia, that is those under the age of 19. I do so in order to look at the way in which the law distinguishes between different age groups and applies not only different laws, but also different principles to children and adults. I have not set any minimum age.

The final question is what term should be used when talking about these children. The literature uses a wide variety of terms, ‘runaways’ (those who have run from their homes), ‘curbsiders’ (those who are still at home, but identify with the street scene), ‘throwaways’ (those who have been thrown out of their homes), ‘societal rejects’, ‘missing children’, ‘homeless youth’, ‘street youth’ and ‘youth at risk’. Using labels like these can give rise to a number of problems. Labels when applied to children “inevitably distort adult perceptions of the children subjected to labelling.” They “oversimplify and amplify only one aspect of the children they purport to help...[and]...limit children by forming the lens through which their potential is viewed.” In addition, labels can add to the marginalization of young people. In her report on the Youth Involvement Project in British Columbia, Cherry Kingsley says,

> Labels try to correspond with existing boxes or services, but often these boxes don’t fit or labelling mistakes are made, marginalizing youth within

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29 You Have Heard This Before, note 3.
30 Brannigan and Caputo, supra, note 22, pp. 19 to 21.
32 Ibid., 1565.
the system that is supposed to serve them. It gets even worse if the child or youth has multi-needs, does not respond 'appropriately' or if the service doesn't fulfill its mandate effectively. Coping with being in boxes that are too wrong or too narrow increases marginalization of youth and children.33

In order to avoid some of these problems, I have preferred for now to use the terms 'young people on the street' and 'street-involved youth'. By using the first longer, descriptive phrase, rather than the simpler 'street kids', I hope to stress the fact that these young people are 'persons' and that they are people first and that living on the street is only one aspect of their lives. The second phrase stresses that I am concerned not just with young people who are actually living on the street on any particular day, but those for whom the street provides their main cultural emphasis.34

33 Finding Our Way, supra, note 17, p. 44.
34 Other writers have come up with different solutions. For example, Tia Jean Plympton writes, "I will use the term displaced youth or street youth to describe persons under the age of 19 who have no viable family or community housing resources or who are living in unsafe or unstable environments. Many of these youths, while visible on the streets, do have access to shelters. Nonetheless, the streets are their homes and the source of all that an ideal home would otherwise provide economically, emotionally, psychologically, culturally, and spiritually." (In Homeless Youth Creating their own 'Street Families'” (New York & London: Garland Publishing, 1997), p. 22.) I have decided not to use phrases like 'displaced youth' which contain an element of judgment. If we call a person 'displaced' we are suggesting that we know that there is a better place for them to be. I prefer to use descriptive phrases, which do not give an opinion as to whether or not I approve of the lifestyle described. The problem can be amplified when international considerations are taken into account. Benno Glauser writes about street children in Paraguay and tries to distinguish between those who live mainly on the street and those who work on the street, but live at home. He says, "Another problem is that the same terms are used internationally even though definitions and circumstances may vary from one local community, country or continent to another and that they may be using different terms of reference." ('Street Children: Deconstructing a Construct", in Allison James and Alan Prout, eds., Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood, (London: Falmer Press, 1990), pp. 138-156, at p. 143.) My choice of language is limited to the British Columbia context.
Views of Young People on the Street

There are problems involved in carrying out studies on young people on the street. The nature of a group of people who live hidden lives makes it almost impossible to find a representative sample. Therefore much of the literature that exists on young people on the street is of an anecdotal nature.\(^{35}\) The more detailed studies that have been carried out have tried to overcome this problem by relying on those providing services to street-involved youths to assist in introducing researchers to a group of youths or in providing a space for notices giving information on the proposed research. Where possible a control group is used, for example a group of children from a local school who have no contact with the street-involved youth. The studies have asked a mixture of open and closed questions by way of a written questionnaire and paid a fee for participation.\(^{36}\)

For my purposes, I have not carried out any direct research among young people on the street. I have instead relied on existing social science literature for factual and statistical information and interviews with those who work with young people on the street for specific information on the position of street-involved youth in British Columbia. Initially, my lack of direct research was due to a number of external constraints. However, as my

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\(^{35}\) For example, Gitta Sereny, *The Invisible Children*, (London, England: Pan Books, 1984). In this case the author spoke to 161 child prostitutes in America, West Germany and England to whom she was introduced by social workers, teachers and police. From this group she talked to 69 at length. The book consists of the detailed stories of 12 of these children, giving the background reasons for their running and the history of their lives on the street.

\(^{36}\) Brannigan and Caputo, *supra*, note 22.
research progressed, I came to realise that the difficulties of conducting direct research with this particular group of people were almost insurmountable. Having read the experiences of other people, I realised that exploring the lives of a group of disempowered and vulnerable young people could only add to their feelings of disempowerment and vulnerability within the world. I realised that it was not for me to decide to construct an image on behalf of these young people, even using their words and ideas. The most that could happen, which is a job that is far beyond me at this point, would be to assist one particular group of young people in constructing their own images and their own ideas. Even this work would not create an image of street-involved youth as a whole. That would be simply to fall into the trap of assuming that young people on the street are a homogenous group that can speak with one voice and provide one image for neat and tidy research purposes. The reality is far more complicated and complex. For this reason, I have chosen not to go down this path at all. However, I am aware that it is a gap in this paper and in the nature of research concerning young people generally that needs to be filled not by adult researchers, but by the young people themselves in a way and at a time that is right for them.\(^{37}\)

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\(^{37}\) In this respect, I should particularly refer to the work of Rachel Pfeffer in *Surviving the Streets: Girls Living on their Own* (New York & London: Garland Publishing, 1997). In her work she had intended to interview a number of young homeless women in San Francisco and "to insert their voices and experiences into social science research literature." (p. 3) As she says, she "did not intend to change their lives, re-unite them with their biological ‘families’, measure their mental illness, their self-esteem or pathologize them in any way." (p.3) However, as she started this work, she realised that even approaching this exercise as a working class lesbian (and so perhaps closer to the young people than other researchers), there were innumerable borders between her and the young people she was trying to work with. As she says, ‘though I rejected [the historical social science doctrines which have demonized young
Studies in British Columbia

There have been numerous studies on street-involved youth. As I mention above, in the last ten years in Vancouver there have been four such studies. The CSVResors study considered the effectiveness of the Ministry of Social Services and Housing's Reconnect Program. This program, which is still in existence today, aims to return young people on the street in Vancouver to their home communities, where appropriate. The researchers interviewed 75 street youth. The study found that there were positive elements to the Reconnect Program, but that there were,

elements of the street scene that are definitely positive and very necessary in the lives of these or any young person, i.e., a sense of belonging and security which is provided by friends (street 'sisters', street 'mother', etc.), excitement, a feeling of independence and even of control. The fact that on the streets friends may be temporary, excitement is often a drug high, and independence and control are largely illusory when an individual is being exploited by pimps or drug dealers is beside the point to the youth.38

The 1992 study by Bill McCarthy interviewed 152 Vancouver street youth. The study focused on the 'backgrounds of youth who 'live on the street', and their experiences once women on their own], my social/political place and my historical and institutional location was the first thing the young women responded to. I represented the authority of institutions whom young women on-their-own rejected. Constantly unraveling and addressing the layers of borders between us was a painful and important part of conducting the research. The borders changed from day-to-day and they grew and diminished depending on a variety of factors.” (p. 4) Not all writers consider there to be such borders. Katherine Coleman Lundy in Sidewalks Talk: A Naturalistic Study of Street Kids (New York & London: Garland Publishing, 1995), considered that her 'empathy was an asset in my research in that it enabled me to develop rapport with my informants, engage their point of view, and intuit their feelings and perspectives with little difficulty.” (At pp. 34-5). However, my feeling was that my undertaking such a study was not practical at this time.

38 Supra, note 18, p. 84.
they leave home. In particular, the study explored family and school experiences, and involvement in crime."39 Its results are reported above in the section entitled Young People on the Street in Vancouver.40 The McCreary Centre Society survey was mainly concerned with health issues and risk-taking behaviours of street youth. The results were compared to a similar study in 1992 of school children in Vancouver. One hundred and ten street youth were surveyed. The study showed significant differences in health and risk-taking behaviours between the street youth and school samples.

Finally, the 1997 study aimed to ‘identify some of the service gaps for street-involved youth in Vancouver.’41 In this case researchers did not talk directly to street-involved youth, but relied on interviews with service providers. The report concluded that there are a number of gaps in the services to young people on the street in Vancouver, including, ‘limited short and long term housing options, the lack of long-term alcohol and drug treatment centres for youth; the absence of 24 hour access to services; poor coordination of services and the need for integrated case management among service providers.’42 Among what the report sees as worrying trends are reduced ages for involvement in prostitution and drug abuse and the lack of specific services for aboriginal youth.

39 Supra, note 5, p. 1.
40 They are also reported in more detail and compared to a parallel study in Toronto in John Hagan and Bill McCarthy, Mean Streets: Youth crime and Homelessness, (Cambridge, NY: Cambridge University Press, 1997).
41 You Have Heard this Before, supra, note 3, p. 4.
42 Ibid., p. 4.
The consensus of these studies is that there are considerable problems facing such youth in Vancouver. Young people on the street in Vancouver are facing difficulties in obtaining access to housing and are increasingly likely to be reliant on drugs, particularly heroin, without access to treatment facilities. Those who want to leave the street find it difficult, "because they cannot find low-cost, affordable housing or employment."44

The Problematic Nature of Street-Involved Youth

Most studies relating to young people on the street focus on such young people being a problem. So, in a study of homeless young people in Scotland, the first section of the book is called "The Problem".45 The introduction says, "Part I outlines the problems to be addressed, explaining their origins and drawing on the evidence of homeless young people to convey the realities of their situation."46 The 1992 McCarthy report referred to above on youth in Vancouver47 is primarily concerned with problems of crime caused by young people on the street. In a recent article on street youth, the Vancouver Sun talks of "street kids [forming] an emerging new underclass that is a province-wide problem."48 Young people living on the street are thus primarily seen as a problem.

43 Ibid., pp. 9-11.
44 Ibid., p. 9.
46 Ibid., p. 1.
47 Supra, note 5.
The reasons why young people on the street are seen as a problem are many. One element is the fear that some people feel about street-involved youth. A study carried out in Calgary asked the public about their fears in using a downtown shopping area. It found that the “type of people” on the street and the fear of personal attacks, muggings and so on had led to a reduction in the use of the area. Peter Silverman talks of the fear aroused when a proposal was made to build a shelter for street-involved youth in Scarborough, Ontario. He talks about the opposition to the shelter from local residents,

But people fear teenagers. Neighbourhood residents think teenagers cause problems – drugs, crime, rebellion. They wear frightening clothing. Some people just can’t understand why kids want to leave home; others think the kids should be given a bath and put in the army. ... To the homeowners, the kids were skinheads, junkies and hookers.

A second element of the ‘problem’ of street-involved youth is that in modern Canadian society most children spend a lot of time in the home. Various writers have explored this phenomenon in the United Kingdom. For example, Tony Jeffs and Mark Smith discuss the way in which ‘reductions in the average size of the family unit, linked to an overall improvement in housing conditions, have reformulated patterns of young people’s leisure.” Additional central heating and investment in home-based activities, such as

50 There were gender differences in the responses. “Females were more concerned by street kids, while males identified drug addicts or dealers, as their principal concern.” *Ibid.*, p. 21.
television and computers, have added to this trend. “As a consequence young people have increasingly acquired a pattern of home-based leisure habits, hobbies and pursuits that embody a self-evident uniformity to that of their parents.”53 The increase of young people generally staying within the home means that those who are not in the home are perceived as different and, potentially, dangerous. Colin Ward writes, “today it is almost taken for granted that to have an outdoor child means endless worry and trouble. The outdoor child is up to no good. ... The outdoor child is automatically suspect.”54 Further, as Benno Glauser points out, seeing young people living on the street contradicts ‘ideas about the purpose of the street or any public space seen from the point of view of adult and class needs and uses.”55 The street should be used as a means of travelling from place to place, not as somewhere to live and work.

As I discussed above, young people on the street in Vancouver face a large number of problems. However, most of the studies relating to street-involved youth focus more on the problematic nature of such young people, rather than the problems that they face.

The Approach of this Thesis

This thesis differs from previous studies in two ways. First, rather than focusing on the

53 Ibid., pp. 53-4.
problematic nature of street-involved youth themselves, as discussed in the previous section, I concentrate on the problems faced by such young people as shown by other studies. In particular, I consider some of the reasons behind such problems. I focus on the dominant discourse of childhood and the way in which it constrains the actions of street-involved youth. Second, other studies tend to focus on specific practical solutions to immediate problems, such as access to housing, employment and medical treatment. I focus on the general availability and use of legal rights as one means of obtaining these solutions, if they are what the young people want.

The Use of Rights

As I mentioned above, rights are only one strategy that could be pursued on behalf of young people on the street. However, it is a particularly powerful one. While rights are the subject of much debate, most writers concede some use for them. The arguments in favour of rights fall into two main categories. First, many writers make the point that obtaining basic equality rights was an important first step in campaigns by many disadvantaged groups. Didi Herman makes the point in relation to lesbian and gay claims for equality:

For early ‘homophile rights’ activists, relying then upon the insights of

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56 This is not true of all writers, however. For example, both Michael Mandel and Allan Hutchinson argue independently that there is no point in disadvantaged groups in Canada today trying to make use of Charter rights. See, Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada, 2nd edition, (Toronto: Thompson Educational Publishing, 1994) and Allan Hutchinson, Waiting for Corafrica: A Critique of Law and Rights (Toronto: University of Toronto Press, 1995).
liberal psychology, the demand for inclusion within the liberal conceptual paradigms was a radical one... The idea of suggesting that these lesbian and gay rights pioneers should have exhorted society to overthrow heterosexuality seems fatuous. Arguably, however, we have moved on from there. The ground paved by these earlier activists has enabled 1990s lesbian and gay rights reformers, perhaps, to contribute towards a paradigm shift in our understandings of sexuality.57

So, lesbian and gay campaigners were strategically astute initially to seek equality within the traditional liberal form of rights. Once that has been achieved, however, the use of rights with that tradition may not be so successful and strategies may have to change.

The second main argument in favour of rights is that they can aid the empowerment of marginalized groups. Didi Herman uses the phrase "to be coded human" 58 to describe the positive use of rights in a capitalist democracy. She explains that in such a society, legal subjecthood is recognised by obtaining legal equality. So rights are useful for what they signify - "public / official recognition, social citizenship and identification" 59.

So far as street-involved youth are concerned, both arguments lend support to campaigns for additional rights. Children are not legally equal to adults.60 Further rights might reduce that inequality, where this is desirable. Further, young people on the street are

58 Quoted from Becki Ross, "Sexual Dis/Orientation or Playing House: To Be or Not to Be Coded Human" in Sharon Dale Stone, ed., Lesbians in Canada (Toronto: Between the Lines, 1990).
59 Herman, supra, note 57, p. 19.
60 It should be noted that I am not arguing that children should have formal equality with adults. Simply, that for some groups of children, and for street-involved youth in particular, some additional rights which would bring them on a par with adults would be a first step in providing the assistance they wish.
marginalized within society and additional rights might help their empowerment. Therefore, the pursuit of rights is a worthwhile strategy.

However, pursuing rights alone will not be sufficient. David Archard writes,

> Of course the possession of rights is not a cure-all. Any expansion of children’s entitlements must form part of a more general empowerment. But, like it or not, rights are an important part of our moral and political discourse. How we see and value humans is crucially determined by what rights we accord them. Giving rights to children is thus a public and palpable acknowledgement of their status and worth.

So, rights need to be part of a wider strategy. Jeremy Roche says,

> Perhaps we can also say that children’s claims to rights, whether made by themselves or by committed adults, and the detail of these demands will become part of an enlarged democratic and political process in which the focus is on citizenship, relationships and dialogue: not abstract rights and decontextualized children.

One final point to consider here is that the pursuit of rights must be carefully monitored. As Wendy Brown has said:

> It makes little sense to argue for [rights] or against them independently of an analysis of the historical conditions, social powers, and political

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61 Cherry Kingsley, in her report on involving youth in the provision of services, *Finding our Way*, supra, note 17, calls for a redefinition of marginalization. She says that, ‘youth and children begin to be marginalized as soon as they are pushed from the centre of the three spheres of family, community and culture. As a result, youth and children are marginalized long before they enter care or hit the streets.” (At p. 41.) Under this redefinition, rights would be important even before young people reach the streets.

62 I discuss this point in more detail in Chapter Two under the heading, Rights as Power.


discourses with which they converge or which they interdict. Accordingly, rights for young people on the street may prove useful. However, it is essential to consider the limits on their effectiveness in the specific context that they are claimed. In this thesis, I look at a number of constraints on the use of rights for young people on the street. These arise, first, from the practical problems associated with exercising the rights that street-involved youth currently have; second, from the liberal form of such rights; and third, from the ideological effects of the dominant discourse of childhood.

What Rights do Street-Involved Youth Currently Have in British Columbia?

Having looked at the problems faced by young people on the street and proposed that rights might provide a solution to some of them, I wish first to consider what rights such young people currently have. As the street-involved youth that I am focusing on are all legally children, most of their legal rights will be generally available to all children. However, I also explore the special rights that apply to young people on the street.

UN Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child ("CRC") is the main

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66 Adopted by the General Assembly of the United Nations on 20th November 1989. Canada signed the
international document that deals with the position of young people. While young people are also generically contained within the overall structure of the Convention on Human Rights, the United Nations has paid specific attention to the position of children’s rights in the CRC. There are numerous works that discuss both generally and in detail the provisions of the CRC. However, it is sufficient for my purposes to outline the type of rights included in the Convention and to consider broadly their application to street youth.

The Convention contains three main types of right. The first are political rights, such as the right to freedom of expression (Article 13), freedom of thought, conscience and

Convention on May 28, 1990. Following consultations with the Provinces to ensure that existing legislation complied with the Convention, Canada formally ratified the Convention on December 13, 1991. Canada became bound by the Convention 30 days later, on January 12, 1992. Canada has made two reservations to the Convention. The first reserves the right not to hold children separately from adult prisoners, contrary to Article 37(c). The second enables aboriginal customary adoptions to continue, despite failing to meet some of the standards laid down in the Convention in Article 21. 67 There is also a European Convention on the Exercise of Children’s Rights European Treaty Series, No. 160. This Convention entered into force on 25th January 1996. This convention ‘grants children a certain minimum of procedural rights in some family proceedings and creates mechanisms for the promotion and exercise of these rights.” The Child as Citizen, Parliamentary Assembly of the Council of Europe, (Strasbourg: Council of Europe Publishing, 1996), p. 77.


religion (Article 14), and freedom of association (Article 15). Whilst certain of these might be of interest to young people on the street, in the main, they are too limited to have much practical effect on the way their lives are led.\footnote{For example, young people might want to claim that a right of association could protect their rights to gather and sleep in public places. The City of Vancouver by-law that restricts panhandling (By-law No. 7885) introduced in 1998 might be subject to challenge under this right. However, the right can be limited in so far as it is necessary "in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." (Article 15(2)). It is easy to see how groups of young people could be refused the right to panhandle or to sleep in public places on the grounds of public health or public order.}

The second main type of rights are rights of protection, such as special rights for children with disabilities (Article 23), protection from abuse (Article 19), and special rights in relation to adoption (Article 21). Again, while these may have some impact for young people on the street, their use is probably limited, in that they see children as being in need of protection.\footnote{As I show below, the presumption of protection constrains the choices available to young people on the street. See Chapter Three.} They are generally well supported in Canadian legislation. For example, the \textit{Child, Family and Community Services Act} contains a wide range of provisions dealing with the protection of children from abuse and neglect. In a recent review of how far British Columbia legislation complies with the CRC, this statute received a maximum four star, excellent, rating.\footnote{The Society for Children and Youth, British Columbia, \textit{The U.N. Convention on the Rights of the Child: Does British Columbia Legislation Measure Up?} (Vancouver: SCY, 1996).}

The third set of rights are economic and social rights. These include rights to social security (Article 26), rights to health care (Article 24), and the right to an adequate
standard of living (Article 27). They are the rights that could be of the most use to young people on the street, who wish to claim rights to welfare benefits, rights to housing and so on. However, these rights are limited both in their specific terms and by the overall tenor of the Convention. I discuss these limits in Chapter Three.

One major problem with the CRC and the rights of young people on the street is precisely in its existence, in that it treats all those under the age of 18 (Article 1) as being children and therefore subject to special rights and special protections, separate from those of adults. By homogenizing children in this way, the mere existence of the Convention makes it difficult to argue that some young people, whilst legally children in the eyes of the Canadian state, should be treated differently from others.73

Constitutional equality rights

Section 15(1) of the Charter provides that:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin,

73 There is some limited recognition of the situation of different children within the Convention. For example, Article 23 provides special rights for children with disabilities and Article 30 gives rights to indigenous minority children. Further, Frances Olsen argues that there is still space in the Convention to make even more radical claims. For example, under Article 8 (the right to an identity), she says, “A right to an identity could imply anything from respect for chosen (or not consciously chosen) sexual orientation to respect for all the child’s efforts to remake his or her identity. Indeed, the basic concept of childhood could be thrown open for redefinition.” (“Children’s Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child” in Children, Rights and the Law, supra, note 69, pp. 192-220, at p. 217.) However, it will be a struggle for such alternative interpretations to be accepted, if at all. I discuss this further in Chapter Four.
Accordingly, we might expect there to have been a number of challenges to statutes that restrict children's activities on the basis of age. However, there have been very few such cases.

In *Reid (Next Friend of) v. Canada* an action was brought on behalf of a number of children aged 2 to 16 claiming that the provisions of the *Elections Act* restricting the right to vote to those over the age of 18 was in breach of the *Charte*r. The Federal Court (trial division) held that this limit was either a "reasonable restriction" under the provisions of section 1 or a "rational dimension" of the right to vote. In either event, the

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75 (1994), 73 F.T.R. 290
77 The action included a further claim that borrowing by the Federal government had a particularly negative effect on children and was unlawful unless a specific referendum was held approving the borrowing where children could vote either directly (if over 12) or through their parents. It seems, therefore, that the action was brought by adults arguing from a particular right wing view of fiscal conservatism. It may be that it was simply used as a forum for bringing these views into public debate and that there was no real intent for young people to be given the vote as a result.
78 Section 1 allows "such reasonable limits prescribed by law" to the rights and freedoms set out in the *Charte*r "as can be demonstrably justified in a free and democratic society." The Supreme Court in *R. v. Oakes* [1986] 1 S.C.R. 103 laid down a three-fold test that must be applied to decide whether any particular provision can be justified under section 1. Iacobucci J summarized that test in *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 182: "First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charte*r guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable." This summary has subsequently been approved by the Supreme Court in *Vriend v. Alberta* (1998) 156 D.L.R. (4th) 385 and *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624.
judge considered that "it is so obvious to me, in the context of this claim, that the age requirement embodied in the Election Act is a reasonable limit that I do not require any evidence on the subject." 79

Similarly in Lister v. Canada 80 the Federal Court of Appeal held against a claim that providing a GST credit only to those who are married, parents or over 19 was in breach of section 15. 81 Létourneau JA said that there was no "prejudice in relation to an age-based definition of dependency in the family." 82 So, although children were treated differently from adults, the court did not consider that this differential treatment was a form of prejudice to be addressed by the Charter.

Not all cases have gone against young people. In Clemens v. Winnipeg (City) 83 the Manitoba Queen's Bench held in favour of a seventeen year old who had been denied social assistance benefits on the basis that her parents were willing to support her and her child. The court decided that the practice was discriminatory on the grounds of age. The decision was overturned in the Court of Appeal 84 on the grounds that the case should have been heard through the appeals procedure laid down in the relevant Manitoba statute. The Court of Appeal did not comment on the substantive point made by the Queen's Bench

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79 Supra, note 75, par Noel J at page 299.
82 Supra, note 80, at page 635.
84 [1995] M.J. No. 84 (QL)
However, in *Mohamed v. Metropolitan Toronto* the Ontario Divisional Court found that, while similar legislation in Toronto was discriminatory under section 15, it could be justified under section 1. In this case the claimant was under 16 (the relevant cut off age under the legislation). She was a Somalian refugee who had no relatives in Canada. In finding that section 15 was breached, Dunnet J on behalf of the Ontario Divisional Court held:

The impugned legislation clearly grants benefits to persons over the age of sixteen which are not granted to persons under the age of sixteen. Further, even though this Act and other provincial legislation provides benefits to those under the age of sixteen through parents or other responsible adults or organizations, there is no direct equivalence in the amount of the benefits. The legislation also denies persons under the age of sixteen the choice of receiving direct benefits. In my view, a denial of equal benefit of the law on the basis of age, an enumerated ground, is thus established and the only issue is whether this denial is discriminatory.

The court found the denial to be discriminatory because it was based on a set age and not on capacity or capability. When assessing whether the discrimination could be justified under section 1, however, the court found that the purpose of the legislation, in conjunction with other relevant legislation, was to provide for children within the context of the family. The judge stated:

I also agree that the objective of supporting and not interfering with the

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86 Ibid., at p. 119.
integrity of the family unit where appropriate to the child's needs is of sufficient importance to justify overriding the appellant's constitutional rights. All witnesses agreed that the ideal would be for children to live at home with their parents. 87

Finally, the judge found that the legislation was proportionate to this objective. It was not for the court to second-guess the legislature as to an appropriate age limit for receiving benefits. In addition, the judge considered that, as children needed more than financial assistance, in that they needed "the support, guidance and care of an adult", 88 it was appropriate that they should be dealt with under the child welfare legislation rather than the social assistance legislation. He said:

It would be contrary to the best interests of children if general assistance were paid directly to them, as it would be an incentive to remove themselves from the care of the family unit or other responsible adults, even where appropriate, because of ideas of what it is like to live "on your own". Clearly the vast majority of children under the age of 16 years in Ontario not only require but receive financial, emotional, social and psychological support either from the family unit, other responsible adults, or the [Children's Aid] Society and its services. 89

This brief review shows that, so far, Canadians have not made much use of the equality provisions of the Charter to challenge restrictions based on age. Further, where they have, these challenges have tended to fail. I discuss some of the reasons for these failures in the following Chapters.

87 Ibid., at p. 125.
88 Ibid., at p. 127.
89 Ibid., at p. 127.
One final point to make under this heading is the possibility of challenging the *Human Rights Code.* In British Columbia, the *Code* defines age as being between 19 and 65. Accordingly, discrimination on the basis that someone is younger than 19 is not unlawful. A challenge has been made to the upper age limit in the context of discrimination in the area of employment. However, the Supreme Court of Canada held that, although the age limit did constitute discrimination on the basis of age pursuant to section 15 of the *Charter,* it was justified under section 1. The reasoning was that as 65 was widely used as a retirement age and about 50 per cent. of jobs in Canada have a mandatory retirement age of 65, it was reasonable for a legislature to choose not to disrupt this long-established situation. In his judgment, La Forest J made passing reference to the lower age limit in the Human Rights legislation:

Though not directly relevant, perhaps, I should mention that s.9(a) is also discriminatory in that it provides for a minimum age of 18 years for those seeking protection under the Code in respect of employment. That distinction is, I would think, readily explicable on human, social and economic grounds.

