Fostering Recognition: A Philosophical Critique of Anglo-American Child Protection Law

Laurence Ricard

Faculty of Law

McGill University, Montreal

November 2023

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Doctor of Civil Law

Table of Contents

Abstract

This thesis is a philosophical study of the Anglo-American legal systems of child protection, through the use of a theory of recognition. Child protection systems are a legal response to the social phenomenon of child maltreatment. Anglo-American jurisdictions share similar child protection systems, characterized by their formalism (through legal regulation) and their individualism. They are organized in two parts: intervention by social workers, and judicial oversight by the courts, who can allow the social workers to take actions without the consent of the parents and the child. Since Anglo-American child protection systems are highly regulated by legislative constraints and court proceedings, they are predicated on the way the law conceives of personal autonomy and family relationships. This thesis contends that the law has a liberal understanding of the person and of relationships. The relationship between a parent and a child is described in law only in terms of rights and duties. In contrast, the social intervention is premised on a more nuanced conception of the person, informed by psychology and social work research.

The thesis argues that the theory of recognition, inspired by the work of philosopher Axel Honneth, offers a fruitful conceptual framework to analyze the limitations of the legal framework of child protection. It offers a new version of the theory of recognition as a critical legal theory offering an alternative to relational theories of law. It demonstrates that the tripartition of recognition put forward by Honneth (interpersonal, social, and legal) are evidenced in the literature on child development, child maltreatment factors and causes, and critical legal pluralism. The theory of recognition developed in the second chapter is used to critically analyze the shortcomings of the ways law conceptualizes childhood, parenthood, and the social responsibility to intervene when the relationship is harmful to the child (chapter 3). It is then used to argue that, although there is a wide consensus against adversarialism in family matters, the adversarial stance is built in the substantive child protection laws, as a consequence of liberalism (chapter 4). This inherently limits the use of alternative dispute resolution mechanisms in child protection matters, and influences their efficiency. Lastly, the thesis concludes on a case study of the child protection system in Québec, reviewing the recommendations of the Laurent Commission in 2021 and the legislative reforms that ensued (chapter 5).

Résumé

Cette thèse est une étude philosophique des systèmes anglo-américains de protection de la jeunesse, à travers le prisme d'une approche de la reconnaissance. Les systèmes de protection de l'enfance sont une réponse juridique au phénomène social de la maltraitance des enfants. Les juridictions anglo-américaines partagent des caractéristiques similaires en matière de protection de l'enfance, notamment quant à leur formalisme (à travers l'encadrement juridique) et leur individualisme. Ces systèmes sont organisés en deux volets: une intervention sociale et une intervention judiciaire, où le tribunal peut permettre à des travailleurs sociaux de prendre des actions à l'encontre de la volonté des parents et de l'enfant. Puisque les systèmes anglo-américains de protection de la jeunesse sont hautement encadrés par des contraintes législatives et par les procédures judiciaires, ils sont ancrés dans la façon dont le droit conçoit la personne et ses relations aux autres. Cette thèse défend l'argument selon lequel le droit est fondé sur une conception libérale de l'autonomie personnelle et des relations familiales. En droit, la relation entre un parent et un enfant est décrite uniquement en termes de droits et de responsabilités. Par contraste, l'intervention sociale se fonde sur une conception plus nuancée de la personne, informée par la recherche en psychologie et en travail social.

Cette thèse fait la démonstration que la théorie de la reconnaissance, inspirée par les travaux du philosophe Axel Honneth, offre un cadre conceptuel fécond pour analyser les limites du cadre juridique de la protection de la jeunesse. Une lecture originale de la théorie de la reconnaissance y est suggérée, proposée comme une théorie juridique critique offrant une alternative aux théories relationnelles du droit. Il y est démontré que la tripartition de la reconnaissance explorée par Honneth (aux niveaux interpersonnel, social et juridique) trouve un ancrage empirique dans les ouvrages de psychologie et travail social en développement de l'enfant, sur les causes et facteurs de la maltraitance, en plus de résonner avec les préoccupations du pluralisme juridique. Cette théorie de la reconnaissance développée dans le deuxième chapitre est utilisée pour faire une analyse critique des limites de la façon dont le droit conceptualise l'enfance, la parentalité et la responsabilité sociale d'intervenir lorsque la relation parent-enfant cause un tort à l'enfant (chapitre 3). Elle est ensuite employée pour démontrer que, bien qu'il existe un consensus contre le système contradictoire en matières familiales, le positionnement des parties comme étant des adversaires découle du droit substantif de la protection de la jeunesse, en raison de son libéralisme (chapitre 4). Cette réalité limite la possibilité de généraliser l'usage des mécanismes alternatifs de résolution de conflits, et influence leur efficacité. Enfin, la thèse se conclut sur une étude de cas, soit le système de protection de la jeunesse au Québec. Les recommandations du rapport Laurent de 2021 ainsi que les réformes législatives qui en ont découlé sont analysées (chapitre 5).

Acknowledgments

It would be unthinkable to write a thesis on recognition and relational autonomy without acknowledging how this work was made possible by a web of relationships. I must first thank my supervisor, Robert Leckey, for his unwavering moral, intellectual and material support, for his confidence in my project, and his attentive reading. Thank you also to my internal committee members, Lara Khoury and Jonas-Sébastien Beaudry, for being generous readers and for giving me so many thoughtful comments and suggestions. I am deeply grateful to have been fortunate enough to benefit from the mentoring and support of many professors, who all made me feel safe and welcome in academia, and were gracious enough to share their time, encouragements, and knowledge: Shauna Van Praagh, Daniel Weinstock, Pascale Dufour, Dia Dabby, Karine Poitras, Marième Lacroix. Thank you to Chantal Cyr for the discussion and references on attachment theory. I am thankful for Christian Nadeau and Ryoa Chung, who have been cheering for me since I first begun my graduate studies journey, more than ten years ago, and for the always wise advice of my friend Pascale Cornut-Saint-Pierre. A special thank you to my doctoral buddy, Vanessa MacDonnell: you have been my rock and an inspiration.

I feel incredibly lucky for the support and camaraderie Marie-Pier Baril and Aurélie Lanctôt have given me. I would not have finished this thesis so quickly without the virtual presence of Aycha Fleury. Yann Allard-Tremblay, I am grateful for our enduring friendship, which influenced my ideas in ways I could not possibly try to count.

I thank all of my colleagues at the Youth Protection Court, and all the social workers, judges, clerks, and officers I worked alongside while practising. It has been an

honour working with you. I wrote this thesis thinking of you all. I especially thank Michelle Dionne, your passion for the welfare of children and their families is contagious.

I am indebted to all of my wonderful, caring, and brilliant friends, and to their children and partners. Because of you, I know the value of authentic connection and commitment that get me through life's many challenges. I would like to especially thank Julie Girard-Lemay, Tanya and Alexandra LaPerrière, Maud Gauthier-Chung, Marie-Christine Rivard, Selma Skalli, Zoe Williams, Étienne Brown, Marie-Hélène Boudreau-Picard, Vincent Hamel Davignon, Hubert Gendron-Blais, Arno Bramann-Bernard, Maxime Guay, Tamy Carrière, Dominique Mathieu, Gabriel Chartier-Primeau, Melissa Lebeau, Hélène Mercier-Brulotte, Roseline Lemire-Cadieux, Zoé Tremblay-Cossette, Émilie Cornut, Myriam Leblanc, Jimmy Simard, Maxime de Cotret, Joseph Martin, and Maxine Kelly for their friendship. You are my community.

Merci à chaque membre de mes familles Ricard et Giroux, je me sens privilégiée de vous avoir dans ma vie et de faire partie des vôtres. Merci, Gabriel et Étienne Giroux de toujours répondre présent. Luce Houde, Réal Giroux, Pierrette Boucher et Jean-Denis Ricard (où tu es), votre amour est un fondement. Jeanne Ricard, merci d'être ma sœur non seulement de nom, mais de cœur. Jacinthe Giroux, Normand Ricard, ce que vous m'avez transmis est partout dans ce que je suis, dans les idées que j'explore, mais aussi dans les domaines que j'ai choisi d'investir. Merci pour tout.

This thesis has been made possible because of the financial support of the Social Sciences and Humanities Research and of the McGill Faculty of Law.

Introduction

But to ourselves we owe an intellectual recognition of the fact that at first we were (psychologically) absolutely dependent, and that absolutely means absolutely.

Donald W. Winnicott[1]

Emily's[2] story never made the news, although she was six years old when she was found to be "malnourished, wearing inadequate clothing and having hygiene issues".[3] She "was repeatedly observed with bruising, scratches and rashes on her body which the mother has been unable to explain or has not sought the appropriate medical attention for".[4] She was exposed to verbal and physical violence at home. She was also subjected to sexual abuse by either her mother, her partner's mother, or someone else. We will never know for sure. She was hit, bruised, and burned with cigarettes. Her development was interrupted somewhere between eighteen months and three years of age. Emily "exhibit[ed] poor impulse control and poor self-regulation and act[ed] out aggressively towards others, destroy[ed] property and [ran] away from caregivers putting herself at risk".[5] She "[strove] to get the attention lacking in her attachment relationships".[6] She urinated and defecated in anxiety-inducing situations. She exhibited sexual behaviours and exhibitionism. Because

[1] Donald W Winnicott, *Winnicott On The Child* (Perseus Publishing, 2002) at 16.
[2] I chose a fictional name to tell the story of the child in *Protection de la jeunesse — 187666*, 2018 QCCQ 8260. All of the facts are real and described in this decision.
[3] *Protection de la jeunesse — 187666*, *supra* note 1 at para 6.
[4] *Ibid* at para 6.
[5] *Ibid* at para 17.
[6] *Ibid* at para 17.

of her disturbing behaviours, Emily was displaced and transferred eight times, from different foster homes to rehabilitation centres, between the age of six to eleven. At age ten, she suffered sexual abuse again, this time from a boy in her rehabilitation centre.[7]

As awful as Emily's story was, it never came to public attention. Why would it? She was only one out of tens of thousands of children in Québec who, every year, suffer from child maltreatment dangerous enough to be considered in need of protection.[8] Her story may be hard to read, but it is unfortunately not as rare as we would think. Yet, the biggest tragedy is our general lack of concern for child protection issues, including from the legal world. This disinterest is a dereliction of our collective duties to children like her.

The definition of child maltreatment has evolved over the years and across cultures, but it is now widely defined in the scientific literature as ranging from physical abuse, sexual abuse, psychological or emotional abuse, neglect, to exposure to intimate-partner violence, experienced in the familial context.[9] Emily's story is at one end of the spectrum of child maltreatment, since she suffered multiple types of serious abuse. But behaviours that were once socially acceptable or merely frowned upon, such as spanking or humiliating a child to teach them a lesson, are now included in those definitions. Demonstrated causal long-term effects of child maltreatment include mental disorders, drug use, suicide attempts, risky sexual behaviour, and sexually transmitted diseases.[10]

---

[7] It led the court to declare that her rights had been violated pursuant to section 91(1)(4) of the *Youth Protection Act*, CQLR c P-34.1: see *ibid.*

[8] When Emily's situation was brought to the attention of child protection services, in 2013, 32,239 children were under the care of the Director of Youth Protection in Québec. In 2022-2023, there were 42,821: *En équilibre vers l'avenir: Bilan des directeurs de la protection de la jeunesse/Directeurs provinciaux* (Québec Government, 2023) at 11.

[9] Ruth Gilbert et al, "Burden and Consequences of Child Maltreatment in High-Income Countries" (2009) 373:9657 The Lancet 68.

[10] Rosana E Norman et al, "The Long-Term Health Consequences of Child Physical Abuse, Emotional Abuse, and Neglect: A Systematic Review and Meta-Analysis" (2012) 9:11 PLoS Med e1001349.

Even so, child maltreatment stories tend to be socially and politically salient only briefly, when dramatic and short-lived human-interest stories of abused children appear in the news. As a matter of public policy, child maltreatment is often considered peripheral and does not bear much political weight, although the State's failures to prevent child deaths from abuse or neglect still periodically provoke shock and concern.[11]

Unfortunately, despite the intermittent attention it receives, child abuse and neglect are highly prevalent, at rates the general public, and the legal system, does not suspect. Although legally, child maltreatment is currently understood as a deviation from normal parenting,[12] in Canada, in 2018, about 6 out of 10 individuals (59,7%) reported having experienced some form of child maltreatment before they were 15 years old.[13] This striking statistic shows that it is far from a marginal social issue.

Despite this prevalence, domestic child protection is still an emerging field of study in law, as demonstrated by the scarcity of the literature on the subject. It is also usually seen as a specialized subject (by contrast with "core" subjects of law, such as contract law, family law, torts, and so on). By comparison with criminal law, a pillar of the legal literature and education, this relative invisibility of child protection in legal scholarship is not representative of the importance of the social phenomena these two fields address. If the statistics are to be believed, many more people will have been exposed or involved to

---

[11] Among other examples: "La fillette morte à Laval était connue de la DPJ", *Radio-Canada* (4 January 2021), online: <https://ici.radio-canada.ca/nouvelle/1760660/laval-fillette-mort-enquete-autopsie> ; Philippe Teisceira-Lessard, "Deux bébés morts dans une famille : la DPJ et la justice en quête de réponses", *La Presse* (15 February 2023) online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2023-02-15/deux-bebes-morts-dans-une-famille/la-dpj-et-la-justice-en-quete-de-reponses.php>.

[12] Nigel Parton, "Addressing the Relatively Autonomous Relationship Between Child Maltreatment and Child Protection Policies and Practices" (2020) 3:1 Int J Child Maltreat 19.

[13] *What Do We Know about Physical and Non-Physical Childhood Maltreatment in Canada?*, by Danielle Bader & Kristyn Frank, Statistics Canada, Economic and Social Reports Catalogue no. 36-28-0001 (Government of Canada, 2023).

child maltreatment in their life than to criminal acts.[14] Furthermore, childhood maltreatment increases the risk of being a victim of criminal violence in adulthood.[15] I hope this dissertation can be a humble contribution in changing that perspective.

This thesis proposes a critical analysis, through applied legal philosophy, of the legal answer to child maltreatment in Anglo-American jurisdictions. It makes the case that the social phenomenon of child maltreatment discloses the relational nature of the self. Since the law is premised on an individualistic and rationalistic understanding of social interactions, child protection laws are structurally inadequate when it comes to providing an adequate answer to this pressing issue. Child protection deserves more attention from legal scholars because it addresses an important social problem. But it also deserves attention because it reveals something about the way law understands personal autonomy, vulnerability, and the accountability of the State in fostering the former and protecting the latter.

1. Argument

Child protection systems are a social and legal response to child maltreatment. In Anglo-American jurisdictions,[16] their main characteristic is their legalistic approach to this issue.[17] In this dissertation, I argue that liberal western law traditions are premised on an unrealistic conception of individual autonomy or agency, centred on human rationality,

[14] In Canada, in 2019, "one in five (19%) Canadians or their households were impacted by […] sexual assault, robbery, physical assault, break and enter, theft of motor vehicles (or parts), theft of household or personal property, or vandalism": *Criminal Victimization in Canada, 2019*, Juristat, by Adam Cotter, Statistics Canada, Juristat Catalogue no. 85-002-X (2021) at 3.
[15] *Ibid.*
[16] This includes some civil law jurisdiction such as Québec.
[17] Marie Connolly & Ilan Katz, "Typologies of Child Protection Systems: An International Approach" (2019) 28:5 Child Abus Rev 381; Neil Gilbert, ed, *Combatting Child Abuse: International Perspectives and Trends* (Oxford University Press, 1997).

that renders this legalistic approach ill suited as a response to child maltreatment.[18] As I endeavour to demonstrate, in law, personal autonomy is a fundamental value aiming to respect the individual capacity, evenly distributed among people, to reason and to guide one's behaviour on individual reasoning. This disputable definition of autonomy has repercussions in the way the law apprehends the realities of interpersonal and social relations, in their substance and forms. It limits its ability to diagnose the sensitive and nuanced relational issues at play in family dynamics in the context of child maltreatment, offering a set of stiff and inadequate solutions to problems often much more complex than legal concepts can describe.[19] Questioning our legal understanding of child maltreatment and child protection forces us to recognize the limits of law's understanding of the legal subject, be they parent or child. It also gives us the tools to imagine a more accurate way to depict how individuals engage with their intimate, social, and legal worlds. Thus, child protection law can serve as an inspiration for a more general relational theory of law and as a field of application of the theory.

Although the Anglo-American child protection systems can differ in many ways, they all share a dual structure. One part of that structure is the intervention of social workers, who act on some form of clinical understanding of the family situation.[20] The

---

[18] Martha A Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics" in Martha A Fineman & Anna Grear, eds, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge, 2013) 13.

[19] I use the term legal concepts in the way described by Roderick A Macdonald: "Legal concepts are organizing structures that enable us to establish a relationship between the world of phenomena, and a series of reactions, reflections and judgements that we personally bring to bear on the meaning of these phenomena. The notion of legal subject is a concept; so too are the notions of filiation, a succession, property, a usufruct, a contract, and a trust." (Roderick A Macdonald, "Triangulating Social Law Reform" (2016) 21 Lex Electronica 118 at 126).

[20] I employ the term "clinical" to refer to the treatment of child maltreatment from a therapeutic perspective.

other is the court system, which is involved in arbitrating conflict between child protection services and families. From a clinical perspective, child maltreatment is the result of a multiplicity of relational factors such as socioeconomic status and the intergenerational history of the family. Addressing child maltreatment can be done through a public health approach as much as through more individualized intervention in the family dynamics.[21] Child protection is an individualized approach to child maltreatment, and falls into the latter type. Although the clinical part of child protection addresses individual families, the theoretical constructs on which it operates are inherently relational. One example that will be explored in this thesis is the use of attachment theory, an influential model in the clinical intervention in child protection. Attachment theory is a relational model, since it posits that children are biologically driven to attach to caregiving figures, and that the relationships they develop with these figures have deep and lasting impacts on their emotional health. [22]

This thesis demonstrates that there is a fundamental disconnect between the legal and clinical approaches to child protection. This disconnect is indicative of a dysfunction in the workings of the child protection system, as much as an inability of the law to properly conceptualize issues that arise within intimate relationships. I contend that the reason for that disconnect is that there is a deep divide between the conception of the individual at the core of clinical approaches to child protection and the mainstream legal conception of the individual in the law.[23] Whereas clinical social intervention (based on social work theory

---

[21] Bob Lonne et al, *Re-Visioning Public Health Approaches for Protecting Children* (Springer, 2019); Louise Dixon et al, eds, *The Wiley Handbook of What Works in Child Maltreatment: An Evidence-Based Approach to Assessment and Intervention in Child Protection* (Wiley-Blackwell, 2017).

[22] See John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* (Routledge, 1988); Sue White & Matthew Gibson, *Reassessing Attachment Theory in Child Welfare: A Critical Appraisal* (Policy Press, 2019).

[23] Here I refer to civil law as the general system of law. The same is true, I contend, regardless of the legal tradition, whether the continental civil tradition or the Anglo-American common law.

and psychology) presupposes a relational conception of the individual, by recognizing the vulnerability of the child and the interdependence of the members of the family unit, the general civil law and procedural law principles remain rooted in a more traditional, liberal conception of the individual.

Therefore, I argue that while child protection legislation, like any family-related legislation, takes account of the relational nature of the individual by recognizing some intimate bonds, it does so without challenging the nature of the general liberal conception of the individual at the heart of our legal systems. The way child maltreatment is addressed by jurists tend to individualize issues instead of putting them in their relational context. This approach defines parents' and children's interests as an adversarial debate and a zero-sum game. In a child protection mindset, children belong to their parents (and their parents belong to them, in a way) until the parents maltreat them, in which specific cases children must be protected from their parents. This rigid framework lacks nuances. This argument applies to many types of jurisdictions across Canada, the United States, and the United Kingdom (and many other Western jurisdictions). All Western civil legal systems share those fundamental liberal tenets. Consequently, some basic assumptions of Western legal systems, such as construing individual autonomy as the exercise of rationality and independence, are being contravened by principles central to child protection.

Even though in the Anglo-American context, child protection is structured by legal principles and rules, most of the academic studies about child protection come from the fields of social work and psychology. The literature on the legal and ethical aspects of child protection is much more limited, especially in the Canadian context.[24] Although many

[24] There also have been interesting takes on the public health aspect of child protection (see *supra* note 21). In Canada, the subject is rarely treated from the legal perspective.

attempts have been made to collect interdisciplinary perspectives on child protection,[25] we have yet to see an integrated approach to child protection that analyzes how the legal system impacts the clinical concerns central to child protection. Therefore, this thesis contributes to the field of child protection studies by suggesting a conceptual framework for interdisciplinary analysis.

In response to the limitations of the liberal understanding of personal autonomy in law, I argue that we need a comprehensive and substantive relational theory of the law, to understand the shortcomings of the legal approaches to child maltreatment in the Anglo-American context. Conversely, and in a dialectical movement, the phenomenon of child maltreatment and its current treatment by the law can help legal scholars to engage in the construction of a substantive relational theory of law, enlightened by a theory of recognition.

On that account, I propose the use a theory of recognition, inspired by the work of Axel Honneth, to better conceptualize the way multiple orders of relationships are needed to foster personal autonomy.[26] I suggest my version of this theory, from which I retain the main tripartite structure of recognition (interpersonal, social, and legal), anchoring it in current social sciences literature on child development and social work. My approach to recognition is devised to work as a legal theory of the interaction between social norms, relationships, and personal autonomy. This theoretical foundation aims at providing the means to think about child protection systems from an interdisciplinary perspective,

[25] In the last two decades, there have been many edited books that very often encompass a very broad scope of issues and perspectives from different countries. For examples, see: Bob Lonne & al, *supra* note 21; Steven J Quintero, *Child Welfare Issues and Perspectives* (Nova Science, 2008); Mike Shaw & Sue Bailey, eds, *Justice for Children and Families: A Developmental Perspective* (Cambridge University Press, 2018).
[26] See Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, translated by Joel Anderson (MIT Press, 1996).

considering it as a fundamentally interdisciplinary endeavour. It also creates an alternative to the liberal legal perspective on interpersonal and social relations, which serves to highlight the law's dysfunctions when it comes to addressing issues surrounding child maltreatment. Thus, this thesis contributes to relational theories of law, since it uses child protection as an inspiration to develop a relational theory of law based on the philosophical concept of recognition.

2. Methodological Approach

This dissertation is a work of applied legal philosophy. It is not a traditional doctrinal analysis or a socio-legal research; rather, it is a philosophical argument that highlights the underpinnings, patterns, and flaws of the conceptual structure of the Anglo-American law of child maltreatment. Each discipline constructs conceptual frameworks and theories that make sense of their objects of knowledge. By dissecting the core components of the legal and clinical discourse and their philosophical premises, I hope to show that the concepts we use to think about a legal system and about our duties towards the most vulnerable people in society have weighty consequences on how we carry on those duties. In that sense, my methodology is mainly grounded in ethical concerns about the impact of the legal conceptual apparatus on the outcomes of child protection cases.

Although a few authors have pointed out the need to institute a dialogue between the traditional philosophical method employed in jurisprudence and other forms of theoretical analysis,[27] the applied legal philosophy approach is not frequently encountered

[27] See, e.g., Nicola Lacey, "Institutionalising Responsibility: Implications for Jurisprudence" (2013) 4:1 Jurisprudence 1–19. See also,e.g., Tom Ginsburg & Nicholas Stephanopoulos, "The Concepts of Law" U Chi L Rev 29.

in the legal academic literature, especially taken as a branch, or cousin, of political philosophy.[28] The philosophical method can be defined, broadly speaking, as "approaching a particular question through meticulous conceptual analysis, making explicit how one's conclusions follow from one's premise".[29] Traditionally, legal philosophy concentrates on foundational issues such as "What is law?" or "Is legality a moral issue?" In contrast, *applied* legal philosophy also employs philosophical methods, but turns to more concrete normative questions, relative to specific legal issues or policies.[30] This creates an opportunity for an integrated approach to interdisciplinary research. In that spirit, from an a philosophical perspective, I survey concepts such as childhood, parenthood, and the adversary system, and compare them to social science conceptualizations to generate a critical analysis of child protections laws.

This thesis takes a "conceptual activist" stance: it assumes that the craft of conceptualization, through the process of a thorough and precise critical analysis, will ultimately lead to better policies.[31] It is based on the assumption that comparing the legal conceptual matrix to the state of knowledge in social sciences will contribute to understand the possibilities and limitations of the law in answering complex social issues. There is a

---

[28] In their chapter, Dempsey and Lister do not differentiate legal and political philosophy: Michelle Madden Dempsey & Matthew Lister, "Applied Political and Legal Philosophy" in Kasper Lippert-Rasmussen, Kimberley Brownlee & David Coady, eds, *A Companion to Applied Philosophy* (John Wiley & Sons, Ltd, 2016) 311.

[29] Kasper Lippert-Rasmussen, "The Nature of Applied Philosophy" in Kasper Lippert-Rasmussen, Kimberley Brownlee & David Coady, eds, *A Companion to Applied Philosophy* (John Wiley & Sons, Ltd, 2016) 1at 4.

[30] Dempsey & Lister, *supra* note 28 at 313-314.

[31] *Ibid* at 315. Dempsey and Lister distinguish three types of applied legal and political philosophy approaches: the "standard activist" uses the philosophical methods to develop "arguments regarding what sorts of policies a society should seek to put in place" ; the "extreme activist", where philosophers craft argument for legal and political proceedings, taking an "expert" stance ; and the "conceptual activist", for whom the craft of conceptualization, through the process of a thorough and precise critical analysis, will ultimately lead to better policies.

resistance from some legal philosophers, especially from proponents of legal positivism, to the idea that legal philosophy should develop a normative discourse about what law should be.[32] Against that stance, I subscribe to Jeremy Waldron's argument that the very political nature of law means that any attempt to do legal philosophy should be inscribed in the greater scheme of political philosophy.[33]

The philosophical approach differs from socio-legal studies methodologies, such as those grounded in comparative law or empirical legal research. Rather than rely directly on empirical evidence, the applied legal philosophy method critically compares the general concepts and theories used by law to the fields of study relevant to the issue at hand (in this case, mainly in social work and psychology literature), by using philosophical concepts. The pitfall of any interdisciplinary analysis is that it is an encounter between multiple debates and vast bodies of work in each discipline. Using the philosophical discourse offers a way to take a step back from the specificities of different fields of study, to try and understand where and how they meet or differ. Therefore, I do not use specialized literature with the aim of demonstrating the exhaustivity of the factual evidence for the arguments I make. Rather, I rely on empirical research in law, social work or psychology as inspirations to develop philosophical arguments that are anchored in a documented reality. Although my work is theoretical, the conceptual framework of recognition that I suggest in this thesis could inspire future empirical research. Such research would allow the theory to be refined, invalidated or validated.

---

[32] Jeremy Waldron, "Legal and Political Philosophy" in Scott J Shapiro, Jules L Coleman & Kenneth Einmar Himma, eds, The Oxford Handbook of Jurisprudence and Philosophy of Law (Oxford University Press, 2004) 352.
[33] *Ibid*.

As for my object of study, I analyze the Anglo-American systems of child protection, which form a type of child protection system.[34] Although I was first interested in Québec's child protection system, I chose to delve into the broader literature on the Anglo-American approach to child protection. This wider subject of analysis allows to reach more perspective and depth when analyzing the philosophical issues at the root of the system's main tensions. Three main reasons support this choice.

First, since my working hypothesis was that there are philosophical differences between the judicial and clinical conceptualizations of child protection, and since the legislations on child protection tend to be localized (at the provincial level in Canada and state level in the United States, for example), a multijurisdictional approach to the literature generates some distance from the letter of the law, to focus instead on its spirit. This choice fits into the wider methodological choice of an applied legal philosophical inquiry. Second, the literature on Québec's specific child protection system is limited.[35] The Canadian literature on the law of child welfare is somewhat broader, notably in light of contributions such as those of legal scholar Nicholas Bala,[36] but there is quantitatively less work on the inner legal mechanisms of the child protection systems and more about their general failures. The fact that each province has its own legislation explains in part the lack of overall data and research at the national level.[37] Furthermore, according to typologies of

[34] Gilbert, *supra* note 17.
[35] The research available on Québec's child protection system is mainly clinical. Little has been published on its legal framework, with the notable exceptions of Mario Provost, *Droit de la protection de la jeunesse* (LexisNexis, 2019) and Renée Joyal, *L'évolution de la protection de l'enfance au Québec: Des origines à nos jours* (Presses de l'Université du Québec, 2000), nor from a public policy perspective, except for governmental reports.
[36] For just one main example, see Nicholas Bala, ed, *Canadian Child Welfare Law: Children, Families and the State* (Thompson Educational Publishing, 2004).
[37] See Karen J Swift, "Canadian Child Welfare" in Neil Gilbert, Nigel Parton & Marit Skivenes, eds, *Child Protection Systems: International Trends and Orientations* (Oxford University Press, 2011) at 36.

child protection systems described literature, Anglo-American jurisdictions form a specific type of child protection system.[38] I lean on the literature on several legal systems of child protection, relying more heavily on Canada, the United States, the United Kingdom, and Australia. There is a broader corpus of work on which to build when we turn to research coming from these countries. In particular, there have been numerous case studies and cross-studies about the role of family courts and judges in cases of child protection.[39]

Third, Anglo-American countries do not only historically share similar approaches to child protection, but are also mainly of the common law tradition. Therefore, we can draw inferences from some shared features of their judicial systems, such as the adversarial structure of the court process. Even in Québec, where child protection – a civil matter – is treated within the civil law legislative framework, the court system is structurally adversarial, a feature in keeping with its character as a mixed jurisdiction.[40] Although there is a generally recognized need to move away from traditional adversarial processes, and most jurisdictions have included a softer approach to family matters, the basic structure of adversarial courts in child protection matters (with the social worker on one side, the

[38] Gilbert, *supra* note 17 at 4. They form what researchers have named the "Anglo-American approach" of a three part typology of western CPS. That approach was contrasted to a European approach that could be divided in two: Continental (Germany, Belgium, Netherlands) and Nordic (Sweden, Finland, Denmark). The Anglo-American approach was identified as oriented toward child protection, whereas the European approach was centred on a family services orientation. This study has been updated with great nuances (Gilbert, Parton, & Skivenes, *supra* note 37) but the historical affinities of the Anglo-American systems is important enough to justify grouping the literature from those jurisdictions for the purpose of this research.
[39] Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (Routledge, 2018); John Eekelaar & Mavis Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Bloomsbury Publishing, 2013); John A Seymour, *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press, 2016); Jill Berrick et al, "Are Child Protection Workers and Judges in Alignment with Citizens When Considering Interventions into a Family? A Cross-Country Study of Four Jurisdictions" (2020) 108 Child Youth Serv Rev 104562.
[40] Laurence Ricard, "Le rapport entre le juridique et le clinique dans l'application de la Loi sur la protection de la jeunesse: une perspective relationnelle" (2013) 43:1 RGD 49; Vernon Valentine Palmer, "Quebec and Her Sisters in the Third Legal Family" (2009) 54 McGill LJ 321.

parents and the child on the other, and a judge to adjudicate) are still the norm in most jurisdictions.[41]

To complete this methodological approach, I use Québec's child protection legislation as a case study in the last chapter. This part of the dissertation demonstrates the applicability of the recognition framework that I develop in the earlier chapters, to show how my version of the theory of recognition applied to legal issues can identify concrete issues in a given legislative and cultural environment, and to lay the foundations necessary to address them in a constructive way.

3. Theoretical Framework

In this research, I develop a philosophical framework of the theory of recognition in the legal context, inspired by Axel Honneth, to compare legal and clinical approaches to child protection. Through an analysis of the impact of the inherently liberal character of law on child protection systems, I conclude that an alternative concept of the self is necessary. In that context, I was first drawn to the relational critiques of law and individual autonomy.[42] Although the field of child protection, as it pertains to social intervention, has developed around an increasingly sophisticated version of the self,[43] it still operates within

---

[41] Robert Porter, Vicki Welch & Fiona Mitchell, "Adversarialism in Informal, Collaborative, and 'Soft' Inquisitorial Settings: Lawyer Roles in Child Welfare Legal Environments" (2019) 41:4 J Soc Welf Fam Law 425; Penelope Welbourne, "Adversarial Courts, Therapeutic Justice and Protecting Children in the Family Justice System" (2016) 28:3 Child & Fam L Q 19; Jennifer E McIntosh, Hon Diana Bryant & Kristen Murray, "Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia" (2007) 46:1 Fam Ct Rev 125.

[42] For some examples, see: Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011); John Christman, "Relational Autonomy and the Social Dynamics of Paternalism" (2014) 17:3 Ethical Theory and Moral Practice 369; Marina Oshana, *Personal Autonomy in Society* (Ashgate, 2006).

[43] Ricard, "Le rapport entre le juridique et le clinique dans l'application de la Loi sur la protection de la jeunesse", *supra* note 40.

a larger legal context that is premised on liberalism.[44] While debates about the liberal conception of the self in political philosophy may have led liberal defenders to recognize the social dimensions of the self,[45] many critical authors have underlined that the traditional liberal assumptions about the rational, independent individual agent are still very much alive in the western legal systems.[46] Whereas relational theories have been used to analyze the dynamics at play in family law or the nature of children's rights,[47] I could not find one instance where it has been used for a critical analysis of child protection systems. I argue that the conception of what a person is and how people relate to each other is fundamentally different in law than it is in clinical approaches to child protection. Theories of relational autonomy allow us to see how the law fails to grasp the relational nature of individuals, and how it impacts the way legal processes attempt to solve interpersonal and social problems, especially in the context of child maltreatment.

Theories of relational autonomy have been developed in the fields of ethics, law, and political philosophy, mainly by feminists.[48] Jennifer Nedelsky first suggested the concept of relational autonomy as a feminist alternative to the traditional liberal conception of autonomy.[49] I subscribe to the argument she makes in her seminal paper: autonomy "is

---

[44] *Ibid*; see also Alison Diduck, "Autonomy and Family Justice" (2016) 28:2 Child & Fam L Q 133.
[45] John Christman, *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (Cambridge University Press, 2009).
[46] For a few example among many, see Fineman & Grear, *supra* note 104; Peter Halewood, "Law's Bodies: Disembodiment and the Structure of Liberal Property Rights" (1996) 18 Iowa L Rev 1331; Francisco Valdes, Angela P Harris & Jerome M Culp, Jr, "Subject Unrest" (2003) 55 Stan L Rev 2435; Pierre Schlag, "The Problem of the Subject" (1991) 69 Tex L Rev 1627 at 1730; Susan Carle, "Theorizing Agency" (2005) 55:2 Am U L Rev 307.
[47] For example, see: Pamela Laufer-Ukeles, "The Relational Rights of Children" (2016) 48:3 Conn L Rev 741; Jonathan Herring, *Vulnerability, Childhood and the Law* (Springer, 2018).
[48] Nathalie Stoljar & Catriona Mackenzie, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000).
[49] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1:1 Yale JL & Feminism 1.

not a quality one can simply posit about human beings"; rather, it is something that is acquired and sustained.[50] She goes on to explain: "We must develop and sustain the capacity for finding our own law, and the task is to understand what social forms, relationships, and personal practices foster that capacity."[51] I suggest that the concept of recognition, as described by Axel Honneth, gives us the tools to do just that: understand how relationships foster personal autonomy.

