

THE EMPIRE OF THE LONE MOTHER: PARENTAL RIGHTS, CHILD WELFARE LAW, AND STATE RESTRUCTURING[©]

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This article uses the Supreme Court of Canada's decision in *G. (J.) v. New Brunswick* to frame a discussion of the historical and ideological character of Canadian child welfare regimes on the nature and experience of women's citizenship within the liberal political order and, in particular, within the current neo-liberal restructuring of welfare provision. The article also analyzes traditional understandings of the political character of child welfare in terms of state intervention and non-intervention, by placing the state ordering of parent-child relations in the context of larger issues of colonialism, gendered parenting discourses, and the linkage between child neglect and poverty. The article argues that this more complex account of state/family relations exposes the rhetorical slippage between a family privacy and family support interpretation of liberal respect for family autonomy in both judicial discourse and the broader political sphere.

À l'aide de l'arrêt *G. (J.) c. Nouveau-Brunswick*, cet article considère le caractère historique et idéologique des régimes des services de bien-être de l'enfance. L'auteure traite de la nature et de l'expérience de l'activisme des femmes au niveau du régime politique libéral, notamment au sein de la restructuration néolibérale actuelle des programmes d'assistance. Cet article analyse également notre compréhension conventionnelle du caractère politique du service de bien-être de l'enfance en matière d'intervention et de non-intervention par l'État. Cette analyse est effectuée en situant la définition étatique de la relation parent-enfant dans le contexte des questions plus larges telles que le colonialisme, les discours (jamais neutres envers le sexe) en matière d'élevage des enfants, ainsi que les liens entre la pauvreté et les enfants laissés à l'abandon. Cet article maintient qu'un exposé plus complexe de la relation entre famille et État fait voir les inconsistances rhétoriques entre les interprétations "assistance à la famille" et "vie privée de la famille" du respect pour l'autonomie de la famille, à la fois au niveau du discours judiciaire et au sein de la sphère politique.

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I.	INTRODUCTION	718
II.	SOCIAL DEMOCRATIC LIBERALISM AND THE INSTITUTIONAL MODEL OF CHILD WELFARE	725
	A. <i>The Starting Point: The Residual Approach to Child Welfare (1880–1940)</i>	725
	B. <i>Institutional Models of Child Welfare and the Second Historical Period (1940–1970s)</i>	732
	C. <i>Enhancement of the “Public” and “Welfare” Dimensions</i>	735
	D. <i>The “Least Detrimental Alternative” Approach and the Proliferation of Support Services</i>	736
	E. <i>Aboriginal Child Welfare and the “Least Detrimental Alternative” Approach</i>	741
	F. <i>Social Democratic Conceptions of Child Welfare: Interventionist or Non-Interventionist</i>	742
III.	THE NEO-LIBERAL STATE, PRIVATIZATION, AND CHILD WELFARE LAW	743
	A. <i>Historical and Contextual Features of Neo-liberalism</i>	743
	B. <i>The 1980s: Child Welfare and the Double Meaning of the “Least Detrimental Alternative”</i>	747
	C. <i>State Intervention or Non-Intervention?: Catholic Children’s Aid v. C.M.</i>	750
	D. <i>The 1990s: Backlash Against Neglectful Families and the Return to an Earlier Model of Residualism</i>	751
IV.	REREADING <i>G.(J.): EMPIRE OF THE LONE MOTHER OR PRIVATIZED MOTHER-PROTECTION</i>	759
	A. <i>Parental Rights: the Empire of the Lone Mother Protectors</i>	759
	B. <i>Fundamental Justice and Public Responsibility</i>	766
V.	CONCLUSION	769

I. INTRODUCTION

Child welfare law is commonly depicted as a classic struggle between the state and the family that must be resolved by placing children at the centre in accordance with the “best interests of the child” principle. Despite women’s continuing role as the primary caregivers, the case law concerning children’s welfare rarely acknowledges any of the complex social and economic inequalities that structure how children’s interests are addressed. Women are cast typically as the threat to children’s welfare, as inadequate providers, nurturers or protectors. The particularities of the lives of children’s mostly female caregivers are subsumed by the urgency that attends so many situations of child neglect and by the assumption that a naturalized notion of mothering is the key to children’s well-being. Critical scholars have tried to expose and analyse the ideology of child welfare law’s subtext on motherhood. They have attempted to return

women to the narrative about the nature of child welfare law in a manner that demands a more complicated analysis of law's role in sustaining economic, social, and cultural inequalities and in reinscribing a regime of colonial dominance with respect to Aboriginal peoples.¹

In a recent decision, *New Brunswick (Minister of Health and Community Services) v. G.J. [J.G.]*,² the Supreme Court of Canada returns women to the narrative via a different route, namely by requiring that judges must take account of parental *Charter* rights under section 7.³ In addition, the Court found that section 7 principles of fundamental justice sometimes require the provision of publicly funded legal aid to parents faced with the apprehension of their children under child welfare statutes. Although the majority used the gender neutral term "parent" to set out these constitutional principles, material presented by the intervenors and relied upon by Justice L'Heureux-Dubé in her concurrence demonstrated the overwhelming predominance of mothers as the key respondents in the majority of child welfare cases.⁴ As Justice L'Heureux-Dubé put it, "[t]his case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings."⁵ Thus, *G. (J.)* brings together the themes of the nature of child welfare law, its role in shaping the terms of women's membership in the liberal political order, and the strategic, discursive, and

¹ See, in particular, M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women" (1993) 18 *Queens L.J.* 306 [hereinafter "Complicating the Ideology"]; M. Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology and First Nations" (1992) 30 *Osgoode Hall L.J.* 375 [hereinafter "Child Welfare Law"]; P. Monture, "A Vicious Circle: Child Welfare and First Nations" (1989) 3 *C.J.W.L.* 1; J. Mosoff, "A Jury Dressed in Medical White and Judicial Black: Mothers with Mental Health Histories in Child Welfare and Custody" in S. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) 227 [hereinafter *Challenging the Public/Private*]; K. Swift, "An Outrage to Common Decency: Historical Perspectives on Child Neglect," (1995) 74 *Child Welfare* 71; and K. Swift, *Manufacturing 'Bad Mothers': A Critical Perspective on Child Neglect* (Toronto: University of Toronto Press, 1995).

² [1999], 3 S.C.R. 46 [hereinafter *G. (J.)*] Chief Justice Lamer, as he then was, wrote the majority opinion, which was agreed to by Justices Gonthier, Cory, McLachlin, Major and Binnie. Concurring reasons were written by Justice L'Heureux-Dubé and agreed to by Justices Gonthier and McLachlin.

³ In *G. (J.)*, the Supreme Court of Canada consolidated its previously fragmented position on the extent to which section 7 extends to protect aspects of the parent-child relationship. This agreement on the nature of the parental rights dimension of security of the person was subsequently confirmed in *Winnipeg Child and Family Service v. K.L.W.*, [2000] 2 S.C.R. 519, a case that dealt with a section 7 parental rights challenge to warrantless apprehensions in non-emergency situations.

⁴ See also, *G. (J.) v. New Brunswick (Factum of the Women's Legal Education and Action Fund* at para. 19).

⁵ *G. (J.)*, *supra* note 2 at 99-100, per Justice L'Heureux-Dubé.

political character of the *Charter of Rights* and, in particular, of section 7 rights.

The figure of the plaintiff and the story of her legal struggle is inspiring. A single mother on income assistance whose three children had been taken into state custody for six months, she persevered through numerous levels of the New Brunswick court system before achieving her first victory at the Supreme Court of Canada. Invoking section 7's promise of liberal respect for individual liberty and security of the person, she staked out her claim in an area—parent-child relations—which, in Blackstone's memorable words, had traditionally been the "empire of the father."⁶ Her victory in the Supreme Court of Canada has direct and progressive consequences for herself and for the numerous others—mostly women, disproportionately members of racialized groups, many disabled, and almost all of them poor—who find themselves in her situation.⁷ A closer reading, however, tarnishes somewhat this optimistic assessment. The majority decision is not only unrelentingly narrow and qualified in its willingness to accord G.(J.) the recognition and material support demanded by her *Charter* arguments, but also constructs her entitlement in the political language of individual sovereignty and self reliance so recently reinvented by the turn to neo-liberalism in the broader political sphere.

In this article, I examine the evolution of child welfare law in order to understand the political repercussions contained in the *G.(J.)* decision and their implications for women within the Canadian political order. I will posit in very general terms three orthodox conceptions of the liberal political community—classical liberalism, social democracy or welfare liberalism,⁸ and neo-liberalism.⁹ These three conceptions are associated

⁶ W. Blackstone, *Commentaries on the Laws of England*, vol. 1, 17th ed., (London: Richard Taylor, 1830) at 453.

⁷ M.J. Mossman, "New Brunswick (*Minister of Health and Community Services*) v. *G.(J.)*: Constitutional Requirements for Legal Representation in Child Protection Matters" (2000) 12 C.J. W.L. 490.

⁸ In a comparative context, the post-war Canadian welfare state, like that in the United States and Great Britain, is characterized as "market liberal" to distinguish it from the social democratic regimes characteristic of the Scandinavian countries and the conservative-corporatist regimes characteristic of some continental European countries such as France, Germany and Italy. See G. Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990). However, as my comparison focuses on different historical models in the Canadian context, I will use the term "social democratic" to denote the change in political ideals and concepts of the entitlements of citizenship that characterized Canadian social welfare efforts in the post-war era. Note that the Esping-Anderson scheme has been criticized as a model that presumes a male worker-citizen by focusing on the extent to which the state acts positively to ameliorate market-derived inequalities and by overlooking the

with three historical periods: the post-Confederation period to the 1940s; the 1940s to the early 1970s; and the period from the early 1970s to the present. The character of these historical periods is, of course, much more ideologically complex and ambivalent, and the transition from one to the next never clearly marked by total transformations in administrative, legal, and ideological features. In particular, the period from 1880 to 1940 saw significant institutional and legal developments that were at odds with the continuing dominance of classical liberal ideology and that laid the foundation for the reforms during the mid-century period.¹⁰ My focus, however, is on dominant understandings with a view to delineating the return, in the present period, to earlier, residual ideals without any significant alteration of the welfarist rhetoric of institutional models of welfare provision. My argument is that this discontinuity between form and substance is reflected in a slippage that occurs in the second and third periods between conceptions of child welfare and their underlying material and structural requirements. Drawing on the experience in British Columbia and Ontario, I will endeavour to show how a social-democratic rhetoric of family support gradually took on the neo-liberal flavour of family privacy as pressure to fundamentally redesign the Canadian political order in the neo-liberal mold consolidated and moved to the centre of popular expectations and political discourse.

It should be noted here that child welfare in Canada, with the exception of Aboriginal child welfare, comes within the jurisdiction of the provincial level of government.¹¹ Thus, a thorough study would have to

relation of the state to familial inequalities. P.M. Evans & G.R. Wekerle, "Shifting the Terrain of Women's Welfare: Theory, Discourse, and Activism" in P. Evans and G.R. Wekerle, eds., *Women and the Welfare Canadian State: Challenges and Change* (Toronto: University of Toronto Press, 1997) 3 at 10 [hereinafter *Women and Welfare* and "Shifting Terrain"].

⁹ I am borrowing from the framework used in J. Bakan *et al.*, "Developments in Constitutional Law: The 1993-94 Term," (1995) S.C.L.R. (2d) 67.

¹⁰ For an analysis of the emergence of notions of enlarged public responsibility for social welfare during the period from 1880-1940 in Canada, see D. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992).

¹¹ Child welfare falls under the residual jurisdiction assigned to the provincial level government by section 92(13) "Property and Civil Rights" of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No.5. Aboriginal child welfare falls under the "Indian and Lands Reserved to Indians" jurisdiction assigned to the federal level of government under section 91(24) of the *Constitution Act 1867, ibid.* In 1951, the federal government took steps to begin a process of phasing out its own residential school approach to Aboriginal child welfare and to have provincial child welfare regimes apply to Aboriginal children. A. Armitage, "Family and Child Welfare in First Nations Communities" [hereinafter "First Nations Communities"] in B. Wharf, ed., *Rethinking Child Welfare in Canada* (Oxford: Oxford University Press, 1993) 131 at 144-51 [hereinafter *Rethinking Child Welfare*].

track the historical development of eleven different regimes. As my inquiry focuses on the general nature of child welfare and on commonalities in how child welfare is conceived and configured within the political order, I have treated the British Columbia and Ontario experience as roughly representative of the history of child welfare in English Canada. I have also used references to the parallel history of a discrete regime under federal jurisdiction with respect to Aboriginal child welfare as a means of demonstrating problematic assumptions about the nature of child welfare.

Two themes run through my study. The first concerns the persistent framing of the central theoretical issue in child welfare law in terms of the tension between state intervention and non-intervention.¹² Child welfare law's political character is shaped by the degree to which the state intervenes in family relationships. This notion is reinforced by the orthodox view that child welfare laws have remained firmly residual in approach throughout Canadian history.¹³ The residual model of welfare defines the sphere of state engagement in welfare provision in negative terms and accords the primary role in addressing need and providing for the material support and welfare of individuals to the family and other institutions of the private sphere, most notably the market. To this extent the residual model reflects classical liberal values of individualism, self-reliance, and negative liberty. The first child welfare statutes in Canada were imbued with these values. However, the statutes also introduced the harsh remedy of child removal based on a finding of parental neglect.¹⁴ The apparent inconsistency between such a drastic invasion of the sphere of parental authority and the anti-statist individualism of classical liberalism, supported the characterization of these early residual regimes and their successors as "interventionist." Subsequent reforms are assessed in terms of the extent they resort to the remedy of child removal into state custody.¹⁵ Thus, the

¹² R. Barnhorst, "Child Protection Legislation: Recent Canadian Reform" in B. Landau, ed., *Children's Rights in the Practice of Law* (Toronto: Carswell, 1986) 255. See also, M. Hall, "A Ministry for Children: Abandoning the Interventionist Debate in British Columbia" (1998) 12 *Int. J. of L. Pol. & Fam.* 121.

¹³ A. Armitage, "The Policy and Legislative Context" in *Rethinking Child Welfare*, *supra* note 11, 37 at 44 [hereinafter "Policy and Legislative Context"]. Harold Wilensky and Charles Lebeaux are usually credited with developing the residual/institutional terminology. See H.L. Wilensky & C.N. Lebeaux, *Industrial Society and Social Welfare* (New York: Free Press, 1965) at 1138-40.

¹⁴ See discussion *infra* note 39.

¹⁵ See "The Policy and Legislative Context," *supra* note 13 at 44; and Barnhorst, *supra* note 12 at 255-58. Brian Wharf points out that the residual format that triggers state intervention only at the point of crisis, namely when children are seriously at risk, "ensures that such intervention will be intrusive."

intervention/non-intervention schematic seems to provide an appropriate lens for gauging the political character of regimes that remain rooted in this familiar classical vision of public and private spheres.

However, the intervention/non-intervention schematic, to the extent that it sets in motion unexamined assumptions about the material and structural context of social relations, can be misleading. As Frances Olsen puts it, “[s]tate intervention is an ideological, not an analytic concept.”¹⁶ The schematic presumes state intervention is an inherently negative intrusion into a previously sealed off and impermeable space of liberating private relations, that a decision to withdraw regulatory oversight is not in itself an allocation of power, and that the constitutional and political order is organized exclusively through deliberated upon decisions, backed by repressive force, to allocate, transfer, and withdraw authority. More fluid and complex accounts of power, in particular its ideological and constitutive dimension, are left out of this simplified portrait of the nature of state intervention. Writing in the same vein as Olsen, Martha Minow argues that a rigidly dichotomized state intervention framework “neglects both the variety of meanings state intervention has in practice, and the ubiquity of state involvement in family relations.”¹⁷ Throughout this article, I will trace the ways in which an oversimplified state intervention schematic in the context of child welfare has often erased experiences that contradict its narrative about the relationship of the political order to human liberation, and, in particular, to the liberation of women who, like G.J., demand fully realized lives for themselves and their children in the face of complex and intersecting factors of disadvantage.

