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# Child Citizenship and Agency as Shaped by Legal Obligations

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## Articles

### Child citizenship and agency as shaped by legal obligations

Angela Campbell, Marissa Carnevale, Suzanne Jackson, Franco Carnevale, Delphine Collin-Vézina and Mary Ellen Macdonald\*

*This article maintains that the legal recognition of obligations for children facilitates their recognition as citizens and agents when such obligations are understood from contextual and relational perspectives. Drawing primarily upon sources from Canada and the United States, the article advances this claim through a study of three separate settings. Part I examines the 'child as student' and studies children's obligations within schools. Part II considers the 'street child' and the obligations and challenges children encounter when they live away from their families and communities. Part III contemplates the 'child as bargainer' and focuses on obligations children assume when accessing, negotiating for, and acquiring services in their communities.*

### Introduction – obligations as constitutive of children's citizenship and agency

Children's 'rights' and 'best interests', although relatively recent concepts, have generated extensive academic attention and commentary. Jurists have considered whether, when and how children acquire, maintain and exercise civil and political, and even social, cultural and economic rights.<sup>1</sup> A parallel strand of work has focused on the notion of children's 'best interests', a phrase

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<sup>1</sup> See M Minow, 'Rights for the next generation: A feminist approach to children's rights' (1986) 9 *Harvard Women's Law Journal* 1; S Van Praagh, 'The education of religious children: Families, communities and constitutions' (1999) 47 *Buffalo Law Review* 1343; N Bell, 'Ethics in child research: Rights, reason and

that is now prevalent within western legal texts pertaining to children.<sup>2</sup>

Efforts to centralise the rights and interests of children can only be considered laudable. These initiatives carve a distinct space for children to have their voices heard and views known in matters affecting them. The perception of the child has thus transitioned from passive object of social norms and legal rules to active subject of the law with at least some measure of agency.

While progressive, discussions advancing children's rights and interests are also incomplete, as they pay little heed to the idea of children's obligations.<sup>3</sup> Such a notion might initially seem incongruent to the very idea of childhood, characterised primarily by dependence, need, ignorance and immaturity. In the result, it is typically difficult to imagine children as bearing obligations to each other, to their family and community members, or to the State. Yet imagining the child through the singular lens of rights, without a concomitant contemplation of her obligations, overlooks the extent to which law's recognition of obligations for children facilitates their recognition as citizens and agents.

This paper advances two chief claims. First, it posits that acknowledgement of the child as a bearer of both legal rights and obligations substantiates her citizenship and agency. In tracing the connection between these concepts, we draw on the work of feminist theorists who see rights and civic participatory obligations alike as constitutive of citizenship, specifically through analyses that revisit what counts as public or political activity and activism.<sup>4</sup> This feminist scholarship also identifies agency as a connective thread in discussions on obligations and citizenship, noting that civic participation both enables and requires an expression of agency. We rely on these connections to demonstrate how a child's involvement in civic life, primarily through the holding and fulfilment of obligations, cultivates her agency and social engagement. Ruth Lister makes a similar point in her reflections on citizenship and agency:

‘To act as a citizen requires first a sense of agency, the belief that one can act; acting as a citizen, especially collectively, in turn fosters a sense of agency. Thus, agency is not simply about the capacity to choose and act but it also about a conscious

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responsibilities’ (2008) 6(1) *Children's Geographies* 7; S Toope, ‘The Convention on the Rights of the Child: Implications for Canada’, in M Freeman et al (eds), *Children's Rights: A Comparative Perspective* (Dartmouth Publishing, 1996), at p 33; A Campbell, ‘Stretching the limits of “rights talk”: Securing health care entitlements for children’ (2003) 27 *Vermont Law Review* 399.

<sup>2</sup> See J Eekelaar, ‘The importance of thinking that children have rights’, in P Alston et al (eds), *Children, Rights and the Law* (OUP, 1992); N Bala and S Miklas, *Rethinking Decisions about Children: Is the ‘Best Interests of the Child’ Approach Really in the Best Interests of Children?* (Policy Research Centre on Children, Youth & Families, 1993); *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Art 3; Divorce Act, RSC 1985 (2nd Supp), c 3, s 16(8); Civil Code of Quebec, SQ 1991, c 64 Art 33.

<sup>3</sup> Although literature explicitly setting out children's obligations under formal law is sparse, we recognise the diverse legal sources that locate sites of responsibility for children. See, eg Canada's Youth Criminal Justice Act, SC 2002, c 1, whose preamble stresses the relevance of young offender legislation that ‘fosters responsibility and ensures accountability’; Civil Code of Quebec, SQ 1991, c 64, Art 597, which provides: ‘Every child, regardless of age, owes respect to his father and mother’; and Civil Code of Quebec, SQ 1991, c 64, Art 585 which articulates a legal duty of support to parents.

<sup>4</sup> See R Lister, *Citizenship: Feminist Perspectives*, (New York University Press, 2nd edn, 2003); R Prokhovnik, ‘Public and private citizenship: From gender invisibility to feminist inclusiveness’ (1998) 60 *Feminist Review* 84; C Mouffe, ‘Feminism, citizenship, and radical democratic politics’, in L Nicholson and S Seidman (eds), *Social Postmodernism: Beyond Identity Politics* (CUP, 1995), at p 315.

capacity, which is important to the individual's self-identity.'<sup>5</sup>

We argue here that law's extension of obligations to children is essential to the development of their citizenship, agency, and the 'self-identity' to which Lister refers here.

This paper's second central claim is that recognition of obligations for children must, to nourish and affirm a child's citizenship and agency, occur through a contextual methodology.<sup>6</sup> That is, a child's legal obligations must account for her embeddedness within her own particular social context and social relationships. Thus, while law might attribute obligations to a child, it must acknowledge the realities of childhood linked to limited experience, exposure, defences, ability, and knowledge. In crafting obligations for the child, law must also identify the relevance of her interdependent relationships, most notably with family and community members. Having said this, it may be conceptually insufficient merely to call attention to the child's relationships and situational context.<sup>7</sup> This point holds particular purchase within feminist analyses seeking to deepen, through consideration of context and relationships, law's appreciation of how socially and economically vulnerable subjects hold and exercise rights and obligations. Thus, simply touting the benefits of a contextual method will be un-instructive without elaboration; it is likely necessary also to identify the aspects of context that merit contemplation and weight in a given legal inquiry. This will be essential to a contextual and relational evaluation of law's perception of children's obligations as constitutive of their citizenship and agency. It charges the authors of this essay with the responsibility of setting out the contextual dimensions relevant to the analysis that we develop here about children. While contextually valuable features will always be case- and fact-dependent, overall, we envisage the child's age, the history and structure of her family relationships, her material, moral and intellectual goals, her physical setting, her educational background and needs, her life experience, and the communities in which she sees herself as a member, as key elements within a contextual study of the child's obligations, citizenship and agency.

In advancing these two principal claims, this paper builds on literature that has considered the meaning of citizenship for children specifically through an analysis of a child's relationships with other actors. Centred within a network of relationships, the child may at once be recognised as an agent and as having interdependent connections to others.<sup>8</sup> While this 'relational' image of the child provides a meaningful grounding for children's rights<sup>9</sup> and citizenship,<sup>10</sup> it provides an equally compelling foundation for imagining their obligations.<sup>11</sup> Through this prism of

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<sup>5</sup> Ibid, R Lister, at p 39.

<sup>6</sup> R Leckey, *Contextual Subjects: Family, state and relational theory* (University of Toronto Press, 2008).

<sup>7</sup> Ibid, R Leckey, at pp 266–268.

<sup>8</sup> N Lee, *Childhood and Society: Growing up in an age of uncertainty* (Open University Press, 2001).

<sup>9</sup> See A Campbell, 'Stretching the limits of "rights talk": Securing health care entitlements for children' (2003) 27 *Vermont Law Review* 399; M Minow, 'Rights for the next generation: A feminist approach to children's rights' (1986) 9 *Harvard Women's Law Journal* 1.

<sup>10</sup> J Roche, 'Children: Rights, participation and citizenship' (1999) 6 *Childhood* 475.

<sup>11</sup> Our approach is not to be conflated with the argument that sees rights and obligations as in a 'reciprocal calculus', hinging an individual's rights on her assumption of obligations. See H Dean, 'Human rights and welfare rights: Contextualizing dependency and responsibility', in H Dean (ed), *The Ethics of Welfare: Human Rights, Dependency and Responsibility* (The Policy Press, 2004), p 7, at p 14. Our model sees obligations for children, like their rights, as contributive to their autonomy and citizenship when they are crafted in a manner that recognises and enriches their relationships with other family, community and social actors.

obligations ‘as relationship,’<sup>12</sup> possibilities for the child’s agency are discernable.<sup>13</sup> She is viewed as bearing the potential and responsibility to make choices that affect those around her, thereby illuminating her civic membership.<sup>14</sup> At the same time, her obligations must be delineated by the recognised vulnerabilities and dependencies inherent in childhood.<sup>15</sup>

This theoretical framework is used to study the role and relevance of children’s obligations in different social settings, drawing primarily upon legal authorities from Canada and the United States. Although these sources are couched in the language of rights, their close examination foregrounds the relevance of children’s obligations. In Part I, we examine the ‘child as student’, relying on sources that discuss children’s rights in schools. We reframe these analyses to inquire into the obligations that a child might have in educational spaces. Part II considers the ‘street child’. A child navigating through street life offers an important counterpoint to the image of the child as dependent, sheltered and protected by her family. Our analysis considers how law’s approach to the street child frustrates her ability to meet her most basic obligations related to survival and law abidance. Finally, in Part III, we study the ‘child as bargainer’, drawing on sources that reveal children as capable of seeking out and benefiting from opportunities they need or want. The analysis in this part focuses on whether, how, and to whom children bear obligations in accessing, negotiating for and acquiring services in their communities.