Important work has been done by relational theorists of law. But, even if the most influential relational thinkers agree on the fact that the self is inherently relational and that it should influence how law structures the norms of society,[52] the work within legal scholarship on relational theories of law largely stays within the boundaries of reformist conceptions. It implies that we should reform law in view of the consequences of thinking of the self as "relational".[53] This kind of work can be useful, because it is malleable and applicable. It points out solutions to partially fix the law, to make the law more responsive to the pressing contradictions that become visible on taking seriously the concept of a relational self.[54] But the reformist perspective is forced to accept the inevitability of those contradictions, since it stays in dialogue with a legal system rooted in liberal principles. Although I agree with relational theorists' diagnosis of the core problems of the law, their accounts of relationality lack a unifying normative principle of the relationality of the self,

---

[50] *Ibid* at 10.
[51] *Ibid*.
[52] Nedelsky and Herring make this thesis explicit in their work: see Jonathan Herring, Law and the Relational Self, 1st ed (Cambridge University Press, 2019); Nedelsky, *supra* note 42.
[53] For example, see Alison Diduck, "Family Law's Instincts and the Relational Subject" in Daniel Bedford & Jonathan Herring, eds, *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020) 31.
[54] This is the way Herring and Nedelsky's works are structured: each chapter explores how the concept of the relational self challenges different fields of law: Herring, *supra* note 52; Nedelsky, *supra* note 42.

and its impact on the organization of social norms. They tend to not pursue the logic of their argument to its end, by sidestepping the issue of how the concept of the rational, atomistic individual still dominates and pervades not only the legal norms, but our very understanding of law, legal concepts, and legal disputes. In contrast to this type of approach, I argue that the implications of the relationality of the self are much more profound and wide than the reformist approach assumes. Since western law is premised on a liberal conception of personal autonomy, challenging that conception creates a ripple that affects all legal norms and systems.

A substantive relational theory of law leads to a more radical critique of the law, since it questions the fundamental assumptions on which western legal systems are premised: the maximization of personal autonomy. If personal autonomy is not just a given, but something that requires conditions to materialize, then social norms aiming at maximizing personal autonomy must foster those conditions. Taking the relational self seriously challenges what Honneth calls "the fabric of justice".[55] Instead of assuming that justice implies a fair distribution of goods, or a retribution in case of bad behaviours, it becomes a matter of fair recognition.

The subject of child protection serves as an example of the need for such a substantive relational theory of law. In this context, I use the concept of recognition as a heuristic tool to bridge the gap between clinical and legal approaches to child protection, as well as to deepen the analysis of the implicit political and social goals of a child protection policy. The theory of recognition integrates concerns about individual freedom

[55] Axel Honneth, *The I in We: Studies in the Theory of Recognition*, translated by Joseph Ganahl (Polity Press, 2012).

and paternalism, while recognizing the structuring effects of intimate, social, and institutional relations on the individual's identity. It provides the tools to understand the phenomenon of child maltreatment and to understand the intrinsic shortcomings of the law in providing a solution to this issue. Recognizing that the law has inherent limitations is a necessary step in evaluating the efficacy of legislative reforms. It is also the first step of a wider philosophical project, that would be to reconsider the nature of justice and of law.

4. Thesis's Plan

Child protection systems are a legal answer to a broader social phenomenon: child maltreatment. The first chapter presents the practical and empirical issues surrounding child protection systems. Chapter 1 has two primary objectives: first, to define child maltreatment, what it is and what causes it; second, to describe Anglo-American child protection systems, how they work and how they fail. Consequently, the chapter starts by exploring child maltreatment and the factors leading to it, from different sources ranging from child development psychology to social work. Unfortunately, in Anglo-American jurisdictions, child protection systems do not address the multiplicity of those factors. Child protection systems aim mainly at correcting individual parenting behaviours. These individualized and legalized systems fail to account for the social determinants of child maltreatment, but also, too often, fails to address adequately the trauma caused by the experience of child maltreatment. Moreover, according to many critiques, it tends to compound the hurt that families experience, notably by not addressing the pain of parents, but mainly by failing to offer a stable and nurturing alternative living environment for children.

In a quest to explain how and why child protection systems cannot seem to function in a way that properly addresses the problems of child maltreatment, I turn to the philosophical method. Chapter 2 makes the argument that the law is premised on a liberal understanding of the self, which overvalues rationality as a defining feature of personal autonomy. It explores the concept of recognition as a way to define a relational conception of autonomy that can serve as a conceptual comparative to the liberal understanding of the term, and offer an alternative framework to think about social and legal norms. I suggest a redefinition of each of those spheres to create an original theory of recognition in the context of legal theory. The chapter ends on an argument on how recognition theory challenges our concept of justice, and how this reverberates to the way we think about law and legal processes.

These theoretical foundations offer fertile ground to analyze how the law conceptualizes childhood and parenthood, and the limits of those legal concepts. After situating the family within Anglo-American legal systems, Chapter 3 argues that the parent-child relationship is defined through a limiting framework of rights and responsibilities, which evacuate the emotional and identity-forming dimensions of that intimate, foundational relationship. Concurrently, when child maltreatment arises, it is defined as a failure from the parent to meet their parental duties. The child protection system aims to address this individual failure, either by asking the parent to change its behaviour, or by finding another caregiving environment to the child. Conversely, in the second part of Chapter 3, the concept of recognition serves to describe a more nuanced understanding of the parent-child relationship, the ways it can devolve into child maltreatment, and the way it should be socially addressed when child maltreatment occurs.

The experience of interpersonal recognition is at the heart of the parent-child relationship, and when misrecognition happens in the form of maltreatment, only other forms of recognition (interpersonal but from a third party, combined with social and legal recognition) can remedy this harm.

While Chapter 3 shows how the liberal concept of personal autonomy influences substantive rules of law, Chapter 4 explores the way it impacts the judicial system and legal processes. The logic of the adversary system at the heart of common law jurisdictions is a direct expression of the rationalistic and individualistic understanding of personal autonomy in liberalism. The chapter makes the argument that alternatives to adversarialism are intrinsically limited, since the substantive law of child protection is, itself, adversarial. To make this case, I review the main ways child protection judicial processes have tried to steer away from adversarialism, from problem-solving courts to mediation, and the limits each alternative has encountered. Chapter 4 ends on a reflection about the current literature on relational approaches to procedural justice, that aim to remedy the problem of adversarialism.

In accordance with the spirit of the applied legal philosophy methodology, Chapter 5 proposes a case study of how the recognition theory laid out in the previous chapters can offer new lenses to analyze concrete issues in child protection legislation, with the example of the jurisdiction of the province of Québec. I use the concept of recognition to frame different issues regarding child protection in Québec: the impacts of the judicial processes on the journey of a child in the system; the difficulty to actualize the central principle of participation of the child and parents; and the unaddressed systemic causes of child

maltreatment. Subsequently, using the theory of recognition, I analyze the Commission Laurent, the latest public commission of inquiry on child protection, and its recommendations. I conclude that if some recommendations are a step in the right direction, others could backfire, as they tend to reinforce the legalized aspects of the system instead of moving away from it.

This thesis is an attempt to take child protection law seriously, by demonstrating how it raises rich and deep questions about how the law defines what it is to be human – after all we were all children once – and what responsibility society and the State should have towards its most vulnerable subjects. The issues surrounding child protection are complex and multi-layered. Therefore, in a work such as this one, many important facets of child protection systems are only broached. Similarly, the theory of recognition I elaborate is a first brush stroke, and would deserve more attention than this project can provide. Hopefully, the thesis still provides some insights as to what works or not, and why, in the Anglo-American child protection systems.

Chapter 1

Child Maltreatment and the Law: An Overview

This chapter addresses the definition of child maltreatment, the definition of child protection systems and the goals they pursue, as well as the numerous failings of those systems as reported in the academic literature. By surveying the many obstacles encountered when trying to define those terms, I map the philosophical issues surrounding child protection and of the role the legal systems play in making explicit some normative commitments and ignoring others. In order to do so, I use and compare sources in the fields of social work, child psychology, and law. In the first section, I present the evolving notion of child maltreatment as the social phenomenon child protection systems are answering to. In the second section, I define the public policy, legal and clinical goals of child protection. The third section summarizes the most widespread critiques of child protection.

1. Defining Child Maltreatment

In this section, I explore the historical evolution of the concept of child maltreatment, before defining the four main types of child maltreatment that are now recognized by therapeutic and legal experts of child protection.

Child abuse has always been part of human societies. In the early second century A.D., Ephesus, a prominent Greek medical figure, in his treaty *Gynaecology*, reports that the nurses who care for a child should be “self-controlled, sympathetic and affectionate”,

otherwise, they might neglect or drop the child.[1] However, most of the phenomenon we would today consider as child abuse have been deemed acceptable in different moments throughout history. For example, in Ancient Greece, infanticide was promoted in some circumstances; in colonial America 14-hour workdays for children in mills and mines were normal; and until just a few decades ago, beating children to discipline them has been socially acceptable.[2] Many Anglo-American countries saw the birth of their first organizations dedicated to prevent or remedy child maltreatment in the late 19th century. The New York Society for the Prevention of Cruelty to Children was established in 1875,[3] while the first English Society for the Prevention of Cruelty to Children was founded in Liverpool in 1883.[4] In Canada, the province of Ontario was the first to adopt a specific legislation to address children abuse, *The Children's Protection Act*, in 1888.[5]

In the 1960s, a renewed and systematic attention to child maltreatment countries came from the medical community. According to Nigel Parton, the child protection systems in the English-speaking countries of North America, the UK and Oceania were all developed following the "modern *re-discovery*" of child abuse by Henry Kempe and his colleagues with the conceptualization of the "battered-child syndrome".[6] The battered-

[1] Margaret A Lynch, "Child Abuse before Kempe: An Historical Literature Review" (1985) 9:1 Child Abuse & Neglect 7.
[2] *Ibid*; Diana J English, "The Extent and Consequences of Child Maltreatment" (1998) 8:1 The Future of Children 39 at 40.
[3] John E B Myers, "A Short History of Child Protection in America" (2008) 42:3 Fam LQ 449.
[4] Lynch, "Child Abuse before Kempe", *supra* note 1 at 10.
[5] Donald F Bellamy & John McCullagh, *A Legacy of Caring: A History of the Children's Aid Society of Toronto* (Dundurn, 2002) at 39.
[6] Nigel Parton, "Comparing Child Protection Systems: Towards a Global Perspective" in Pat Dolan & Nick Frost, eds, *The Routledge Handbook of Global Child Welfare* (Routledge, 2017) 225; Nigel Parton, "Addressing the Relatively Autonomous Relationship Between Child Maltreatment and Child Protection Policies and Practices" (2020) 3:1 Int J Child Maltreat 19.

child syndrome referred to a medical condition in infants causing severe disability or death. According to Kempe and al.:

> The syndrome should be considered in any child exhibiting evidence of fracture of any bone, subdural hematoma, failure to thrive, soft tissue swellings or skin bruising, in any child who dies suddenly, or where the degree and type of injury is at variance with the history given regarding the occurrence of the trauma.[7]

Child maltreatment was therefore initially defined as physical abuse on a child (mainly infants under three years old), "generally from a parent or a foster parent", that manifested by physical symptoms.[8]

In this seminal article, Kempe and his colleagues were suggesting the intergenerational nature of child abuse. The authors stress that "[p]arents who inflict abuse on their children do not necessarily have psychopathic or sociopathic personalities or come from borderline socioeconomic groups", but rather, may be more likely "be repeating the type of child care practiced on them in their childhood".[9] One of the key elements of their work was to present for the first time the idea that medical science could prove the physical abuse of babies, without a clear backstory of how the injury happened and without concurrent testimonies. The injuries themselves could, in many cases, be enough for a diagnosis. In exposing their "discovery" of the battered-child syndrome, Kempe et al. pressed physicians to overcome their uncomfortable feelings about the guilt of the parents

[7] C Henry Kempe et al, "The Battered-Child Syndrome" (1962) 181:1 JAMA 17.
[8] *Ibid*.
[9] *Ibid* at 24.

and urged them to report their diagnosis to the authorities.[10] The main intervention recommended for most cases was temporary placement with relatives or in a foster home, with a bias for the child's safety, even if the parents wish to have the child back.[11]

An editorial of the Journal of American Medical Association, in the same issue in which the first battered-child syndrome article was published, argued for a mandatory reporting system and better instances of child protection.[12] This wish would become fulfilled in the coming decades. In the 1960s and 1970s, the battered child syndrome triggered the constitution of new judicial and social systems to protect the children from abuse in many countries. Even though the medical experts at that time recognized that there were still many unknowns in the psychological and psychiatric factors that came to play in child abuse, according to Nigel Parton, the social and political failure to understand the scope of the problem of child maltreatment was widespread.[13] It was assumed that the parents who committed child abuse were deviant, leading to marginalizing and diabolizing them.[14] This problem widened with the expansion of the concept of child abuse, which came to include, by the late 1980s, neglect, sexual abuse, and emotional abuse.[15]

The definition of child maltreatment is still ever evolving, transforming through cultural expectations and scientific knowledge. As we will see in the coming section, the definitions of what western countries consider to be child maltreatment vary from jurisdiction to jurisdiction, and are ever evolving. James Garbarino, a psychologist

---

[10] *Ibid*.
[11] *Ibid*.
[12] "The Battered-Child Syndrome" (1962) 181:1 JAMA 42.
[13] Parton, *supra* note 6 at 226.
[14] Gary B Melton, "Mandated Reporting: a Policy Without Reason" (2005) 29:1 Child Abuse Negl 9 at 11.
[15] Parton, *supra* note 6 at 226-227.

specialized in child and adolescent development, suggested a wide and stable definition that can be true regardless of legislative changes and variations. He describes child maltreatment as "acts of omission or commission by a parent or guardian that are judged by a mixture of community values and professional expertise to be inappropriate and damaging".[16]

Those inappropriate and damaging acts are defined by each legislation, but the definitions coalesce around an international standard. We can usually find four core forms of maltreatment addressed in the specific state or provincial legislations: physical abuse, sexual abuse, psychological (or emotional) abuse, and neglect. These four elements of child maltreatment reflect the agreement reached in the United Nations Convention on the Rights of the Child (UNCRC), which states that all countries who ratified the convention have to take measures to "protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse".[17] They also reflect the current scientific consensus on what constitutes child maltreatment. The four different types of maltreatment often overlap and coexist, making their boundaries somewhat difficult to draw. For example, it could be argued that psychological abuse includes all other forms of maltreatment (physical abuse, sexual abuse and neglect). Understanding each type, how they can be substantiated, and how their definitions can vary according to different cultural standards (even within the Anglo-

[16] James Garbarino, *Children and the Dark Side of Human Experience* (Springer, 2008) at 43.
[17] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, [UNCRC], Article 19. In the United States, the only country not to have ratified the UNCRC, the *Child Abuse Prevention and Treatment Act* defines "child abuse and neglect" as, "at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation (including sexual abuse […]), or an act or failure to act which presents an imminent risk of serious harm": *Child Abuse Prevention and Treatment Act*, Public Law 93-247, 42 USC §5101 (1974), at s 3.

American communities) and ethical commitments, is an essential step in understanding the aims and defects of child protection services.

In the following sections, I present the clinical definitions operationalized by clinical experts for these four main types of child maltreatment and present the way they are translated into legal definitions for Anglo-American jurisdictions. The legal definitions of the core four forms of maltreatment will vary depending on the state or provincial legislation and those variations can narrow or widen considerably the powers of the child protection services. As we will see, these four forms of maltreatment can be differentiated but can also coexist on a continuum. Their legal definitions highlight ethical rather than clinical boundaries, that nonetheless impact how they are handled in the child protection system.

There are two definitional standards that have been used for research purposes: a harm standard and an endangerment standard.[18] Those two standards also demonstrate a policy stance. The endangerment standard shows a bias for prevention, whereas the harm standard will only allow to intervene after the maltreatment has occurred. For each child maltreatment type, jurisdictions choose to adhere to one or the other standards. In some jurisdictions that are adopting mainly an endangerment standard, a child will be deemed in need of protection not only when child maltreatment has been proved to have happened, but also if it can be proved that there is a serious risk that it may happen in the future.

[18] *New Directions in Child Abuse and Neglect Research*, by Policy Committee on Child Maltreatment Research et al (National Academies Press (US), 2014) at 35.

1.1. Physical Abuse

Physical abuse can be defined as an act that physically harms a child or puts the child at substantial risk of suffering physical harm.[19] Even though physical abuse is the result of action and not omission, it does not require an intent to harm.[20] Depending on the statute, types of abusive acts can include: shaking, pushing, grabbing, throwing, hitting (with hand or with an object), punching, kicking, biting, strangling or burning.[21] In nearly ten American states, the definition of abuse does not include "acts or circumstances that threaten the child with harm" or acts that put the child at substantial risk of harm.[22] This legislative choice, although not common in Anglo-American jurisdictions, falls within a harm standard. By contrast, including substantial risk of physical abuse in the definition of child abuse gives child protective services the means to intervene to prevent the harm before it occurs, falling within the endangerment standard.

As we saw earlier, physical abuse as a form of maltreatment was first brought up by medical specialists as a diagnosis for a certain number of factors that came up upon medical examination, such as, for example, injuries with no compatible explanations, multiple injuries, injuries in a non-verbal child or a non-ambulatory infant with injuries.[23] These situations usually meet the harm standard, since they are discovered once the harm has occurred. A medical assessment can also contribute to substantiate a risk of physical

---

[19] English, *supra* note 2 at 41; *Physical Abuse and Physical Punishment in Canada*, by Andreas Jud & Nico Trocmé, Information Sheet 122E (McGill Centre for Research on Children and Families, 2012).
[20] *Ibid.* The definitions provided in the literature focus on the act that could cause harm, without mention of the intention of the author.
[21] *Ibid.*
[22] *Definitions of Child Abuse and Neglect*, Child Welfare Information Gateway (Washington, DC: U.S. Department of Health and Human Services, Children's Bureau, 2019) at 2.
[23] Dulce Gonzalez, Arian Bethencourt Mirabal & Janelle D McCall, "Child Abuse and Neglect" in *StatPearls* (Treasure Island (FL): StatPearls Publishing, 2021).

abuse, by revealing sentinel injuries, which are minor injuries indicative of a potential for "escalating and repeated violence toward the infant".[24]

Not all acts of physical abuse leave body marks. In some jurisdictions, some forms of corporal punishment are now considered as physical abuse for the purpose of child protection laws, even if they have for a long time been socially accepted as reasonable forms of discipline. Since the ratification of the UNCRC, there has been growing scientific consensus on the lack of efficiency of this method and the numerous negative long-term outcomes of physical punishment.[25] The use of physical force to inflict pain or discomfort as a method of behavioural control has been condemned by many childhood specialists, notably by the American Academy of Child and Adolescent Psychiatry and the American Academy of Pediatrics.[26] Nonetheless, in Anglo-American countries, the tolerance for the use of physical force in disciplining children is still higher than in other countries. Whilst as of June 2021, 62 states around the world had prohibited all types of corporal punishment on children and 27 states were in a committed process to join their rank, most of the Anglo-American countries, including Canada, the United States and the United Kingdom, are still missing from that list and allow some types of corporal punishment at home.[27] The causes are mostly cultural: corporal punishment is still seen as an effective and fairly harmless

[24] L K Sheets et al, "Sentinel Injuries in Infants Evaluated for Child Physical Abuse" (2013) 131:4 Pediatrics 701.
[25] Joan Durrant & Ron Ensom, "Physical Punishment of Children: Lessons from 20 Years of Research" (2012) 184:12 Can Medi Ass J 1373; Elizabeth T Gershoff & Andrew Grogan-Kaylor, "Spanking and Child Outcomes: Old Controversies and New Meta-Analyses." (2016) 30:4 J Fam Psy 453.
[26] Andrew Rowland, Felicity Gerry & Marcia Stanton, "Physical Punishment of Children: Time to End the Defence of Reasonable Chastisement in the UK, USA and Australia" (2017) 25 Int J Child Rights 165.
[27] "Global Partnership to End Violence Against Children", *Countdown to Universal Prohibition*, online: <https://endcorporalpunishment.org/countdown/>.

way to discipline children, in addition to being considered a private parental decision.[28] In those three countries, *reasonable* corporal punishment at home is not criminal.[29] The extent to which the use of physical force is permitted can vary according to the specific state and provincial legislations. In most American states, to prove physical abuse as a child protection ground, the abuse gesture has to result in the physical impairment of the child, which excludes spanking that does not leave any mark.[30] By contrast, in Québec for example, physical abuse includes both "bodily injury" and "unreasonable methods of upbringing".[31]

As with the reasonableness standard in many other legal fields, the interpretation of what constitutes a reasonable use of physical force in discipline or punishment is variable. There can also be a significant difference in what act can be considered as a criminal offence and what can be prohibited through civil child protection laws. For example, in Canada, in most situations, it is not criminal to spank a child if the spanking does not leave any mark, but depending on the context, it could be considered as physical abuse by the provincial or territorial child protection laws.

It could be argued that corporal punishment, when it does not inflict a physical injury, falls under the purview of emotional or psychological abuse. In general, all physical

---

[28] Rowland, Gerry & Stanton, *supra* note 22; Cindy Miller-Perrin & Robin Perrin, "Physical Punishment of Children by US Parents: Moving Beyond Debate to Promote Children's Health and Well-Being" (2018) 31:1 Psicol Refl Crít, online: <https://prc.springeropen.com/articles/10.1186/s41155-018-0096-x>.
[29] There are two exceptions in the UK: in Scotland, where it was prohibited in 2019, and in Wales, in 2020 ("Global Partnership to End Violence Against Children", *Corporal Punishment of Children in the United Kingdom* (November 2020), online: <https://endcorporalpunishment.org/reports-on-every-state-and-territory/uk/>). Australia is also a Anglo-American country in which corporal punishment is still not prohibited (Rowland, Gerry & Stanton, *supra* note 26.).
[30] *Definitions of Child Abuse and Neglect*, Child Welfare Information Gateway, *supra* note 22.
[31] *Youth Protection Act* [YPA], CQLR c P-34.1, s 38(1)(e)(1).

abuse is closely tied to emotional abuse: "Physical abuse is usually (if not always) accompanied by psychological maltreatment with its attendant belittling, spurning and other emotional damage to the child's ego, emotional health and development."[32] The scope of the health impacts of child physical abuse is wide. It can cause body injuries and the more severe cases are causes of death. But beyond the physical injuries, the short- and long-term outcomes of physical abuse include, among others, "depression, unhappiness, anxiety, feelings of hopelessness, use of drugs and alcohol, and general psychological maladjustment".[33]

1.2. Sexual Abuse

In the same way, sexual abuse is a mixed kind of maltreatment in terms of physical and emotional consequences. However, in contrast with physical abuse for which the line of acceptability is still debated, its definition is much less contested. Sexual abuse is "any activity with a child before the age of legal consent that is for the sexual gratification of an adult or a substantially older child".[34] This definition includes any intentional contact with the breast, the genital, and the rectal areas, but also contactless sexual activity such as showing pornography to a child.[35] Since it is the parents' responsibility to care for the child and protect them, child protection systems aim to remediate harmful parenting or a lack of adequate parenting and not at protecting the child from every possible predator. Consequently, sexual abuse will usually fall under child protection laws only when one of

---

[32] Vincent J Palusci, "Current Issues in Physical Abuse" in Jill E Korbin & Richard D Krugman, eds, *Handbook of Child Maltreatment* Child Maltreatment: Contemporary Issues in Research and Policy (Springer, 2014) 63 at 67.
[33] Durrant & Ensom, "Physical Punishment of Children", *supra* note 21 at 1374.
[34] Charlie Felzen Johnson, "Child Sexual Abuse" (2004) 364 The Lancet 462.
[35] *Ibid*.

the parents is the perpetrator, or when the parents fail to protect the child from the abuser. Sexual abuse can also include, explicitly or implicitly, sexual exploitation of children, which "contains an underlying element of economic exchange", in contrast to sexual abuse which "occurs purely for the sexual gratification of the perpetrator".[36] In many cases, sexual exploitation is listed as a specific type of child maltreatment.

The impacts of sexual abuse can include physical lesions, but are mainly psychological. Like other victims of child maltreatment, sexually abused children can grow up to have a negative self-concept (that is, the ideas and beliefs we have about the self, the foundation of self-esteem and autonomy) and have higher psychopathology rates.[37] It also impacts their own parental capacities, which can lead to intergenerational transmission of trauma and abuse.[38] Researchers have a hard time estimating the prevalence of child sexual abuse, and some studies suggest that, like for physical abuse cases, only a small proportion of cases actually come to the attention of child protection services.[39]

1.3. Psychological Maltreatment or Emotional Abuse

Emotional abuse, sometimes referred to as psychological abuse or psychological maltreatment, is probably the most elusive type of child maltreatment, even if it can be one

[36] June Simon, Ann Luetzow & Jon R Conte, "Thirty Years of the Convention on the Rights of the Child: Developments in Child Sexual Abuse and Exploitation" (2020) 110 Child Abuse Negl 104399.
[37] Ateret Gewirtz-Meydan, "The Relationship between Child Sexual Abuse, Self-Concept and Psychopathology: The Moderating Role of Social Support and Perceived Parental Quality" (2020) 113 Child Youth Serv Rev 104938.
[38] Brittany C L Lange, Eileen M Condon & Frances Gardner, "Parenting Among Mothers Who Experienced Child Sexual Abuse: A Qualitative Systematic Review" (2020) 30:1 Qual Health Research 146.
[39] Harriet L MacMillan, Ellen Jamieson & Christine A Walsh, "Reported Contact with Child Protection Services Among Those Reporting Child Physical and Sexual Abuse: Results from a Community Survey" (2003) 27:12 Child Abuse Negl 1397.

of the most harmful on the long term.[40] Since it has less tangible aspects than the other types of maltreatment, its manifestations are sometimes subtle. Danya Glaser, approaching the debate from a clinical standpoint, suggests a wide working definition of emotional abuse and neglect as "persistent, non-physical, harmful interactions with the child by the caregiver, which include both commission and omission".[41] This definition is especially wide and difficult to operate in a legal context. In contrast, Hart and al. prefer the term psychological maltreatment to emotional abuse because of its comprehensive aspect. They suggest the following definition, which has been endorsed by the American Professional Society on the Abuse of Children (APSAC):

> a repeated pattern or extreme incident(s) or caretaker behaviour that thwarts the child's basic psychological needs (e.g.: safety, socialization, emotional and social support, cognitive stimulation, respect) and convey a child is worthless, defective, damaged goods, unloved, unwanted, endangered, primarily useful in meeting another's needs, and/or expendable.[42]

According to this definition, psychological maltreatment can take the form of spurning, exploiting/corrupting, terrorizing, emotional unresponsiveness, isolating, and neglect.

One reason for this definitional hurdle is that, contrarily to physical or sexual abuse, emotional abuse is a relational pattern and can rarely be determined by a single incident.

---

[40] E.g.: Tuppett M Yates, "The Developmental Consequences of Child Emotional Abuse: A Neurodevelopmental Perspective" (2007) 7:2 J Emot Abuse 9.
[41] Danya Glaser, "How to Deal with Emotional Abuse and Neglect—Further Development of a Conceptual Framework (FRAMEA)" (2011) 35:10 Child Abuse Negl (Special Issue on Emotional Maltreatment) 866.
[42] Stuart N Hart, Marla R Brassard, et al, "Psychological Maltreatment of Children" in J Bart Klika & Jon R Conte, eds, *The APSAC Handbook on Child Maltreatment* (SAGE Publications, 2017) at 147.

The distinction between poor parenting and psychological maltreatment will depend on factors established by that pattern (frequency, intensity, duration) rather than a factual difference in behaviour.[43] Furthermore, considering the psychological and emotional effects of other types of abuse, or even neglect, its boundaries can sometimes be murky. In a sense, psychological maltreatment is a component of all forms of child maltreatment, including neglect.[44]

Probably because of the vastness of the clinical definition of psychological maltreatment, or because of cultural resistance to clearly define the boundaries of inappropriate parental-relationship behaviour, there is no legal standard for defining emotional abuse in Anglo-American countries. Legal definitions vary widely from one jurisdiction to another, and the none of them reflect the definitions used in research and surveillance studies.[45] In most states of the United States and in most Canadian provinces, terms like "mental injury", "emotional injury", "emotional harm" or "psychological ill-treatment" are used, which implies that the harm has already occurred.[46] Some definitions, like Québec's, list situations which are deemed to constitute psychological ill-treatment: "indifference, denigration, emotional rejection, excessive control, isolation, threats, exploitation, particularly if the child is forced to do work disproportionate to the child's capacity, and exposure to conjugal or domestic violence".[47] Most definitions, however, such as the one in Ontario for example, list manifestations of emotional harm in the child:

---

[43] Amy JL Baker, Marla R Brassard & Janet Rosenzweig, "Psychological Maltreatment: Definition and Reporting Barriers among American Professionals in the Field of Child Abuse" (2021) 114 Child Abuse Negl 104941.
[44] Hart et al, *supra* note 42.
[45] Baker, Brassard & Rosenzweig, "Psychological Maltreatment", *supra* note 43.
[46] *Ibid*.
[47] YPA, *supra* note 31, s 38(1)(c).

"anxiety, depression, withdrawal, self-destructive or aggressive behaviour, or delayed development".[48] The legal evidence in the first kind of definition will rely on a factual demonstration of the inappropriate parental behaviour, whereas in the second definition, the child's reaction will be a more dominant piece of evidence. In many states and provinces, though, emotional abuse will not be defined by statute.[49]

1.4. Neglect

Neglect is by far the most common and deadly form of reported child maltreatment. In the United States, in 2019, 74.9% of the substantiated victims reported to child protection services agencies were neglected.[50] Of the American children who died from maltreatment, 72.9% were neglected.[51] Nevertheless, neglect is also the most controversial reason for the intervention of child protective services, considering that its occurrence is closely linked to poverty and social inequalities, and that visible minorities (especially Indigenous and Black people) are overrepresented in neglect cases.[52] Given these controversies, how we socially and legally define neglect has long been a subject of academic and activism debate. As opposed to the first three types of maltreatment, neglect is can be defined as acts of omission. As with emotional abuse or psychological

---

[48] *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sched 1 at s 125(1). There are 33 states in the United States that provide definition for emotional abuse and the typical definition is centred around evidence of the mental injury itself, not what caused it: *supra* note 22. For example, California's definition of emotional abuse is very similar to Ontario's: Cal Welf & Inst Code § 300.
[49] Baker, Brassard & Rosenzweig, "Psychological Maltreatment", *supra* note 43.
[50] *Child Maltreatment 2019* (published January 2021) Children's Bureau (Administration on Children, Youth and Families, Administration for Children and Families) of the U.S. Department of Health and Human Services, at 22, available at: https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment/.
[51] *Ibid* at 56.
[52] Laura J Proctor & Howard Dubowitz, "Child Neglect: Challenges and Controversies" in Jill E Korbin & Richard D Krugman, eds, *Handbook of Child Maltreatment* (Springer, 2014) 27; Lindsey Rose Bullinger et al, "Heed Neglect, Disrupt Child Maltreatment: a Call to Action for Researchers" (2020) 3:1 Int J Child Maltreat 93.

maltreatment, neglect is a complex phenomenon that does not result from a single act of omission, but from a pattern of behaviour. The fact that neglect results from omission rather than commission makes it harder to tackle. The causes of neglect are much more diverse than those of child abuse, and are arguably more influenced by macro-level factors than any other types of child maltreatment.

Neglect can be broadly defined as a situation where a child's basic needs are not met, regardless of the cause.[53] We can find many different typologies of neglect in the literature. The main types of neglect that are usually reflected under this term in the child protection laws are physical (including food, shelter, hygiene, clothing, medical care) and, sometimes, cognitive (adequate supervision and engagement in the child's education). For example, a child victim of physical neglect can arrive to school without proper winter clothes in a country where the temperature is freezing, or without lunch. The apartment in which they live could be filled with garbage bags, pets' excrement on the floor, dirty dishes and laundry everywhere; they could be of school age and have never seen a doctor or a dentist; or they could be five years old and still wear diapers because they were never potty-trained. Educational neglect (which would be a form of cognitive neglect) would include, for example, leaving young children unattended for long periods of time or in a dangerous environment, not sending a child to school, or not giving any stimulation to an infant so that they accumulate developmental delays, whether it be their motor, socioemotional or language skills.

[53] Howard Dubowitz et al, "A Conceptual Definition of Child Neglect" (1993) 20:1 Crim Justice Behav 8.

In some states, some acts are specifically excluded from the statutory definition of neglect. For example, "in 12 States and the District of Columbia, financial inability to provide for a child is exempted from the definition of neglect".[54] Furthermore, as we have seen, some emotional abuse behaviour could clinically be described as neglect since they are acts of omission, such as a lack of affection or an inability to provide a home safe of violence.[55] Many working definitions of emotional abuse for research purposes include emotional neglect.[56] Legally though, those situations will likely be filed under emotional abuse or psychological maltreatment.

Because of its nebulous characteristics and its multifactorial incidence, child neglect tends to be less studied and even considered less serious by child protection services providers.[57] Its understanding depends on what society considers to be normal parenting duties and behaviours. Very often, this will include a responsibility for the parent to not only care for the child, but to be proactive and successful in finding alternative means to do so when they are not able to meet the child's needs (like, for example, finding appropriate day care if the parent has to work full-time).

1.5. Other Grounds of Child Protection

Depending on the jurisdictions, for many of the aforementioned grounds of child protection, especially the first three (physical abuse, sexual abuse and neglect), a serious

---

[54] *Definitions of Child Abuse and Neglect*, Child Welfare Information Gateway, *supra* note 22.
[55] Kristen Shook Slack et al, "Improving the Measurement of Child Neglect for Survey Research: Issues and Recommendations" (2003) 8:2 Child Maltreat 98.
[56] Hart et al, *supra* note 42.
[57] Carl Lacharité & Guylaine Fafard, "Research-Practice Partnership in Developing Services for Neglect" in Sophie Léveillé et al, eds, *Research-Community Partnerships in Child Welfare* (Toronto, ON: Centre of Excellence for Child Welfare, 2010) 193.

risk of abuse or neglect can be invoked as a sufficient reason for child protective services to intervene. Some jurisdictions have additional legal grounds for child protection. Abandonment can be part of the definition of neglect, or a stand-alone cause for child protection, depending on the jurisdiction.[58] When it is defined separately from neglect, the definitions vary widely. It can refer, for example, to a failure to provide minimal support, a failure to maintain contact with a child, or to situations where the parents are either unknown, unreachable or dead when no other arrangement has been made for the child to be cared for.[59] Parental substance abuse is also in and of itself a ground of endangerment in some American states.[60] By contrast, in other jurisdictions, parental substance abuse would be considered a possible ground of endangerment only if resulted in a serious risk of neglect.[61]

In recent years, a consensus has been building around the inclusion of child exposure to domestic violence as a ground of child maltreatment.[62] A few American states and Canadian provinces define it as a type of child maltreatment in itself. In some cases, like in Québec, child exposure to domestic violence is considered a form of psychological maltreatment.[63] Some researchers argue that it should be a legal ground of child endangerment triggering child protection laws in and of itself.[64] This distinction would

[58] *Definitions of Child Abuse and Neglect*, Child Welfare Information Gateway, *supra* note 22.
[59] *Ibid.* In Québec, abandonment is defined as "a situation in which a child's parents are deceased or fail to provide for the child's care, maintenance or education and those responsibilities are not assumed by another person in accordance with the child's needs": YPA, *supra* note 31, s 38(1)(a).
[60] *Definitions of Child Abuse and Neglect*, Child Welfare Information Gateway, *supra* note 22.
[61] It is the case in Québec, for example, YPA, *supra* note 31, s 38(1)(b)(ii).
[62] Colleen Henry, "Exposure to Domestic Violence as Abuse and Neglect: Constructions of Child Maltreatment in Daily Practice" (2018) 86 Child Abuse Negl 79–88.
[63] YPA, *supra* note 31, s 38(1)(c).
[64] For an example, see Henry, "Exposure to Domestic Violence as Abuse and Neglect", *supra* note 62.

allow to put in place more specific policies for accurate assessments and efficient interventions.[65]

Serious behavioural disturbance of the child, or a "child beyond parental control", can also constitute a need for protection under some jurisdictions, although for many, it will be a part of the juvenile delinquency legislation.[66] It might come as a surprise that it could be considered from a protection angle, since the criteria to evaluate those situations is the child's behaviour, even if there is no child maltreatment *per se.* This stance represents a focus on the child's developmental perspective (if they risk harming themselves or others), rather than on the parents' action or inaction. This ground for intervention recognizes that the inability of the parent to regulate the child's behaviour may not always result from abusive or neglectful parenting. The situation may require services for the family nonetheless.