Further, the Supreme Court stated that a complaint based on age discrimination has less

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90 *Supra,* note 74.


92 *Harrison v. University of British Columbia* [1990] 3 S.C.R. 451. This challenge was made in the context of mandatory retirement from universities. The complainants argued that they should be able to challenge a policy of mandatory retirement at age 65 under the *Human Rights Code,* but were prevented from doing so due to the age restrictions contained in it. They claimed that this was a breach of their section 15 equality rights, based on the enumerated ground of age within that section.

93 See the judgment of La Forest J in *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, a case heard at the same time as *Harrison* and which decided on the same issues in relation to the Ontario *Human Rights Code.*

strength than one based on the other grounds set out in section 15. In McKinney La Forest J said: 'It must not be overlooked, however, that there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1).' Accordingly, challenges to the Human Rights Code are likely to be of limited success. These limitations on the use of the Human Rights Code may be problematic for street-involved youth. They mean that young people under the age of 19 can be discriminated against in relation to the availability of housing and employment, two key areas for street-involved youth.

Rights of protection

It is under the broad heading of the protective rights that we see the widest range of rights for children. These rights include a right to be protected from abuse and neglect from parents and others, a right to free education from age 5 to 16, and protection for a

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95 Ibid., p. 297.
96 See the comments of street-involved youth in the Kingsley report, Finding our Way, supra, note 17. As regards discrimination in the area of housing, the British Columbia Supreme Court has upheld tenancy agreements that prohibit those under the age of 19 from living in a particular apartment block. See Hsuen v. Mah [1986] B.C.J. No. 776 (QL).
97 Under the Child Family and Community Services Act, R.S.B.C. 1996, c.46. This Act provides for a variety of actions to be taken in order to protect children. Under Part 3 of the Act, the director must first investigate any report that a child might be in need of protection. The legislation provides for protective measures first to take the form of a family conference by which a plan of care can be agreed and services provided to the family. The provisions for a family conference are not yet in force, so care plans are currently ordered by the courts. A variety of orders is possible, from supervision by the director to permanent care. The director also has the right to take immediate action if a child is unattended, has run away or is in immediate danger. This action can include removing a child from its home.
98 School Act, R.S.B.C. 1996, c.412.
child's property.\textsuperscript{99} One important point to note here is that while these rights undoubtedly protect children\textsuperscript{100} and are vital to protect very young children who are otherwise unable to protect themselves, they can include an element of compulsion of the child. So, the right to free education is combined with an obligation to attend school.\textsuperscript{101}

The other interesting point to note about these rights is that in many cases they are tied up with attitudes about the family. So, looking again at the question of education, it is not the child who commits an offence by failing to attend school, but the parent who is failing properly to educate the child.\textsuperscript{102} Further, the \textit{Child, Family and Community Services Act}\textsuperscript{103} has the maintenance of the family at its core. So the Act deals first with support for the family and upholding the sanctity of the family, allowing the child to be taken out the family only as a matter of last resort and if there are severe and obvious problems of abuse.\textsuperscript{104}

\textsuperscript{100} Although many children are not adequately protected by even these rights. The Gove Report (\textit{The Report of the Gove Inquiry into Child Protection in British Columbia}, by Thomas J Gove, (Vancouver, BC: The Inquiry, 1995)) showed how one child, Matthew Vaudreuil, was subject to neglect and abuse by his parents and eventually died. The social services were unable to protect him, despite the existence of laws aimed at the protection of children from this sort of treatment. However, this is not an argument against having the rights, but more an argument over how they should operate.
\textsuperscript{101} \textit{School Act}, supra, note 98, ss. 3, 12 and 13.
\textsuperscript{102} \textit{Ibid.}, section 13.
\textsuperscript{103} \textit{Supra}, note 97.
\textsuperscript{104} This philosophy is not set out explicitly in the legislation and shifts from time to time in practice. Following the Gove Report, \textit{supra}, note 100, there is probably more emphasis on the safety of the child, although the structure of the legislation follows a pattern of favouring the family. For more information on the philosophy behind the \textit{Child, Family and Community Services Act}, see \textit{The Child at the Centre: Rethinking Child Protection}, by Margaret Hall, ([Vancouver]: University of British Columbia, 1998).
It should be noted, however, that the statutes do not necessarily follow a one-sided protection basis. So, although most of the rights under the *Child, Family and Community Services Act* are most properly considered as being protective, certain of its provisions are concerned with giving more active rights to young people. So, in many places the Act provides for the views of the child to be taken into account.\(^{105}\) These provisions imply that the child has an element of choice in deciding whether the protective rights should be enforced in her or his favour and in the method of enforcement.\(^{106}\) Further, the Act provides specific rights to children in care. Section 70 gives rights such as the right to be informed about the child’s plan of care (sub-section (1)(b)), the right to reasonable privacy (sub-section (1)(d)), to receive guidance and encouragement to maintain their cultural heritage (sub-section (1)(j)) and to be informed of their rights under the Act (sub-section (1)(o)).

However, a wide range of children’s rights in British Columbia today are still aimed solely at protecting children from harm. This same theme can also be seen if we look at the rights that children do not have. Generally, children do not have the right to enter into binding contracts,\(^{107}\) they do not have the right to write a valid will,\(^{108}\) they cannot marry

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\(^{105}\) For example, one of the guiding principles in section 2 provides, “the child’s views should be taken into account when decisions relating to the child are made.”

\(^{106}\) However, the way in which these rights are used is not always to uphold the true choice of the child, given the constraints of the system. See the discussion under the heading Atomism in Chapter Two for more details.

\(^{107}\) *Infants Act*, R.S.B.C. 1996, c. 223, s. 19. Interestingly, while others who are incompetent to enter into contracts are given the power to enter into contracts for necessities under the *Sale of Goods Act*, R.S.B.C. 1996 c. 410, s.7, this power is not extended to children.

\(^{108}\) *Wills Act*, R.S.B.C. 1996 c. 489. Only those persons under 19 who are or have been married or are in
without parental consent, they cannot buy alcohol and so on. Looking at this lack of rights we can again see a protective theme emerging. Children are denied the right to undertake certain activities that adults consider may be dangerous for them.

This thinking carries through to some extent to adulthood. There are limits on the right of adults to consent to an assault. Adults cannot agree to a fist fight, unless it is in the context of a formal boxing match. The reasoning of the Supreme Court in banning such fights was that "it is not in the public interest that adults should willingly cause harm to one another without a good reason." However, the range of restrictions is far greater in childhood than in adulthood. It is interesting also to note the way in which certain of these rights are limited with respect to children. For example, there is no statute stating specifically that a child may not enter into a contract. However, the Infant Act provides that contracts made by infants are generally unenforceable against the infant. Whilst this provision ostensibly does not prevent the infant from entering into a contract, in practice it makes it unlikely that third parties will wish to contract with the infant. The key point to note is that the effect of the right is protective.

the armed forces are allowed to write a will.

109 Marriage Act, R.S.B.C. 1996, c. 282, s. 28.
110 Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, s.3.
112 Gonthier J at p. 762.
113 These provisions will not prevent children from entering into all contracts. For example, contracts of employment, where the child is paid only after having performed her side of the contract do not pose problems for the adult employer. If the child fails to perform, the employer has not lost out. On the other hand, tenancy agreements might be more difficult for children. Here, the contract calls for the tenant to pay rent on a regular basis, to keep the property clean and so on. Landlords might be reluctant to contract with children, on the grounds that the landlords could not enforce these terms.
This element of protection can also be seen in the way that a child’s rights increase with age. For example, a five year old has very few active rights, but as she grows older, these rights increase. So, a child can leave school at 16,\(^{114}\) can drive from the age of 16,\(^{115}\) can consent to sex at the age of 14\(^{116}\) and can have a hunting licence at the age of 10.\(^{117}\) These limited rights reflect a view that whilst younger children need to be protected against a wide range of perils, as we grow older, we can start to exercise our own judgment with regard to certain matters, whilst remaining protected persons under the law in relation to the vast majority of activities. One area where this development is particularly evident is in the area of deciding on medical treatment. Under common law, a doctor may not carry out any treatment on another person without their consent.\(^{118}\) For adults, this consent may be given or withheld at any time, subject to protective laws for those with mental disabilities. For children, initially parents may give consent for treatment. As the child grows older, however, the *Infants Act* in British Columbia gives a child the right to consent to health care, provided that the health care provider is satisfied that the child 'understands the nature and consequences and the reasonably foreseeable benefits of the

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\(^{114}\) *Supra*, note 98.

\(^{115}\) *Motor Vehicle Act Regulations*, B.C Reg. 26/58, regulation 30.05.


\(^{117}\) *Wildlife Act*, R.S.B.C. 1996, c. 488, ss. 11 and 17

\(^{118}\) "The application of force to the person of another without lawful justification amounts to the wrong of battery. This is so, however trivial the amount or nature of the force may be, and even though it neither does nor is intended nor is likely nor is able to do any manner of harm. Even to touch a person without her consent or some other lawful reason is actionable." Salmond, *The Law of Torts*, 20\(^{th}\) ed. (London: Sweet and Maxwell, 1992), p. 125, as cited in *Wilson on Children and the Law*, (Toronto and Vancouver: Butterworths, 1994, updated to October 1997), para. 5.20.
health care” and determines that “the health care is in the infant’s best interests.” It is likely that these conditions will be satisfied more easily for older children.

So far as street-involved youth are concerned, a recognition that rights should increase with age is likely to be beneficial. Although, as I discussed above, there appears to be a tendency for younger and younger people to become involved in street life, street-involved youth are all of an age where they have at least the physical ability to live independently of adults and are capable of expressing their views. They should, therefore, be entitled to more rights than younger children.

**Procedural rights in criminal law**

There is a different emphasis on the rights of children in criminal law. The Young

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119 *Infants Act, supra*, note 107, section 17.
120 This section does not appear to give the right to refuse medical treatment. Doctors or parents can apply to court to force a child to undergo treatment under the *parens patriae* doctrine or under section 29 of the British Columbia *Child, Family and Community Services Act*. I discuss this further below at note 270. However, cases in other Provinces suggest that a right to consent will also extend to a right to refuse treatment. In both Ontario and New Brunswick the courts have held that, provided the child was competent, she or he could refuse blood transfusions, even where this was likely to result in her or his death. See *Hughes v. Children's Aid Society of Metropolitan Toronto* (1996) 37 C.R.R. (2d) 270 and *Walker v. Region 2 Hospital Corp.* (1996) 116 D.L.R. (4th) 477. However, the legislation in each case was clearer than the British Columbia legislation in its linkage between the maturity of the child and the right to refuse treatment. What is relevant for my purposes here is that the Ontario court found a 13 year old girl to be incompetent and the New Brunswick court found a 15 year old boy competent. It is likely that the fact that the New Brunswick boy was older was relevant.
121 See note 9 above.
122 Whether this is always beneficial is debatable. I discuss below the way in which nominally listening to the views of street-involved youth can lead to their true wishes being ignored, in so far as these wishes cannot be accommodated. See Chapter Two under the heading Atomism.
123 See also the discussion in Chapter Three under the heading Innocence.
Offenders Act\textsuperscript{124} places a degree of responsibility on those between the ages of 12 and 18, while still differentiating them from adult offenders. Along with the stress on responsibility in the Young Offenders Act, there is also a stress on procedural rights for young offenders. Whilst there is generally no right to a jury trial (apart from first degree murder charges, where the sentence is long enough to fall within section 11(f) of the Charter) young offenders generally have the same procedural rights as adults. In addition, the Young Offenders Act contains additional procedures to be used in conducting a prosecution, including rights for the young offender to counsel, provided from public funds if necessary, provisions for notifying the young person's parents following her or his arrest and specific notice to be given to the young person of the right to have a lawyer and another adult present in the police station.\textsuperscript{125}

The courts generally have tried to uphold the rights given to young people under the Young Offenders Act. For example, in R. v. D. (C.M.)\textsuperscript{126} the British Columbia Court of Appeal made it clear that in order for a young person to waive the right to have counsel present during questioning, his rights had to be clearly explained in language appropriate to his age. The accused was 12 and was arrested for armed robbery following a photo line up. On arrest he was given a formal warning and he asked for a lawyer to be present during questioning. At the police station the police spoke to his mother and she put

\textsuperscript{124} Supra, note 26.
\textsuperscript{125} Sections 9, 11 and 56.
\textsuperscript{126} (1997) 113 C.C.C. (3d) 56.
pressure on her son to confess. In the meantime, he had tried to call a lawyer, without success. The boy agreed to confess and signed a formal waiver of his right to counsel.

The trial judge described the position of the offender as:

At age twelve [C.M.D.], as I pointed-out, seemed unusually competent for a twelve year old in being able to call a lawyer without assistance, something that adults are often unable to do from time to time while down at the police station. And then he discussed the circumstances of his case in great detail. He may have been teary eyed and emotional, but then there's no indication that he was not acting with anything but an operating mind.\(^{127}\)

However, the appeal court saw the position as:

The appellant was a 12 year old boy. He was understandably frightened. I think it is highly speculative to suggest that, without a very clear explanation, he would understand that the disjunctive "or" used in the waiver form was to be read as the conjunctive "and". Constable Lemaitre did not appear to know that. There is no reason to credit the appellant with greater understanding than the police officer.\(^{128}\)

While the trial court judge seemed happy to uphold the young person's waiver of his right to counsel on the basis that he was competent, the court of appeal wanted to protect his interests in this respect.

In addition to these specific rights under the *Young Offenders Act*, there have been a number of cases where young people have tried to augment their rights by appealing to the

\(^{127}\) *Ibid.*, at p. 60.
Charter. In the main, unless such cases specifically relate to the procedural rights set out in the Charter, they tend not to succeed. For example, in R. v. T.L.C. the Supreme Court of Canada was asked to consider whether the lack of an automatic right of appeal under section 27 of the Young Offenders Act, in contrast to the position of adult offenders under section 691 of the Criminal Code, breached the young person's equality rights under section 15 of the Charter. The Supreme Court refused to consider the matter on the grounds that insufficient notice had been given of the challenge. However, Sopinka J speaking for the court did say:

There are fundamental differences between the treatment of young offenders and adults who commit criminal offences. Given these differences, I find it difficult to accept that a young offender can select one aspect of the scheme and claim entitlement to the equal benefit of it with adults without taking into account the many related benefits accorded to young persons which are denied to adults.

While he did not say that this problem would definitely bar a future challenge, it does create a hurdle to Charter challenges to the provisions of the Young Offenders Act.

As young people on the street are often affected by crime, either as perpetrators or victims, their rights in the criminal justice system are important to them. I discuss

129 Supra, note 74.
131 Ibid., pp. 9-10.
132 See the conclusion to the McCarthy report, supra, note 16.
further below how these rights are limited.\textsuperscript{133}

\textbf{Specific rights for young people on the street}

Very few rights apply specifically to young people on the street. Rather, in the main, they will be treated in the same way as other children. However, the \textit{Child, Family and Community Services Act}\textsuperscript{134} does contain certain provisions aimed specifically at this group of children.\textsuperscript{135} Section 9 of the Act enables social services to enter directly into agreements with young people for the provision of "residential, educational and other services." The agreements are enforceable against the young person, in contrast to the usual position under the \textit{Infants Act}.\textsuperscript{136} The important point to note about this section is that it only applies to youths (that is, those between the ages of 16 and 19 or those who are married or a parent) who "cannot ... be re-established in the youth's family." So, it is of particular application to young people on the street.\textsuperscript{137}

These rights recognize that as young people grow older, their ability to exercise rights increases. However, the language of the statute does not exclude all elements of protection. First, section 9 only applies if the director considers that the youth cannot be re-established with his or her family. So, the power as to whether or not the right should

\begin{itemize}
  \item \textsuperscript{133} See the discussion around note 338.
  \item \textsuperscript{134} \textit{Supra}, note 97.
  \item \textsuperscript{135} Although they have yet to be brought into force.
  \item \textsuperscript{136} \textit{Supra}, note 107.
  \item \textsuperscript{137} It would also be of use to other children who were not living with their biological families, such as those in care.
\end{itemize}
apply is vested not in the young person, but in the director. Second, an agreement under this section may only be entered into where the director considers that this is in the best interests of the youth and must contain a set of goals for the youth to meet. So, the contents of the agreement are likely to have a protective element to them.

The *Child, Family and Community Services Act* also applies to young people on the street in its general protective provisions. Section 13 sets out the circumstances in which a child is in need of protection. Sub-section (1)(i) includes as a relevant circumstance "if the child is or has been absent from home in circumstances that endanger the child's safety or well-being." So, by living on the street, it is likely that a child will be seen as in need of protection. Section 26 gives specific powers to the director to take charge of a child "if it appears ... that the child is lost or has run away." These provisions enable the director to exercise his or her powers under the Act to return the child to his or her parents or to

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138 This can lead to problems with enforcement. I discuss this further below.

139 In particular, the ‘best interests’ test, which applies throughout child welfare law, is likely to lead to protective measures being applied. I discuss in Chapter Three the way in which the dominant discourse of childhood can have ideological effects. One element of these effects is protectionism. Children are seen as being in need of protection and, accordingly, any test that requires services to be in the best interests of the child will incorporate this protective ideology. Other writers have shown how the best interests test can operate to uphold particular ideologies of family and motherhood. See, for example, Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations", (1989) *Can J of Women and the Law* pp. 1-17, Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations", (1992) *Osgoode Hall LJ* vol. 30, pp. 375-425, and various articles in Philip Alston, ed., *The Best Interests of the Child: Reconciling Culture and Human Rights*, supra, note 69.

140 I do not mean here to suggest that it would be correct simply to leave the young person on the street. However, by immediately seeing the issue as one of protection, the options open to the Ministry are constrained. If young people had options they could exercise if they choose to leave home, and if help were given to them in the form of housing and financial assistance outside the current child welfare system, the chances of them avoiding the dangers of the street would be greatly increased. The rights under section 9, if they ever come into force, might be of help in this respect.
apply for an order to take the child into care.

Practical Problems with Rights for Young People on the Street

A number of practical problems arise for young people on the street in pursuing rights claims. First, litigation is time-consuming. For young people on the street, whose lives are precarious and unstable, finding time to pursue litigation, even with the support of advocates, would be an enormous problem. Young people who are living on the street will be more likely to miss appointments and hearing dates. Those who are involved with drugs will have an additional level of difficulty in complying with the court system.

Second, the costs of bringing rights claims of all sorts are large. Most street-involved youth would meet the financial criteria for legal aid in British Columbia. However, legal aid for non-criminal and family law cases is highly restricted. In 1996/97, 22 per cent. of ‘other civil’ cases were referred to legal aid following an application, as opposed to 70 per cent. of criminal cases and 56 per cent. of family cases. Accordingly, the type of

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141 This assumes they would be treated as individuals and not as part of the family. A librarian at the Legal Services Society said that in some circumstances the Society would treat street-involved youth as independent, but they would probably try to involve the young person’s parents in the claim where possible.

142 These cases include problems with pensions and income assistance, small claims, debt problems, human rights hearings, landlord/tenant disputes, review hearings under the Mental Health Act and UI and WCB appeals. See Annual Report 1995-1996, Legal Services Society, (Vancouver: LSS, 1996), p. 12.

143 Annual Report 1996-1997, Legal Services Society, (Vancouver: LSS, 1997), p. 5. Some care needs to be taken with these figures, as the Society changed its case recording system during the period of the report. In particular, I have combined the figures for ‘Other Civil’ cases and ‘Intake Cases.’ Intake cases, a new category for this report, are cases where no formal application for legal aid is made, but up to two hours of advice are given. I have combined the figures as, when looking at earlier years, it is clear that all the intake cases related to other civil matters. Taking this into account, the figures are fairly consistent
rights claims most relevant to street-involved youth would generally not be covered by legal aid.\textsuperscript{144}

In addition, the take up of legal aid is restricted to those who know of its existence. The National Council of Welfare have said of this problem:

\begin{quote}
Part of the problem is that low-income persons, who may have the least formal education, who often lead isolated lives, and who have usually suffered many injustices, are so badly informed they do not know or believe they have any rights.\textsuperscript{145}
\end{quote}

This quote could just as easily apply to young people on the street. The Legal Services Society has done no specific outreach work with street-involved youth. Accordingly, their knowledge of the availability of legal aid is likely to be fairly limited.

Next, the lives that street-involved youth lead are likely to be difficult to represent in court. Those without access to a regular schedule will find it harder to remember exactly what day a particular event occurred on. Those addicted to drugs will find it harder to fix particular events at particular places. Such problems give fuel to the opposing counsel to attack the young people as unreliable witnesses and so to undermine their case. It seems likely to me that young people in such trials would find their lives open to investigation in

\textsuperscript{144} As regards criminal cases, even where legal aid is not available, section 11 of the \textit{Young Offenders Act} provides that a lawyer must be made available to the young person at no cost. The White Paper on the reform of the youth justice system published earlier this year upholds this right, although it proposes that funds might be recovered from richer parents and children after proceedings have ended. \textit{A Strategy for the Renewal of Youth Justice}, The Department of Justice, Canada, 1998, pp. 33-4.

\textsuperscript{145} \textit{Legal Aid and the Poor}, Winter 1995, p. 12.
a way similar to the intrusion into women’s lives in rape trials. By attacking the credibility of the young people, by attacking their lifestyles, those defending the status quo would argue that the protective nature of the relevant law was essential.

As regards specific rights for street-involved youth, not too much can be expected of the Child, Family and Community Services Act immediately. Even these limited rights for 16 to 18 year olds have yet to come into force, due to budgetary constraints. Young people on the street are particularly vulnerable to these sort of financial limits on services. Although they are widely seen as a problem in society, they do not provide a powerful lobby in Parliament or the Legislature when arguing for funds. It is cheaper for governments to ‘get tough’ on the problem, by increasing police activity or passing by laws to move young people on from a particular location in town, as opposed to providing services that might assist the young people in living an independent life.

Even if the section comes into force, in order to enforce a right to receive services under

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146 Although some of the attacks on women in the context of rape trials have been restricted in Canada, it used to be common practice to bring the character of the complainant into question in order to undermine her credibility. “At common law, a witness could be cross-examined as to any matter of conduct, including sexual conduct, which was relevant to impeach the witness’s credibility. ... Under the guise of a principled application of the legal concept of relevance, the common law allowed the accused to delve at length into the moral character of the complainant by adducing ‘relevant’ sexual history.” L’Heureux-Dubé J, in R. v. Seaboyer [1991] 2 S.C.R. 577, at p. 667. This case concerned the ‘rape shield’ provisions introduced into the Criminal Code to prevent such evidence being allowed. The defendants were challenging the legitimacy of the provisions under the Charter. L’Heureux-Dubé’s judgment contains a detailed summary of the way in which such evidence has been used to undermine women’s testimony in rape trials. Although there are now some protections against the use of such evidence in sexual assault trials, it would still be open to Counsel to use similar tactics against street-involved youth.

147 I am grateful to my discussion with Annabel Webb for bringing this point to my attention.

148 See discussion in Chapter One under the heading The Problematic Nature of Street-Involved Youth.
section 9, it would be necessary to show that the director had wrongly decided that the young person was not eligible for such services. As the young person’s ability to claim services in the future depends on a good relationship with the Ministry, it would be risky for her to bring an action challenging the Ministry’s decision. As a result, the services are likely to be provided at the discretion of the Ministry, as opposed to being available as of right.

As regards specific services to young people on the street, a potential alternative route to litigation in British Columbia is the Children’s Commission. The Commission is a new statutory body, established in 1997, whose brief includes dealing with complaints about decisions concerning certain designated services provided to children. The Commission investigates the complaint and tries to settle any dispute by alternate dispute resolution process. This process should be more sympathetic for young people on the street, as the formal rules of evidence would not apply and the setting would not be so intimidating as a court room. If the complaint cannot be resolved in that manner, it is referred to a tribunal, which has the power to order a reconsideration of the decision and to make

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149 Currently, all services provided by the Ministry for Children and Families to any child are designated for the purposes of the Act. (Children’s Commission Regulation, B.C. Reg. 250/97.) This would include the services under section 9 of the Act, when that section comes into force. It would not include services under section 10 of the Act, which provides on-going services to those between the ages of 19 and 24, as the recipients of these services are no longer legally children.

150 There are still problems with alternative dispute resolution processes. Because the process is informal and lawyers are usually not involved, it can favour those who are more articulate. It can also mirror power imbalances, rather than being able to rectify them. See, for example, “Power (Im)balance and the Failure of Impartiality in Attorney-Mediated Divorce” by Nancy Illman Meyers, (1996) University of Toledo Law Review vol. 27, pp. 853-881.
recommendations. The Commission has no power to order a particular decision to be reached and its main sanction is adverse publicity for the relevant Ministry. However, it seems to me that using the Commission might prove a more successful route than pursuing litigation, although this will depend on how accessible the Commission makes itself to street-involved youth.\textsuperscript{151} This approach might require the Commission to employ one or more workers specifically to deal with such young people, with specialised training and skills, and to engage in outreach work so that the services were easily available to young people on the street.

One further practical problem to consider is that there is some evidence to show that young people have difficulty in accepting that they really have rights. Gary Melton and Susan Limber have looked at this aspect in the USA. They say:

Children from disadvantaged backgrounds often are so skeptical that their exercise of rights will go unpunished that their legal rights become virtually meaningless in practice, even in circumstances in which the perception of an absence of rights does not match reality. Although some extraordinary effort may be particularly necessary to convince some lower-class and ethnic-minority children that they actually are empowered to exercise autonomy, the difficulty that most minors have in fulfilling their rights means that even adolescents often will require special procedures if newly recognized rights are to be enjoyed.\textsuperscript{152}

\textsuperscript{151} The first two reports of the Commissioner, Cynthia Morton, have shown that she sees a need for young people to be actively involved in the provision of services. For example in her 1997/97 Annual Report the Commissioner says, “It is our hope that youth will have a role to play in evaluating the effectiveness of the new initiatives.” Accordingly, I would hope that complaints made to the Commission by street-involved youth would be handled sympathetically and effectively.

Accordingly, simply giving more specific rights is unlikely to do much for young people on its own; rather, this strategy has to be part of a wider picture. I discuss this point further in Chapter Four when considering the strategies that might be of use to street-involved youth.

**Conclusion**

Street-involved youth face a number of problems in their day to day lives. These problems include increased health problems, exposure to crime, lack of affordable accommodation and employment prospects. Their existing rights seem to provide little to address these problems. Further, there are practical limitations on the exercise of these rights that restrict their use. In the following Chapter I go on to consider some further theoretical limitations on the use of rights for young people on the street.
CHAPTER TWO – LIMITATIONS ARISING FROM THE FORM OF RIGHTS

People look at us and think
“What a pity, at least I’m not one of them.”
Well first,
they do not understand our freedom,
our liberation from the rat race of society,
and second,
we do not want them to be one of us anyway.