Throughout this analysis, we generally refer to the actors in question as ‘children’ even though most of the case studies we present involve adolescents.<sup>16</sup> This is not surprising given law’s awareness of a teen’s developing autonomy as she bridges childhood and adult life, which would result in a wider breadth of obligations.<sup>17</sup> Thus, ‘[t]he arguments for the increased participation of children in decision-making affecting their lives are both practically and theoretically more compelling the older the child is’.<sup>18</sup> Our argument, however, is that law’s extension of obligations to children generally, even before adolescence, may be viewed as commensurate with recognising a child’s citizenship and agency provided that this occurs through a contextual approach that accounts for her particular circumstances, her evolving level of maturity and awareness, and her interdependent connections with other actors. Furthermore, given the power of discourse to affect law’s imaginations of children, we resist the term ‘youth’, particularly in

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<sup>12</sup> This language is borrowed from Jennifer Nedelsky, who speaks to the notion of ‘rights as relationship’ to argue that autonomy is not enabled by a liberal perception of rights, which protects the individual from state interference with her choices and actions. Rather, for Nedelsky, developing autonomy is only possible through the recognition and fostering of interdependent social relationships. J Nedelsky, ‘Reconceiving rights as relationship’ (1993) 1 *Review of Constitutional Studies* 1.

<sup>13</sup> T Cockburn, ‘Children and citizenship in Britain: A case for a socially interdependent model of citizenship’ (1998) 5 *Childhood* 99, at p 113, proposes that reliance on a social interdependence theory of citizenship offers a viable basis for arguing that ‘all children carry some responsibilities and duties’.

<sup>14</sup> J Hine, ‘Children and citizenship’ (08/04) *Home Office Online Report*, at p 40.

<sup>15</sup> This proposition lines up with Nikolas Rose’s argument to the effect that citizenship involves rights as well as obligations, even where children are concerned and even though children are perceived as requiring guidance in their decision-making and development of citizenship. See N Rose, *Governing the Soul: The shaping of the private self* (Free Association Books, 1999).

<sup>16</sup> This is so even though law recognises obligations for children in certain contexts. See S Van Praagh, ‘“Sois sage” – Responsibility for childishness in the law of civil wrongs’, in J Neyers, E Chamberlain and S Pitel (eds), *Emerging Issues in Tort Law* (Hart Publishing, 2007), at pp 63–84.

<sup>17</sup> S Van Praagh, ‘Adolescence, autonomy and Harry Potter: The child as decision-maker’ (2005) 4(1) *International Journal of Law in Context* 335.

<sup>18</sup> J Roche, ‘Children: Rights, participation and citizenship’ (1999) 6 *Childhood* 475, at p 483.

view of its deployment in the ‘marketing’ of varied legal measures aimed at ‘responsibilising’, ‘adulterising’, and criminalising children.<sup>19</sup>

Ultimately, this paper does not aim to efface or undercut the crucial work that has succeeded in enhancing rights for children. The opposite is true. That is, this work aspires to give further traction to discussions about children’s rights and interests by demonstrating how accepting notions of obligations for children can enhance their agency and civic membership where such obligations are achievable. As an actor who bears both rights and obligations, the child conceptually begins to stand on equal footing with her adult counterparts as one who not only benefits from rights, but also stands to make a contribution and difference through the fulfilment of obligations to others. At the same time, we posit that appreciating the child’s situation in context and within a network of critical social relationships is necessary to ensure that her obligations, and by extension her citizenship and agency, have value and meaning.

## I. The child as student

Given that children are generally subject to compulsory school attendance,<sup>20</sup> one of their most important roles is that of student. Lessons learned at school surpass the content of curriculum; school is where children begin to discern and make sense of social relationships, and where they forge a sense of self. In making her way through her school years, a child’s beliefs, conduct and modes of expression may bump up against rules put in place by educators and administrators with a view to ensuring safety and order. Where law has assessed children’s entanglement with such rules, discussions have been pitched primarily at the level of students’ rights. However, these discussions also illuminate the obligations that attend children whose views and behaviours are perceived to conflict with the norms structuring educational settings. Three principal obligations held by the child as student are considered in turn, followed by some reflections on the notions of obligation and control in school settings.

### (a) The obligations appertaining to one’s faith

*Multani v Commission scolaire Marguerite-Bourgeoys (Multani)*<sup>21</sup> offers an example of the way in which law requires children to navigate their different, sometimes competing, obligations to religious and school communities. The case centred on Gurbaj Singh, a 12-year-old orthodox Sikh boy living in Montreal, Quebec who, as part of his faith, wore the *kirpan*, a religious symbol that resembles a dagger. When Gurbaj dropped his *kirpan* while playing in his schoolyard, his school board<sup>22</sup> became concerned and offered to allow Gurbaj to continue wearing the object provided that he conceal this in a wooden box sealed in a cloth sheath sewn

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<sup>19</sup> C Piper, ‘Who are these children? Language in the service of policy’ (2001) 1 *Youth Justice* 30.

<sup>20</sup> See Education Act, RSO 1990, c E.2, s 21; Education Act, RSQ, c I-13.3, s 14. These provisions recognise that a child might be exempt from attending school in certain circumstances or that another program of education may be an equivalent to school attendance.

<sup>21</sup> 2006 SCC 6, [2006] 1 SCR 256.

<sup>22</sup> In Quebec, a school board has as its mission the organization of educational services in the province and the promotion and enhancement of educational services within its set jurisdiction. This is in contrast to the ‘governing board’ of a school, which oversees and assesses the ‘situation prevailing’ at the particular school, seeking in particular to ensure students’ needs are met and to facilitate communication among students, parents, teachers, school administrators and community members. Education Act, RSQ, c I-13.3, s 207.1 and s 74 respectively.

into his undergarments. Gurbaj and his parents agreed to these terms. The agreement was not, however, endorsed by the school's governing board. The latter held that wearing a *kirpan* at school violated the school's *Code de vie*, which prohibited carrying weapons. The governing board's view was supported by the school board's council of commissioners, which indicated that Gurbaj could substitute his *kirpan* for a metal *kirpan* pendant or a wooden *kirpan*. The boy and his parents initiated legal proceedings, arguing that the refusal to allow Gurbaj to wear his *kirpan* on his person at school violated their rights to religious freedom as protected by both the Quebec and Canadian Charters.<sup>23</sup>

The case ultimately found its way before the Supreme Court of Canada, where it was held that an absolute ban on the *kirpan* was inconsistent with Gurbaj Singh's constitutional religious freedoms. The Court noted that the interference with the boy's rights was significant, as it effectively prevented him from attending public (that is, a state-funded and state-administered) school. While the prohibition against wearing the *kirpan* was recognised as connected to a pressing and substantial objective – namely, ensuring a reasonable level of school safety – other means for the school board's council to achieve this end were available that would not conflict so deeply with the child's religious freedoms.

While the Court's analysis in *Multani* is rooted in a rights-based perspective, the decision also conveys an appreciation of the young person's obligations. The judgment indicates that while a child is seen as capable of having religious convictions and expressing them in educational spaces,<sup>24</sup> he is also understood to have an obligation to express his religion in a safe manner in relation to other members of his school community.<sup>25</sup> When Gurbaj accepted the school board's conditions for wearing his *kirpan*, he acknowledged his obligation to practice his religion in a way that did not compromise student safety. *Multani* thus suggests that the child is obligated to refrain from religious observances that would compromise school security.

*Multani* also points to a second obligation, which is more closely linked to the child's relationship with her faith. Gurbaj Singh was permitted to wear his *kirpan* because this was consistent with his sincere religious beliefs, pursuant to which the *kirpan* was only a religious symbol and could not be used as a weapon.<sup>26</sup> *Multani* thus requires children to understand and respect the significance of their religious symbols and practices. More significantly for this paper, *Multani* reflects an appreciation of the child's situation within his religious group. Gurbaj Singh's *kirpan* was emblematic of his belonging within his family and community contexts. Drawing on an appreciation of obligations and agency that seeks to privilege relationships, Gurbaj's decision to wear the *kirpan* may be understood as upholding an obligation to these larger social constituencies in a way that solidifies his connections to and membership within them. Viewing this obligation through this lens creates a conceptual platform for recognising it as contributing to the child's citizenship and agency.

Ultimately, *Multani* proposes a nuanced message about children's obligations that harmonises with this essay's main claims. The judgment recognises Gurbaj Singh explicitly as having rights and freedoms, and more tacitly as bearing obligations. Such obligations are situated within a

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<sup>23</sup> Charter of Human Rights and Freedoms, RSQ, c C-12, Art 3; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, s 2(a).

<sup>24</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256, at para [79].

<sup>25</sup> *Ibid*, at para [54].