2. Risk Factors for Child Maltreatment

Due to the dominance of empirical research, recent studies on child maltreatment are usually modest in their endeavour and scope. They generally avoid the daunting task of elaborating a comprehensive analysis of parenting relationships and attempting to reflect directly on causality, and instead aim more modestly at analyzing risk factors for child abuse or neglect. This tendency to draft research questions in a way that avoids scrutinizing the causes of child maltreatment can, in part, be explained by the epistemological limits of

[65] *Ibid*.
[66] For example, it is included in Québec's and Manitoba's child protection statutes (YPA, *supra* note 31, s 38(1)(b)(f) and *The Child and Family Services Act* CCSM c C80, s 17(2)(d)), as a situation in which the court can intervene.

social sciences, and the influence they had on modern psychological research: to be so bold as to try to predict human behaviour is, from a philosophical standpoint, problematic. Such a project would imply both a strong deterministic stance and a reductionist take on what shapes motivations. Free individuals can choose to act or omit action in a deliberate manner and the causes of human behaviour are so complex (determined by biology, genetics, personal history, socioeconomic background or sociopolitical factors) that they are out of the scope of possible knowledge.

Therefore, one of the main design problems of child protection systems is that they try to address a phenomenon that socially feels urgent and necessary, but they do so without a clear understanding of its root causes. As with most laws, child protection laws have initially been written in answer to a new awareness of a social issue, and have been evolving with our understanding of those issues. Whereas for centuries children were considered as quick-forgetting proto-people who may need a heavy hand to knock some sense into them, childhood pain and suffering are not deemed acceptable anymore. We have a better sense of how childhood experiences shape individuals and impact their adult lives. We now recognize that certain parental behaviours can harm children, not only physically, but predominantly psychologically. But not all bad parenting is abusive or neglectful, the same way not all abused or neglected children will suffer the same impacts of maltreatment.[67]

The Anglo-American child protection model is based on the idea that the child needs to be protected from certain bad behaviours of their parents.[68] The initial historic

[67] Garbarino, *supra* note 16.
[68] Melton, "Mandated Reporting", *supra* note 14.

focus on the wrongful parental behaviour reinforces the idea that child maltreatment is primarily a private and personal problem to be treated within the family. This vision has been complicated by research on the causes of child maltreatment, which now points to a more complex set of risk factors. One of the main reasons determining the causes of maltreatment is such a complicated endeavour is that, as heterogenous and different they may be, subtypes of child maltreatment frequently co-occur. Treating them independently would not be representative of how they manifest in the child's life.[69] Of course, as there are many different forms of child maltreatment and each of those forms can arise from many factors, it is impossible to sketch a definitive portrait of their cumulative causes. Trying to do so could also lead to pathologizing some behaviours that, even if harmful, are still widespread in all societies. Even with all the best inner and outer resources in the world, parenting is hard, and it is not a straight path. And as we have seen, the line between "bad parenting" and child abuse or neglect can be fine.

2.1. The Ecological-Transactional Model

The roots of child maltreatment run deep and far in human societies. It is not a marginal phenomenon entirely distinct from a "normal" experience of childhood or parenting. However, there are risk factors that seem to enhance the possibility of child maltreatment occurrence. The ecological-transactional model of child maltreatment, a model which has been authoritative since its inception in the early 1980s, helps to

[69] Jennifer M Warmingham et al, "Identifying Maltreatment Subgroups with Patterns of Maltreatment Subtype and Chronicity: A Latent Class Analysis Approach" (2019) 87 Child Abuse Negl 28.

understand the complexity of the interaction of those risk factors.[70] This approach views child development and child maltreatment as a result of individual, familial, communal and cultural dynamics. In this view, "multiple levels of children's ecologies influence each other, and in turn influence children's development".[71] Those levels are the following:

1) *The Macrosystem*: refers to the shared cultural values and belief of a community impacting the violence in a community, such as, for example, the perceived legitimacy of physical punishment of children;

2) *The Exosystem*: the social structures that shape child's immediate environment, such as community ties, social network, socioeconomic status, employment status of the parents and immediate family, etc.;

3) *The Microsystem*: the family environment, including maltreatment itself, family dynamics, psychological resources of the parents, etc.;

4) *Ontogenic Development of the Child*: the individual-level factors, such as the quality of the attachment relationship between the parent and the child.[72]

While the ecological-transactional model offers a helpful map of the influences on children's development, recent research usually focuses on narrower issues, singling out risk factors to flesh out how each system comes to shape child maltreatment prevalence.

---

[70] Dante Cicchetti & Ross Rizley, "Developmental Perspectives on the Etiology, Intergenerational Transmission, and Sequelae of Child Maltreatment" (1981) 1981:11 New Dir Child Adolesc Dev 31; Jay Belsky, "Child Maltreatment: an Ecological Integration." (1980) 35:4 Am Psychol 320.
[71] Dante Cicchetti & Michael Lynch, "Toward an Ecological/Transactional Model of Community Violence and Child Maltreatment: Consequences for Children's Development" (1993) 56:1 Psychiatry 96.
[72] *Ibid*.

Microsystemic factors such as parental mental health, parenting stress, stressful life events or intimate partner violence within the family unit are usually addressed through therapeutic work based on psychology research[73]. In the social work and public policy literature though, three factors (belonging to the micro and exosystems) stand out: the intergenerational transmission of maltreatment, the socioeconomic conditions of the family and the lack of social support. Studies have demonstrated that those factors have a significant bearing on the likelihood of child maltreatment. I focus on these three factors because, as we will see, they serve as a link between social dynamics and the microsystem-level and ontogenic development of the child factors.

2.2. Intergenerational Transmission

The hypothesis of the intergenerational transmission of child maltreatment has been on the mind of specialists since the birth of the battered-child syndrome in the 1960s[74]. The logics of intergenerational continuity of maltreatment are still debated by researchers, but its prevalence has been demonstrated.[75] When parents have themselves suffered abuse or neglect as children, they are at risk of repeating those behaviours with their own children, or expose them to situations in which they could be neglected or abused.[76] Although this

[73] It goes without saying that all those factors can also be considered in their sociological dimension, but within child maltreatment literature, they tend to be considered more as individual-level factors.
[74] Kempe et al, *supra* note 7.
[75] Mark Assink et al, "The Intergenerational Transmission of Child Maltreatment: A Three-Level Meta-Analysis" (2018) 84 Child Abuse & Neglect 131–145; Louise Dixon, Kevin Browne & Catherine Hamilton-Giachritsis, "Risk Factors of Parents Abused as Children: a Mediational Analysis of the Intergenerational Continuity of Child Maltreatment (Part I)" (2005) 46:1 J Child Psychol Psychiatry 47; Carolyn A Greene et al, "Intergenerational Effects of Childhood Maltreatment: A Systematic Review of the Parenting Practices of Adult Survivors of Childhood Abuse, Neglect, and Violence" (2020) 80 Clin Psychol Rev 101891; Melissa Van Wert et al, "Intergenerational Transmission of Child Abuse and Neglect: A Transdisciplinary Analysis" (2019) 3 Gender and the Genome, online: <https://doi.org/10.1177/2470289719826101>.
[76] Greene et al, "Intergenerational Effects of Childhood Maltreatment", *supra* note 75.

phenomenon can seem straightforward, the way in which it plays out is complex. It bears noting that the intergenerational effect is not demonstrably a direct *cause* of child maltreatment; indeed, the majority of parents who were victims of abuse break the cycle of violence and do not abuse their own children.[77] It is rather a factor, among others, that "confers significant risk for the intergenerational transmission of abusive parenting behaviours".[78]

There are two types of intergenerational maltreatment: the *transmission* of maltreatment, which refers to a person who was maltreated as a child and goes on to maltreat their own children, and the *continuity* of maltreatment, a phenomenon where the child of a maltreated person experiences maltreatment, but the perpetrator is not necessarily the parent who experienced maltreatment.[79] For example, there will be intergenerational continuity of maltreatment when the daughter of a mother who has been sexually abused as a child is herself subjected to sexual abuse from a different abuser.

A systematic review of 97 studies on parenting behaviours that can contribute to the intergenerational effects of abuse, published in 2020, found convincing evidence to support the hypothesis of intergenerational transmission of abuse and neglect.[80] This study was focused on intergenerational transmission (the maltreated parent is the perpetrator of the abuse). Among other findings, the study concludes that a history of child physical abuse or exposition to domestic violence "confers increased risk for engaging in abusive or

---

[77] *Ibid*; Lisa Schelbe & Jennifer M Geiger, *Intergenerational Transmission of Child Maltreatment* (Springer, 2017).
[78] Greene et al, "Intergenerational Effects of Childhood Maltreatment", *supra* note 75 at 11.
[79] Schelbe & Geiger, *supra* note 77 at 3.
[80] Greene et al, "Intergenerational Effects of Childhood Maltreatment", *supra* note 75.

neglectful parenting, either directly or indirectly".[81] More generally, the parents' prior experience of child abuse and neglect may interfere with parental abilities such as being emotionally responsive and nurturing to toddlers and provide adequate monitoring and structure to older children.[82]

2.3. Socioeconomic Status and Race

The intergenerational factor is the most prevalent among other individual parent-related factors, such as becoming parents at a young age, mental health issues, substance abuse, history of adolescent delinquency, or choice of partner.[83] These characteristics are correlated with social and economic inequalities, and are part of the exo and macro systems in the ecological-transactional model. Just like for the intergenerational transmission of child maltreatment, poverty and socioeconomic disadvantages are considered risk factors for child maltreatment rather than direct causes, because of the complexity of the causalities at play.

Although it is widely known that child maltreatment is associated with poverty and disadvantaged socioeconomic groups,[84] the exact dynamics of this relationship is still up for debate. Various hypotheses have been suggested as explanations for this correlation. A Canadian study found that economic hardship was a factor: even "when controlling for demographics, caregiver risk, previous substantiated maltreatment, type of current

---

[81] *Ibid* at 10.
[82] *Ibid* at 12.
[83] Schelbe & Geiger, *supra* note 77.
[84] Kelley Fong, "Neighborhood Inequality in the Prevalence of Reported and Substantiated Child Maltreatment" (2019) 90 Child Abuse Negl 13; Jill D McLeigh, James R McDonell & Osnat Lavenda, "Neighborhood Poverty and Child Abuse and Neglect: The Mediating Role of Social Cohesion" (2018) 93 Child Youth Serv Rev 154.

maltreatment, and certain socio-economic variables, children living in families facing economic hardship are significantly more likely to be victims of maltreatment".[85] The stress of having a precarious access to material resources and social support could increase the risks of child maltreatment.[86] It can strain the parents' mental health and impact their parenting behaviour. It is also directly connected with the ability of the parents to meet a child's needs, creating the perfect storm to generate a situation of neglect.[87] Apart from the direct impact of material poverty, other mechanisms are at play when it comes to explain the correlation of socioeconomic status and child maltreatment. Adults who have themselves been abused or neglected as children tend to end up with a lower socioeconomic wellbeing in adulthood, which can feed an intergenerational cycle of abuse and neglect.[88]

Furthermore, many studies have demonstrated the over-representation of racialized and Indigenous children in child protection cases.[89] Untangling what is a cause and what is an effect of child maltreatment in the complex web of historical, structural and systemic racism is an almost impossible task. Addressing those issues is a highly sensitive and complex endeavour, since child protections agencies are often perceived as reproducing the oppression experienced by racial minorities.[90] There are two main competing explanations regarding the over-representation phenomenon. Some will point out the

---

[85] Rachael Lefebvre et al, "Examining the Relationship between Economic Hardship and Child Maltreatment Using Data from the Ontario Incidence Study of Reported Child Abuse and Neglect-2013 (OIS-2013)" (2017) 7:4 Behav Sci 6.
[86] *Ibid*.
[87] *Ibid*.
[88] David S Zielinski, "Child Maltreatment and Adult Socioeconomic Well-Being" (2009) 33:10 Child Abuse Negl 666.
[89] Bryn King et al, "Factors Associated with Racial Differences in Child Welfare Investigative Decision-Making in Ontario, Canada" (2017) 73 Child Abuse Negl 89; Keva M Miller et al, "Individual and Systemic/Structural Bias in Child Welfare Decision Making: Implications for Children and Families of Color" (2013) 35:9 Child Youth Serv Rev 1634–1642.
[90] King et al, *supra* note 89.

systemic racism and biases of the child protection institutions, while others contend that this disparity can be explained by the associated factors, such as the fact that the same populations also experience more poverty and intergenerational traumas, as a result of the broader systemic racism in societies.[91]

There are obvious methodological shortcomings in trying to distinguish the rate of child maltreatment and the rate of child protection services involvement in those communities. Part of this problem comes from the fact that most data about child maltreatment comes from reports made to child protection services.[92] The main other option to retrieve data about child maltreatment would be self-reports, which rest on a fragile capacity to recognize one was a victim of maltreatment and to overcome the shame or loyalty issues that can arise in verbalizing it. Consequently, it is difficult to figure out whether child maltreatment happens more frequently in racialized communities because their characteristics intersects with other factors for child maltreatment, or if they appear to have a higher rate of child maltreatment because the involvement of child protection services tends to be heavier as a result of institutional bias relative to race. Giving what we know about both the causes of child maltreatment and systemic racism, it is probably safe to assume that both forces come into play to bring about the over-representation of certain communities in child protection services.

---

[91] For an example of the first stance, see Paul Banahene Adjei & Eric Minka, "Black Parents Ask for a Second Look: Parenting under 'White' Child Protection Rules in Canada" (2018) 94 Child Youth Serv Rev 511. For an example of the second stance, see Calum Webb et al, "Cuts Both Ways: Ethnicity, Poverty, and the Social Gradient in Child Welfare Interventions" (2020) 117 Child Youth Serv Rev 105299.
[92] Webb et al, "Cuts Both Ways", *supra* note 91.

2.4. Lack of Social Support and Social Cohesion

The lack of social support, a problem of the exosystem in the ecological-transactional model, is an important factor in child abuse and neglect.[93] Social isolation impacts child maltreatment directly and indirectly. The most obvious direct effect is that socially isolated parents have more difficult access to resources for themselves and their children. Material and emotional support are harder to come by. But this lack of support also impacts parents in subtler ways. While poverty is a factor in child maltreatment prevalence (and lower-income neighbourhoods are more likely to see high rates of child maltreatment), the social cohesion of the community is a mitigating factor.

Indeed, a string of recent studies suggests that neighbourhoods in which the community has stronger connections and higher collective efficacy have lower rates of child maltreatment.[94] The term "collective efficacy" is an extension of the psychological concept of individual self-efficacy, and refers to the "shared beliefs in a neighborhood's conjoint capability for action to achieve an intended effect, and hence an active sense of engagement on the part of residents".[95] Beyond the structural characteristics that affect child maltreatment rates in some neighbourhoods, such as socioeconomic status, studies found that increased social processes that build confidence and support networks, positive

---

[93] Diane St-Laurent et al, "Intergenerational Continuity/Discontinuity of Child Maltreatment among Low-Income Mother–Child Dyads: The Roles of Childhood Maltreatment Characteristics, Maternal Psychological functioning, and Family Ecology" (2019) 31:1 Dev Psychopatho 189.
[94] Beth E Molnar et al, "Neighborhood-Level Social Processes and Substantiated Cases of Child Maltreatment" (2016) 51 Child Abuse Negl 41; James R McDonell, Asher Ben-Arieh & Gary B Melton, "Strong Communities for Children: Results of a Multi-Year Community-Based Initiative to Protect Children from Harm" (2015) 41 Child Abuse & Neglect 79; McLeigh, McDonell & Lavenda, "Neighborhood Poverty and Child Abuse and Neglect", *supra* note 84.
[95] Robert J Sampson, "Neighborhood-Level Context and Health: Lessons from Sociology" in Ichiro Kawachi & Lisa F Berkman, eds, *Neighborhoods and Health* (Oxford University Press, 2003) at 138.

models and intimate interactions had a protective effect on child maltreatment.[96] According to some studies, one of the values of participating in social processes for parents is that it contributes to building an internal "locus of control".[97] This means that, through their role in their community, parents develop a sense of responsibility and efficacy of their own actions, instead of feeling that their behaviour or their experiences are the result of outside forces or sheer luck. This internal locus of control is, in turn, associated with lower psychological aggression and physical abuse.[98]

Intergenerational transmission of child maltreatment, socioeconomic status and social cohesion are all part of the complex web of child maltreatment causes. However, as we will see, dismantling these root causes is not the target of our societies' main response to child abuse and neglect. Understandably, the first and principal concern of our public policies is to relieve the suffering of the children victim of maltreatment (when applying an intervention standard of harm) or to prevent individual children at risk from getting maltreated (when applying a standard of endangerment). Indeed, in Anglo-American societies, child protection systems have been the main response to child maltreatment, targeting almost exclusively the micro and individual-level factors. This system is a public policy choice entrenched in its legal framework, which in turn informs the way clinicians of child protection (generally social workers) approach their role. Nonetheless, to be efficient, a child protection system should be designed in a way that is mindful of the

[96] Molnar et al, *supra* note 94.
[97] Yiwen Cao & Kathryn Maguire-Jack, "Interactions with Community Members and Institutions: Preventive Pathways for Child Maltreatment" (2016) 62 Child Abuse Negl 111.
[98] Neil B Guterman et al, "Parental Perceptions of Neighborhood Processes, Stress, Personal Control, and Risk for Physical Child Abuse and Neglect" (2009) 33:12 Child Abuse Negl 897.

different levels of the ecological-transactional model. The current Anglo-American approach, mainly because of the dominance of its legalistic aspects, fails in this regard.

3. The Child Protection System: A Response to Child Maltreatment

Although child welfare and child protection are terms used interchangeably in the literature, it could be argued that child protection is part of the broader child welfare field. For the purpose of this thesis, child welfare refers to broader measures to ensure the wellbeing of children, whereas child protection refers to a narrower (and often more coercive) system put in place to prevent or remedy child maltreatment. Parallel to child protection systems, public health approaches to child maltreatment focus mainly on preventing the general occurrence of child maltreatment in the population, rather than preventing individual cases or healing the wounds once they have been inflicted, which is the aim of child protection systems. The scholarly literature about child protection usually comes from social work or "social welfare" academics. In the coming section, I will explain the characteristics of the child protection approach to child maltreatment, before exploring its legal and clinical components.

3.1. The Anglo-American Approach: Child Protection

Following the expansion of the child maltreatment definition of the 1980s, by the mid-nineties, as the numbers of reported child protection cases soared, the need for reform in the Anglo-American countries became evident and researchers turned to comparative analysis with countries from other cultures in the quest to find ideas for potential reforms.[99]

[99] Parton, *supra* note 6.

Since then, it has become somewhat of an international standard to divide child welfare systems into two main broad categories, following a large international study on child protection in western countries conducted more than twenty years ago: child protective systems and family-services-oriented systems.[100]

At the time, Gilbert and al. distinguished the Anglo-American approach (United States, Canada and England), oriented on child protection, the Continental approach (Belgium, Netherlands and Germany), with a family-oriented approach but mandatory reporting of child abuse, and the Nordic approach (Denmark, Sweden and Finland), family-oriented without mandatory reporting. The child protection orientation or the Anglo-American approach emphasizes legalistic intervention. It frames the problem of child maltreatment as a need for "protection of children from harm by degenerate relatives".[101] By contrast, the family-oriented approach from the other countries emphasizes therapeutic interventions, considering the problem as a "family conflict/dysfunction stemming from social and psychological difficulties that are responsive to services and public aid".[102] Yet in some ways, family-oriented systems can appear as favouring the parents' rights and not the children's rights, especially regarding the rights to retain custody of the children and to maintain relationships with them.[103] In their conclusion, the authors of the study underline how many nuances come to play when it comes to comparing national responses to child abuses, since countries have different cultures relating to families, to children's education,

[100] Neil Gilbert, ed, *Combatting Child Abuse: International Perspectives and Trends* (Oxford University Press, 1997).
[101] *Ibid* at 232.
[102] *Ibid* at 232.
[103] *Ibid* at 234.

but also different socioeconomic distribution. Their comparative approach does not yield clear conclusions about which system can best answer the children's needs.

This study was updated some fifteen years later, following the expansion of the influence of the neoliberal doctrine in most countries under study.[104] In this 2011 update, Gilbert and al. come to the conclusion that those categories are not as clear-cut as they once were:

> Countries that were previously designated as having a family service orientation, whether they had a mandatory reporting system or not, have shown a notable increase in the number of children seen as needing child protection services— whether they have had a high-profile "scandal" or not. In contrast, the United States, which was previously identified with the child protection orientation, appears to be moving in the other direction […] with a greater emphasis on preventive family services.[105]

Nonetheless, for heuristic purposes, the authors stick with the typology proposed in 1997, following the conventional typology in the field of comparative welfare state analysis of liberal (Anglo-American), conservative (Continental European) and social democratic (Nordic) regimes.[106] One of the findings of this update is that Anglo-American countries' patterns for out-of-home care show that, in Canada and England, children tend to stay in care for longer periods, while in the United States, there is a comparative rate of children

---

[104] Neil Gilbert, Nigel Parton & Marit Skivenes, eds, *Child Protection Systems: International Trends and Orientations* (Oxford University Press, 2011).
[105] *Ibid* at 246.
[106] *Ibid* at 4; Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990).

exiting the child welfare system through adoption. This change could reflect a relatively new commitment to more permanent plans of care for displaced children.[107] The study also found that all countries have expanded their child welfare services. Two hypotheses could explain this change. There are good reasons to believe that children's rights have become more socially important and that countries are more committed to children's welfare; however, it could also demonstrate "a broadening of systems of social surveillance toward families".[108] An increase in formal procedures and the use of risk-assessment tools was also noted in all ten countries surveyed, which the authors connect to the effort to promote evidence-based practice and documentation of results, as opposed to a more informal appraisal by social workers.[109]

Another typology following two axes (collectivism *versus* individualism, and formalism *versus* informalism) has since been suggested.[110] This typology comes from a broader international comparison, since it was commissioned by UNICEF. It stresses the effects of cultural values, social beliefs and variations of legal frameworks on the design of child protection systems. The individual-community continuum represents how society considers the relations between children, families and communities. The individualistic pole "reflects an orientation towards individual autonomy and the *self*", while collectivism emphasizes group interests and group coherence.[111] The second continuum, formal-informal, refers to the regulation of child protection systems. As the authors of this paper

[107] The importance of the permanency goal in child protection measures will be discussed in more details in section 3.3 of the present chapter and in chapter 2.
[108] Gilbert, Parton, & Skivenes, *supra* note 104 at 248.
[109] *Ibid* at 249.
[110] Marie Connolly & Ilan Katz, "Typologies of Child Protection Systems: An International Approach" (2019) 28:5 Child Abus Rev 381.
[111] *Ibid* at 384 (emphasis in original).

explain, for example, in some societies such as Bhutan or Nepal, the tasks that would be undertaken by professional social workers in western countries are completed by volunteers.[112] Conversely, countries with highly formalized child protection system will have strict regulatory frameworks backed by the strongest powers of the state.[113]

In this typology, the Anglo-American countries are found at the end of the two spectrums, as *individualist* and *formal*. It should not come as a surprise, since they evolved in similar ways, sharing roots in liberal democratic traditions. They share an emphasis on individual rights and responsibilities: parents are the only people responsible for caring for children and, if they do it properly, they should be able to do so without the intrusion of the State on their right to privacy.[114] They also favour a legalistic approach (which, as we will see in the coming chapter, may be an extension of their individualism) to social problems, rather than fostering informal systems of support.

While western child protection laws and systems vary from jurisdiction to jurisdiction, they all grapple with a set of the same fundamental issues. It is impossible to make an exhaustive and clear list of those core issues that reflects the nuances of the legal and ethical choices made by each legislation, but Jill Duerr Berrick identifies eight fundamental principles to child protection that applies to most western industrialized countries, but especially to Anglo-American countries:[115]

---

[112] *Ibid* At 385.
[113] *Ibid*.
[114] *Positive Possibilities for Child and Family Welfare: Options for Expanding the Anglo-American Child Protection Paradigm*, by Gary Cameron et al (Waterloo, ON: Wilfrid Laurier University, 2001) at 17.
[115] Berrick specifies that her list is based on the Californian child welfare system, but that from her researches, it applies to most western countries : Jill Duerr Berrick & Erika Altobelli, *The Impossible Imperative: Navigating the Competing Principles of Child Protection* (Oxford University Press, 2018) at 5.

1. Parents who care for their children safely should be free from government intrusion in their family;

2. Children should be safe;

3. Children should be raised with their family of origin;

4. When children cannot live with family, they should live with extended relatives;[116]

5. Children should be raised in families;

6. Children should have a sense of permanence – that the caregivers they live with will care for them permanently;

7. Families' cultural heritage should be respected;

8. Parents and children (of a certain age and maturity) should have a say in the decisions that affect their lives.

The weight given to each of these principles differs depending on jurisdictions and cultures. They reflect a mix of legal, ethical, and therapeutic concerns. Each of these principles is articulated differently through legal instruments for each jurisdiction, and most of them are affirmed in the UNCRC.[117] The permanency principle, as well as the right to be raised by the extended family or by people that are significant to the child if not by

[116] Although Berrick uses the term extended relatives, many jurisdictions have a larger definition that includes anyone which with the child has a significant emotional tie. See for example YPA, *supra* note 31, at s 4.
[117] UNCRC, *supra* note 17.

the parents, are not part of the UNCRC. Those principles contrast with the six others, since they find their origin in clinical knowledge about child development, and not primarily in legal conventions that reflect the liberal individualist stance.

Given that Berrick's list is made to reflect primarily the American reality, those eight principles are minimal. The United States has not ratified the UNCRC, and the list falls short of one more principle that is key in all countries that have a broader understanding of child welfare, that is, the "right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".[118] The list also does not mention any principles relating to a general goal of promoting the wellbeing of the child, legally translated in the paramount concept of the "best interest of the child". This absence reflects the American bias in favour of a narrower approach to child protection. Nevertheless, Berrick's list gives a general sense of the competing principles at the heart of most Anglo-American child protection systems.

Anglo-American countries share a "threshold approach" to child protection, which means that families enter the system only when they cross a threshold of dysfunction.[119] They also have systems of mandatory reporting, which means professionals working with children, and sometimes others, must report any suspicion of child maltreatment.[120] The state must then inquire to see if the threshold allows an infringement on the parents' right to privacy. If the facts are substantiated and they constitute what is legally characterized as

[118] UNCRC, *supra* note 17, article 27.
[119] Cameron et al, *supra* note 114 at 17.
[120] *Ibid*; Gilbert, *supra* note 100.

child maltreatment, social workers will be mandated to work with the family to find solutions to put an end to the behaviour or conduct that triggered their involvement.

This logic creates a basic structure that all Anglo-American systems share.[121] First, reports coming from the public or professionals are assessed, based on the prevailing legislation on what constitutes child maltreatment in the competent jurisdiction. Social workers will investigate the allegations made in the referral and gather evidence to build a case around their reading of the situation. If they find that the child is subject to maltreatment or is at serious risk thereof (the terms vary according to the legislation), social workers have to determine a course of action, based on their clinical appraisal. This step implies a risk assessment and decision-making on the appropriate measures to take, including the timing of those measures (the development of an intervention plan is required). The measures can be immediate or applicable once a court sanctions them in the regular process, and range from voluntary cooperation with social services to court-imposed short- or long-term out-of-home care.

Child protection is always an exercise in risk assessment. Jurisdictions which choose to enforce a harm standard have put more value into protecting the families from state intervention, whereas jurisdictions who enforce an endangerment standard are more proactive in trying to avoid, when possible, harm to the child.

[121] This summary is inspired by part I of Gilbert, Parton, & Skivenes, *supra* note 104. The first three chapters of this book are on the Anglo-American systems (US, Canada and England). The vocabulary and methods change from jurisdiction to jurisdiction, but the steps are similar.

3.2. The Anglo-American Legal Frameworks for Child Protection

Anglo-American child protection systems fall within civil law matters, as opposed to criminal law. Some child maltreatment acts or omissions are criminal in nature or as a matter of degree. For example, sexual abuse of a child is almost always a criminal act;[122] striking a child can, in some circumstances, be considered assault; neglect that leads to physical harm or death could be criminal neglect. However, the system of child protection is not meant to punish the parents, but to protect the children from harm. The regulations of child protection systems are therefore civil laws, even though they give the state-wide powers to intervene in families. Accordingly, the burden of proof for child protection cases is the balance of probabilities.

For the lawyer representing the agency, building a child protection case for trial can be thorny. First, as with all family matters, the alleged events usually happened behind closed doors, out of outsiders' sight. Second, the type of suspected maltreatment has a direct impact on the type of evidence that needs to be produced to obtain the necessary court orders to intervene. For some types of maltreatment, such as psychological maltreatment or some non-physical types of neglect, the evidence will be inherently harder to gather and produce, especially for non-verbal children. In numerous cases, the child's testimony can play a crucial role, but it comes at a price. While in some cases testifying

[122] Some acts can be considered as sexual abuse from a protection standpoint, but will not be a criminal offense, for example, watching pornography with a child.

can contribute to the healing process, participating in court hearings is most likely to contribute to their trauma, especially if it is not their choice.[123]

The judge has a complicated and delicate role in weighing this evidence. The terms used in legal definitions of child maltreatment give the judge the responsibility of interpreting clinical and culturally charged concepts they usually do not have the competency to evaluate. For example, neglect usually occurs within a continuum of behaviour that, until it meets a certain level of gravity,[124] will not be considered as child maltreatment. It is up to the judge, with the help of the jurisprudence, to decide whether the facts of a case constitute negligence or simply poor parenting. The case of psychological maltreatment is even more complicated, as it usually refers to a relationship dynamic between the parent and the child. In most jurisdictions, the judge also has to make decisions that overall are in the best interest of the child, a standard intrinsically relative.[125] These difficulties can lead to an over-reliance on expert testimonies, which leads to its own set of problems, the most practical ones being additional costs and delays.[126]

Courts are involved at different moments of the investigation process and the planning of appropriate measures, depending on the jurisdiction. But the constant is that they are usually involved whenever a parent or a child (from a certain age of maturity and on) disagree with the social worker on the proposed intervention, and especially if an out-of-home care is proposed. Judges are the only ones who can impose measures on the family

---

[123] *Children's Presence in Court During Child Protection Hearings: Empowering or Re-Traumatizing?*, by Kathryn Piper et al (Columbus, Ohio: The Center for Child Policy, 2019).
[124] Proctor & Dubowitz, *supra* note 52.
[125] The legal concept of "best interest of the child" and its interpretation are analyzed in chapter 3 of the thesis.
[126] Chapter 4 will address issues relating to court proceedings in child protection.

against their will,[127] since it is their role to make sure claims about right infringement have been properly heard and to decide which competing individual right shall prevail. Courts have the role of determining if there is child maltreatment (as defined by the legislation), and if so, the appropriate measures to put in place as a remedy. Once they render judgment, the case is sent back to the child protection agency, where the implementation of measures is supervised by social workers.

One legal feature shared by Anglo-American jurisdictions is that they have a history of using primarily adversarial court systems, following the common law tradition. Even in Québec, where child protection, a civil matter, is treated within the civil law tradition's legislative framework, the court system is structurally adversarial.[128] One of the major issues with this structure is that the social workers building the case for the court proceedings are construed, in court, as the opponents of the parents and child, even though they most likely will have to establish a therapeutic alliance with the family to help them work through their issues.[129] Although there is a generally recognized need to move away from traditional adversarial processes and most jurisdictions have included a softer

[127] There are some exceptions relating to emergencies.
[128] Laurence Ricard, "Le rapport entre le juridique et le clinique dans l'application de la Loi sur la protection de la jeunesse: une perspective relationnelle" (2013) 43:1 RGD 49.
[129] The importance of therapeutic alliance will be addressed in the second chapter of this thesis, while the impact of the adversarial system will be addressed in the fourth chapter.

approach to family matters,[130] the basic structure of adversarial courts in child protection subsist.[131]

As Gilbert and al. have shown in their later comparative study, following an international trend since the beginning of the twenty-first century, the Anglo-American systems of child protection have moved from a focus on parental behaviours that endanger children to become more child-focused, with an emphasis on children's rights and their development and wellbeing.[132] This evolution came with a greater weight given to clinical knowledge, grounded in child psychology development. But this has not changed the basic features of their child protection systems, such as its individualistic approach and its formality. Individual parental responsibility and a high rate of judicial intervention are still two very prominent features of Anglo-American child protection systems.

3.3. The Clinical Approaches to Child Protection

In this section, I introduce key concepts of the clinical approaches to child protection, to highlight how the concerns of therapeutic professionals of child protection come from a different angle than those of jurists. Those concepts will then be explored more in depth in the second chapter, and the analysis of the differences between the legal and social work aspects of child protection will be the subject of the third chapter.

---

[130] For some examples: Penelope Welbourne, "Adversarial Courts, Therapeutic Justice and Protecting Children in the Family Justice System" (2016) 28:3 Child & Fam L Q 19; Jennifer E McIntosh, Hon Diana Bryant & Kristen Murray, "Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia" (2007) 46:1 Fam Ct Rev 125.

[131] Robert Porter, Vicki Welch & Fiona Mitchell, "Adversarialism in Informal, Collaborative, and 'Soft' Inquisitorial Settings: Lawyer Roles in Child Welfare Legal Environments" (2019) 41:4 J Soc Welf Fam Law 425.

[132] Gilbert, Parton, & Skivenes, *supra* note 104.

The legal aspects of Anglo-American child protection systems strongly constrain the social work response to the issue of child maltreatment. Indeed, as we have seen, one of the specificities of this type of child protection system is its strong regulatory basis. But child protection has another, arguably more central, aspect: the social intervention by the State in families to address child maltreatment. In Anglo-American countries, this intervention has been professionalized and is performed on the frontline by social workers. Since the social workers usually work with teams or partner with different specialties (such as psychologists, medical specialists, and criminologists), I use the terms "therapeutic", along with the term "clinical" to refer to professionals in different fields of social and medical intervention who work at preventing or treating child maltreatment, and to the specific professional knowledge on which the rely for their intervention. [133] What does it mean for therapeutic professionals, mostly social workers, to act in this highly regulated system of child protection? To what extent do their fields of expertise inform the legal frameworks, and the course of action in child protection cases?