Sixpack

The Will and Interest Theories

In the previous Chapter I explored the rights that young people on the street currently have in British Columbia. These rights do not appear to be helping street-involved youth significantly. In the following two Chapters, I explore some of the reasons why these rights do not appear to be effective. I start by considering the theoretical background to rights and the ways in which this background constrains the use of rights for young people on the street.

Most of the debate on children’s rights centres around two theories of rights, the will and interest theories. The adherents of these two theories argue with each other as to which

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153 Out in the Open, supra, note 1.
154 See for example the conclusion of the Chand report, You Have Heard This Before, supra, note 42.
155 These theories are known by a number of different names. For example, David Archard refers to the liberation and caretaker views of children’s rights (Children: Rights and Childhood, supra, note 63, chapter 3), Tom Campbell calls the will theory the power theory, (“The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult” in Children, Rights and the Law, supra note 69) and Michael Freedden talks of choice or option rights and welfare rights (Rights (Milton Keynes: Open University Press, 1991)).
provides a better basis from which to decide what rights children should have. Under the will theory where a person owes me an obligation, I have a right in so far as I am able to waive performance of that obligation. So, as a woman, I have a right to equal treatment in relation to men. This right means that other persons have a duty not to discriminate against me on the basis of my gender. I have the right in so far as I am able to waive performance of that obligation. Rights falling within the will theory would be constitutional equality rights, the procedural rights in criminal law and rights for youths under section 9 of the Child, Family and Community Services Act.

In contrast, the interest theory of rights argues that rights exist to protect certain interests.

156 H.L.A. Hart puts it this way, “Y is, in other words, morally in a position to determine by his choice how X shall act and in this way to limit X’s freedom of choice; and it is this fact, not the fact that he stands to benefit, that makes it appropriate to say that he has a right.” From “Are There Any Natural Rights?” in Jeremy Waldron, ed. Theories of Rights, (Oxford: OUP, 1984), pp. 77-90, at p. 82. Critics of rights argue that the element of choice suggested by this theory is illusionary. I explore this further below at note 159. In this essay Hart does not address the question as to whether there are any absolute rights, that is, rights that cannot be alienated by the individual concerned. However, these do exist. In Canada today a person may not “consent to have death inflicted on him” (Criminal Code, supra, note 116, section 14) and there are limits as to how far a person may consent to an assault (R. v. Jobidon, supra, note 111, where the Supreme Court held that consent was not a valid defence to a charge of assault arising from a fist fight). These limits might reflect fundamental interests that are to be protected, whether the person in question chooses this or not, and so show that both the will and interest theories have some value. Alternatively, we can regard these matters as another category of right, that of immunities, where a waiver is not appropriate. (Hart, Essays on Bentham, (Oxford: Oxford University Press, 1982), pp. 189-91, as cited in Freeden, supra, note 155, p. 48). A waiver is not appropriate where the benefits involved relate to the person’s security (so the examples given above) or their development or dignity (so again restricting the rights of children to avoid education and so on). An alternative way of looking at this problem is used by Paul Graham, “The Will Theory of Rights: A Defence” (1996) Law and Philosophy vol. 15, pp. 257-270. He suggests that we need to look outside the legal system and consider the moral theory of rights. On a contractarian basis, as suggested by John Rawls (see note 195 below), ideal agents construct a system of legal rights that they wish to govern their moral relationships in the real world. “The agents have unlimited powers to agree to any contract they might choose” (p. 266). So, in the moral system, all rights are the subject of choice, although the choice made may result in some legal rights being inalienable. Again, this does not offer any comfort to children, as they would not have any say in the moral choices being made.
Neil MacCormick describes such rights in general terms as:

To ascribe to all members of a class $C$ a right to treatment $T$ is to presuppose that $T$ is, in all normal circumstances, a good for every member of $C$, and that $T$ is a good of such importance that it would be wrong to deny it to or withhold it from any member of $C$.\footnote{Neil MacCormick, \textit{Legal Right and Social Democracy: Essays in Legal and Political Philosophy} (Oxford: Clarendon Press, 1982), p. 160.}

Using this definition, a legal right exists where "the law has the effect of making it legally wrongful to withhold $T$ from any member of $C."\footnote{Ibid., p. 161.} Using the above example, I have the right to equal treatment in order to protect my interests as a woman in a society that has historically treated women in a discriminatory manner. The rights of protection described in the previous Chapter would fall within this theory.

In the case of adults, the two theories both presuppose a degree of choice over the content of rights-claims.\footnote{In this context I am talking about choices that are internal to law. Even while a person might have a theoretical choice, there might be external constraints, such as economic considerations that make it difficult to exercise a free choice. Gerison Lansdown differentiates in the case of children between inherent vulnerability (i.e., physical size, lack of experience and knowledge) which is used to deny rights and structural vulnerability (i.e., lack of political and economic power) which places practical problems for exercising rights. (In “Children’s Rights”, \textit{supra}, note 69.) While adults also have limits on their ability to choose the content of their rights, these limits are structural rather than inherent.} The will theory relies on choice as its key element. In the case of the interest theory, MacCormick considers that for adults "there would be good reason to leave it to any right-holder to choose whether other parties need or need not on any given occasion respect his primary right."\footnote{\textit{Supra}, note 157, p. 165. This would of course be subject to the limits on choice discussed in note 159.}
However, where children are concerned, both theories run into difficulties. Where we are talking about very young children, the will theory immediately gives rise to problems. Babies cannot be said to waive performance of any obligations, as they are unable to communicate such a waiver to the holder of the obligation. However, we are reluctant to say that babies have no rights, for example, rights to care and protection. To many people it is also a problem to say that children who are able to express their views are able to waive their rights to protection or education.

The interest theory can accommodate rights for those who cannot express their views, as their interests can be identified by third parties and protected. However, the power of waiver that MacCormick sees for adults, again gives rise to problems. MacCormick considers children not to be good judges of what is in their best interests, so argues that adults should not allow children to waive their rights. Campbell puts it another way. He differentiates between "intrinsic rights (or rights in themselves), and extrinsic or instrumental rights." While children have intrinsic rights under the interest theory, they

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161 Although Hart considers that the language of duties, not rights, better describes the position of babies and animals. "Are there any natural rights?" supra, note 156, p. 82. Other writers, who also consider that the language of duties provides the best framework to protect young children, support this. See, for example, Onora O'Neill, "Children's Rights and Children's Lives", in Children, Rights and the Law, supra, note 69, pp. 24-42. She says at pp. 24-25 that "children's fundamental rights are best grounded by embedding them in a wider account of fundamental obligations, which can also be used to justify positive rights and obligations."

162 See the discussion on the nature of childhood in Chapter Three. Many people also have problems with the concept of obtaining the views of younger children. Certain lawyers who act for children say that children often do not understand the role of a lawyer and are unable to give independent instructions. For a discussion of this see Emily Buss, "You’re my What?" The Problems of Children's Misperceptions of Their Lawyers' Roles" (1996) Fordham Law Review vol. 64(4), pp. 1699-1762.

163 Campbell, "The Rights of the Minor", supra note 155, p. 9. (Emphasis in original.)
may not have instrumental rights, such as remedial rights. Campbell explains that “...[remedial] rights are not ascribed to children because they lack the capacity to invoke or secure remedies for the violations of interests of which they may not even be aware.”\(^\text{164}\)

So, children are not given a legal choice as to whether or not to enforce their rights.

An alternative to abandoning the will theory is to redraw it to take into account the position of children. An example of a writer who does this is John Eekelaar who objects to the interest theory on the grounds that someone else decides what is in the right-holder’s interest. Taking Dworkin’s concern with the right-holder’s ability to ‘trump’ what a third party considers is in her interests,\(^\text{165}\) Eekelaar cannot see rights existing except where the right-holder decides the content of the right.\(^\text{166}\) In order to bring children into this theory, even where they are incapable of expressing their views of the content of their rights, Eekelaar substitutes a hypothetical judgment. He says:

> So adults’ duties towards young children cannot be convincingly perceived as reflecting rights held by the children unless it can be plausibly assumed that, if fully informed of the relevant factors and of mature judgement, the children would want such duties to be exercised towards them.\(^\text{167}\)


\(^{165}\) See Ronald Dworkin, “Rights As Trumps” in *Theories of Rights*, supra, note 156, pp. 153-167. The essay starts, “Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”

\(^{166}\) This is not to say that the interest theory cannot also be considered as upholding Dworkin’s ‘trump’ rule. Rights that are given to protect interests will trump other views of society’s needs. So, even where society may be better off if not all children were to be educated to a certain level, those children would still have a right to that education.

This approach allows adults to decide the content of children's rights. It should be noted that Eekelaar is at pains to point out that using substituted judgment is not a recipe for ignoring children's views of their own rights:

On the contrary, it stipulates a process which requires serious attention to be given to what the child in question, of his or her gender, ethnicity and other personal and social characteristics, is likely to have wanted if fully informed and mature. This has important consequences. General theories of what comprises children's best interests will not in themselves suffice as grounds for decision-making.\(^{168}\)

However, older children who are able to express their views are still not able to determine the content of their own rights. The key words in Eekelaar's substituted judgment are "fully informed" and "mature judgement".

The assumptions of information and maturity incorporate into rights-based decision-making regarding young children the requirement that such decisions promote the goal of maturity, which is taken to be the ability to confront the truth and exercise self-determination. Maturity opens up options; it does not close them down.\(^{169}\)

This approach imposes serious limitations on the ability of children to define their own rights. The work of another adherent of the will theory, Michael Freeman, provides an example. He sees rights as protecting autonomy. While children have autonomy, choices that they may make while children may impact on later life choices. So, they need some degree of protection while they are children, in order to protect their potential for

\(^{168}\) Ibid., p. 229, emphasis in original.
\(^{169}\) Ibid., p. 229.
autonomy as adults. This involves a balancing act:

The question we should ask ourselves is: what sort of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings?\(^{170}\)

He says later,

We would not be taking rights seriously if we only respected autonomy when we considered the agent was doing the right thing. But we would also be failing to recognize a child’s integrity if we allowed him [sic] to choose an action, such as using heroin or choosing not to attend school, which could seriously and systematically impair the attainment of full personality and development subsequently.\(^{171}\)

So, when dealing with children, both the will and interest theories reach a similar point.\(^{172}\)

While children may be said to have rights, the content of their rights is to be determined by others. The content of those rights may differ between the two theories as the reasoning behind them differs and this is the main basis of discussion between the adherents of the

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\(^{172}\) When looking at competent adults the two theories also tend to converge in their practical effect, albeit in a different direction. Because adults are deemed to be able to decide their own interests, rights which protect interests and those which are based on the will of the individual will have the same content. One interesting difference is reflected in the *Jobidon* case discussed above at notes 111 and 156. In this case the Supreme Court held that adults did not have the right to consent to an assault caused by a fist fight. This decision was justified on public policy grounds. It was not so much that it was not in the interests of the participants that they could not consent to a fight, it was in the public interest. Gonthier J speaking for the majority said at page 762, “It is not in the public interest that adults should willingly cause harm to one another without a good reason.” Interestingly, he distinguished ‘the phenomenon of the ‘ordinary’ schoolyard scuffle, where boys and girls immaturity seek to resolve differences with their hands.” This sort of ‘immature’ behaviour would not be the subject of a legal sanction, unless the level of harm caused was significant.
two theories. The will theory is usually linked to a view of liberty or autonomy. The prime aim of that theory is to promote autonomy, which is seen as the key to human dignity. So, the rights that the will theory will promote for children will be those leading to maximum autonomy. The interest theory is more usually linked to utilitarianism or welfarism. Under these, rights promote either the best interests of society as a whole or the best interests of individuals within that society. In so far as autonomy is taken as an interest of the individual or society, the rights will be similar to those under the will theory. Where other interests are taken into account, the rights may differ. So, under the will theory, a child will always have a right to an education to a level necessary to develop autonomy. However, under the interest theory, if autonomy is not seen as the paramount interest, education might be aimed at other ends. So, there might only be a right to an education sufficient to obtain employment.

In each case, the fact that adults at the end of the day decide the content of the rights is a serious limitation for young people on the street. Because living on the street is inherently dangerous, any decision to leave home for the streets can be seen as a decision made without capacity and therefore not worthy of respect.

173 It is interesting to note here that although free high school education can last until a child reaches the age of majority, compulsory education in British Columbia ends at age 16 (supra, note 98). This might suggest that education up to the age of 16 is sufficient to develop autonomy (raising the question of why the age of majority is not also 16). Alternatively, it might uphold an interest theory which is that education is compulsory to a level necessary to get a job, although further education is preferred to reach full autonomy (raising the question as to why we give rights to all those over the age of 19 and not just those who have completed their high school education).
It is easy to query a decision to leave the apparently desirable state of living in a house, sleeping in a bed and having meals provided for you, in order to go to that of the uncertainty of living without a fixed home, having to sleep rough and not knowing where the next meal is coming from. Indeed, much of the literature on street-involved youth includes quotes from young people on the street encouraging others not to leave home, because life on the street is so difficult. For example, Ken, aged 20, said,

Not having any roots is awful. Kids who think this is a cool way to live, they would hate it if I told them some of my experiences.\footnote{\textit{In New Directions: Stepping out of street life,} by Pat Kariel, Calgary: Greenways Press, 1993, p. 107. Other examples can be found in Jon Bannister et al, \textit{Homeless Young People In Scotland,} supra, note 45, at p. 24 which contains the following quotes, “Try not to leave” (Sean, 17), “It all depends: if it’s a small thing then get them (the young people) to stay in the house.” (Clare, 18), and “Whatever is wrong, try to get it sorted out.” (Stuart, 19).}

On the other hand, when reading the individual stories of young people who have left home, the decision to leave often seems to be the most competent decision they could have made.\footnote{\textit{See, for example, the quotes given above at notes 11 and 12. Other examples can be found in almost any book on street-involved youth. For example, in \textit{New Directions,} supra, note 174, there are a number of stories of young people who were subjected to varying degrees of abuse and neglect both in their own homes and in the care system and for whom leaving was the only viable option. As Lundy puts it, “In [the context of interpersonal dynamics], the runaway act was viewed as a healthy response to an intolerable situation.” In \textit{Sidewalks Talk,} supra, note 37, at p. 21, referring to G. R. Adams and G. Munro, “Portrait of the North American Runaway: A Critical Review” (1979) \textit{Journal of Youth and Adolescence,} vol. 8, pp. 359-373. Pfeffer writes, “We know that in many cases, ‘risk taking behavior’ occurs because young people are in powerless and dangerous situations (i.e., adult abuse, unstable housing, poverty, gang culture)” (\textit{Surviving the Streets,} supra, note 37, at p. 31.)} Other decisions, as quoted in the literature, do not appear from a relatively stable adult point of view to seem so sensible.\footnote{\textit{For example in \textit{Homeless Youth Creating their own ‘Street Families’,} supra, note 34, Tia Jean Plympton gives the story of Rose who said that she ran away from home because ‘Mom was so boring and kind of dull. I had to get out of there.” (p. 51).}} However, in each case, the limitations of
both the will and interest theories make it difficult to uphold the decisions of the young people.

The Liberal Form of Rights

The discussion that takes place between the adherents of the will and interest theories shows one problem arising from the theoretical basis of rights; the content of the rights, in particular the ability to choose whether or not to enforce a right, is in the hands of adults, rather than the hands of the child right-holder. However, this discussion is limited to considering the problems that arise within the overall context of liberal rights. I now consider how the form of liberal rights, whether conceived under the will or interest theories, itself constrains the use of rights for street-involved youth.

The liberal tradition can be defined in a number of ways. Morton and Knopff, writers who uphold the liberal view of law, explain their understanding of liberal basis of the Charter as follows:

First it was premised on the classical liberal distinction between state (the public) and society and economy (the private), and was strongly portrayed as a defender of the latter against the former. Second, judicial review embodied a distrust of majoritarian democracy; it was understood as a way to protect individual rights and liberties, especially private property rights, against demagogues and misguided majority rule. Third, constitutional rights were understood to be not just ‘for’ by also ‘by’ individuals. ... Fourth, judicial review was inherently conservative or traditional, in the sense that it preferred and protected ‘the ancient truths’ against corruption by future majorities. ... Fifth, judicial review was understood as an exercise
of legal judgment not political will. ... Finally, there has always been a nation-building or centralizing thrust implicit in judicial review. 177

Joel Bakan distils this liberal view into two main elements, anti-statism and atomism. He explains,

Anti-statism is manifest in the traditional conception of rights as protecting individuals from public (state) interference in their private affairs but not requiring positive assistance from the state. ... Atomism represents rights as belonging to individuals (or groups), with other individuals (or groups), institutions, or state agencies having corresponding duties. 178

Bakan considers that this liberal tradition restricts the use of rights in a number of ways. First, "only state action is caught by the Charter’s rights." 179 So, if inequalities result from private sources, the Charter cannot be invoked to address those wrongs. 180 Second, the Charter cannot force action from the state; it can only operate in areas where the state has

177 The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Postmaterialist Politics (Calgary: Research Unit for Socio-Legal Studies, 1992), pp. 2-3. This analysis would also apply to other types of right. Interestingly, Morton and Knopff argue that in practice the Charter has not upheld these values. I do not consider this argument further. Given my aim of considering how far rights might be of use in furthering a challenge to dominant thinking, I have not looked at those views that see rights as going too far, but only at those that see their limits.
178 Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997), p. 47. These definitions correspond to the views of Morton and Knopff. Anti-statism reflects their first, second and fourth points and atomism reflects their second and third points. Bakan’s work focuses on rights under the Charter. However, his analysis also applies to the other rights that I discussed in the previous Chapter.
179 Ibid., p. 48.
180 Interestingly, Kate Sutherland has explored the way that the Charter has an indirect effect on private law decisions. She shows particularly how tort decisions, arising from the common law, have been influenced by the equality rights discourse of the Charter. "The New Equality Paradigm: The Impact of Charter Equality Principles on Private Law Decisions" in Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics, David Schneiderman and Kate Sutherland, eds., (Toronto: University of Toronto Press, 1997), pp. 245-270. In so far as the Charter influences this and other areas of private law, it may have some additional impact on street-involved youth.
chosen to act.\textsuperscript{181} Lastly, "a rights claim must be framed in dyadic terms ... as a challenge to a discrete state action with specific effects on a particular individual or group."\textsuperscript{182} So, the Charter cannot directly address wider systemic problems that cause inequalities. It can only seek a specific remedy from one actor to another.

Another implication of the liberal tradition not discussed by Bakan is that its atomistic nature means that only those who are perceived to be individuals are able to exercise rights. Children tend not to be seen as fully autonomous people and, accordingly, their use of rights is restricted.\textsuperscript{183} I discuss below how these aspects of the liberal form of rights particularly constrain rights for street-involved youth.

\textit{Anti-statism}

The anti-statist nature of liberal rights means that rights are primarily seen as a protection

\textsuperscript{181} Since Bakan's book was published there have been two Supreme Court cases on section 15 of the Charter that challenge his assertion that the Charter cannot force action from the state. First, in \textit{Eldridge v. British Columbia (Attorney General)} [1997] 3 S.C.R. 624, the Court ordered that the British Columbia legislature administer its health care plan in such a way that sign-language interpretation be provided to hearing-impaired patients where this is necessary for such patients to receive proper health care. Then in \textit{Vriend v. Alberta} (1998) 156 D.L.R. (4th) 385, the Court directed that the Alberta human rights legislation be read so as to include discrimination on the basis of sexual orientation. In each case, however, the Court specifically held that these were areas where the legislatures had taken action, but in an underinclusive manner. The Court left open the question as to whether it had the power to force governments to act in areas where they had not legislated at all. Accordingly, although Bakan’s specific analysis of the Charter needs amending in the light of these cases, the basic liberal tendency to prefer rights that protect the individual from the state remains the same. While in some cases rights do uphold state action and groups can claim such positive rights from the state, these rights are contrary to the liberal tradition and so must be fought for and won despite that tradition.

\textsuperscript{182} \textit{Just Words, supra, note 178, p. 48.}

\textsuperscript{183} See, for example, the views of Michael Freeman, at note 171 above.
against the actions of the state. The state is seen principally as an entity that can interfere in private lives, not as an entity that could assist those in need.\textsuperscript{184} So, rights that require the interference of the state are opposed to the traditional liberal form and need special pleading to be accepted. This factor is a particular problem for very young children who cannot speak for themselves. Traditional liberal theory holds that the rights of such children are best protected within the family and that the state should only interfere where the child is in extreme danger.

The case of \textit{B. (R.) v. Children's Aid Society of Metropolitan Toronto}\textsuperscript{185} provides an example. In this case a child was born with a number of medical problems. Her parents were Jehovah’s Witnesses and refused to allow her to undergo any treatment that could include the use of blood transfusions. The Ontario Children’s Aid Society obtained a wardship order so that the treatment could be given. The case progressed to the Supreme Court where the parents argued that the wardship order contravened their liberty rights under section 7 of the \textit{Charter}\textsuperscript{186} and their freedom of religion under section 2(a) of the \textit{Charter}. Each member of the court upheld the order. However, in so doing, they upheld the liberal view that the child’s rights are best protected within the family. It was only because this case was extreme, where the child’s life was in immediate danger, that the court was willing to intervene. La Forest J writing for the majority said,

\begin{quote}
See Bakan, note 178 above.\textsuperscript{184} [1995] 1 S.C.R. 315.\textsuperscript{185} Supra, note 74.\textsuperscript{186}
\end{quote}
Parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*. ... The state can properly intervene in situations where parental conduct falls below the socially acceptable threshold.  

However, children need the state to uphold their rights where they cannot do so themselves. The minority judges were willing to incorporate the children’s rights into their analysis of the application of sections 7 and 2(a). But the majority took the view that the child’s rights could only be taken into account when considering whether the wardship order was in accordance with the principles of fundamental justice under section 7 and was justified under section 1. The liberal form of rights was too strong to allow for the child’s rights, supported by the state, to constrain the existence of the parents’ rights. The most that the child’s rights could do was provide justification for state intervention, in the right circumstances. One review of the case talking of the minority position, says,

Thus, at a minimum, parental liberty can be given a meaning that incorporates the obviously relational nature of parenting rather than casting children as potentially hostile interests which might provide, either reasonably or unreasonably, a basis for the state to constrain parenting choices.

This case suggests that there might be problems for young people trying to exercise rights that are contrary to their parents’ wishes. For young people on the street this limit would

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187 At pp. 372-3.
188 Hester Lessard, Bruce Ryder, David Schneiderman and Margot Young, ‘Developments in Constitutional Law: The 1994-95 Term”, (1996) *Supreme Court Law Review*, vol. 7, pp. 81-156, at p. 120.
be a particular concern. In so far as street-involved youth need access to government services, they are reliant on state intervention. However, if their parents object to these services, the *B. (R.)* case would help the parents in a claim that the services amounted to unjustified state interference in the family.\textsuperscript{189}

Another aspect of the anti-statist nature of rights is that it results in only negative, not positive rights. As discussed above, younger children will often need state assistance in enforcing their rights. However, even where children are given intrinsic rights, they tend not to be given the remedial rights so that they can directly enforce those intrinsic rights.

\textsuperscript{189} It is impossible to tell from the existing cases how far the courts would uphold the rights of older children as against their parents' rights. There are cases involving older children refusing blood transfusions where the courts talk in terms of the child's right to consent or refuse medical treatment. However, these cases are heard against a background of statutory authority that gives a mature minor the right to consent (and, in these cases, to refuse, although contrast the position in British Columbia discussed at notes 120 above and 270 below) to health care, if their doctors agree it is in their best interests. In addition, in each case the custodial parent agreed with the child's decision, so the court was not being asked to uphold a child's rights against the parents' rights. See for example, the *Hughes* and *Walker* cases referred to at note 120. In the *Hughes* case the Ontario Divisional Court ordered that a 13 year old be taken into care for the purpose of being given blood transfusions, despite her and her mother's refusal. Wilson J held that she was not sufficiently competent to decide for herself to refuse the treatment. Because the judge considered that any requirements of fundamental justice under section 7 had been met, she did not rule on whether the girl had any specific section 7 rights in addition to those under statute. Wilson J did find that the girl's freedom of religion under section 2(a) had been infringed, but also found that the infringement was justified under section 1 on the grounds that the girl was not sufficiently mature to make the decision to refuse blood transfusions. In the *Walker* case a 15 year old boy had refused blood transfusions. He was supported by both parents. His doctors applied to the New Brunswick court for permission not to use blood products, as they were concerned that if they upheld his wishes, they could be liable for the consequences. The doctors considered that it was in the boy's best interests not to give him blood transfusions, even though this might lead to his death. The New Brunswick Court of Appeal found the boy to be sufficiently mature to decide to refuse the treatment and granted the order to the doctors. Only one judge out of 5 felt that the case should come back to court if the boy's life was in immediate danger. The remaining judges were willing to uphold his decision in all circumstances. Each case was decided on the basis of the perceived maturity of the child. In *Hughes* a 13 year old was not sufficiently mature. In *Walker* a 15 year old was sufficiently mature. In neither case was there a conflict between the parents and the child.
rights.\textsuperscript{190} Even with such direct remedial rights, enforcement would be problematic without access to legal aid and support in bringing legal actions.\textsuperscript{191} So, resources must be applied to services that will assist children in effectively exercising their rights. However, providing such services would involve challenging the liberal form of rights.

\textit{Atomism}

The atomistic nature of liberal rights leads to a number of problems for children. As was seen in the \textit{B. (R.)} case above, "Justice La Forest’s ‘isolated’ view portrays the individual in a fashion associated with classical liberalism, namely, as an abstract agent whose happiness consists of the unimpeded pursuit of subjectively defined preferences."\textsuperscript{192} The parents’ rights were seen in isolation from those of the child. The dependency of the child on the family means that the child’s rights have no separate status.

However, simply imposing liberal rights on children will not necessarily provide children with rights separately from the family. In his book, \textit{The Missing Child in Liberal Theory: Towards a Covenant Theory of Family, Community, Welfare and the Civic State},\textsuperscript{193} John

\textsuperscript{190} \textit{Supra}, note 163.

\textsuperscript{191} For example, children might need assistance in understanding the legal process, such as understanding the process of cross-examination, the role of counsel and the judge and so on. Such assistance might of course be useful to many people who come into contact with the legal world for the first time. However, it would be especially important to children, particularly younger children, in that their knowledge of such matters would be likely to be less than that of adults. As discussed in the previous Chapter, legal aid is of limited use for the problems faced by street-involved youth.

\textsuperscript{192} Lessard et al., \textit{supra}, note 188, p. 120.

\textsuperscript{193} (Toronto: University of Toronto Press, 1994).
O’Neill contrasts the liberal theory that each person is a separate individual, with a covenant theory that lays stress on the interconnected nature of all people. The covenant theory has particular implications for families and so children:

In the covenant view, families are not merely a by-product of individual lifestyles, because family life is the primary institution of infancy and childhood. Families make families. Families make communities. Communities make states. States should make sustainable communities and families that make and care for children and youth.\(^{194}\)

In contrast, O’Neill sees rights as being based primarily on contract and criticises those liberal thinkers who base their philosophical views on a social contract.\(^{195}\) So far as children are concerned, O’Neill considers that they are automatically dependent within the family and so rights based on an individualistic and contractarian theory cannot be effective. He says, “currently there are attempts to define children’s rights on the liberal model of individual rights exercised by potentially autonomous agents – despite the reality of children’s dependency.”\(^{196}\) He contrasts the covenant view where “the family rights system would need to be grounded in the embodied family covenant.”\(^{197}\)

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\(^{194}\) Ibid., p. 4.