<sup>26</sup> *Ibid*, at paras [36]–[40].

layered social context that acknowledges this child's relationships with his family, school, and faith communities. Accounting for and holding a child to such obligations in context holds promise for enhancing a sense of citizenship in these diverse relational settings, primarily through recognition of the child's 'conscious capacity' for decisions and actions, and for absorbing the consequences thereof.<sup>27</sup> We argue that this, in turn, both facilitates and compels the development of the child's agency.

### (b) Obligations alongside the right to privacy

Similar to the legal appreciation of religious expression in schools, a student's right to privacy is limited by school security concerns and the consequential expectations regarding conduct that befall all members of a school community. In *R v M(MR)*<sup>28</sup> a 13-year-old student, 'M', was searched by his vice-principal while attending a school dance after the vice-principal received tips from several students that M was selling drugs on school grounds. This search revealed that M was carrying marijuana and he was subsequently charged with possession of narcotics. At trial, the judge excluded from evidence drugs that had been found through the search, holding that the vice-principal had violated M's right to be free from 'unreasonable search and seizure' guaranteed by section 8 of the Canadian Charter. This finding was overturned by the Supreme Court of Canada, which held that school officials may search students without a warrant when reasonable grounds exist for believing that the student has contravened a school rule and that the search will yield evidence of such contravention. The Court held that the vice-principal's search in this case met these criteria and did not illegally compromise M's constitutional expectation of privacy. Evidence deriving from the search was thus admissible.<sup>29</sup>

Schools' responsibility for providing a safe learning environment results in a quelled expectation of privacy for their students.<sup>30</sup> The majority judgment in *M(MR)* thus stressed the importance for school officials of having the flexibility required to act quickly and effectively to respond to situations that may disrupt school operations or risk students' safety.<sup>31</sup> As such, a search on school premises without a warrant or other authorisation is not *prima facie* illegal.<sup>32</sup>

Like *Multani*, *M(MR)* is decided principally from the angle of students' rights. The judgment tells us that a child's privacy rights do not altogether vanish at school, but her expectations in this regard are reduced in this context. *M(MR)* simultaneously sheds light upon students' obligations in schools. As in *Multani*, the decision depicts the child as central to schools' ambition of maintaining a safe and ordered environment for educational and social interaction.<sup>33</sup> Even though a school's curriculum and rules are set by adults, ensuring their efficacy requires that they be

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<sup>27</sup> R Lister, *Citizenship: Feminist Perspectives*, (New York University Press, 2nd edn, 2003), at p 230.

<sup>28</sup> *R v M(MR)* [1998] 3 SCR 393.

<sup>29</sup> *Ibid*, at para [64].

<sup>30</sup> AW Mackay and J Burt-Gerrans, 'Student freedom of expression: Violent content and the safe school balance' (2005) 40(3) *McGill Journal of Education* 423, at p 427; S Shariff, 'Cyber-dilemmas in the new millennium: School obligations to provide student safety in a virtual school environment' (2005) 40(3) *McGill Journal of Education* 467, at p 478.

<sup>31</sup> *R v M(MR)* [1998] 3 SCR 393, at paras [35], [36], [45], [47] and [49].

<sup>32</sup> This does not, however, mean that searches for evidence of illicit activity can take place under any circumstances in school settings. In a more recent case, *R v AM*, 2008 SCC 19, [2008] 1 SCR 569, a majority of the Supreme Court of Canada held that a search involving the use of sniffer-dogs to find suspected drug evidence in a high school student's backpack violated the student's constitutional right to be secure against unreasonable search and seizure.

<sup>33</sup> *R v M(MR)* [1998] 3 SCR 393, at para [33].



understood and respected by the youngest members of school communities, the students. The latter are therefore obliged to conduct themselves in a way that avoids compromising secure learning environments. This emerges in *M(MR)* both from the analysis of the vice-principal's search of M, and through the reference to the students who informed their vice-principal about M's suspected drug possession, whose conduct ultimately furnished 'reasonable grounds' for the impugned search. While these students are not characterised as having fulfilled an explicit obligation, their behaviour is implied as contributing to a safe and disciplined school environment.

The students in *Multani* and *M(MR)* hold obligations in their schools primarily on account of their membership within such settings. These obligations reflect the child's conscious ability to choose particular paths of action and the child's belonging within her school community. In this way, such obligations are emblematic and facilitative of the child's citizenship and agency in this context.

### (c) Obligations regarding self-expression

Just as concerns regarding school security can be invoked to limit a student's religious freedom and privacy rights, such concerns might also curtail her right to free expression. *Emmett v Kent School District*<sup>34</sup> recounts the case of 18-year-old Nick Emmett, a star student and athlete with no disciplinary history who, apparently inspired by a prior creative writing exercise, posted mock obituaries of fellow students on his own private website that mimicked his school's homepage.<sup>35</sup> Nick was subject to emergency expulsion for 'intimidation, harassment, disruption to the educational process, and violation of Kent School District copyright.' This disciplinary measure was subsequently modified to a 5 day suspension. Nick challenged his suspension before the District Court, which ruled in his favour. Even though his website was outside the school's control or supervision, the Court found that school administrators retained an interest given that '[w]eb sites can be an early indication of a student's violent inclinations, and can spread those beliefs quickly to like-minded or susceptible people'. In this case, however, the evidence indicated that Nick Emmett's speech did not intend to threaten anyone or actually threaten anyone, nor did it issue any threats or display 'violent tendencies'. It could not therefore be limited by school authorities.<sup>36</sup>

*Emmett* reinforces the idea that a child is obliged to refrain from conduct, including expression, which threatens school security. Yet, what of student expression that is not threatening, but potentially distracting? The landmark *Tinker*<sup>37</sup> decision of the US Supreme Court provides insight into the way that law envisions communications within schools that may be viewed as 'troublesome', but non-violent. The case involved three students who wore black armbands to school in protest of the United States' involvement in the Vietnam War.<sup>38</sup> Having become aware of this plan, the principals of the Des Moines schools implemented a new policy stipulating that any student wearing an armband would be asked to remove this, and if she refused, she would be suspended until she returned to school without an armband.

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<sup>34</sup> *Emmett v Kent School District No. 415* 92 F. Supp. 2d 1088 (WD Wa 2000).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Tinker v Des Moines Independent Community School District* 393 US 503 (1969).

<sup>38</sup> *Ibid.*, at p 504.

The three children involved in *Tinker* refused to remove their armbands or to return to school in compliance with this policy. Through their parents, they filed a complaint seeking to restrain school officials from enforcing the new armband policy and disciplining students pursuant to it. The US Supreme Court majority held that the students' protest was permissible, as they had passively expressed their opinions with the hope of influencing others and did not interfere with the work of the school or the right of the others to be free from disturbance.<sup>39</sup> The majority affirmed, in its now-famous passage, that '[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,' and that the interference with the students' expression was not permissible as their behaviour did not 'materially and substantively disrupt the learning process'.<sup>40</sup>

At the same time, the majority affirmed that the State and school retain a 'comprehensive authority' to stake out, monitor and control conduct within schools. Children in school settings thus may express their opinions as long as this does not interrupt the learning process or impede the rights of others in school settings. Students are obliged to censor themselves beyond these boundaries, a point illustrated in *Bethel School District v Fraser (Fraser)*.<sup>41</sup> In this case, high school administrators disciplined Matthew Fraser for his speech nominating his friend for student council that was replete with sexual allusions. Although not violent, Matthew's speech was considered, much like the armband-wearing children in *Tinker*, to constitute 'disruptive behavior'. Matthew's argument against school authorities claiming a violation of his constitutional right to free speech ultimately failed before the US Supreme Court. The *Fraser* majority distinguished the case from *Tinker*, contrasting the political message central to the latter case with the gratuitous sexual innuendo in the former to conclude that free speech in schools did not extend to protect 'an elaborate, graphic, and explicit sexual metaphor'.<sup>42</sup>

*Tinker* and *Fraser* allude to students' obligation of self-censure where expression would prove disruptive or harmful to others in a school setting. Beyond this, a second obligation emerges in these cases. *Emmett*, *Tinker* and *Fraser* require students to listen to, and learn from, one another. While one normally associates learning in school with curricula, these judgments underscore the relevance of student education outside of classroom walls, and of the critical role students have in creating space for ideological pluralism in informal school settings. In his opinion in *Tinker*, Justice Fortas states that students may express their opinions not only in class, but also 'in the cafeteria, or on the playing field, or on the campus during the authorised hours'. Such 'personal intercommunication among students' is vital, for Fortas J, to the educational experience. Yet it requires not only expression, but careful listening and tolerance, too. For students like those featured in *Tinker* to have the right to wear black armbands, other students around them must be viewed as having a concomitant obligation to try to understand and tolerate that expression, regardless of their own opinions on the relevant issues. Similarly, in *Fraser*, Chief Justice Berger speaks to schools as the institutions tasked with preparing young people for the rights and responsibilities of citizenship. For the Chief Justice, this requires student tolerance for 'divergent political and religious views, even when the views expressed may be unpopular,' while at the same time accounting for others' sensibilities. In the final analysis, then, while students have an

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<sup>39</sup> Ibid, at p 508.

<sup>40</sup> Ibid, at p 513.

<sup>41</sup> *Bethel School District No. 403 et al v Fraser, A Minor, et al.* 478 US 675 (1986).