The second theme concerns the privatization agenda that has become the defining feature of neo-liberal strategies aimed at dismantling the Keynesian programs put in place during the social democratic period. Privatization redraws the public/private boundary with respect to responsibility for need. It contemplates a retreat from collective responsibility for the material and social well-being and dignity of all citizens and the endorsement, instead, of notions of private and individual

See also, B. Wharf, “Organizing and Delivering Child Welfare Services: The Contributions of Research” in J. Hudson & B. Galaway, eds., *Child Welfare in Canada: Research and Policy Implications* (Toronto: Thompson Publishing, 1995) at 5.

¹⁶ F. Olsen, “The Myth of State Intervention in the Family” (1985) 18 U. Mich. J.L. Ref. 835 at 863.

¹⁷ M. Minow, “Beyond State Intervention in the Family: For Baby Jane Doe” (1985) 18 U. Mich. J. L. Ref. 933 at 1010.

responsibility. Privatization, however, can also refer simply to the reliance by the state through contract on private institutions—either non-profit or commercial—to deliver programs aimed at carrying out the public social welfare mandate. Child welfare law has always been privatized in both senses of the word.¹⁸

First, child welfare law has been premised, since its inception, on the notion that families—institutions that function ideologically and structurally as the most quintessentially private of all institutions—should bear the responsibilities and costs of child rearing. Thus, the history of child welfare law is really about different modes of implementing and justifying that fundamental alignment between the state and the family. Child welfare regimes also stand in special relation to the second meaning of privatization, namely privatization understood as a mode of implementing a public responsibility without necessarily reconfiguring public/private relations in the more fundamental sense. Some argue that privatization in this sense addresses need in a more pluralized, democratic and localized fashion.¹⁹ Historically, child welfare regimes in Canada have relied heavily on private institutions to deliver benefits and services and thus have always been privatized, to a large extent, in this second sense. Children's aid societies, for example, began as private voluntary organizations that then were delegated a child protection mandate under legislation.²⁰ In many

¹⁸ The two meanings of privatization often get used interchangeably because in recent years the strategy of privatization in the sense of contracting out service delivery to private-sector organizations has been used to facilitate privatization in the more fundamental sense of reducing public responsibility for need. See J. Ismael & Y. Vaillancourt, eds., *Privatization and Provincial Social Services in Canada: Policy, Administration and Service Delivery* (Edmonton: University of Alberta Press, 1988) [hereinafter *Privatization*] for a series of essays that discuss the extent of privatization—in both senses of the word—in a number of Canadian provinces. See also, Patricia Evans's and Gerda Wekerle's description of "reprivatization" in *Women and Welfare*, *supra* note 8 at 7.

¹⁹ D. Donnison, "The Progressive Potential of Privatisation" in J. LeGrand & R. Robinson, eds., *Privatisation and the Welfare State* (London: George Allen & Unwin, 1984) 45. For an overview of arguments in favour of privatization, see J. LeGrand & R. Robinson, "Privatisation and the Welfare State: An Introduction" in LeGrand & Robinson, eds., *ibid.*, 1 at 7–14. For a contrary view that argues that privatization modes of delivering public programs are the first step in off-loading responsibility for need to the private sector, see generally L. Hurl, "Privatized Social Service Systems: Lessons from Ontario Children's Services" (1984) *Can. Pub. Pol.* 395–405; *Privatization, ibid.*; J. Pulkingham & G. Ternowetsky, "The Changing Context of Child and Family Policies" in Pulkingham & Ternowetsky, eds., *Child and Family Policies* (Halifax: Fernwood Publishing, 1997) 14 [hereinafter "The Changing Context"]; and M. Kline, "Blue Meanies in Alberta: Tory Tactics and the Privatization of Child Welfare" in *Challenging the Public/Private*, *supra* note 1 at 330.

²⁰ E. McIntyre, "The Historical Context of Child Welfare in Canada" in *Rethinking Child Welfare*, *supra* note 11 at 22–32 describing the early role of privately constituted children's aid societies in Nova Scotia, British Columbia and Ontario. See generally, D.C. Bracken & P. Hudson, "Manitoba;" and R

provinces, the societies or other kinds of private institutions still play that public role while retaining their private status. As pressure to privatize public programs grows, it becomes increasingly difficult to disentangle the two senses of privatization. Governments today frequently pursue privatization in both the substantive and methodological senses.²¹

This article will discuss privatization in the first and substantive sense, namely in terms of the political understanding of responsibility for material and social well-being. It is therefore important to examine not only the kind, range, and funding of services provided in a privatized manner, but also the underlying philosophy of need and of responsibility for need. The focus will be on how the two rhetorics of state intervention and of privatization meet and become entangled in today's political discourse. Simply put, state intervention is usually understood as a trespass upon the classical liberal values of individual freedom and family privacy. Privatization, the shift of responsibility from the state to individuals, families, and the market, makes normative sense in relation to the "neo" version of liberal values currently dominating political agendas. However, state intervention in the child welfare context, as I hope to show in this essay, has been subject to several contradictory meanings. The malleable liberal language of respect for the integrity and autonomy of the family, in an earlier era, was more resonant with social democratic values. It signaled support rather than the right to be left alone. Recently, however, liberal values of respect for family have provided the rhetorical justification for a family privacy rather than family support approach to the issue of responsibility for child rearing. A glance back at the history of child welfare regimes reveals the tension and overlay of these two different meanings—family support and family privacy—of state intervention in families.

II. SOCIAL DEMOCRATIC LIBERALISM AND THE INSTITUTIONAL MODEL OF CHILD WELFARE

A. *The Starting Point: The Residual Approach to Child Welfare (1880–1940)*

The first child welfare statutes enacted at the end of the nineteenth and beginning of the twentieth centuries breached previous boundaries on

Mishra, G. Laws & P. Harding, "Ontario" in *Privatization*, *supra* note 18 [hereinafter "Ontario"].

²¹ See generally, *Privatization*, *ibid.*

parental and family privacy. The statutes enacted during this period laid the foundation for the liberal welfare state by “sanction[ing] unprecedented intervention into deviant or potentially deviant families.”²² The first Ontario child protection statutes did so by extending a remedy of removal of children from families in which neglectful parenting imperiled children’s well-being, thereby explicitly asserting a state interest in the lives of children in a comparatively broad range of families. Previously, state programs dealing with children’s welfare were confined to children in orphanages, almshouses, workhouses and poor houses, and to criminal children, and were directed primarily at securing children’s labour in the market.²³ Rather than turning to institutional care, the early child protection regimes introduced a reliance on individualized familial solutions in the form of foster care to deal with children in state custody.²⁴ Nevertheless, these reforms, despite the ground-breaking nature of some of their features, operated within the ideological and structural constraints of classical liberalism that remained dominant and unchallenged during this period

²² Chunn, *supra* note 10 at 44. Chunn’s analysis includes the federal *Juvenile Delinquents Act, 1908*, S.C., 1908, c. 40, with the Ontario child protection statutes as another important example of the shift at the end of the 19th and beginning of the 20th centuries in conceptions of the state’s role in relation to the ordering of family life and of children, in particular. A more comprehensive portrait than is possible in this article of changing conceptions of children’s welfare would include a more detailed account of the shifting and often blurred line between criminal and child welfare law.

²³ P. Rooke & R.L. Schnell, *Discarding the Asylum: From Child Rescue to the Welfare State in English Canada 1800-1950* (Lanham: University Press of America, 1983) at 68; N. Sutherland, *Children in English Canadian Society: Framing the Twentieth Century Consensus* (Toronto: University of Toronto, 1976) at 91; E. McIntyre, *supra* note 20 at 16; K. Swift, “Contradictions in Child Welfare: Neglect and Responsibility” in C. Baines, P. Evans, & S. Neysmith, eds., *Women’s Caring: Feminist Perspectives on Social Welfare*, 2nd ed. (Toronto: Oxford University Press, 1998) 160 at 234-71 [hereinafter *Feminist Perspectives* and “Contradictions.”]

²⁴ A. Jones & L. Rutman, *In the Children’s Aid: J.J. Kelso and Child Welfare in Ontario* (Toronto: University of Toronto Press, 1981) at 36; C.T. Baines, “Restructuring Services for Children: Lessons from the Past” in S. Neysmith, ed., *Restructuring Caring Labour* (Toronto: Oxford University Press, 2000) 164-84 [hereinafter “Restructuring Services”]. Baines, in a study of the impacts of the professionalization of social work at the beginning of the twentieth century, notes that the accompanying shift to reliance on foster care and social worker intervention in child placement had negative consequences for working class mothers. In particular, it prevented them from negotiating, and thereby exercising more control over the placement of their children in residential facilities. Such facilities, Baines points out, were resorted to frequently during times of economic stress and functioned often in the same way as private boarding schools for more economically privileged families. *Ibid.* at 169.

within political discourse.²⁵ In particular, these regimes left intact assumptions about the privatized nature of familial relations.

These early child protection regimes were steeped in Blackstonian notions of parental responsibility for children and thus were not about recognition of public responsibility for child welfare but, more precisely, about “enforcing needed care through the medium of the family.”²⁶ However, these statutes were far from neutral. Rather, the regimes deployed a range of strategies, both coercive and non-coercive, to enforce not only private responsibility for familial need, but also a specific and idealized notion of the nature and structure of family.²⁷ The key features of this familial ideal—a conception of childhood as a stage of dependency, of motherhood in terms of primary responsibility for nurture and unpaid caring labour, and of fatherhood in terms of moral authority and financial support²⁸—was at odds with the organization of the majority of Canadian families at the time, in both rural and urban working class settings.²⁹

²⁵ Chunn, *supra* note 10 at 28. Chunn’s book rebuts the view that reform efforts during the period from 1880 to 1940 failed to produce significant change. Instead, she argues that institutional, legal and social practices with respect to social welfare in Canada underwent a qualitative transformation between 1880 and 1940 that ultimately made possible the development of publicly funded universal social programs in the mid-century period. *Ibid.* at 8. However, she points out that “public repudiation of *laissez-faire* principles did not begin to coalesce in Canada until the 1940s.” *Ibid.* at 28. Thus, reforms to institutions, modes of delivery and social work practices that occurred in this early period, although ultimately transformative rather than merely supplemental, took place within the constraints of the *laissez-faire* state. As Chunn puts it: “the prevailing ideology of individualism and the minimal state and the underdevelopment of the social sciences set limits on the publicly acceptable responses to social problems at this time. Thus, the idea that the state should act directly to normalize and maintain marginal families in the community was, for most people, inconceivable, particularly in the context of a predominantly rural society such as Canada’s.” *Ibid.* at 41.

²⁶ “Contradictions,” *supra* note 23 at 238. E. McIntyre makes the same observation about child welfare regimes during this period, namely that “...the state, it should be noted, focused its intervention more on the controlling and enforcing of standards of care and on aspects of parenthood that included ‘limiting and directing their environments, opportunities and activities,’ rather than on the caring aspects, leaving responsibility for financial maintenance and discipline with the child’s own parents.” *Supra* note 20 at 21, quoting M. Reitsma-Street, *A Feminist Analysis of Ontario Laws for Delinquency and Neglect: More Control than Care* (University of Toronto, Faculty of Social Work, Working Papers on Social Welfare in Canada, 1986) at 9. Finally, Chunn points out that “what was different about the new welfare statutes...was the explicit provision of state power to enforce the privatization of the costs of social reproduction.” *Supra* note 10 at 49.

²⁷ E. Zaretsky, “Rethinking the Welfare State: Dependence, Economic Individualism and the Family” in J. Dickinson & B. Russell, eds., *Family, Economy and State: The Social Reproduction Process Under Capitalism* (Toronto: Garamond Press, 1986) 85, 95; and J. Ussel, *Private Lives, Public Policy: 100 years of State Intervention*, (Toronto: Women’s Press, 1992) at 61-124 [hereinafter *Private Lives*].

²⁸ Zaretsky, *ibid.*

²⁹ Chunn, *supra* note 10 at 39-40.

Typically, within these non-middle class and rural families, both children and mothers had roles as workers outside the domestic unpaid sphere,³⁰ children's leisure time was often unsupervised,³¹ schooling for children was sporadic and tied to economic pressure,³² and, in some instances, extended family networks, whether for cultural or economic reasons, pooled resources to form one household.³³ The nuclear family ideal was fully realized only in the minority of families at the time, namely middle-class families living in urban settings.³⁴

In the new child welfare regimes, the deeply privatized notion of children's welfare, as well as its linkage to the traditional nuclear family, manifested itself in two key assumptions: first, that state action is only triggered at the point that families seriously fail to perform their "natural" child rearing function, and second, that original and foster families should do parenting work with virtually no public support.³⁵ The day-to-day aspects of caring labour were performed, in both types of families, largely by mothers who were often expected to engage in paid work to assist their economically struggling families and cope with child rearing as well as the illnesses and disabilities that accompanied rapid industrialization and urbanization. In addition, the early regimes assumed that charitable and religious organizations would continue to provide the bulk of services for distressed families.³⁶ Even funding of the administrative infrastructure

³⁰ *Private Lives*, *supra* note 27 at 85–98. With respect to children as workers, see J. Bullen, "Hidden Workers: Child Labour and the Family Economy in Late Century Urban Ontario" in B. Bradbury, ed., *Canadian Family History: Selected Readings* (Toronto: Copp Clark Pittman, 1992) 199; B. Bradbury, "Gender at Work at Home: Family Decisions, the Labour Market, and Girls' Contributions to the Family Economy" in Bradbury, *ibid.* at 177–98 [hereinafter "Gender at Work"]; and C. Gaffield, "Schooling, the Economy and Rural Society in Nineteenth Century Ontario" in J. Parr, ed., *Childhood and Family in Canadian History* (Toronto: McClelland & Stewart, 1982) 69.

³¹ S. Houston, "The 'Waifs and Strays' of a Late Victorian City: Juvenile Delinquents in Toronto" in Parr, *ibid.* at 129.

³² Gaffield, *supra* note 30. See also, Sutherland, *supra* note 23 at 156–71.

³³ J. Parr, "Introduction" in Parr, *supra* note 30 at 13–14 [hereinafter "Introduction"].

³⁴ Chunn, *supra* note 10 at 39–40; "Introduction," *ibid.*

³⁵ Jones & Rutman, *supra* note 24 at 82. The underfunded and largely voluntary nature of foster care work remains true today. In 1981, Nicholas Bala and Kenneth Clarke wrote: "Foster parents receive a minimal sum for each foster child they have, generally from \$5 to \$10 a day, an amount that barely covers the cost of feeding the child. Clearly, this is the least expensive form of care that can be provided, as foster parents are virtually in a volunteer status, taking children out of a sense of love." N. Bala & K. Clark, *The Child and the Law* (Toronto: McGraw Hill-Ryerson, 1981) at 121–22. See also, Martyn Kendrick, *Nobody's Children: The Foster Care Crisis in Canada* (Toronto: Macmillan, 1990).

³⁶ Jones & Rutman, *supra* note 24 at 71–76.

underpinning the statutes remained largely by donation and by a haphazard network of municipal grants well into the second half of the twentieth century.³⁷

Typically, these first statutes enumerated categories of disorderly and morally suspect behaviour that were combined with vague undefined terms such as serious peril, neglect, impropriety, and lack of parental control.³⁸ In this way, a large, unstructured discretion was conferred on social workers and, in turn, the judges who decided whether to order committal to state care. Furthermore, these statutes were at least as concerned with the quasi-criminal business of child protection, child delinquency, and the trial and punishment of the offence of parental neglect as with children's welfare.³⁹

The early statutes and their successors are typically referred to as harshly interventionist because of the broad unstructured powers they conferred on state officials and because, once triggered, their impacts on families were severe—fines, imprisonment, and removal of children.⁴⁰ This sort of intervention presumes a state that is monolithically and inherently negative in character and sets in motion a measuring tool aimed at the exercise of repressive force for determining the character of state ordering of parent-child relations. Yet intervention can also be viewed as positive and facilitative if the intervention is in the form of support services to assist families in staying together, rather than in the punitive form of removing children from their homes. More generally, if one considers intervention from the standpoint of collective responsibility for basic material well-being, then the early statutes were drastically *non*-interventionist. Rather than providing basic assistance, the early statutes adhered to a regime directed primarily at moral and social correction despite the distressing spectacle of families devastated by rapid social and economic change. Thus, a more complex meaning of “intervention” emerges if competing notions of state ordering are contemplated.