\(^{195}\) For example, John Rawls argues for a particular conception of justice based on an imaginary contract that people in a given society would make if they had no idea who they might be in that society. So, they might decide to provide social assistance schemes on the basis that they would not know whether they would be rich or poor and so would want to ensure that, if they were poor, they had access to public funds. See *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971).


\(^{197}\) Ibid., p. 64. In making this argument, O’Neill does not draw upon the feminist critique of the family. (See, for example, Michele Barrett and Mary McIntosh, *The Anti-Social Family*, (London: Verso, 1982) and Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (London: Routledge, 1995)). Rather, he argues in favour of the family, without ever defining what that might mean, other than a link between parents and children.
While I would not accept that children need be seen automatically within the family, at least when they are old enough to make a decision to live outside the family setting, O’Neill’s views are useful in suggesting an interconnected nature of childhood. Even where children choose to live outside the family, they need not necessarily be seen as fully independent persons. They are likely still to need services and assistance from others, for example in the form of state provided accommodation and financial assistance.

Finally, the liberal view of rights requires that the right-holder be an autonomous person. Richard Lindley writing of the liberal conception of autonomy says,

In order to be a person, a creature must have second-order volitions – that is desires about which of her desires she wants to become her will. In order for a person to have a free will, her will must be as she wants it to be, that is, her actual motivating desires are the desires she overall wants to motivate her. ¹⁹⁸

As children are seen as incompetent and dependent, they are not autonomous and their use of rights is accordingly limited. The cases on blood transfusions referred to in footnote 120 are examples of this limitation. In the Hughes case the child’s rights could be overridden because she was not sufficiently mature to make a decision that could cost her life. In contrast, the boy in the Walker case was “able to take care of [himself]” ¹⁹⁹ and so entitled to the right.

As children get older, their ability to conform to the image of the autonomous individual increases. So, for example, the policy manual from the British Columbia’s Ministry for Children and Families gives guidelines for deciding when children have the capacity to give consent under the *Child, Family and Community Services Act*. For those between the ages of 16 and 19, capacity is presumed, unless the child’s developmental level and maturity indicates otherwise. For those under 12, there is a presumption of incapacity. For those in between, capacity is decided on the developmental level and maturity of each child.\(^{200}\)

Both aspects of the liberal form of rights therefore constrain the use of rights for children. However, their application is sometimes contradictory. In Vancouver there are limited safe-house places available for street-involved youth. The stress that the *Child, Family and Community Services Act* lays on respecting the views of the child\(^{201}\) can allow social workers to avoid taking charge of a child pursuant to section 26 of the Act\(^{202}\) and so avoid further overcrowding of the limited safe-house places. By offering the young person an option that the social worker knows is not acceptable, for example a place in a safe house that does not take pets, when the young person is accompanied by a dog, the youth is given no real choice. She or he either abandons the pet or refuses services. The social worker can close the file for that day, having complied with the statute, but not having


\(^{201}\) *Supra*, note 105. Section 2(d) provides that one of the guiding principles of the Act is that “the child’s views should be taken into account when decisions relating to a child are made.”

\(^{202}\) This section provides that the director may take charge of a lost or runaway child for up to 72 hours.
assisted the young person in any practical way. Here, therefore, the child’s autonomy is upheld. However, the atomistic nature of rights means that only the child’s immediate choice is considered. The constraints on that choice imposed by the rules against pets can be ignored. The complexity of the problem is reduced to a simple choice between upholding the child’s wish to go into the shelter or not. The fact that the child’s wish might be to go into a shelter with her pet can be ignored as irrelevant.

Some writers have tried to overcome some of the constraints on children caused by the liberal form of rights by recasting rights in a different form. I go on to discuss two such attempts.

Rights as Power

The first challenge to the liberal form of rights comes from Katherine Hunt Federle. She has argued that both the will and interest theories disempower children. As I have pointed out, both theories rely on a concept of capacity and autonomy in establishing the content of rights. Federle considers that “capacity is part of the language of hierarchy and status, of exclusion and inequality.” She sees power as a key concept.

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203 This scenario was presented to me by a worker with street-involved youth in an interview in Vancouver on July 2nd 1998. The attitude of social workers was also the subject of comment by Genya Stefanoff in her UBC Masters Thesis, Housing Street youth in Vancouver, a case study (1994). She says, “A problem cited by one interviewee was that often the personality of the social worker affects the outcome of what happens to the youth.” (At p. 92.)

Power is the obverse of social oppression and political inequality, for it licenses hierarchy and status. Rights, however, mitigate the exclusionary effects of power by allowing the powerless to access existing political and legal structures in order to make claims. Permitting these types of rights claims also has the salutary effect of redistributing power and altering hierarchies. Herein lies the real value of rights, for rights require that we respect the marginalized, empower the powerless, and strengthen the weak.\textsuperscript{205}

This approach then sounds like a way forward for children generally and young people on the street in particular. They are certainly powerless in today's society. But what does Federle envisage as an alternative to the existing theories of rights? In a later article she puts forward a proposal for reconceiving rights as a means of empowering children. Under this proposal rights are seen as a "form of power".\textsuperscript{206} The rights will give children the power they lack under the present way of viewing rights. They move beyond paternalism, beyond third parties deciding what is in the best interests of the child. Because they acknowledge the existing powerlessness of children, they "have a transformative aspect for the enabling effects of rights would reduce the victimization and dependence of children."\textsuperscript{207}

Federle gives two examples of how empowerment rights might work. The first is in a custody case following divorce. She suggests that a seven-year-old daughter should participate as a party in the custody proceedings, represented by a "competent and

\textsuperscript{205} Ibid., p. 986.
\textsuperscript{207} Ibid., p. 1598.
independent attorney."  Any settlement would require the approval of the child. Federle considers that this will ensure that the child’s views are not only heard, but also actively taken into account in the result of the hearing. A second example is given of a child welfare hearing, where again the child would be a party to the proceedings and would have the right to veto any outcome with which she disagreed. Federle suggests that if children were given rights in this way, “one would expect the victimization of children to decrease as they come to be seen as powerful, rights-bearing individuals.”

Federle’s view of rights still therefore falls to a large extent within the liberal tradition. She sees the use of rights primarily within the legal system to uphold the individual position of children against other actors, be they state or family. Her challenge is limited to the assumption that children need to be autonomous before they can be given rights. Rather, she sees rights as being able to give children autonomy and power. However, the way in which rights can give power is all important.

Federle sees power as follows:

Power structures the interactions between and among individuals and the state. It is power that permits an individual to assert a claim against another and power that permits the enforcement of that claim.

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208 Ibid, p. 1600. This leaves unanswered what should happen with children who do not wish to express a view or whose views are unduly influenced by one or both parents. See note 213 below.
However, that power comes from the mainstream form of law, which "is saturated with liberal ideology, and lawyers and judges [who] are trained to believe that its elements are as natural as the air that they breathe."\(^{211}\) So, simply giving children rights will not challenge the fundamental liberal nature of those rights. The other limits of anti-statism and atomism discussed above will still limit their effectiveness for young people.\(^{212}\)

Indeed, even Federle sees limits to the extent that children can exercise the rights she proposes. In both the examples given by Federle on the empowerment value of rights, the child in question is old enough to express her views.\(^{213}\) Federle does not say what should happen with a one year old son in the same divorce proceedings. Would he also be entitled to be a party to the proceedings? How would he instruct counsel? Would there need to be a third party to give instructions on his behalf? If so, how would we decide when children were old enough to be able to give instructions directly? What test, other than capacity, would be used?\(^{214}\) Federle limits her analysis to rights to be represented in


\(^{212}\) In this respect, it is interesting that in the area where children have most procedural rights (the criminal justice system), they do not seem to have any additional power. See the discussion in the previous Chapter.

\(^{213}\) However, even where a child is old enough to express an opinion, there can be difficulties in actually ascertaining those views. See note 162 supra. There is also a problem, in so far as children are currently treated as dependent, in ensuring that one parent does not unduly influence them. If society insists that children remain within the family, it constrains choices available to children on divorce. Some writers have raised fears that fathers, usually the more affluent, might be able to influence children to remain with them by promising them increased allowances and other material benefits. See for example the works cited by Liz Trinder in "Competing constructions of childhood: children's rights and children's wishes in divorce" (1997) *Journal of Social Welfare and Family Law* vol. 19, pp. 291-305, especially at p. 294.

\(^{214}\) In her later article, "The Ethics of Empowerment" *supra*, note 210, Federle suggests that the decision as to capacity should be made by the lawyer representing the child. If the lawyer considers that the child lacks capacity, she may, in the last resort, make decisions on behalf of the child. (At p. 1692.) So, the child may have rights, but it is the lawyer who ultimately has the power to decide the content of the rights.
court. She also admits that there would be limits on the orders that a judge could make in custody proceedings - "a court could set aside a negotiated bargain that would permit a parent to abuse a child or to batter a spouse." These limits might provide a loophole in the empowerment perspective. If a child wants to live on the street, would the law be able to overrule that wish on the grounds that, in the court's opinion, this lifestyle would further disempower the young person? Again, the young person's lack of full autonomy limits the effectiveness of their potential rights claims.

Other writers have embraced rights due to their apparently empowering nature. Critical race theorists in particular have claimed that rights can give power to disempowered groups. One such critical race theorist is Patricia Williams. In her article "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" she tells a story of searching for a flat at the same time as a white male colleague. Her colleague wanted a minimum of formality in his dealings with his landlord, paying a deposit in cash and not asking for a lease agreement. On the other hand, Williams insisted on a written lease and a maximum of formalities. She explains the differences as coming from their different situations. Her colleague needed to show that he could be trusted, that he was not an all-powerful lawyer.

The child is in a stronger position than currently, as presumably she could choose a different lawyer, although this would depend on economic constraints. If the lawyers are provided by the state, it is unlikely that the child would be able to change lawyers over a difference in opinion as to capacity. So, these reforms are likely to help those with access to money more than others.

215 Federle, "Looking Ahead", supra, note 206, p. 1602. It is not clear what sort of agreement would allow for these matters. Federle does not say any more than this.
Williams also needed to show she could be trusted. But in her case this meant showing that she was an educated Black woman who could be relied on. Insisting on complying with the formalities of a lease agreement was the best way to do so.

From this situation, Williams draws the lesson that when a person has little formal sense of self in law, rights can be used to build up the self. So, rights can be used as a form of self-empowerment. However, other writers have questioned how far the empowerment value of rights can be pushed. Didi Herman has studied the Bill 7 debate in Ontario.\textsuperscript{217} This debate turned into a large campaign and lesbians and gays united behind it. However, the picture of lesbians and gays that was produced by the debate both in Parliament and the media was conservative. The picture was one of a majority group (heterosexuals) and a minority group (homosexuals), both of which are made up of members who have no choice as to which group they belong to and with the majority showing tolerance and compassion to the minority.\textsuperscript{218} As Herman says, this approach ignores more radical views of sexuality as being socially constructed, rather than being an inherent characteristic. So, the group that was being empowered by the use of a rights claim was not able to define itself as it chose.\textsuperscript{219} It had to work within the given liberal structure. Herman believes that this limit is a weakness in the claims made by Williams and others on behalf of Blacks.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{217} Bill 7 was a statute designed to bring Ontario legislation in line with the Charter. In 1986 the NDP proposed amending the Bill to include sexual orientation to the list of grounds on which discrimination was prohibited.\textsuperscript{217}
\item\textsuperscript{218} See Rights of Passage, supra, note 57, chapter three, particularly pages 38-43.\textsuperscript{218}
\item\textsuperscript{219} Ibid., pp. 43-4.\textsuperscript{219}
\end{enumerate}
\end{footnotesize}
Rights may not be self-empowering, if one does not have the ability to define the self that is to be empowered. 220

This limitation is of particular concern to young persons. Given the tendency under rights theories to hold that children do not have the capacity to decide for themselves the content of rights, there will always be a risk that claiming rights will simply reinforce the status quo. For example, Federle has argued that the interest theory of rights 'perpetuates a caretaker ideology that promotes the powerlessness of children.' 221

Finally, Federle's approach is limited because it considers that giving children legal rights will be sufficient to empower them. However, rights on their own are not enough. As I discussed in Chapter One, rights can empower only as part of a wider strategy. 222

Rights as Relationships

The second challenge to liberal rights comes from Martha Minow. She says,

Moreover, the debate about children contrasts a view of the child as totally independent of adults with a view of the child as totally dependent. Both of these choices obscure the child's relationship with the state under either principle. These choices also ignore the real possibility that the same child may need custody and care for one purpose, and rights of autonomy or self-determination for another. 223

220 Ibid., pp. 68-9.
221 Supra, note 206, p. 1590.
222 See notes 63 and 64 above. I discuss this further when considering strategies in my final Chapter.
In contrast to the will and interest theories that she refers to here, Minow proposes a way of looking at rights in relationships. She suggests that all rights define relationships. Property rights reflect the relationships of individuals and communities to limited resources, contract rights deal with “the formation and dissolution of commercial relationships”. Within these relationships all are more or less dependent on others.

The very freedom of the traditional male role - to participate in public life and move in and out of the private family realm - depended upon the traditional female role, which maintained continuity in the family realm and provided someone - a wife - to be subject to the husband’s freely exercised power. Men’s power has obscured their own dependence upon women.

However, where relationships and dependencies exist without rights, imposing the liberal notion of individual rights on those relationships will not necessarily change those relationships. Minow points to the family, which has for many years been upheld by the state as a private arena, where rights only accrued to the male head of the household:

New rights have presumed that men and women are the same for purposes of child custody battles, postdivorce finances, and other family matters. These rights ignore the differences historically drawn on gender lines and the reinforcement of those differences in institutions surrounding the family.

For children the picture is even more complicated. Minow states that children are

225 Ibid., p. 276.
dependent on their parents, and so firmly within the private sphere. She does not challenge this assumption nor query whether it must always be so, but takes it as a given starting point for her discussion. Because of this dependence she identifies three types of right that might be claimed for children. First, protective rights whereby the state protects children from abuse from the family; second, rights that protect children from the state, but do so by upholding the family’s power over the child; and third, rights of the child against the parent based on the child’s own wishes.

Minow calls for a move beyond these contrasting views of rights for children. By seeing rights as relationships, she argues that we can use rights to define the relationships of children to the wider community. Communities live by rules; these rules are governed by the rights held by those living under them. By claiming rights, children can claim to be

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In the terms of the debate set out above, the first two sorts of rights appear to represent the interest theory, with the child’s interests being defined by the state and the family respectively. The third represents the will theory. Under the substituted judgment will theory of Eekelaar and Freeman, the first set of protective rights may also be part of the will theory, as the child, once an adult, would presumably wish to have been protected from abuse. It is interesting that Minow does not consider a possible fourth source of rights; those of the child directly against or from the state, without the intervention of the family. This appears to reflect Minow’s acceptance of the key role of the family in the lives of children. My concern in this thesis is primarily with this type of right, as I am dealing with young people who are no longer based in the family and so need to have rights directly against or from the state. Federle criticises Minow’s approach of rights and relationships because she considers that Minow ignores the difference between the interdependence of children and adults. She says, “The interconnectedness of adults and children is different in origin; children have no real choice in the creation or continuation of the relationship precisely because they are thought to ‘heed’ these relationships, and they need these relationships because they are immature and incompetent.” (Federle, 1993, supra, note 204, at p. 1019). So, talking about relationships obscures the power imbalances that exist between children and adults. Using a Foucauldian approach, Federle also criticizes Minow for specifically ignoring the power that women have over children and so claiming that what is good for women is good for children. Robert Harris and David Webb have described Foucault’s concern with power, where “there are everywhere plots and power struggles, devices to seize more power, to have one’s own way” in Welfare, Power & Juvenile Justice (London: Tavistock Publications, 1987) at p. 59. So, while women are generally powerless in society, they can and do have power over children. Their interests may be linked, but are not identical.
part of that community. However, any relationships formed as a result of claiming such rights will necessarily be limited in practice. By claiming rights as part of a community, there is an agreement to abide by the existing rules. ‘Stating a claim in a form devised by those who are powerful in the community expresses a willingness to take part in the community, as well as a tactical decision to play by the rules of the only game recognized by those in charge.”

Minow acknowledges that the main right that can be gained by this route is that of “equality of attention”. This right may not change hierarchies, but will ensure a voice for the powerless. Jeremy Roche gives a similar view, saying,

> Notions of rights might be indivisible from ideas of responsibility to and for the community to which one belongs. Yet communities may contain ‘oppressive hierarchies of domination and subordination’ and children, if visible or heard, may be at the bottom of these hierarchies.

The implication of Minow’s suggestion is that children’s own voices should be heard, although she is not explicit on this point. However, she does not hold out much hope that they will be listened to or any action taken as a result. Her main concern appears to be with due process, with having children adequately represented in formal hearings. Roche has a more hopeful view. He says,

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228 Making all the Difference, supra, note 223, pp. 294-5.
229 Ibid., p. 297.
It need not be a question of adult imposition versus child autonomy: rather a matter of acknowledging the interconnectedness of our lives, of no longer seeing the relationships that children have with significant adults as naturally and necessarily hierarchic. We, as adults, might also benefit from dialogue with children in confronting our dilemmas. As in other spheres of our lives it is not just what we do that is important but how we do it.\(^{231}\)

Roche agrees with Minow that the relationships between children and adults are important. However, he is also willing to challenge the existing hierarchies that exist within those relationships. One important element would be to ensure that we understand “the relationships in which children are involved, from their own point of view”.\(^{232}\)

Minow’s method of reconceiving rights for children aims to avoid arguments that rights are atomistic. By seeing children in relationship to others, Minow argues that rights simply help to define those relationships and do not detract from them. Indeed, she is clear that legal rights by themselves will have very little effect on the underlying power balance in those relationships. Minow does not address the anti-statist nature of rights. Rather, she seems to uphold the view that children’s relationships will mainly be within the context of the family. However, her approach might have uses for young people on the street in so far as it can be extended to see all relationships as equally important. As I discussed above, street-involved youth can be constrained by the liberal form of rights because it does not take into account the complex factors that make up their lives. A form

\(^{231}\) Ibid., pp. 286-7.
of rights that is able to assess the relational nature of a young person, without assuming that those relationships should be primarily based within the family, could be of use to them.

Conclusion

In this Chapter I have explored two liberal theories of rights, the will and interest theory. I have shown that these theories are of limited use to young people. Their liberal nature constrains their use in two ways. First, because they are anti-statist, children who need state assistance might find their rights subjected to those of their parents in all but the most extreme cases. Second, because they are atomistic, children are seen either as within the family or as independent. There is no room for alternative views of their interdependence. Further, because children do not tend to measure up to the image of a fully autonomous rights holder, they have problems in enforcing their rights.

I then considered an alternative way of conceiving rights that aimed at least to overcome the problem of autonomy. Federle's method of giving rights to children, regardless of capacity goes some way to answering the problems of rights for children. However, because she leaves the other liberal elements of rights untouched, her approach is of limited use. Finally, I looked at Minow's reformulation of rights as relationships. I concluded that this approach might have some use for young people on the street, provided it could be shifted from a family-based theory.
In the following Chapter I explore a further way in which the use of rights for young people on the street is limited by the constraints imposed by the ideological effects of the dominant discourse of childhood.
CHAPTER THREE - WHAT IS A CHILD? - IDEOLOGICAL LIMITATIONS ON RIGHTS FOR STREET-INVOLVED YOUTH

The truth is always best.
The only trouble is – what is the truth?

*Ritchie* 233

The Social Construction of Childhood

As a starting point to this Chapter, I want to introduce you to Nema, a person invented by Rex and Wendy Stainton Rogers in their book *Stories of Childhood: Shifting Agendas of Child Concern.* 234 The staff at a shopping mall find Nema at closing time, naked in the women's toilets. The police doctor can find no identifying marks and can only estimate her age at somewhere between fourteen and twenty. Nema has total amnesia, but otherwise appears normal. She is kept in a psychiatric hospital and on trips out can cope with city life without difficulties. She has an IQ of 148. The problem remains however, how should she be treated, as an adult or a child? The Stainton Rogers discuss the problem as follows:

Immediately, we come up against a problem - who makes the decision? Do we turn to an 'expert' like a judge or a psychiatrist? Or do we let Nema decide for herself? One solution favoured by moral philosophers would be to ask: who would I want making the decision if I were Nema? The usual

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233 *Out in the Open, supra, note 1.*
answer is *me*, I would want to make that choice. But if Nema chose to be fourteen, would we see that as a sensible choice, or might we find ourselves thinking that anyone who made that choice wasn't rational enough to make it! The notion of 'Nema's choice' also raises awkward questions about actual fourteen year olds. If we were to allow Nema to choose to be an adult when she might 'really' only be fourteen, why not allow other fourteen year olds so to decide?\textsuperscript{235}

If childhood is simply a natural feature of biology, the difficult question of whether Nema is a child or not would not arise. However, childhood is more than this. It is also a complex set of ideas that define what society sees as a child and the behaviour expected from children. This idea that childhood is a social construct comes from a variety of traditions. First, there is the difference between a *concept* and a *conception*. This distinction is drawn by John Rawls and is explained in relation to childhood by David Archard as follows:

The *concept* of childhood requires that children be distinguishable from adults in respect of some set of unspecified characteristics. A *conception* of childhood is a specification of those attributes.\textsuperscript{236}

In this Chapter I explore in particular the way in which the law specifies a number of characteristics to create a dominant legal conception of childhood.

I also draw on the work of feminist writers who have long argued that, whilst there may be biological differences between men and women (that is the idea of sex is biological and unchangeable) the concept of gender (that is the characteristics that we ascribe to men and


\textsuperscript{236} David Archard, *Children: Rights and Childhood, supra*, note 63, p. 22. (Emphasis in original)
women and the behaviour that we expect of them) has been socially constructed.\footnote{But see Carol Smart's article "Law, Feminism and Sexuality: From Essence to Ethics" (1994) \textit{Canadian Journal of Law and Society} vol. 9, pp. 15-38 where she discusses the problems with accepting sex differences as natural. She first considers the biological argument that chromosomes can determine sex, with XX chromosomes giving rise to a woman and XY chromosomes to a man. She draws attention to the sex-testing in the Olympics that 'has revealed that a number of women have XY chromosomal composition. These women who have breasts, female genitalia and who are within the range of height, build and strength usually associated with women have been declared to be men and disqualified. Equally hirsute, well-built men have been identified as having XX chromosomes thus rendering them women.' (At p. 19.) She next discusses the work of Thomas Laqueur, who identified two ways of looking at sex differences. The first comes from Greek medicine and sees there as being one sex, with women being seen as lesser men. The second developed at the time of the Enlightenment and saw there as being two sexes, with women being both different and inferior to men. Smart argues that by looking at biology in this way, 'we are increasingly able to appreciate the discursive construction of biology, rather than taking the biological for granted.' (At p. 21.) Finally, Smart considers the work of Judith Butler who argues that feminists are unduly restricting themselves by limiting their views to two sexes and so to two genders. She quotes Butler as saying that 'perhaps this construct called 'sex' is as culturally constructed as gender'. (J. Butler, \textit{Gender Trouble} (London: Routledge, 1990), at p. 7, cited in Smart, at p. 21.)}

In the same way, I wish to argue that whilst there is a biological stage of change between birth and physical maturity, the characteristics that we ascribe to this period are made socially and not given biologically.\footnote{Again, it is not a simple matter to determine the biological facts of childhood. Marx Wartofsky in his article "The Child's Construction of the World and the World's Construction of the Child: From Historical Epistemology to Historical Psychology" (in Frank S. Kessel and Alexander W. Siegel, eds., \textit{The Child and Other Cultural Inventions} (New York: Praeger Publishers, 1983), pp. 188-215) suggests one such definition as 'the period of the organism's existence immediately following parturition, for the offspring of human parents, and extending until the growth or maturation of certain anatomical, physiological and neural features has reached a defined stage.' (At p. 191.) However, he goes on to deconstruct such a definition by questioning the nature of parenthood as a cultural matter, especially with the development of reproductive technologies where biological parenthood and legal parenthood may be different. As with Smart, he questions the supposedly neutral nature of biology, with 'the older history of the domestication of animals and the newer history of animal and plant breeding as examples of how culture, or conscious human practice, infringes upon and transforms biology itself.' (At p. 192.) We should also have to question why this definition of childhood begins at birth and not earlier or later, and how we are to agree on the features of maturity. Are we to look solely to sexual maturity or to some other physical characteristic or are we to try to find some sign of cognitive maturity which can be measured? I would also question the way in which this definition, as with the definition of sex, only allows for two possibilities. We must be either a child or an adult. Would it not be possible to find biological reasons to support a variety of stages. For example we could look at the period from birth to when the child can walk, from walking to talking, from talking to being able to perform certain manual tasks, from this time to sexual maturity, from sexual maturity to a reaching full height and so on. These categories might take
Childhood is not a brief physical inhabitation of a Lilliputian world owned and ruled by others, childhood is rather a historical and cultural experience and its meaning, its interpretations and its interests reside within such contexts.\textsuperscript{239}

Finally, I rely on the work of sociologists in redefining the way in which children should be studied. In particular, I have drawn on the work of Alan Prout and Allison James. They state a number of features of this redefinition, including,

1. Childhood is understood as a social construction. As such it provides an interpretive frame for contextualizing the early years of human life. Childhood, as distinct from biological immaturity, is neither a natural nor universal feature of human groups but appears as a specific structural and cultural component of many societies.

2. Childhood is a variable of social analysis. It can never be entirely divorced from other variables such as class, gender, or ethnicity. Comparative and cross-cultural analysis reveals a variety of childhoods rather than a single and universal phenomenon.

4. Children are and must be seen as active in the construction and determination of their own social lives, the lives of those around them and of the societies in which they live. Children are not just the passive subjects of social structures and processes.\textsuperscript{240}

As Prout and James identify, there are a number of constructions of childhood in any society. These constructions will differ depending on the persons creating the


\textsuperscript{240} "A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems" in James and Prout, eds., Constructing and Reconstructing Childhood, supra, note 34, pp. 7-34, p. 8.
construction. It is likely that different constructions would arise from those in different classes, of different ethnic backgrounds or of different genders. In this Chapter I demonstrate that a particular construction of childhood is dominant in Canada today, that is, a construction which reflects the dominant strand of thinking in Canadian society. I do so by considering the legal construct of childhood. In considering the way in which law constructs childhood, it is important to realise that law itself is a social construct. That is, there is no external measure to decide what the law should be; it varies from society to society and from age to age. But, despite this lack of external certainty, law has a particular power. Carol Smart writes,

Law sets itself above other knowledges like psychology, sociology, or common sense. It claims to have a method to establish the truth of

241 The quote from Mark Kessler below, note 245 explains that the dominant strand in society is that which has the power to treat itself as dominant. It is likely that this dominant strand will reflect the white, anglo-saxon majority in Canadian society.