The social work intervention in Anglo-American child protection involves two steps: the assessment, and the "treatment", or the intervention within the family. As we saw earlier, those two stages are strongly regulated by law, and the legal frameworks are, to a large degree, based on the clinical principles guiding the professional practice of child protection. In the assessment stage, three principles dominate the current professional practices: "the interests of the child are paramount; that delay in determining the questions

[133] It is worth noting that the social work profession differs from one jurisdiction to another, notably in how the profession is regulated, the level and type of education required and the nature and frequency of training received by social workers. Some clinical concepts are not regularly used or applied or not uniformly applied through different states and jurisdictions. The following may not reflect the actual practice standards, but they do reflect the current academic knowledge.

concerning a child's upbringing is likely to prejudice the welfare of the child; and that non-intervention is preferred, except in cases where it can be demonstrated that a court order would be better for a child than no order".[134] From my analysis of a variety of statutes and a review of the social work literature, I note three main goals in the intervention stage: ending the child maltreatment situation, preventing its reoccurrence and treating the impacts it had on the child.

Throughout the assessment and intervention stages, many therapeutic tools and concepts have an impact on how the clinical team intervenes with the parents and children. Three of those concepts give us a general portrait of how the needs of the child and the parents are conceived by therapeutic professionals: attachment theory, trauma-informed intervention and therapeutic alliance.

Attachment theory has a major influence in child protection, both in the social workers' approach to cases and in court decisions.[135] It was first formulated by John Bowlby in the 1950s and has had a major influence over child psychology since. Attachment is described by Bowlby as "any form of behaviour that results in a person attaining or maintaining proximity to some other clearly identified individual who is conceived as better able to cope with the world".[136] In child psychology, it "refers to the infant's or young child's emotional connection to an adult caregiver – an attachment

---

[134] Louise Dixon et al, eds, *The Wiley Handbook of What Works in Child Maltreatment: An Evidence-Based Approach to Assessment and Intervention in Child Protection* (Wiley-Blackwell, 2017) at 6.
[135] David Wilkins, "Using Q Methodology to Understand How Child Protection Social Workers Use Attachment Theory: How Social Workers Use Attachment Theory" (2017) 22 Child Fam Soc Work 70; Tommie Forslund et al, "Attachment Goes to Court: Child Protection and Custody Issues" (2021) Attach Hum Dev 1; Sue White & Matthew Gibson, *Reassessing Attachment Theory in Child Welfare: A Critical Appraisal* (Policy Press, 2019).
[136] John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* (Routledge, 1988) at 26-27.

figure".[137] This attachment allows the child to be soothed when distressed, and also gives the child a "secure base" from which she can explore the world, which in turn allows her to build her own sense of self and gives her the means to become an autonomous adult.[138] The type of attachment the child experiences with her caregiver, whether secure or insecure, organized or disorganized, will influence her general development and have an impact throughout her life.

There is a close relationship between attachment theory and social work approaches to child protection. A study in England showed that social workers rely on attachment theory for four main factors: (1) for a better understanding of the child; (2) to take clear decisions and intervene purposefully; (3) to emphasize the primacy of the relationships and ethical partnership with the parents; (4) as a general framework to understand and help parents.[139] In a more structural way, through the years, attachment theory found its way into the very principles on which child protection is now based. Two of the main principles of child protection identified by Berrick come from attachment theory: (1) permanency planning (that there should be, as much as possible, a continuity of care so that the child does not suffer ruptures of attachment)[140], and (2) the priority given to people already

[137] Charles H Zeanah, Lisa J Berlin & Neil W Boris, "Practitioner Review: Therapeutic Applications of Attachment Theory and Research for Infants and Young Children" (2011) 52:8 J Child Psychol Psychiatry 819.
[138] Forslund et al, "Attachment Goes to Court", *supra* note 135. White & Gibson, *supra* note 135.
[139] Wilkins, "Using Q Methodology to Understand How Child Protection Social Workers Use Attachment Theory", *supra* note 135.
[140] Yvon Gauthier, Gilles Fortin & Gloria Jéliu, "Therapeutic Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care" (2004) 25:4 Infant Ment Health J 379.

significant to the child when it comes to finding alternative care (the need for familiar caregivers).[141]

One major problem that arises from that prominence is that attachment theory, as a field of knowledge in psychology, is ever-evolving and entails subtle assessments that only trained specialists can complete. Its translation in a legislative context is full of obstacles. A recent article signed by more than sixty specialists of psychology from all over the world shows that, as much as those principles have been implemented in the legal frameworks of family law and child protection,[142] the legal professionals of child protection still share widespread misunderstandings of attachment theory, which leads to misapplications of the theories by the courts, whether in applying principles related to continuity of care or significant people, or in the general interpretation of the concept of the best interest of the child.[143]

Trauma-informed intervention is based on the suggestion that trauma healing can start in non-therapeutic settings.[144] Children who end up being involved in the child welfare system are likely to have been exposed to traumatic events, and to even experience the intervention of the system as a trauma in itself.[145] Moreover, given intergenerational

---

[141] Forslund et al, "Attachment Goes to Court", *supra* note 135. An important caveat : although attachment theory can give credence to the idea that familiar caregivers might be a better choice than a regular foster family, it does not, in itself, support without nuances the thesis of kinship placement. Kinship or relative placement might be preferable for a host of different reasons ranging from practicality in public policy to ethics, but it cannot be defended by the simple evocation of attachment theory.
[142] E.g., in Québec : Laurence Ricard, "L'évolution récente de la conception de l'enfant dans le droit québécois: l'exemple de la Loi sur la protection de la jeunesse et des récents projets de loi en matière d'adoption" (2014) 44:1 RDUS 27.
[143] Forslund et al, "Attachment Goes to Court", *supra* note 135.
[144] Howard Bath, "The Three Pillars of Trauma-Informed Care" (2008) 17:3 RCY 17.
[145] Jason M Lang et al, "Building Capacity for Trauma-Informed Care in the Child Welfare System: Initial Results of a Statewide Implementation" (2016) 21:2 Child Maltreat 113.

transmission of child maltreatment,[146] a lot of the parents in the child welfare system may have been exposed to complex trauma themselves. Those experiences commend specific types of intervention.[147] There are still definitional issues as to what constitutes trauma-informed care,[148] but the recent literature frequently references six key principles of trauma intervention: (1) safety; (2) trustworthiness and transparency; (3) peer support (4) collaboration and mutuality; (5) empowerment, voice, and choice; (6) cultural, historical, and gender issues.[149] The efficacy of trauma-informed approaches has been demonstrated.[150] Underlying the advocacy for trauma-informed care is a tacit recognition of a collective ethical duty to base our institutions on the scientific knowledge about the causes of trauma and the proven features of healing environments for vulnerable individuals or populations.

Finally, in a child protection system, the social worker's role is to help the parents end maltreatment, while keeping the child safe. To achieve this goal, it has been demonstrated that a trust relationship between them and the family is an essential feature of best practices.[151] This clinical principle is referred to as the therapeutic alliance, or "working alliance", between the social worker, the parents, and child. While it is fundamental to any social intervention, in the Anglo-American approach, the challenges of

---

[146] Dixon, Browne & Hamilton-Giachritsis, "Risk Factors of Parents Abused as Children", *supra* note 75.
[147] Virginia C Strand & Ginny Sprang, *Trauma Responsive Child Welfare Systems* (Springer, 2017).
[148] Rochelle F Hanson & Jason Lang, "A Critical Look At Trauma-Informed Care Among Agencies and Systems Serving Maltreated Youth and Their Families" (2016) 21:2 Child Maltreat 95.
[149] *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*, HHS Publication No. (SMA) 14-4884 (Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014).
[150] Lisa Bunting et al, "Trauma Informed Child Welfare Systems—A Rapid Evidence Review" (2019) 16:13 Int J Environ Res Public Health, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6651663/>.
[151] James Gladstone et al, "Looking at Engagement and Outcome from the Perspectives of Child Protection Workers and Parents" (2012) 34:1 Child Youth Serv Rev 112.

establishing and maintaining an alliance with the family are enhanced by the mandatory reporting system and the adversarial court system.[152] The latter, among other effects, challenges social workers who see their work and competencies challenged during cross-examination, in front of the parents and child they are trying to help.[153] This adversarialism can break the therapeutic alliance and erode the already fragile trust in child protection services.

4. The Failings of the Child Protection Systems

The subject of child maltreatment is socially highly sensitive and the many failures of child welfare and child protection systems have been the object of thorough scrutiny. Depending on the main concern of research orientations and on the field of discipline in which researchers based their inquiries, many different problems have been identified and many different (and often contradictory) diagnosis have been made. The critiques stand on a spectrum. On one end, there are the interventionist critiques, which are critical of the failures of child protection to fulfill its purpose, that is to adequately protect children from maltreatment and abuse[154]. These critiques are more often heard after tragedies where children die at the hands of their parents, or from extreme neglect. They tend to diagnose a *lack* of adequate intervention from child protective services and to advocate for a broader,

---

[152] Elizabeth J Greeno, Charlotte Lyn Bright & Leslie Rozeff, "Lessons from the Courtroom: Perspectives from Child Welfare Attorneys and Supervisors" (2013) 35:9 Child Youth Serv Rev 1618; Vicki Lens, Colleen Cary Katz & Kimberly Spencer Suarez, "Case Workers in Family Court: A Therapeutic Jurisprudence Analysis" (2016) 68 Child Youth Serv Rev 107.

[153] Greeno, Bright & Rozeff, "Lessons from the Courtroom", *supra* note 152; Frank E Vandervort, Robbin Pott Gonzalez & Katlheen Coulborn Faller, "Legal Ethics and High Child Welfare Worker Turnover: An Unexplored Connection" (2008) 30:5 Child Youth Serv Rev 546.

[154] E.g.: Eileen Munro, "Learning to Reduce Risk in Child Protection" (2010) 40:4 Br J Soc Work 1135–1151; Elizabeth Bartholet, "Thoughts on the Liberal Dilemma in Child Welfare Reform" (2016) 24:3 Wm & Mary Bill Rts 725.

more efficient system of intervention. These approaches are more likely to be child-centred. On the other end of the spectrum of critiques, we find the reductionist critiques. They tend to see child protective services as an oppressive system, having flaws that not only reflect wider social systemic problems, but perpetuate them.[155] Those views are usually defended from a sociological standpoint and tend to make more room for concerns about the impacts of the child protection system on parents, as well as on children as members of their respective communities.

The diversity of critiques towards child protection systems is as wide as its object is complex. For the purpose of my general argument, in this section, I sketch two main lines of critiques, the first from a societal point of view and the second from the child's perspective, before turning to the main critique the rest of this thesis will address: the impacts of the legal world on the child protection systems and on the victims of child maltreatment and their families.

4.1. Child Protection and Social Inequalities

In general, sociological critiques of child protection tend to denounce the authoritative intervention of the State on families. For example, feminist critiques have shown how the child protection systems tend to amplify sexism, by targeting mothers and imposing higher standards of parenting on women.[156] Analyses based on social class

[155] E.g. : Emmanuelle Bernheim & Marilyn Coupienne, "Faire valoir ses droits à la chambre de la jeunesse: état des lieux des barrières structurelles à l'accès à la justice des familles" (2019) 32:2 Can J Fam L 237; Heather Douglas & Tamara Walsh, "Continuing the Stolen Generations: Child Protection Interventions and Indigenous People" (2013) 21:1 Int J Child Rights 59; Wendy Haight et al, "'Basically, I Look At It Like Combat': Reflections on Moral Injury by Parents Involved with Child Protection Services" (2017) 82 Child Youth Serv Rev 477.

[156] E.g. Stacy Dunkerley, "Mothers Matter: A Feminist Perspective on Child Welfare-Involved Women" (2017) 20:3 J Fam Soc Work 251.

divides have led to critiques that highlight the child protection system's tendency to further marginalize already vulnerable parents,[157] and to target mainly families afflicted by poverty.[158] These are in line with critiques centred on the coldness of institutional care and the damages made by poorly planned and executed out-of-home placements.[159]

Finally, in the same vein, a major line of critiques has been about how child protection systems tend to perpetuate racism[160] and colonialism.[161] In particular, regarding Indigenous people, there are sound arguments to the effect that child protection policies are the continuation of an ongoing colonialism. I will not go into the details of those critiques, even though they are essential to many other research agendas on child protection. The issues of race and colonialism are complex, well documented, and require a specialized treatment. They represent an entire field of study. It would not do them justice to try and summarize them in more detail here, since my thesis will not directly address those concerns.[162] The following chapters will, nonetheless, provide a theoretical

---

[157] Traci LaLiberte et al, "Child Protection Services and Parents with Intellectual and Developmental Disabilities" (2017) 30:3 J Appl Res Intellect Disabil 521.
[158] Wendy Jennings, "Separating Families without Due Process: Hidden Child Removals Closer to Home" (2019) 22:1 NY City L Rev 1.
[159] *Ibid*.
[160] For just a few examples of recent scholarship on the subject, see: Michelle Burrell, "What Can the Child Welfare System Learn in the Wake of the Floyd Decision: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations" 22:1 NY City L Rev 124; Adjei & Minka, "Black Parents Ask for a Second Look", *supra* note 91; J Stokes & G Schmidt, "Race, Poverty and Child Protection Decision Making" (2011) 41:6 Br J Soc Work 1105.
[161] E.g.: Hayley Hahn, Johanna Caldwell & Vandna Sinha, "Applying Lessons from the U.S. Indian Child Welfare Act to Recently Passed Federal Child Protection Legislation in Canada" (2020) 11:3 Int Indig Policy J 1; Douglas & Walsh, "Continuing the Stolen Generations", *supra* note 155; Courtney Jung, "Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society" in Paige Arthur, ed, *Identities in Transition* (Cambridge University Press, 2010) 217.
[162] For example, in answer to the problem of ongoing colonialism, a promising solution seems to be to create Indigenous child welfare agency, to give back to the communities the power to intervene according to their own cultural norms. In Canada, a federal law passed in 2019 allows indigenous communities to adopt their own child protection legislation: *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c 24. In Québec, the Atikamekw Opitciwan community was the first to enact their own child protection law: *Loi de la protection sociale Atikamekw d'Opitciwan (Miro nakatawer ma*

framework that makes room for issues linked to systemic oppression. The relational approach that I defend is a proposed answer to the current obliviousness of the system to the conditions in which child protection cases arise, including structural oppressive conditions such as poverty, racism, colonialism and other exclusionary or unjust social systems. It also comes closer to Indigenous conceptions of the world and the place of the individual within it than the liberal perspective.[163]

These sociological critiques bring out important concerns about how social biases can inform child protection agencies' decisions relative to cases involving already oppressed situations. It is no surprise that the literature on those questions is extensive and fertile. But while those critiques are essential to any discourse on child protection, as they describe undeniable and untenable realities, they also tend to veer away from the perspective of the child. They can also be murky on how they draw inferences of causation from demonstrations of correlation and tend to focus on macro-explanations (systemic oppressions), while not taking into account the micro-explanations that could stem directly from those wider phenomenon. For example, the over-representation of some populations in child protection systems could have multiple intersectional causes: systemic racism, institutional biases, ongoing colonialism, as well as intergenerational trauma that stems from a past of collective oppression.[164]

---

tanak awacak mamo), online: <https://www.sac-isc.gc.ca/DAM/DAM-ISC-SAC/DAM-SOCIAL/STAGING/texte-text/notices_requests_act_respecting_first_nations_inuit_metis_LPSAO_1643317226312_fra.pdf> .

[163] On how the liberal legal order differs from the indigenous thought, see Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

[164] Webb et al, "Cuts Both Ways", *supra* note 91.

4.2. Child Protection Failings From the Victim's Perspective

One fact that tends to be absent from discussions surrounding the failings of child protection systems is that children who come to require the intervention of child protection services have already been hurt or neglected, or are at serious risk. The intervention of the state is always predicated on a fragility or wound experienced by a child. Any kind of measure taken to remedy the child's situation will always fall short of making things right again. Even if children can be resilient,[165] by the time child protection services enter their lives, children's relationships with their most significant figures of care will have been structured in a way that will forever have impacts on their lives. They come from a place of increased vulnerability, because of their age and of their early adverse life experiences. This vulnerability is one reason that explains why the level of scrutiny from legal authorities is so high; any mistake in the intervention is likely to add to an already vulnerable child's hardship. But every decision in child protection is the product of a complex risk calculation and there is never any straight clear path as to how to proceed.

Child protection systems fail children in many ways. Notably, they fail to protect children enough, for example, by leaving out the ones who would need protection, and by not recognizing their needs. They also protect children inadequately, for example, by not securing for them the services they need to heal, or not making sure they have a stable environment and continued trusting relationships with adults. And in some cases, child protection systems misdiagnose child maltreatment and intervene too strongly, severing relationships that could have been beneficial for the child, for example. These failures may

[165] Susan Yoon et al, "Defining Resilience in Maltreated Children from the Practitioners' Perspectives: A Qualitative Study" (2020) 106 Child Abuse Negl 104516.

come from individual errors made while handling a case, either by the social worker or by the judge, but also from a wide range of structural defects. It would be impossible to list all the types of structural defects that have been identified by researchers on child protection; however, if we observe a few, we see a pattern emerge: they all relate to the multiple ways in which different actors in the system conceive the role of child protection in society and the interests and needs of the child.

For example, one of the main ways in which child protection systems fail children is in prioritizing biological parenting over alternatives that would be more stable for the child. This bias towards family preservation has served to justify keeping children with their parents even when they were at risk of harm, but also bringing children back to their biological families prematurely, which can create a cycle in which the child experiences another displacement and bounces from one foster family to another.[166] It is sometimes easier for professionals in child protection to identify with the parents in front of them, especially if they believe out-of-home placements to be harmful to a child.[167] This posture could stem in part from a collective difficulty in understanding how we became adults and in resisting the projection of strong feelings toward parenting or childhood unto other families' stories.

Another example is the way we understand and interpret children's voices throughout the child protection process. It is still an ideological challenge to really include

---

[166] This is a recurrent finding. E.g.: Gauthier, Fortin & Jéliu, "Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care", *supra* note 140; Forslund et al, "Attachment Goes to Court", *supra* note 135.

[167] Whitney D de Haan et al, "Out-of-Home Placement Decisions: How Individual Characteristics of Professionals are Reflected in Deciding about Child Protection Cases" (2019) 1:4 Dev Child Wel 312.

the child in the decisions that concern them. Child protection professionals tend to be torn between a tendency to keep the child away from the discussions relating to their situation and a propensity to take the child at their word.[168] If the first posture could stem from an overly protective and paternalistic approach, it is often defended under the real concern that child protection services' involvement may reactivate or add on to the child's trauma.[169] The child's expressed desires are not always in their best interests, and professionals have to take into account a child's vulnerabilities in the context of their maturity level, and the impacts of the maltreatment they suffered.[170] But this vulnerability should not prevent a child from taking a part in the decisions regarding their life.[171]

Lastly, as we will see in the next section and the coming chapters, the power of the legal world over child protection's enforcement has major impacts on the handling of child protection cases. The legal eyes have blinkers that complicate their assessment and understanding of the abused or neglected child's wellbeing.

4.3. The Impacts of the Legal World on Child Protection

One underdeveloped critique of the Anglo-American systems of child protection is the impact of the legal world on the treatment of child protection cases. By "legal world", I refer to the laws and the legal procedures around child protection, and to the culture and attitudes of lawyers, judges, and legal scholars towards child protection law. The legal

---

[168] Paul McCafferty, "Children's Participation in Child Welfare Decision Making: Recognising Dichotomies, Conceptualising Critically Informed Solutions" (2021) Child Care in Practice 1.
[169] Katrin Križ & Marit Skivenes, "Child Welfare Workers' Perceptions of Children's Participation: a Comparative Study of England, Norway and the USA (California)" (2017) 22:S2 Child Fam Soc Work 11.
[170] Mona Paré & Diane Bé, "La participation des enfants aux procédures de protection de la jeunesse à travers le prisme de la vulnérabilité" (2020) C de D 61:1 223 at para 66.
[171] *Ibid*.

frameworks and the formal proceedings of child protection have a structuring effect on how child protection services are provided. They not only dictate *what* is considered child maltreatment requiring legal protection, but also *when* and *how* child maltreatment is socially addressed. Whereas therapeutic professionals consider maltreated children primarily through their needs, the legal world tends to focus on the violation of their rights and the wrongdoing of the parents. Those perspectives overlap in many ways, but still shed different lights on the same problem. The legal system tends to fail to address appropriately child protection by generating a tendency to take a coercive approach to child maltreatment. By considering the parents as wrongdoers and the authority of the law as the main and necessary tool to redress the situation, it can disempower social workers connecting to the families they meet and constructing working alliances with them. It also structures the problem of child maltreatment as adversarial: the parents have failed and the State must step in to redress the situation.

In the two last decades, child protection systems have shifted to a more child-centred approach.[172] However far we may have come from considering the child as a possession of their parents to a children's rights discourse, we still have far to go into creating an empathetic and caring system of protection for children. We still function in a system where child protection is considered as a dichotomic operation: assessing whether there is child maltreatment, then putting measures in place until it stops. From that perspective, the aim of the social intervention will be to end maltreatment, as if it was a cancerous tumour that only needed a surgery to be extracted from the life of the child. But there is no clean slate possible when it comes to childhood adversity. Each of the child's

[172] Gilbert, Parton, & Skivenes, *supra* note 104.

experience will have left a mark on their psychological development. Not only child protection as a system cannot successfully remedy neglect and abuse before it happens, it cannot therapeutically intervene without being informed by an in-depth, interdisciplinary understanding of children's development and needs. To effectively address the many causes and impacts of child maltreatment, we need a comprehensive understanding of what constitutes a child's wellbeing.

A relational theory of child protection, as I endeavour to sketch, aims at providing a framework to explain how the structure of the child protection system and its embeddedness in the broader legal system might be contributing to a systemic blindness to how those structural inequalities impact the work of therapeutic and legal professionals in child protection. Since any structure of oppression is linked to trauma,[173] a philosophical approach that can take into account the impact of trauma and the dignity of the individuals involved in child protection is relevant and complementary to the research on the systemic injustices of child protection systems. Children and parents who end up encountering child protective services are generally in difficulty and, more often than not, in pain. We need to find ways to reconcile how to help people in difficulty while considering the broader systemic issues in which they evolve, their environment and vulnerabilities (personal, social or structural), without paternalizing them, and with the aim of helping them heal and develop their sense of personal autonomy.

[173] Kathryn A Becker-Blease, "As the World Becomes Trauma–Informed, Work to Do" (2017) 18:2 J Trauma & Dissociation 131.

Chapter 2

Recognition, Child Maltreatment, and Law

This chapter proposes a version of the theory of recognition to be used as a theoretical framework that articulates a relational critique of the law. This framework addresses issues in the child protection approach to child maltreatment. I argue that the main problems of this approach arise from their liberal roots. Systems of child protection are grounded in a legalistic, and therefore individualistic, conception of the person. Yet, the liberal and rationalistic premises of western legal systems limit our ability to understand and solve issues of child maltreatment. To remedy this problem, I elaborate a relational critique of liberalism based on the concept of recognition.

Relational theories offer an alternative to the atomistic liberal individualism, and they can also be fleshed out by the social scientific knowledge on child development and the parent-child relationship in the context of child maltreatment. In particular, the concept of "recognition" as proposed and developed by Axel Honneth[1] can marry relational theories' aspirations and most of the therapeutic considerations in the social intervention for child maltreatment. The originality of the argument I am proposing is, first, to suggest a substantive relational theory of the self, based on the concept of recognition, and anchored in the knowledge and insights into family relationships that comes from the social science research on child maltreatment and, second, to apply that recognitional theory to

[1] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, translated by Joel Anderson (MIT Press, 1996). Axel Honneth, *The I in We: Studies in the Theory of Recognition*, translated by Joseph Ganahl (Cambridge: Polity Press, 2012).

child protection law. The alternative model to liberalism that I propose is an empirically grounded theory of human agency and its interaction with social norms, anchored in social and developmental psychology. It uses an Honnethian concept of recognition and the empirical evidence that supports it. The model of recognition serves as theoretical framework that answers the concerns of jurists and social workers in addressing child maltreatment as a global social phenomenon, and develops a relational critique of child protection systems. I believe that this account of relational autonomy can provide a basis for building a broader critical approach to western legal systems, since it relies on theories whose fundamental principles are generally consensual in the field of psychology: attachment theory, and the ecological systems theory of human development.[2] Those theories apply to maltreated children and their parents, and are universal. In that perspective, child protection systems can be understood as a case study of this substantive version of a relational theory of law.

The first part of the chapter demonstrates that Anglo-Saxon countries' systems of law are grounded in a rationalistic liberal individualism. However, in the past decades, many critical perspectives have underlined the social nature of the individual and the importance of relationships to foster autonomy. I argue that while these theories aim in the right direction, we need a substantive relational theory to ground an effective critical relational theory of the law. In that spirit, in the second part, I sketch a recognition-based version of relational theory, inspired mainly by the work of Axel Honneth. In the third part, I demonstrate that this relational approach fits the current knowledge in fields such as

[2] Originally formulated respectively by Bowlby and Bronfenbrenner: John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* (Routledge, 1988); Urie Bronfenbrenner, *The Ecology of Human Development: Experiments by Nature and Design* (Harvard University Press, 1979).

psychology and social work about relationships and how they shape individuals. In the fourth part, I argue for a recognition-based approach to law.

1. Liberalism, Relational Theories and Personal Autonomy

Here, I describe the liberal individualist foundations of the law that grounds it in a rationalistic ideal of personal autonomy, and the relational critiques opposing this traditional liberalism. I then argue that relational conceptions of autonomy are more apt to describe human agency, and thus to develop adequate responses to child maltreatment. This argument results in a general critique of western liberal legal systems, where child protection serves as an example of a broader problem within the law.

Since western democracies have mostly embraced a liberal definition of democracy, their legal systems are premised on liberal principles.[3] Liberalism is a vast and complex body of ideas, comprising many variations, and it is a truism to say that it has become a kind of all-purpose denomination. As Waldron suggests, this may be because "political theories in the West have not been developed self-consciously under any ideological rubric or classification".[4] Therefore, trying to define liberalism is itself a contentious exercise. Critics of liberalism tend to ascribe to it principles or values that many liberals would condemn. Nevertheless, the literature usually agrees on some basic features. Bikhu Parekh suggests that liberalism can be described as a family of theories founded on methodological and ontological individualism.[5] This individualism distinguishes

[3] Bhikhu Parekh, "The Cultural Particularity of Liberal Democracy" (1992) 40: Special Issue Political Stud 160.
[4] Jeremy Waldron, "Theoretical Foundations of Liberalism" (1987) 37:147 Philos Q 127.
[5] Parekh, *supra* note 3.

liberalism from pre-modern forms of political thought and from its modern and postmodern detractors. Some, such as Will Kymlicka, would nuance that definition, arguing that liberalism's aim for individual autonomy does not preclude it from taking into account the "importance of the social world to the development, deliberation, and pursuit of individuals' value".[6] It seems, then, that the individualism of liberalism is grounded in a commitment to the individual's autonomy. For Jeremy Waldron, "liberals are committed to a conception of freedom and of respect for the capacities and the agency of individual men and women", which "generates a requirement that all aspects of the social should either be made acceptable or be capable of being made acceptable to every last individual".[7] Liberals are thus concerned by individual freedom and what kind of political arrangements can best foster it.

In this chapter, I am concerned with a specific version of liberalism, namely the tradition of Kantian liberalism which, following Martha Nussbaum, I contend has been the most influential in our legal western systems and political philosophy.[8] I do not challenge liberalism's defence of personal autonomy's primacy, but rather the Neo-Kantian understanding of autonomy that is usually implied within the traditionalist liberal view.

1.1. Liberal Autonomy and the Relational Critique

John Rawls' work can be used as an ideal-typical theory of Neo-Kantian liberalism to which relational account of individual autonomy is answering, given how foundational it

---

[6] Will Kymlicka, "Liberal Individualism and Liberal Neutrality" (1989) 99:4 Ethics 883 at 904. Waldron, *supra* note 68, makes a similar point at 132.
[7] Waldron, *supra* note 68 at 128.
[8] See Martha C Nussbaum, "The Feminist Critique of Liberalism" in Alison Jeffries, ed, *Women's Voices, Women's Rights: Oxford Amnesty Lectures 1996* (Routledge, 2021) 44.

has been for the political philosophy conversation of the past fifty years. One of Rawls' greatest contributions to contemporary political philosophy was the neo-Kantian rationalistic individualist methodology he laid down at the heart of *A Theory of Justice.*[9] In his "original position" thought experiment, he asked us to imagine a situation where every individual is stripped of their personal and social circumstances and characteristics such as race, gender, religion, social class, or occupation. This "veil of ignorance" serves to identify fundamental justice principles to which people could reasonably agree, regardless of their real-life circumstances. The strength of his proposition rests on an ideal of impartiality and equity. The thickness of the veil of ignorance serves to extract rational moral principles from the obstruction of non-ideal life circumstances. Rawls' theory is grounded in a "thin" conception of the good, as neutral as possible, defending an account of "goodness as rationality", relying in part on rational choice theory. This use of the thin conception of the good presupposes an individualist procedural concept of personal autonomy, where autonomy is implicitly equated to an ability to use reason to define goodness. Yet, critiques of mainstream liberal accounts of autonomy have shown that the individualistic and rationalistic conceptions of autonomy limit our ability to think about many ethical and political issues.

Among many other intellectual currents,[10] relational theories[11] have emerged in the past decades as among of the main challengers to the traditional liberal account of

[9] John Rawls, *A Theory of Justice* (Harvard University Press, 1971).
[10] The critiques of liberalism have been numerous and have all serve to influence in some ways relational theory: marxism and socialism, post-structuralism and communitarianism have all attacked the atomistic liberal conception of the self.
[11] Even though we often see relational theory as a singular phrase, I consider that the relational approaches to personal autonomy and to every field where the concept has been exported are diverse enough to warrant the use of the plural form.

individual agency. Born out of the feminist critiques of the concept of individual autonomy,[12] relational theories retain the liberal commitment to individual agency and freedom, but reframe it to reflect the idea that personal autonomy depends on relational conditions, whether they be intimate, social or institutional.[13] Relational theorists are taking a critical stance towards what they consider an overly rationalistic and individualistic account of moral psychology, such that of Rawls's[14] and of other mainstream liberals. Jennifer Nedelsky has been the first to suggest a concept of relational autonomy.[15] As Catriona Mackenzie and Nathalie Stoljar's influential anthology showed,[16] since Nedelsky's first articulation of the idea of relational autonomy, diverse approaches have flourished under the same name. Different accounts of relational theories may have different stances on the types of relationships that structure the self and how those relationships impact personal autonomy, but they all "share an emphasis on the social embeddedness of the self and on the social structures and relations that make autonomy possible".[17] Their motivation is not only to adequately describe the complexity of agency (which is influenced by socially constructed desires, fears, creativity and emotions as well as rationality), but also to explore how a relational description of the individual agent can impact the conceptual frameworks that define legal, ethical or political issues.

---

[12] Those critiques are summarized in the introduction of Nathalie Stoljar & Catriona Mackenzie, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000). One of the most influential of those critiques was that of Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).
[13] For an overview of relational accounts of autonomy, see Stoljar & Mackenzie, *supra* note 12.
[14] Rawls, *supra* note 9.
[15] Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1:1 Yale JL & Feminism 1.
[16] Stoljar & Mackenzie, *supra* note 12.
[17] Andrea C Westlund, "Rethinking Relational Autonomy" (2009) 24:4 Hypatia 26.

Mackenzie and Stoljar divide theories of autonomy in two categories: procedural and substantive.[18] Both types have been defended by relational theorists, though most of them would subscribe to the latter type. Procedural accounts usually insist on the intrinsic necessity to preserve a content-neutral conception of autonomy, by focusing on the capacity of the agent to adopt a critical reflection on their own actions, without making any value judgment on the content of the person's desires, beliefs or values.[19] According to Mackenzie and Stoljar, the problem with these procedural conceptions of autonomy is that they cannot account for the impact of oppressive socialization on the formation of the preferences, since they focus on the conditions of exercise of autonomy and not on its content.[20] In contrast, substantive accounts add constraints on the types of desires or preferences that can be considered autonomous.[21] They exclude the possibility that the internalization of an oppressive norm through socialization could be compatible with autonomy. For example, a woman who thinks her role is to serve a man because of her conservative upbringing could not be considered fully autonomous in her choice to be a housewife. Mackenzie and Stoljar further distinguish weak substantive accounts from strong ones. In a strong substantive account, personal autonomy implies conditions such as self-worth, self-respect or self-trust.[22]

---

[18] Stoljar & Mackenzie, *supra* note 82 at 13.
[19] For a defence of a relational procedural account of autonomy see, Westlund, *supra* note 17. See also Diana T Meyers, "Personal Autonomy and the Paradox of Feminine Socialization" (1987) 84:11 J Philos 619.
[20] Stoljar & Mackenzie, *supra* note 82 at 18.
[21] For an example of a substantive relational account of autonomy: Marina Oshana, *Personal Autonomy in Society* (Ashgate, 2006).
[22] Stoljar & Mackenzie, *supra* note 82 at 21. See also Catriona Mackenzie, "Feminist Innovation in Philosophy: Relational Autonomy and Social Justice" (2019) 72 Womens Stud Int Forum 144.

In sum, neither traditional Neo-Kantian liberalism nor procedural relational theories put forward a satisfying and, most of all, workable account of personal autonomy that would allow to understand the interaction between the individual, its interpersonal life, and society (more generally). This thin conception of autonomy has an impact on legal theory, since the rationalistic account of personal autonomy at the heart of traditional liberal individualism is a core component of our western legal systems. This issue is made particularly evident in the field of child protection.

1.2. Liberal Autonomy and Child Maltreatment

The law, as one of the main structures of modern institutional orders, is premised on the value of personal autonomy.[23] As Axel Honneth points out, the autonomy of the individual has become the dominant ethical norm of modern societies, and the foundation of the legitimacy of the social order:

> The normative legitimacy of the social order increasingly depends on whether it does enough to ensure individual self-determination, or at least its basic preconditions. As a result, notions of social justice and considerations on how to ensure that the way society is organized does justice to the interests and needs of its members have become inseparable from the principle of individual autonomy.[24]

[23] Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life* (Columbia University Press, 2014) at 16.
[24] *Ibid* at 16.

As a structure for political arrangements and an institution meant to balance individual freedoms and social constraints, the law is the main framework through which liberalism's ideals are manifested. Debates about the liberal conception of the self in political philosophy may have come to the shared recognition of the social dimensions of the self,[25] but many authors have underlined that the traditional liberal assumptions about the rational, independent individual agent are still very much alive in the western legal systems.[26] Numerous postmodernists and feminists have argued that western law is built on the ideal of the individual man's capacity to make rational decisions regarding his life.[27] This rationality is the foundation of his claim to liberty, actualized mainly in his right to contract: the obligations he is subjected to are, for the most part, stemming from his volition.[28] This foundational myth has a long history, dating back from the Enlightenment foundations of Descartes mind/body dichotomy and Kant's transcending rationalism.[29] In this tradition, rationality is seen as the common feature of all men and the foundation of both the equality between them, and the dignity of each of them.[30]

Despite the fact that many philosophical currents have nuanced or challenged these assumptions, especially during the twentieth century, this fundamental rationalistic and

---

[25] John Christman, *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (Cambridge University Press, 2009).
[26] For a few example among many, see Fineman & Grear, *supra* note 103; Peter Halewood, "Law's Bodies: Disembodiment and the Structure of Liberal Property Rights" (1996) 18 Iowa L Rev 1331; Francisco Valdes, Angela P Harris & Jerome M Culp, Jr, "Subject Unrest" (2003) 55 Stan L Rev 2435; Pierre Schlag, "The Problem of the Subject" (1991) 69 Tex L Rev 1627 at 1730; Susan Carle, "Theorizing Agency" (2005) 55:2 Am U L Rev 307.
[27] It is a common feature of most contributions in Fineman & Grear, *supra* note 26. See also Steven Lukes, *Individualism* (ECPR Press, 1973) at chapter 11;
[28] Fineman, *supra* note 107 at 17.
[29] Halewood, *supra* note 26.
[30] William Bristow, "Enlightenment" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, fall 2017 ed (Metaphysics Research Lab, Stanford University, 2017); Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor, Lara Denis, ed. (Cambridge University Press, 2017).

individualistic assumption still stands strong at the centre of the law's edifice and its ramifications are often deeper and wider than we realize. Still, one could argue that adjustments have been made to include a more nuanced concept of the legal subject. One example is in contract law, where throughout the years, courts and legislatures have come to recognize power differences between players and protect more vulnerable parties.[31] Another striking example is family law, where the legal developments of the last few decades attempted to devise a system that would both recognize the freedom and interdependence of each family member.[32] There are many other fields of law that could exemplify how the legal world is constantly refining its understanding of the individual and its relationship to other people and the social world. As much as these developments are important, by focusing on them and viewing them as part of a linear process of natural legal evolution, we risk losing sight of how deeply ingrained liberal biases still are in so many of our legal institutions, including in family law.