<sup>42</sup> Ibid.

obligation to listen to a plurality of ideas and messages, the right of others to communicate such ideas and messages is not absolute and can be legitimately curbed when the expression is ‘lewd, indecent, or offensive’.

## Conclusion

The cases in this part show how courts have engaged with the task of delineating student conduct and expression that generate controversy. Although students, given their young age and impressionability, may be socially construed as vulnerable and requiring supervision, the analysis here demonstrates law’s willingness to perceive them as rights-bearers. Yet when exercised in the school context, these rights have important limitations, particularly in relation to school security. The child is thus directed to avoid or cease conduct or speech that threatens or that is gratuitously offensive.

A second obligation emerges from law’s approaches to the child as student. School is understood as the place where children learn not only from educators through a structured curriculum, but also from one another, through social engagement and interaction. The child as student is thus obliged to respect and tolerate diverse religious and political views.

While we do not seek to offer an ethical or normative assessment of the cases discussed in this Part, we see these authorities as relaying critical narratives for discerning law’s assessment of the child as student. These cases indicate that the law, by requiring children to behave and communicate in their schools in an earnest, safe and respectful manner, sets itself up as a tool that seeks to support the child’s acquisition of citizenship and its attendant rights and obligations. Courts’ willingness to recognise the student as holding obligations is probably best not interpreted as burdensome or as unduly encumbering or truncating students’ liberties. Instead, it conveys juridical recognition of the child’s intellectual and social capacity to contribute meaningfully to her school community and of her potential as citizen. We argue that this interpretation of children’s obligations is dignifying, rather than detrimental, for the child as student.

Such obligations are also unavoidable in settings, like schools, where children and their interests are central and where their self-identity is forged. Ensuring that students grow intellectually, emotionally and socially in schools requires more than a collection of rules created and enforced by teachers and administrators; students themselves are likely to be the most important actors in this regard. Most school rules, like those at issue in each of the cases examined above, require some student buy-in to have normative clout. Student obligations crafted in relation to such rules can therefore be reflective of their potential status, influence, and membership in schools.

Having said this, a competing argument might be advanced in relation to these cases on the child as student. The rules at issue in the cases discussed above were crafted and imposed on students without their input. In an effort to ensure a particular pattern of behaviour and discipline, these rules might be viewed as pertaining more plainly to notions of control, governance<sup>43</sup> and the

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<sup>43</sup> On the notion of ‘governance’ and children, see N Rose, *Governing the Soul: The shaping of the private self* (Free Association Books, 1999) where it is argued that childhood is the most extensively ‘governed’ dimension of human existence, as children are subject to multiple competing rules imposed by a range of different actors.

‘construction’ of a set image of childhood,<sup>44</sup> as opposed to infusing children with a sense of citizenship or agency through obligation. Moreover, the extension of rights to students might actually reinforce rather than challenge this normative model of childhood.<sup>45</sup> Excluding children from school because they break the rules of that setting, and subsequently attributing responsibility for such exclusion to the children themselves, seems inequitable and coercive.<sup>46</sup> So, too, does a requirement that a child follows further new rules, such as Gurbaj Singh’s obligation to keep his *kirpan* securely fastened to his person, in order to return to school.

While these qualms are of vital relevance, they do not preclude a progressive analysis of a child’s obligations in a school setting. Our point in this paper is not that obligations for children are necessarily meant to be instruments of liberation. Instead, our argument is that viewing the child as developing within a network of interdependent social relationships allows for a recognition of her rights *and* obligations vis-à-vis the actors with whom she engages. Specifically, it recognises the child’s ability to identify others within her communities who may be affected, possibly adversely, by consciously chosen decisions and actions. In turn, this view lends itself to perceiving the child as citizen and agent with particular reference to her social context and relationships.

The foregoing discussion contemplates children’s obligations in their most obvious social setting beyond the boundaries of home. Yet, children frequently detour from the trodden path between home and school. In the following parts of this paper, we consider other milieus outside the immediate family sphere that children may navigate, beginning with children who have decided or been compelled to leave home and who must survive street life.

## II. The street child

Street children shatter the conventional image of the child as innocent, helpless and dependent on adult caregivers. Nevertheless, law views these children, especially girls, as defenceless and in need of protection, particularly when their choices are considered harmful and reckless.<sup>47</sup> This is likely because law also construes the street child as isolated, severed from the social networks vital to children in other contexts. This Part explores the nature of obligations perceived to be held by children who have left their homes and families, typically due to abuse or neglect in

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<sup>44</sup> D Monk, ‘Theorising education law and childhood: Constructing the ideal pupil’ (2000) 21(3) *British Journal of Sociology of Education* 355.

<sup>45</sup> D Monk, ‘Children’s rights in education – Making sense of contradictions’ [2002] CFLQ 45.

<sup>46</sup> Analogy might be drawn here to cases in the United Kingdom in which pupils, unwilling to adhere to school dress codes, were attributed responsibility for their own exclusion from school. See *Spiers v Warrington Corp* [1954] 1 QB 61, and *R (On the Application of Begum) v Head Teacher and Governors of Denbigh High School* [2006] UKHL 15. But see *R (On the Application of Watkins-Singh) v Governing Body of Aberdare Girls’ High School* [2008] EWHC 1865 (Admin), [2008] ELR 561. As Daniel Monk notes, a decision holding a child culpable for her behaviour ‘implicitly recognises the agency of the child’. However, because the child has no voice in exclusion proceedings, her welfare and voice are ‘at best, marginalised’. D Monk, ‘Children’s rights in education – making sense of contradictions’ [2002] CFLQ 45.

<sup>47</sup> RR Corrado, C Odgers and IM Cohen, ‘The incarceration of female young offenders: Protection for whom?’ (2000) 42(2) *Canadian Journal of Criminology* 4. See also M Reitsma-Street, ‘Canadian youth court charges and dispositions for females before and after implementation of the Young Offenders Act’ (1993) *Canadian Journal of Criminology* 437.

those settings.<sup>48</sup> The analysis contemplates two main obligations: to provide for one's own basic needs, and to respect civic rules. We proceed to consider how current legal frameworks render these two obligations mutually exclusive in many instances, precluding street children from fulfilling both simultaneously.

#### (a) Leaving home and family life, and the consequential obligation to provide for one's self

Courts typically construe a child's departure from home and family life as a voluntary choice to become independent. This rationalises judicial decisions that transfer parents' obligations to support and provide for children to the child herself. Legislation supports such an analysis. For example, the Ontario Family Law Act stipulates that parents' general duty to support their children does not extend to minors aged sixteen or more who have 'withdrawn from parental control'.<sup>49</sup> Similar language exists in family law legislation in other Common Law provinces.<sup>50</sup>

*Dhillon v Dhillon (Dhillon)*<sup>51</sup> offers a vivid example of how these principles play out in families. Jessica Dhillon, daughter to Sikh parents, sought a judicial order for support from her parents after leaving home. She also sought a Canada Savings Bond in her name and a restraining order against her parents. Jessica argued she had no choice but to leave her home at aged 16 after her father physically assaulted her in front of her mother and grandmother who did not intervene. The parents stated that the father struck their daughter in order to discipline her for breaking household rules and lying about this behaviour.<sup>52</sup> They denied having any ongoing obligations to Jessica, arguing that after making many unsuccessful attempts to reconcile with her, they had the right to withdraw financial and emotional support because she was no longer under their control.

Salhany J found for the Dhillon parents. While he recognised the strict discipline and unlawful assault to which Jessica had been subject,<sup>53</sup> he denied her claim for support, framing her departure from the family home as a voluntary choice rather than the sole viable alternative for a child faced with parental violence.<sup>54</sup> *Dhillon* suggests that the law typically will not be quick to intervene to evaluate the strictness of parents' disciplinary measures. If a child finds these rules unbearably severe and thus opts to escape her parents' control, she loses the parental support to which she would otherwise be entitled and the obligation to provide the necessities of life will fall upon the child herself.<sup>55</sup>

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<sup>48</sup> L Serge, M Eberle, M Goldberg, S Sullivan and P Dudding, 'Pilot study: The child welfare system and homelessness among Canadian youth' (2002) *National Homelessness Initiative* online: <[http://homeless.samhsa.gov/ResourceFiles/Pilot\\_Study\\_The\\_Child\\_Welfare\\_System\\_and\\_Homelessness.pdf](http://homeless.samhsa.gov/ResourceFiles/Pilot_Study_The_Child_Welfare_System_and_Homelessness.pdf)> at p 8. See also Canadian Children's Rights Council, 'Homeless children and youth in Canada', online: Children's Rights Council: <[http://www.canadiancrc.com/Homeless\\_Children\\_and\\_Youths\\_in\\_Canada.aspx](http://www.canadiancrc.com/Homeless_Children_and_Youths_in_Canada.aspx)>.

<sup>49</sup> Family Law Act, RO 1990, c F.3, s 31(2).

<sup>50</sup> See in Alberta and Nova Scotia respectively, Family Law Act, SA, 2003, c F-4.5, s 49(2)(b) and Maintenance and Custody Act, RS, 2000, c 160, s 1; c 29, s 2(c) and 8.

<sup>51</sup> (1991) OJ No 1657 (QL).

<sup>52</sup> *Ibid.* The household rules stated in the judgment were: '1. The applicant was not allowed to date; 2. In the event the applicant was away from the home in the evening, the respondents were entitled to know where she was at all times; 3. Having just turned 16 and having just obtained her driver's licence, the applicant was allowed to use the family car only infrequently (approximately once per month).'