³⁷ N. Trocme, “Child Welfare Services” in R. Barnhorst & L. Johnson, eds., *The State of the Child in Ontario* (Toronto: Oxford University Press, 1991) 63 at 64.

³⁸ See, for example, *An Act for the Prevention of Cruelty to, and Better Protection of Children*, S.O. 1893, c. 45, ss. 3, 14 [hereinafter *Prevention of Cruelty Act*]; and *Children's Protection Act of British Columbia*, S.B.C. 1901, c. 9, ss. 4, 5 [hereinafter *Children's Protection Act*].

³⁹ For example, the first portion of the *Prevention of Cruelty Act* defines the offence of parental neglect, its trial by summary conviction, and its punishment with a fine or imprisonment. *Ibid.* at 39, ss. 2–8. The final portion concerns trials of children who commit offences. *Ibid.*, ss. 24–30.

⁴⁰ “Policy and Legislative Context,” *supra* note 13 at 46–49; and Barnhorst, *supra* note 12.

Conversely, if direct repression is the measure of state intervention, one can argue that from the perspective of federal Aboriginal child welfare regimes during the same period, the repressive aspects of these early statutes were minimal and their “facilitative” aspects were striking compared to federal Aboriginal child welfare regimes during the same period. A deliberate policy of wholesale removal and institutionalization of Aboriginal children in residential schools was developed by the federal government, beginning in the 1880s and extending into the 1960s, with the consequential destruction not only of Aboriginal families but of entire communities.⁴¹ Emotional, physical, and sexual abuse, spiritual and moral devaluation, destruction of sibling and familial ties, eradication of linguistic and cultural heritage, and substandard education characterized the experience of many of the Aboriginal children who found themselves in the residential school program. The combination of these factors led all too often to the economic, social, and cultural disintegration of Aboriginal communities and intergenerational patterns of familial breakdown.⁴²

The formal differentiation between federal regimes directed at Aboriginal children and provincial regimes of general application during this early period presents a particularly stark and graphic picture of the racial and colonial agenda underlying child welfare’s focus on the supervision of parent-child relations as “the key to the vigor of the citizenry.”⁴³ Aboriginal peoples have historically posed a fundamental challenge to the legitimacy of non-Aboriginal assertions of political and territorial sovereignty in both colonial and neo-colonial Canada, rendering Aboriginal childhood a primary site for struggles over colonial domination

⁴¹ A. McGillivray, “Therapies of Freedom: The Colonization of Aboriginal Childhood” in A. McGillivray, ed., *Governing Childhood* (Aldershot: Dartmouth Publishing, 1997) 135 at 152–58; and “First Nations Communities,” *supra* note 11 at 134–43.

⁴² Canada, *Report of the Royal Commission on Aboriginal Peoples*, v. 1 (Ottawa: Ministry of Supply & Services, 1996) at 333–37.

⁴³ G. Mink, “The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State” in L. Gordon, ed., *Women and the Welfare State* (Madison: University of Wisconsin Press, 1990) 92 at 93. Mink argues that motherhood, in particular, is the focal point of the American welfare state’s inculcation of the norms of citizenship. A number of Canadian scholars have examined the racial subtext of motherhood discourses in contemporary Canadian child welfare cases concerning Aboriginal mothers. See “Complicating the Ideology,” *supra* note 1; and Monture, *supra* note 1. The experience of the residential school program for Aboriginal children and its explicit objective of removing Aboriginal children from “the uncivilized state in which [they have] been brought up” reinforces the linkage between the discourses of motherhood and citizenship that characterize contemporary debates about child welfare. McGillivray, *supra* note 41 at 155, quoting the 1889 *Indian Affairs Annual Report* in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 196.

and self-governance.⁴⁴ However, the racial and nationalist complexion of child welfare is also evident during this period in mainstream regimes and programs concerning children, many of which explicitly or implicitly differentiated between children and families of the “right kinds...i.e. Anglo-Celtic and worthy citizens of the True North,” and others.⁴⁵ Aboriginal children, racialized children, children of immigrants, delinquent children from destitute and working class families, and children with mental or physical disabilities found themselves consigned to institutions or programmes that applied the harsher methods of segregation and punishment to mold them for what was often a secondary or subordinate form of citizenship.

In summary, the first child welfare statutes purported to re-draw the line between state and family, and to herald an era in which the state appeared more willing to compromise parental/paternal authority and autonomy. However, the co-existence of the new child saving agenda introduced by these early statutes with the residential school approach for children whose racial, cultural, or class position set them outside the social norm, undermined the objectivity and clarity of distinctions based on the newly introduced legalized concept of neglect. As a consequence, the public order/familial privacy orthodoxy that stands behind the state intervention/non-intervention rubric becomes less useful, if not misleading, as a normative guide to mapping the character of child welfare regimes during this first period of their history. The second period of welfare history, during which a different conception of social welfare took hold in the political mainstream—albeit briefly and never in fully realized form—reinforces this point, namely the importance of complicating the intervention/non-intervention schematic.

⁴⁴ McGillivray, *ibid.* at 136–38.

⁴⁵ R.L. Schnell, “Childhood Rescued and Retained in English Canada” in P. Rooke & R.L. Schnell, eds., *Studies in Childhood History* (Calgary: Detselig Enterprises, 1982) 204 at 209 [hereinafter *Childhood History*], referring to the nature of the propaganda promoting the country life movement in Alberta in the early part of the 20th century. Nova Scotia had explicitly race differentiated “poors’ asylums” during the same period. See P.T. Rooke & R.L. Schnell, “Guttersnipes and Charity Children: Nineteenth Century Child Rescue in the Atlantic Provinces” in *Childhood History*, *ibid.* 82 at 85. The authors note in this context that racial segregation was instituted at a time when sexual separation was considered unnecessary for pauper children in state institutions because they were seen to lack the sensitivities of middle-class children. *Ibid.*

B. *Institutional Models of Child Welfare and the Second Historical Period (1940–1970s)*

The social democratic vision of the political order adheres to the liberal blueprint of the relationship between state and society. However, within this modified and more modern context, the unencumbered abstract individual of classical liberalism becomes the embodied individual of the Keynesian welfare state with concrete material needs and diverse cultural commitments. In other words, a societal shift occurred towards a welfare state in which greater attention was given to the provision of basic material needs for society at large, rather than to the earlier primitive form of intervention aimed at distinct groups. The embodiedness of the individual invites both particularization and concretization of needs, thus shifting the boundary between public and private and justifying the revision of the state's role in terms of facilitating, reinforcing, and supporting social equality through social spending and regulation.

The institutional model of social welfare associated with the historical shift to a more social democratic vision of the political order is built on the notion of social citizenship, namely the notion that members of the liberal political community should be guaranteed basic economic and social security rights in addition to civil and political rights.⁴⁶ In Canada, the foundation for the liberal welfare state was laid by the reforms of the period between 1880–1940. However, the attempt at implementation of social democratic ideals took place in the mid-twentieth century decades, roughly from the 1940s to the early 1970s. The experience of the Depression in the 1930s followed by a world war is often credited with instilling in the political culture a widespread sense of collective responsibility for risk and need.⁴⁷ Thus, rather than viewing state-funded benefits as residual and need as indicative of individual moral failure, post-World War II initiatives often viewed benefits in terms of rights and basic entitlements. Universality and comprehensiveness were key features of post-war programs such as family allowance, old age security, and health care, distinguishing them from the

⁴⁶ T.H. Marshall, "The Right to Welfare" in T.H. Marshall, ed., *The Right to Welfare and Other Essays* (New York: Free Press, 1981) 83.

⁴⁷ P. Armstrong, "The Welfare State as History" in R. Blake, P. Bryden, & F. Strain, eds., *The Welfare State in Canada: Past, Present and Future*, (Concord, Ont.: Irwin Publishing, 1997) 52 at 54 [hereinafter *Welfare State*]; J.C. Turner, "The Historical Base" in J.C. Turner & F.J. Turner, eds., *Canadian Social Welfare*, 3rd ed. (Scarborough, Ont.: Allyn & Bacon, 1995) 75 at 80-82; D. Guest, *The Emergence of Social Security in Canada*, 3rd ed. (Vancouver: University of British Columbia Press, 1997) 83 at 133.

minimalist and morally pejorative approach typical of the residual model of welfare provision.⁴⁸

The relative prosperity of the post-war era facilitated the development of these more generous and affirmative institutional style welfare programs, culminating in 1966 with the Canada Assistance Plan (CAP), a federal provincial agreement that both expanded and structured federal transfer payments to the provinces in order to strengthen the social citizenship rights of Canadians. Importantly, CAP not only provided resources, but also did so on conditions that at least partially strove for the social citizenship ideals of universality, comprehensiveness, and respect for individual dignity.⁴⁹ While the social democratic ideal was never fully realized in Canada, a significant, if imperfectly realized, shift in the general understanding of the relation between the state and society, and of liberal citizenship occurred during this period.

Feminists have been quick to point out that the newly embodied liberal citizen of the post-war era is often presumed to be a white male heterosexual worker and that the renegotiated public/private split is shaped typically by racial and sexual ideologies.⁵⁰ In the context of social welfare, feminist critical scholars have focused on the extent to which social welfare programs not only fail to challenge the structural dimension of economic inequalities but also reflect, overlook, or further entrench social inequalities based on gender, race, sexual orientation, and ability within families and workplaces.⁵¹ A key feminist insight is that many of the institutional style programs of this era, most notably the family allowance, reproduced a gendered social order, replacing one form of patriarchy with another.⁵² Nevertheless, the direction of much feminist critique has been to demand fuller, more substantive realization of social democratic ideals for Canadian women and more attention to the social control and depoliticizing aspects of a heavily bureaucratized welfare state, rather than to reject the fundamental notion that social risks and responsibilities should be shared equitably and fundamental needs securely met without undermining individual dignity.⁵³

⁴⁸ Guest, *ibid.*

⁴⁹ *Ibid.* at 145–47; and Armstrong, *supra* note 47 at 60.

⁵⁰ See generally, *Private Lives*, *supra* note 27; and *Women and Welfare*, *supra* note 8.

⁵¹ *Women and Welfare*, *ibid.*

⁵² *Private Lives*, *supra* note 27 at 54–57.

⁵³ Armstrong, *supra* note 47 at 61; and “Shifting Terrain,” *supra* note 8 at 3–27.

Marilyn Callahan offers an example of how the social democratic conception of the state might be deployed by feminists in the context of child welfare. She argues that a feminist rethinking of child welfare would see the removal of the “quasi-crime of neglect” from child welfare statutes and its replacement with the primary and exclusive mandate to support caring work and provide caring services. She elaborates as follows:

If chronic neglect is primarily a matter of poverty, frequently the poverty of disadvantaged women, then it should be dealt with as a resource issue rather than a personal, individual problem. If situational neglect occurs, such as the abandonment of children, then such problems can be dealt with by providing care and resources to children, locating parents, and helping them make plans for their children. Proving them unfit to care for their children in either case is irrelevant, as it wastes court time and damages parent-child relationships.⁵⁴

To the extent that better material supports and services for parenting are the benchmark of the institutional approach, this model has the potential to address the division of labour within families and to give it more visibility as a public issue. Unfortunately, social democratic values affected the design of child welfare regimes in Canada only indirectly and in an extremely fragmentary way. Mid-century reform period took for granted many of the operational and ideological features of their predecessors. My argument, however, is that despite their limited impact on child welfare regimes, the shifts in the political, legal, and economic climate provided a glimpse of an alternative to the residual model. The following sections trace these partial impacts on child welfare regimes in Ontario and British Columbia. I have divided the reforms into two categories. The first covers a range of different changes which, cumulatively, indicated greater political recognition of the importance of thinking of children as members of the liberal “public” with distinct public welfare needs. The second category focuses on a significant change in social work philosophy which, in the political and economic climate of the mid-century period, spurred the development of child welfare regimes that aspired to provide families with psychological, educational, and, most importantly, some measure of material support.

⁵⁴ M. Callahan, “Feminist Approaches: Women Recreate Child Welfare” in *Rethinking Child Welfare*, *supra* note 11, 172 at 204–05.

C. *Enhancement of the “Public” and “Welfare” Dimensions*

The first wave of reforms consisted of administrative and organizational changes which, when taken together, emphasized the need for public accountability and fairness in dealing with issues relating to children’s well-being. Although the changes did not contemplate any radical rethinking of the meaning of child welfare, they did give it a more public character and, at least on a formal level, introduced a more explicit and expanded focus on welfare rather than one limited to protection. For example, in Ontario, the *Child Welfare Act*⁵⁵ of 1954 introduced references to the interests and welfare of children not only in its title but in provisions setting out the role and powers of the courts.⁵⁶ Commentators have noted more generally that the 1960s was the era when the welfarist “best interests” principle began to appear as the legislative test for procedural issues.⁵⁷ The “best interests” principle subsequently assumed a more central role as an overarching principle, thus making it clear that children, like other members of the community, should be the subjects of public welfare in ways that take account of their distinctiveness. The public character of the new regimes was enhanced also by a movement to professionalize the workforce,⁵⁸ a rationalization of the regulation of parent-child relations by

⁵⁵ S.O. 1954, c. 8.

⁵⁶ *Ibid.* ss. 16(14), (17) concerning the termination of permanent wardship and the extension of wardship beyond age eighteen.

⁵⁷ Walter *et al.*, “Best Interests’ in Child Welfare Proceedings: Implications and Alternatives” (1995) 12 C.J.F.L. 367 at 372. Note, however, that in B.C. the “best interests” test did not appear until 1968, and then was introduced only as a dispositional test for permanent orders of committal. *Protection of Children Act*, R.S.B.C. 1960, c. 303, s. 10(4), as am. by S.B.C. 1968, c. 41, s. 5 [hereinafter *Protection of Children Act* 1968]. In child welfare, the “best interests” principle heralded a move away from a presumption in favour of birth family ties when determining custody. By constructing children as individuals, set apart from their birth families and with distinctive needs for emotional and psychological security, judicial interpretations of the “best interests” principle facilitated the placement of children in adoptive and foster families. However, the individualized focus of the principle also facilitated judicial avoidance of the structural and systemic factors that disadvantage the birth parents who are often young, female, economically vulnerable, single and, frequently, Aboriginal. See, for example, “Child Welfare Law,” *supra* note 1.

⁵⁸ C.T. Baines, “Women’s Professions and an Ethic of Care” in *Feminist Perspectives*, *supra* note 23 at 23, chronicles the professionalization of social work in Canada during the early and middle 20th century and ways in which professionalization entrenched a sex-stratified workforce and work ethic. See also, “Restructuring Services,” *supra* note 24.

consolidating a variety of statutes into one regime,⁵⁹ and more attention to the structure and reporting obligations of children's aid societies.⁶⁰

Although the more self-consciously public and welfarist understanding of the character of child welfare was manifested in the changes to the formal face of the law, the new statutes retained the key elements of a residual regime. In particular, they still provide for apprehension and committal of children to state care based on moralistic and imprecise notions of child neglect⁶¹ with the concomitant conferral of a relatively unstructured discretion on judges and social workers notwithstanding—or perhaps because of—vague references to the interests and welfare of the child.⁶²

D. *The “Least Detrimental Alternative” Approach and the Proliferation of Support Services*

The second type of reform that took hold in the 1960s and 1970s was motivated by disillusionment with the paternalism and ineffectiveness of state-funded substitute care for children in need of protection. The growing stature of the “best interests” test meant that social workers and judges had a broader basis on which to take action. The main response, however, remained the same as under the old-style residual statutes, namely removal—albeit with clearer controls on its type and length. As disillusionment with the remedy of removal and state care grew, the aim of reform became, wherever possible, to support and supervise children at risk *without* removing them from their families. In other words, change was predominantly driven, not by any shift in the conception of state/family relations, but by exasperation with the methods of maintaining those relations. The phrases “permanency planning”⁶³ and “the least detrimental

⁵⁹ See, for example, *Child Welfare Act*, *supra* note 57; *Protection of Children Act*, R.S.B.C. 1948, c. 48; and the *Adoption Act*, R.S.B.C. 1948, c. 7.