Child protection systems are no exception to this rule: they also are premised on the ideal of personal autonomy. Although the field of child protection, as it pertains to social intervention, has developed around an increasingly sophisticated version of the self, it still operates within a larger legal context that is premised on liberalism. The agenda of child protection seems at first glance incompatible with a traditional liberal conception of the self. Traditional liberalism's insistence on maintaining a procedural conception of autonomy, based on the rational abilities of the individuals, serves as a way to maintain the State's neutrality towards privates lives and individual conceptions of the good – which

[31] Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing: First Supplement to the Third Edition*, 3rd ed (London: Sweet and Maxwell, 2021).
[32] John Eekelaar, *Family Law and Personal Life*, 2nd ed (Oxford University Press, 2017).

should include different conceptions about childrearing. However, this is impossible to reconcile, at least in this preliminary state of the argument, with child protection systems' concerns. Child protection is based on the premise that children's wellbeing and children's rights outweigh the parents' right to privacy (which includes the rights to raise their children free of the State intervention). If the State has the legitimacy to interfere with parental freedom and the private lives of the family, it is because of the child's right to the preconditions of having, themselves, an autonomous life. Consequently, how those systems come to define personal autonomy has a deep bearing on their structure and effects.

Anglo-American child protection systems are an interesting case study for relational theories, since they are part of legal systems based on individual rights, but cannot enforce those rights without taking into account the relational nature of the child and its parents.[33] Moreover, the definition of child maltreatment places limits on what conception of good childrearing can be pursued by parents, and conversely defines minimal standards of what constitutes acceptable parenting, even more so as the child protection system tries to act pre-emptively. Hence, in accordance with their foundational liberalism, the Anglo-American child protection systems are an application of the liberal harm principle: the limit on parental freedom is only justified by the harm caused to the child. However, a thin version of the harm principle as the basis for child protection intervention is a limiting principle of action, since it is based on the definitions of the harm and not of what constitutes secure and healthy childrearing practices. The harm principle works well

[33] This general argument has been made regarding family law. For a summary of the vulnerability and relational critique of family law, see the introduction in Alison Diduck, "Family Law's Instincts and the Relational Subject" in Daniel Bedford & Jonathan Herring, eds, *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020) 31.

when the definition of the harm is easy and clear. However, as we have seen in the first chapter, child maltreatment is a continuum of behaviours, and there are many nuances that depend on context, repetition, or gravity.[34] Most often than not, whether there is child maltreatment and whether it deserves action from a third party are debatable issues.

Therefore, without a comprehensive understanding of the wellbeing of the child, that is, a certain form of perfectionist account of childrearing, it becomes complicated to act pre-emptively to avoid the harm. For example, without evaluating the quality of the interactions between a parent and a child, it can be difficult to detect the risk that the relationship can deteriorate to the point of violence before the violence actually happens.[35] A child welfare system that takes seriously pre-emptive action involves a certain degree of societal perfectionism, in the sense that it cannot function without a conception of what constitutes the wellbeing of a child, including the quality of her relationship with her parents.[36] This necessary analysis of good enough childrearing through the measure of a substantive account of the child's wellbeing can hardly be theorized within a traditional liberal framework of the self, or within a procedural relational theory.

In this sense, child maltreatment, is a superb example of a field in need of a substantive relational theory that fleshes out the normative relational content of the child's best interests, of parenthood, and of society's intervention in families. The concept of

---

[34] Laura J Proctor & Howard Dubowitz, "Child Neglect: Challenges and Controversies" in Jill E Korbin & Richard D Krugman, eds, *Handbook of Child Maltreatment* (Springer, 2014) 27.
[35] Lindsay Asawa, David Hansen & Mary Flood, "Early Childhood Intervention Programs: Opportunities and Challenges for Preventing Child Maltreatment" (2008) 31 Education and Treatment of Children 73.
[36] One could argue that liberals can still defend a child protection system based on the future autonomy of the child, but it would still imply that some parenting behaviours are required to develop autonomy, and challenge the assumption that autonomy just spontaneously appears with age.

recognition is a promising tool to build a theoretical framework that substantiates the relational nature of personal autonomy.

2. A Recognition-Based Account of Relational Theory

In this second part, I start by situating Axel Honneth's work about the concept of recognition. I explain that, while his general goal is to provide an alternative definition of justice in the context of academic debates in political philosophy, his work can serve as an inspiration for a relational approach in applied legal theory, especially in the context of child maltreatment. I then describe Honneth's relational account of autonomy based on the concept of recognition, as a basis for a theoretical framework to build a relational critique of the treatment of child maltreatment in the law. His account rests on a tripartite conception of recognition: interpersonal recognition, social recognition and legal recognition.

I build on Honneth's tripartite structure of the theory of recognition, which makes it as much a theory of interpersonal relations as a theory of social organization, to reflect on how it could be used in the legal field. Although the structure and general content of each part draw on Honneth's corpus of work, I offer a reinterpretation to create a recognitional framework for legal theory. Therefore, I move away from the project of describing a general theory of society, and instead aim to provide a basis for a recognition-based relational theory of law. In accordance with that plan, I appeal to authors who worked with similar concepts or commented Honneth's work to flesh out an original understanding of the inner workings of each level of recognition. According to Honneth's theory, personal

autonomy is built through three levels of recognition: rights, love, and solidarity.[37] Each one of them is encountered in different contexts of social relations, and each one of them serves to acknowledge the individual's existence within their interpersonal and social context, which in turn allows the person to autonomously act within that context. I think that this structure can help us envision a deep critique of western legal institutions and practices.

2.1. The Concept of Recognition

As an alternative to the traditional liberal conception of autonomy and to procedural relational theories of autonomy, I suggest a relational substantive theory of the legal subject inspired by Axel Honneth's theory of recognition. I am interested mainly in Honneth's general framework of recognition and less so in the details of his comprehensive theory of society and justice. I will argue that his tripartite concept of recognition is a fruitful framework for thinking relationally about law, and that the definitions of the three spheres of recognition can reasonably be supplemented and nuanced by the literature in psychology and political philosophy.

The concept of recognition, inspired by Hegel's *Phenomenology of Spirit*, has been at the centre of many other philosophers' works, such as Jürgen Habermas, Charles Taylor, Judith Butler, Nancy Fraser, or Paul Ricoeur.[38] It is also at the centre of the feminist critical

[37] Joel Anderson & Axel Honneth, "Autonomy, Vulnerability, Recognition, and Justice" in Joel Anderson & John Christman, eds, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press, 2005).

[38] Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State" in *Multiculturalism* (Princeton University Press, 1994) 107; Charles Taylor, "The Politics of Recognition" in *Multiculturalism* (Princeton University Press, 1994) 25; Judith Butler, "Longing for Recognition" in Kimberly Hutchings & Tuija Pulkkinen, eds, *Hegel's Philosophy and Feminist Thought: Beyond Antigone?* (Palgrave Macmillan, 2010) 109; Paul Ricoeur, *Parcours de la reconnaissance*, Folios Essais (Gallimard, 2005); Nancy Fraser,

psychoanalyst Jessica Benjamin.[39] Although each one of them has different optics on the specifics of the concept, as critical thinkers ought to do, they all refer to a similar definition. Recognition is a process by which the claims to agency of a person or a group of persons are acknowledged by others.[40] Recognition is therefore always understood as not only being seen, but as being given a power of action through that act of looking. By its definition, then, the concept of recognition is evidently relational. Honneth, in a chapter co-written with Joel Anderson, has framed his concept of recognition as one possible definition of relational autonomy.[41] The translation of the original German term "*Anerkennung*" in Honneth's work by the term "recognition" has some shortcomings. The English word "recognition" and its French translation "*reconnaissance*" have an epistemic dimension of recollection or identity that the German concept lacks. In accordance to its original German meaning, the concept of recognition for Honneth means "the affirmation of positive qualities of human subjects or groups".[42] Recognition, in that sense, is not a passive, individual cognitive moment of recollection. It is an intersubjective everyday moral act, situated in the social world.

Citing Nedelsky's early work on relational autonomy, Honneth and Anderson assert that the theory of recognition is one iteration of relational conceptions of autonomy:

"Rethinking Recognition" (2000) 3 New Left Review 107; Nancy Fraser, "Recognition without Ethics?" (2001) 18:2–3 Theory, Culture Soc 21.

[39] Jessica Benjamin, *Beyond Doer and Done to: Recognition Theory, Intersubjectivity and the Third* (Routledge, 2017); Judith Butler, "Longing for Recognition Commentary on the Work or Jessica Benjamin" (2000) 1:3 Stud Gender Sexuality 271.

[40] Honneth, *The I in We*, *supra* note 1 at 80-81.

[41] Anderson & Honneth, *supra* note 37

[42] Honneth, *The I in We*, *supra* note 1 at 80.

> Instead, we propose to take up and further develop another expansion of the claims of social justice in line with a conception of autonomy that goes by various names – relational, social, intersubjective, situated, or recognitional – but can be summarized in the claim that "Autonomy is a capacity that exists only in the context of social relations that support it *and only in conjunction with the internal sense of being autonomous*."[43]

In that quotation, Nedelsky, describes relational autonomy in two moments. They are best described through the process of recognition. As a first step, social relations must support autonomy by affirming the specificities of the individual. The act of recognition presupposes an active role of the people, groups and institutions surrounding the individual, which have morally acknowledged the qualities of a given person. In a second step, that acknowledgment builds "the internal sense of being autonomous", by allowing the individual to make sense of who he is. As we will see in the third part of this chapter, attachment theory, in child psychology, explains how the intimate bond of love can be so essential in the individual's capacity to develop a sense of self, as an infant and as an adult.[44] The theory of recognition takes this well-established psychological fact to another level by suggesting that the same process is at play through social relationships and institutional structures.

---

[43] Anderson & Honneth, *supra* note 37 at 129, citing Nedelsky, *supra* note 18 at 25; emphasis added.
[44] W Rholes Rholes et al, "Adult Attachment Styles, the Desire to Have Children, and Working Models of Parenthood" (1997) 65:2 Journal of Personality 357.

The case for a relational conception of personal autonomy has been supported in fields of knowledge ranging from neuroscience[45] and sociology,[46] to child development psychology.[47] Honneth's theory of recognition is one version of a substantive account of relational autonomy that has had resonance in child psychology and social work literature, but less so in legal theory.[48] This author is of interest for the study of child maltreatment and the law because his work draws inspiration from sociologists and philosophers, as well as from attachment theory, a pillar of today's child psychology field. In his first iteration of the theory of recognition, Honneth cites two foundational thinkers of attachment theory, John Bowlby and Donald Winnicott.[49] It is no wonder that Honneth's work has drawn so much attention from many social work scholars, and that his theory of recognition has been abundantly used in recent child welfare literature.[50] His account of relational autonomy through the concept of recognition is thus compatible with many of the key concepts of therapeutic approaches to child protection that I described in the first chapter: attachment

---

[45] See for example Shaun Gallagher, Ben Morgan & Naomi Rokotnitz, "Relational Authenticity" in Gregg Caruso & Owen Flanagan, eds, *Neuroexistentialism: Meaning, Morals, and Purpose in the Age of Neuroscience* (Oxford University Press, 2017) 126.

[46] Pierpaolo Donati & Margaret S Archer, *The Relational Subject*, The Relational Subject (Cambridge University Press, 2015).

[47] Bowlby, *supra* note 2. See also Inge Bretherton, "The Origins of Attachment Theory: John Bowlby and Mary Ainsworth" (1992) 28:5 Dev Psychol 759. For an argument about how neuroscience and child psychology support relational theory, see Laurence Ricard, "L'autonomie relationnelle: un nouveau fondement pour les théories de la justice" (2013) 40:1 Philosophiques 139.

[48] For an specific account of autonomy following the theory of recognition: Anderson & Honneth, *supra* note 37. On the theory of recognition: Axel Honneth, *The Struggle for Recognition*, *supra* note 1; Honneth, *The I in We*, *supra* note 1.

[49] Axel Honneth, *The Struggle for Recognition*, *supra* note 1.

[50] For just a few examples: Mark Smith, Claire Cameron & Daniela Reimer, "From Attachment to Recognition for Children in Care" (2017) 47:6 Br J Soc Work 1606; Petteri Niemi, "Recognition and the Other in Social Work" (2021) 51:7 Br J Soc Work 2802; Danae Dotolo et al, "Expanding Conceptualizations of Social Justice across All Levels of Social Work Practice: Recognition Theory and Its Contributions" (2018) 92:2 Social Service Review 143; Mary Mitchell, "The Value of Recognition Theory to Family Group Conferencing and Child-Care and Protection" (2021) 51:6 Br J Soc Work 2191; Robert Lindahl, "Individualising or Categorising Recognition? Conceptual Discussions Concerning the Relationship Between Foster Children and their Child Welfare Workers" (2021) 24:4 European Journal of Social Work 566; Paul McCafferty, "Children's Participation in Child Welfare Decision Making: Recognising Dichotomies, Conceptualising Critically Informed Solutions" (2021) Child Care in Practice 1.

theory, the ecological-transactional model, trauma-informed care and therapeutic alliance. All four concepts reflect how autonomy can be gained, regained, and sustained through a nurturing environment and trusting relationships that create recognition, personally and institutionally.

A further reason why Honneth's concept of recognition is fertile ground for legal theory is that it reflects a distinctive concept of justice. Honneth's general project is the reconstruction of Hegel's theory of recognition. He aims to build an alternative to theories of justice (such as that of John Rawls, for example), that would focus on relationships of recognition at various levels (intimate, social and legal), rather than on the distribution or redistribution of goods. His objective is to propose "a better account of the relationship between socialization and individuation".[51] Honneth does not set out to sketch a relational theory of the law. As a social philosopher, he works on defining the concept of justice. His use of the concept of law is implicit; it appears throughout his writing without ever being properly defined and situated. But his contribution to the meaning of the concept of justice can serve to inform a theory of the law. My appeal to his work and arguments does not intend to demonstrate that his general theory of society can be directly applied to our understanding of any specific law that deals with intimate relationships and general social norms. Rather, I take it as a general inspiration that will serve to construct conceptual tools that tie together concerns voiced by relational theories and theoretical approaches to law, to meet the concrete challenges of building a working critique of the legal comprehension of child maltreatment.

[51] Honneth, *The I in We*, *supra* note 1 at vii.

Two caveats will complete this contextualization of the theory of recognition and introduce its use in my analysis of child maltreatment and the law. First, Honneth's theory has been widely debated and criticized by political philosophers, especially among specialists of critical theory and among analytical philosophers. Those critiques argue that the concept of recognition fails to give a comprehensive framework to understand structural power dynamics, the impact of capitalism, and domination relations.[52] While the debates surrounding the adequacy and completeness of the theory of recognition as a general social critical theory are fascinating and important, I do not believe they have a significant impact on the use I am planning to make of the theory of recognition. The theory of recognition does not have to be comprehensive as a general social explanation in order to be helpful in a specific field (in this instance, legal theory). In the same way, the critiques about Honneth's interpretation of the authors he mobilizes to build his theory do not affect the use I am making of the concept of recognition, since I argue that Honneth's general reconstruction of how a person needs an affective bond to develop their concept of the self is supported by the current knowledge in psychology research, as we will see in the next section.[53]

Second, Honneth's work has not widely been discussed in the general literature on relational theories, apart from the literature on personal autonomy in political philosophy.

---

[52] The most famous critique came from Nancy Fraser, who argues that redistribution cannot be subsumed under the concept of recognition. See Nancy Fraser & Axel Honneth, *Redistribution Or Recognition?: A Political-Philosophical Exchange*, translated by Joel Golb, James Ingram, & Christiane Wilke (London; New York: Verso, 2003). Various critiques have been made regarding the incompleteness of the theory of recognition. A few examples: Julie Connolly, "A Fourth Order of Recognition?" (2015) 16:4 Critical Horizons 393; Amy Allen, "Recognizing Domination: Recognition and Power in Honneth's Critical Theory" (2010) 3:1 Journal of Power 21; Paul Michael Garrett, "Recognizing the Limitations of the Political Theory of Recognition: Axel Honneth, Nancy Fraser and Social Work" (2010) 40:5 Br J Soc Work 1517.

[53] See section 3 of the current chapter.

One possible explanation is that relational theories are a diverse bundle of approaches that have found resonance in different fields of ethics and applied legal theory, mainly in an analytical tradition of philosophy. There are also probably contingent disciplinary reasons that explain why recognition, as a concept, has not further influenced the relational approach to legal issues. I contend that, notwithstanding that disregard in the literature, the concept recognition can give much-needed depth and substance to relational theories of law. The multiple layers of the concept of recognition, which finds resonance in describing intimate relationships as much as legal and social relationships, makes it uniquely apt approach for legal theory.

2.2. Legal Recognition

Autonomy first demands self-respect, which includes an ability to see oneself as the author of one's life.[54] Socially and politically, this can only be the case when one can come to be recognized as an equal-standing member of society, with a legal and political voice. Therefore, to understand oneself as an integral part of the society one evolves in, one needs to be fully and formally recognized as such through the law: "only once we have taken the perspective of the 'generalized other', which teaches us to recognize the other members of the community as the bearers of rights, can we also understand ourselves to be legal persons, in the sense that we can be sure that certain of our claims will be met."[55] There is a dialectical movement, an acknowledgment of our social nature which creates

[54] *Ibid* at 132.
[55] Honneth, *The Struggle for Recognition*, *supra* note 1 at 108.

our understanding of ourselves and others as bearers of rights and obligations, at the centre of legal relations.

This sphere of recognition is familiar to liberalism, as it pertains to the recognition of formal rights based on a shared human dignity.[56] It is intuitive in liberal societies to understand that the law represents a way to allocate rights and responsibilities with the aim of creating coexisting spheres of individual autonomy. This creates the conditions for self-respect, that is, a capacity to "raise and defend claims as a person with equal-standing".[57] Through its recognition mechanism, the law creates "subjects". A person exists in the law when it is recognized as such, and the law gives them the legal capacity to act, the responsibility to answer for those actions, and the ability to put forward claims.

One misunderstanding about the concept of recognition within legal scholarship comes from the tendency to interpret it solely in legal terms. Hans-Georg Flickinger explains clearly the limitations of this solely legal concept of recognition:

> As the liberal order recognizes the interests, claims or chances for individual activity in dependence of the protection provided by a legal title, we can say that the proceduralist conception makes use of a conditioned, or better: of a weak concept of recognition. In this perspective, expectations of justice are defined by the attribution of rights and obligations without any basis in

[56] Anderson & Honneth, *supra* note 37 at 132.
[57] *Ibid* at 132.

> intersubjectively legitimatised guarantees and respect for the different interests and claims for individual autonomy.[58]

Interestingly, the discussions surrounding the politics of recognition have underlined the limitations of the legal understanding of recognition, notably concerning decolonization practices. One critique of a "liberal" approach to the politics of recognition[59] rests on the psychoaffective impacts of the domination of a colonial and racist settler-state, inspired by Frantz Fanon's work.[60] Glen Coulthard makes this argument by building on Fanon's critique of the Hegelian model of recognition to expose the limits of this approach to abolish the structures of colonial power in Canada and the domination of Indigenous peoples.[61] He contends that "the reproduction of a colonial structure of dominance like Canada's rests on its ability to entice Indigenous peoples to come to identify, either implicitly or explicitly, with the profoundly asymmetrical and non-reciprocal forms of recognition either imposed on or granted to them by the colonial-state and society."[62]

Coulthard's argument is that the formal recognition that proponents of the politics of recognition came to champion, such as "the delegation of political and cultural 'autonomy' to Native groups through the institutions of 'self-government'," [63] falls short of

---

[58] Hans-Georg Flickinger, "Between Civil Society and State: Considerations on Axel Honneth's Critical Theory of Justice" in Nythamar De Oliveira, et al, eds, *Justice and Recognition: On Axel Honneth and Critical Theory* (Porto Alegre: PUCRS, 2015) 181.
[59] I use liberal here following the qualification of Coulthard in Glen S Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 Contemporary Political Theory 437. This qualification could be challenged, as Coulthard refers mainly to Charles Taylor's "Politics of Recognition", *supra* note 38, and Taylor is usually considered as a critique of the dominant strand of liberalism.
[60] Frantz Fanon, *Peau noire, masques blancs*, seuil ed (Paris, 2015 (1952)); Frantz Fanon, *Les damnés de la terre* (Paris: La Découverte, 2019 (1961)).
[61] Coulthard, "Subjects of Empire", *supra* note 59.
[62] *Ibid* at 439.
[63] *Ibid* at 442.

undoing the effects of colonialism, since it does not address the structure of the colonial state and its capitalist economy. Building his argument on a reading of Fanon, Coulthard explains that "a change in the social structure would not guarantee a change in the subjectivities of the oppressed": the misrecognition harm of colonization had a psychological impact on the colonized subjects which resulted in an "inferiority complex" which cannot be resolved only within the sphere of a liberal legal recognition.[64] He also underlines that for mutual recognition to support the process of identity-formation, it needs to be in an equal relationship of mutual dependency.[65] Yet, in the context of the relationship between the state and Indigenous people, this equality of status does not exist. Coulthard's prescription is the necessity of what he calls "self-recognition", that is, an emancipation of the "Other" figure, which in his view maintains the oppressed under the domination of the oppressor by making him a necessary part of their emancipation.[66]

Coulthard's critique condemns the reductive aspect of focusing only on the legal sphere (understood, again, in a broad sense) of recognition. In that sense, it is compatible with Honneth's project, in which all spheres of recognition interact with each other and cannot be thought of as separate and vertical relationships. Furthermore, in the context of Coulthard's argument, the prescription for "self-recognition" is not individual but collective. This "self-recognition" is arguably the sum of self-trust, self-respect, and self-esteem targeted by Honneth's three spheres of recognition. In that sense, individuals still need their context of relationality to reach emancipation through interpersonal recognition and social recognition within their community. We can interpret the post-colonial critique

[64] *Ibid* at 448.
[65] *Ibid*.
[66] *Ibid*.

as underscoring the importance of the evaluative impact of recognition on the self, rather than undermining the use of recognition to give substance to relationality. No practice can be understood as effective recognition if it does not translate into a possibility for "self-recognition".

Although Coulthard's argument addresses the wrongs of colonization, it has the same structure as arguments made by other critical approaches of the law, such as critical race theory and feminist theory. Those critical approaches share an emphasis on the ideological underpinnings of the law, and therefore, the intrinsic limitations of focusing mainly on changes through legal reforms. The law is, in itself, the product of history of domination. If we understand the term "recognition" only in a narrow legalistic sense, it is bound to reinforce structures of domination instead of undoing them. Honneth understands this danger. In a book that attempted to answer critiques, he encountered in the twenty years following the publication of *The Struggle for Recognition*, he addresses this fear:

> I had said that we cannot exclude the possibility that forms of social recognition possess a purely ideological function if they encourage an individual relation-to-self that suits the existing dominant order. Instead of truly giving expression to a particular value, such ideological forms of recognition would ensure the motivational willingness to fulfil certain tasks and duties without resistance.[67]

[67] Honneth, *The I in We*, *supra* note 1 at 86.

To answer that problem, we need to take seriously the other forms of recognition, which allow to build a "relation-to-self" that is strong enough to express identities, needs, and desires potentially running counter to those allowed by the dominant order. The concept of recognition cannot serve as a model of "mutual objectification"; there needs to be an "unconditional mutuality" where each other is not only *seen*, but *acknowledged* as equally autonomous, with the same capacity of recognition.[68]

The theorization of the process of recognition through the law has been widely studied by legal scholars and political philosophers over the last sixty years.[69] In the legal scholarship and contemporary political philosophy literature, the expression "struggle for recognition" usually refers to "the volatile conflicts among individuals, minorities and majorities of diverse kinds" and the way institutional and social norms, in great part through the law, answer these conflicts.[70] As James Tully puts it, "struggles over recognition are struggles over the intersubjective 'norms' (laws, rules, conventions or customs) under which the members of any system of government recognise each other as members and coordinate their interaction."[71] Legal recognition in that sense consists in making individuals or communities co-legislators of the norms that govern them.

Consequently, there are two possible and distinct ways to think of legal recognition: one is as referring to recognition in positive law; one is as referring to any system of rules or norms that govern a collective endeavour, such as in classrooms, bureaucracies, and

---

[68] Flickinger, *supra* note 58 at 186.
[69] James Tully, "Recognition and Dialogue: the Emergence of a New Field" (2004) 7:3 Crit Rev Int Soc & Pol Phi 84 at 84.
[70] *Ibid* at 84.
[71] *Ibid* at 86.

organizations. While Honneth initially referred to positive law when describing the process by which legal recognition builds self-respect,[72] he took a more nuanced stance later on, by integrating the limitation of the state-made norms to his general model of justice.[73] I see no reason not to adopt a wider pluralistic conception of law to describe legal recognition, as long as it relates to norms that have an impact on governance. If self-respect relates to authorship and governing power, then it derives not only from state-law, but from all the informal legal structures conferring people voice, power and ownership in a broad sense. The particularity of Honneth's insight towards the sphere of legal recognition is that it cannot be thought of apart from the other two spheres of recognition. As Honneth and Anderson put it: "on the recognitional approach, guaranteeing rights does not ensure autonomy directly (in the negative sense of blocking interference) but rather supports autonomy via the support for self-respect."[74] In that sense, the process of legal recognition is only one step in the broader recognitional frame.

2.3. Interpersonal Recognition

To understand how recognition as a broader phenomenon (and not purely a legal one) comes to create a subject's sense of agency, we first have to get a sense of how a subject comes to understand itself as a *subject*. Multiple contemporary thinkers of recognition, apart from Honneth, have tried to describe the intersubjective process that

[72] Honneth, *The Struggle for Recognition*, *supra* note 1 at 108.
[73] Honneth, *The I in We*, *supra* note 1 at chapter 3: "The Fabric of Justice: On the Limits of Contemporary Proceduralism". The critique of the state is also a part of *Freedom's Right*: see Honneth, *supra* note 23 at 71 and following.
[74] Anderson & Honneth, *supra* note 37 at 133.

generates an individual's sense of self, notably Charles Taylor,[75] Paul Ricoeur,[76] and Jessica Benjamin.[77] They all argue that, rather than be at odds with social life, individuality emerges from it.[78] As Honneth explains it, a person can only come to see itself as a subject by an intersubjectivistic encounter: "it learns to perceive its own action from the symbolically represented second-person perspective".[79] It is only by imagining how another person would react to my actions that I can develop the self-consciousness of being a subject. The first category of recognition in the human experience is love. "[L]ove relationships are to be understood […] as referring to primary relationships insofar as they – on the model of friendships, parent-child relationships, as well as erotic relationships between lovers – are constituted by strong emotional attachments among a small number of people".[80] Love is a mutual interpersonal recognition of our condition as dependent and needy beings, by the bond of loving care. The intimate relationships of recognition, through genuine love, are essential conditions to personal autonomy by generating the conditions for, first, a sense of agency and, second, the construction of self-trust.

This process is best described by the dance between independence and attachment that we first experience as children in the relationship with our primary caretaker, usually defined in psychoanalytical literature as the "mother" figure. To describe how love relationships are the primary structure of a recognition pattern, Honneth relies on object-

[75] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge University Press, 1992).
[76] Ricoeur, *supra* note 37.
[77] Jessica Benjamin, *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (New York: Pantheon Books, 1988); Benjamin, *supra* note 38.
[78] David V Ciavatta, "The Family and the Bonds of Recognition" (2014) 13 Emotion, Space and Soc71
[79] Honneth, *The Struggle for Recognition, supra* note 1 at 75.
[80] *Ibid* at 95

relations theory, a "psychoanalytic model of mind development".[81] This theory describes how the cognitive development of the child is dependent on its affectional attachments.[82] Honneth relies on the work of Donald Winnicott, a profoundly influential figure in child development theory. The struggle for recognition between the mother and the child comes from the initial state of "absolute" dependence of the child, and their relationship with a mother that is, in the very beginning of their life, indistinguishable from the generality of their environment. The mother is the entire world of the infant, and the dependence makes their relationship symbiotic: "During the first months of life, the child is incapable of differentiating between self and environment, and moves within a horizon of experience, the continuity of which can only be assured by the supplemental assistance of a partner in interaction."[83] As the infant matures, the mother regains a certain activity in the social world, which "forces her to deny the child immediate gratification of the child' needs", and corresponds to the moment where the child develops the ability to cognitively differentiate self and environment.[84] As child and mother become more independent, the child forms an affective attachment to the mother which will serve as the security basis from which they will, step by step, explore the world. Child and mother enter a phase where they recognize each other as "objects" outside of their subjective world. This first process of detachment is possible through a first "struggle for recognition".[85]

---

[81] Dragan M Svrakic & Charles F Zorumski, "Neuroscience of Object Relations in Health and Disorder: A Proposal for an Integrative Model" (2021) 0 Front Psychol, online: <https://www.frontiersin.org/articles/10.3389/fpsyg.2021.583743/full>.
[82] Honneth, *The Struggle for Recognition, supra* note 1 at 96.
[83] *Ibid* at 99.
[84] *Ibid* at 100.
[85] *Ibid* at 101. Honneth here cites Jessica Benjamin, a feminist psychoanalyst who made the Hegelian concept of recognition central to her theory of psychoanalysis: Benjamin, *supra* note 77.

Love, through a process of attachment and recognition, creates the ability to build one essential feature of autonomy: self-trust (or "basic self-confidence").[86] The importance of self-trust was highlighted with the emergence of the feminist discourse on relational autonomy in the 1990s.[87] Since then, it has become a common feature of discussions about relational autonomy.[88] Self-trust is a precondition of autonomy in the sense that it allows the individual to have confidence in the information they perceive from their feelings, thoughts, emotions, sensory processes, impulses, and desires. The ability to perceive as correctly as possible what happens in our inner world, and to self-examine this inner world, rests on the capacity to trust oneself. Self-trust, then, is essential to self-reflection.[89] As Honneth and Anderson point out:

> One of the enduring accomplishments of psychoanalytic theory lies in exposing the illusion both of complete transparency about our motives and of perfect harmony among our desires, even in the case of perfectly of autonomous agents. This unavoidably inchoate, shadowy, and conflicted inner life suggests the need for a more polyvocal conception of how autonomous individuals relate to their desires, impulses, fantasies, and other dimensions of subjectivity. [90]

---

[86] Anderson & Honneth, *supra* note 37.
[87] Trudy Govier, "Self-Trust, Autonomy, and Self-Esteem" (1993) 8:1 Hypatia 99.
[88] For example, in the field of consent to healthcare : Thomas Nys, "Autonomy, Trust, and Respect" (2016) 41:1 J Med Philos 10. Carolyn McLeod & Susan Sherwin, "Relational Autonomy, Self-Trust, and Health Care for Patients Who Are Oppressed" in Nathalie Stoljar & Catriona Mackenzie, eds. *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000) 259. See also: Karen Jones, "The Politics of Intellectual Self-Trust" (2012) 26:2 Social Epistemology 237.
[89] Anderson & Honneth, *supra* note 37; Govier, *supra* note 87.
[90] Anderson & Honneth, *supra* note 37 at 134.

Self-trust is thus a precondition to the capacity to deliberate internally, namely, to carry on the "legislative" work of choosing the norms who will guide one's actions.

Although it could seem like an individual feature, self-trust is inherently relational: it is built through intimate relationships and can be deeply harmed through violations of intimacy. The negative impacts of those transgressions are well documented: trauma victims in cases of physical, sexual or emotional abuse, are known to show suspicion towards their own bodily signals, impulses or desires.[91] Conversely, as we have seen earlier, the experience of recognition through a relationship of emotional attachment builds the sense of trust in oneself insofar, through love, the *other* (parent, lover, friend) reflects back (*recognize*) characteristics about the self that are then internalized as self-knowledge.[92] Healthy intimacy respects the boundaries expressed by the person experiencing it, which in turn reinforces the capacity of the subject to understand their bodily and emotional signals as trustworthy, as well as to believe in their own pure motivations and competence.[93] These relationships also create a safe space from which to build internal validation and test one's examination of their inner life, a "risky" process that demands "courage".[94] The support of significant others offers the safety required to authentically engage with one's thoughts and feelings.

[91] *Ibid* at 134; Govier, *supra* note 87.
[92] Serena Chen, Helen Boucher & Michael W Kraus, "The Relational Self" in Seth J Schwartz, Koen Luyckx & Vivian L Vignoles, eds, *Handbook of Identity Theory and Research* (Springer, 2011) 149.
[93] Govier, *supra* note 87.
[94] Anderson & Honneth, *supra* note 37 at 185.

2.4. Social Recognition

The last sphere of recognition in Honneth's model comes from society in the form of a social sense of value, which builds another prerequisite of an autonomous life: self-esteem. As Honneth puts it: "The cultural self-understanding of a society provides the criteria that orient the social esteem of persons, because their abilities and achievements are judged intersubjectively according to the degree to which they can help to realize culturally defined values."[95] Accordingly, self-esteem is developed relationally, by the process of social recognition which attributes value to a person's contribution to their community. Honneth also describes this form of recognition as group solidarity, where solidarity is defined as " an interactive relationship in which subjects mutually sympathize with their various different ways of life because, among themselves, they esteem each other symmetrically".[96]

In a step further, in their article published ten years after Honneth's initial exposition of his theory of recognition, Anderson and Honneth bring to light the "semantic" aspect of the process of social recognition. Being esteemed by one's community creates a "symbolic-semantic field", that is, a linguistic ability to make sense of one's activity or role. Self-esteem emerges from a common language, a "horizon of significance", that in turn builds the vocabulary that allows not only to shape one's identity, but generates the possibility to endorse such an identity.[97] Anderson and Honneth give the example of the "openly lesbian" or "stay-at-home dad", identities that are framed by the social context

[95] Honneth, *The Struggle for Recognition*, *supra* note 1 at 122.
[96] *Ibid*.
[97] Anderson & Honneth, *supra* note 37 at 136. The concept of the "horizon of significance" comes from Taylor, *supra* note 75.

giving them meaning and legitimacy. One can only experience being an "open lesbian" as a part of positive experience for self-esteem if society allows for such a role to exist.[98] As for the other two types of recognition, the impacts of a denial of this form of recognition makes its necessity clearer. If a person experiences social humiliation or denigration, or if a person fears those experiences, it affects not only their sense of worth and identity, but also their capacity to live up to their authentic selves. In a context of social repression or disapproval, "marginalized ways of life cease to be genuine options for individuals".[99] To follow on the previous example, before society allowed people to be openly gay, gay people had to deal with secrecy, shame, and denial. In that sense, positive social recognition provides the colour palette from which persons can paint their original and self-determined life.