242 As I explain below, law reflects the dominant strand in society. Accordingly, the dominant discourse is both constituted and reflected by law. For feminists, this dual role of law has posed a number of problems. For example, Martha Fineman argues that: “Law is a crude and limited device and is circumscribed by the dominant ideologies of the society in which it is produced. ... Therefore law reform cannot, in and of itself, be effective as a catalyst for more generalized reforms.” (The Neutered Mother, supra, note 197, p. 17.) Carol Smart writes of the care that needs to be taken in proposing law reform. “It also follows that we cannot predict the outcome of any individual law reform. Indeed the main dilemma for any feminist engagement with law is the certain knowledge that, once enacted, legislation is in the hands of individuals and agencies far removed from the values and politics of the women’s movement.” (Feminism and the Power of Law, (London: Routledge, 1989), p. 164.) For this reason, I do not intend to propose specific law reforms that might help street-involved youth. I look instead at ways in which the dominant construct of childhood might be challenged outside of law reform in order to limit the restrictions of the exercise of rights that it causes.

243 There are writers who argue that law should be based on ‘natural rights’, derived either from a religious perspective or from considerations as to the ‘natural’ features of human life. One modern example is John Finnis, see for example, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980).
events.\textsuperscript{244}

Legal method purports to be neutral, to be able to find the facts. Accordingly, the images produced by law are particularly powerful as they are produced by a method that purports to discover the truth. Mark Kessler writes,

Dominant norms – norms that ‘are produced by those with the power to name and the power to treat themselves as the norm’ – are made to appear universal and natural by a discourse that seems rational and neutral.\textsuperscript{245}

Further, law is “enmeshed within and contained by the overarching normative systems that reflect dominant cultural and social ideologies.”\textsuperscript{246} Accordingly, the legal conception of childhood will reflect the dominant cultural and social conception of childhood.

**The Law’s Construct of Childhood**

It would be misleading to claim that there is only one image of the child in law. Law itself speaks with a number of disparate voices; the voice of the legislature speaking through statutes; the voice of judges speaking through cases; the voices of counsel speaking both in court and privately to clients and the voices of many more players in the legal world such as policemen, social workers, probation officers and so on.\textsuperscript{247} As a starting place

\begin{footnotes}
\item \textsuperscript{244} Feminism and the Power of Law, supra, note 242, p. 10.
\item \textsuperscript{246} Martha Fineman, The Neutered Mother, supra, note 197, p. 16.
\item \textsuperscript{247} Although, as Smart points out, despite these disparate voices, law “claims a unity through the common usage of the term ‘law’.” (supra, note 242, p. 4.) For this reason, although I have chosen only to look at the image of childhood produced by statutes, I continue to treat this as the legal discourse of childhood.
\end{footnotes}
then in examining the picture of the child in law, I will look at the effect of statutes and the way that they reflect a particular type of childhood in British Columbia. I have chosen statutes as they, together with long standing principles of common law, establish the ground rules within which other legal players must act.\(^{248}\)

**Dependency**

The starting point in this discussion is the age of majority, which in British Columbia is 19.\(^{249}\) In general, statutes in British Columbia treat those under and over the age of 19 differently. Those under the age of 19 are legally known as ‘infants’ or ‘minors’. The use of the word ‘infant’ in particular has an impact on the picture that is created in one’s mind when considering the legal status of those under 19. In *Websters Encyclopedic Dictionary: Canadian Edition*\(^{250}\) an ‘infant’ is defined as “a very young child, esp. one not yet able to walk or talk” and an infant school in England is a school for those children under 7. By using language that conjures up an image of a very young child, the statute reinforces the different status of those under 19. In practice, we might not be able to tell whether a young person is 18 or 19, but in law the difference is essential. By using a

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\(^{248}\) As regards children, statutes provide the main framework within which legal players operate. The common law comes into effect in the doctrine of *parens patriae*, which provides a broad sweeping up power to the courts to protect children. “Its raison d’être was and remains the necessity within the law for a remedial failsafe for those who are unable to care for themselves.” Jeffrey Wilson, *Wilson on Children and the Law*, supra, note 118, para. 1.19.

\(^{249}\) *Age of Majority Act*, supra, note 25. However, it should be noted that for criminal justice purposes, a person becomes an adult at 18, *Young Offenders Act*, supra, note 26.

particular kind of language, the *Age of Majority Act*\textsuperscript{251} and the *Infant Act*\textsuperscript{252} in particular create that difference in our minds. The image created is one of incapacity and dependence.

Dependency is reinforced through other statutes. While a person is legally an infant, a range of statutes combine together to make that person economically dependent on adults. School is compulsory from the age of 5 to 16,\textsuperscript{253} there are restrictions on the work a child can do while under 15,\textsuperscript{254} and those under 19 cannot enter into any enforceable contract.\textsuperscript{255} The combination of these factors means that those under the age of 16 are prevented from becoming economically independent by being forced to be in full time schooling and by the limits on their ability to work. The restriction on contractual capacity also makes it difficult for those between 17 and 19 who might have left school and started work to enter into contracts on a comparable basis with those who are legally adults.

**The role of the family**

In addition to being made dependent, statute law in British Columbia goes further and sees children as being primarily dependent on and the responsibility of their parents. This

\textsuperscript{251} *Supra*, note 25.  
\textsuperscript{252} *Supra*, note 107.  
\textsuperscript{253} *School Act*, supra, note 98, s. 3.  
\textsuperscript{254} *Employment Standards Act*, R.S.B.C. 1996, c. 113, s.9.  
\textsuperscript{255} *Infants Act*, supra, note 107, s. 19.
emphasis on the family is reflected in much of the legislation that relates to children. For example, one of the guiding principles of the *Child, Family and Community Services Act* is:

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents.256

This principle is reflected in other statutes. For example, the *Adoption Act* provides that the following must be taken into account in considering a child’s best interests,

(d) the importance to the child's development of having a positive relationship with a parent and a secure place as a member of a family.257

The importance of the family is also key to the *Young Offenders Act*. One of the principles of that Act is,

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.258

Accordingly, parents are given prime responsibility for children.

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256 *Supra*, note 97, s. 2.
258 *Supra*, note 26, section 3(1)(h).
Protection

The overall impression given by statutory provision for children is that children need to be protected because of their lack of capacity to protect themselves. Another of the guiding principles of the Child, Family and Community Services Act is:

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm.\textsuperscript{259} Adults, in contrast, are protected from deliberate harm through the criminal justice system. Negligent harm is compensated through the tort system. In each case, there is no additional protection available.

Children's interests in property are looked after by the Public Trustee who has the power to ask the courts to dispose of property on behalf of a child if this is "expedient, necessary or proper in the interests of the infant or for the infant's maintenance or education" or if the land is depreciating and "the infant's interest requires the disposition or will be substantially promoted by the disposition."\textsuperscript{260} Adults are left to decide for themselves whether they are to dispose of property, even if they are mismanaging it.\textsuperscript{261} In this and

\textsuperscript{259} Supra, note 97, section 2(a).
\textsuperscript{260} Infants Act, supra, note 107, section 2.
\textsuperscript{261} The only time where decisions are made on behalf of adults is where an adult is judged as being incapable of managing his or her own affairs or incapable of managing himself or herself. In this case, the Attorney General or a relative can apply to court for a committee to be appointed to look after the affairs of the patient. This committee has "all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and sound and disposing mind." Patients Property Act, R.S.B.C. 1996, c. 349, sections 1, 2 and 15. However, in this case, the onus is on the Attorney General or the relative to prove incompetence. Where children are concerned, incompetence is assumed
numerous other instances the law assumes that children are unable to protect themselves. This presumption of incapacity runs throughout British Columbia’s legislation.\textsuperscript{262}

\textit{Capacity}

In general, statutes rely on age to determine when a specific incapacity has ended and adulthood (with its assumption of capacity) has begun, as opposed to using subjective factors such as deciding on a particular child’s competence, responsibility or some other measure. So, childhood begins at birth and ends in British Columbia at 19.\textsuperscript{263} As a child approaches the age of majority, the restrictions on his or her actions are lessened.\textsuperscript{264} However, childhood does not fully end until a person’s nineteenth birthday. On reaching that age, one becomes an adult. This reliance on age does not take into account the fact that people mature at different rates and that different factors in their lives might affect and cannot be challenged.

\textsuperscript{262}This is a key point in the debate on whether children can have rights – see Chapter Two above. In this connection, Martha Minow writes that “it is more honest to disclose that competence and incompetence are used ... as proxies for a variety of concerns about what societal decision-makers think children may need, and what they simultaneously think allows adults to choose for themselves.” (In “A Feminist Approach to Children’s Rights”, supra, note 223, p. 5. She argues that as there is no clear-cut test of competency and as psychologists cannot agree on what competency means, it is used as an excuse for separating children from adults. It is interesting to note here that Elizabeth Cauffman and Laurence Steinberg in their discussion of adolescent capacity acknowledge that adolescents have the cognitive ability to be considered competent, but that they still make ‘risky’ decisions and so do not have the necessary ‘maturity of judgment.’ Here, it seems that when adolescents reach a certain standard of competency, the test will be changed to ensure that they remain on the child side of the divide. (“The Cognitive and Affective Influences on Adolescent Decision-Making”, (1995) Temple Law Review vol. 68, pp. 1763-1789.)

\textsuperscript{263}Age of Majority Act, supra, note 25, although for criminal law purposes, childhood ends at 18, Young Offenders Act, supra, note 26.

\textsuperscript{264}See Chapter One under the heading Rights of protection, notes 114 to 117.
their need or ability to mature. It assumes that by certain ages the majority of children are able to undertake certain actions without protection. However, it ignores both those who mature earlier and could safely be allowed, for example, to consent to sex at a lower age, and those who mature later, where, given the premise that protection is desirable for children, protection until a later age may be appropriate.

One major exception to the use of age as a measuring stick of maturity is that of the marriage or parenthood of a child. These acts have traditionally been seen as ending childhood, even where the person remains under the age of majority, as they reflect a move into the world of adulthood. So, children are usually not capable of writing a valid will. However, where a person under 19 is married, she or he has the capacity to write a will.

There are certain exceptions to the reliance on age alone as a determining factor of capacity. As I discussed in Chapter One, section 17 of the Infants Act provides that those

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265 For example, Anne Solberg has studied the contributions of children in Norway to housework. (‘Negotiating Childhood: Changing Constructions of Age for Norwegian Children" in James and Prout, supra, note 55, pp. 118-137.) She found that children who were given more responsibility were treated as older. Anne does one quarter of the housework, like each member of her family. She works without supervision. Carl, he does much the same amount of work, but only in response to a request from his mother and under her supervision. Solberg concludes, “The two mothers perceive their 12-year-olds differently: Mrs. Anderson regards her daughter as ‘older’ than Mrs. Carlsen regards her son. ... In the Anderson family Anne ‘grows’ through her tasks. Mrs. Anderson, seeing the result of her daughter’s work – the cleaned floors and cooked meals – sees a responsible subject behind. Carl remains ‘little’ despite his work, because Mrs. Carlsen sees a ‘helper’ behind it, a person who can manage to do certain well defined tasks but who does not have any responsibility for organizing or completing large tasks.” (At p. 130.)

266 Wills Act, supra, note 108, section 7.
under 19 may consent to health care.\textsuperscript{267} Such consent is effective provided that the health care provider is satisfied that "the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care" and that "the health care is in the infant's best interests".\textsuperscript{268} So, the statute allows the health care provider to establish whether the child has the capacity to consent to care, without imposing any minimum age. However, there is still an element of protectionism included. Infants cannot consent to any care that the health care provider considers not to be in their best interests. So, for example, a doctor could refuse a child advice on contraception or an abortion without her parent’s consent.

One key difference between adults and children in British Columbia is the extent to which their voices are heard. Because adults are presumed to be competent, their views are taken into account as a matter of course. For example, in health care, adults have the right to refuse any treatment, whether or not it is in their best interests to do so,\textsuperscript{269} while a child’s views would probably be overruled under the \textit{parens patriae} doctrine, if the court considered that this was in the child’s best interests.\textsuperscript{270} In a number of areas recent

\textsuperscript{267} See under the heading Rights of protection, note 120.

\textsuperscript{268} Again, the use of the best interests test allows the introduction of ideological thinking in the making of decisions under this section. See the discussion at note 139 above.

\textsuperscript{269} For example, Cory J said, ‘Everyone has the right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent.” In Ciartariello v. Schacter (1993) 100 D.L.R. 4th 609 (Supreme Court), at p. 618. The only exception to this would be an adult who was certified as being mentally disordered under the \textit{Mental Health Act}, R.S.B.C. 1996, c. 288 and could then be treated compulsorily (sections 22 and 31).

statutes in British Columbia have attempted to improve the position of children as regards having their voice heard. So, for example, another of the guiding principles of the Child, Family and Community Services Act is that "the child's views should be taken into account when decisions relating to a child are made" and in considering the best interests of the child, the child's views are a relevant factor. While this provision is an improvement on the previous legislation, which did not provide any references to the views of the child, it still reinforces the child's dependency. Whilst her views are to be taken into account, they are not to be decisive.

I n n o c e n c e

The general picture of children so far created by British Columbia statutes is one of dependency, the need for protection, lack of capacity and reliance on the family. There is

the BC Supreme Court held that the Infants Act did no more than codify the common law and that a refusal by a child would not bind the doctors who could apply under the parens patriae doctrine to treat the child compulsorily. Under section 29, the director may apply to court to overrule the refusal of a child or his or her parents if "in the opinion of 2 medical practitioners, [the treatment] is essential to preserve the child's life or to prevent serious impairment of the child's health." Interestingly, however, the Child, Family and Community Service Policy Manual, supra, note 200 suggests at page 3.14-5 that where a child has the legal capacity to consent to treatment, neither the director nor the child's parents can override a decision to refuse health care. The interaction of section 29, the parens patriae doctrine and this policy are unclear. The position is different in other Provinces where the legislation more clearly allows a mature minor to refuse health care. See, for example, Hughes and Walker, supra, notes 120 and 189. In Britain, the common law has developed to make it clear that those under the age of majority do not have the right to refuse treatment, no matter how competent they are. Whether a BC court would now follow the British cases or try to extend the scope of the Infants Act remains to be seen.

Supra, note 97, sections 2(d) and 4(1)(f). There are a number of other specific references in the Act to explaining particular courses of action to a child, ascertaining the views of the child and taking them into account. These sections do not always work in favour of the child. See the discussion above in Chapter Two under the heading, Atomism.

Family and Child Service Act S.B.C. 1980, c. 11.
a further possible element to childhood, innocence. However, this element is not so clear cut. The statutes discussed so far tend to promote the idea of the child as innocent. However, in terms of the criminal law, the picture is more complicated. Those under the age of 12 in Canada are considered to be below the age of criminal responsibility. So, if they carry out acts that in those over the age of 12 would amount to a crime, they are not subject to the criminal justice system. In these circumstances, they may be subject to action by the social services, but cannot be charged with an offence or subject to criminal proceedings. These provisions would appear to support the idea that those under a certain age, in this case 12, are considered to be innocent and so incapable of breaking the law. If the alternative view were taken, that is that children are inherently sinful, one would expect statutes to provide that the law would punish all children for their crimes. A further element of innocence might be that children under a certain age are seen as subject to further corruption, if placed in a corrective institution with other offenders. Accordingly, they are kept outside the criminal justice system altogether.

Historically, there has been a conflict between those who see children as inherently good and those who see them as inherently evil. For example, Rousseau, in his book *Emile*, suggests that children are inherently innocent and destined to grow into good adult persons, given the right circumstances. (Translated by Barbara Foxley, (London: Dent, 1911), first published in 1762.) On the other hand, the more evangelical Protestant religions saw the child as inherently sinful. One such religious campaigner, Hannah More, said that we should consider children "as beings who bring into the world a corrupt nature and evil dispositions, which it should be the great end of education to rectify". (Quoted in P. Robertson "Home as a Nest: Middle Class Childhood in Nineteenth-Century Europe" in L. de Mause *The History of Childhood*, (London: Souvenir Press, 1976), p. 421.)

Section 15 of the *Child, Family and Community Services Act* (supra, note 97) provides that if a child under the age of 12 has broken the law, a police officer may report the circumstances to a director under the Act and must do so if the child has killed, assaulted or endangered another person. This differential treatment of those under 12 is of course not simply a question of innocence. Also intermingled with this is the question of capacity. Children under a certain age are deemed simply not to
This element of innocence is also reflected in the treatment of young offenders between the ages of 12 and 18. Whilst they are subject to the criminal justice system, they are still not treated in the same way as adults. So, the declarations of principle contained in section 3 of the *Young Offenders Act* include statements that "while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions" and "young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance".\(^{276}\)

There is a strong emphasis in the Act on the need to rehabilitate young people. That is, young people who have committed offences are not totally beyond recovery. They can be brought back to the innocent state that is expected of them.\(^{277}\) This approach is in...
contrast to the way that statutes regard adult offenders, where sentencing must encompass a number of factors, only one of which is rehabilitation.\textsuperscript{278} Again, there is a stress on the importance of the family on rehabilitating young offenders. Section 3(1)(h) states that "parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate." The \textit{Young Offenders Act} contains a number of alternative dispositions (or sentences) which are only available to young people.\textsuperscript{279}

However, there is a conflict within the \textit{Young Offenders Act} itself. Section 16 allows a young person over the age of 14 to be transferred to an adult court. The factors that the court considers in deciding on a transfer include the seriousness of the offence and the rehabilitation of the young person. That must be the ultimate aim of all dispositions." (At 427) This is so, even though there has been a shift in overall emphasis from the \textit{Juvenile Delinquents Act} to the \textit{Young Offenders Act}. The old JDA, dating essentially from 1908, relied solely on a welfare model of justice. However, this led to a number of problems. Gordon West writes, "The vagueness of this legislation, its lack of due process, the inclusion of a wide range of new juvenile-status offences (e.g., truancy), and wide dispositional powers left the treatment of juveniles open to administrative arbitrariness." ("Towards a more socially informed understanding of Canadian delinquency legislation" from \textit{The Young Offenders Act: A Revolution in Canadian Justice}, eds. Alan W Leschied, Peter G Jaffe and Wayne Willis, (Toronto: University of Toronto Press, 1991), pp. 3-16, at p. 7.) Accordingly, the YOA encompasses a number of approaches. On the one hand it adopts a justice model, giving clear legal rights to young offenders, while it also mixes welfare and crime control in its sentencing structure. (See further, Raymond R. Corrado and Alan Markwart, "The Evolution and Implementation of a New Era of Juvenile Justice in Canada" from \textit{Juvenile Justice in Canada: A Theoretical and Analytical Assessment}, eds., Raymond R Corrado, Nicholas Bala, Rick Linden and Marc Le Blanc (Toronto: Butterworths, 1992), pp. 137-227, especially at p. 142.) As discussed above in relation to under 12 year olds, there is also a feeling that young offenders might be corrupted by exposure to older criminals. Accordingly, young offenders are generally held separately from adult offenders.

\textsuperscript{278} Criminal Code, supra, note 116, section 718.
\textsuperscript{279} For example, sub-sections 20 (1)(c), (d), (e) and (f) provide that a young offender can pay compensation, make restitution or provide compensation in kind or by providing services. There are no equivalents for adults.
alleged circumstances, the age, maturity, character and background of the young person and their record of offences and the adequacy of the Young Offenders Act as against the adult courts to meet those circumstances. Once the case has been transferred to the adult court the young person will for most purposes be treated as an adult and will be subject to adult procedures and adult sentencing. These provisions suggest that in certain circumstances, the innocent nature of a young person can be overlooked and they may be treated as an adult. This appears to be the case where the young person has a background in crime, and has therefore shown herself conclusively not to be innocent, or where the offence is of a particularly serious nature and, therefore, incompatible with the presumption of innocence.

These provisions are the subject of much controversy. The Act was amended in 1992 and again in 1995 to increase the penalties for serious crimes and to make it easier to transfer young people to the adult courts. For example, 16 and 17 year olds who are charged with murder, manslaughter or aggravated sexual assault are automatically tried in an adult court unless the young person or the Attorney General seeks an order that they should be tried as young offenders. Earlier this year the Federal Justice Minister, Anne McLellan, introduced a white paper dealing with further reform to the youth justice system in Canada.\footnote{A Strategy for the Renewal of Youth Justice, supra, note 144.} The paper calls for a new youth justice statute to replace the Young Offenders Act. For my purposes, the white paper calls for the provisions on transfer to an adult
court to be extended. First, a new category will be added to the list of offences where there is a presumption in favour of transfer. The new category will be "young persons who have a pattern of convictions for serious, violent offences." Second, the presumption will now apply to 14 and 15 year olds as well as 16 and 17 year olds.

Even these proposed changes will not satisfy everyone. After the killing of a teenage girl in Victoria last November by other teenagers, the local MP, Keith Martin, called for the Young Offenders Act to be abolished and for violence to be more heavily penalized. Similar calls come from around the country whenever a young person is charged with a particularly violent crime.

The provisions in the Criminal Code dealing with sexual offences cause a further complication. Given the stress on dependency and innocence in the statutes explored above, one might have thought that there would be strict provisions prohibiting sex for all children. However, section 150.1 of the Code allows any person over the age of 14 to consent to sex with any other person. Further, 12 and 13 year olds can have sex with each

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281 Ibid., p. 25.
282 The procedure will also change. Instead of a hearing to decide whether the case should transfer to an adult court, the Crown will give notice that it proposes to seek an adult sentence. The accused then has a choice of venue. If found guilty, the court will decide whether or not to impose the adult sentence. It should be noted in the context of my overall discussion on innocence that the Standing Committee on Justice and Legal Affairs had recommended that 10 and 11 year olds charged with a limited range of serious, violent offences should be subject to the criminal justice system. This recommendation has not been acted on in the White Paper. These children will continue to be dealt with under child welfare programs.
283 His comments were reported in the Times Colonist on November 26, 1997, at p. A1.
284 Supra, note 116.
other, provided there is no relationship of authority or dependency. The only overall prohibition is that anal intercourse is unlawful if you are under 18. So, an element of protection remains for those under the age of 14 and against male gay sex.

Summary

The image of the child presented by statute law in British Columbia is of a child who is dependent, particularly dependent on her parents, in need of protection, incompetent to make major decisions, gaining specific competencies as she or he grows older, but not reaching adulthood until the age of 19. The civil provisions in British Columbia tend towards a picture of innocence. The Young Offenders Act backs this picture up, at least until the age of 12, with a conflict between the concept of innocence and inherent evil after that age. The Criminal Code provisions on sexual offences complicate the issue of innocence further, so some care must be taken in not pushing this element of the picture too far. One further point to make is that the law tends to treat children as a homogenous group. While social scientists and psychologists discuss the different developmental stages of childhood, the law sees all those between the ages of 0 and 19 as being one group.

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285 Ibid, section 150.1(3).
286 Section 159. The Ontario Court of Appeal has held that this provision breaches the Charter, in that it discriminates against gay men between the ages of 14 and 18. R. v. M(CC) (1995), 23 O.R. (3d) 629.
287 For example, Bob Franklin writes, "Consequently, the period between birth and adulthood is usually divided into four distinct periods: infancy, childhood, adolescence and early adulthood, with different needs, rights and responsibilities being judged appropriate for the different age groups." (In "The case for children's rights: A progress report", in The Handbook of Children's Rights, Bob Franklin, ed., (London & New York: Routledge, 1995), pp. 3-22, at p. 8.)
There are limited differences, but the overwhelming picture is that all those under 19 are children.\textsuperscript{288}

\textbf{Images, Discourse or Ideology}

So far in this Chapter I have deliberately used the language of images or pictures of childhood when discussing the law's construct of childhood.\textsuperscript{289} The reason for using this language is that I find it a helpful concept to consider the internalized process by which each of us views the world. Personally, I tend to interpret the world through a series of internalized pictures, images in the mind's eye.\textsuperscript{290} So, if the word 'child' is mentioned, a picture comes into my mind of a young child, probably no older than 9, asexual (that is, the sex cannot be distinguished), white and blond haired, usually playing. This picture enables me to tell a story about the child; my immediate thought goes to the child's family.

\textsuperscript{288} Most of the differences are based on age. Another example is aboriginal children, who are given special consideration in the \textit{Child, Family and Community Services Act}. One of the Act's guiding principles is that 'the cultural identity of aboriginal children should be preserved' (section 2(f)). This is carried into effect in the Act by providing that aboriginal organisations must be informed when there is a hearing relating to an aboriginal child and that any consideration of the child's best interests must take into account the importance of preserving the child's cultural identity. These differences give hope to further proposals that the law should take more account of the individual characteristics of different children. I discuss this further in Chapter Four.

\textsuperscript{289} In this I am following Saussure in distinguishing between the two elements of the sign; the mental image and the word. I have been concentrating on the mental image produced by the use of the word 'child' and as such, exploring the nature of the 'sign' of childhood. See Purvis and Hunt, 'Discourse, ideology, discoursed, ideology, discourse, ideology ...' (1993) \textit{British Journal of Sociology} vol. 44, pp. 473-499, p. 485, referring to F. de Saussure, \textit{Course in General Linguistics} (London: Routledge, 1984).

\textsuperscript{290} Patricia Holland has written that 'Pictures seem to halt the slipperiness of language, pull meanings together and bind them so that they appear natural and irresistible.' \textit{What is a Child? Popular Images of Childhood} (London: Virago, 1992). Holland is discussing the impact of actual photographs as they are used in the media and advertising, but the point is relevant to our internal pictures also. These internal pictures or images simplify what we know to be a complex and sometimes contradictory issue.
for I assume that she or he has a family, although I make no assumptions about that family. For all my reading on children and childhoods and the discussion included in this Chapter on the socially constructed nature of childhood, I seem to be unable to shift this particular image, even though when I think consciously about children, I know that this image is only one of many that I might have. Why should this be so?  

Perhaps more common language used by other writers discussing the social construction of subjects is that of discourse or ideology. As Trevor Purvis and Alan Hunt have said, 'modern social theory is awash with talk of 'discourse' and 'ideology'.” In this thesis I follow the arguments of Purvis and Hunt in distinguishing these two concepts.

Ideology has its roots in Marxist analysis of society. Terry Eagleton writes: 'The study of ideology is more than some sociology of ideas; more particularly, it claims to show how

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291 Interestingly, this is an image of myself as a child. I do not know whether this is a more widespread phenomenon, but it seems likely that many of us use our own experience of childhood to inform our current thinking in this area. One aspect that comes through is my internalised racism. Jenny Kitzinger comments that in media portrayals of child abuse in the UK the children used are always white. She says, 'The image of the solitary black child would represent a different concept – racism means that while a white child can represent 'Childhood' the black child is only used to represent black childhood, or 'The Third World' or 'Foreign' or 'Starvation'.” ('Who Are You Kidding? Children, Power and the Struggle Against Sexual Abuse” in James and Prout, supra, note 34, pp. 157-183, at p. 158.) An alternative view is given by this quote about Woody Allen, ‘He tells about one of the many instances in his smallhood, in his childhood, when he was going to be beaten to death by bullies. He said, ‘And suddenly my whole life flashed in front of my eyes – sitting on a split-rail fence with hay in my mouth and putting the cows back in from the pasture and putting the hay in the barn. And then suddenly I realized it wasn't my life that was flashing in front of my eyes, it was somebody else's.’ But, you know, this is the mythic American childhood which I grew up with, thinking that was the real thing. What I had was a vicarious experience in Brooklyn!” Quoted by Marx Wartofsky in his discussion of a paper by Wolfgang Edelstein, 'Cultural Constraints on Development and the Vicissitudes of Progress” in The Child and Other Cultural Inventions, supra, note 238, pp. 48-88, at p. 85-6.