⁶⁰ Trocme, *supra* note 37 at 65; and *Child Welfare Act*, S.O. 1965 c. 14 s. 8.

⁶¹ See the definition of a neglected child in the *Child Welfare Act*, R.S.O. 1960, ch. 53, s. 11(1)(e) and the enumeration of classes of children in need of protection in the *Protection of Children Act*, R.S.B.C. 1960, c. 303, s. 7.

⁶² “Child Welfare Law,” *supra* note 1.

⁶³ The permanency planning movement highlighted the detrimental impacts of foster care “drift” and multiple placements for children at risk. Trocme, *supra* note 37 at 65. Advocates of permanency planning advocates argue that children should be maintained in their own homes if possible, and that out-of-home care is unstable and undesirable. See A. Maluccio *et al.*, “Beyond Permanency Planning” (1980) 56 *Child Welfare* 515; A. Maluccio & E. Fein, “Permanency Planning: A Redefinition” (1983)

alternative”⁶⁴ were coined to indicate this revised approach to dealing with children at risk and its philosophy of maintaining those children, if possible, within their families.

The turn to the “least detrimental alternative” approach had, at least on the surface, very little to do with giving child welfare more of a public character, and, indeed, it was often described and promoted in terms that invoked classical liberal notions of respect for family privacy and family integrity.⁶⁵ Nevertheless, despite the rhetoric of family privacy and the limited nature of the social democratic reforms during this period, child welfare laws were experienced in significantly different ways. Two factors account for the change in the character of children’s welfare. First, the shift to the “least detrimental alternative approach” resulted in a steep drop in the number of children in care. Second, increased funding made it possible to enhance children’s protection and well-being by materially supporting their families.⁶⁶

The increased availability of resources under CAP resulted in the devotion of larger amounts of stable government funding for child welfare and for related programs directed at families. For example, in Ontario during the 1960s, funding of child welfare at the provincial level went from a collection of small grants to supplement municipal and charitable funding

57 Child Welfare 195; R. Chisholm, “Permanency Planning and Child Placement Law and Policy: A Slogan and its Limitations” (1987) 18 J. Comp. Fam. Stud. 207; and S. Palmer, *Maintaining Family Ties: Inclusive Practice in Foster Care* (Washington: Child Welfare League of America, 1995) at 2. But see P. Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care* (Toronto: University of Toronto Press, 1991) 220–21. Steinhauer is critical of permanency planning to the extent that in its rejection of unplanned long term and badly managed foster care placements, it overlooks the fact that well-planned long-term foster care is “the least detrimental alternative” for many children. *Ibid.* at 220–32.

⁶⁴ The “least detrimental alternative available standard” was articulated by J. Goldstein, A. Freud & A. Solnit in *Beyond the Best Interests of the Child* (New York: Free Press, 1973) at 53–64 [hereinafter *Beyond the Best*]. This standard stressed children’s psychological need for continuity in relationships and for respect for their own rather than adults’ sense of time. In addition, the standard was guided by a conviction concerning “law’s incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.” *Ibid.* at 49.

⁶⁵ Goldstein, Freud, and Solnit linked their articulation of the “least detrimental alternative” standard to a preference for a non-interventionist approach to child welfare, the value of family privacy, and a presumption of parental autonomy. In doing so, they invoked the classical tension between family integrity and state intrusion. J. Goldstein, A. Freud, & A. Solnit, *Before the Best Interests of the Child* (New York: Free Press, 1979) at 4–14 [hereinafter *Before the Best*].

⁶⁶ Trocme, *supra* note 37 at 67–71.

to 80 per cent of the operating budgets of children's aid societies.⁶⁷ In addition, many of the expanded resources were directed at an unprecedented variety of support services for families and children. CAP stipulated the direction of approximately a third of federal transfer payments toward welfare services aimed at alleviating the causes and effects of poverty.⁶⁸ With the help of this conditional funding, services such as "income support, medical services, recreational groups, child care, educational resources, housing, homemakers, and institutional settings for disturbed children" proliferated.⁶⁹ The result was that the steep drop in the number of children in care was accompanied by an equally sharp rise in the number of families served by child welfare authorities.⁷⁰ Thus, there was a material basis upon which to address children's welfare by supporting them within and through their families rather than by removing them. The expansion of services in this manner coincided with larger shifts, from an emphasis on moral correction of the poor to one on socialization and normalization of non-conforming families, and from a decentralized focus on children's well-being to a focus on children as part of a set of interdependent familial relationships.⁷¹

The change in social work philosophy toward the "least detrimental alternative" principle envisioned serving children at risk, where feasible, through family support services. The change occurred well in advance of any formal amendments to the surface of the governing statutes. The NDP government in British Columbia in the early 1970s began but never finished a process of comprehensive amendment and change which, among other things, contemplated statutory entitlements to support programs, a legal

⁶⁷ *Ibid.* at 64. The *Child Welfare Act*, S.O. 1965, c. 14, s. 12 commits the provincial government to funding 100 per cent of the costs related to the care of children of unmarried mothers and 40 per cent of all other services. The remaining sixty per cent is left to municipalities.

⁶⁸ "The Changing Context," *supra* note 19 at 33.

⁶⁹ "Contradictions," *supra* note 23 at 244, writing about Ontario as well as generally. See also, M. Callahan & C. McNiven, "British Columbia" in *Privatization*, *supra* note 18, 13 at 16 [hereinafter "British Columbia"]; and "Ontario," *supra* note 20 at 122.

⁷⁰ "Ontario," *ibid.* at 119-39, summarize the increase in public welfare expenditures during the post-War era in Ontario, noting in particular the impact of CAP on the growth of social services. Trocme, *supra* note 37 at 67-68, provides charts that set out the drop in the number of children in care and the parallel rise in the number of families served by child welfare authorities. This trend continued well into the eighties.

⁷¹ Again, these shifts began in the previous period, in particular during the interwar years. However, they coalesced during the mid-century period. Chunn, *supra* note 10 at 19-20. See also, J. Donzelot, *The Policing of Families* (New York: Pantheon Books, 1979) at 58-81 with regards to the moralization/normalization distinction.

obligation on child protection workers to offer preventive services to avoid protection proceedings, and recognition of children's and family rights.⁷² However, the return to a Social Credit government in 1975 changed the course of the reform process, resulting in a statute, the *Family and Child Service Act*, that featured the welfarist language of "best interests" more prominently but contained none of the family support and preventive measures of the earlier drafts.⁷³ Indeed, the new definition of "child in need of protection," although free finally of references to vagrancy and moral vice, incorporated relatively high standards of endangerment and necessity into the key doctrinal tests for apprehension and removal.⁷⁴ It was not until 1984 in Ontario and 1994 in British Columbia that explicit references to some form of the "least detrimental alternative" principle as well as clear commitments to family integrity and the continuity of parent-child relationships appeared on the face of their respective child welfare statutes.⁷⁵

In Ontario, the work of voluntary and non-profit private organizations was not displaced by the expansion of welfare services directed at families. Rather, these bodies also proliferated, becoming the vehicles for delivery of new services such as daycare, home support, and prevention programs.⁷⁶ Commercial entities also became involved in service

⁷² *Ibid.* at 37–38.

⁷³ S.B.C. 1980, c. 11. The actual language refers to "safety and well-being." Section 2 of the Act states: "In the administration and interpretation of this Act, the safety and well-being of a child shall be the paramount considerations."

⁷⁴ *Ibid.*, s. 1.

⁷⁵ *Child, Family, and Community Service Act*, S.B.C. 1994, c. 27, s. 30(1)(b), as am. by *Child, Family, and Community Service Act*, R.S.B.C. 1996, c. 46, stipulates that removal of a child by a director without a court order may occur only if there is "no other less disruptive measure," while s. 2(b) asserts the guiding principle that family is the preferred environment for child rearing. Section 4(1)(c) defines the best interests of the child in terms of continuity in care and maintenance of the parent-child relationship. In Ontario, interim legislation enacted in 1978 emphasized continuity in care and the enjoyment of parent-child relationships as a dimension of the best interests of the child. *Child Welfare Act*, S.O. 1978, c. 85, ss. 1(b)(ii), (iv), (v) [hereinafter *Child Welfare Act, 1978*]. In 1984, Ontario put in place a regime that articulated the legislative purposes of "giv[ing] support to the autonomy and integrity of the family" and of recognizing "that the least restrictive or disruptive course of action that is available and is appropriate in a particular case to help a child or family should be followed." *Child and Family Services Act*, S.O. 1984 ch. 55, ss. 1(b),(c) [hereinafter cited to R.S.O. 1990, c. 11].

⁷⁶ "Ontario," *supra* note 20 at 119–22, describe the strong grass roots populist sentiment that favoured decentralization and debureaucratization in the administration of social services in order to maximize democracy and citizen participation. The authors point out how easily the progressive anti-statism of activists on the left merged with and was overtaken by the neo-conservative downsizing objectives of the Ontario government in the mid-seventies.

delivery. However, their role was kept to a minimum, in part because the terms of CAP favoured reliance on the non-profit sector.⁷⁷ In addition, private sector organizations during this period operated under conditional grants rather than fee-for-service contracts. The former allows organizations to continue their work as advocates and innovators alongside their roles as service providers.⁷⁸ So while the expansion of the privatized model of service delivery in Ontario during the 1960s and early 1970s may have laid the groundwork for privatization in the more substantive sense in later years, initially the aim was better and more services rather than fewer services.

Similarly, in British Columbia in the late 1960s and early 1970s, there was an expansion of funding for personal social services. The NDP government elected in 1972 “substantially increased its subsidy to the voluntary sector for a wide range of preventive, advocacy, and planning functions as well as direct client services.”⁷⁹ The increases in funding continued in the first years of the succeeding Social Credit government. Again as in Ontario, a privatized model for delivery of the new and expanded services was favoured. Indeed, the NDP put in place an explicitly decentralized framework for allocating social welfare resources that reflected the community based populist values of British Columbia activists on the left at that time.⁸⁰

In summary, the development of an extensive, albeit ad hoc and often fragmented, array of benefits aimed at support of child caring work during this post-war period introduced a tension between social democratic and classical liberal understandings of welfare. The institutional ideal, rooted in social democratic values, views need—here marked by child neglect—as a systemic rather than individual parenting failure, an outcome of poverty, illness, or other phenomena beyond the control of individual parents. The failure to rethink the nature of state/family relations in any comprehensive way during this period meant that this ideal was never realized. Nevertheless, the impact of the residual model was softened by the

⁷⁷ *Ibid.* at 129. The authors write that the for-profit sector has been “involved mainly in the provision of children’s residences and daycare centres.” *Ibid.* at 128. They also observe that, well into the eighties, it has been mostly municipalities and children’s aid societies using government funds rather than the Ontario government directly that has contracted out service delivery to the for-profit sector. *Ibid.* at 129.

⁷⁸ *Ibid.* at 134.

⁷⁹ “British Columbia,” *supra* note 69 at 16.

⁸⁰ *Ibid.*

combination of a social work philosophy of support for families with actual material resources to provide that support, as well as a widespread recognition among frontline workers that the crucial factor in child neglect is poverty rather than individual moral failings.⁸¹ Importantly, these changes took place in the realm of program development and social work practice and without much formal recognition on the face of the governing statutes. However, a brief look at developments in Aboriginal communities during the same period underscores, by contrast, the point that even an incomplete patchwork of services in a political climate that emphasizes support rather than correction can have a significant impact.

E. *Aboriginal Child Welfare and the “Least Detrimental Alternative” Approach*

The rise of the “least detrimental alternative” approach in the administration and practice of child welfare within provincial jurisdictions coincided roughly with federal dismantling of the residential school system and the extension, through federal provincial agreements, of provincial child welfare laws to Aboriginal children.⁸² However, many of the services and benefits aimed at supporting families were unavailable to Aboriginal communities, compounding the legacy of decades of colonialism. Underfunding was routinely explained during this period as a problem of federal-provincial bickering over resources and jurisdiction rather than as a problem of racism and colonialism.⁸³ In addition, the notion that Aboriginal children were in some sense constructively at risk given the extent of economic and social devastation within their communities pervaded both social work practice and judicial child-welfare discourse.⁸⁴ As a result, the implementation of provincial child welfare regimes in Aboriginal communities during this period resulted in the notorious “sixties scoop,” namely the apprehension of large numbers of children, many of whom were adopted out or permanently committed to the guardianship of

⁸¹ “Policy and Legislative Context,” *supra* note 13 at 39.

⁸² Note, however, that both Aboriginal and non-Aboriginal children in socially marginalized populations continued to find themselves categorized often as juvenile delinquents and relegated to residential-style institutions. See, for example, J. Sangster, “Girls in Conflict with the Law: Exploring the Construction of Female ‘Delinquency’ in Ontario, 1940-60” (2000) 12 C.J.W.L. 1.

⁸³ Monture, *supra* note 1 at 9–11.

⁸⁴ *Ibid.* at 12–15.

the state.⁸⁵ Thus, while overall numbers of children in care dropped, the proportion of Aboriginal children in care rose sharply, from almost none to numbers that far exceeded Aboriginal representation in the overall population.⁸⁶ In sum, Aboriginal communities were subjected to the harshest impacts of the residual model without any of the moderating effects of the preventive, support, and advocacy services available more generally to non-Aboriginal Canadians. The individualized framework characteristic of all liberal child-welfare regimes ensured the erasure of considerations relating to racism and colonialism in Aboriginal child welfare cases.⁸⁷ Likewise, the dominance of the social-work philosophy of permanency planning ensured that the least detrimental alternative for Aboriginal children was the most detrimental measure possible from a systemic perspective, namely removal and adoption.⁸⁸

F. *Social Democratic Conceptions of Child Welfare: Interventionist or Non-Interventionist*

This sketch of Canadian child welfare law and policy from the 1940s to the end of the 1970s illustrates how the intervention/non-intervention schematic oversimplifies and distorts the nature of state/family relations underlying child welfare regulation. The “least detrimental alternative” approach is commonly referred to in the literature as the non-interventionist approach.⁸⁹ A Supreme Court of Canada case, *Catholic Children’s Aid Society of Toronto v. C.M.*, dealing with the interpretation of the 1984 Ontario statute, observed that “when compared to the legislation of other provinces, (it) has been recognized as one of the least interventionist regimes.”⁹⁰ The statute in question contained detailed provisions committing Ontario to the “least detrimental alternative”

⁸⁵ The term “sixties scoop” was coined by Patrick Johnston in P. Johnston, *Native Children and the Child Welfare System* (Toronto: James Lorimer, 1983). Johnston’s report exposed the devastating impact of provincial child welfare regimes on aboriginal communities and sent “shock waves” through the child welfare system. *Report of the Royal Commission on Aboriginal Peoples*, *supra* note 42, vol. 3 at 24.

⁸⁶ Johnston, *ibid.* at 54-57.

⁸⁷ “Child Welfare Law,” *supra* note 1.

⁸⁸ *Ibid.* See also, *Report of the Royal Commission on Aboriginal Peoples*, *supra* note 42, vol. 3 at 24; *Child and Family Services Act*, *supra* note 75 at 29; and Monture, *supra* note 1.

⁸⁹ *Before the Best*, *supra* note 65.