This form of recognition surpasses the formal recognition offered by the legal sphere, although it also emanates from structural and institutional settings. Put simply, even if one has equal legal standing in a given society, one cannot be thought of as fully autonomous if falling short of social markers of recognition. Social recognition includes social opportunities, social prestige and honour, as well – crucially – as income distribution.[100] Honneth critiques the current division of labour and resources as tying social recognition to "achievement", in a way that undermines solidarity.[101] One example of social misrecognition, for example, is that in a neoliberal society, an individual's social standing is closely tied work status, which he does not entirely control. Unemployment

[98] Anderson & Honneth, *supra* note 37.
[99] Anderson & Honneth, *supra* note 37 at 136.
[100] Honneth, *The Struggle for Recognition*, *supra* note 1 at 127.
[101] *Ibid*.

leads to forms of social suffering that are hardly taken into account by liberal theories of justice: " [f]or those who are victims of long-term unemployment for example, feelings of shame and depressive affects are consequences of a social situation as well as factors that make their situation worse."[102] Therefore, social recognition is a necessary component of personal autonomy, and needs to be accounted for in a relational conception of the individual.

3. Empirical Grounds for Recognition: Child Maltreatment from a Therapeutic and Clinical Perspective

In this third part of the chapter, I argue that the concept of recognition finds resonance, first, in the main key concepts about the causes of child maltreatment and, second, in the theoretical concepts of therapeutic approaches that we introduced in the first chapter. The theory of recognition is supported by psychological and social work research. In fact, its theoretical premises find confirmation in what we presently know about the role of attachment theory, child maltreatment's risks factors and principles of social intervention such as trauma-informed care and therapeutic alliance. It also serves as a common conceptual bridge to understand therapeutic and clinical concerns regarding child maltreatment, and eventually translate them into the legal world.

Honneth's project explicitly intends to blend social analysis, which is traditionally left to social scientists, and normative theory. In *The Struggle for Recognition*, he explains that, as he plans on reconstructing Hegel's theory of recognition in a contemporary setting, he wishes to do so by offering "a reconstruction of his initial thesis in the light of empirical

[102] Emmanuel Renault, "A Critical Theory of Social Suffering" (2010) 11:2 Critical Horizons 221 at 224.

social psychology".[103] As we have seen, Honneth builds his account of relational autonomy in the epistemology of social psychology. In the last few years, at least one study in psychology aimed at testing the empirical validity of Honneth's recognition theory and confirmed his theoretical thesis.[104] By anchoring Honneth's concept of recognition in the current state of knowledge and practice of social work regarding family dynamics and child maltreatment, this part of the chapter is an extension of the theoretical move he initiated. In turn, using the concept of recognition to flesh out the relational critique of the law should help the legal world work together with therapeutic professions, rather than in parallel to them, by creating a shared language and understanding of the issues they confront.

3.1. Recognition and Attachment Theory

Attachment theory has entered the common vocabulary of popular culture[105] and of some institutional settings (especially in family law).[106] Therefore, its core concepts and principles have been interpreted in many different ways, depending on who uses it and in what context. In this section, I will present a succinct definition of attachment theory and draw parallels with the first type of recognition relationship: love.

---

[103] Honneth, *The Struggle for Recognition, supra* note 1 at 68.
[104] Daniela Renger et al, "A Social Recognition Approach to Autonomy: The Role of Equality-Based Respect" (2017) 43:4 Pers Soc Psychol Bull 479.
[105] See Foster Kamer, " Are You Anxious, Avoidant or Secure? Over a decade after its publication, one book on dating has people firmly in its grip", *The New York Times* (6 November 2021), online: <https://www.nytimes.com/2021/11/06/style/anxious-avoidant-secure-attached-book.html>; Pascal Vrticka, "Attachment Theory: What People Get Wrong About Pop Psychology's Latest Trend for Explaining Relationships", *The Conversation* (30 November 2022) online: <https://theconversation.com/attachment-theory-what-people-get-wrong-about-pop-psychologys-latest-trend-for-explaining-relationships-195034>.
[106] Tommie Forslund et al, "Attachment Goes to Court: Child Protection and Custody Issues" (2021) Attach Hum Dev 1.

Attachment theory is one of the central frameworks with which specialists of child maltreatment devise diagnosis of situations and plans of intervention. Attachment research has been helpful in helping clinicians answer the needs of maltreated children, but it does not have a direct link to child maltreatment. It does, however, influence greatly how child development and family specialists understand the dynamics of child-parent relationships and how they devise solutions to improve these dynamics. Therefore, my attention on attachment theory serves to give social scientific grounding to the theory of recognition sketched above, and not to offer a direct framework of analysis of child maltreatment.

The bond of attachment is not the same as its quality. As posited by Bowlby and confirmed by those who followed him, attachment is a primary biological drive, a predisposition children have to bond with their caregivers to survive.[107] The absence of attachment is extremely rare and only happens if a child was not given sufficient time to attach to a specific figure, or had no figure with whom to attach (for example, in institutional settings).[108] The child's attachment system is activated when they experience distress. The infant will then seek proximity to an attachment figure. A consistently present caregiver can become a safe haven, whose proximity soothes them.[109] It is important to stress that for a child to be attached, the caregiver does not have to be available at all times. Furthermore, the physical presence of the caregiver does not mean that they are

[107] Mary D Salter Ainsworth et al, *Patterns of Attachment: a Psychological Study of the Strange Situation*, classic edition ed, Psychology Press and Routledge Classic Editions (New York London: Routledge, Taylor & Francis Group, 2015) at 95.
[108] Forslund et al, "Attachment Goes to Court", *supra* note 106 at 10.
[109] *Ibid* at 8.

"emotionally available".[110] The caregiver's availability is a function of their attunement to the infants' needs.

Children can be strongly attached to their caregiver regardless of the quality or type of their attachment.[111] What changes from child to child, depending on the relationship they have with their primary caregiver (the "mother" figure), is the quality and type of attachment.[112] The *quality* of attachment can be secure or insecure. The securely attached child expects their caregiver to be present when needed, which allows them to form a mental representation of their attachment figure that serves a "secure base".[113] This safe haven will allow them to explore their environment more freely.[114] "This secure attachment is associated with enhanced developmental outcomes (e.g., self-regulation, empathy, and social competence), and in turn, is associated with building positive parent–child relationships and making parenting easier."[115]

Conversely, insecurely attached children will present one out of three types of patterns of attachment, two of which are non-pathological adaptive patterns. It is important to stress that an insecure attachment is not in itself considered as a disorder – recent studies show that as much as 48,4% of the general population has an insecure attachment type.[116] Furthermore, a child can be insecurely attached and still sometimes find a safe haven in its

---

[110] *Ibid* at 8.
[111] *Ibid*.
[112] Ainsworth et al, *supra* note 107 at 95.
[113] Jude Cassidy & Phillip R Shaver, *Handbook of Attachment, Third Edition: Theory, Research, and Clinical Applications* (New York: Guilford Publications, 2016) at 7.
[114] Forslund et al, "Attachment Goes to Court", *supra* note 106 at 8.
[115] Matthew R Sanders & Alina Morawska, eds, *Handbook of Parenting and Child Development Across the Lifespan* (Cham: Springer International Publishing, 2018) at 12.
[116] Ainsworth et al, *supra* note 107.

attachment figure.[117] The two main insecure attachment styles are *anxious-resistant* or *ambivalent* (also named *preoccupied*), and *avoidant* (or *dismissive*).[118] The anxious-ambivalent child will be in greater distress when separated from their principal attachment figure, but will resist being soothed, while the avoidant child will exhibit detachment from the attachment figure.[119] Those two types are still "organized": they are coherent systems of behaviours adapted to obtain the most out of the caregiver the child has.[120] Research has found a third type of insecure attachment: the *disorganized*. Children with disorganized attachment have "conflicted, disoriented, or fearful behavior" towards their caregivers.[121] This type of attachment is linked to insensitive caregiver behaviour and to high-risk ecological contexts.[122] It is also correlated with "greater risk of psychopathology, behavior problems, stress dysregulation, and poor cognitive performance".[123] There are correlations between child maltreatment and insecure attachment, but there are no proven links of causation.[124]

As we have seen in the previous part, Honneth develops his concept of interpersonal recognition partly based on Winnicott and Bowlby's findings on attachment. Both are still influential figures of child psychology today and the research on attachment theory has grown exponentially in the sixty years since it was first posited. Today, the research on

---

[117] Forslund et al, "Attachment Goes to Court", *supra* note 106.
[118] Kenneth N Levy et al, "Attachment Style" (2011) 67:2 J Clin Psychol 193.
[119] Jeffry A Simpson, "Influence of Attachment Styles on Romantic Relationships" (1990) 59:5 J Pers Soc Psychol 971.
[120] Forslund et al, "Attachment Goes to Court", *supra* note 106 at 10.
[121] Pehr Granqvist et al, "Disorganized Attachment in Infancy: a Review of the Phenomenon and its Implications for Clinicians and Policy-Makers" (2017) 19:6 Attach Hum Dev 534.
[122] Chantal Cyr et al, "Attachment Security and Disorganization in Maltreating and High-Risk families: A Series of Meta-Analyses" (2010) 22:1 Dev Psychopatho 87.
[123] *Ibid* at 87.
[124] Forslund et al, "Attachment Goes to Court", *supra* note 106 at 19.

attachment theory has demonstrated that child development is profoundly impacted by the quality of attachment, supporting Honneth's theoretical foundations. Attachment theory resonates deeply with the concept of interpersonal recognition, or "love". Following Honneth and Benjamin, the phenomenon of early attachment can be described as a process of interpersonal recognition. The caregiver's sensitivity to the child, as they decipher the infant's physical and emotional needs and offer a generally consistent answer to those needs, is a recognitional act. The child learns how to understand himself as an independent and situated subject through this attachment bond.[125] Numerous studies since the 1960s have demonstrated that a child's relationship with his primary caregivers is built on a need for attachment. The security of attachment refers to a propension of the child to find comfort and solace in the proximity of their attachment figure when they experience distress, which allows them to feel secure enough to explore their environment and fosters their learning process.[126] There is a broad scientific consensus on the findings that "caregiver sensitivity has long been established as an important predictor of children's attachment quality".[127] Therefore, a secure attachment could be construed as a process of interpersonal recognition realized to its full potential.

Conversely, insecure attachment can be conceptualized as interpersonal "misrecognition", especially when it leads to a disorganized pattern of attachment. Although there is no proven direct causation link between disorganized attachment and child maltreatment, the other recognized pathways to disorganized attachment are tied to phenomena that can be framed within the misrecognition concept, such as major or

[125] Honneth, *supra, The Struggle for Recognition,* note 1 at 100.
[126] Bowlby, *supra* note 2.
[127] Forslund et al, "Attachment Goes to Court", *supra* note 123 (references omitted).

repeated separations, parents who experienced unresolved trauma or loss, or contexts of socioeconomic adversity.[128] Furthermore, experiences of recognition are at the centre of the current evidence-based interventions proposed to answer to attachment disorganization: "[…] there is robust evidence that both (1) attachment-based interventions and (2) naturalistically occurring reparative experiences (stable, safe, and nurturing relationships) can break intergenerational cycles of abuse and lower the proportion of children with disorganized attachment."[129]

Attachment is a life-long feature of the human psyche, in the context of child-parent relationships and in other intimate contexts. It carries over into adolescence and adulthood, because it comes to define "internal working models of close relationships".[130] It influences everything from romantic relationships, parenting, and responses to psychotherapy.[131] For example, adult attachment styles are predictive of the characteristics they will carry into their romantic relationships, such as interdependence, trust, commitment and satisfaction.[132] The emotional response to the dissolution of the relationship is also a function more of the attachment style than the quality of the relationship.[133] Attachment also has an impact on how individuals approach parenting. There is strong empirical evidence that parents' own attachment styles have an impact on

[128] Granqvist et al, "Disorganized Attachment in Infancy", *supra* note 121 at 536.
[129] *Ibid* at 536.
[130] Rholes et al, *supra* note 43. The article refers to John Bowlby, *Attachment and Loss: Volume II: Separation, Anxiety and Anger* (Basic Books, 1973).
[131] Simpson, *supra* note 119; Jason D Jones, Jude Cassidy & Phillip R Shaver, "Parents' Self-Reported Attachment Styles: A Review of Links with Parenting Behaviors, Emotions, and Cognitions" (2015) 19:1 Pers Soc Psychol Rev 44; Levy et al, *supra* note 118.
[132] Simpson, *supra* note 119 at 978.
[133] *Ibid* at 979.

their parenting.[134] Notably, "it is certainly true that insecurity is related to more negative parenting behaviors, emotions, and cognitions".[135] Thus, the influence of attachment styles on so many features of our intimate lives is much better represented by a theory of recognition such as Honneth's, than by a rationalistic liberal understanding of human motivations. Attachment theory's current findings support the idea that there is an interpersonal sphere of recognition that shapes our understanding of ourselves and our relationships to others.

Although it generally represents a scientific consensus among child development specialists and psychologists in general, attachment theory has been criticized as culturally situated.[136] Recent literature has been especially critical of its use in Indigenous contexts.[137] The general critique is that attachment theory tends to focus on a dyadic relationship between a biological parent and a child, whereas in most Indigenous cultures, childrearing is usually based on communal parenting.[138] There is indeed a lack of research about how attachment theory works in these cultural context.[139] But most critiques do not dispute attachment theory per se; they recognize the pertinence of the model for our understanding

---

[134] Jones, Cassidy & Shaver, "Parents' Self-Reported Attachment Styles", *supra* note 131 at 67. Sheri Madigan, Greg Moran & David R Pederson, "Unresolved States of Mind, Disorganized Attachment Relationships, and Disrupted Interactions of Adolescent Mothers and their Infants" (2006) 42:2 Dev Psychol 293.
[135] Jones, Cassidy & Shaver, "Parents' Self-Reported Attachment Styles", *supra* note 131 at 68.
[136] Heidi Keller, "Universality Claim of Attachment Theory: Children's Socioemotional Development Across Cultures" (2018) 115:45 Proceedings of the National Academy of Sciences 11414.
[137] Peter W Choate et al, "Where Do We Go From Here? Ongoing Colonialism From Attachment Theory" (2020) 32:1 Aotearoa NZ Soc Work 32; Peter W Choate et al, "Rethinking Racine v Woods from a Decolonizing Perspective: Challenging the Applicability of Attachment Theory to Indigenous Families Involved with Child Protection" (2019) 34:1 Can J Law Soc 55. Raymond Neckoway, Keith Brownlee & Bruno Castellan, "Is Attachment Theory Consistent with Aboriginal Parenting Realities?" (2020) 3:2 First Peoples Child & Fam Rev 65.
[138] Neckoway, Brownlee & Castellan, *supra* note 137.
[139] *Ibid* at 35.

of human relationships.[140] Rather, they are critical of the way child protection systems, including courts, have been using them to justify ideologically based decisions through the best interest of the child standard.[141]

Attachment theory influenced legislation and judicial processes in family courts all over the world.[142] Unfortunately, this popularization of attachment theory in legislative and judicial contexts led to issues of interpretation. Recently, a long list of attachment specialists from multiple countries has drawn attention to the common mistakes in interpretation that court practitioners tend to make when relying on attachment theory, regarding "(a) the nature of attachment, (b) the interaction among multiple attachment relationships, and (c) the implications of classifications of attachment quality".[143] They identified three attachment principles that are relevant to court practice in family law and that should guide legal practice when it comes to child maltreatment situations:

1. The child's need for familiar, non-abusive, and non-neglecting caregivers;

2. The value of continuity of "good-enough" care;

3. The benefits of networks of attachment relationships.[144]

It is indeed necessary to make sure that attachment theory is not reified and used to force western modes of childrearing onto other cultures, or to reinforce ideological prejudices on

[140] *Ibid* at 33; Choate et al, "Rethinking Racine v Woods from a Decolonizing Perspective", *supra* note 137 at 67.
[141] *Ibid*.
[142] Forslund et al, "Attachment Goes to Court", *supra* note 106.
[143] *Ibid* at 4.
[144] *Ibid*.

family relationships. In that sense, critiques of the use of attachment theory in Indigenous contexts meet those of worldwide attachment specialists who came forward to denounce the misuse of attachment theory in family courts.[145] For example, one of the principles promoted by those specialists was specifically that attachment networks are beneficial to a child.[146] They also use the term "caregiver" instead of mother, allowing for figures of attachment to bear different social statuses with regards to the child.[147] Attachment theory is a scientific field of study of the human behaviour and, therefore, is a constantly evolving field of knowledge. It has to be treated as such by other disciplines.

3.2. Recognition and Child Maltreatment Risk Factors

Interestingly, some researchers in social work have called for a turn away from the attachment vocabulary in child protection, notably because of its misuse, and propose in turn to use the concept of recognition defined by Honneth.[148] This move is advocated mainly as a way to step out of biologizing discourses about attachment, and to re-focus intervention on the multidimensional factors of child maltreatment and the multiple relationships involved in remediating it. As we have seen, attachment theory was one inspiration for Honneth's theory and is compatible with the theory of recognition. Nevertheless, by insisting for the need of a wider conceptual framework to address child maltreatment, these authors recognize the diversity of risk factors involved and the need for a wider understanding of the phenomenon.

---

[145] *Ibid*.
[146] *Ibid* at 10 and following.
[147] *Ibid*. It is the only term used throughout the article.
[148] Mark Smith, Claire Cameron & Daniela Reimer, "From Attachment to Recognition for Children in Care" (2017) 47:6 Br J Soc Work 1606.

The authoritative model for explaining the complexity of the factors at play in child maltreatment is remarkably compatible with Honneth's framework of recognition. In the first chapter, we briefly explained the ecological-transactional model, which makes clear that multiple layers of social relationships influence a person's development. According to this model, the factors influencing a child's development are at four levels: the ontogenic level (the child's personal characteristics), the microsystem (the family dynamic), the exosystem (the social conditions of the child and its family) and the macrosytem (the wider cultural norms of the society in which the child and its family evolve).[149] These levels mirror the levels of recognition in Honneth's theory. The ontogenic and the microsystem level are both spaces of interpersonal recognition; the exosystem is the space of social recognition; and the macrosystem is a sphere of legal recognition, in a pluralistic understanding of legal norms. Of course, both models come from different disciplines, so the comparison can only serve as an analogy, and not as an equivalence. But it gives weight to the argument that recognition theory is grounded in a more realistic model of human development than liberal conceptions of the self, especially since the ecological-transactional model is based heavily on a general model of the ecology of human development that still influences greatly fields surrounding child development and human psychology in general.[150]

Other approaches identifying factors of child maltreatment can also be accounted for by the concept of recognition. As we have seen, intergenerational transmission patterns

---

[149] Jay Belsky, "Child Maltreatment: an Ecological Integration." (1980) 35:4 Am Psychol 320.
[150] Bronfenbrenner, *supra* note 2. This theory still generates a lot of attention today, and numerous empirical studies have been conducted since the 1980s to confirm its applicability. For a recent example: Jessica L Navarro et al, "Bored of the Rings: Methodological and Analytic Approaches to Operationalizing Bronfenbrenner's PPCT Model in Research Practice" (2022) 14:2 J Fam Theory Rev 233.

of maltreatment have roots in interpersonal relationships, in part in the impact the attachment styles of parents can have on their own parenting style.[151] They can also be accounted for by socioeconomical factors, which, in terms of recognition, are tied to solidarity. The impact of socioeconomical status on child maltreatment can be understood as an effect of social misrecognition. As we have seen, social misrecognition can manifest itself in exclusion (including racial exclusion) and social inequality, both of which are known risk factors for child maltreatment.[152] In a similar way, the findings that social cohesion and the sense of "collective efficacy" have a positive effect on parenting practices tend to validate the importance of social recognition for child development.[153] Furthermore, this research substantiates Honneth's conceptual understanding of how this pattern of recognition influences the sense of self, since they conclude that one of the effects of social cohesion and participation was to create an "internal locus of control", that is, a sense of self-efficacy that can be tied to self-esteem.[154]

---

[151] Jones, Cassidy & Shaver, "Parents' Self-Reported Attachment Styles", *supra* note 131.
[152] Kelley Fong, "Neighborhood Inequality in the Prevalence of Reported and Substantiated Child Maltreatment" (2019) 90 Child Abuse Negl 13; Jill D McLeigh, James R McDonell & Osnat Lavenda, "Neighborhood Poverty and Child Abuse and Neglect: The Mediating Role of Social Cohesion" (2018) 93 Child Youth Serv Rev 154; Calum Webb et al, "Cuts Both Ways: Ethnicity, Poverty, and the Social Gradient in Child Welfare Interventions" (2020) 117 Child Youth Serv Rev 105299.
[153] Beth E Molnar et al, "Neighborhood-Level Social Processes and Substantiated Cases of Child Maltreatment" (2016) 51 Child Abuse Negl 41; James R McDonell, Asher Ben-Arieh & Gary B Melton, "Strong Communities for Children: Results of a Multi-Year Community-Based Initiative to Protect Children from Harm" (2015) 41 Child Abuse & Neglect 79; McLeigh, McDonell & Lavenda, "Neighborhood Poverty and Child Abuse and Neglect", *supra* note 152.
[154] Neil B Guterman et al, "Parental Perceptions of Neighborhood Processes, Stress, Personal Control, and Risk for Physical Child Abuse and Neglect" (2009) 33:12 Child Abuse Negl 897; Yiwen Cao & Kathryn Maguire-Jack, "Interactions with Community Members and Institutions: Preventive Pathways for Child Maltreatment" (2016) 62 Child Abuse Negl 111.

3.3. Recognition and Therapeutic Interventions

Lastly, the concept of recognition is a useful heuristic tool to understand how therapeutic interventions by clinical specialists are thought of. Trauma-informed care and therapeutic alliance fit within the wider frame of recognition. Both are grounded in the idea that mutual recognition is a fundamental part of any learning or healing processes. The principles at the heart of trauma-informed intervention reveal a process of recognition, especially when it comes to establishing safety, collaboration, mutuality, and empowerment.[155] The foundations of therapeutic alliance are similar, emphasizing the creation of a collaborative relationship built on attachment, understanding of each other's tasks, and mutual goals.[156] It is therefore not surprising that, as I noted earlier, social work scholars have been turning their eye towards the theory of recognition as a general model of intervention in contexts of child maltreatment.[157]

The new interest of social work academics for the theory of recognition in recent years has been emerging as part of a trend of "relational social work".[158] This approach to social work emphasizes relationship as a key for change, and positions social intervention in the context of "the interpersonal, intrapersonal and structural worlds of both practitioner and service user".[159] Relational social work acknowledges how these worlds meet in the therapeutic relationship, influencing "engagement, communication and collaboration to

---

[155] *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*, HHS Publication No. (SMA) 14-4884 (Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014).
[156] Richard F Summers & Jacques P Barber, "Therapeutic Alliance as a Measurable Psychotherapy Skill" (2003) 27:3 Academic Psychiatry 160.
[157] See references *supra* note 52. See also: Stan Houston & Pat Dolan, "Conceptualising Child and Family Support: The Contribution of Honneth's Critical Theory of Recognition" (2008) 22:6 Children Soc 458.
[158] Karen Winter, "Relational Social Work" in Malcolm Payne & Emma Reith-Hall, eds, *The Routledge Handbook of Social Work Theory* (Routledge, 2019) 151.
[159] *Ibid* at 151.

achieve desired outcomes".[160] In that context, recognizing the "wounds of stigma as social and political injuries" is a necessary step in "forging networks of care and solidarity".[161] In that sense, Honneth's work serves as a theoretical tool to understand the multiple levels of misrecognition that can be at play when it comes to providing social services.

For example, in one instance, researchers studied the work of an organization working with women who have experienced or are considered at risk of child removal for placement into care or adoption in the UK.[162] The researchers used the theoretical frame of recognition to highlight how the women felt seen by the team of this organization in a way that most of their previous encounters with professionals failed to achieve. The intervention by the practitioners were based on creating a relationship of care, respect, and fun. They shared food, sang, and watched films.[163] These acts of recognition were felt by the women themselves, who "consistently described the relationship with their […] practitioner as a different kind of relationship, and spoke in terms of reciprocal care, solidarity and respect".[164] The research also concluded that the practitioners' recognition of their experience of motherhood supported them "to manage safe and meaningful involvement in children's lives, as appropriate across diverse forms of placement."[165] Seen through relational lens, this experience of recognition also contributes to the child's wellbeing, by

[160] *Ibid* at 151.
[161] Imogen Tyler, *Stigma: The Machinery of Inequality* (Bloomsbury Academic & Professional, 2020) at 29.
[162] Janet Boddy & Bella Wheeler, "Recognition and Justice? Conceptualizing Support for Women Whose Children Are in Care or Adopted" (2020) 10:4 Societies 96.
[163] *Ibid* at 113.
[164] *Ibid* at 113.
[165] *Ibid* at 113.

supporting positive contacts when possible with their birth parents even when they experience placement.[166]

Recognition helps build a critical conception of social work by proposing a framework that makes room for the interpersonal as much as the social and structural forces that shape a person's life.[167] It has also been used to frame various experiences, such as those of mothers of children in care,[168] young people who experienced adversity in childhood,[169] refugees experiencing low self-esteem and invisibility,[170] and residential child care.[171] What all these people have in common is an experience of adversity. The challenges they meet were not only personal, social, or political; they have legal ramifications. How does the legal system fare in terms of recognition?

4. The Theory of Recognition, Justice, and Law

In this fourth and last part of the chapter, having exposed what I mean by "recognition" and how this theoretical framework is supported in social sciences, I argue in favour of using the theory of recognition to think about law: how it defines persons, their relationships, their conflicts, and the possible resolutions to these conflicts. To do so, I come back to Honneth's general philosophical project to sketch how the concept of

---

[166] *Ibid* at 113.
[167] Stan Houston, "Empowering the 'Shamed' Self: Recognition and Critical Social Work" (2016) 16:1 J of Soc Work 3.
[168] Boddy & Wheeler, "Recognition and Justice?", *supra* note 162.
[169] Robyn Munford & Jackie Sanders, "Shame and Recognition: Social Work Practice with Vulnerable Young People" (2020) 25:1 Child & Fam Soc Work 53.
[170] Hibah Hassan & Leda Blackwood, "(Mis)recognition in the Therapeutic Alliance: The Experience of Mental Health Interpreters Working With Refugees in U.K. Clinical Settings" (2021) 31:2 Qual Health Res 399.
[171] Gerry Marshall, Karen Winter & Danielle Turney, "Honneth and Positive Identity Formation in Residential Care" (2020) 25:4 Child Fam Soc Work 733.

recognition could inform a theory of law. As we have seen, the theory of recognition is a broad social theory about norms, ideology and suffering. It relies on a complex understanding of the individual psyche and the way it is intersubjectively shaped by its relationships and its environment. Honneth's overarching argument is that recognition theory challenges the traditional liberal notion of justice. This argument has deep implications for how we think about the role of law, legal institutions, and legal processes. In the context of child maltreatment, recognition is a powerful tool to sharpen our understanding of law's shortcomings.

4.1. Recognition and Theories of Justice

Honneth's philosophical project is to construct a theory of justice grounded in social analysis – in immanent, rather than transcendent, principles. One of the main critiques he makes about contemporary political philosophy is that it tends to focus on abstract normative principles, constructed in isolation from social reality, gauging the "moral legitimacy of social orders".[172] Contemporary theories of justice tend to rely on principles that are "drawn up in isolation from the norms [*Sittlichkeit*] that prevail in given practices and institutions, and are then 'applied' secondarily to social reality".[173] As we have seen, Rawls' theory of justice, the main inspiration of this renewal of contemporary philosophy, approached the discussion of justice through this Kantian method. By trying to extract rationality from the lived reality of individuals, the original position is a conceptual device that precisely serves to construct evaluative principles that are removed from the historical context of actual social and political institutions. The concept of recognition is meant to

[172] Honneth, *Freedom's Right*, *supra* note 23 at 1.
[173] *Ibid*. at 75.

remedy that problem, by offering a much more realistic take on personhood; that is, a relational take. As Honneth puts it: "A critical theory of society needs, on the normative level, a concept of the human being that is as realistic and close to the phenomena as possible; it should be able to accord an appropriate place to individuals' unconscious, non-rational attachments".[174]

Honneth's critique of the liberal theories of justice is premised on his argument that a proceduralist conception of justice like that of Rawls is based on the assumption that the "material of justice" (its substance) is essentially a distribution of goods. In a tradition that goes back as far as Kant or even Rousseau, personal autonomy is presupposed, as a form of self-respect "that allows us to be confident of our needs and beliefs, and to value our own capacities".[175] Every individual needs resources to survive, but also to actualize their dispositions and personal talents. As such, justice is essentially a matter of access and equal distribution of goods, as means to actualize personal autonomy. However, as Honneth points out, this argument lacks one step: to recognize their needs, beliefs, and abilities as worthy of being realized, the individual needs to be recognized as such by others: "… if individual autonomy is to emerge and flourish, reciprocal intersubjective recognition is required. We do not acquire autonomy on our own, but only in relation to other people who are willing to appreciate (*wertschätzen*) us, just as we must be able to appreciate them."[176] In other words, personal autonomy requires reciprocal relations of recognition. By focusing on the distribution of goods, proceduralist conceptions of justice ignore that there are

[174] Honneth, *The I in We*, *supra* note 1 at 195.
[175] *Ibid* at 41.
[176] *Ibid*.

preconditions to the exercise of personal autonomy that do not only depend on material means.

The inherently distributive liberal concept of justice is, as Honneth points out, state-centric.[177] The individuals cannot implement the principles of justice; doing so would amount to imposing on them an ethic of virtues which would deprive them of their freedom. The distributive conception of justice is intrinsically linked to "the assumption that the state alone possesses the appropriate and universally accepted means for implementing principles of justice, imposing a distribution of basic goods – agreed upon by social agents in fictitious deliberations – in the form of enforceable laws."[178] This marriage between proceduralist justice and state-made law is central to the liberal project. By contrast, operating on a relational conception of personal autonomy through the concept of recognition dematerializes the concept of justice. By extension, it challenges the idea that justice is enforced mainly through state-made laws and a central judiciary system. In the same vein, it deconstructs our understanding of judicial matters as a distributive exercise, and forces us to situate it on a relational continuum of recognition patterns.

This shift from a rationalistic to a more embodied and empathetic concept of justice gives us tools to understand how the liberal systems of justice fail to grasp issues of child maltreatment, and many other different social issues. Our current liberal understanding of justice, which dominates legal thought, does not allow for discussions about the most

[177] In my understanding, Honneth employs the term "distributive justice" to encompass all materialistic conceptions of justice. It could then include certain forms of corrective justice, if they imply a redistribution of goods (taken in a wide sense).
[178] Honneth, *The I in We*, *supra* note 1 at 43.

salient features of intersubjective experiences. With the theory of recognition, Honneth tries to remedy this wrong. As D'Avila and Saavedra put it:

> It seems clear that with his plural theory of justice, Honneth is trying to introduce into the contemporary discourse elements which have not yet been considered. For instance, he considers it limitative to rule out the emotional dimension of justice, as did Kant and as most of the contemporary debates still do. Honneth tries to overcome this qualification by showing that the experience of love and care and the healthy development of the individual play an important role in concretising justice in social relations, as does the discovery of subjective rights.[179]

In this sense, the theory of recognition represents an attempt at reflecting on matters of justice from a relational perspective.

4.2. Recognition and Law

At this point of the argument, one could wonder: if law is one form of recognition, and the other forms – love and solidarity – are different and distinct from it, why should the theory of recognition change the way we think about law? Why should jurists care that other forms of recognition are necessary to achieve personal autonomy, since they fall out of the purview of the law? Should they not just focus on the sphere pertinent to their specialization and leave the issues of love and solidarity to psychologists and sociologists or others? The answer I would suggest is that all spheres of recognition interact and cannot

[179] Fabio Roberto D'Avila & Giovani Agostini Saavedra, "Legal Good and Recognition: A Study of Axel Honneth's Social Theory" (2011) 78:2 Dr et soc 325 at 327.

be approached in isolation from one another. The theory of recognition gives a general portrait of how human beings are, what motivates them, what makes them thrive, and how they interact with each other and within society. This picture should guide us to examine the law critically in light of this more accurate depiction, to evaluate the assumptions the law makes and the impacts it has on legal norms, legal practices and legal processes. The theory of recognition challenges our common understanding of the concept of justice. If law is a part of our concept of justice, then the objections that the theory of recognition raises to the concept of justice should challenge jurists' understanding of law too.

For legal scholars, one interesting contribution of Honneth's theory is its challenge to the idea that justice must be inherently distributive, in the sense that it is (almost always) mediated by concepts of rights, obligations, and material consequences. As Honneth notes, the primary goal of all contemporary conceptions of justice is to foster personal autonomy and conciliate personal autonomy with the demands of life in a community.[180] Yet, when this goal is paired with a traditional liberal concept of autonomy (such as a Rawlsian notion that implies the possibility to live as rational agents, able to choose and pursue their conception of the good), the ensuing concept of justice becomes distributive.[181] Current liberal theories of justice focus on the distribution of goods – understood largely as opportunities – as if individuals' autonomy depended only on having the means and space to pursue whatever conceptions of the good they have. As jurists, we regularly encounter examples of this "distributive" conception of justice within private law, and even sometimes in public law. We could even argue that, even in the context of criminal law,

[180] Honneth, *The I in We*, *supra* note 1 at 37 and following.
[181] For an example: Michael Blake, "Distributive Justice, State Coercion, and Autonomy" (2001) 30:3 Philos Public Aff 257.

the monolithic approach to sentencing is based on this same concept of autonomy – the most punitive gesture a society can take upon someone who breaches their most fundamental obligations is a privation of bodily autonomy. Conflicts of private law are more obviously based on a distributive concept of justice, entailing rights, obligations, and remedies.[182] When it comes to private law, justice is done by the correction of this distribution. Legal norms are there to make sure the distribution of "goods" (which could include such things as property or rights) stays fair. The legal system serves to redress that equilibrium when, for whatever reason – be it a natural or intentional event – the balance is off.[183]

But, when we acknowledge the intersubjective nature of personal autonomy, the "fabric of justice" changes. Justice becomes made of recognition relationships, instead of an adequate distribution of goods. As Honneth says, "if relations of reciprocity, and not goods, represent the conditions of autonomy, then current theories of justice completely fail to grasp the structure of justice".[184] If we take the uncontroversial view that laws ought to be just, as the concept of justice changes, our concept of the law should change too. Even if the succinct theory of justice Honneth recently sketched in a chapter on the subject lacks some nuances,[185] it seems evident that, as Nedelsky described,[186] putting the focus on "law's relations" in the way the theory of recognition does changes the "material of justice"

[182] Arthur Ripstein, "Private Order and Public Justice: Kant and Rawls" (2006) 92 Va L Rev 1391.
[183] Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012).
[184] Honneth, *The I in We*, *supra* note 1 at 41.
[185] *Ibid.*
[186] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011).

(to employ Honneth's term) in a way that has enough normative strength to envision (1) a substantial critique of law, and (2) a horizon of justice that can guide concrete reforms.