<sup>53</sup> *Ibid.* Jessica's father was convicted of assault and given an absolute discharge.

<sup>54</sup> *Ibid.*

<sup>55</sup> Although Jessica brought her application 2 years after leaving home and was thus legally an adult, the judge did not factor this into the analysis. This could be because the parental assault occurred while she was still a minor.

Arguably, the reasoning in *Dhillon* rendered Jessica more vulnerable than independent. By ruling that she had lost her right to parental support, Jessica's dependence on a boyfriend with whom she had begun cohabiting would only increase. If this relationship were to prove unhappy or somehow oppressive, she would face serious challenges leaving it because of the Court's understanding of Jessica as bearing the obligation to provide materially for herself. The judgment is exemplary of law's efforts to render children who leave or are forced out of family life 'responsible' and 'obedient'. As the ensuing discussion illuminates, such efforts will fail when they do not take account of the particular realities for children who must survive without consistent and predictable support networks.

### (b) Obligations in tension: survival and law abidance

Many children who flee their homes ultimately find themselves working and living on the streets. Carrying an obligation to provide for themselves, these children must locate and deploy methods for their own protection and provision. Yet, the obligation to feed and find shelter for oneself often runs counter to a street child's concomitant civic obligation to abide by the law. This tension is rendered particularly acute because of status offences that target children as well as other offences that disproportionately affect street children.<sup>56</sup> The point is aptly demonstrated in the cases of 'squeegee kids' and child sex workers.

With limited education and no permanent address, most street children are unable to find regular paid work.<sup>57</sup> In the early 1990s street children began washing car windows for drivers at stoplights in exchange for money. This activity soon became known as 'squeegeeing' and those who took it up acquired the title, 'squeegee kids'.<sup>58</sup> As a result of political and social pressures to 'clean up' urban centres, the Province of Ontario implemented the Safe Streets Act.<sup>59</sup> This new statute outlawed squeegeeing through provisions prohibiting commercial activity and the solicitation of people in vehicles on roadways.

*R v Banks*<sup>60</sup> involved a constitutional challenge to the Safe Streets Act on the basis of claimed violations of Sections 2(b), 7, and 15 of the Canadian Charter.<sup>61</sup> A unanimous Court of Appeal for Ontario upheld the statute on each of these grounds. Speaking for the Court, Justice Juriensz held that activities targeted by the legislation were not necessary to the economic survival of

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Moreover, she would, had her removal from parental control not been viewed as 'voluntary', have remained entitled under Ontario's Family Law Act to support from her parents given that she was pursuing university studies. Ontario Family Law Act, RSO 1990, c F.3, s 31(1) states, 'Every parent has an obligation to provide support for his or her unmarried child who is a minor *or is enrolled in a full time program of education*, to the extent that the parent is capable of doing so.' (Emphasis added)

<sup>56</sup> R Fader, 'Order for open custody: A rebirth of the status offence under the Young Offenders Act' (1997) 3 *Appeal: Review of Current Law and Law Reform* 23. See also S Hoyt and DG Scherer, 'Female juvenile delinquency: Misunderstood by the juvenile justice system, neglected by social science' (1998) 22(1) *Law and Human Behaviour* 84. See also JB Sprott and AN Doob, 'Gendered treatment: Girls and treatment orders in bail court' (2010) 52(4) *Canadian Journal of Criminology and Criminal Justice* 430.

<sup>57</sup> B O'Grady and R Bright, 'Squeezed to the point of exclusion: The case of Toronto squeegee cleaners', in J Herman and J Mosher (eds), *Disorderly People: Law and the Politics of Exclusion in Ontario* (Fernwood, 2002), at p 35.

<sup>58</sup> *Ibid*, at p 27.

<sup>59</sup> SO 1999, c 8.

<sup>60</sup> 2007 ONCA 19 (CanLII).

<sup>61</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982.

those charged under its provisions, and that they had other options to earn an income, such as ‘beg[ging] or provid[ing] a service in exchange for alms’, which were outside the statute’s purview.<sup>62</sup> Further, the Court suggested that the Safe Streets Act was aimed at protecting the safety of citizens, including individuals targeted by the statute, by limiting pedestrian circulation in traffic lanes. In this way, the analysis at once depicts street children as offensive, and possibly threatening, while also in need of State protection. This lines up with law’s paradigmatic perception of children ‘simply as “trouble” or “in trouble”’.<sup>63</sup>

Rather than protection, legal approaches like the one embodied in the Safe Streets Act and in *Banks* ultimately position street children as having to choose between respecting law and meeting their obligation of self-sustenance. Bill O’Grady’s field research revealed street children’s frustration with the statute’s imposition of limitations on their livelihood without simultaneously providing feasible legal alternatives. As one participant in this study stated, ‘I think if they’re going to cut us off from squeegeeing they should give us another alternative. Right now they haven’t done that’.<sup>64</sup> Another participant noted: ‘... if it gets too bad and I have to resort to criminal activity then I will do it – believe I’ll do it... if they put me in a position where I have no choice, and if I get more desperate than I am now and I have no choice... then I’ll do what it takes to survive’.<sup>65</sup> These passages illuminate the natural inclination to prioritise self-support and survival over civic obligations and law-abidance. The point is underscored in Justin Douglas’ recent analysis of ticketing practices adopted by police in various Canadian cities in an effort to curb child homelessness.<sup>66</sup> The consistency with which children are fined for municipal by-law infractions<sup>67</sup> highlights the tension between their obligation, on one hand, to find shelter and food and, on the other, to respect legal rules. It further reflects the priority that they will, by necessity, attribute to the former obligation.

Although well-intentioned, recent initiatives designed to promote law-abidance among street children cannot mediate the conflict between their obligations to themselves and to the State. The Royal Canadian Mounted Police and the Regional District of Central Okanagan have collaborated to design a positive ticketing program, Recognising Every Strategy Promoting Excellent Community Trust (R.E.S.P.E.C.T.),<sup>68</sup> which seeks to promote good public behaviour among children and to improve their relations with the police.<sup>69</sup> When a child is found not to be engaging in negative or destructive behaviour, she may receive a ‘positive ticket’ for things such as free slushies, pizzas, and passes to the swimming pool or the movies.<sup>70</sup> The difficulty,

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<sup>62</sup> *R v Banks* 2007 ONCA 19 (CanLII), at paras [81]–[82].

<sup>63</sup> J Roche, ‘Children: Rights, participation and citizenship’ (1999) 6 *Childhood* 475, at p 486.

<sup>64</sup> B O’Grady and R Bright, ‘Squeezed to the point of exclusion: The case of Toronto Squeegee Cleaners’, in J Herman and J Mosher (eds), *Disorderly People: Law and the Politics of Exclusion in Ontario* (Fernwood, 2002), at p 28.

<sup>65</sup> *Ibid.*, at p 34.

<sup>66</sup> J Douglas, ‘The criminalization of poverty: Montreal’s policy of ticketing homeless youth for municipal and transportation by-law infractions’ (2011) 16(1) *Appeal: Review of Current Law and Law Reform* 49.

<sup>67</sup> *Ibid.*, at p 50. According to Douglas, many street youth will have between ‘\$7,000 and \$20,000 worth of tickets.’

<sup>68</sup> City of Kelowna, ‘R.E.S.P.E.C.T.’, online: The City of Kelowna <<http://www.city.kelowna.bc.ca/CM/Page1171.aspx>>.

<sup>69</sup> See discussion, J Douglas, ‘The criminalization of poverty: Montreal’s policy of ticketing homeless youth for municipal and transportation by-law infractions’ (2011) 16(1) *Appeal: Review of Current Law and Law Reform* 49, at pp 61–62.

<sup>70</sup> *Ibid.*

however, is that such rewards are largely out of step with the context and ordinary needs of a homeless child, struggling to survive the streets. As such, the extent to which such programs will incentivise compliance with laws that penalise urban street children is questionable.

Statutes that sanction street conduct deemed publically undesirable or unacceptable risk driving homeless children to social peripheries, where they are less visible and less secure. This risk is particularly acute for girls who engage in sex work on city streets.<sup>71</sup> Apart from the general criminalisation of activities associated with prostitution under Canada's Criminal Code,<sup>72</sup> measures have been instituted in some Canadian provinces aimed at eliminating child prostitution. For example, in 1999, Alberta enacted the Protection of Children Involved in Prostitution Act (PCHIP), which purported to protect children by granting police and child welfare officials the authority to apprehend any child who was, or appeared to be, involved in sex work.<sup>73</sup> The legislature's stated intention was to transition children out of sex work. However, according to Jennifer Koshan, this legislation effectively legalised the forced confinement of girls on an assumption that apprehending them, even against their will, would protect child sex workers from themselves and their reckless behaviour. PCHIP criminalised children for what was presumed to be poor choice in dress, affiliation, and use of their bodies. In doing so, the law punished children for being indigent and lacking opportunities to take up more politically palatable economic activities. By targeting children as the object of sanction, instead of protecting them from their pimps or working with them to secure alternate and meaningful modes of subsistence,<sup>74</sup> this law failed to recognise the needs, weaknesses, vulnerabilities and entitlements of street children.