⁹⁰ [1994] 2 S.C.R. 165 at 191 [hereinafter *C.M.*] citing Richard Barnhorst, *supra* note 12.

approach.⁹¹ To the extent that this approach in its original incarnation did signal a drop in overall apprehensions, the term “non-interventionist” is accurate. However, from a perspective that views intervention positively and measures it in terms of the social democratic recognition of public collective responsibility for social and economic need, these regimes during a short period from the mid 1960s to the early 1970s were actually *more* interventionist. Furthermore, from the perspective of mothers, who are expected to and do perform the bulk of nurturing children’s well-being, this understanding of intervention is pivotal in assessing what child welfare has to say about the nature of the liberal community and of the terms of women’s citizenship within that community. The fact that this fuller, more embodied account of citizenship was racially specific as well as deeply gendered again belies the usefulness of the intervention/non-intervention paradigm. Later research on the attenuated version of these programs that survived into the 1980s and 1990s demonstrates that even the comparatively generous benefits available in non-Aboriginal communities were premised on terms aimed at securing a gendered order of parenting work.⁹² Thus, again, the question about the extent of state intervention tends to sideline the crucial question about *how* the state intervenes and about the political and ideological nature of state/family relations.

III. THE NEO-LIBERAL STATE, PRIVATIZATION, AND CHILD WELFARE LAW

A. *Historical and Contextual Features of Neo-liberalism*

The defining features of neo-liberal public policy are the emphasis on fiscal restraint, “the subordination of social policy to the demands of labour market flexibility and structural competitiveness,”⁹³ the dismantling of universal social programs, and anti-statism. The citizen of the neo-liberal state is the self-reliant taxpayer citizen who expects a direct return on any investment in social spending.⁹⁴ The resulting realignment of ideological

⁹¹ *Child and Family Service Act*, *supra* note 76, ss. 1(b), (c).

⁹² See discussion in *C.M. infra* notes 128-132; and J. Krane’s research, *infra* notes 183-190.

⁹³ J. Brodie, “Restructuring and the New Citizenship” in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) 126-40 at 130 [hereinafter “Restructuring”].

⁹⁴ See J. Shields & B.M. Evans, *Shrinking the State: Globalization and Public Administration “Reform”* (Halifax: Fernwood, 1998) at 80.

assumptions about the relation of the state to the market and family has rejuvenated classical liberal values and rhetoric but with one important difference: the state of nature is a globalized market, unaccountable to and unmanageable by national democratic institutions.⁹⁵

In Canada, the key event marking the beginning of the shift to a neo-liberal political order was the demise of the federal Liberals' ambitious plan in the early 1970s to expand and rationalize social security programs in order "to free personal social services from their residual straitjacket and move them toward a modern, institutional response to the human problems of urban-industrial society."⁹⁶ Unemployment and inflation spurred by the 1973 energy crisis fueled "demands for more use of demonstrated need, a curtailment of universal programs, and a cutback in government spending generally."⁹⁷ An explicitly neo-liberal agenda marked by cuts to social programs, regressive tax policies, and reduced transfer payments to the provinces under CAP was consolidated and pursued at the federal level in the 1980s by the Mulroney Conservative government.⁹⁸ Although the federal Liberals returned to power in 1993 under Jean Chretien, the stage was set for a "shift to the political right."⁹⁹ The 1995 federal budget accomplished this shift, consolidating and entrenching the new political order, and radically restructuring jurisdiction over and funding of social programmes. The use of conditions inserted in federal transfer payments to the provinces to impose terms reflective of social democratic ideals on provincial social spending and regulation was abandoned, except with respect to health care and residency requirements in income assistance. At the same time, federal transfer payments were significantly reduced. A new funding formula called the Canada Health and Social Transfer (CHST) was put in place, marking the end of a conception of Canadian citizenship in terms of a collective commitment to ensuring social and economic security.¹⁰⁰

The key terms and institutions for implementing this political shift cannot be found in any formal constitutional text despite the foundational

⁹⁵ *Ibid.* at 24–34.

⁹⁶ Guest, *supra* note 47 at 173.

⁹⁷ *Ibid.* at 180.

⁹⁸ *Ibid.* at 217–18.

⁹⁹ *Ibid.* at 250.

¹⁰⁰ See generally, A. Moscovitch, "The Canada Health and Social Transfer" in *Welfare State*, *supra* note 97 at 105–120; and M. Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) C.J.W.L 371.

nature of the realignment of the political order. As with its assembly, the texts setting out the disassembly of the Canadian welfare state are more likely to be found in intergovernmental agreements and budgets. Nevertheless, the struggle over the normative and political values at stake is clearly evident in constitutional discourse. In broad political terms, the neo-liberal project of privatization entails a deliberate recommitment to and endorsement of the residual model of welfare under which primary responsibility for individual need resides in the market and the family while the state performs only a minimal back-up role. However, the ideological and normative understanding of the residual model under neo-liberalism differs importantly from classical liberalism. Efficiency and economic changes as well as, and sometimes instead of, the principles of human freedom and individual dignity are invoked as the rationale for state restructuring. For example, in constitutional division of powers discourse, economic imperatives are a dominant theme in the recurrent debates over constitutionally entrenching an amended set of relations between the federal and provincial governments and between those governments and the Canadian economy.¹⁰¹

Neo-liberal ideals also surface in the *Charter* discourse of rights, not only in a rejuvenation of the classical liberal principles of negative liberty and formal equality, but also in the introduction of the neo-liberal discourse of privatization. The latter is represented by a pattern in judicial decisions favouring claims for equal access to private forms of economic support and protection and explicitly disfavoured claims that assert a right to public benefits.¹⁰² The distinction between private and public benefit programs typically arises in the context of section 1 analysis. Protecting the “public purse” has been identified as a substantial and compelling objective of regimes that facilitate private responsibility for need¹⁰³ and as a basis for deference toward legislative decisions regarding the appropriate

¹⁰¹ See J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canadas* (Ottawa: Carleton University Press, 1992). See especially, D. Schneiderman, “The Constitutional Politics of Poverty” at 125; H. Glasbeek, “The Social Charter: Poor Politics for the Poor” at 115; and H. Lessard, “Creation Stories: Social Rights and Canada’s Social Contract,” at 101–14.

¹⁰² See H. Lessard *et al.*, “Developments in Constitutional Law” (1996) 7 *Supreme Court L.R.* 81 at 100.

¹⁰³ *M. v. H.*, [1999] 2 S.C.R. 67, 69, 72, per Cory and Iacobucci JJ. for the majority.

distribution of public resources.¹⁰⁴ Conversely, insignificant impacts on the “public purse” are invoked to justify remedying public benefit programs that fail to meet *Charter* standards of inclusiveness and respect for fundamental justice.¹⁰⁵

The political shift to neoliberalism has been characterized by several governmental strategies, among them the use of a tax credit rather than direct-benefit system for redistributing wealth,¹⁰⁶ the replacement of the principle of universality with targeted programs in areas such as old age security, family allowances, and income assistance,¹⁰⁷ and privatization.¹⁰⁸ The residual mold of income assistance programs, softened during the Keynesian era by the language of reasonableness and human dignity, has re-emerged full force with a reinvigorated moralistic rhetoric and revival of the notion of the “undeserving poor.”¹⁰⁹ The latter has been applied with particular force and consistency to single mothers.¹¹⁰ Targeting programs in this manner serves to “pathologize and individualize difference and imposes a stigma that places members of the target group ‘outside the norms of the new citizenship.’”¹¹¹ Although all of these strategies transform the nature of citizenship, privatization strategies translate most directly into a realignment of fundamental relationships between the state and society. Privatization also stands in a peculiar relation to child welfare, given the historical role of voluntary, non-profit, and commercial institutions in delivering state funded child welfare services and given the centrality of the

¹⁰⁴ *Egan v. Canada*, [1995] 2 S.C.R. 513 at 572, per Sopinka J. concurring in result; and *Collins v. Canada*, [2000] 2 F.C. 3 (T.D.) at 60–61 and 65–69. The latter decision was heralded in the press as signaling judicial awareness of the need for fiscal prudence. “Hooray for Reasoned Law” *The Globe and Mail* (8 November 1999) A18.

¹⁰⁵ *Schacter v. Canada*, [1992] 2 S.C.R. 679; *G. (J) v. New Brunswick*, *supra* note 2 at 92–94; and discussion *infra* note 176.

¹⁰⁶ For example, the 1988 federal budget restructured family allowance benefits, introducing a system of child tax credits to redistribute benefits to low- and moderate-income parents. Guest, *supra* note 47 at 225.

¹⁰⁷ “Restructuring,” *supra* note 93 at 136–37.

¹⁰⁸ See generally, *Privatization*, *supra* note 18.

¹⁰⁹ P. Evans, “Single Mothers and Ontario’s Welfare Policy” in J. Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996) 151 at 160; and M. Little, “No Car, No Radio, No Liquor Permit”: *The Moral Regulation of Single Mothers in Ontario, 1920–1997* (Toronto: Oxford University Press, 1998) 139.

¹¹⁰ Little, *ibid.* at 157–63 describes policy shifts in Ontario that increasingly favoured tying social assistance to employment, with particularly severe impacts on single mothers.

¹¹¹ “Restructuring,” *supra* note 93 at 137.

ideology of familial privacy to child welfare. Thus, I will focus on privatization and privatization discourse in examining the reconfiguration of child welfare under neo-liberalism.

Although child welfare in Canada has always been cast in the privatized mold in both the substantive and methodological sense, child welfare programs were significantly re-privatized in the 1980s and 1990s. In the 1980s, the acceleration of broad cost-cutting measures aimed at the benefit provision and preventive aspects of social programs began to undermine the family support interpretation of the “least detrimental alternative” philosophy.¹¹² In the 1990s—not surprisingly given the cumulative impact of cuts to support services—a number of child welfare “scandals” fueled media and political attacks on the “least detrimental alternative” approach and a demand for a return to the emphasis on intervention, child removal, and correction associated with an earlier, more clearly residual model of child welfare regulation.

B. *The 1980s: Child Welfare and the Double Meaning of the “Least Detrimental Alternative”*

Tracking the shift to a neo-liberal model of child welfare in Canada is difficult given that no Canadian child welfare regime fully embraced an institutional model. Instead what occurred was more complex. The residual model was moderated by deleting the “offence” sections, gradually removing the language of moral correction and maintenance of the social order, replacing it, at least in part, with the welfarist language of “best interests,” and shifting emphasis and resources towards family support rather than child removal as a more effective method of addressing child neglect. This latter shift to the “least detrimental alternative” approach found formal expression in statutes often long after it had been adopted as a practice. The rhetoric of the “least detrimental alternative” and of family autonomy was linked ostensibly to classical liberal ideals of negative liberty.¹¹³ However, in a political climate that at least partially embraced social democratic ideals and in a favourable economic climate, the liberal rhetoric had a social democratic tone. In the late 1960s and early 1970s,

¹¹² R. Chisholm, writing in 1987 about the United States and Australia, observed that “there may well be a connection between permanency planning and the limited availability of funds for social welfare in the 1970s and 1980s” and that in examining the endorsement by governments of permanency planning rhetoric and programmes, “it is often difficult to disentangle the cost-cutting objectives from those relating to children’s welfare.” Chisholm, *supra* note 63 at 211–12.

¹¹³ See discussion of *Before the Best*, *supra* note 65.

family autonomy with respect to child welfare meant that children at risk should be supported within their families by helping families cope with parenting. In the 1980s, family autonomy began to lean in the opposite direction: that families should be responsible and that child welfare services and resources be reduced. Existing privatized modes of delivery were supported for reasons of cost-effectiveness rather than for reasons of pluralism and community empowerment.

A variety of forms of privatization of child welfare took place in British Columbia during the 1980s. They ranged from cabinet decisions to repeal regulations providing support services, reducing government responsibility for the long-term care of children by favouring adoption over foster care, cutting staff, replacing institutional care for special needs children with family or community services that are less comprehensive and accessible, and, finally, contracting out service delivery to private sector organizations.¹¹⁴ All of these changes were instituted without any substantial amendment of the *Family and Child Services Act* enacted by the Social Credit government in 1980.

In Ontario, two scathing reports in 1976 and 1977 on the disorganized, erratically funded, and ineffective regime of children's services prompted the formation of the Children's Services Division with the mandate to improve the delivery of services in a cost-effective manner.

The government stipulated that no increase in spending and no change in the mix of private and public services would be acceptable.¹¹⁵ These restraints precluded an institutional approach.¹¹⁶ Instead the recommended reforms were administrative in nature, urging integration of services in one ministry, standardization and guidelines for service providers, better communication and monitoring, and reconfiguring existing funding.¹¹⁷

Ontario rendered its reform agenda into positive law in two stages. An interim statute, *The Child Welfare Act*, was enacted in 1978. As in the 1980 British Columbia statute, it gave a central role, for the first time, to the doctrinal test of the "best interests of the child" in structuring judicial discretion.¹¹⁸ However, unlike the British Columbia version, Ontario's statute provided interpretive guidelines with respect to the meaning of the

¹¹⁴ See generally, "British Columbia," *supra* note 69.

¹¹⁵ Hurl, *supra* note 19 at 399.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Child Welfare Act, 1978, supra* note 75, s. 30.

“best interests” test that gave specific emphasis to “least detrimental alternative” values such as continuity and the integrity of parent-child relationships.¹¹⁹ In 1984 a more comprehensive statute, the *Child and Family Services Act*, was enacted that articulated in lengthy and detailed introductory sections the purposes of child welfare law.¹²⁰ These subsections repeated the commitments to continuity¹²¹ and family integrity¹²² and explicitly used the language of the “least restrictive or disruptive course of action.”¹²³ In addition to giving a firm “family support” content to the “best interests” test, the statute tightened the definition of “children in need of protection,” discarding the word “neglect” altogether and imposing a high threshold for apprehensions that are motivated by ill-defined concerns about psychological and emotional harms. Specific directives indicating respect for cultural and religious difference as well as Aboriginal concerns for autonomy and the continuity of cultural and social traditions gave the statute’s family support theme an explicitly pluralist tone.¹²⁴ However, the principles articulated were too vague to cause disagreement or to provide guidance, and the scheme failed to place a “specific duty on the state or its agencies to promote the interests and welfare of children,” instead adhering to a negative stance regarding familial and children’s interests.¹²⁵

With well-resourced preventive and support programs, the precisely worded constraints on apprehension and committal to state care in the 1984 Ontario statute might have functioned as a safety mechanism in a regime designed to ensure children’s well-being in concrete material terms within their families and their cultural communities. However, as the experience of the 1990s made clear, *without* material support for the principles of community and family integrity, these radically reformulated regimes operated in much the same way as the residual models of the earliest period of Canadian welfare history. The new legislation was, in its essential attributes, residual in style, envisioning fewer mandated services, privatized delivery of whatever services were contemplated, and a deployment of such

¹¹⁹ *Ibid.*, s. 1(b).

¹²⁰ *Child and Family Service Act*, *supra* note 75.

¹²¹ *Ibid.*, s. 1(i).

¹²² *Ibid.*, s. 1(b).

¹²³ *Ibid.*, s. 1(c).

¹²⁴ *Ibid.*, ss. 1(e), (f).

¹²⁵ N. Bala, “The Children’s Act: A Consultation Paper – Child Welfare Reform in Ontario” 1983 4 C.J.F.L. 233 at 236 [hereinafter “The Children’s Act”], commenting on the reform proposals leading up to the 1984 legislation. See also, Hurl, *supra* note 19 at 402.

services only *after* a family is found to be at risk.¹²⁶ Nicholas Bala wrote with respect to the theme of seeking “the least disruptive ... course of action” that characterized studies leading up to the enactment of the 1984 statute: “Perhaps it is not too cynical to note that intervention is expensive and some of the concern about ‘overintervention’ may be viewed as a disguised attempt to reduce government expenditures on child welfare.”¹²⁷

C. *State Intervention or Non-Intervention?: Catholic Children’s Aid v. C.M.*¹²⁸

As mentioned earlier, the Supreme Court of Canada in *C.M.* characterized the 1984 Ontario statute as the most non-interventionist of the new wave of Canadian child welfare laws, pointing to the legalistic and detailed constraints on social worker and judicial discretion and the theme of respect for families. In formal terms, the British Columbia statute in force at the time—the *Family and Child Services Act*—might very well represent the other end of the spectrum, namely the harshly interventionist model with its conferring of large unstructured discretion on social workers and judges, thinly veiled moralistic tone, and heavy reliance on child removal. A closer look at *C.M.* illustrates, again, how the intervention/non intervention framework can easily mislead.