As I alluded to earlier, Honneth's distrust of proceduralist conceptions of justice proceeds in part from a dissatisfaction with a concept of justice that, by definition, can only be applied by the government – which means by positive law. By contrast, a recognitional justice implies that the civil organizations and families, as much as the State, "play an increasing role as spheres of the struggle for recognition and, consequently, also as agencies for ideas of social justice."[187] But, as Hans-Georg Flickinger remarks, since the late 19th century, the liberal system of law has increasingly interfered with the private and social spheres to implement a welfare state, such as legislation for child protection, but also in fields such as labour law. In a way, the liberal system of law acknowledges the limitations of the principle of distributional justice.[188] As Flickinger explains, "the own logic of liberal law resists to an all-comprehensive juridification of moral principles, which should guide our sense for justice", and the use of moral concepts in law, such as "children's welfare", "turns juridical interpretation very difficult".[189] But Flickinger's conclusion, that the "strong" concept of recognition defended by Honneth must be relegated to civil society's struggles for recognition,[190] seems tone-deaf to me. If we accept that the liberal legal logic negates basic structures of justice, we need to address those wrongs directly.

---

[187] Flickinger, *supra* note 58 at 189.
[188] *Ibid*.
[189] *Ibid* at 194.
[190] *Ibid* at 195-196.

The importation of the basic framework of the theory of recognition into legal theory seems to me to be more promising if we use it to enrich and expand, on the one hand, relational approaches of the law, and on the other hand, legal pluralism. As much as the theory of recognition can evidently and explicitly be understood as a relational approach to social justice,[191] the multiplicity of the norms of justice that emanate from a recognitional concept of justice is reminiscent of the multiplicity of legal orders unveiled by legal pluralists.[192] In a sense, the three spheres of recognition can serve as a theoretical basis for a critical legal pluralism in the sense that Kleinhans and Macdonald advocated for, where legal subjects are not only submitted to a multiplicity of normative orders, but where they all take part in constructing that normativity.[193] But using the theory of recognition as a critical approach to law offers a different take on that pluralism, by offering a unifying principle under the concepts of recognition and misrecognition. Agency, then, becomes neither a concept devoid of normative sense, nor a synonym for rationality; it can take a tridimensional shape that thinks, feels and acts like a human. Recognition offers what other theories often fail to offer: motive. It opens up a new way to think about how humans interact, what they need to flourish and the dialectical relationship they have with social structures.

These theoretical tools that allow us to seize something of the complexity of human behaviour are especially important to address a phenomenon as complex and multifaceted as child maltreatment. As we have seen in the first chapter, the causes and impacts of child

---

[191] Anderson & Honneth, *supra* note 37.
[192] Roderick A Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism Part I: General Themes" (1998) 15:1 Ariz J Int'l & Comp L 69.
[193] Martha-Marie Kleinhans & Roderick A Macdonald, "What is a Critical Legal Pluralism?" (1997) 12:02 Can J Law Soc 25.

maltreatment are multilayered. The institutional response to this issue tends to be inadequate mainly because the law tends to simplify and reify complex relational and social issues, to make them fit within its own ideological structure. Child maltreatment is profoundly puzzling when it is strictly contemplated within traditional liberal framework. Take, for example, a devoted parent who says they love their children but ends up doing psychological harm by exposing them to recurrent bouts of anger that can end in physical violence, because they do not know how to manage their aggression. The parent does not see the issue with their behaviour, since they were raised the same way and, according to them "they turned out fine". The child feels ambivalent toward their parent: they fear them, but also feel like they could not live without them. The solution to this situation seems like an insoluble dilemma if we do not have a framework that makes sense of these behaviours.[194] Within a current liberal Anglo-American system of child protection, if a parent refuses to recognize the problem and to accept help, and if parent and child refuse placement, it would seem like there is little else left to do but to impose the authority of the State on them. A judge will have to render a decision of placement against the will of both parties, since it is impossible to reconcile the autonomy of the parents, the status of the child as an evolving agent, and the emotional and physical security of the child. In contrast, a recognitional framework would provide tools to understand the causes of the parent's behaviour, their reluctance to acknowledge their own history of trauma, and the loyalty the

[194] This argument is even more important when we consider how domestic violence against children, but also women, is not an exception to the norm, but is endemic and systemic (Nedelsky, *supra* note 186 at 208-218). Following other feminists, Jennifer Nedelsky argues convincingly that violence is systemic and makes an explicit connection between that phenomenon and child abuse: "As with rape of adult women, without changing the structure of relations that systematically produces the behavior, simply trying to enforce prohibitions (trying to police the boundaries of rights) will not work." (*Ibid*. at 210).

child has toward their parent even if they are suffering. It can therefore be more imaginative in setting up processes to deal with the situation and find solutions to the issue.

Chapter 3

A Recognitional Account of Law of Child Maltreatment

In this chapter, I build the case for a recognitional theory of the law by arguing that it can offer a better conceptual framework to address issues of child maltreatment than the liberal legal framework of Anglo-American jurisdictions. Currently, the legal and clinical professions hold different views on what it means to be a parent, what it means to be a child, and how society can or should intervene in the parent-child relationship when it comes to child maltreatment. The conceptualization of parents and children as legal subjects is tainted by a certain streak of neo-Kantian liberalism: it retains in some ways a rationalistic and individualistic stance on interpersonal relationships, even at the most intimate level. This posture limits the legal framework when it comes to understanding family dynamics and intervening in familial contexts. By contrast, a recognitional approach emphasizes the relational aspects of the child-parent dynamic, in a way that takes into account not only the needs of children and responsibilities of parents, but also how the parenting relationship shape both the parent and the child as individuals, and the influence of the social context in which that relationship unfolds. As we saw in the last chapter, the theory of recognition is a conceptual framework that can integrate the empirical knowledge on child development in a larger reflection about social justice and norms. This chapter sets the scene for the exploration of the practical consequences of the contrast between legal and clinical approaches of child protection, which will be the subjects of the subsequent chapters. I use the work of Anglo-American legal scholars on family law as my

main sources to contrast the legal and the recognitional understanding of family relationships.

In the first part, I situate the family in the general context of western (and most specifically Anglo-American) legal systems. In the second part, I argue that parents and children are conceived as liberal subjects in western law, and I show how this ideological stance comes with inherent contradictions in the context of family law in general. As we have seen in the first chapter, the "legal world" constitutes not only a *context*, in terms of the norms it instills, but also a *culture*, with its own ideological understanding of social phenomena. Conversely, in the third part, I suggest a recognitional account of the relationships between parents, children, and society. This account is based on a more comprehensive understanding of parents and children's motivations and needs in the context of intimate and social relationships, as suggested by the state of knowledge in social work and psychology. Each of the second and third parts is subdivided in three sections: what it means to be a child, what it means to be a parent, and how society intervenes in the parent-child relationship. I aim to show that the framework of recognition can help us build a deeper and richer understanding of what it means to be a child and a parent. Finally, the fourth part addresses how a recognitional account of parenthood and childhood reframes the way the law should address the issue of child maltreatment. The legal world should find ways to question itself according to that framework if it wants to address the needs of children and their families.

1. The Anglo-American Legal Systems and the Family: Tensions between Privacy and Justice

In this first part, I explore how liberalism and family law are intertwined yet in tension. Liberalism has never been particularly concerned by the idea of the family. The nuclear family unit is usually conceived as being the core of the private sphere and, as such, as independent of the political life it aspires to theorize.[1] As Anne Daily puts it, "under liberalism, the domestic sphere of the family is generally perceived as lying outside the realm of legitimate political discourse".[2] Within this framework, the family is the space in which individuals are free to pursue their conception of the good life, free from the government's intervention.[3] The value of personal autonomy is understood as antinomic from the dynamics of a family: "While autonomy in the common law is linked to independence, liberty and freedom, its 'other' – vulnerability – will always be linked to connection, dependence and care; in other words, to family living".[4] There is, therefore, an appearance of conceptual opposition between the liberal idea of personal autonomy and the demands and structure of the family life, which placed it outside of the purview of the ideal of justice.[5]

If traditional liberalism did not pay much attention to familial relationships, the family law of the past century demonstrates that this apparent neutrality presupposed strong substantive social norms of what family relationships should be. Robert Leckey points out

---

[1] It is the argument made by Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989).
[2] Anne Dailey, "Constitutional Privacy and the Just Family" (1993) 67 Tul L Rev 955.
[3] Okin, *supra* note 1 at 8.
[4] Alison Diduck, "Family Law's Instincts and the Relational Subject" in Daniel Bedford & Jonathan Herring, eds, *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020) 31 at 36.
[5] Okin, *supra* note 1 at 7.

that family law reflects some kind of exception to the general rule that law is built on the traditional liberal idea of the individual.[6] Indeed, family law has traditionally presupposed some forms of strong relationships between individuals. The family was a unit and its bonds were the only ones in society that could not be challenged. The problem was not that the law did not see the relational nature of family law; it was that "it permitted relationships to abridge individual autonomy too much".[7]

The substantive nature of familial legal bonds comes from their historical social function. The life of the home, which became today a familial space, was once "*oeconomical"* in the original sense of the term, relating directly to the management of home affairs.[8] In feudal times, the household was linked to socioeconomic privilege, and included not only a biological family, but many contract workers, servants, and slaves, because it was a place of industry and not just reproduction: "Food was not only cooked and eaten in the household, it was grown there; thread was spun and cloth woven there; the geographical space of the household was traversed constantly by persons having legally determined, hierarchically arranged relations".[9] The Industrial Revolution separated productive labour from the household, "both in social life and legal taxonomy". The productive labour came to be public; the household became private. This distinction between the private and public realm has created what Janet Halley calls "family law exceptionalism", an ideology born out of the distinction between family and market,

---

[6] Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (University of Toronto Press, 2008).
[7] *Ibid* at 21.
[8] Janet Halley, "What is Family Law?: A Genealogy Part I" (2011) 23:1 Yale JL & Human 1.
[9] Janet Halley & Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism Critical Directions in Comparative Family Law: Introduction" (2010) 58:4 Am J Comp L 753 at 756.

between status and contract.[10] In parallel, the legal acts framing the structure of the family (marriage, birth certificate, death certificate) were, for a long time part, of ecclesiastical law and not civil law. This tendency persisted for a long time. In the civil law jurisdiction of Québec, the possibility of celebrating a marriage in a civil ceremony appeared only in 1968.[11] Family relationships were not understood as legal relationships as much as social status relationships.

Just as enlightenment thinkers had grounded their theories in the distinction between body and soul, the law had separated the affective nature of the family and the rational nature of public interactions. This separation allowed liberalism to coexist with the coercive nature of power relationships within the family unit. As John Eekelaar explains, until the 1960s, family law was designed to sustain social structures such as heterosexual marriage, male superiority and birth legitimacy, which "ensured orderly devolution of family status and wealth".[12] With the 1960s came the rise of the rhetoric of individual rights, which acted as a restraint on the traditional powers at play in the family.[13] The ideal of individual self-determination became the theoretical main value of both social and legal norms.[14] These rights include equal parental rights respecting children, the right to be

[10] Halley, *supra* note 8; Janet Halley, "What is Family Law?: A Genealogy Part II" (2011) 23:2 Yale JL & Human 189.
[11] Benoît Moore, "Culture et droit de la famille: de l'institution à l'autonomie individuelle" (2009) 54:2 McGill LJ 257.
[12] John Eekelaar, "Family Law and Legal Theory" in Elizabeth Brake & Lucinda Ferguson, eds, *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 41.
[13] *Ibid* at 47.
[14] *Ibid*; Moore, "Culture et droit de la famille", *supra* note 11 at 264; Alison Diduck, "Autonomy and Family Justice" (2016) 28:2 Child & Fam L Q 133–150.

protected from violence and abuse within the family, the right to be heard for children, among others.[15]

Contemporary family law is thus shaped by two opposing but coexisting forces. On one hand, it is grounded in a form of conservatism that upholds the family as a private sphere, it conceives of family relationships as institutions conferring social statuses to its members. Family law is scarcely interested in what happens in the ongoing family; it tends to focus on the effects of its dissolution rather than its functioning.[16] Child protection laws are the main exception to this state of affairs, and the legal profession's reluctance to acknowledge the field of child maltreatment as a proper object of legal studies is probably grounded in the sacral value of the privacy of familial life.[17] The special status of the family structure in our societies tends to obscure the fact that, like all other social institutions, it is a locus of power.

On the other hand, the emancipation of individual family members from the coercive forces of the family unit (mainly from the men's power) has been driven by the affirming fundamental rights and legal personhood of each of them, which grounds it firmly in liberalism.[18] If, as Janet Halley demonstrates, this "exceptionalism" of family law is still going strong,[19] it still is part of the general *law*, and as such, it operates within the liberal framework of the common and civil law, with the same limited tools to

---

[15] Eekelaar, *supra* note 12.
[16] Halley, *supra* note 10. The resilience of family law exceptionalism in the Canadian context has been evoked in the discussions surrounding the rise of private ordering in family law: see Robert Leckey, "Shifting Scrutiny: Private Ordering in Family Matters in Common-Law Canada" in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Springer, 2015) 93; Luke Taylor, "Domestic Contracts and Family Law Exceptionalism: An Historical Perspective" (2021) 66:2 McGill LJ 303.
[17] See the explanation in the introduction of this thesis and in chapter 1.
[18] Diduck, *supra* note 4.
[19] Halley, *supra* note 10 at 285.

conceptualize relationships. Women and children gained legal autonomy by a legal recognition of their capacity to make choices for themselves. With that recognition came legal rights, that is, the ability to make claims. The use of the discourse of rights to include women and children in the concept of legal personhood has been an immense achievement of the second part of the twentieth century. But it did so by including them into the liberal society and its correlative vocabulary, instead of transforming the way we think about autonomy and productive work. Family law continues to evolve in a society built upon a private/public distinction that renders invisible most care work,[20] and upon assumptions about what warrants a legal claim to autonomy: capacity based on rationality or, in the case of children, the potential for capacity.[21] It has not broken free of liberalism, rather, it has moved to integrate it.

In consequence, if today's family law recognizes in some ways the structural importance of intimate relationships and the interdependence members of a family, it does so while withstanding many liberal assumptions about what constitutes individual preferences, motivations, and interests. Law, as any language, can exercise a conceptual reductionism that tends to subsume differences and nuances under more or less rigid concepts, in an attempt to organize complex social situations. The limitations of the ability of the legal vocabulary to describe reality are a necessary ill to set norms and enforce them. Nonetheless, in Anglo-American jurisdictions, the way the law frames relationships and defines individual's needs and motivations is grounded in some version of liberalism: law

[20] Frances E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96:7 Harvard Law Review 1497.
[21] Katherine Hunt Federle, "On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle" (1993) 42 DePaul L Rev 983.

tends to describe the relationship between the legal subject and the world they evolve in through the lenses of a rights and responsibilities framework. Law both enables and constrains the subject's agency, on the one hand, by affirming their rights, and, on the other hand, by setting boundaries to those rights. Contemporary family law is not an exception to this: in law, parents and children are no more than rights and duties bearers toward each other.

The field of child protection law is the cornerstone of the ambivalence of family law towards privacy and social norms, autonomy and institution. It is public law, but its core principles are determined by private law: parental duties and children's rights. In that sense, it sits on the edge of law's complex relationship with the private and public nature of intimate relationships. Understanding how the Anglo-American legal systems conceptualize childhood and parenthood is the key to understanding why those jurisdictions try to remedy child maltreatment with child protection systems and how those systems fail to address the core issues of child maltreatment.

2. The Anglo-American Legal World and the Parent-Child Relationship

In this part, I analyze how the law conceptualizes family relationships. To do so, I describe the ways legal concepts in Anglo-American jurisdictions define what it means in law, first, to be a child, second, what it means to be a parent, and third, the reasons and ways the State can legitimately intervene in that relationship. Law, in general, conceives of individuals as right-holders and duty-bearers. It relies on this rights discourse to define relationships, even if we instinctively know that most, if not all, relationships have more depth and complexity. Family law makes no exception to this rule. This field of law

conceptualizes parents and children solely in terms of their rights and responsibilities towards each other. Throughout this part of the chapter, I argue that the legal concepts surrounding childhood and parenthood are limiting, and tend to reduce a complex interdependent relationship to a lifeless list of mutual duties. This reduction impacts the way we can legally conceptualize issues that arise within that relationship. Consequently, the solutions the law comes up with fall short of addressing the core problems of child maltreatment.

2.1. Legal Childhood

I begin this analysis by describing how the law conceptualizes childhood. There are two main ways to address the distinctive status of children in law: by referring to their rights, or referring to the best interest standard, which serves to underline the vulnerability of young people.[22] Those lenses are not mutually exclusive, but their interactions are complex. The weight and interpretation given to each right or to the best interests standard can produce widely different outcomes when deciding cases involving children, revealing most often than not ideological biases on what children need to thrive. While children's rights reflect their evolving autonomy, the best interests concept palliates the fact that they are not considered fully autonomous. Both concepts are used in a balancing act to situate children in a conceptual framework that historically took individual autonomy as granted and equated it with rationality.

[22] This is interestingly done in contrast to adults. The vulnerability in adults and the concept of their best interests would go against the liberal principle of self-determination.

The end of the 20th century has seen a shift from a paternalistic and proprietary view of children, to recognizing the child as a legal subject in its own right, who is owed a voice.[23] This shift was marked by the unanimous adoption of the UN Convention of the Rights of the Child of 1989 (UNCRC), which affirmed the best interests of the child standard, but also established the child as a "*subject of rights"*.[24] The UNCRC is generally acknowledged as a turning point in the evolution of children's legal status, by transforming the children's rights discourse that had emerged in the previous decades in academic circles into international law (and, by extension, domestic law).[25]

This discourse of children's rights emerged from a historical movement that broadened the use of the language of rights as political and legal leverages to empower and protect vulnerable, oppressed, or marginalized populations.[26] Since then, the phrase "children's rights" became all-encompassing for different and sometimes contradictory demands.[27] Two main approaches to children's rights can be distinguished. The first, the "liberationists", is inspired by the civil rights movement in the United States in the 1960s and 1970s. Some proponents of the children's rights discourse took this approach, meaning they saw children as an oppressed population "entitled, like blacks and women, to a civil

---

[23] Barbara Bennett Woodhouse, "Who Owns the Child: Meyer and Pierce and the Child as Property" (1992) 33:4 Wm & Mary Bill Rts J 995; David Archard, "Do Parents Own Their Children?" (1993) 1:3–4 Int J Child Rights 293.
[24] Jean Zermatten, "The Best Interests of the Child Principle: Literal Analysis and Function" (2010) 18:4 Int J Child Rights 483 at 483.
[25] See for example at 6. See also Michael Freeman, "Why It Remains Important to Take Children's Rights Seriously" in Michael Freeman, ed, *Children's Rights: Progress and Perspectives: Essays from the International Journal of Children's Rights* (Brill Nijhoff, 2011) 5 at 6; Christine Such, "History and Development of Children's Rights" in *Children's Rights 0-8* (Routledge, 2014) 23.
[26] Martha Minow, "What Ever Happened to Children's Rights" (1995) 80:2 Minn L Rev 267.
[27] Martha Minow, "Children's Rights: Where We've Been and Where We're Going" (1995) 68:4 Temp L Rev 1573; Hillary Rodham Clinton famously described children's rights as a "slogan in search of a definition": Hillary Rodham, "Children Under the Law" (1973) 43:4 Harv Educ Rev 487 at 487.

rights revolution".[28] This view insists on the fact that children have agency and that they deserve to be part of the processes that affect them. From this perspective, the right to participate in matters that concern them should be the central claim of children's rights, or what Jeremy Roche interestingly calls "autonomy rights".[29] There are recent critiques of the best interests standard that reflect this stance. For example, Aoife Daly asserts that the best interests standard still has more weight than children's rights, more specifically when it comes to the right of participation.[30] She argues that it has been used to deny due process to children: some rights, like the child's right to be heard, are too often overridden on the pretense that it would not be in the interest of the child to be exposed to the delicate matters discussed in her case in court. In answer to this problem, she suggests a reconceptualization of children's rights that puts the child's autonomy as a central principle,[31] but others argue that putting the emphasis on the right of participation of the child is problematic, since it lets the child carry the weight of the decisions that concerns them.[32]

The second approach, the "protectionists", calls for a better protection of children, insisting on their vulnerability. Some children's rights, like the rights to be safe and cared for, reflect the relatively recent recognition of their status as vulnerable individuals. In that sense, their rights do not resemble adults' rights, and sometimes entail denying them an autonomous status, like eliminating the right for minors to get married.[33] Moreover, most of the rights recognized by the UNCRC are positive rights: they cannot be respected

---

[28] Minow, *supra* note 27 at 1575.
[29] Which refers to a traditional liberal conception of autonomy as freedom *from*: Jeremy Roche, "Children's Rights: In the Name of the Child" (1995) 17:3 J Soc Welf Fam Law 281.
[30] Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill Nijhoff, 2017).
[31] *Ibid*.
[32] Milfred D Dale, "Don't Forget The Children: Court Protection from Parental Conflict is in the Best Interests of Children" (2014) 52:4 Fam Ct Rev 648.
[33] Martin Guggenheim, "The Not So New Law of the Child" (2017–2018) 127 Yale LJ Forum 942.

without someone, parents or State, meeting correlative duties. In contrast to the right of participation, these rights tend to imply that respecting children means intervening in their lives in a specific and positive way to deliver socioeconomic goods. Nevertheless, liberationists and protectionists[34] are both sides of the same liberal coin: either the child deserves to be treated equally as other human beings and their autonomy needs to be emphasized, or the child's special status is grounded in the fact that they are still developing the capacities to become autonomous, and thus they deserve protection (by contrast to autonomous adults who, in this liberal framework, are not considered vulnerable).

That is where the best interests standard's comes in: its role is to balance the specificities of every child when it comes to assessing their positive and negative rights. As a legal subject who, in many situations cannot claim their rights or has a limited ability to do so, and as an individual who is, arguably, not yet considered autonomous enough to determine their version of the good life, the child needs a special legal concept to overcome the limits of the liberal concept of a legal person. In a sense, the best interests standard underscores the limits of the liberal discourse of individual rights, premised on capacity and inferred from a presupposition of individual rationality. The best interests of the child legal standard was first included in the 1959 Declaration of the Rights of the Child.[35] As Jean Zermatten points out, it is as much a rule of procedure (it is a step in the decision-making process) as it is a substantive positive right and an overriding legal principle.[36] The all-encompassing yet indeterminate nature of the standard has generated significant

[34] As described by Minow, *supra* note 27.
[35] Zermatten, "The Best Interests of the Child Principle", *supra* note 24 at 484.
[36] *Ibid*.

critiques over the years,[37] yet it is still a determining feature of any legal decision concerning a child.[38] The best interests of the child standard also cements a recognition of the vulnerability of the child.

The problem, though, is that the best interests standard does not challenge the liberal framework, because its normative content is undefined. In the context of a liberal conception of the individual, the best interests standard can only be indeterminate: if it was not an empty shell, if it had a determinate content such as guiding principles on what constitutes the interests of a child, it would become a perfectionist standard, upholding some version of what a "good life" is for a child. The complications raised by the indeterminacy of the best interests standard are widely acknowledged.[39] As Robert Mnookin puts it:

> Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he grows up?[40]

---

[37] The concept of the best interest of the child is a vast subject that has generated a wide literature. For just a few influential examples in the literature criticizing the concept, see Robert Mnookin, "Foster Care—In Whose Best Interest?" (1973) 43:4 Harv Educ Rev 599; Jon Elster, "Solomonic Judgments: Against the Best Interest of the Child" (1987) 54:1 U Chi L Rev 1; Helen Reece, "The Paramountcy Principle" (1996) 49:1 Curr Leg Probl 267.

[38] Robert Mnookin, "Child Custody Revisited" (2014) 77:1 Law & Contemp Probs 249; Elizabeth S Scott & Robert E Emery, ""Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard" (2014) 77:1 Law & Contemp Probs 69.

[39] John Eekelaar, "Do Parents Know Best?" (2020) 28:3 Int J Child Rights 613; Scott & Emery, *supra* note 38.

[40] Mnookin, *supra* note 37 at 260.

The judge can only answer those questions through their own training and background which, obviously, are entrenched in the culture of the legal world. Hence, in an adjudication system where the deciding voice is ultimately a jurist with a knowledge of the law, but no specialized knowledge of the child's psychology or development, the best interests of the child standard affirms ideological stances and social prejudices.[41]

The best interests standard also has an awkward stance in the context of judicial battles, with regards to the positions of the parties involved. It tends to obscure the motives of each party, since they have to make an argument consistent with the legal standard of the best interests of the child. Technically, to win their case, parents fighting against each other, or against a child protection agency, have to show that their position represents the right application of the best interests of their child. To have a chance to win the legal argument, they have to present their case as though their claims were always premised on an objective assessment of their conception of the needs of their child. This requirement renders invisible the inevitable motives behind their interpretation of the best interests of the child: the attachment they have to their child, the bond that they feel toward them, or their personal needs regarding their child.[42]

The notion of the best interests of the child is still today the subject of much debate on its interpretation, even though it is now at the heart of the legal discourse in family law,

---

[41] Reece, *supra* note 37. Even if specialists and experts can assist the court in determining the best interests of children, but the use of experts in matters of family and child protection is controversial: Nicholas Bala, Rachel Birnbaum & Carly Watt, "Addressing Controversies About Experts in Disputes Over Children" (2017) 30:1 Can J Fam L 71.

[42] Sarah Fotheringham, Jean Dunbar & Dale Hensley, "Speaking for Themselves: Hope for Children Caught in High Conflict Custody and Access Disputes Involving Domestic Violence" (2013) 28:4 J Fam Viol 311.

especially in countries that have ratified the UNCRC. The reason is probably that the liberal origins of this legal concept, seeking neutrality towards the different conceptions of good childrearing, do not ascribe it a fixed meaning. This is a challenge when it comes to enforcing it.

2.2. Legal Parenthood

Now, let's turn our gaze towards what it means to exercise the role of a parent in the eyes of the law. In this part, I describe and critically analyze how the law conceptualizes the function of parenthood. I contend that the discourse of rights and responsibilities is insufficient to capture the nature of parenthood. In consequence, the law has a blind spot when it comes to understanding what is at stake for parents in legal disputes regarding their children. It either tends to grant too much weight to parental rights, or to have too little interest in parents' experiences of their role. The law lacks the capacity to seize what is at stake in disputes surrounding parenting matters, especially when it comes to child maltreatment.

There are two main types of debates regarding legal parenthood: the first regards who can be afforded the status of legal parent, and the second is about the role of the legal parent, that is, defining the parental duties and correlative rights. While the literature on this first debate is rich with insights about what a parenting relationship entails, I will not dive into those discussions here, since it revolves mainly around the granting of a status (that of parent) and not on the act of parenting. I am mainly interested in how the law describes the dynamics of a parent-child relationship, and how it comes to define this relationship in specific ways. What are the core legal components of the parent-child

relationship? What do our legal definitions leave out? How do those definitions establish the framework by which society intervene in the parent-child relationship?

The language used to describe the parent-child relationship in Anglo-American law makes plain that notions of attachment and affection are left out of the legal discourse. While the legal status of children as minors rests on an individual and objectively assessed characteristic (the person's biological age), the legal status of parents is in essence relational. One can only be a parent in relation to a child, and the legal definition of parenthood is, essentially, the definition of a relationship through the framework of rights and responsibilities. Being legally named as a parent amounts to being the bearer of responsibilities toward a minor, and with those responsibilities comes the power to make certain decisions. Conversely, the child *as a child* bears a right to be protected (conceived largely as a right to receive basic necessities of life to survive but also having the means to develop healthily). This right is recognized not because he has parents, but because we socially acknowledged that his objective status as a child makes him more vulnerable.

There are differences across Anglo-American jurisdictions on the role and privileges of the parent. The United States affirms stronger parental rights than other countries, giving them constitutional, statutory and common law protection. Parents have multiple explicit legal rights: "for instance, parents have the right to the physical possession of the child, including the day-to-day care and companionship of the child; the right to discipline the child, including the right to inculcate in the child the parents' moral and ethical standards".[43] For example, in *Troxel v Granville*, the United States Supreme Court

[43] Barbara Hall, "The Origin of Parental Rights" (1999) 13:1 Public Aff Q 73 at 20; Anne C Dailey & Laura A Rosenbury, "The New Parental Rights" (2021) 71:1 Duke LJ 75. For a defence of parental rights

found that parents had the constitutional right to oversee the care, custody and control of a child, and that this right could not be overridden by the best interests of the child standard.[44] This American cultural particularity may reflect, in part, the fact that the United States has not ratified the UNCRC, which puts the best interests of the child ahead of any other consideration.

In contrast, other Anglo-American jurisdictions have asserted with more decisiveness the best interests of the child standard, leaving a variable role to parental rights. The United Kingdom's 1989 Children Act, for example, states the paramountcy of the "welfare principle", putting the welfare of the child first. [45] In effect, though, parents' interests are often given a generous weight in judicial decisions, mostly by recognizing parental rights correlative to the parental duties.[46] As we have seen, in the United Kingdom, the concept of "parental responsibility" has been created as a way to introduce a different perspective on parent and children's legal relations. But this broad notion comprises explicit parental rights, as the definition of the term in the Children Act 1989 explicitly states: "In this Act "parental responsibility" means all the *rights*, duties, *powers*, responsibilities and *authority* which by law a parent of a child has in relation to the child and his property".[47] In Canada too, the best interests of the child prevail.[48] In the bijuralist context of Canada, with provinces of common law and Québec's civil law, a plurality of

in the name of the child's wellbeing, see Clare Huntington & Elizabeth Scott, "The Enduring Importance of Parental Rights" (2022) 90 Fordham L Rev 2529.

[44] *Troxel v Granville*, 530 US 57 (2000).

[45] Jonathan Herring, "The Welfare Principle and the Rights of Parents" in Andrew Bainham, Shelley Day Sclater & Martin Richards, eds, *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart, 1999) 89.

[46] *Ibid*.

[47] *Children Act 1989*, c 41 part 1 s 3, UK, available at <https://www.legislation.gov.uk/ukpga/1989/41/section/3> , emphasis added.

[48] *Young v Young* [1993] 4 SCR 3; *BJT v JD* 2022 SCC 24.

concepts coexist with regards to the role of parents. Notwithstanding this diversity and an amended Divorce Act in effect since March 2021, which substitutes the concept of "custody" by "parenting time", [49] the core principles of family law still implies some parental rights and duties. For example, a parenting order creates a right for the parent to spend time with their child, and affords them decision-making responsibility during that time.[50] Another example is that the parent who is not exercising their parental time also is "entitled to request […] information about the child's well-being".[51] In a more straightforward way, the Civil Code of Québec specifies that parents have, among other attributes of parental authority, "the rights and duties of custody, supervision and education of their children".[52]

The problem with this vocabulary is that defining parenthood through a rights and responsibilities vocabulary comes with problematic assumptions about the needs and capacities of the individuals taking part in that relationship. Since "[l]aw tends to become involved in the parenting of children only when things go wrong",[53] the legal world tends to operate on a description as thin as possible of what the parent-child relationship entails, defined through the anticipation of what happens when the minimum requirements of that relationship are not met. This is coherent with the liberal take on individual autonomy: until something goes array, we assume everyone to be able to fend for themselves. By taking this hindsight stance on parenting, the law is blind to many aspects that make

[49] *Divorce Act*, RSC 1985, c 3 (2nd Supp).
[50] *Ibid* s 16.1(1).
[51] *Ibid* s 16.4.
[52] *Civil Code of Québec*, CQLR c CCQ-1991 [CCQ], a 599.
[53] Craig Lind & Tom Hewitt, "Law and the Complexities of Parenting: Parental Status and Parental Function" (2009) 31:4 J Soc Welf Fam Law 391 at 403. The law surrounding parenting is therefore following the same principles that apply to family law in general: what goes on in families is not considered legal matters (see Halley, *supra* note 10 and Diduck, *supra* note 4).

childrearing a meaningful experience for many adults and, even more importantly, stays oblivious to how fundamental the parenting care is in shaping of the child's most formative life experiences. The legal framework does little to understand why parents become parents in the first place, why they are so attached to their children and the freedom to exercise their authority over them or educate them in the way they see fit, and why they may not always be able to focus on their best interests. In the same way, they function on a presumption of parental capabilities and abilities, without questioning the collective resources a parent requires to attend to their child's needs.

It is relatively uncontroversial to recognize that parents have interests that arise either from their legal status as a parent or from their parental duties. What is still up for debate is whether these parental interests should be translated into legal parental rights, and what weight, if any, should be given to parental rights in the face of sometimes competing children's rights? Andrew Bainham, for example, argues that, since parents have interests "which are not referable exclusively to promoting their children's welfare […] the legal system should explicitly and unapologetically endorse them".[54] Bainham explains that he does not differentiate parental interests and parental rights, without justifying the choice to blend the two. This theoretical move is unconvincing. There is no reason to accept that special interests over someone's life should translate in moral rights over them, let alone legal rights. Many legal scholars in the United States argue that parental rights should be defended in light of children's wellbeing.[55] This argument is also problematic, as it

[54] Andrew Bainham, "Is Anything Now Left of Parental Rights?" in Rebecca Probert, Stephen Gilmore & Jonathan Herring, eds, *Responsible Parents and Parental Responsibility* (Oxford: Hart, 2009) 361 at 364.
[55] For a few examples: Melissa Moschella, *To Whom Do Children Belong?: Parental Rights, Civic Education, and Children's Autonomy* (Cambridge University Press, 2016); Huntington & Scott, *supra* note 43; Guggenheim, *supra* note 33.

postulates that parents are always better situated to determine the best interests of the child, which is highly debatable.[56] On the other side of the spectrum, some scholars argue that parents should be considered as "fiduciaries" of children.[57] This argument does not solve the issue, since it forces parents into an unrealistic position of disinterest towards their own stakes in the parenting relationship, as though the attachment and love they feel for their children are not, in part, linked to their own emotional needs.

The reason why all of those arguments fail to enunciate a coherent legal norm for parenthood is that the legal vocabulary of rights and duties is too limiting. The rights discourse is useful insofar as it creates duties for other people to protect the interests of the rights holder,[58] but it also creates a framework of claims that are usually arbitrated as a zero-sum game. This is just not how intimate relationships work. The relationship between parent and child cannot adequately be described as one governed only by responsibilities. Legal rights determine boundaries,[59] but those boundaries are fictitious when it comes to a relationship as intimate as the one between a parent and a child.

The coexistence of children's rights and parents' rights is problematic within a classical liberal framework. As Anne McGillivray explains it: "Other-directing rights are for the most part anathema in liberal philosophy and modern rights discourse. If parents have rights over children, then children cannot have rights, certainly not of the kind

---

[56] Dailey & Rosenbury, *supra* note 43.
[57] Elizabeth S Scott & Robert E Scott, "Parents as Fiduciaries" (1995) 81 Va L Rev 2401; Lionel Smith, "Parenthood is a Fiduciary Relationship" (2020) 70:4 UTLJ 395.
[58] David Archard, "Child Abuse: Parental Rights and the Interests of the Child" (1990) 7:2 J Appl Phi 183 at 187, citing Joseph Raz, "Legal Rights" (1984) 4:1 Oxf J Leg Stud 1 at 13-14.
[59] Nedelsky, Jennifer, "Reconceiving Rights As Relationship" (1993) 1 Rev Const Stud 1 at 7.

guaranteed by the Charter and the Convention."[60] As long as society's regard for parents' relationships with their children is based in a rights discourse, children's rights are bound to be infringed upon, since their rights will be opposing those of their parents. Defining children's needs in terms of a rights and responsibility structure fails to create a system that can meet those needs, since their needs are essentially relational and the rights structure is intrinsically adversarial. The legal vocabulary cannot capture what is at stake in a parent-child relationship, because it describes a truncated version of individuals and of their interpersonal relationships.