292 In “Discourse, ideology, discourse, ideology, discourse, ideology ...”, supra, note 289, at p. 473.
ideas are related to real material conditions by masking or dissembling them."\textsuperscript{293} The concept of discourse, on the other hand, was developed within post-modern theories of language. It provides "a term with which to grasp the way in which language and other forms of social semiotics not merely convey social experience, but play some major part in constituting social subjects, ... their relations and the field in which they exist."\textsuperscript{294}

Post-modernism is very difficult to define, partly because its very name suggests a negative. It is that which is after the modern era. Wendy Brown writes,

\begin{quote}
In political theory and practice, postmodernism is after Platonic forms, Hobbesian sovereignty, Hegelian totality, Millian liberty, Kantian reason and will, and Marxian dialectics and redemptive politics.\textsuperscript{295}
\end{quote}

Further, the essence of post-modernism is a 'refusal to self-define or write a single origins story."\textsuperscript{296} The nearest to a definition that I can manage is that postmodernism 'if it signifies anything at all, announces at the very least a certain degree of scepticism concerning the transformative and critical powers of art, aesthetics, knowledge."\textsuperscript{297}

Accordingly, post-modern thinking sees the traditional view of ideology as problematic. Because post-modernism denies our ability to ascertain a truth that is outside our
discursive experience, any suggestion that there is a reality outside of our social situation which can be called upon to challenge the truth of an ideological concept is suspect. Foucault challenged the use of ideology by saying,

Now I believe that the problem does not consist in drawing the line between that which in a discourse falls under the category of scientificity or truth, and that which comes under some other category, but in seeing historically how effects of truth are produced within discourses which in themselves are neither true nor false.\(^\text{298}\)

So, the challenge is not to identify the truth, but to see how certain discourses are perceived to contain a greater truth than others.

However, because post-modernism denies that there is an external truth against which discourses can be measured, it is difficult to decide which discourses have greater value than others.\(^\text{299}\) This tendency also gives rise to problems. Judith Squires says postmodernism "offers little guide to the problems of how to resolve conflict among competing voices; how to effect a transition from the present in which many voices cannot speak, or are necessarily excluded, to a more polyvocal one; how to compensate for the political consequences of an unequal distribution and control of resources."\(^\text{300}\) There is a

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\(^{299}\) Kate Soper writes: "There are ... no transcendent, extra-discursive qualities or experiences to which we can appeal as the grounds for the talk of values and the discriminations it offers, since these refer us only to what discourse itself constructs." In "Postmodernism, Subjectivity and the Question of Value" in *Principled Positions: Postmodernism and the Rediscovery of Value* (London: Lawrence & Wishart, 1993) ed. by Judith Squires, pp. 17-30, at pp. 18-9.

\(^{300}\) From the Introduction to *Principled Positions: Postmodernism and the Rediscovery of Value*, supra,
need for some way of distinguishing between discourses and ranking them according to their effects.

Because of these problems, Purvis and Hunt argue for a use of ideology to provide a link between notions of discourse and relations of power. They suggest a distinction between 'discourse as process and ideology as effect.' In this respect, an effect is ideological where 'it pertains to relations of domination/subordination.' As discussed above, law is a particularly powerful discourse because of the claim it makes to be able to distinguish the truth. It has ideological effects where it operates in a manner that acts to subordinate other voices. For example, Carol Smart writes of the way that 'in order to have any impact on law one has to talk law's language, use legal methods, and accept legal procedures. All these are fundamentally anti-feminist or, in Stang Dahl's terms, bear no relationship to the concerns of women's lives.' In so doing, the law operates ideologically to subordinate women. As regards children, it is likely therefore that law will have particular ideological effects in subordinating their interests to those of adults. I discuss this in detail below.

Ideology can operate on a number of levels. Shelley Gavigan suggests two levels of
inquiry to consider:

The first is a question of identifying the ideological nature of legal doctrine and principles: 'equality', 'best interests of the child', 'community standards' and so on. The second, equally important, inquiry involves identifying the extent to which the judiciary itself employs 'ideological thought' (which is formally external to the law) but which is then incorporated into legal doctrine and becomes virtually unassailable.\footnote{305 "Law, Gender and Ideology" in Anne Bayefsky, ed., \textit{Legal Theory Meets Legal Practice} (Edmonton: Academic Printing and Publishing, 1988), at p. 292.}

In this thesis, in Chapter Two I considered the ideological nature of legal rights. As discussed above, I looked at the primarily liberal form of rights and considered how this form operates to constrain the use of rights by street-involved youth. In this Chapter I go on to the second stage of Gavigan's analysis to show how the ideological effects of the dominant discourse of childhood further constrain the use of rights by young people on the street.

From the discussion in this Chapter, it is clear that there is no single discourse of childhood; indeed, any one discourse of childhood may be complex and at times contradictory. For example, the legal discourse of childhood does not have a clear image of whether the child is innocent; the level of innocence appears to differ, depending on the particular legal context. However, from the discussion above, we can see that there is a pre-eminent discourse of childhood in Western society, which is reflected by the image of the child created by legislation in British Columbia. That is, a child is dependent,
particularly dependent on the family, incompetent, in need of protection and, to some extent, innocent. This image is seen as natural and 'common sense'. This is one element of its strength.

The Power of the Ideological Effects of Discourse

The ideological effects of the dominant discourse of childhood have particular strength in three ways. These are their common sense nature, the way they are internalized and the special position of children in society.

Common sense

Shelley Gavigan quotes Cotterrell's 'checklist' of the characteristics of ideological thought:

1. It appears to be 'common sense', obvious and natural and hence not requiring specific justification. It provides a basic structure of perceptions and beliefs in relation to which experience is interpreted.

2. This structure of beliefs and perceptions tends to assert its own completeness and timeliness.

3. This claim to completeness and self-sufficiency is maintained by emotional commitments which may justify selective consideration of empirical evidence.\(^{306}\)

So, in the *McKinney* case referred to above,\(^{307}\) La Forest J needs no extensive evidence or discussion to dismiss altogether the notion that discriminating against those under 18 (or 19 in British Columbia) in the employment field would be justified. He can rely on his 'common sense' view of the matter in saying,

> Though not directly relevant, perhaps, I should mention that s.9(a) is also discriminatory in that it provides for a minimum age of 18 years for those seeking protection under the Code in respect of employment. That distinction is, I would think, readily explicable on human, social and economic grounds.\(^{308}\)

Despite the fact that a young person can leave school at 16 and that there are no restrictions on employers employing those over 15 under the *Employment Standards Act*, employers could apparently discriminate against young people simply on the basis of their age.

A further example of this strength of ideology can be seen in the *Reid* case discussed above.\(^{309}\) Here, the judge considered that limiting the vote to over-18 year olds was so obviously correct that he did not call for any evidence of the matter.\(^{310}\)

*Internalization*

Another aspect of the workings of ideological thought is the way that those who are most

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\(^{307}\) Note 93 above.


\(^{309}\) Note 75 above.

\(^{310}\) See note 79 above.
affected by it internalize its effects. Eileen Fegan has explored the interaction of discourse and ideology and sees ideology as “things people do”, (to give their own meaning to [identities constructed by discourse]). So, a further ideological effect of the dominant discourse of childhood discussed above is the way in which that discourse governs the lives of the young people themselves. Tia Jean Plympton found that many street-involved youth created their own street families, which mirrored the image of family which forms part of the dominant discourse of childhood. She says,

My study shows that a number of provisions and task-performing functions that help solidify a normative (parent culture) family can be found in the street family context.

Plympton believes that street families are used by street-involved youth to accommodate the loss of their original families. So, young people on the street are themselves to some extent constrained by the image of family as all-important to children.

They also appear to be constrained by the patriarchal nature of the archetypal family in Western culture. Rachel Pfeffer writes of the way that young women on the street are affected by a ‘hierarchy informed by sexism.’ Squats were organized by men. This structure had particular repercussions for young lesbians, who ‘felt they could not have sex with other women while ‘living on the street’ because they would be stigmatized by

312 Homeless Youth Creating Their Own ‘Street Families’ supra, note 34, p. 56.
313 Ibid., p. 71.
314 Surviving the Streets, supra, note 37, p. 61.
the people in their squat." While these are only examples, they show that dominant images do appear to constrain the thinking even of those who seem to have rejected them outright.

Further work would be required to see how far such internalized dominance operates in the lives of street-involved youth and the extent to which it constrains their lives. This internalized dominance might also impact on the effectiveness of the strategies that I discuss in my final Chapter.

**The special position of children**

A final consideration of the ideological aspects of the dominant discourse of childhood is the special position that children find themselves in. While other oppressed groups have been able to use the language of rights to advance their claims to empowerment, some writers argue that children are in a different position. Onora O’Neill says,

> Appeals to children’s rights might have political and rhetorical importance if children's dependence on others is like that of oppressed social groups whom the rhetoric of rights has served well. However, the analogy between children’s dependence and that of oppressed groups is suspect. ... the dependence of children is very different from the dependence of oppressed social groups on those who exercise power over them.  

O’Neill goes on to distinguish the way in which young children are unavoidably

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dependent, due to their physical weaknesses, from the forced dependence of, for example, women in the past. She also distinguishes the different attitude between those with power over oppressed groups, where the dependence is enforced and often reciprocal, and that of parents and teachers towards children, where, in the main, the aim is to educate children in order to reduce their dependence.

The crucial difference between (early) childhood dependence and the dependence of oppressed social groups is that childhood is a stage of life, from which children normally emerge and are helped and urged to emerge by those who have most power over them.\footnote{Ibid., pp. 38-9.}

It is important to note that O’Neill limits her argument to younger children. She accepts that those adolescents who are more mature (a stage she does not define) can more usefully make use of rights claims to assert their equal status with adults. This argument might also be relevant to young people on the street, who have rejected an image of childhood as a stage of dependency. In this respect, by treating these young people as children, the law is adding to their oppression, in the same as it did when it refused to recognise a woman’s rights independently of her husband or father.

This different position of children is especially important when considering the extent to which the dominant discourse of childhood can be changed. In the following Chapter I suggest various strategies that might assist in this process.

\footnote{Ibid., pp. 38-9.}
How the Dominant Discourse of Childhood Constrains Children's Rights

So far in this Chapter I have discussed the dominant discourse of childhood. This has four principal elements: children are dependent, reliant on their families, lack capacity and are seen as needing protection. I believe that these four elements operate in an ideological manner to constrain the use of rights by children and so to keep them in a subordinate position as regards adults.318

The family

First, children are seen as belonging primarily within the family. Because liberal theory sees the family as a place where the state should interfere as little as possible, the use of rights within the family is restricted.319 However, John O’Neill’s criticisms of liberal theory again lay stress on a view of the family as sacrosanct and free of rights, at least for children.320 So, from both left and right political perspectives, children are kept within the family and not given independent rights.

This stress on the family can be seen first in the limits on the effectiveness of the United Nations Convention on the Rights of the Child discussed in Chapter One. In their specific terms, the rights under the CRC make it clear that children’s rights to economic benefits

\[318\] As discussed above, I am concerned with the way in which ideological effects of discourse pertain to relations of domination and subordination, referring to Purvis and Hunt, note 289 above.

\[319\] See the discussion above in Chapter Two.

\[320\] See the discussion under the heading Atomism in Chapter Two.
should be considered within the context of the family. For example, Article 27 reads:

1. State Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.

3. State Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. State Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, State Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

The nature of this Article makes it difficult to see how young people on the street could use it to try to obtain independent access to financial benefits. As happened in the Mohamed case discussed in Chapter One, the Article upholds the idea that financial support from the State should be given to children through the family or other responsible adults, rather than enabling children to claim such benefits directly.

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321 See note 85.
Further the general tenor of the Convention is likely to restrict its use by young people on
the street in a number of ways. First, the Convention lays great emphasis generally on the
importance of the family in the life of young people. So, for example, Article 5 provides
that "State Parties shall respect the responsibilities, rights and duties of parents" and
Article 18 states, "parents ... have the primary responsibility for the upbringing and
development of the child." This concentration on the family will again cause problems for
young people who have rejected standard family life as their means of support.322

The second problem is contained in Article 3 which lays down a basic rule for all actions
concerning children, that the best interests of the child should be a primary consideration.
Much has been written about this test and the way in which it can operate to uphold
particular racialized ideologies of family and motherhood.322 In this context, it is almost
inevitable that such a test would draw heavily on the dominant view of childhood. So, for
example, children who choose to live on the street, rather than living either within their
biological family or within an approved care setting, can have their views ignored on the
grounds that it is in their best interests to be within some form of a family setting. Again,

322 It can indeed work against them. Judith Ennew has written of the problems of applying the CRC to
street children in "Outside childhood: street children’s rights" in The Handbook of Children’s Rights,
supra, note 287, pp. 205-214. Writing primarily about street children in the South she suggests at p. 204
that the emphasis on family in the CRC means that they are “frequently in danger of being taken off the
streets and either placed in institutions or for adoption without attempts being made to trace their natal
families and perhaps support a reunification process.” Further she points out at p. 211 that “there is no
 provision in the Convention for respect and support to be paid to children’s own friendships and support
networks.” This is despite the fact that some street youth have what they describe as their own ‘street
families’, see Plympton, Homeless Youths Creating their Own ‘Street Families’”, supra, note 34.
323 See for example the articles referred to at note 139 above.
the *Mohamed* case discussed in Chapter One lends support to this argument. The court held that welfare benefits should not be paid to those under the age of 16 on the grounds that it might encourage young people to leave the family setting. The judge said,

> It would be *contrary to the best interests of children* if general assistance were paid directly to them, as it would be an incentive to remove themselves from the care of the family unit or other responsible adults, where they receive financial, emotional, social and psychological support.\(^{324}\)

It is interesting that even in the *Mohamed* case where the child in question clearly did not fit the image of childhood, the court was unable to shift its thinking away from the importance of the family. In that case a 15 year old was living independently, outside the family, with no familial-type supports, attending high school and apparently thriving.\(^{325}\) Even in this best-case scenario, very different to the challenge to the image of the child made by young people on the street, the court was constrained by its own image of childhood and terrified of encouraging young people to act contrary to that image. I would argue that this effect is ideological in that the end result is to remove choice from the lives of the young people in question, so enforcing their position of dependency on a family-type relationship. By maintaining children’s reliance on the family, children are

\(^{324}\) *Supra*, note 85, at p. 127. Emphasis added.

\(^{325}\) It is hard to judge otherwise from the case. The Children's Aid Society had not assessed her as being in need of protection and had taken no steps to force her to enter a group home or foster care. It had made payments to the adult in whose house she lived, although this was described as a boarder/landlord relationship. There is no reference in the case to the young woman’s biological family, despite the stress laid on the family in the judge’s comments (see note 87 above). There is also no discussion on how far a 15 year old in Somalian society would be treated as a child. The actual status of the young woman in question is ignored.
kept in a subordinate position as regards adults. In *Mohamed*, the young woman wanted to have the independence given by being able to claim social assistance in her own name. However, the court used the dominant discourse of childhood to ensure that she remained dependent on the Children’s Aid Society and so subject to greater surveillance than would otherwise have been the case. As Purvis and Hunt have said:

Thus what makes some discourses ideological is their connection with systems of domination. Ideological discourses contain forms of signification that are incorporated into lived experience where the basic mechanism of incorporation is one whereby sectional or specific interests are represented as universal interests.326

In the *Mohamed* case, the interests of the family and of the state in upholding family life were represented as universal interests, such that the individual wishes of the applicant to live outside of a family could be suppressed.

Similarly the *B. (R.*) case referred to in Chapter Two327 shows the effect of familial ideology on children. The strength of the family unit is such that the majority of the court cannot see the child as separate from the parents. La Forest J said,

We must accept that parents can, at times, make decisions contrary to their children’s wishes – and rights – as long as they do not exceed the threshold dictated by public policy.328

However, there are gaps in the strength of this aspect of the discourse of childhood. The

326 *Supra*, note 85, p. 497.
327 Note 185 above.
328 At p. 373.
cases on consenting to health care by older children show that, as children mature, the courts are more willing to listen their views as opposed to those of their parents.\textsuperscript{329}

For young people on the street familial ideology poses a serious threat. By refusing to remain within the family norm, young people on the street are immediately problematic. The services available to street-involved youth are formed around the family norm. First, young people are placed in family-type situations in foster or group homes. However, if they refuse this assistance and are over 16 they may simply fall outside the child welfare services altogether. Older teenagers will receive income assistance, but no other services.\textsuperscript{330} The limited availability of semi-independent living arrangements, where a young person has access to assistance but also has a large measure of independence, and the lack of other, non-family based services, means that many street-involved youth simply fall through the cracks.

\textit{Dependency}

A second element of the discourse of childhood that has an ideological effect is the emphasis on dependency. Young people living on the street have rejected the idea that they should be reliant on adults and dependent. They have deliberately left the family

\textsuperscript{329} See the cases discussed at notes 120, 189 and 270 above.
\textsuperscript{330} This is the reasoning behind section 9 of the \textit{Child, Family and Community Services Act} discussed in Chapter One under the heading, Specific rights for young people on the street. Additional services would be available even to those not formally in care.
home. However, it is difficult for them to overcome the expectation of dependency. Restricted access to social assistance benefits for those under the age of 19\textsuperscript{331} and the limits imposed on young people working under the age of 15\textsuperscript{332} mean that those who leave home at an early age have no legitimate means of making an income. Accordingly, in order to maintain their independence, many young people resort to criminal activities, such as theft, prostitution, drug dealing and so on.\textsuperscript{333} These actions, however, feed into the image of children in need of protection. If a young girl leaves home at the age of 12 and, because she can find no other means of making money, becomes a prostitute, the response of the child welfare agencies would be that she would be in need of protection and should potentially be taken into care for her own good.\textsuperscript{334} The image of the child in this case becomes self-fulfilling. An enforced dependency inevitably results in the need for protective measures.\textsuperscript{335} Therefore the ability of young people to challenge this image

\textsuperscript{331} Regulation 5 of the \textit{Income Assistance Regulation}, B.C. Reg. 75/97, provides that a child who is not residing with his or her parents is not eligible for benefits under the \textit{BC Benefits (Income Assistance) Act} unless the minister has first made reasonable efforts to have the parents take responsibility and then decides that the child is a suitable case for receiving benefits. In practice, under-16 year olds very seldom receive income assistance benefits.

\textsuperscript{332} \textit{Employment Standards Act}, supra, note 254.

\textsuperscript{333} See the report on Vancouver street-involved youth referred to above, note 5.

\textsuperscript{334} Interestingly, in Margaret Michaud's study of young prostitutes in Vancouver, \textit{Dead End: Homeless Teenagers A Multi-Service Approach} (Calgary: Detselig Enterprises, 1988), she found that girls were far more likely than boys to be picked up by the police for their involvement in prostitution. She believes that the young men were 'perceived as 'not being at risk' and not in need of protection.' (At p. 11.) It should be noted that I am not saying that young prostitutes are not in need of some assistance. However, simply seeing their problem as one of protection means that their choices are constrained. Providing assistance in the form of accommodation and financial benefits would help young people avoid the dangers of prostitution, without forcing them back within either their original families or a state-based alternative.

\textsuperscript{335} The definitions used of 'at risk' behaviours are based on an image of a 'safe youth' who 'is white, male, middle class and secure in a home with two parents.' (Rachel Pfeffer \textit{Surviving the Streets}, supra, note 37, p. 28.) Pfeffer points out that there is no contribution by young people to the debate on what is 'at risk' behaviour. As a result, 'most interventions disregard the context for youth actions.' (At p. 31.) Once again, therefore, the dominant image of childhood constrains the lives of young people on the street.
appears to be limited. Ray Edney gives one reason for this limitation:

The system is designed to be a parent, and in this role attempts to restrict and to control the lives of juveniles without due consideration of their individual experiences. Unable to endure this controlling and punitive approach, these juveniles resist, rebel and run away at every chance. 336

Here we can see the interaction of the various ideological elements of the discourse of childhood. Seeing the system as a parent brings in a familial element. Because the system acts as a parent, its responses to street-involved youth are constrained to appropriate, parental responses. Most parents wish to protect their children. So, the state as parent acts in a protective manner and is unable to move beyond that role to be more enabling for those who challenge its parental character. These ideologies constrain the ability of street-involved youth to live the lives they choose. A further element is a sense that such young people do not have the capacity to make choices that should be respected.

Capacity

The notion of capacity operates throughout the debate on children’s rights. As shown in the previous Chapter, both the will and interest theories at the end of the day are unwilling to allow children to decide the content of their rights, as they are seen as not having the

336 “The Impact of Sexual Abuse on the Adolescent Female Prostitute” in Michaud, Dead End, supra, note 334, pp. 25-36, at p. 29. Here again we can see the impact of the dominant discourse of childhood. If children are meant to be within the family, it is likely that the child welfare system will continue to act as a parent. Those children who reject the familial model, will also reject the child welfare system, in so far as it imitates that model.
capacity to make such choices. In this case, the dominant discourse of childhood has the effect of keeping children in a dependent position. By portraying children in a particular manner, which is simply one of many ways in which children may be seen, children are denied the rights that adults can take for granted.

Where such young people are allowed to make choices, they are severely constrained by the other ideological elements of the dominant discourse of childhood. As discussed in the previous Chapter, a young person might be asked whether they want to go into a safe-house without their pet or whether they want to be placed in a particular group home. A refusal, for whatever reason, is taken as a decision to reject assistance. However, the young person’s choice to stay with her pet or her particular objection to the home suggested are ignored as irrelevant. She is treated as having capacity, but the choices she is given simply limit her options.337

The other main area where children are seen as having capacity is in the criminal arena. As I discussed above, all those over the age of 12 bear some responsibility for the offences they commit. Further, those over 14 can be tried as adults, if they have committed a more serious offence. Cecilia M Espenoza has identified in the States the way in which ‘good kids’ and ‘bad kids’ are treated differently with regard to capacity.338 However, she concludes that the end result in each case is to deny substantive rights to young people.

337 See the discussion under the heading Atomism in Chapter Two.
She says of the 'good kids',

When labeled as 'good children,' they are automatically considered vulnerable, and thus are precluded from utilizing their voice and constitutional rights because their interests are subordinated to the will of parents or the state.\footnote{Ibid., p. 453.}

In contrast, as regards the 'bad kids', she says,

By understanding that the bad juvenile language is used as a method to extend rights to legitimize punishment against youths who are viewed as violent, we can move from that approach and instead focus on the actual substantive or procedural due process rights required to effectuate equal protection under the law.\footnote{Ibid., p. 453.}

Because children in criminal law are given rights, regardless of their capacity to exercise them and without assistance, these rights can operate against their true wishes. Studies in the States have shown, for example, that young people waive their right to counsel in far greater numbers than adults.\footnote{See. For example, Gary B. Melton and Susan P. Limber, "What Children's Rights Mean to Children: Children's Own Views", supra, note 152.} Capacity is therefore a two-edged sword. It can be used to deny rights to those who are seen as in need of protection, but it can also be used to restrict the actions of those who are seen as problematic, either in the criminal justice system or while involved in street life.

The issue of restricted capacity is one of the most difficult to counter. Clearly babies and
pre-lingual children are incapable of making choices of the type required for legal rights.\textsuperscript{342} Once a child can speak, she or he can at least indicate a decision in a way that can be interpreted by others. However, only the most fervent child liberationists would argue for full rights to be given to very young children.\textsuperscript{343} For my purposes that issue does not arise. Young people who have chosen to leave home and live on the street have made a clear choice, even if that choice is constrained by the lack of alternatives to young people who wish to leave the family relationship. Accordingly, arguments about capacity tend to run into arguments about whether the decisions they make are wise or risky and whether they are in need of protection.\textsuperscript{344}

\textit{Protection}

The element of protection means that discussions about capacity inevitably become reduced to discussions about how far society will allow young people to endanger themselves. I discussed in Chapter Two in my consideration of the will and interest

\textsuperscript{342} Jacqui Cousins refers to the work of Elinor Goldschmeid which shows that even babies and young infants make choices in their play. However, such choices would not extend to complex matters, such as choosing which parent to live with following divorce. With the very young, even where a choice might be possible, the lack of language skills makes it impossible for adults to know the extent of that choice. See Jacqui Cousins, "Empowerment and Autonomy: The Perspective of 'Early Years' Research" in \textit{Children in Charge: The Child's Right to a Fair Hearing}, Mary John, ed., (London: Jessica Kingsley, 1996), pp. 191-203.

\textsuperscript{343} Howard Cohen is one who does. However, he suggests that there should be agents to assist children in exercising their rights. As far as very young children are concerned, he considered that the chances are they would not exercise their rights and saw no problems with this. \textit{Equal Rights for Children} (Totowa, New Jersey: Rowman and Littlefield, 1980).

\textsuperscript{344} See for example the article referred to at note 262 by Elizabeth Cauffman and Laurence Steinberg which argues that although children might have sufficient maturity to meet the test of consenting to health care, they are not competent to make other decisions, because they make bad or risky decisions.
theories the way in which deciding to live on the street is often seen as an incompetent choice. However, one of the problems of discussing competency in this area is that I am inevitably trying to impose an adult-defined concept of competency onto the behaviour of young people who have gone through many and varied traumatic experiences. In doing so, I am not accepting any particular definition of competency, but trying to explore the way in which the dominant view of children as being incompetent is reinforced by the behaviour of at least some young people choosing to live on the street. For example, many young people on the street in Vancouver today are heavy drug users, behaviour that is criminal and seen as a problem for adults as well as young people.