Following a successful constitutional challenge to PCHIP in October 1999, Alberta replaced the statute with the Protection of Sexually Exploited Children Act.<sup>75</sup> This new statute addresses the constitutional deficiencies of PCHIP but arguably remains just as problematic in its orientation toward child 'protection'.<sup>76</sup> The Act allows for the apprehension of children presumed to be in the sex trade and for their confinement in safe houses.<sup>77</sup> While there is no doubt about the dangers of sex work, such legal approaches based on criminalisation and apprehension risk driving child prostitutes to work in underground, hidden and thus more dangerous settings. The

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<sup>71</sup> On the risks of prostitution generally, see *Bedford v Canada* 2010 ONSC 4264 (CanLII), where Himel J notes that violence in sex work is usually perpetrated by male clients on female prostitutes, at para [121]. Moreover, the judgment finds that street prostitution is more dangerous than 'indoor' or 'on-call' versions of the activity, as the latter can be practiced with the integration of various protective measures, at para [300].

<sup>72</sup> Criminal Code, RSC 1985, c C-46, s 210-213. Note that a recent constitutional challenge to s 210, 212(1)(j), and 213(1)(c) was recently upheld by the Ontario Superior Court of Justice, rendering these provisions inoperative in that province. See *Bedford v Canada* 2010 ONSC 4264 (CanLII). This decision was appealed in 2011; the judgment of the Ontario Court of Appeal was still pending at the time of publication.

<sup>73</sup> Protection of Children Involved in Prostitution Amendment Act, SA 2000, c 22.

<sup>74</sup> *Ibid*, s 22.

<sup>75</sup> Protection of Sexually Exploited Children Act, RSA 2000, c P-30.3.

<sup>76</sup> *Ibid*. The statute's preamble reads: '... WHEREAS children engaged in prostitution are *victims* of sexual abuse and sexual exploitation and *require protection*; WHEREAS the Legislature of Alberta recognises the responsibility of families, communities and the Government of Alberta to provide that *protection*; WHEREAS the Government of Alberta is committed to assisting families and communities in providing that *protection*; WHEREAS the Government of Alberta is committed to ensuring the safety of all children; and WHEREAS the Government of Alberta is committed to assisting children in ending their involvement with prostitution; ...' (Emphasis added).

<sup>77</sup> *Ibid*.



point is bolstered by a recent judicial finding that criminalising sex work threatens rather than safeguards sex workers' personal security.<sup>78</sup> In addition, like other laws targeting homeless children, such initiatives focused on sex work render it impossible for these children to straddle their obligations to provide for themselves and to remain on the right side of the law.

### (c) Conclusion

The State is obliged to enact legal regimes that promote compliance with and respect for the law.<sup>79</sup> Arguably, the State fails in this duty when it creates rules that foreclose legal modes of survival for street children. Legislation such as Ontario's Safe Streets Act and Alberta's Protection of Sexually Exploited Children Act ignore the fact that once a child leaves the authority of her parents, typically as a result of abuse or neglect at home, law compels her to shoulder the obligation of providing for herself. The child who navigates street life will have to be resourceful in meeting this obligation and will often do so by panhandling, squeegeeing or prostitution. Outlawing such activities places street children in the impossible position of having to choose between shelter and food, or abiding by law. Obviously there is nothing real about such a 'choice' and, as shown here, most children will need to stand in breach of the law in order to meet their basic needs.<sup>80</sup>

Law's complicated image of the street child as at once vulnerable and independent is not shocking or new. Children faced with difficult life circumstances in other contexts might be similarly expected to be held responsible for outcomes, even when the law recognises their ongoing dependence and frailties.<sup>81</sup> The troubling point that undermines the analysis here is that obligations for street children are excised from context. Street children are obliged to fend for themselves while adhering to State-crafted rules that fail to account for their material needs and for the relational networks that may develop on the streets or that may subsist with family and community left behind. These obligations also overlook the street child's entitlement and ability to make valuable social contributions despite her ostensible isolation and desperation. In the result, the street child's obligations are typically unrealisable. Vacated of possibilities for civic membership, such obligations also deprive the child of opportunities for developing and conveying agency.

In some ways, law's image of the child as student and the street child stand in parallel. Both portray the child as a potential threat to herself and others while also exposed and needing adult protection, supervision and correction. Both narratives rely on allusions to security to rationalise limits on children's options and conduct. Beyond this, law's perceptions of the student and street child diverge. The student is connected to her social context; her obligations relate specifically to her school community and its members, recognising her as a member of this community. Conversely, the street child is viewed as altogether removed from her social context and from any mutually-beneficial social relationships. The sole relationship of value she is seen to have is with the State, whose job it is to step in and shield the child and those around her from the

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<sup>78</sup> *Bedford v Canada* 2010 ONSC 4264 (CanLII), at paras [359]–[362].

<sup>79</sup> *Hitzig v Canada* 2003 CanLII 30796 (ON CA), at paras [115]–[118].

<sup>80</sup> Jean Hine's empirical study on children in the United Kingdom, which speaks to 'the mentality of "no choice" and "I had to" presented by many young offenders as a reason for their behaviour'. J Hine, 'Children and Citizenship' (08/04) *Home Office Online Report*, at p 40.

<sup>81</sup> F Kaganas and A Diduck, 'Incomplete citizens: Changing images of post-separation children' (2004) 67 *Modern Law Review* 959.

child's misguided ways. The street child is subject to an incoherent legal framework that preempts possibilities for meeting the obligations it imposes on her. This can only have the effect of constraining or altogether debilitating a child's citizenship and agency.

Having considered the way that obligations for children play out in the contexts of schools and streets, the discussion that follows explores how these analyses compare with those suggested by law's perception of children who seek to access commercial, health and social resources.

### III. The child as bargainer

While ordinarily cast as needing protections or exemptions from legal rules,<sup>82</sup> law also imagines children as having some capacity to negotiate for and acquire resources they desire or need. For instance, the law recognises different points at which children can enter commercial or employment contracts, or consent to medical care without parental notice or endorsement.<sup>83</sup> As children's autonomy burgeons, the extent to which they acquire concomitant legal obligations is less clear. What obligations does a child have in accessing and using services that she views as necessary for her well-being? This Part explores this question drawing principally on three judicial decisions that illuminate the obligations a child might bear when she moves into the world normally occupied by adults to seek out particular resources.

#### (a) Negotiating for and accessing commercial services and goods

*Bédard v Roussin Parfumerie (bedard)*<sup>84</sup> offers a rendition of the classic story of teenage self-expression that borders on rebellion. The matter arose after the parents of 13-year-old Chantal Bertholet learned their daughter had her navel pierced. Bertholet's parents alleged that the merchant who performed the piercing had acted unprofessionally and irresponsibly by providing piercing services to their daughter without parental consent. They claimed \$2,000 for damages to their daughter's physical integrity and a further \$1,000 for inconvenience and damages ensuing from the alleged failure to respect their parental authority.

Drawing on Article 157 of the Civil Code of Quebec (CCQ), Villeneuve J noted that a child may enter into contracts alone for her 'usual and ordinary needs', within the limits set by her 'age and power of discernment'. The judge referred also to Article 220, paragraph 1 CCQ, which indicates that a child manages alone the proceeds of her work and her allowances paid to meet her usual and ordinary needs. She thereby concluded that law recognises a child's ability to make independent decisions as she matures. Chantal Bertholet's contract for navel piercing services, albeit counter to her parents' wishes, was thus valid and binding.

On a quick read, *Bédard* seems a straightforward case establishing only that a child, even one as young as 13 years and 7 months, can pierce her body without her parents' involvement as long as the piercing does not cause physical harm. A closer look reveals how the judgment gestures at law's vision of children as bearers of obligations. Justice Villeneuve's reasons indicate that

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<sup>82</sup> A clear example is found in the restricted and particular application of criminal law principles to young persons. See Criminal Code, RSC 1985, c C-46, s 13, which precludes application of this statute to minors under age 12, and Youth Criminal Justice Act, SC 2002, c 1, which sets out a framework for sentencing young offenders.

<sup>83</sup> See Civil Code of Quebec, SQ 1991, c 64, Art 14, 16, 17, 156 and 220.

<sup>84</sup> 2006 QCCQ 1074 (CanLII).

Chantal Bertholet, like other children in her circumstances, held three particular obligations. First, her reference to Articles 157 and 220 CCQ reflects children's capacity to hold contractual and commercial obligations. As noted, these provisions recognise children as having the right to contract for their usual and ordinary needs in accordance with their age and power of discernment. Correlatively, then, children are also obliged to uphold their end of a bargain for a good or service that fulfilled such 'usual and ordinary needs'. *Bédard* therefore indicates that Chantal's obligations deriving from the contract (most obviously, to pay for the provided services) were legally enforceable despite her young age.

A second, less explicit, obligation figuring in this judgment pertains to the parent-child relationship. Justice Villeneuve emphasises that Chantal Bertholet's decision to pierce her navel was entirely her own. Although this did not give rise to a legal remedy, it countered her parents' explicit beliefs and wishes. Similar to the approach taken in *Fraser*,<sup>85</sup> where the court suggests that a student who breaks school rules must accept disciplinary consequences, Villeneuve J indicates that this child must assume responsibility for any adverse effects of her conduct on her relationship with her parents.<sup>86</sup> The judge does not, however, comment on the propriety of the parents' rules. Although clearly dealing with a less severe set of facts, Villeneuve J's approach calls to mind Salhany J's abstention, in *Dhillon*,<sup>87</sup> from commenting on the parents' physical disciplinary tactics.