The case concerned C.M., a woman who came to Canada from Portugal at the age of twenty and worked in a number of service and factory jobs before giving birth to her daughter, S.M., in 1986. Her history thereafter is beset with difficulties that brought child welfare authorities into C.M.’s life shortly after S.M.’s birth.¹²⁹ Ultimately, after legal proceedings that stretched over five years, the Supreme Court of Canada upheld an order making S.M. a Crown ward for the purposes of adoption.

The reasons for the Court by Justice L’Heureux-Dubé are, in part, about the importance of “intervening” in light of the paramountcy of the “best interests” principle and notwithstanding the “family support” theme

¹²⁶ Hurl, *ibid.* at 402–03.

¹²⁷ “The Children’s Act,” *supra* note 125 at 239. Note that this commentator has flipped the meaning of intervention to mean support rather than repression, illustrating how easily the language of state intervention sustains contradictory meanings.

¹²⁸ *C.M.*, *supra* note 90.

¹²⁹ Immigration authorities forced S.M.’s father to leave a year after her birth. S.M. was either in care or under supervision by child welfare from the time she was a month old. C.M. was hospitalized for a period after rushing into a bank with S.M. screaming that someone was trying to kill her. *Supra* note 136 at 321–22.

of the statute.¹³⁰ However, it is possible to argue that the non-interventionist slant in the Ontario regime is contained not in its commitment to family autonomy and continuity of parent-child relationships but in its failure to provide supports for families struggling with systemically rooted issues of need and discrimination. The failure to provide social supports is compounded by the specific barriers of intertwined racism and sexism faced by immigrant women in C.M.'s situation. Overall, the significance of the formal legal differences between the Ontario and British Columbia regimes at the time of the case is effectively erased, especially for women who are poor and who are subject to the disadvantaging effects of multi-faceted systemic inequalities.¹³¹ Rather than seeing the result in C.M. as the interventionist exception that proves the non-interventionist rule, I suggest it can be characterized, as the enforcement of a fundamentally non-interventionist, i.e., non-supportive, stance through the most severe of remedial options under the statute, permanent removal of a child.¹³²

D. *The 1990s: Backlash Against Neglectful Families and the Return to an Earlier Model of Residualism*

The obfuscation of the nature of state/family relations by the terminology of intervention/non-intervention was given an even greater boost by the most recent chapter in child welfare reform. The cumulative effect of many years of cutting back support services, staff, and resources resulted in the 1990s in unwieldy caseloads for service providers and the channeling of scarce resources into managing and monitoring caseloads instead of directly assisting and supporting parenting work. Highly publicized cases of mismanaged files in which children at risk were subject to appalling neglect and abuse while being monitored by child welfare

¹³⁰ *Ibid.* at 336.

¹³¹ C. Sheppard, "Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*" (1995) 12 C.J.F.L. 283 at 322–28.

¹³² Elaine Freedman has written about instances in which courts have flipped the meaning of "intervention" in the way that I suggest, i.e., to mean an entitlement to support rather than the application of the state's coercive powers in the form of child removal. For example, she describes one case in which a judge was deeply critical of child welfare authorities who offered no services before apprehension, relenting only at the insistence of the mother's lawyer two years later. The judge ordered the child be returned and services provided. E. Freedman, "Parents' Rights and the Best Interests of Children Under the Child and Family Services Act" (1994) 11 Can. Fam. L.Q. 215 at 238, citing *C.A.S. of Hamilton-Wentworth v. M. (M.)* [1992] W.D.F.L. 1158 (Ont. U. Fam. Ct.).

authorities fueled calls in the 1990s for child-welfare reform in almost every province in Canada.

British Columbia's experience illustrates the collision of several contradictory notions of the meaning and purpose of child welfare with drastic consequences for the social workers, families, and children involved. Here, the turn to the "least detrimental alternative" model of legal regulation came much later than in other provinces. The Social Credit's 1980 statute was finally replaced by the NDP government in 1994 by the *Child, Family, and Community Service Act*.¹³³ The new statute resembled Ontario's mid-1980s reform in its basic features, namely highly legalized, precise, and restrictive criteria to structure social worker and judicial discretion¹³⁴ combined with the language of family autonomy¹³⁵ and least disruption,¹³⁶ more attention to cultural and religious pluralism,¹³⁷ and qualified recognition of Aboriginal concerns about cultural continuity and community survival.¹³⁸ Unlike the Ontario reform, the British Columbia statute contained firmer commitments to material support for families in distress.¹³⁹ However, as in Ontario, the enactment of the statute was accompanied by an administrative reorganization aimed at efficiency through centralization and better communication and monitoring rather than a rethinking of child welfare objectives.¹⁴⁰ Furthermore, its introduction to the legislature was temporarily derailed by a public scandal that typifies events in other provinces.

The furor arose over the death of a child, Matthew Vaudreuil, while under supervision of the Ministry. Judge Thomas J. Gove was appointed to conduct an inquiry into the matter. He demanded and obtained a suspension of the legislative process while he completed a report that

¹³³ *Supra* note 75.

¹³⁴ *Ibid.*, ss. 13, 35–36, 41, 49.

¹³⁵ *Ibid.*, s. 2(b).

¹³⁶ *Ibid.*, ss. 4(1)(c), 30(1)(b), 33(1)(d).

¹³⁷ *Ibid.*, ss. 3(c), 4(e).

¹³⁸ *Ibid.*, ss. 1, 2(f), 3(b), 34(3)(d), 39(1)(c), 49(2)(c–d).

¹³⁹ *Ibid.*, ss. 5, 6(4)(a). These provisions are phrased in terms of an obligation on service providers to consider offering support services. However, under Part 4 of the *Act* dealing with the rights of children in care, an affirmative right to food, clothing and nurture is asserted. *Ibid.*, s. 70(1).

¹⁴⁰ In 1996, responsibility for child welfare services was moved from the Ministry of Social Services to a newly created Ministry for Children and Families. The new Ministry brought together programs directed at families and children that had previously been located in five different ministries. Hall, *supra* note 12 at 138–39.

castigated the family-centred approach of the proposed legislation, linking it to Matthew Vaudreuil's death.¹⁴¹ When the legislation was finally enacted in 1996, it contained Judge Gove's recommendations with regard to making child safety paramount, suspending provisions that would give families whose children were under the care of the Ministry greater participation in developing plans for those children, and introducing a service delivery approach that shifted social workers' role more in the direction of law enforcement and away from family support.¹⁴² Judge Gove's recommendations for administrative reform were also followed up, including the creation of a Children's Commissioner.¹⁴³ Although the Commissioner's statutory mandate is fairly broad, the obligation to inquire into children's deaths remains its most highly publicized function.¹⁴⁴

In 1997, yet another shocking child abuse situation hit the press. Mavis Flanders had been under supervision by the Ministry. Her two-year-old child was found clinging to her body six days after she had died from a drug overdose.¹⁴⁵ A report by the Children's Commissioner pointed out that the mother, contrary to the Minister's assurances to the legislature, had *not* received services to treat her addiction from the Ministry.¹⁴⁶ Cutbacks to support programs, overloaded social workers, and the general lack of resources was identified in the media as key factors contributing to the tragedy.¹⁴⁷ In particular, it was pointed out that Flanders, as an Aboriginal

¹⁴¹ British Columbia, *Report of the Gove Inquiry in Child Protection*, vol. 2, (Victoria: Ministry of Social Services, 1995) at 207–08, 243–47 [hereinafter “Gove”]. See also, Hall, *supra* note 12 at 135–41.

¹⁴² Gove, *ibid.*, vol. 3, recommendation 68 at 68; and recommendations 70 at 85. Hall comments that the report also sparked a revision of the child protection worker's role as a “highly trained ‘specialist,’ aided by the police...” and observes that the connection with the police may serve to justify the “kind of judgmental, authoritarian, and coercive behaviour towards strangers that would be intolerable in the private citizen.” Hall, *ibid.* at 141.

¹⁴³ Gove, *ibid.*, vol. 3, recommendations 49–50 at 61; *Children's Commission Act*, S.B.C. 1997, c. 11. Hall, *ibid.* at 141–43.

¹⁴⁴ Hall, *ibid.*

¹⁴⁵ “Tot Tried Waking His Dead Mother” *The Toronto Star* (29 March 1997) A11; and “Tot Trapped Week With Dead Mom” *The [Toronto] Sun* (29 March 1997) 31.

¹⁴⁶ “A Reality Check” *The [Vancouver] Sun* (5 July 1997) A22. The Commissioner made it clear that the Minister, Penny Priddy, was not misleading the legislature but that she had not been kept well informed by her staff. *Ibid.*

¹⁴⁷ J. Hunter, “Workers Reject Blame for Addict Mom” *The [Vancouver] Sun* (5 July 1997) A1; J. Hunter, “Addict Was On Wait List for Rehab Program” *The [Vancouver] Sun* (8 July 1997) B1; and T. Barrett, “Chabasco's Legacy” *The [Vancouver] Sun* (12 July 1997) C1.

woman, was particularly vulnerable because of the lack of culturally sensitive services for off-reserve Aboriginal persons.¹⁴⁸

Meanwhile, social workers, caught in a double bind of depleted resources and public demands for better supervision of cases, began to resort to “preventive” child removal. Between 1995 and 1998, the number of children in care in British Columbia rose from 6,000 to 10,000.¹⁴⁹ When more than seventy-one children, roughly one third of them Aboriginal, were apprehended in Quesnel over the short space of two and one-half months at the end of 1997, the uproar in the community resulted in a review by the Children’s Commissioner.¹⁵⁰ Without waiting for the results of the review, the NDP government admitted that workloads for its child protection workers were too high.¹⁵¹ Although the Commissioner’s report on Quesnel did not address the case load issue, it did point to a number of resource-related deficiencies in the Quesnel office including inadequate monitoring of children at risk, the absence of protocols for First Nations, and a lack of support for families at risk.¹⁵²

The Ontario experience in the 1990s may foreshadow reforms to come in other parts of Canada. Public scandals about mismanaged cases of preventable child abuse and neglect were followed by public inquiries and reports.¹⁵³ Ontario, like British Columbia, also experienced a steep rise in the numbers of children in care during this period.¹⁵⁴ Much of the press coverage identified funding cuts to staff and to preventive programs as a

¹⁴⁸ P. McMartin, “While a Scapegoat is Sought in the Flanders Case, Women Continue to Die” *The [Vancouver] Sun* (7 July 1997) B1.

¹⁴⁹ K. Pemberton, “B.C. to Give Troubled Teens Money to Live on Their Own” *The [Vancouver] Sun* (28 July 1999) A1 [hereinafter “Troubled Teens”].

¹⁵⁰ B. McClintock, “Morton Launches Quesnel Probe” *The [Vancouver] Province* (5 April 1998) A7; and D. Rinehart, “More Social Workers Sent to Quesnel,” *The [Vancouver] Sun* (10 February 1998). The Minister admitted that the proportion of Aboriginal children was “unconscionably high” but in line with the ratio across the Province and thus part of a broader issue. Rinehart, *ibid.*

¹⁵¹ B. McLintock & K. Tait, “Child-Protection Push On” *The [Vancouver] Province* (21 April 1998) A14.

¹⁵² K. Pemberton, “Quesnel Child Removals Justified” *The [Vancouver] Sun* (10 June 1998) A3.

¹⁵³ C. Mallan, “New Plan in Place to Spot Kids at Risk” *The [Toronto] Star* (3 July 1997) A1. Mallan’s article points to a report of the Ontario Child Mortality Task Force and the “inquests into the deaths of Shanay Johnson, the twenty-one month-old toddler beaten to death in 1993 by her crack-cocaine-addicted mother, and Kasandra Shepherd, a three year-old beaten to death by her stepmother in 1991” as the impetus for calls to reform Ontario’s child welfare system. *Ibid.*

¹⁵⁴ J. Wells, “Life in Limbo” *Elm Street* 4:5 (April 2000) 92-100. Wells reports that between 1995 and 1999 the number of children in care in Ontario increased by 35 per cent. *Ibid.* at 95.

key factor in what was characterized as a “child-protection crisis.”¹⁵⁵ Some included cuts to the broader array of government supports to indigent families in describing the social and economic underpinning of the crisis with respect to children.¹⁵⁶ In a furor over the slashing of a program aimed at “helping families keep the kids off the street, out of care, and living at home,” the Ministry of Community and Social Services confirmed that Children’s Aid Societies had been directed to spend money “largely on protecting children who were already in the care of child welfare agencies, or in need of imminent care, and not for programs that prevent children from being taken into care.”¹⁵⁷ However, the legal framework contained in the *Child and Family Services Act* 1984, in particular its “non-interventionist” approach so touted in the Supreme Court of Canada’s decision in *C.M.*, also came in for persistent criticism.¹⁵⁸

In 1998, the near-death of baby McCutcheon, a toddler whose extreme malnourishment and chronic illness failed to attract the attention of child-care workers despite a record of forty-eight visits, was blamed on the legislative posture of support for family autonomy and the lack of any provision for protection from neglect, short of extreme danger.¹⁵⁹ Other more contextual factors in the McCutcheon case—that the family was barely subsisting on the mother’s monthly disability cheque, that the mother

¹⁵⁵ See, for example, D. Rogers, “CAS crisis prompts hiring spree” *The [Ottawa] Citizen* (24 June 1998) E17; E. Tait, “We Could do Better” *The [Hamilton] Spectator* (20 July 1998) N1; T. Blackwell, “Province Plans to Study Child Neglect and Abuse,” *The [Hamilton] Spectator* (22 August 1997) D3, pointing out that the Harris Conservative government has cut Children’s Aid Society budgets by \$17 million a year; and M. Bohuslawsky, “Kasonde Inquest Resumes” *The [Ottawa] Citizen* (26 May 1997) D1. Bohuslawsky identified, among other factors underlying the 1995 murder of two children by their father, a budget cut to the Children’s Aid Society of close to \$4 million with a concomitant 23-per-cent increase in new and re-opened cases. *Ibid.* See also, D. Wood & G. Crone, “No New Money for Child Welfare, Policy Expert Says” *The [Hamilton] Spectator* (4 July 1997) B3 [hereinafter “No Money”], citing expert testimony to the effect that, because of the lack of funding, “over the past few years, Children’s Aid Societies have begun focusing only on cases they legally must take where children are in need of protection.” *Ibid.*

¹⁵⁶ See, for example, C. Blatchford, “CAS Disconnected from Ugly Reality” *The [Toronto] Sun* (17 April 1997) 5; and J. Lahey, “Workfare Parents Face Day-Care Squeeze” *The [Toronto] Star* (23 February 1998) B1.

¹⁵⁷ R. Harvey, “Program to Stop Runaways: Chopped Children’s Aid Blames Provincial Changes in Welfare Funding” *The [Toronto] Star* (8 April 1999) B3.

¹⁵⁸ See, for example, “No Money,” *supra* note 164; D. Wood, “Many Turned a Deaf Ear to Alarm Bells” *The [Hamilton] Spectator* (12 July 1997) A13, citing concern by experts that the Ontario legislation did not protect against child neglect; and D. A. Freed, “Stiffer Laws Urged as Shanay’s Legacy” *The [Toronto] Star* (10 May 1997) A1.