Anyone who chooses to act in a way that is not in accordance with mainstream philosophy is always at risk of being labelled incompetent or mad. My point in looking at the apparent competency or otherwise of the decisions taken by young people is to show the self-fulfilling nature of the discourse of childhood discussed above. If children are naturally seen to be within the family, then any child who chooses to live a different life cannot be seen as natural. Cherry Kingsley writes,

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345 As discussed in Chapter Two, competency is often used as a tool for keeping young people separate from adults, see note 262.
346 See the report by Chand referred to at note 3. She explains that the age of drug users on the street in Vancouver is reducing and that “while heroin used to be more or less confined to the downtown area, it is now spreading into all of Vancouver’s neighbourhoods.” (At p. 10.)
347 Even in my own life, choosing to give up well paid job as a corporate lawyer has caused some people, if not to question my sanity, at least to question the wisdom of the decision.
348 Lundy says, “Their deviance from accepted norms engendered conflict with adults who anticipated control of and obedience from children.” In Sidewalks Talk, supra, note 37, at p. 15, referring to Lewis Aptekar, Street Children of Cali (Durham, NC: Duke University Press, 1988).
As a culture, we marginalize youth and children by ... being antagonistic towards them by treating them as a problem to be solved if they don't fit cultural norms and expectations.\textsuperscript{349}

In this respect, Benno Glauser says,

Street children represent deviations from normal standards and it is they who, in a way which cannot be ignored, confront and touch society’s dominant sectors’ views and lives and interfere or threaten to interfere with its major interests. It becomes clear, therefore, that society as such has a practical need to conceptualize this phenomenon in order to both express public concern and take action.\textsuperscript{350}

So, the protective ideology of childhood operates in order to silence the choices that might be made by street-involved youth. Even where certain other aspects of the dominant discourse of childhood are challenged, the protective element remains. So, although section 9 of the \textit{Child, Family and Community Services Act}, which allows young people between the ages of 16 and 19 to enter directly into agreements for services with the child welfare agencies, challenges the familial aspects of the discourse of childhood, it retains other ideological effects.\textsuperscript{351} As these young people are still regarded in law as children, even where a statute reflects their unique position as children who have rejected the usual status of childhood, by removing themselves from the family, they are still seen as needing protection. It is interesting here to contrast section 10 of the Act which allows the

\textsuperscript{349} \textit{Finding Our Way: Report of the Youth Involvement Project}, supra, note 17, p. 43.

\textsuperscript{350} “Street Children: Deconstructing a Construct”, supra, note 34, p. 146.

\textsuperscript{351} Purvis and Hunt point out that, “every discursive formulation is in some degree open.” (At p. 492) Because of this, there are gaps that can appear, such as in this section, which can allow for choice and disruption of the dominance of the discourse, at least in part. Purvis and Hunt say that ‘discourses are always subject to the play of alternatives and struggle.” (At p. 493.) See Purvis and Hunt, \textit{supra}, note 289.
director to make further agreements with those between the ages of 19 and 24 who have already entered into agreements under section 9. While these agreements are also intended to provide services to the young person, there are no goals set and no reference to the best interests of the youth.\(^{352}\)

**Conclusion**

When combined, the various ideological elements of the dominant discourse of childhood produce two main constraints on the lives of young people on the street. First, because services to such young people are based around a desire to replicate the family, young people must either accept the familial form of such services or reject the services altogether. Services that might uphold an alternative lifestyle are not available. Second, because young people are generally seen as incompetent and as making risky decisions, their choices are seen as unacceptable. There is no attempt to include street-involved youth in making decisions about the services that are available or in the way they are provided.

These limits are linked to those I identified in the Chapter Two as arising from the liberal form of rights. There I showed that the use of rights by street-involved youth was limited by the way that children’s rights are subjected to those of their parents and by the way that

\(^{352}\) Neither section 9 or 10 is yet in force, as budgetary restrictions have prevented any of the relevant services being put in place.
children are seen either as within the family or as independent. These two limits are reflected by the first limit set out above, that services are limited to those that replicate the family. In Chapter Two I also showed that because children do not tend to match the image of a fully autonomous rights holder, they have problems with enforcing their rights. This is reflected in the second limit discussed in this Chapter, that the decisions made by street-involved youth tend to be seen as unacceptable and unsupported.

I discuss in my final Chapter ways in which these constraints might be overcome.
CHAPTER FOUR - STRATEGIES AND CONCLUSION

We are a proud people.
We are a lonely people,
let me tell you
something;
you do not really know us
and you do not wish to know us,
for in us you will find
yourself!

Jack James Jr.\textsuperscript{353}

To summarize so far, I have showed that rights are a potential option for improving the lives of young people on the street. However, their use is constrained in a number of ways. First, there are a number of practical problems with enforcing the existing rights of street-involved youth.

Second, the liberal form of rights limits the use of rights due to its anti-statist and atomistic nature. The limitations caused by the form of rights are that children who need assistance from the state might find their rights subordinated to those of their parents; that children tend to be seen as dependent within the family or independent, other forms of interdependence are ignored; and that as children do not measure up to the image of a fully autonomous rights holder, they have problems enforcing their rights.

Third, the dominant discourse of childhood sees children as dependent, in need of

\textsuperscript{353} Out in the Open, supra, note 1.
protection, reliant on adults generally and on their families in particular, incompetent, and, to a greater or lesser degree, innocent. The ideological effect of this discourse further limit the use of rights for such young people. There are two particular limits, being the familial structure of the services provided, that results in excluding those young people who reject the family in all its forms, and the way in which the voices of young people are silenced.

In this Chapter I suggest various strategies that might be of use in tackling these various limitations.

**Strategies**

It is not my place as an adult to speak for the young people in claiming rights. Such claims can only have validity if they come from the young people themselves from a process of negotiation and representation. However, young people on the street form a heterogeneous group. Rights that might work for some young people might not work for others, or might indeed cause more problems for others. Accordingly, rather than suggesting a manifesto list of rights for street-involved youth, I suggest a series of strategies that might be of use to governments, those who work with young people on the street and the young people themselves in helping to shift the dominant discourse of childhood. These strategies reflect to some extent those suggested by other writers. However, their purpose comes from the discussion earlier in this thesis on the problems for street-involved youth in making rights claims. Starting to challenge the liberal form of
rights and to shift the dominant discourse of childhood might open the door to greater success in such claims.

**Strategy One: Listen to Young People**

In Chapter Two I identified one of the factors of the liberal form of rights as being the need for an autonomous rights holder. So far as children are concerned, this factor causes problems due to the fact that the dominant discourse of childhood, identified in Chapter Three, sees children as incompetent and dependent and so not autonomous. Even the revised form of rights suggested by Martha Minow, rights as relationships, requires there to be a separate person in the form of the child to be in relationship to others. Accordingly, the first strategy that I suggest is that young people should be given a voice to articulate themselves as individuals capable of having rights. This strategy is aimed principally at governments. It is government that has the power to implement schemes that can include street-involved youth in, for example, designing services that meet their needs. The strategy should also be considered by all adults who work with young people on the street. It is vital that these young people stop being passive recipients of assistance and become active agents in their own lives.

*Giving young people a voice*

Having argued above that the United Nations Convention on the Rights of the Child is of limited use, I would like to draw attention to one Article that could prove of some use to
young people on the street.\textsuperscript{354} This is Article 12, which calls on governments to give a voice to young people:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

While this Article allows for considerable leeway for ignoring the voices of young people, in that it places limits on the weight given to the child's views and allows for indirect representation, it does provide a stress on the importance of listening to children. In addition, although this Article is simply one among many, it is often seen as one of the key Articles in the Convention. For example, the Committee on the Rights of the Child, which monitors the CRC, gives guidelines to governments for them to report compliance with the Convention. The guidelines call first for information on four general principles, being:

(a) Non-discrimination (Article 2).

\textsuperscript{354} Although the Convention is not directly enforceable in British Columbia, it has an indirect effect in two ways. First, it is a rule of statutory interpretation that statutes be interpreted in conformity with international treaties. So, the CRC might be useful where a statute is ambiguous on the involvement of a young person. Second, implementation of the CRC is constantly monitored by a Committee, see note 355. By lobbying this committee and UNICEF, which has overall responsibility within the UN for the CRC, interest groups can put pressure on the Canadian and Provincial governments to act in accordance with the Convention. For more details, see Parkdale Community Legal Services, 'Homelessness and the Right to Shelter: A View from Parkdale', (1988) \textit{Journal of Law and Social Policy} vol. 4, pp. 35-101, at pp. 56-7.
(b) Best interests of the child (Article 3).
(c) The right to life, survival and development (Article 6).
(d) Respect of the views of the child (Article 12).}

Further, as so many of the writers on children’s rights have commented, the importance of giving children a voice is crucial to their empowerment, even though its impact might be limited.

It is crucial that in developing this strategy of listening to children a number of factors be considered. The first is that listening to children means really listening to them. Roger A Hart has used a ladder "as a metaphor to illustrate the different degrees of initiation and collaboration children can have when working on projects with adults." Under this metaphor, the three lowest rungs are manipulation, decoration and tokenism, which in effect act as non-participation by children. Tokenism is a particular concern of Hart’s. For example, at conferences relating to children nowadays there will often be children invited to participate. However, Hart warns,

355 Reporting Guidelines to Governments, General Guidelines Regarding the Form and Contents of Initial Reports to be Submitted by State Parties Under Article 44, Paragraph 1(a), of the Convention, adopted by the Committee on the Rights of the Child at its 22nd meeting (first session) on 15 October 1991. In addition the Rights Awareness Project run by the Society for Children and Youth of BC in its analysis of how far British Columbia’s legislation complies with the CRC judged the legislation first on its overall compliance with the Convention and second on how well the statute gives effect to the child’s own views, supra, note 72.
356 See, for example, the articles by Katherine Hunt Federle and Martha Minow referred to in Chapter Two, notes 204, 206, 223 and 224.
357 See the discussion in relation to Federle’s theories in Chapter Two. In addition, Frances Olsen makes the point that simply giving children a voice based on their age and maturity will not challenge existing relations of power. "In ignoring questions of power and treating choice as a matter of age and maturity, the convention may miss dealing with some of the harder questions." ‘Feminist Approaches to Children’s Rights’, supra, note 73, p. 211.
It is common for articulate, charming children to be selected by adults to sit on panels, with little opportunity to consult with their peers whom they purportedly represent. Rarely is the audience given any sense of how children are selected and hence of which children's perspectives they represent, but this does not even seem to concern many audience members.\textsuperscript{359}

Hart goes on to look at more effective ways of ensuring children's participation, including social mobilization, projects designed by adults, but with full consultation and information from young people, adult projects which involved shared decision-making with children, full scale child initiated and child directed projects and, finally, child initiated projects, but where adults are co-opted to provide additional support. Each of these is a valid way of using children's participation, and each might have its use in a different structure.

Other writers have criticised Hart's ladder metaphor. Mary John writes,

\ldots such a metaphor [is] unfortunate in all the implications it has of bestowing rights on a passive receiver. From much of what has already been said about children's participation it is clear that we need a model which is much more dynamic, which takes account of the politics of child participation and which also encompasses the construction of creative alliances with adults which forms the true basis of an emotional democracy on which, it could be argued, children's participation must be based.\textsuperscript{360}

Instead John proposes a metaphor of a bridge over "the chasm between the world of the child and the world of the adult from which they are initially excluded"\textsuperscript{361} She considers that this metaphor better allows us to see children as active participants in the process.

\textsuperscript{359} \textit{Ibid.}, pp. 41-2.
\textsuperscript{360} \textit{Children in Charge, supra}, note 342, p. 19.
\textsuperscript{361} \textit{Ibid.}, p. 21.
She says,

In the case of children as a minority rights group, transforming power relations involves constructive and insightful relationships with children and with adults; it requires that they communicate and both are ‘heard’ and understood.\textsuperscript{362}

It is interesting to compare this approach to that of Federle,\textsuperscript{363} who also talks in terms of power relations, but who sees that empowering children is best done simply by giving them rights within the litigation process. John’s approach is more all-encompassing, and, in my opinion, is more likely to be successful by helping to shift the image of childhood that is dominant in Western society as discussed in Chapter Three. The more that children and adults can work co-operatively and with both parties being active participants, the more likely it is that adults will start to adjust their image of the child. As has been shown throughout this thesis, the image of the child has a powerful constraining effect on the lives led by street-involved youth and on the usefulness of rights to young people.

Despite the problems in Hart’s metaphor for participation, he makes a number of points that are vital to remember. The first is that “children need to be involved in some degree in the entire process.”\textsuperscript{364} For example, it is not enough to involve children in the design of a project, if they are not also involved in subsequent implementation. As Hart says, the subsequent implementation often involves compromises to the project that can alter its

\textsuperscript{362} Ibid., p. 21.
\textsuperscript{363} Notes 204 and 206, supra.
\textsuperscript{364} Supra, note 358, p. 44.
original scope. 'Even if children cannot have a voice in these discussions they should be able to understand how and why compromises are made. In this way, they will be less likely to assume that their participation was merely token and more likely to gain a realistic idea of how environments are created.'

Secondly, Hart stresses the importance of the representative nature of the children involved in any project. It is not sufficient for adults simply to pick the relevant young people. Hart calls for there to be a clear selection process. Volunteering might be appropriate, but some form of selection by peers is likely to create a greater degree of representation. In addition, the method of representation should not be imposed from above, but should itself be discussed with and chosen by the young people involved.

Finally, Hart calls for explicit rules and decision making structures. Again, the group of young people in question should develop the rules.

Hart discusses in detail the ways in which children, even from very young ages, can be included in a wide variety of participatory projects. He stresses the need for a degree of

365 Ibid., p. 44
366 Zoran Pavlovic makes the point that in visiting a children’s parliament at a school in Slovenia, ‘It was impossible not to notice that the ‘bad’ children were not at the school Parliament. They probably self-excluded themselves at the very beginning of the whole process. There were some children outside throwing snowballs at the window. Maybe they were just younger children amusing themselves. But, more likely, they were of the same age as those inside but they did not ‘belong’ to this nice, smart cooperative crowd.” “Children’s Parliament in Slovenia” in John, ed., Children in Charge, supra, note 342, pp. 93-107, at p. 103. So far as young people on the street are concerned, it is vital to ensure that their voices are heard and not excluded by the means chosen to listen to young people.
imagination and lateral thinking so that apparent problems can be resolved within the scope of the project and without compromising the need for representation.\textsuperscript{367}

\textit{The current position in British Columbia}

There are a number of ways in which the government in British Columbia tries to give a voice to young people. First, as discussed earlier in Chapter One, the \textit{Child, Family and Community Services Act} provides that the views of the child are taken into account in a wide variety of situations.\textsuperscript{368} The policy guidelines drawn up by the Ministry make it clear that usually those over 16 have the capacity to consent to any action being taken under the Act, unless their developmental level and maturity indicate otherwise.\textsuperscript{369} However, as discussed in Chapter Two, too often these provisions can be used to deny young people access to services, by presenting options that the young person considers they have no choice but to refuse.\textsuperscript{370} As discussed above, listening to young people means more than

\textsuperscript{367} For example, at p. 47 Hart discusses a problem that arose with street workers in the Philippines who wanted to have officers chosen from the street children, but were concerned with issues of competence and responsibility. Hart suggested allowing younger children to gain experience as apprentices or shadows of older and more experienced children. “This would offer opportunities for learning and demonstrating competence, and would also provide continuity when the adolescents move out of the group into adulthood. Furthermore, as long as they can see the consequences of their decisions, they would gradually improve their voting behaviour.” Hart, \textit{supra}, note 358, p. 47. There are numerous other examples in the literature of projects where children have been given a greater voice in decisions affecting them. For example, Gillian Alexander refers to a project in Glasgow on philosophy for the under 5s, which is aimed at developing children’s decision making skills. In “Children’s rights in their early years: From plaiting fog to knitting treacle” in Franklin, ed., \textit{The Handbook of Children’s Rights}, \textit{supra}, note 287, pp. 131-146.

\textsuperscript{368} See note 105 above.


\textsuperscript{370} See note 203 above.
simply giving them a voice at the last stage of a process. In order for services properly to reflect the needs of street-involved youth, it will be necessary to involve them in the design and evaluation of those services. It is encouraging that the Children’s Commissioner has called for such increased participation and I can only add my voice to hers in this respect.\textsuperscript{371}

Other means of taking into account young people’s views include the Premier’s Forum, an annual meeting between the Premier and other Ministers and selected young people. Participants are selected at the suggestion of a wide variety of youth-focused organizations. While such a forum is useful, it seems to fall close to the bottom of the Hart ladder metaphor, being a mixture of decoration and tokenism. By selecting participants from youth organizations, street-involved youth are automatically excluded. By limiting the forum to one-day sessions, there is very little chance for young people to be involved in detailed consideration of any policy or practice. If the Premier really wants to hear youth voices, he needs to undertake more extensive exercises in involving young people from all sectors of society in forming policies and seeing them implemented.

Cherry Kingsley’s report referred to in Chapter One\textsuperscript{372} was prepared for the Ministry for Children and Families in British Columbia. The report came from a Youth Involvement Project suggested by Kingsley, herself previously a street-involved youth, designed ‘to

\textsuperscript{371} Supra, note 151.
\textsuperscript{372} Finding Our Way: Report of the Youth Involvement Project, supra, note 17.
obtain the views and inputs of marginalized youth about services to be developed for youth throughout the Child, Family and Community Service Act." The young people involved in the project came from three groups: youth in care, aboriginal youth and street-involved youth. The report contains an extensive list of recommendations, with a large number relating to the involvement of young people in the future. These recommendations include asking for flexibility in meeting style, training in using office equipment and in meeting procedures, day care arrangements, payment for expenses and participation, representatives being chosen by youths, acknowledging and respecting the young people as equal participants, and involving youth in all aspects of a project. It remains to be seen how far these recommendations will be taken on board.

It is not impossible for young people on the street to form organizations or otherwise to put their voice forward. Whilst I am not aware of any organizations that are led by such young people in British Columbia today other than the one-off report referred to above, Hart gives a number of examples of street-based projects overseas. In fact, he argues strongly in favour of such projects, as they can be used to provide educational resources to young people in a form that is highly relevant to their lives. He also says,

Another argument is ... the danger of the oppressed becoming the oppressors. While 'empowering' children or building a sense of identity and self-worth through the promotion of individual rights, one needs

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373 Ibid., p. 9.
simultaneously to foster a sense of responsibility towards others.\textsuperscript{374}

Hart gives examples from New Delhi, Zimbabwe, Ecuador and others. One problem that might be expected from organizations of young people would be a level of inconsistency, as the membership of the organization would always be changing as children grow up and move on. However, the street youth project in the Philippines referred to at note 367 shows that this problem can be minimised, by enabling younger children to work with the older ones, to allow a degree of continuity. Further, Pavlovic, writing of the Children’s Parliament in Slovenia, says,

One would not expect such a thing as a Children’s Parliament to develop in time, because the majority of the actors change from one to another. But, social processes seem to have this ability of actually developing – even when all the actors change in a rather short time, as is the case with the members of the social group ‘children.’\textsuperscript{375}

Finally, it is important to remember that there will not be just one voice of young people on the street. Jeremy Roche says,

We must be aware of the variety of childhoods in our society. Dimensions of class, gender and race are present. Once we genuinely allow children to exercise a right to speak and be heard we might have to participate in new conversations. Children of different backgrounds might make varying demands of adults regarding education, health, religion, or marriage, as well as regarding with whom they are allowed to associate. There is no single voice of childhood.\textsuperscript{376}

\textsuperscript{374} Hart, \textit{supra}, note 358, p. 65.
\textsuperscript{375} "Children’s Parliament in Slovenia", \textit{supra}, note 366, p. 98.
\textsuperscript{376} "Children’s Rights", \textit{supra}, note 64, p. 293.
Strategy Two – Don’t Treat all Young People the Same

As Roche identified in this last quote, there is no single voice of childhood; not all young people are the same. However, as I discussed in Chapter Three, there tends to be only one solution provided for street-involved youth: the family setting. One way to start to overcome this limitation is to recognise that young people on the street form a heterogeneous group. The figures quoted at the beginning of Chapter One show that the population in Vancouver is split roughly 60/40 male to female and that there is a high percentage of First Nations youth on the street. However, the dominant image of childhood built up in Chapter Three tends to erase these differences by focusing entirely on the image of the child as distinct from the adult. Janet Ainsworth writes of this process,

An essentialist view of the child, then, posits the existence of innate and uniquely differentiating characteristics of children which invariably distinguish them from adults. This essentialism accords primacy to that aspect of identity that it calls ‘child’, and in highlighting those attributes, it necessarily shrouds other aspects of identity that are at least equally constitutive of identity, such as race, gender, and class. Since essentialism maintains that the unique essence of the child exists universally, then this intrinsic nature of the child must by necessity constrain humanly-created social institutions dealing with the young.

377 Further, the liberal form of rights discussed in Chapter Two also lays particular stress on the position of children within the family and does not acknowledge alternative forms of interdependence.
378 As I discuss at note 288 above, there is some limited difference in the position of aboriginal children under the Child, Family and Community Services Act.
This second strategy aims to challenge the essentialist view of childhood built up in Chapter Three by calling on governments and those working with street-involved youth to avoid treating all young people in the same way.

**Looking at factors other than childhood**

As Ainsworth says, concentrating on the image of the child means that it is easy to ignore other factors that make up a person's individuality. We can complicate the picture of childhood by considering the different childhoods of young girls as compared to boys, of Aboriginal children, immigrant children, white children, those of colour, of those with disabilities, and so on. The next step is to consider how these factors, both individually and together impact on the lives of those who have chosen to leave their homes and live on the street.

For example, I referred in Chapter Three to the different treatment by the police of young girls and boys on the street.\(^{380}\) The police were more likely to pick up young girls than young boys as being at risk for their involvement in prostitution. Michaud believes that this difference is caused by further stereotyping, seeing the boys as male and so not in need of protection. For this purpose, it is sufficient to identify the difference to show that the experiences of young people on the street vary according to gender.

\(^{380}\) See note 334 above.
One way in which this difference might play out is in the 'good kids/bad kids' distinction identified by Cecilia Espenoza and discussed in the Chapter Three. If young girls are seen as in need of protection, they fall more on the 'good' side of the line, will be considered vulnerable and refused rights, in their own best interests. The boys, on the other hand, are more likely to be picked up for burglary. They will be seen as criminals, 'bad' kids, who will be given formal rights within the criminal justice system in order to legitimise their punishment. This is a possible scenario. Specific research is required to show whether the distinction identified by Espenoza in the States would also apply in British Columbia. Further research would show whether the gender split identified by Michaud continues today and how it might affect the rights of those involved.

The picture is likely to be further complicated by an intersectional analysis, that considers the ways that different factors, such as gender and race, intersect, to produce different effects in various contexts. So the lives of a white girl on the street would be very different from that of an Aboriginal girl and both would be different again from that of a girl of Japanese descent. While their gender might provide some similarities in terms of how they are treated, the added factor of race would alter their experiences of both oppression and resistance. Considerable work is therefore needed to ensure that the different experiences of those on the street are reflected in the programs offered. This,

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then, brings us back to the first strategy. When listening to the voices of those on the street, it is vital to give voice to all those involved, to reflect their different experiences.\footnote{This need is reflected in Cherry Kingsley’s report of the Youth Involvement Project, \textit{supra}, note 17. One of her recommendations is: “Agencies conducting consultations with youth should ensure young participants are chosen by youth, represent as broad a range of youth perspectives as possible and are assured practical encouragement to attend.” (At p. 20.)}

It is interesting that in the one project that has aimed to give a voice to street-involved youth in British Columbia the results show that “most street youth are not interested in reintegrating into the mainstream or even reconnecting with family. Neither are they interested in being taken into care and given a new ‘family.’”\footnote{\textit{Ibid.}, p. 36.} Listening to the different voices of young people on the street and allowing their differences to show will lead to new and different solutions to their problems.\footnote{This study was led by a young woman who had previously lived on the streets in Vancouver and was designed to discover some of the voices of marginalized youth in British Columbia. Accordingly, although this statement cannot be said to represent all street-involved youth, it does appear to speak for a sizeable number of them. It is also interesting that many young people on the street try to recreate some element of the family in their lives on the street (see my discussion under the heading Internalization in Chapter Three).}

\textit{Don’t get caught up on age}

A second aspect of looking at the differences between young people is to consider the use of age as the key determining factor to distinguish between adults and children. As I showed in Chapter Three, age is used in statutes in two main ways. First, as an overall dividing line between adulthood and childhood by laying down an age of majority.\footnote{\textit{Age of Majority Act}, \textit{supra}, note 25.}
Secondly, by providing differing age limits for various matters, such as allowing children to drive from age 16.\textsuperscript{386}

However, age limits are always arbitrary. There is no significant difference between a young person aged 18 years and 11 months and one aged 19. The usual argument given in favour of age limits is that law needs some arbitrary limits in order to be certain. For example, there is no significant difference in terms of safety in a car going 49 kph in a built up area and one going 51 kph. But the law says that the latter is committing an offence, while the former is not.\textsuperscript{387} Archard argues that, provided the limits are a good approximation to the problem to be addressed, we should live with an element of arbitrariness.\textsuperscript{388} So, in the case of speed limits, if 50 kph is a good approximation of the maximum speed that is safe for a built up area, its arbitrary nature should be accepted. In the case of children, Archard says,

Farson [one of the child liberationists] saw nothing wrong or inconsistent about conceding the ‘obvious incapacity’ of a 2-month-old baby to administer its inherited property, nor the ‘obvious inability’ of a very young child to vote. Nor can it be disputed that the acquisition by human beings of various skills and abilities proceeds according to a fairly standard and universal chronology. Indeed the pattern of human sensory, motor, cognitive and linguistic development displays a significant degree of cultural invariance. Children walk, recognise and manipulate objects, talk, etc. at roughly the same ages whatever the society in which they are brought up. There are some differences between societies and, within the same society, some individual children may, for instance, walk later or earlier than most do. But the degree of significant correlation between age

\textsuperscript{386} Motor Vehicle Act Regulations, supra, note 115.
\textsuperscript{387} Motor Vehicle Act, R.S.B.C. 1996 c. 318, s. 146.
\textsuperscript{388} Children: Rights and Childhood, supra, note 63.
and acquisition of competence is such that exceptions to the general rule are rarer the further they depart from the mean.\textsuperscript{389}

However psychologists are far from in agreement as to the developmental stages of childhood, or even whether the developmental model is correct.\textsuperscript{390} Even Archard uses the example of walking and talking, which can be observed and measured. Questions of competence, rationality and other measures that might be used to show the difference between adulthood and childhood are far more controversial.

So, if law did not use age limits, what other factors could be used to distinguish children from adults?\textsuperscript{391} One alternative to using age limits, is to use a flexible guideline as to when different children should be treated differently. An example can be found in Scottish law. Here a child under the age of 16 has limited contractual capacity, depending on whether the transaction is ‘of a kind commonly entered into by persons of his [sic] age and circumstances.”\textsuperscript{392} This provision gives the courts an element of discretion in deciding

\textsuperscript{389} Ibid., p. 62.
\textsuperscript{390} For example, Rex and Wendy Stainton Rogers challenge the whole concept of developmental psychology. See Stories of Childhood, supra, note 234.
\textsuperscript{391} I do not at this point wish to challenge the overall division between children and adults. As young people on the street have reached an age where they are able to make decisions and carry out plans, as demonstrated in their lives, I do not have to consider the position of younger children. There is considerable debate on the question of giving full equal rights to children, either based on competency tests, John Harris, “The political status of children” in Keith Graham, ed., Contemporary Political Philosophy (Cambridge: Cambridge University Press, 1982), pp. 35-55, or by using a presumption of competency until proven otherwise, Hilary Rodham “Children’s Rights: A Legal Perspective” in Patricia A. Vardin and Ilene N. Brody, eds., Children’s Rights: Contemporary Perspectives (New York: Teachers College Press, 1979), or by providing children with agents to assist them in the decision making process, Howard Cohen, Equal Rights for Children, supra, note 343, or simply by giving children the rights without any form of protection, John Holt, Escape from Childhood: The Needs and Rights of Children (Harmondsworth: Penguin, 1974). Rather than join this debate, I am more concerned with looking at specific rights and finding ways to allocate them to children on bases other than age.
\textsuperscript{392} Age of Legal Capacity (Scotland) Act 1991, section 2(1).
whether to uphold transactions by those under the age of 16. The advantage of this
discretion is that it can allow the courts to recognise that not all those under the age of 16
are in the same boat. If a child has grown up in a community where young people have a
wide degree of authority, this fact will be reflected in the law. The statute avoids the need
to spell out exactly which circumstances will trigger capacity - it is left deliberately vague,
so that it can reflect a changing society. So, if over time younger children are generally
given more authority, the law will automatically reflect this authority.