Finally, *Bédard* speaks to children's obligations related to their own health and physical integrity. The judgment characterises a navel piercing as a fashion statement that does not cause physical harm. It was therefore something for which a 13-year-old could contract independently. This reasoning suggests that a child has an obligation not to engage in conduct that puts her health or physical integrity at risk without parental involvement. This inference is consistent with the principle articulated at Article 17 CCQ, which calls for parental consent to medical interventions not required by a child's state of health if these entail a serious risk for the child and may cause grave and permanent effects. Parents' stake in a child's health care decisions is discussed further in the ensuing subsection.

### (b) Negotiating for and accessing health services

As they reach adolescence, children are recognised as having a level of autonomy that may carry the ability to make independent health-related choices.<sup>88</sup> Children are thus competent to consent to necessary medical interventions without parental permission or involvement at a certain point. This benchmark might be set by age,<sup>89</sup> or it may be determined by an assessment as to whether the child is a 'mature minor' who is able to understand her decision and its consequences.<sup>90</sup>

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<sup>85</sup> *Bethel School District No. 403 et al v Fraser, A Minor, et al.* 478 US 675 (1986).

<sup>86</sup> 2006 QCCQ 1074 (CanLII), at paras [32]–[33].

<sup>87</sup> [1991] OJ No 1657 (QL).

<sup>88</sup> For a rich discussion on the link between adolescent autonomy and the capacity for medical decision-making see S Van Praagh, 'Adolescence, autonomy and Harry Potter: The child as decision maker' (2005) 4(1) *International Journal of Law in Context* 335.

<sup>89</sup> As is the case, for example, in the provinces of Quebec and Manitoba: Civil Code of Quebec, SQ 1991, c 64, Art 14 and 17; Health Care Directives Act, CCSM, c H27, s 4(2).

<sup>90</sup> This doctrine has its roots in common law jurisprudence, originating in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL), [1986] 1 FLR 224. The mature minor doctrine has been applied by Canadian

While adolescents may consent to some health care services, the law often treats a refusal to accept such services differently. Where the care in question is deemed necessary for the child's survival or to avert a serious health threat, a court may become seized of the matter and may in some cases have jurisdiction to order the administration of treatment over any objections.<sup>91</sup> The precise scope of judicial discretion to intervene in a child's medical decisions is set by the applicable statute in a given jurisdiction. Where legislation grants a child the right to make independent treatment decisions, it is arguable that even a decision that appears to counter her best interests – such as a refusal of necessary care – should be respected.<sup>92</sup>

A child's independence may also be curtailed where she seeks to consent to care that is viewed as elective and that may have serious consequences. Article 17 CCQ, referred to above, indicates that where a child aged 14 or older consents to care not required by her state of health, her parents' consent is also required 'if the care entails a serious risk' and may yield 'grave and permanent effects'. Abortion may constitute a medical intervention within the ambit of Article 17 CCQ. Canada has no explicit rules governing abortion for minors; general principles governing access to medical care will apply in such contexts. The American Supreme Court, however, has examined the governance of abortion on several occasions. This Court has been called upon to rule on the constitutionality of parental consent and parental notification requirements imposed by the State on girls who seek abortion services.<sup>93</sup>

In *Hodgson et al v Minnesota*,<sup>94</sup> a group of petitioners that included six pregnant children representing a class of pregnant minors challenged a Minnesota statute prohibiting the performance of abortions on girls under 18 until at least 48 hours after the notification of both parents. Certain exceptions, including a 'judicial bypass' (that is, a court exemption from the parental notice and waiting requirements) were built into the legislation. A majority of the Court struck down the legislation as unconstitutional, holding that the requirement of notifying *both* parents was unreasonably connected to State interests in protecting children.

Although multiple opinions are delivered by members of the Court in *Hodgson*, each is punctuated by emphases on children's interests, vulnerability, and need for guidance and counsel. Children's rights are also central, as the case recognises a child's constitutional right to terminate a pregnancy, even though the State may restrict its exercise. Quite apart from this focus on rights, interests and vulnerabilities, judicial discussions in *Hodgson* yield insight into law's perception of children's obligations. The Court intimates that children are *prima facie* expected to discuss matters pertaining to their health with their parents, even when this would reveal private or intimate information about the child. The State is viewed as having an acceptable interest in ensuring that a child, 'when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice'.<sup>95</sup>

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courts: see *Walker v Region 2 Hospital Corp.* (1994), 4 RFL (4th) 321 (NB CA); *Re LDK; U(C) (Next friend of) v Alberta (Director of Child Welfare)* (2003).

<sup>91</sup> See *AC v Manitoba (Director of Child and Family Services)* 2009 SCC 30, [2009] 2 SCR 181; *Re Dueck* [1999] 171 DLR (4th) 761 (Sask QB); *Protection de la jeunesse-884* [1998] R.J.Q. 816 (C.S.).

<sup>92</sup> See Law Reform Commission of Ireland, *Children and the Law: Medical Treatment* (Law Reform Commission, 2009), at pp 132–147 for a helpful overview of legal approaches to children's health care decisions in Canada.

<sup>93</sup> *Planned Parenthood of Central Missouri v Danforth* 428 US 52 (1976), at p 95; *Hodgson et al v Minnesota* 497 US 417 (1990).

<sup>94</sup> 497 US 417 (1990).

<sup>95</sup> 497 US 417 (1990), at p 483 per Kennedy J concurring in the judgment in part and dissenting in part.

While this does not mean that a child's will succumbs to her parents' wishes in medical decision-making,<sup>96</sup> the Court signals its sense of the desirability of family dialogue about serious health choices.<sup>97</sup>

Additionally, *Hodgson* tells us that children have an obligation to accept judicial involvement and approval where their medical choices risk seriously compromising their well-being. So while mature minors might be competent to consent to necessary care independently, judicial intervention may be engaged when a decision to seek or refuse an intervention may place a child's life or health in jeopardy or may have long-standing consequences. In *Hodgson*, this principle materialises in the form of the judicial bypass requirement for children who do not notify parents about decisions to seek abortion services. The principle also emerges in cases where a child and her parents refuse necessary medical care.<sup>98</sup> This connection between children and the judiciary - and more broadly, the State - is even more pronounced in the discussion that follows regarding children subject to protective social services.

### (c) Negotiating for and Accessing Social Services

*Bédard* and *Hodgson* suggest that the law expects children to consult with their parents about major decisions affecting them, and that children must respect their parents' right and obligation to play the lead role in guiding, supporting and teaching them as they mature. But these cases also tell us that this expectation is not boundless. Children are entitled to make autonomous choices that respond to their ordinary and everyday needs and lifestyles. This might have private repercussions at home, but typically law does not interfere with such familial fallout. Moreover, parental rights and authority can be limited by the State when these are deployed in a way that exposes a child to intolerable physical or psychological risk.

A third narrative on the child as 'bargainer' further clarifies the contours of the parent-child relationship in law while also casting the child as a bearer of obligations. This narrative affirms the non-absolute nature of parental rights and choices for children, demonstrating the power law gives the State to remove a child viewed as requiring protection from her parents' custody and control. The case in question, *Protection de la jeunesse-456*,<sup>99</sup> involved a 15-year-old girl, referred to as 'B.T.' The judgment casts B as resourceful and persevering in the face of extremely difficult family circumstances. B's parents required her to work without pay in their family business, which interfered with B's social and academic life. On occasion it resulted in her absence from school. She was physically disciplined by her parents, and had informed school authorities about this abuse. When this complaint failed to yield results, B presented herself at the Office of Youth Protection requesting her own placement in foster care.

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<sup>96</sup> On this see *In re Cayouette*, [1987] RJQ 2230 (CS), a Quebec judgment holding that a child's refusal to undergo a bone marrow retrieval for donation to a younger sibling could not be overridden by his parents' consent to the procedure.

<sup>97</sup> *Hodgson et al v Minnesota* 497 US 417 (1990). The Court notes, however, that such conversations are not expected with parents who are absent or those with a history of abuse or maltreatment. The Court accepts the legislative exemption to the notification requirement in cases where the minor declares to authorities that she has been the victim of parental abuse or neglect.

<sup>98</sup> See Civil Code of Quebec, SQ 1991, c 64, Art 16, which allows for judicial intervention and see *AC v Manitoba (Director of Child and Family Services)* 2009 SCC 30, [2009] 2 SCR 181; *Re Dueck* [1999] 171 DLR (4th) 761 (Sask QB); *Protection de la jeunesse-884* [1998] R.J.Q. 816 (C.S.).

<sup>99</sup> [1990] RJQ 2746 (CQ).

Justice Bernier granted the Director of Youth Protection's application to declare B's security and development at risk, finding that allowing B to return to her parents' home would expose her to moral or physical danger. The judge rejected B's parents' argument, resonant with that advanced by the parents in *Dhillon*, to the effect that B suffered from behavioural problems and required disciplining. And although B told the Court she was eager to return home with her family, the Court, relying on expert evidence, held that B should remain in foster care until she re-established communication with her parents and until her parents reflected on and re-evaluated their 'attitudes éducatives'.