¹⁵⁹ P. Orwen, “The Sorry Scandal of Baby M” *The [Toronto] Star* (25 October 1998) B1.

was afraid of letting workers know there was no food in the house, that “family support” took the form of written pamphlets despite the fact that the mother’s mental disabilities rendered her unable to read them—were minimized, and, instead, blame was pinned on the law itself by the Children’s Aid Society.¹⁶⁰ After commissioning a report that recommended substantially broadening the legal basis for apprehending children,¹⁶¹ the Harris Conservative government began the process in 1998 of amending the legislation to correct what was identified by politicians and the press as the misguided legislative direction to social workers to preserve the family unit and to seek alternatives to removal of children. The new amendments had broad support across the political spectrum¹⁶² and were proclaimed on 31 March 2000.¹⁶³

The shift in approach represented by the new legislation in Ontario is signaled by the opening declaration of principles that gives the “best interests, protection and well-being of children” a clear position of superiority with respect to the other enumerated principles.¹⁶⁴ In addition, the revised declaration stipulates that the “least disruptive course of action” need now only be “considered” rather than “followed.”¹⁶⁵ Perhaps the most important feature of the changes, however, is the reintroduction of broader more discretionary grounds for finding a child in need of protection, including the vague ground of “neglect.” Specifically, the statutory regime can now be triggered by a finding that harm to a child has resulted from a “pattern of neglect” in the care, supervision, provision for or protection of

¹⁶⁰ Orwen, *ibid.*

¹⁶¹ Ontario, *Protecting Vulnerable Children: Report of the Panel of Experts on Child Protection* (Toronto: 1998) (Chair: Justice M.J. Hatton). For a discussion of the *Report*, see N. Bala, “Reforming Ontario’s *Child and Family Services Act*: Is the Pendulum Swinging Back Too Far?” (1999) 17 C.F.L.Q. 121 at 140–45 [hereinafter “Pendulum”]. Bala points out that the panel, chaired by Justice Mary Jane Hatton, did not hold public hearings and favoured a more “interventionist” stance than Justice Gove’s report in B.C. *ibid.*

¹⁶² T. Blackwell, “Opposition Agrees to Rapid Enactment of Child-Welfare Bill” *National Post* [Toronto Edition] (27 April 1999) B2. Nicholas Bala described the legislative support for the bill amending the *Child and Family Services Act* as a “virtually unprecedented display of unanimity.” “Pendulum,” *ibid.* at 121.

¹⁶³ *Child and Family Services Amendment Act* (Child Welfare Reform), 1999, S.O. 1999 c.2, Proclamation, proclaimed in force 31 March 2000, O. Gaz. 2000. 451.

¹⁶⁴ *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 1, as am. by *Child and Family Services Amendment Act* (Child Welfare Reform), 1999, S.O. 1999, c.2, s. 1. The previous s. 1 declaration of principles was ambiguous with respect to the relation among the principles, arguably presenting them as on a par with each other.

¹⁶⁵ *Ibid.*

a child by the person in charge.¹⁶⁶ Furthermore, the “emotional harm” provisions now extend to “serious” rather than, as formerly, “severe” behavioural indicators and “delayed development” has been added to the list of indicators.¹⁶⁷ Finally, a court need only find a “risk” rather than a “substantial risk,” as set out in the previous regime, of these and the other harms set out in the definition of a child in need of protection.¹⁶⁸ The lower threshold contained in these provisions for the application of an array of statutory remedies transforms the Ontario regime from what the *C.(M)*. Court described as the “least interventionist” model in Canada to a model that more closely resembles the residual models of an earlier era. Finally, the amendments have cut back the opportunities for parents of children in care to regain custody of their children or, alternatively, maintain their relationships with those children.¹⁶⁹

Recently, the turn toward responses that rely on the justice system and law enforcement models rather than material support and preventive programs, has taken the extreme form of calls for the criminalization of parental neglect, bringing the trajectory of reform back to its initial starting point at the end of the nineteenth century.¹⁷⁰ In November 1999, the federal Justice department issued a report setting out proposals to criminalize emotional abuse of children and child neglect, as well as failure to report suspicions of child abuse or neglect.¹⁷¹

In summary then, the philosophy of “least detrimental alternative” and permanency planning that began to gain support in the 1960s and 1970s was always susceptible to a reading that emphasized the essentially classical liberal values of family privacy and negative liberty. However, in the context of greater acceptance for more textured and positive notions of autonomy as well as social democratic conceptions of the welfare function of the state,

¹⁶⁶ *Ibid.*, s. 37(2)(a), as am. by S.O. 1999, c. 2, s. 9(1).

¹⁶⁷ *Ibid.*, s. 37(2)(f), as am. by S.O. 1999, c. 2, s. 9(4).

¹⁶⁸ *Ibid.*, s. 37(2)(b), as am. by S.O. 1999, c. 2, s. 9(2); s. 37(2)(d), as am. by S.O. 1999, c. 2, s. 9(3); and s. 37(2)(g), as am. by S.O. 1999, c. 2, s. 9(4).

¹⁶⁹ *Ibid.*, s. 29(6), as am. by S.O. 1999 c. 2, s. 8(2); s. 70(1–2), as am. by S.O. 1999, c.2, s. 21(1); and s. 59(2–3), as am. by S.O. 1999, c. 2, s. 16. See also, “Pendulum,” *supra* note 170 at 152–58.

¹⁷⁰ See, for example, C. Phillips & G. Galloway, “Police Say Boy Murdered” *The [Hamilton] Spectator* (4 October 1997) A1; and “Judge Questions the Role of Child-Care Workers” *The [Toronto] Star* (3 July 1998) B8.

¹⁷¹ Canada, Department of Justice, *Child Victims and the Criminal Justice System* (Consultation Paper), online: <<http://www.canada.justice.gc.ca/en/cons/child/toc.html>> (last modified: 29 November 1999). See also, E. Cherney, “Ottawa looks at Criminalizing Emotional Abuse of Children” *National Post* [All But Toronto Edition] (27 November 1999) A1.

the family-centred social work philosophy in its original manifestation facilitated a more collective understanding of public responsibility for the material and social well-being of children and their families. This occurred despite the expansion of privatized rather than public modes of service delivery. Social-welfare programs during this period were criticized for entrenching a gendered, heterosexist, and racialized notion of the citizen that presumed and enforced the privatization of familial work such as parenting, and its relegation, for the most part, to the sphere of unpaid or underpaid work. Nevertheless, the ideal of a more textured and embodied citizen opened up space for an anti-racist, engendered, anti-heterosexist, and particularized politics of liberal citizenship.¹⁷²

Retrenchment to a neo-liberal political order, beginning in the 1970s and consolidating in the next two decades, turned the social democratic ideal on its head. Privatization became a means of reducing public responsibility for need and of replacing redistributive and social equity priorities with cost-effectiveness, monitoring, and financial accountability priorities. Family support became family privacy. The least intrusion or disruption was easily translated into the negative right to be left alone and permanency planning came under fire by critics as a transparent method to cut costs, often meaning that children were left alone within their original families or within court-sanctioned substitute families.¹⁷³ The key indicators of this distinction between two radically different interpretations of child welfare law and practice are not easily visible. The formal language of the legal regimes is often highly misleading. Instead, the political and constitutional character of child welfare is buried in provincial budgets, in regulations setting out the criteria for access to social programs, and in the terms of contracts between ministries and privately operated service providers.

¹⁷² I.M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 81–91. Young describes a dialectic in which insurgent groups seek democratization and empowerment at the local level while the institutions of welfare capitalism seek to depoliticize such demands by reabsorbing them into the distributive apparatus of the welfare state. Welfare provision under capitalism, on her account, both supports and stifles the formation of social movements that pursue an ideal of justice incorporating both collective responsibility for material needs and substantive democracy. *Ibid.*

¹⁷³ Chisholm, *supra* note 63 at 211–212.

IV. REREADING *G.(J.)*: EMPIRE OF THE LONE MOTHER OR PRIVATIZED MOTHER-PROTECTION

It is at this point that *G.(J.)* enters the debate on the nature of child welfare law. The case constitutionalizes a set of understandings about the nature of state-family relations. However, in doing so it employs the open-ended flexible vocabulary of rights discourse, a vocabulary that is subject to multiple and often contradictory readings. Placing *G.(J.)* against the backdrop of the historical complexities of child welfare law brings into focus some of the political currents that have, in the past as well as in the current moment, freighted the empty language of parental sovereignty and familial and individual privacy with particular meanings. In this section, I will map some of those interpretations and resonances.

In *G.(J.)* the Supreme Court of Canada accepted the applicant's argument that section 7 protects parental rights and that, as an offshoot of that protection, fundamental justice requires, at least in some circumstances, the provision of publicly funded legal counsel in child apprehension proceedings. Thus, remarkably, the case appears to depart from the trend to delineate rights in narrow cautious terms as well as from the growing judicial tendency to give the seal of constitutional approval to the privatized and individualized character of responsibility for well-being while withholding approval from a commitment to the public character of social responsibility. A closer reading of both parts of the analysis—the parental rights analysis and the fundamental justice analysis—yields a less optimistic story.

A. *Parental Rights: the Empire of the Lone Mother Protectors*

The majority reasons by Chief Justice Lamer locate *G.(J.)*'s rights under the rubric of security of the person, specifically the right to psychological integrity. Doing so enables Chief Justice Lamer to leave intact his own repeated statements that section 7 liberty should be confined to a right of non-detention.¹⁷⁴ Liberty rights, however, are lurking quite visibly beneath the surface of Chief Justice Lamer's reasons. The "serious

¹⁷⁴ The Court returned to the issue of the scope of the liberty interest in *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307 [hereinafter *Blencoe*], albeit in *dicta* and with a slim majority of five out of nine judges. Here, the majority reasons asserted that section 7 liberty extends beyond Chief Justice Lamer's notion of freedom from physical restraint to protect a broader notion of individual autonomy and freedom to make decisions of fundamental personal importance without state interference. *Ibid.* at 340, per Justice Bastarache. The other four judges in *Blencoe* disagreed with the characterization of the issue in the case as a *Charter* issue. *Ibid.* at 383, per Justice LeBel, dissenting in part.

and profound effect” on G.(J.)’s psychological integrity, in Chief Justice Lamer’s account, arises from the “gross intrusion into a private and intimate sphere” as well as the stigma associated with being found an unfit parent in child protection proceedings.¹⁷⁵ The concerns about reputation and a negative notion of familial privacy are rooted in classical liberalism’s vision of individual liberty. Thus, the interference with G.(J.)’s security of the person upon which the analysis hinges consists, in essence, of the stresses resulting from an interference with what would ordinarily be called her liberty rights. Thus, by casting section 7 firmly in the classical liberal mold wherein rights protect solitary and free individuals by reining in a harshly repressive state, Chief Justice Lamer solidifies the doctrinal barriers to using section 7 more broadly to secure a constitutional foundation for public responsibility for benefit provision.¹⁷⁶ This is the first sign that G.(J.)’s seemingly remarkable conclusion that there is a free-standing entitlement under section 7 to publicly funded legal aid may be more illusory than real.

The emergence of the classical language of liberty in this context also evokes a strong and recurrent ideological theme in the state ordering of child welfare. Chief Justice Lamer’s respect for G.(J.)’s sovereignty as an autonomous individual both challenges and affirms the ideology of classical liberalism and its subtext on the traditional family that has underpinned the approach to child welfare in Canada since the first statute. Importantly, respect for G.(J.)’s liberty disrupts the heavily gendered trope of traditional and historical constructions of parental rights in terms of the “empire of the father.” As noted earlier, the first child welfare statutes redrew the line between public supervision and the private authority of parents while at the same time enforcing a specific notion of family relations in terms of paternal authority over naturally subordinate children and over the caregiving work of wives and mothers. The sight of G.(J.) “cross dressing” in the classical liberal language of respect for parental/paternal authority represents a liberating and transgressive moment in legal discourse. However, recall that the reconfiguration of public and private responsibility in these first statutes took the form of state enforcement “of needed care through the medium of the family” rather than state support for the labour

¹⁷⁵ G.(J.), *supra* note 2 at 77–78.

¹⁷⁶ W.A. Schabas comments that “most judges remain very conservative on this issue” of whether social and economic rights inhere in section 7 of the *Charter*. “Freedom from Want: How Can We Make Indivisibility More Than a Mere Slogan?” (2000) 11 N.J.C.L. 189 at 207.

of caring.¹⁷⁷ In doing so, these early legal regimes operated to instill in marginalized families a notion of family relations that was not only gendered but also shaped by the experiences of white middle-class urban Canadians. Thus, although the majority decision in *G. (J.)* rejects, at least on a formal level, the gendered dimension of the “empire” trope, the construction of parental rights in terms of negative privacy and reputational interests leaves intact its class and, to some extent, its racial and cultural subtext.

In contrast, Justice L’Heureux-Dubé’s concurring reasons demonstrate that it is possible to read section 7 in a way that acknowledges the particularities and materialities of barriers to enjoying the personhood signified by section 7. Justice L’Heureux-Dubé insists on a reading of section 7 that is informed by and consistent with *Charter* principles of substantive equality,¹⁷⁸ directly linking child welfare to the feminization of poverty and to issues that concern “members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled.”¹⁷⁹ She refuses to subsume crucial aspects of *G. (J.)*’s situation—her status as a single mother and her indigence—to an abstract narrative about sovereign individuals, reputational privacy, and negative liberty.¹⁸⁰ It is possible to view the differences between the two judgements not simply as two different readings of section 7 but also as two different accounts of the political character of child welfare law. Chief Justice Lamer’s judgement presents as inevitable the residual model of child welfare law with its starkly drawn state intervention schematic and its naturalization of the privatized character of child rearing work. Justice L’Heureux-Dubé’s judgement centres the social and political impacts of the residual model and problematizes gendered assumptions about private and public responsibility for children’s well-being.¹⁸¹

¹⁷⁷ “Contradictions,” *supra* note 23 at 238.

¹⁷⁸ *G. (J.)*, *supra* note 2 at 99.

¹⁷⁹ *Ibid.* at 100.

¹⁸⁰ *Ibid.* at 99.

¹⁸¹ Somewhat the same split regarding the nature of the protected parental interest occurs in *Winnipeg Child and Family Services v. K.L.W.*, *supra* note 3, only here the characterization of the interest in terms of privacy and reputational interests is invoked by Justice Arbour in dissent. *ibid.*, at 532–33. Justice L’Heureux-Dubé adheres to her more socially textured account in a majority set of reasons. *Ibid.*, at 562–64. Interestingly, both judges attempt to grapple with the current context of shifting legislative approaches and widespread social concern about the failure of child protection regimes to adequately protect children. For Justice Arbour, dissenting in *Winnipeg v. K.L.W.*, *ibid.*, the shift back to a law enforcement model accentuates the need to rigorously protect a sphere of negative freedom

However, even Justice L'Heureux-Dubé's articulation of the substantive equality dimension of G.(J.)'s claim functions only to give a more textured account of G.(J.)'s liberty and security concerns without actually challenging the current alignment of public and private responsibility for children's welfare by entitling her to material support. Thus, although on a formal level, equal liberty is accorded to both mothers and fathers, the anchoring of both Chief Justice Lamer and Justice L'Heureux-Dubé's accounts in the private/public vision of the liberal political order not only reinscribes the class and racial dimensions of the ordering of childrearing work but its gendered dimension as well. The specific nature of the substantive and material costs to G.(J.) and to other women in her situation are laid out in the wider record of G.(J.)'s legal struggles. Not only did G.(J.) fail to win back custody of her children, even with the help of *pro bono* legal representation,¹⁸² but also the terms of her defeat appear to entrench what one commentator, Julia Krane, has described as a regime of enforced mother protection.¹⁸³

Both Karen Swift and Julia Krane have written of the ways in which child welfare practice, particularly in recent years, is directed increasingly at providing "various kinds of treatment programs aimed at the rehabilitation of inadequate mothers" rather than at support.¹⁸⁴ Indeed, the tension between correction and support inevitably shifts in the direction of correction as neo-liberal values and strategies become the norm. Krane's analysis is developed in the context of a study of state responses to sexual and physical abuse, an area in which one would expect mobilization of the fullest range of services. Krane postulates that under contemporary regimes informed by the principle of the "least disruptive alternative"

[p]rotection ... is a process that entails translation of the problem of *child sexual abuse* to one of *failure to protect*. Rewritten in this way, the problem is transformed from an offence

against "over-intervention." *Ibid.* at 535–37. For Justice L'Heureux-Dubé, writing the majority reasons, the resort to warrantless apprehensions in non-emergency situations must be viewed against the backdrop of increased awareness regarding the vulnerability of children to abuse within families. *Ibid.* at 563–64.