However, there are disadvantages to this approach. The first is a loss of certainty, which
might have the effect of undermining the way in which the statute operates. A third party
entering into a transaction with someone under 16 can never be sure that a court would
uphold the transaction, because she or he could never know whether the child's age and
circumstances were such as to justify the exercise of the court's discretion. For third
parties, a more rigid approach would be preferable, even to the lengths of spelling out
what sort of transactions could legitimately be undertaken by those of different ages. For
example, the statute could specify that those over five could buy sweets and comics up to
a value of $1.00, those over ten could buy sweets and comics up to a value of $3.00 and
so on. While this approach would destroy the flexibility that might favour the child, it
would enable all parties to know when a transaction was definitely valid. This certainty
might favour those children who would fall squarely within a given category, in the
example given, allowing a seven year old to be able to buy sweets up to $1.00 without any
fear of the shopkeeper refusing to serve her. However, it would be impractical to devise a
categorisation that would satisfy all parents and children and yet be sufficiently simple to use in practice.

The second problem with the Scottish approach is that although it goes some way to looking at individual circumstances, it does so by considering what would be normal for any child in given circumstances, rather than by considering any different characteristics of the individual child. So, it substitutes one set of fixed guidelines, that of age, with another, that of common circumstances. So, while the child in the farming community may be able to buy or sell a few sheep, the child in the city could not. In this sense, the law is inherently conservative. It asks the courts to consider what society already accepts as within the capacity of children and to uphold that. It does not enable children who may wish to push the barriers of what society sees as their role. This limitation means that such an approach would be limited for young people on the street. They are likely to be seeking rights that go beyond the mainstream view of young people. Accordingly, they would need more specific rights, as opposed to relying on a law that reflects mainstream views.

However, there are circumstances where the law can recognise the individual characteristics of children and weigh them against not just what is commonly accepted for children, but also more generally. To some extent the common law in England and Wales takes this approach on the issue of consenting to medical treatment. In the well known Gillick case the House of Lords held that under common law a child of ‘sufficient
understanding and intelligence" has the ability to consent to medical treatment and that such consent cannot be overridden by his or her parents.\textsuperscript{393} The advantage of such an approach is that the court (or the relevant doctor in cases that do not go to court) must look at the specific circumstances of the child in question. It is not enough simply to consider whether children of this age or circumstances commonly have sufficient understanding, but whether the particular child does so. While there will be disagreement over whether the particular test is the correct one, whether understanding and intelligence are relevant, and over how such matters can be measured, the underlying concept does allow for maximum flexibility in deciding whether children of certain ages should be given certain powers and responsibilities.

However, such flexibility can and does give rise to problems of its own. By giving the courts the ultimate power to decide whether a child is \textit{Gillick} competent, without any guidelines as to how they should do so, we run the risk of dominant and ideological views of childhood influencing the way in which the decisions are made. I do not intend here to join in the debate on how far the British courts have retreated from the position of the House of Lords in \textit{Gillick}.\textsuperscript{394} However, I do want to look at some of the post-\textit{Gillick}

\textsuperscript{393} \textit{Gillick v. West Norfolk and Wisbech Area Health Authority} [1986] AC 112, at 186. This case is reflected in British Columbia by section 17 of the \textit{Infants Act}, referred to at notes 120, 189 and 270 above.

\textsuperscript{394} Briefly, when the \textit{Gillick} case was first decided, commentators hoped it would lead to greatly increased rights for older teenagers. However, even within the medical field its scope has been narrowed. Subsequent decisions have made it clear that it does not apply to a decision to refuse medical treatment, which can be forced on the young person under the \textit{parens patriae} doctrine. As discussed above, at notes 120, 189 and 269 specific legislation in certain Provinces in Canada have given young people the right to refuse medical treatment.
cases to see how the British courts are making these decisions.

In *Re S (A Minor) (Consent to Medical Treatment)*\(^{395}\) the divisional court was asked to order a 15 year old to continue with treatment that included blood transfusions. She had refused the treatment, which she had been undergoing since birth, on the grounds that she was a Jehovah's Witness. The court ordered the treatment. Johnson J described the young woman as follows:

S seemed to me to be not only small, frail and pale of face, but she seemed to me to be less mature than most girls of her age in the way she spoke, responded to questions and generally conducted herself. Of necessity she has had a sheltered upbringing and it seemed to me that she was lacking in the emotional maturity that one would have expected of a girl her age. Dr. S felt she was not seriously immature in this sense and I defer to Dr. S's view, she having had the better opportunity than I have in assessing S's maturity.\(^{396}\)

Earlier on he had described her as looking

... to my untutored eye, pale and weak. ... S lay at the back of the court with her head on her mother's lap. Her situation is pitiful.\(^{397}\)

From these quotes we can see that the judge saw S as a child. Her "small, frail" appearance was due to her illness, but it is interesting that it is paired in the judge's discussion with a view of S as immature. Although the judge ostensibly defers to the doctor's view of S's maturity, he still found her to be *Gillick* incompetent in relation to

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\(^{395}\) [1994] 2 FLR 1065 (FD)
deciding whether or not to have further blood transfusions.

In another case on blood transfusions, Re E (A Minor) (Wardship: Medical Treatment)\textsuperscript{398} the divisional court again found a 15 year old not to be Gillick competent. Here the court was faced with a 15 year old who had been brought up as a Jehovah’s Witness (as opposed to S, who was a convert). In this case, A was described as:

... a boy of ordinary average intelligence, a boy of considerable athletic prowess - big and strong and, until the catastrophic events of the last few weeks, fit and healthy.\textsuperscript{399}

So in this case the court was not influenced by physical appearance to see the young person in question particularly as a child in need of protection. However, the judge clearly had some problems with the strength of A’s faith. He described him as having been “conditioned by the very powerful expressions of faith to which all members of the creed adhere.”\textsuperscript{400} Later the judge says that “one has to admire - indeed one is almost baffled by - the courage of the convictions he expresses.”\textsuperscript{401} In the end, the judge was not convinced that such faith was in the boy’s best interests and ordered the blood transfusions to continue.

So, we can see from this debate that finding alternatives to age is difficult. However, it is

\textsuperscript{398} [1992] 1 FLR 386 (FD)
\textsuperscript{399} Ibid., p. 387.
\textsuperscript{400} Ibid., p. 393.
\textsuperscript{401} Ibid., p. 394.
vital for young people on the street that governments try to move from simply using age limits. The British Columbia government has done so to some extent in its provisions on street youth in the *Child, Family and Community Services Act*. As discussed earlier, this Act contains specific provisions giving rights to young people on the street to enter into agreements directly with the Ministry for services. These rights are based on a combination of their age and the fact that they cannot be re-established with their families. The result is not perfect. First, children are living on the street from much younger ages than 16. Second, the statute relies on the director of child welfare to decide whether a child can be re-established with her family, so leaving the question as to whether the section applies in the hands of the authorities rather than the young person. Third, the section uses the best interests test, which has inherent flaws. However, it is at least a start in recognising that age alone should not be the determining factor.

Further, section 10 of the Act allows services to continue to be provided after the age of 19. So, there is a recognition that if the state has provided services to a young person when they are under the age of majority, there is no logical reason why those services should stop on the person’s nineteenth birthday. Indeed, there are those who would call for a recognition that dependency in the modern era lasts beyond the age of majority.

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402 *Supra*, note 97, section 9.
403 See for example, *You Have Heard this Before, supra*, note 3, which refers to 11 and 12 year olds on the street seeking drug and alcohol services and 14 and 15 year olds involved in the sex trade.
404 See the articles referred to at note 139.
405 *Child, Family and Community Services Act, supra*, note 97, section 10.
Those who continue to live at home long into their twenties are proof of that. The law in British Columbia merely reflects this reality into the lives of some of those who do not have families of their own.\textsuperscript{406}

A different aspect of the need to avoid getting caught up on age as an issue is to move from a position where education is primarily seen as the preserve of the young. In this respect, the British Columbia government is on track. It recently announced that it was abolishing tuition fees for adult basic education at public institutions.\textsuperscript{407}

Strategy Three – Don’t Worry About Contradictions

This third strategy is aimed at all of the limitations that I identified in Chapters Two and Three. Giving a voice to young people on the street does not necessarily mean treating them as full adults. It can mean respecting their choices and their autonomy, but still providing assistance and support for those choices where it is wanted. This apparent contradiction, treating young people as autonomous and yet providing protective services, can also enable us to get beyond the family as the primary form of assistance offered. By providing more options, some of which appear contradictory, this concentration on the family can be shifted.

\textsuperscript{406} Brian Raychaba To Be on Our Own With No Direction from Home: A Report on the Special Needs of Young People Leaving the Care of the Child Welfare System (National Youth in Care network, 1988). He makes the point that in 1984 86.3% of eighteen year old Canadians were still living at home. (His reference to 18 is relevant as that is the age of majority in Ontario.)

\textsuperscript{407} Press release dated 13\textsuperscript{th} May 1998.
The use of contradictory strategies, run by different groups at the same time, can also help to overcome the unpredictable nature of politics. So, although I have referred in Chapter One to the problems in pursuing a strategy for equal rights through the courts, there would, I consider, be a virtue in pursuing other political action for greater equality rights for young people on the street. The aim of such a campaign would be in part at least to attempt to alter the dominant image of children in our society. Although images might appear to be fixed, they can also be changed. So, for example in the UK, the government is currently introducing legislation to alter the age at which young gay men can legally have sex together (from 18 to 16) and also the age at which young people can smoke cigarettes (from 16 to 18). The effects of these changes are to alter the way in which young people in Britain will be seen. Whilst there is still a large element of protectionism in the proposals, in that young people will not be able to smoke cigarettes legally until they are two years older than presently, there is also an element of liberation in that young gay men will no longer be ‘protected’ from themselves and their sexuality.

The point is that political change can occur and the way in which young people are regarded can be altered. So, young people in Canada could campaign outside the

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408 The first part of this legislation, relating to sex, is currently going through Parliament. It passed with a large majority in the House of Commons, but was defeated in the House of Lords. Discussions are currently progressing as to how this problem will be solved.

409 The British press reacted in a number of ways; from outrage that 16 year old gays will be able to have sex, to humour, with cartoons showing two young men in bed, complaining that they are too young to enjoy a smoke after sex.

410 Shelley Gavigan writes: “The insistence on the implications of social construction is of fundamental importance: if relations of subordination are socially constructed, it follows that they can be changed.” Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay
courts for greater equality rights and campaign for laws to be changed. This campaign might have limited success in British Columbia in producing minor amendments to the *Human Rights Code*. As discussed in Chapter One, this Act does not currently protect those under 19 from adverse discrimination in relation to employment or freedom of association. Accordingly, changes could be introduced to prevent discrimination in these areas.\(^{411}\)

For young people on the street, a vigorous campaign arguing that they should be treated as adults in a number of respects might start to erode the dominant image of such young people. Care would have to be taken in this respect. As discussed in Chapter Three, young offenders can be treated as adults when they commit serious offences. As I discuss in that Chapter there are a large number of people who are calling for these provisions to be strengthened further. There are contradictions here that could operate either for or against street-involved youth. As I discussed in Chapter Three, capacity can be used as a two-edged sword either to restrict access to rights for those seen as conforming to the dominant image of childhood, or to restrict the actions of those seen as outside that image, such as young offenders or street-involved youth. These contradictions might provide scope for arguing that young people on the street should be treated as adults in other areas. On the other hand, they may simply operate to maintain the distinction between the good and the bad, with street-involved youth being on the bad side of the divide.

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\(^{411}\) As discussed earlier, it is unlikely that such a change could be forced through a *Charter* challenge.
Such campaigns also run the risk of a backlash, if rights for certain young people are pushed too far. Didi Herman writes of the problems facing lesbians and gays in pressing for equal rights. Although they may gain some element of formal equality, if the effects are too extreme in the eyes of the mainstream community, there will be a backlash against such rights. She says: “For example, it is one thing to say that you support ‘equal rights for lesbians and gays’; it is quite another to champion lesbians’ and gay mens’ rights to foster and adopt children.”

In the case of street-involved youth, such a backlash could take the form of a lack of support for services being provided in certain areas. For example, I referred in Chapter One to the fear that some people have of street-involved youth. So, while a campaign might lead to an acceptance in principle that additional rights should be given to such young people, in practice there would be problems with implementing the rights.

In addition to a campaign to increase the choice rights of young people, it may be useful simultaneously to argue for specific rights for the same group of young people to provide additional protection in specific areas. I give an example of how this approach might work below. However, many writers consider that it is not possible for children to have

412 "The Good, the Bad and the Smugly: Sexual Orientation and Perspectives on the Charter” in Charting the Consequences, supra, note 180, pp. 200-217, at p. 211. One example of this is an article in my local newspaper, The Driftwood, on July 1st 1998. Here Hubert Beyer argued against a proposal from the BC Government to allow same-sex couples to allocate their partner to receive pension benefits. The headline ran, “Same-Sex Couples: Not Normal Lifestyles.” Despite his claims not to be homophobic, Beyer illustrated the way in which even those who usually support a fairly liberal viewpoint can react against what they see as excessive rights claims.

413 See, for example the reaction against the building of a safe-house referred to in Chapter One, note 51.
both full rights of protection and adult rights. For example, Bruce and Jonathan Hafen say,

To confer the full range of choice rights on children is also to confer the burdens and responsibilities of adult legal status, which necessarily removes the protection rights of childhood.\(^{414}\)

Alternatively, John Seymour says,

If society believes that its children are special and deserve protection and guidance, it must accept that disputes in which they are involved will be handled by persons operating within a particular frame of reference. The alternative is to accept that children who display a certain level of maturity should be treated in the same way as adults. We cannot have it both ways.\(^{415}\)

An example of a law which encompasses both independence and protection can be found in Scotland. I referred above to the *Age of Legal Capacity (Scotland) Act 1991*.\(^{416}\) Under this Act those over the age of 16 have full legal capacity to enter into any transaction.\(^{417}\) However, section 3 goes on to provide that the young person may apply to court up until he or she is 21 to set aside prejudicial transactions entered into between the ages of 16 and 18.\(^{418}\) In this way, the statute gives young people a large degree of independence, by giving them extensive legal capacity. However, it still contains a protective element,

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\(^{414}\) Hafen and Hafen “Abandoning Children to their Autonomy”, *supra*, note 69, p. 461.


\(^{416}\) *Supra*, note 392.

\(^{417}\) “Transaction” includes entering into a contract, writing a will, bringing civil proceedings and acting as a trustee.

\(^{418}\) There are exceptions to the transactions that can be set aside. So, steps taken in civil proceedings cannot be set aside. The main transactions to which the section will apply will therefore be contracts.
allowing the young person to avoid excessive prejudice caused by a lack of judgment. It therefore acknowledges that the best way for young people to gain experience and maturity of judgment is to allow them to make real decisions, while protecting them from the worst consequences of such decisions. In another post-Gillick case, Re W (A Minor)(Medical Treatment) Lord Donaldson talks of adolescence as:

... a period of progressive transition from childhood to adulthood and as experience in life is acquired and intelligence and understanding grow, so will the scope of decision-making which should be left to the minor, for it is only by making decisions and experiencing the consequences that decision-making skills will be acquired.419

I would call on governments to move beyond the thinking of those such as the Hafens and Seymour and to consider ways in which young people generally and in particular those on the street can be given greater independence, without “abandoning them to their rights.” In this way young people could start to show that they can gain competency by being entrusted with responsibility.420

One example of how contradictory strategies might operate results from my critique of the

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419 [1992] 4 All ER 627 (CA)
420 In a small way the example given at note 265 above is relevant here. Anne Anderson is seen by her mother as older and more competent because she is entrusted with responsibility. Carl Carlsen is seen as younger, because he is always under supervision. However, we should be wary of imposing too much responsibility. Judith Hughes argues that limiting children’s rights may be necessary because, “It may be that what we are protecting children from is not so much the awful consequences of their ignorant decisions but of the burden of responsibility for those decisions which children are not yet ready to bear and which, for entirely non-political reasons, we cannot choose to impose upon them.” “The Philosopher’s Child” in Rosalind Ekman Ladd, ed., Children’s Rights Re-Visioned: Philosophical Readings (Belmont, CA: Wadsworth Publishing, 1996), pp. 15-28, at p. 26. The advantage of the Scottish approach is that young people are protected from the extreme consequences of responsibility, while being given a real chance to exercise rights.
ideological nature of the claim that children are dependent on adults in general and on their families in particular. In making this criticism I identified the way in which the ideology of dependency operates to restrict services for young people on the street to those that reflect the family. However, despite identifying the way in which this ideology can operate to constrain the services available, I would not argue that street-involved youth should simply be given full independence. Rather, I would call for a range of services to be available to young people that reflect their needs and wishes. The exact nature of such services would have to be identified by the young people themselves, as discussed under my first strategy. This would in itself be a step to recognising that street-involved youth are not fully dependent, in that it would allow them to decide the content of the services to be provided. It is likely that any such involvement is some way away.

A further element of this strategy is to realise that matters do not always progress in a straight line and so flexibility is essential. So, Stefanoff argues for a range of accommodation to be available to young people on the street, so that they can move from a fairly sheltered lifestyle to more independence. However, it may be that some young people might need to start at a fairly independent stage, with the ability to choose to return to a more structured living arrangement in due course.

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421 Housing Street youth in Vancouver, a case study, supra, note 203.
Strategy Four – Don’t be Afraid of What Young People Might Do

This strategy again looks to each of the problems that I identified in Chapters Two and Three. Giving a voice to young people means that governments must trust young people to make the choices that are best for them, in all the circumstances. As is shown below, politicians, especially on the right, tend to assume that some young people will manipulate to their own ends any services that are offered to ameliorate the position of street-involved youth. However, if they start to really listen to the voices of young people, this fear should diminish. Further, these politicians tend to assume that, although the family is the best place for young people, it is such a frail structure that it must be bolstered by state supports. So, young people must be discouraged from leaving the family and, if they do leave, must be placed with substitute families wherever possible. Learning to trust young people, to trust their judgments as to whether they wish to stay in a family setting and what the nature of that setting should be, can help to shift the dominant reliance on the family as the primary setting for young people.

However, one of the greatest restrictions on providing any additional rights for young people on the street seems to be a fear that, by making it too easy for young people to leave home, many more young people will do so. This fear certainly formed part of the reasoning of the judge in the Mohamed case referred to earlier.\textsuperscript{422} It could also be seen

\textsuperscript{422} Supra, note 85.
throughout the discussion in the British Columbia Legislature on the provisions of section 9 of the *Child, Family and Community Services Act*. In the second reading debate R. Neufeld, in talking about the prospect of section 9 agreements, said,

[The young person] get[s] some kind of incentive that they can leave that family unit. All of a sudden, Big Brother or someone else is there to look after them.  

Again, in the committee debate, J. Weisgerber was concerned that section 9 would give young people rights. He said:

My concern would be that some young people, particularly young girls, are in very difficult situations they want to get out of. I would hope that we’re not creating a situation that set the stage for a young person to become pregnant and therefore have an opportunity to get out of an unhappy household situation and into a home of their own.

In answer to comments such as these I would make a number of points. First, as I discussed in Chapter One, most young people end up on the streets because of intolerable living conditions either in their own family homes or in the child welfare system. For me, it is not acceptable to refuse assistance to these young people on the grounds that other young people might be encouraged to seek such assistance for themselves when they might not have otherwise done so. Second, these politicians appear to assume that the

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424 BC Hansard, Parl. 35, Sess. 3, volume 16, no. 8 June 9, 1994, p. 11730. It should be noted that both these politicians were members of the Reform Party, a minority party in the legislature at that time. However, the minister was keen to reassure both members that the Bill met their concerns. For example, in response to Weisgerber, the Minister, Joy MacPhail said, “this section will only come into play when every other avenue has been pursued to reunite the child with his or her family.” (Ibid.) Accordingly, these ideas had an influence on the legislation, even if only to limit how far it could go.
young people they are discussing are merely unhappy, and that they should stick it out at home until they are 19 and able to act as they wish. However, the lack of options available to young people who wish to live outside the family unit means that we have no way of knowing whether those who choose not to run away are unhappy or simply cannot see any point in running to greater misery. I would argue that we should give young people a variety of options as to living arrangements, generated from their own ideas and input. David Archard argues,

> Children should have available to them feasible alternatives to their parents. ... A child's strong interest in not staying with its [sic] present parents is of diminished weight when no less detrimental alternative is possible. Society should strive to supply well-funded and imaginative schemes of both a residential and non-residential kind.\(^{425}\)

Finally, in common with the strategy of listening to young people, I would urge governments to stop trying to impose their own ideas of what is good or bad for young people, and to start to allow young people to develop those ideas for themselves away from artificial constraints or restrictions on what they can do. If governments could stop being so frightened of the potential actions of young people in leaving home, they might free those young people to develop alternative ways of living. This in turn might help to shift the image of childhood that constrains so much of our current thinking about young

\(^{425}\) *Children, Rights and Childhood, supra,* note 63, p. 167. This is backed up by the views of young people in a Vancouver study which found, “that the ideal accommodation for many youths would be a place safe from pimps or pushers, where the youths could come and go as they pleased, without having to be officially taken into care and without stringent rules about curfews, nightly presence, etc.” (CSResors Consulting Ltd. *A Study of the Vancouver Reconnect Program and Vancouver Street Youth, supra,* note 18, p. 43.)
Strategy Five – Look at the wider picture

This final strategy is designed simply to put the problems of street-involved youth in context. It is easy when writing and thinking about one particular group in society to get so caught up in that group that one forgets the wider picture. While young people on the street present their own specific challenges that need to be analysed and considered, they are also part of wider social phenomenons. So, there are links between street-involved youth and social poverty. In common with other welfare recipients, young people on the street might become involved in campaigns to increase benefit levels. There are links with the gay community. Many young people are forced to leave home because of homophobia.\textsuperscript{426} There is a reluctance to acknowledge that young people can be gay or lesbian and coming out at a young age can be traumatic.\textsuperscript{427} So, tackling homophobia is a key element in helping young people avoid the need to run to the streets. There are also links with other young people. While there are differences between street-involved youth and other youth, there are also connections. Youth unemployment is a problem that

\textsuperscript{426} Teemu Ruskola refers to one study that “indicates that one young gay man out of four was forced to leave home when his parents found out he was gay. According to another estimate, one quarter of the youths living on the street in the United States are gay.” In “Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth do not Exist” (1996) \textit{Yale Journal of Law and Feminism}, vol. 8, pp. 269-331, at p. 270, referring to Gary Remafedi, “Male Homosexuality, the Adolescent’s Perspective” (1985) (unpublished manuscript) and Paul Gibson, \textit{Gay and Lesbian Youth Suicide}, in 3 U.S. Department of Health and Human Services Youth Suicide Report (1989).

\textsuperscript{427} See Ruskola, \textit{supra}, note 426.
affects all young people. Calling for more job creation programmes, better training for youth and other such matters is a campaign that can link all young people.

The problems faced by young people on the street are therefore part of a wider set of problems. Sarah Lugtig makes it clear that we must therefore adopt a "systemic approach."\textsuperscript{428} We must re-evaluate systems that are based in inequality, we must move beyond the courts, and "child advocates should seek ways to work and join cause with ... more powerful movements, thereby supporting the relationships that are crucial to the exercise of young people’s rights."\textsuperscript{429}

Acknowledging the need to look beyond the immediate problem is an issue that many disadvantaged groups face. It is also one of the issues that limits the use of rights for such groups. Bakan points out that, "poverty and economic inequality are rooted in intersecting relations of class, gender and race, not in particular acts of government or private actors."\textsuperscript{430} However, "Charter arguments against poverty, if accepted by the courts, would only impose obligations on governments to provide groups with particular remedies; they would not affect the social and economic conditions that produce poverty. Significant social change requires work at the structural and institutional levels of society, not just patching up of the most egregious and visible effects of exploitative and

\textsuperscript{428} "Children, Rights and Childhood", \textit{supra}, note 232, p. 905.
\textsuperscript{429} \textit{Ibid.}, p. 905.
\textsuperscript{430} \textit{Just Words}, \textit{supra}, note 178, p. 51.
While I have used street-involved youth to provide a focus for this thesis, I would urge both the young people themselves and governments not to isolate such youth. Only by considering the whole picture can we adequately analyse each element of it. In so doing, it will be necessary to move beyond merely legal rights, into wider campaigns that can address a variety of issues.

Conclusion

Given the liberal form of rights discussed in Chapter Two and the dominant discourse of childhood described in Chapter Three, the pursuit of legal rights for young people on the street is a difficult path. While such rights can assist the empowerment of young people, problems of enforcement and the limits that the courts impose on such rights mean that they are only of limited use. Change will only come about as the dominant discourse of childhood is shifted. This change can only happen when we include all young people actively in decisions that concern them. Such involvement must be active, must come from the grassroots, and must be included at all stages of the decision-making process, from designing the programmes and services available onwards.

The path towards change will be difficult. Years of campaigning for equal rights for

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431 Ibid., p. 54.
women has left women still earning less than men, still the subject of sexual assaults and rape, still struggling against a male-dominated system. The ability to change the position of children is even more limited. As I discussed in Chapter Three, children are in a different position in society from other disadvantaged groups. Every adult has once been a child and most children will grow up to be adults. This cross-over between childhood and adulthood makes some people consider that the best remedy for children’s powerlessness is that they grow up.\textsuperscript{432} Because the majority of adults are or plan to become parents, I believe that they will be unwilling entirely to give up the image of the child as dependent and in need of protection. Carole Smith suggests one reason,

\begin{quote}
We can talk all we like about respecting children’s wishes, listening to their views and responding to them as intentional subjects rather than objects of concern, but we are not prepared to withdraw our protection or to abandon the legal distinction between children and adults. To do so would strike at the very heart of the adult-child relationship which enables adults to locate themselves emotionally, as being affectionate, caring, protective, and socially, as being responsible for moulding the next generation of citizens.\textsuperscript{433}
\end{quote}

There is, then, an enormous way to go before the image of the child will shift sufficiently to allow children to exercise rights free from the specific constraints of childhood. The strategies suggested here are designed to help this process.

\textsuperscript{432} Onora O’Neill, \textit{supra}, note 161, p. 39.
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