Consistent with *Bédard* and *Hodgson* and with decisions examined in relation to law's approach to the child as student, *Protection de la jeunesse-456* is framed in terms of B's rights and interests. Bernier J focuses on the importance of adolescent socialisation and education, and on the need to protect B from being forced to assume a workload disproportionate to her capacities or level of responsibility. But the judgment also intimates a couple of ideas about children's obligations. First, Bernier J stresses that children should have opportunities for social integration, most obviously by attending school. Although she never states overtly that B had an *obligation* to be educated and to socialise, the judge viewed the parental prohibition on bringing friends home and on conduct like wearing makeup or jewellery as problematic. These elements, as well as B's absence from school and her limited ability to study because of parental demands, formed the basis of Bernier J's finding that B was in need of protection. The ruling is consistent with jurisprudence indicating that parental isolation of a child can interfere with the child's right and obligation to attend school.<sup>100</sup>

A second obligation intimated by *Protection de la jeunesse-456* pertains to the child's relationship with the State. Although B expressed the desire to return home to her family, the Court orders her continued residence in a foster home. Like her parents, B is equally subject to the judgment granting the Director of Youth Protection's application for intervention. B must comply with the terms of the order requiring her to remain outside of her parents' care until further judicial assessment. The judgment thus indicates that even when a child herself seeks out social services, if the State finds these services necessary for her protection she must accept them even if she subsequently revisits her choice and decides that she no longer wants or needs them.

## Conclusion

Law perceives the child who crosses the confines of family and home life to seek out commercial, health or social services, as bearing autonomy to negotiate for and access resources she desires or sees as essential to her well-being. Yet, as the cases here show, that autonomy has limits. For example, while a child can make contractual undertakings, this entitlement is limited by the child's age and maturity level. The same is true for health services; depending on the gravity of the child's medical condition and the nature of the care sought, parents, social workers, and even the judiciary may be brought into the fold of analysis and decision-making. In

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<sup>100</sup> See *Protection de la jeunesse – 477* [1991] Recueil de Jurisprudence du Québec 861 (CQ), and more famously, *Wisconsin v Yoder* 406 US 205 (1972), where the US Supreme Court held that followers of the Old Order Amish could remove their children from public education institutions past the eighth grade. For discussion see, S Van Praagh, 'The education of religious children: Families, communities and constitutions' (1999) 47 *Buffalo Law Review* 1343. In the Quebec context, a child is generally obliged to attend school until the end of the school year in which she turns 16-years-old or until she obtains a diploma from the Minister of Education, whichever occurs first: Education Act, RSQ, c I-13.3, s 14.

the context of social services, a child can ask for protection, but it is the State, through its Youth Protection or Child Welfare branch, that will oversee the matter and determine the proceedings and measures needed to safeguard the child's security.

More subtly, legal sources also tell us that the child as bargainer is a bearer of obligations. She is viewed as having the obligation to respect certain contractual undertakings, and to accept State-imposed requirements related to education, health and social services. The child in this setting is also positioned more explicitly in relation to her family than the child as a student or the street child. While the student's obligations are primarily to her peers and school community, the street child, apparently severed from her family, has obligations focused on her own survival and law abidance. The child as bargainer, in contrast, has close links to her parents. While she may transact beyond the domestic sphere, she can venture only so far alone. Law still sees this child as nestled within a network of family ties, requiring her to consider her relationship with her parents in making significant decisions, even if this results in reduced privacy for the young person or risks engendering family conflict. Ultimately, the child as bargainer possesses a range of obligations that extend to those with whom she engages for services, to those having parental authority, and more broadly, to the State.

This view harmonises with the perception of children as embedded in a network of interdependent social relationships, the recognition of which facilitates and enriches her citizenship and agency. Specifically, the citizenship and agency of the child as bargainer are manifest through law's recognition of her conscious ability to seek out services for herself, even when these services are controversial in the eyes of her family, her community or the State. Yet her abilities in this connection are bound by a set of obligations that reflect her status as a child, with evolving capacities and autonomy, as well as her reciprocal commitments with family and state. We see such obligations as constituting, at least in part, the citizenship and agency of the child as bargainer. In assuming obligations while taking up commercial, health, and social services, the child is viewed as acting in connection with larger constituencies, members of whom may be affected by, or called upon to support her in her choices and actions. The child as bargainer does not, therefore, act in isolation but as a member, or citizen, of broader social contexts, namely her family, communities and the State. Confronting, accepting and meeting these obligations serves as evidence and expression of the child's agency.

## Conclusion

Legal sources contribute significantly to revealing the ways in which children can be meaningful members of their families and communities. Children are viewed as having rights, which may be tailored to, and limited by, competing interests relating, for example, to security or protection. Legal authorities also corroborate the thesis that a child's citizenship is rounded out by the inclusion of obligations, their nature and scope dependent on context. While the child as student is obliged to avoid compromising school safety and to exhibit tolerance for diverse opinions, the street child must provide for herself while respecting laws targeting indigent children. Meanwhile, the child as bargainer must adhere to appropriate commercial undertakings, involve parents in decisions with considerable health effects and respect juridical norms, even when these involve incursions into private family life.

The narratives selected for consideration in this paper illuminate the value of appreciating how a child's civic and social identity is forged through the recognition of obligations. The child who

engages with others in schools, on the streets, and in accessing services and resources is recognised as bearing the potential for conscious reflection. She is expected to grasp, in at least some measure, the possible ramifications of her conduct, words and choices. In consequence, law expects the child – whether as student, street child or bargainer for goods and services – to accept the consequences of her actions to the extent of her maturity and cognitive abilities. This is true regardless of whether such actions involve breach of a home or school rule, a decision to leave home, entering into a contractual agreement, or a decision to access child welfare services when faced with compromising family circumstances.

At first blush, law's imposition of obligations on young people may seem austere. We instead see such obligations as critical to the child's citizenship and agency. Vested with obligations within various social contexts and relationships, children are given the message that they are empowered to achieve particular outcomes and to affect and engage with others. They are entrusted with the obligation to exercise their power, entitlements, and rights in ways that avoid inflicting risk upon those surrounding them. Given the link between notions of responsibility and citizenship,<sup>101</sup> and because citizenship both requires and cultivates agency,<sup>102</sup> the extension of obligations to children becomes foundational in promoting their social and political belonging as well as their own self-identity.

There is, as this paper shows, an exception to the foregoing observation. Law's treatment of the street child cannot be said to infuse her with self-worth or agency. Her belonging in civic society is muted by a set of internally inconsistent rules that make it impossible for her to flourish, or perhaps even survive, if she prioritises law-abidance. The street child is thus typically an outlaw, stigmatised for engaging in prohibited conduct that is often necessary to self-preservation. This case study highlights how extending obligations to children can only facilitate their social and civic growth when such obligations are contextually designed. That is, these obligations must be realistic and realisable, ensure satisfaction of children's most essential needs, and recognise her ongoing dependence and the network of relationships she must continue to support and rely on to achieve autonomy and to develop and express agency.

Finally, this paper yields an important observation about the parameters of children's obligations. Law's extension of obligations to children reflects their ongoing connections with their families and communities. This is consistent with the paradigm of obligations deployed here, which is meaningful only through recognition of the network of relationships central to the child. Although the parent-child relationship is only implicit in the context of the child as student, and is essentially ignored in analyses of the street child, a close examination of these circumstances reveals the persistent importance of this connection. For example, a child's conduct and expression at school is often reflective of values and beliefs instilled at home or within a cultural setting. This point is observable in both *Multani* and *Tinker*, the students in each case having worn to school symbols that reflect their own ideologies and those of their parents and larger communities. The child who navigates street life independently is cast as distinctly removed from family life, usually by choice. But as the analysis in Part II demonstrates, this is a flawed interpretation for many street children. A more nuanced juridical appreciation of the multitude of familial factors prompting children to flee parental control is apposite.

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<sup>101</sup> J Hine, 'Children and Citizenship' (08/04) *Home Office Online Report*, at pp 4 and 5.

<sup>102</sup> R Lister, *Citizenship: Feminist Perspectives*, (New York University Press, 2nd edn, 2003), at p 39.



In contrast to the child as student and the street child, a study of the child as bargainer presents parents much more prominently and explicitly. While the law allows children to negotiate for services, parents are always perceived to be not far in the background, ready to be called forth where the services in question engender controversy. At the same time, the law does not see deference to parental rules as paramount. Rather than rulers over their children, parents are cast more properly as ‘consultants’ with whom children should confer but not necessarily obey. Child disobedience may have no legal consequence (as in *Bédard*<sup>103</sup>) or if it does, the job of righting family conflict may legally rest with parents (as in *Protection de la jeunesse-456*<sup>104</sup>).

Ultimately, an analysis of law’s imagination of children beyond the limits of home and family life elucidates the centrality of their obligations. It underscores the value such obligations can yield, positioning children as capable of conscious self-reflection, citizenship and agency. At the same time, it warns against unrealistic obligations that fail to account for the contexts and realities of children, particularly those who face the most severe social and economic risks. It further stresses the need to account for relationships in considering children’s obligations. Taken together, these factors offer a framework for appreciating obligations for children as paralleled with their rights and interests and oriented toward a textured recognition of their civic membership and agency.

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<sup>103</sup> 2006 QCCQ 1074 (CanLII).

<sup>104</sup> [1990] RJQ 2746 (CQ).