¹⁸² *G.(J.)*, *supra* note 2 at 59. G.(J.), however, did ultimately regain custody of her children on the expiry of the second temporary order. *Ibid.* at 59.

¹⁸³ J. Krane, "Least Disruptive and Intrusive Course of Action ... for Whom? Insights from Feminist Analysis of Practice in Cases of Child Sexual Abuse" in J. Pulkingham & G. Ternowetsky, eds. (Halifax: Fernwood Publishing, 1997).

¹⁸⁴ "Contradictions," *supra* note 23 at 245. See also, *ibid.* at 58–74.

committed predominantly by men to transgressions or acts of omission by women as wives, mothers and protectors.¹⁸⁵

Social workers, Krane argues, applying the dominant family dynamics model of sexual abuse, analyse child sexual abuse in terms of family dysfunction in which the failure of women to act effectively as protectors of their children from abusive male family members is the defining feature shaping state intervention. Krane's study of case worker notes revealed that mothers are typically presumed to have the knowledge and ability to recognize indicators of abuse in their children's behaviour as well as the power to intervene and protect their children from abuse.¹⁸⁶ Mothers are systematically urged to take on the ostensibly public mandate of protection by pledging to observe and report warning signs in the offender's behaviour and to provide or arrange for comprehensive supervision and shepherding of the victimized children.¹⁸⁷ Male non-offenders, most notably fathers, are rarely held to the same expectation. Despite the fact that most mothers, even those with small children, work outside the home, the expectation of "mother protection" presumes the workplace engagement of mothers to be secondary.¹⁸⁸ In addition, in cases in which the offender is the father, mothers are asked often to choose between having their children apprehended or separating from offenders who are a significant source of support for the family. Krane describes the consequences of this "voluntary" choice for the mothers involved as follows:

Some moved into public housing, others sought welfare. Some had to contend with finding accommodation, paying first and last month's rent, packing belongings and physically relocating while working full-time or caring for their children. Throughout this period they also had to attend support groups to deal with the abuse, arrange for their children to attend group meetings and appear in court.¹⁸⁹

The women in Krane's study present catalogues of the small but cumulatively significant changes to their daily routines involved in carrying the responsibility—described by one woman as a "ball and chain"—of

¹⁸⁵ Krane, *Ibid.* at 62.

¹⁸⁶ *Ibid.* at 64. Krane points out that this theme persists in case worker observations even though the literature indicates a wide variation in mothers' awareness of and reactions to abuse and, as well, a pattern in child sexual abuse "wherein the offender sets up the conditions for access, opportunity and privacy, induces or engages the child and imposes secrecy." *Ibid.*

¹⁸⁷ *Ibid.* at 65-66.

¹⁸⁸ *Ibid.* at 71.

¹⁸⁹ *Ibid.* at 67.

watching, observing, shepherding and protecting.”¹⁹⁰ Although G.(J.)’s situation involves issues of neglect rather than abuse, the same dynamic of directing services to rehabilitate mothers and instill appropriate mothering practices rather than to support mothering work is evident in the characterization of G.(J.) relied upon by the lower courts in denying her challenge to the state’s removal of her two children. The portrait of G.(J.) that emerges from these judgments is of a woman whose life is beset with crises and instability. The judicial record notes that she has moved several times, had several partners, and placed her children in and out of care.¹⁹¹ Particularly crucial to the continued removal of her children from her custody, however, is a psychologist’s assessment that “... [s]he takes no sense of personal responsibility for having mismanaged any of the child-raising situations.”¹⁹² Indeed, it is repeatedly observed that she tends to attribute her troubles to others rather than herself. Her overestimation of her own capacities is described as bordering on a “clinical elevation in a scale entitled Grandiosity.”¹⁹³ One witness provides a pointed and poignant example of this behaviour, to the effect that:

While J. has been willing to receive helpers sent by the Department to assist with her household, her interpretation of their duties was quite removed from their actual purpose. She insisted that “No one has said that there is anything wrong with my parenting skills,” and perceived helpers to be there to look after the children, or possibly do a bit of housework.¹⁹⁴

Thus, G.(J.), when presented with corrective and instructional services, demanded and expected support. The disjunction between G.(J.)’s idea of the purpose of social worker intervention and the actual regime governing intervention encapsulates the slippage between the two contradictory meanings of liberal respect for families, namely family support and family privacy. The slippage for G.(J.) is not simply a point of argument. It has devastating personal consequences, resulting almost inevitably in an assessment that attributes many of the negative aspects of her situation to her uncooperative personality. G.(J.) is also faulted for protesting about the meagreness of her weekly access to her children but then, during her access visits, grocery shopping while leaving her children

¹⁹⁰ *Ibid.* at 68.

¹⁹¹ *New Brunswick v. J.G.*, [1995] N.B.J. No. 3 (Q.B.) at para. 4, online (QL)(NBJ).

¹⁹² *Ibid.* at para. 6 quoting psychologist Barbara Gibson.

¹⁹³ *Ibid.* at paras. 6, 8.

¹⁹⁴ *Ibid.* at para. 8.

in the care of a babysitter.¹⁹⁵ Indeed, she is faulted for complaining about everyone and everything—about the counsellors sent to help her, the individuals sent to transport her kids, and the school officials and parent helpers. It is inappropriate to second-guess judicial assessments of fitness to parent but the general features of the record illustrate both Swift's and Krane's point that services are increasingly directed at rehabilitating and disciplining "mother-protectors" rather than supporting mothering work performed by women who, like G.(J.), are coping with economic and social disadvantage. In the end, G.(J.)'s irritating resistance and rejection of the rehabilitative regime seems to figure as importantly in the judicial denial of custody as her instability and the distress experienced by her children. Her most serious transgressions are aimed at resisting the enforcement of privatized responsibility for child rearing and at demanding support for and relief from her work rather than training in how to perform it more effectively.¹⁹⁶ She is inevitably found inadequate within a model that fails to comprehend that grocery shopping in a lone-mother household is an unavoidable and necessary component of parenting. Chief Justice Lamer's vindication of her rights to be left alone in the exercise of her parental sovereignty signifies liberal respect and dignity but in a cruelly ironic manner, given the material and structural features of her situation. At some point, G.(J.)'s delusions of grandiosity that fuel her stubborn resistance have to be weighed alongside judicial delusions of a mythic motherhood miraculously unaffected by poverty and systemically ordered inequalities.

In sum, the resonances with classical liberal ideology in the parental rights analysis in *G.(J.)* by themselves are not surprising, especially given the *Charter's* liberal lineage. However, those resonances translate, in material terms, in different ways in the differing contexts of a political order that subscribes, at least in part, to social democratic ideals and one which, increasingly, is committed to neo-liberal ideals. The glimpses of G.(J.)'s life, caught in the records of her many appearances before the courts, reflect back to us in painfully immediate terms the consequences of the reconfiguration currently underway. The residual model of child welfare associated with classical liberalism under which families bear primary responsibility for the costs of social reproduction has remained in place throughout Canadian history. However, its gendered, racial, and class impacts were, to some extent, moderated by the prevailing social work

¹⁹⁵ *Ibid.* at para. 30.

¹⁹⁶ In addition, she is faulted for encouraging her children to "reject socially accepted values, institutions and persons in authority." *Ibid.* at para. 28 quoting psychologist Barbara Gibson.

philosophy of family support and the more social democratic conception of public responsibility for need within the political sphere during the mid-century period. As discussed in the preceding part, in the current neo-liberal context, the slippage from family support to family privacy on a rhetorical level is reflected in structural and material terms in the slashing of welfare budgets, the turn to targeted programs, and the move to criminalize parental neglect and other behaviours rooted in socio-structural dependency and need. Against this backdrop, the parental sovereignty language in *G. (J.)* is not simply a predictable manifestation of the *Charter*'s liberal roots but a reflection and legitimation of larger political trends.

B. *Fundamental Justice and Public Responsibility*

The fundamental justice portion of the Supreme Court of Canada's analysis—affirming *G. (J.)*'s entitlement to legal aid—appears as a striking contrast, not only to the traditional account of rights in the parental rights portion, but also to the growing judicial support for privatized models of responsibility and for the privatizing strategies of current governments. A second reading, however, again disrupts this optimism.

First, the majority reasons by Chief Justice Lamer frame the entitlement to legal aid in deliberately restrictive terms. The triggering interest—psychological integrity with respect to one's parental relationship to one's children—is tied closely to concern about one's reputation as a parent rather than to one's parental identity or commitment.¹⁹⁷ The result is an exceedingly narrow ambit of protection that does not extend to the interference in parent-child relations stemming from imprisonment of a child or even negligent killing of a child by a state official.¹⁹⁸ Second, the Court does not mandate provision of legal aid in child apprehension proceedings, only the preservation of judicial discretion to award legal aid funding where circumstances warrant.¹⁹⁹ The discretion is structured by consideration of three factors drawn from appellate cases on legal aid entitlement in the penal context: 1. the complexity of the proceedings; 2. the seriousness of the interest at stake; and 3. the capacity of the applicant.²⁰⁰

¹⁹⁷ *G. (J.)*, *supra* note 2 at 78–9.

¹⁹⁸ *Ibid.* at 79.

¹⁹⁹ *Ibid.* at 93–4.

²⁰⁰ *Ibid.* at 83.

Again, the fuller record of G.(J.)'s legal struggles provides a glimpse of how this recipe for fundamental justice might operate when transplanted from the penal to the child apprehension context. In G.(J.)'s case, presumably with an eye to the appellate jurisprudence, her counsel led as evidence of G.(J.)'s incapacity to represent herself the very same psychologist's report that had disqualified her as a fit parent in the child apprehension proceedings.²⁰¹ In other words, G.(J.) was inevitably pressured into constructing herself as inadequate on the very terms which guaranteed the loss of her custodial rights.

Finally, the decision in *G.(J.)* is an example of the procedural dimension of justice trumping the substantive dimension. Judicial concerns about the unfairness of the process by which G.(J.)'s rights are infringed displace any consideration of the unfairness of a private market in legal services that is inherently exclusionary of socially and economically marginalized individuals. Indeed, a key factor in Chief Justice Lamer's conclusion that fundamental justice would have required the provision of legal aid in G.(J.)'s case was the calculation of how little it would cost New Brunswick to extend its benefit provision in the discretionary and carefully circumscribed manner set out in his reasons.²⁰² Thus, in many respects, Chief Justice Lamer's reasons are consistent with the judicial discourse of privatization.

However, while the decision in *G.(J.)* both echoes and lends legitimacy to larger political trends, I do not mean to suggest that a more generous response by the Supreme Court majority would have addressed the fundamental issue of collective responsibility for G.(J.)'s situation. So far, I have endeavoured to show how the rhetoric of state intervention in the sphere of political discourse, reinvigorated and partially revised by the neo-liberal privatization agenda, can easily mislead. It dresses up neo-liberal economic imperatives in the stirring language of individual human freedom in order to justify a radically diminished notion of the public sphere. In the context of child welfare regimes, the rhetoric of state intervention obscures the slippage between the family privacy and family

²⁰¹ *New Brunswick (Minister of Health and Social Services) v. J.G.*, [1997] N.B.J. No. 138 (C.A.) at paras. 80–81, online: QL (NB) per Justice Bastarache's dissenting reasons. At the Supreme Court, Justice L'Heureux-Dubé, in her concurring reasons, accepted the majority's analytic framework but tried to moderate its impact by directing that claimants for legal aid need only invoke the systemic dimension of personal attributes to demonstrate a lack of capacity. *G.(J.) v. New Brunswick*, *supra* note 2 at 105–06. It remains to be seen whether this is feasible, given strategic pressures and the difficulty of disentangling systemic and personal factors when making an argument about personal capacity.

²⁰² *Ibid.* at 92.

support interpretations of liberal autonomy and respect. However, my aim is not to simply transpose this thesis to the sphere of judicial discourse under the *Charter*. *G.(J.)*, with its majority and minority reasons neatly mapping over fundamentally different visions of the liberal political order, also illuminates the ideological and institutional limits of rights discourse and strategic litigation. In short, even a judge such as Justice L'Heureux-Dubé who is willing to expansively interpret the liberal legal frame of the *Charter* and of the courts' role under the Constitution, must ultimately work within the prevailing alignment of public and private responsibility as it has been drawn in the sphere of democratic deliberation. Legislative majorities working within the liberal democratic frame can significantly alter the meaning of state intervention and, in turn, of collective public responsibility for welfare; judicial majorities working within the bounds of the *Charter* face institutional constraints that—as critical scholars have often pointed out—are directly rooted in and thus more rigidly enforce the central features of the classical liberal story.²⁰³

The contextualization of *G.(J.)*'s claim exposes the structural underpinnings of the finding of parental neglect that led to the apprehension and removal of her children. However, within the case itself those details are not themselves challengeable. They fail to fit into the classical account of state intervention that structures *Charter* litigation. They do not constitute state actions that intrude upon *G.(J.)*'s parental sovereignty, given the actual mapping of the boundary of state responsibility by the New Brunswick legislature. Instead, at best, the contextualization of *G.(J.)*'s claim functions only to strengthen her entitlement to material support for legal costs in order to ensure that her children are removed in a procedurally fair manner. No doubt the Court could have been much more supportive in its delineation of *G.(J.)*'s entitlement to legal aid. As it was, the Court, despite the structural and ideological constraints on its powers, was arguably more generous than political decisionmakers operating outside the judicial realm. It is the latter, not judges, who are responsible for addressing the systemic dimension of the stresses faced by *G.(J.)* and others in her situation and for articulating the public and private meanings of their claims to liberal citizenship. Indeed, the bleakness of the neo-liberal account of those claims currently being offered in some Canadian legislatures provides a flattering backdrop

²⁰³ See, for example, J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Can. Bar Rev. 307.

for the courts. It gives judicial caution the flare of courage and the warmth of heartfelt sympathy.

V. CONCLUSION

G.(J.) provides the heroic narratives of one woman's victorious defiance and of the liberal dream that individual rights are the keystone of social justice and individual freedom. However, a closer reading of the case shows how these narratives intertwine with and echo—not always in positive ways—the tension between liberalism's fundamental commitment to a privatized model of responsibility for individual need and the systemic nature of need. The tension shapes the historical development of child welfare in Canada, and throughout this history, is intertwined inextricably with the theme of the gendered nature of our political order and of our concepts of citizenship. Whether one considers the abstract citizen of classical liberalism, the worker citizen of social democratic liberalism, or the taxpayer citizen of neo-liberalism, the recurrent construction of familial practices and relationships as essentially private and inhering in the sphere of natural preferences or individual choice belies any change in the experience of citizenship for many women, particularly those disadvantaged by poverty and by intersecting and substantive inequalities. Privatization of responsibility for the well-being of children ensures that the work of nurturing children performed mostly by women in families or in low-waged and often racialized sectors of the workforce remains invisible in judicial calculations of fundamental justice and the best interests of the child.²⁰⁴ More embodied notions of justice characteristic of the social democratic vision of the liberal order can moderate and soften the impact of residual models of welfare. However, as neo-liberal values and instrumental imperatives capture political momentum and mainstream support, the *Charter* language of section 7 parental rights is likely to reinforce rather than challenge the assumption that the moral and psychological failings of mothers in *G.(J.)*'s situation have primary, if not exclusive, relevance in any consideration of their children's distress and neglect. Nevertheless, it would be unfortunate not to recognize *G.(J.)*'s achievement. Her tenacity in pursuing her claim through multiple and often parallel legal proceedings and in persisting until the final decision by the Supreme Court of Canada, despite a dismal record of defeats at lower levels, is inspiring. She is indeed

²⁰⁴ With regard to paid domestic work, see A. Bakan & D.K. Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997).

an iconic figure. She represents the ambivalent character of strategic litigation under the *Charter* and the double-edged nature of the political vocabulary of individual rights. More fundamentally, she represents the challenge to rethink our political order with herself at the centre rather than the margins.