2.3. Society's Role in Parent-Child Relationships: The Legal Intervention Through Child Protection Systems

We have seen that childhood and parenthood are defined narrowly within the terms of the law.[61] This conceptual structure has major consequences when it comes to the legal understanding of child maltreatment. The phenomenon of child maltreatment occurs within the parent-child relationship. Its legal definition is therefore limited to what the law understands of that relationship. Through the framework of the rights discourse, child abuse and neglect is essentially understood in law to be a failing of the parent to uphold their responsibility, and a breach of a child's right to protection.

As we saw in chapter one, child protection as a legal system is only one possible answer to the empirical problem of child maltreatment.[62] This system is based on the liberal

---

[60] Anne McGillivray, "Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada" (2011) 19:1 Int'l J Child Rts 21 at 25 (references omitted).
[61] I refer to the previous section on the rights and responsibilities legal discourse surrounding parenthood.
[62] Neil Gilbert, Nigel Parton & Marit Skivenes, eds, *Child Protection Systems: International Trends and Orientations* (Oxford University Press, 2011).

premises of Anglo-American legal systems, which is a normative framework on the relationships between individuals, between the individual and society, and between the individual and the State. David Archard's conceptualization of the liberal system of child protection is useful to understand how the discourse of rights and responsibilities shape the legal response to child maltreatment. He contends that the child protection system has three fundamental features.[63] First, the paramountcy of the best interests of the child standard (the "welfare principle" in England); second, the rights of parents to autonomy and privacy; and third, "a specification of the threshold of state intervention, that is a statement of those conditions satisfaction of which would warrant State agencies in breaching the rights to parental privacy and autonomy".[64] Generally, those conditions involve "that the child should have been subjected to, or be in immediate and real danger of being subjected to actual and specific harms".[65]

This description, compatible with the more detailed account of Anglo-American systems of child protection explored in the first chapter, makes it manifest that, from a legal and an ethical point of view, the child protection system is based on the competing interests of parents and children, translated in terms of "rights". Protecting children from maltreatment, in this framework, amounts to limiting the rights of parents in the name of the rights of children. This protection is based on the harm principle, one of the main norms of liberalism: one's freedom can only be infringed upon when its exercise harms someone else. Parental discretion meets its limits when children are harmed by parents' actions or omissions. Therefore, the child protection system in the liberal landscape of Anglo-

[63] Archard, *supra* note 58.
[64] *Ibid* at 184.
[65] *Ibid* at 184.

American jurisdictions, with its threshold approach, draws upon the legal definition of parenthood. Parents have legal responsibilities over their children, but they have a certain freedom in how to exercise those duties, until a certain point. Child protection laws, in addition to other legal norms,[66] make it clear that parents owe their children certain basic necessities (the lack of it which forms the basis of the child neglect definitions) and ought to refrain from certain behaviours that society deems harmful or inappropriate (what we define as child abuse).[67]

To arbitrate the conflict between parents' rights and children's rights, the legitimacy of an intervention in the name of a collective third (such as the State) is determined by the legal process. When suspicions of child maltreatment arise, society's response is thoroughly legalized. Every aspect of the treatment of the situation is defined by the law: who should obtain the information about what happened, the way it is communicated, how to determine if an abuse or neglect justifies an intervention, the range of the intervention that can be done, how parents and children can participate in the process, what to do if social workers and the family disagree, etc.[68] This legal process, first and foremost through its definition of childhood and parenthood, sets up: 1) the terms of the conflict between the parties (child, parent, State); 2) the expectations of the parties; 3) the possible outcomes of the conflict. These are posited in the legal vocabulary of rights and responsibilities, without

[66] While there are no other written legal norms in common law jurisdictions, in Québec's civil law, the basic parental obligations are defined in the Civil Code (articles 599 and following CCQ). On legal norms in family law and the differences between civil law and common law jurisdictions, see Eekelaar, *supra* note 12 at 45.
[67] James G Dwyer, "Regulating Child Rearing in a Culturally Diverse Society" in Lucinda Ferguson & Elizabeth Brake, eds, *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 273.
[68] Nigel Parton, "Addressing the Relatively Autonomous Relationship Between Child Maltreatment and Child Protection Policies and Practices" (2020) 3:1 Int J Child Maltreat 19.

a complete (and necessarily complex) account of the individuals involved (both parents and children), and the nature of the relationship they have with each other. Since, as we will see in the next part, child maltreatment cannot be understood in those limited terms, it becomes hard to understand what really is at stake when it comes to settling matters as intimate as the ones that arise in family or child protection law, and to come up with creative solutions to resolve tensions.[69] We can better understand these limitations by turning to a recognitional approach of individual autonomy.

3. A Recognitional Approach to the Parent-Child Relationship

In this part, I will give an overview of how what I designate "clinical approaches" of child maltreatment challenge the legal definitions of childhood, parenthood and the appropriate responses to child abuse and neglect by a third party. To compare and contrast the legal and clinical definitions of childhood and parenthood, I use the concept of recognitional autonomy I described in the second chapter. The three spheres of recognition outlined in the recognitional theory of autonomy represents a useful framework to categorize the key factors that allow children and their parents to flourish in their respective roles. These accounts contrast starkly with the legal definitions just surveyed, in that they are mainly interested in the emotional substrate of the child-parenting relationships, the

[69] I would argue that the same reasoning would apply to matters where gains and losses would appear to be much more objective, like commercial relationships, since the cost/benefits analysis is never really as straightforward as we might like to think. The increasing use of mediation in commercial disputes, for example, reflects the relational nature of those legal disputes. Relational theory has been influential in contract law for now decades: Ian R Macneil, "Relational Contract: What We Do and do Not Know" (1985) Wis L Rev 483; Jean-Guy Belley, "Contrat relationnel" (2020) 66:1 McGill LJ 33–39. Furthermore, Axel Honneth's concept of recognition has been recently used to analyze contract theory: Pascale Dufour, *Contribution à la réactualisation théorique du rapport entre le contrat et la relation contractuelle au 21e siècle à partir des travaux de Axel Honneth sur la reconnaissance* University of Luxembourg, 2021) [unpublished].

impact of the context in which that relationship is built, and the complex ways in which it can evolve through external intervention.

3.1. Childhood

In this section, I will explore how interpersonal, social, and legal recognition can shift our understanding a child's developmental needs and highlight the failings of the legal conception of childhood to take those needs into account.

3.1.1 Childhood and Interpersonal Recognition

First, let's start with the first sphere of recognition: love. From a psychological and psychosocial perspective, a child's development is highly dependent not only on the presence of caregivers who meet its physical and educational needs, but on the quality of the relationship with its caregivers.[70] It's not only that relationships are fundamental for children to develop healthily and, in the best of cases to thrive, it's that they need certain kinds of relationships, not only on an individual level, but also on a societal level.[71] The concept of recognition emphasizes this relational necessity, by suggesting that children benefit from qualitatively positive intimate relationships to flourish; that they need a social context to exist not only in the eyes of their caregivers, but to exist in society too, as fully recognized members of a group; and that they need legal rights to articulate the institutional recognition of that agency. In all of those spheres, if children experience misrecognition, if the people and society fail to grasp their agency and to engage with their needs, they suffer. Child maltreatment is, within that framework, a form of misrecognition.

[70] This argument is developed in the second chapter of the thesis.
[71] See chapter 2.

As I argued in the second chapter, a substantial relational conception of the individual grounded in the concept of recognition is more apt than the liberal conception at describing what childhood is, what goes on in the parent-child relationship for both parties, why and how this relationship can become harmful to the child, and in those situations, why and how society should intervene. The liberal concept of personal autonomy creates a rigid understanding of the agency and interests of children, since the liberal conception of autonomy is a function of rationality, and children usually gain rationality as they mature. Therefore, children are deemed non-autonomous for a certain time,[72] and then become autonomous according to both a sliding scale[73] and the arbitrary biological marker of age, for example, when they turn 14, 16, 18 or 21, depending on the jurisdiction, and legally become either partly competent or adults.[74]

In contrast, a recognitional account of autonomy creates a different perspective on both the agency of children and adults. From this perspective, the first sphere of recognition necessary to for a child to obtain the tools to become autonomous is the intimate sphere, through love relationships.[75] As we have seen in the previous chapters, the empirical research on how the feeling of love and connection normatively affects a child's development has been attachment theory, a central theoretical influence "for those

[72] In Canada, this principle has been affirmed by the Supreme Court, notably in *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30.
[73] Ibid.
[74] Majority age is generally set at 18 in Canadian provinces, (ex: CCQ a 153) but some acts are permitted before and some acts are restricted until 21, For example, in Québec, the right to consent to medical care is set at 14 (CCQ, a 14) and in Manitoba, it is 16 (*The Child and Family Services Act*, CCSM c C80 s 25(2)). By contrast, the drinking age in Ontario, for example is set at 19 (see *Liquor Licence Act*, RSO 1990, c L19 s 30) and the age to legally possess cannabis in Québec is set at 21 (*Cannabis Regulation Act*, CQLR c C-5.3 s 7).
[75] See chapter 2.

concerned with the well-being of children, caregiving, and family functioning".[76] This has made an impact in family and child protection cases, where attachment concepts are more and more influential in the decision-making process.[77] Yet, recent research shows that misunderstandings of attachment theory by family law and child protection's practising legal communities have perpetuated decisions based on ideological conceptions of the parent-child relation, instead of relying on the complicated understanding of that relationship that attachment theory puts forward.[78]

The contrast between clinical and legal takes on how to qualify the relationships that shape a child's life can be illustrated by the role attachment theory has come to play in family law. In a recent consensus statement, attachment specialists have identified common misunderstandings by legal actors of the concept of attachment.[79] They point out, among other concerns: the indeterminacy of the best interests of the child standard,[80] many assumptions about attachment (such as that the notion of attachment is just stating the obvious, that it equates with attachment quality, caregiver sensitivity, relationship quality, that attachment insecurity can be detected in a single event, that children are born attached, that an insecure attachment is weaker, that there cannot be multiple equally important attachment bonds), and multiple overly broad types of inferences courts or professionals

[76] Tommie Forslund et al, "Attachment Goes to Court: Child Protection and Custody Issues" (2021) Attach Hum Dev 1 at 3.
[77] *Ibid* at 3.
[78] *Ibid* at 7. See also p 20 and following.
[79] *Ibid* at 9 and following.
[80] *Ibid* at 4-7. The argument is summarized at 5 : "However, the principle's broad formulation leads to a demand for more specific meaning in court practice. Specifically, the principle appears to require accounts of optimal and adequate child-rearing practices and of child development, in general, as well as in specific cases. Consequently, the principle has contributed to a need for expert assessors and witnesses with knowledge of caregiving and child development, and to a demand for considerations to be based on developmental theories with high scientific status." (References omitted.)

tend to make from conclusions about the quality of attachment (such as, for example, that a secure attachment equals psychosocial health, or that an organized insecure attachment pattern is pathological).[81]

From the perspective of a recognitional approach, these problems in the interpretation of attachment theory stem from trying to fit the concept of attachment within a liberal understanding of the parent-child relationship. They demonstrate a black and white mode of thinking which presents the parenting relationship as good or, exceptionally, bad. It assumes that a child is automatically attached to their biological parents more than other figures, that when the attachment is normal enough the parent-child relationship is to be presumed healthy, and that if a child has an insecure attachment type, it necessarily demonstrates a pathology. Based on the arguments detailed in the previous parts of this chapter, I suggest that the incapacity of the legal professionals to integrate the nuances of attachment theory and research in their appraisal of a family situation is structural. It is caused by the legal framework in which they are forced to operate.

In contrast to the legal understanding of parent-child relationships, which has few tools to qualify the nature of intimate relationships outside the advent of serious harm or prejudice, the theory of attachment represents love as a recognitional and normative process. The existence of intimacy (or of an attachment) is not in and of itself what Axel Honneth, following Hegel, calls "love";[82] it is rather the process by which, through a pattern of attachment, the child feels seen and secure, which in turn allows them to

[81] *Ibid*. These examples are discussed throughout the article.
[82] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, translated by Joel Anderson (MIT Press, 1996).

individuate and explore their environment.[83] As we have seen in earlier chapters, there are two axis to the quality of attachment: secure or insecure, organized or disorganized. The insecure but organized attachment type is what we could call a resilient recognitional process, where inconstant or weak recognition of the infant's needs still creates for them expectations of the world, and a model of how to interact with it. The dynamics of childhood emerge from the interpersonal recognition process, whatever form that recognition takes, since a child learns to be autonomous by forming patterns of behaviour in consequence of how its attachment bond with its caregivers plays out.[84] Attachment theory is inherently relational and normative. When taking a child's attachment patterns into account, it is self-evident that a child's interests are always defined in relation with its caregivers. It is not surprising, then, that the incapacity for legal professionals to make sense of the intrinsic normativity and relationality of attachment theory perverts its meaning.

3.1.2. Childhood and Social Recognition

The second sphere of recognition, social recognition, insists on the role of the community to support a child's development and to support the parent in its role. Family law's focus on the parent-child relationship can obscure the other relationships and the social context (the parent's and the child's) that are fundamental to a child's healthy development. Although love is the main form of recognition in childhood, since the intimacy of the family is the main space where the child evolves in western societies, childhood also unfolds in the context of a broader community. Social recognition is

[83] *Ibid*. at 99.
[84] John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* (Routledge, 1988).

important for childhood development, as it constitutes an essential step in the individuation process,[85] and an important factor of resilience when misrecognition is experienced in the intimacy of family relationships.[86] As we have seen in the second chapter, social recognition builds self-esteem, one of the emotional pillars of personal autonomy.[87] There are many contexts in which children can experience social recognition: in the family unit, the extended family or circle of family friends, in daycare, in school, in extracurricular activities, and so on. In each of those settings, the child can experience having their feelings heard, acquiring a sense of being a competent member of a group, feeling useful, in sum, being recognized as a full member of a community.

3.1.3. Childhood and Legal Recognition

The first two spheres of recognition demonstrate the limitation of only recognizing, in law, the third sphere: legal recognition. The interdependence of the three spheres of recognition can be exemplified by the dilemmas surrounding the exercise of the child's right to participation. Actualizing that right is as much a gesture of social recognition as it is of legal recognition. However, attachment theory and other theories of child development challenge the liberal interpretation of children's rights, including the right to participation, by stressing the relational nature of children's healthy development.

---

[85] William Damon, "Socialization and Individuation" in Gerald Handel, ed, *Childhood Socialization* (Routledge, 1987) 3.
[86] Elise N Pepin & Victoria L Banyard, "Social Support: A Mediator between Child Maltreatment and Developmental Outcomes" (2006) 35:4 J Youth Ado 612; Xiangfei Meng et al, "Resilience and Protective Factors among People with a History of Child Maltreatment: A Systematic Review" (2018) 53:5 Soc Psychiatry Psychiatr Epidemiol 453; James R McDonell, Asher Ben-Arieh & Gary B Melton, "Strong Communities for Children: Results of a Multi-Year Community-Based Initiative to Protect Children from Harm" (2015) 41 Child Abuse Negl 79.
[87] Honneth, *supra* note 82 at 122.

As we have seen, what tends to distinguish a protectionist from a liberationist approach to children's rights is the interpretation of the right of participation.[88] In a classic liberal approach, the child's right to voice their opinion will mean that, in a judicial context, from a certain age, they should have the right to testify and their opinion should be given weight in the final decision. From the moment the child is deemed to have a certain level of rationality (and therefore, of maturity), its voice will have more and more weight in the decision-making process. The judge has discretionary power in balancing a child's wishes and what is determined to be in their best interests. In practice, there are many hurdles to the process that relies on a liberal interpretation of the child's right of participation. First, the indeterminacy of the best interests of the child tends to render the balancing act unpredictable and dependent on the individual views of the decision-maker.[89] Second, the liberal conceptual framework surrounding the notion of capacity (taking into account the age of the child, their level of maturity and, therefore, their level of rationality) lacks two main things: a focus on the relational context of the child, and a way to take into account not what we could consider their "mature-enough" perspective, but all of the other information their voice provide, such as their fears, their hopes, what soothes them, etc. "A child's view of their own life and their own experiences does not require only an assessment of maturity but rather it places that child as an agent with a voice based upon their own life."[90]

---

[88] Minow, *supra* note 27.
[89] Antoinette L Harmer & Jane Goodman-Delahunty, "Practitioners' Opinions of Best Interests of the Child in Australian Legislation" (2014) 21:2 Psychi Psycho L 251; Whitney D de Haan et al, "Out-of-Home Placement Decisions: How Individual Characteristics of Professionals are Reflected in Deciding about Child Protection Cases" (2019) 1:4 Dev Child Wel 312.
[90] Emmie Henderson-Dekort, Veronica Smits & Hedwig Van Bakel, "The Meaningful Participation and Complex Capacities of Children in Family Law: Based on Transdisciplinary Perspectives and Articles of the United Nations Convention on the Rights of the Child" (2021) 29:1 Int J Child Rights 78 at 94.

From a relational autonomy perspective, a child's participation rights should not be based on capacity, but on agency. It is the fact that the child evolves as a subject in the world that confers on them the right to be heard by the people taking decisions in their best interests. The child's development is always already a negotiation between the child's volition and the boundaries and decisions its caregivers make to keep the child safe, and to help them develop their potential. From an empirical perspective, it is clear that the rational capacity to take well-thought out decisions is a utopian ideal, even for adults. It cannot serve as a measure of how much agency we recognize to individuals.

A simple example of the participation's rights dilemma is the context of an acrimonious conflict of separation between the parents. The literature on the reliability of children's wishes and feelings in the context of high-conflict contact disputes is divided. While some specialists stress the importance of making sure children "speak for themselves"[91] in the context of postseparation conflict, others highlight the unreliability of children's narratives when it comes to expressing wishes or needs.[92] The postseparation conflict offers a clear-cut example of how children's loyalties can complexify their assessment of their best interests. Loyalty issues are always acting as a backdrop against which children's views on their situation are formed. The maltreated child often will not have the tools to detect the maltreatment to which they are subjected, since they only ever

[91] Fotheringham, Dunbar & Hensley, "Speaking for Themselves", *supra* note 42.
[92] Kirk Weir, "High-Conflict Contact Disputes: Evidence of the Extreme Unreliability of Some Children's Ascertainable Wishes and Feelings" (2011) 49:4 Fam Ct Rev 788.

have experienced one form of caregiving, and they usually are attached, however the quality of their attachment, to their caregiver.[93]

By analogy, the philosophical concept of adaptive preferences can help to understand how maltreated children can come to have wishes that go against their interests.[94] The situation of those children mimics the situation of dominated social classes, such as women, minorities, or lower socioeconomical stratus: they are deprived of options that more privileged individuals have. In the case of maltreated children, they are confronted to parents who are limited in what they can offer them in terms of caring and security, putting them in a situation of deprivation. This situation has an impact on the formation of their preferences, the same way material deprivation can have an impact on the preferences of poor populations:

> In situations of longstanding deprivation, the victims do not go on grieving and lamenting all the time, and very often make great efforts to take pleasure in small mercies and to cut down personal desires to modest—'realistic'—proportions. Indeed, in situations of adversity which the victims cannot individually change, *prudential reasoning* would suggest that the victims should concentrate their desires on those limited things that they can possibly achieve, rather than fruitlessly pining for what is unattainable.[95]

---

[93] Diane Dansey, Mary John & Danielle Shbero, "How Children in Foster Care Engage with Loyalty Conflict: Presenting a Model of Processes Informing Loyalty" (2018) 42:4 Adopt Fost 354.
[94] Rosa Terlazzo, "Conceptualizing Adaptive Preferences Respectfully: An Indirectly Substantive Account" (2016) 24:2 J Pol Philos 206.
[95] Amartya Sen, *Inequality Reexamined* (Harvard University Press, 1992) at 55.

Similarly, a child who was deprived of warm and adequate care will have a tendency to adapt their desires to what they can reasonably receive from their abusive or neglecting caregiver. This process is at the root of attachment patterns: a child whose parent consistently does not answer their expressions of need will develop an avoidant pattern, learning to rely on themselves rather than expect something that they know will not come.[96]

The child's participation rights and the best interests approach need not be at odds, but stepping back from that dichotomy does require letting go of the rigid legal understanding of those concepts, and a nuanced intervention to support children in affirming their voices. An alternative pilot project in Alberta, for example, endeavoured to do so, in the context of high parental conflicts.[97] It combined therapeutic counselling (relying on clinical theories including trauma and attachment) and legal representation for children. The findings, from standardized measures, suggest the children who experienced this approach were "emotionally and therapeutically supported", and that "the ideal of balancing a child's best interests in therapy with that of their rights through legal representation is […] both ground-breaking and effective".[98]

In sum, recognition offers a normative framework that challenges deep-seated assumptions about childhood in the law. A rigid dichotomy between a right to freedom and a right to protection cannot adequately describe what it means to be a child, but not because childhood is essentially different from adulthood; because the legal rights vocabulary falls

[96] Inge Bretherton, "The Origins of Attachment Theory: John Bowlby and Mary Ainsworth" (1992) 28:5 Dev Psychol 759.
[97] Fotheringham, Dunbar & Hensley, "Speaking for Themselves", *supra* note 42.
[98] *Ibid* at 321-322.

short of recognizing the inherent vulnerability of the human condition.[99] Recognition, as a prescriptive project, is a proposition to integrate this vulnerability into our social and legal norms.

3.2. Parenthood

Just as the phenomenon of childhood is more aptly described when seen through the relational lenses of recognition, the complexities surrounding parenthood are better understood through a recognitional approach than a purely legal one. The legal definition of parenthood through vocabulary like parental rights, parental responsibilities or duties, lacks the conceptual depth to flesh out what actually happens in a parenting relationship, what motivates parents to care for their children, and how and why that caregiving can go wrong. What seems to be missing in those terms is the deep-seated undeniable emotional content of the parenthood experience. As a whole field of academic legal literature emerged to prove it, law tends not to know what to do with emotions.[100] It posits its subject as mainly rationally motivated. But the sacrifices involved in childrearing makes it an essentially emotional choice (that is, when it is, in fact, a choice).

---

[99] Ellen Gordon-Bouvier, *Relational Vulnerability: Theory, Law and the Private Family* (Springer, 2020). Jonathan Herring, *Vulnerability, Childhood and the Law* (Springer, 2018).

[100] Susan A Bandes ed, *The Passions of Law* (New York University Press, 1999); Kathryn Abrams & Hila Kerentt, "Who's Afraid of Law and the Emotions?" (2010) 94:6 Minn L Rev 1997; Renata Grossi, "Understanding Law and Emotion" (2015) 7:1 Emotion Rev 55.

While people become parents for many reasons,[101] such as internalized personal values or external pressure,[102] or giving meaning to one's life,[103] the experience of childrearing is essentially affective, not rational, both in the motives that lead people to become parent, and in the experience of parenting.[104] In the latter case, it is now a well-established fact that a parent's attachment style is correlated to their attachment behaviours and the way they bond with their child.[105] Parenting triggers the attachment style of the parent and influences their way of understanding and answering the child's needs.[106] Therefore, a parent's relationship to its child is as much an experience of attachment bonding as is the relationship of a child to a parent.

In contrast, as I argued earlier, the legal conception of parenthood focuses on the responsibilities of parents and the best interests of the child, as though parents were not emotionally involved in their children. It assumes that parents could be acting out of pure generous motives, or as if they could put aside all of their personal issues and feelings to be able to assess and enforce what would better benefit the child.[107] This sort of fiduciary understanding of parenthood is evidently unrealistic, for two main reasons. The first, as we have seen, is that parents are usually attached emotionally to their children, and therefore the child fulfills an emotional role in the parent's emotional landscape. The second is that,

---

[101] It does not matter for my argument how much of these reasons stem from nature or culture.
[102] Mylène Ross-Plourde & Dominique Basque, "Motivation to Become a Parent and Parental Satisfaction: The Mediating Effect of Psychological Needs Satisfaction" (2019) 40:10 J Fam Issues 1255.
[103] Jessica L Morse & Michael F Steger, "Giving Birth to Meaning: Understanding Parenthood Through the Psychology of Meaning in Life" in Orit Taubman – Ben-Ari, ed, *Pathways and Barriers to Parenthood: Existential Concerns Regarding Fertility, Pregnancy, and Early Parenthood* (Springer, 2019) 1.
[104] Inge Bretherton et al, "Attachment: The Parental Perspective" (1989) 10:3 Infant Mental Health Journal 203.
[105] *Ibid*; Liesbet Nijssens et al, "Parental Attachment Dimensions and Parenting Stress: The Mediating Role of Parental Reflective Functioning" (2018) 27:6 J Child Fam Stud 2025.
[106] Bretherton et al, "Attachment", *supra* note 104.
[107] See section 2.2 of the present chapter.

as intensely devoted as a parent can be, it is unrealistic to imagine parenthood as a total devotion to a child's best interests regardless of the other family members' needs. As Jonathan Herring explains:

> Parenthood demands enormous sacrifices. But there is not a parent in the country who always places their child's interests before their own—inevitably and quite rightly family relationships involve "give and take". In many families the children's interests are pre-eminent, but on some occasions fairness and practicality demand that the interests of a child must be subordinated to those of the parents or other family members.[108]

Children are members of a family, and they are born into a context. It is the parent's role to tend to that context and provide an environment in which the child can develop fully. Putting the emphasis on the context in which the child evolves and not their personal needs means that, sometimes, other family members' needs will prevail, and this can be beneficial in the long-term for the child.

One way to explain that complex relation between a child's wellbeing and the family wellbeing is by referring to an influential approach in clinical psychology, Bowen's family systems theory. This theory describes how it is impossible to think of a child's wellbeing without situating it in the context of the mutual relationships that constitute the family's "systems".[109] Bowen's work still has a great influence today, having given rise

[108] Herring, *supra* note 45 at 89.
[109] Murray Bowen, *Family Therapy in Clinical Practice* (Jason Aronson, 1978).

both to major trends in therapeutic clinical settings and in research.[110] This approach considers the family as an emotional unit, a "system". Family systems theory is built on the premise that a family is "an emotional relationship between the family members with an emotional interest and an emotional basis".[111] According to this theory, the individual's wellbeing is a product of

> a person's place in the system(s) in which he or she finds himself or herself, subject to the pushes and pulls of the system, including competing emotional demands, role definitions and expectations, boundary and hierarchy issues, coalitions and collusions, loyalty conflicts, family and institutional culture and belief systems, double binds, projective identifications, and systemic anxiety.[112]

The family systems theory is in essence relational: a person's patterns can be explained not only by their individual characteristics, but by their role in a larger system of relationships. It is built on the premise that a family is "an emotional relationship between the family members with an emotional interest and an emotional basis".[113]

Family systems theory's central theoretical construct, the "differentiation of the self", is a conceptualization of the need (and difficulty) for an individual to be able to distinguish their own emotions and thoughts from those of the other members of the system

---

[110] For an overview of contemporary applications and research, see Keller N Mignonette & Robert J Noone, eds, *Handbook of Bowen Family Systems Theory and Research Methods: A Systems Model for Family Research* (Routledge, 2020).
[111] Simone Pfeiffer & Tina In-Albon, "1.10—Family Systems" in Gordon J G Asmundson, ed, *Comprehensive Clinical Psychology (Second Edition)* (Oxford: Elsevier, 2022) 185.
[112] W H Watson, "Family Systems" in V S Ramachandran, ed, *Encyclopedia of Human Behavior (Second Edition)* (Academic Press, 2012) 184.
[113] Pfeiffer & In-Albon, *supra* note 111.

(typically a child differentiating from their parents).[114] This process is made difficult by the tendency of the family system to project unto the child its dysfunction.[115] For example, a parent fears that a child will lack self-confidence. They then become overinvolved in affirming the child at each possible moment, and the child becomes dependent on their affirmation for their self-esteem.[116] Furthermore, family systems theory recognizes the impact of social systems on the family, taking into account the impact of the social sphere on intimate issues.[117]

Family systems theory brings into view that the wellbeing of the whole family is directly tied, in a causal relation, to the wellbeing of the child. Recognizing this interdependence is a support to the argument that understanding parenthood within a rights and responsibilities framework, as the law does, is problematic and reductive, because it does not account for how parents' wellbeing has a direct impact on the best interests of the child. Family systems theory also furthers our understanding of how the child's sense of self and their ability to speak their voice is closely related to their relationship not only to their parents, but the whole family system in which they are brought up. If the legal construction of childhood and parenthood cannot account for the complex relationship dynamics in which they both are formed, another conceptual framework is necessary.

---

[114] M Calatrava et al, "Differentiation of Self: A Scoping Review of Bowen Family Systems Theory's Core Construct" (2022) 91 Clinic Psych Rev 102101.
[115] Alexandra S Ross, Adam B Hinshaw & Nancy L Murdock, "Integrating the Relational Matrix: Attachment Style, Differentiation of Self, Triangulation, and Experiential Avoidance" (2016) 38:4 Contemp Fam Ther 400; Michael E Kerr, "Family Systems Theory and Therapy" in Alan S Gurman & David P Kniskern, eds, *Handbook of Family Therapy* (Routledge, 2013) 226 at 243.
[116] This example is inspired by the examples provided on the website of The Bowen Center for the Study of Family: <https://www.thebowencenter.org/family-projection-process >.
[117] Kerr, *supra* note 115 at 251.

In contrast to the liberal legal perspective, the recognitional approach offers the conceptual means to account for the fact that the experiences of being a parent and being a child are essentially interdependent. The child needs to experience intimate recognition through the relationship with its caregiver to develop its sense of agency, but this can only happen if the caregiver is also recognized fully as a subject with its affective world, its thoughts and its needs. Furthermore, both of them have to be understood as members of society, and as part of a wider network of recognitional relations. Ignoring those essential features of the experiences of childhood and parenthood creates social and legal interventions that are disconnected from the concrete issues children and parents encounter. This is especially damaging in the context of child maltreatment. The legal vocabulary of rights and responsibilities, as well as the vague understanding of the best interests of the child standard and of the rights of participation of the child, fashions a context in which the law cannot grasp the reality of child maltreatment, much less remediate it.

3.3. Society's Role in Parent-Child Relationships: A Recognitional Approach to Child Maltreatment

Challenging our legal understanding of childhood and parenthood leads to rethink the legal response to child maltreatment. As we saw in section two, within the liberal legal framework, child maltreatment is understood as a child suffering harm from their parent, therefore triggering a duty of the State to come in and protect the child. This is why the systems elaborated as an answer to child maltreatment are called systems of "child protection". Therefore, child protection is a legal concept that refers to a normatively charged understanding of a social phenomenon. In this perspective, child maltreatment is an anomaly, a deviation from the norm of good-enough parenting expected from biological

parents, that does not warrant external intervention. It is the result of bad or insufficient parenting, with an unambiguous consequence on the child: harm. As the problem of child maltreatment is set up by child protection systems, the remedies are limited: either a social worker is tasked to help and police the parent at the same time, to make sure the harm stops, or the child is removed from its family home. As Nigel Parton argued, "child protection policies cannot be understood as simple reactions or responses to the phenomena of child maltreatment. They have their own dynamics and determinations to the point where they can be seen to operate quite independently of the social problem, which, it is assumed, they are trying to prevent and respond to."[118]

However, the clinical portrait of child maltreatment has, over the years, evolved to paint a much wider and complicated picture of the phenomenon. Child maltreatment is a public health issue, with determinants that are more complex than just poor parenting judgment.[119] One of the most influential representations of the causes of child maltreatment, the ecological-transactional model reflects this complexity. The ecological-transactional model of child maltreatment challenges the efficacy of the child protection system as an appropriate answer to child maltreatment.[120] If we agree that the causes of child maltreatment are so diverse and integrated in the different strata of relationships that come to define human psychological development, as the ecological-transactional model theorizes, then the narrow view of child maltreatment as an aberration to normal parent-child relationship on which child protection systems are founded becomes evidently out of

[118] Parton, *supra* note 68 at 19-20.
[119] Bob Lonne et al, *Re-Visioning Public Health Approaches for Protecting Children* (Springer, 2019).
[120] Kelli Connell-Carrick & Maria Scannapieco, *Understanding Child Maltreatment: An Ecological and Developmental Perspective* (Oxford University Press, 2005).

touch. As I argued in the second chapter, this model is better represented in a recognitional understanding of agency, than in the traditional liberal one. To find acceptable norms of intervention in response to the issue of child maltreatment, we need a recognitional approach to those norms.

As we saw in the first chapter, child protection systems are made of two different fields of specialization interacting: social work and law. Social work intervention is highly regulated by legal statutes and checked by legal processes, and in return, legal statutes and decisions are informed by the evolution of knowledge about child development and by how social workers analyze a child's case. But this reciprocal influence is of unequal force; social work's approach to child maltreatment is deeply shaped by the legal context, since it comes to define the aims of child protection agencies, their field of actions and the means at their disposition. Scholars in child welfare, social work, and public health are pointing out the disconnection between the research on the causes of child maltreatment and the child protection systems.[121]

Therefore, there are two main problems with the liberal legal understanding of child protection. One is that it does not describe accurately what child maltreatment means to its main actors, the parent and the child, what the effect of it is and how it can be addressed therapeutically. The other is that it does not take into account the fact that, far from being a marginal phenomenon in some families, it represents a significant and complex social issue that needs to be addressed at a macro level. A recognitional approach addressing child maltreatment would take these concerns into account, by focusing on the casuistic

[121] Parton, *supra* note 68; Lonne et al, *supra* note 119.

experiences of child maltreatment in all its affective, dynamic and systemic complexities, but also by shedding light on the social and legal factors that contribute to child maltreatment as a social phenomenon.

These two problems generate two corresponding tasks to address child maltreatment through a theory of recognition. The first task is to recognize the complexity of the parent-child relationship and to understand that any intervention aiming at putting an end or even preventing child maltreatment needs to be grounded in recognition and empathy for all parties involved. Since, in the context of Anglo-American jurisdictions, the clinical intervention in cases of child maltreatment is dictated by the legal framework imposed by the child protection paradigm, this legal paradigm has to change. At the very least, people in decision-making positions regarding child maltreatment cases should be aware of their biases considering the child protection culture they operate in, and understand the impact of the legal framework of child protection.[122] But furthermore, the legal framework has to create conditions in which social intervention is therapeutic for the child, while considering their wellbeing in the complex ecosystem of their unique life.

Practically, creating therapeutic intervention for the child means that, in cases where it is possible, there should be direct therapeutic intervention for the parents, since we know that a parent's personal history, mental health conditions and general situation all affect directly their parental capacities.[123] In other cases, it means recognizing that the child needs to be protected from the emotional turmoil the parent can, sometimes unknowingly

[122] Whitney D de Haan et al, "Out-of-Home Placement Decisions: How Individual Characteristics of Professionals are Reflected in Deciding about Child Protection Cases" (2019) 1:4 Dev Child Welf 312.
[123] Tim M Mulder et al, "Risk Factors for Child Neglect: A Meta-Analytic Review" (2018) 77 Child Abuse Negl 198.

and unintentionally, create for them.[124] Instead of focusing on the inquiry of "deviant" parenting behaviour, therapeutic care needs to be part of the care given to families where child maltreatment is discovered or suspected, from the beginning of the intervention through the end. For example, in cases where an inquiry of maltreatment leads to the consideration of a possibility of an out-of-home placement, studies showed that a parent's participation in an attachment-based intervention can clarify the necessity of that measure.[125] Of course, the role of a legal scholar is not to determine how the clinical professionals should intervene, and the specific means by which the therapeutic goals regarding child maltreatment should be reached are best left to specialists in the fields of child development, psychology and social work. But understanding those goals through a wider recognitional framework makes it more likely that they will be met, as the conceptual background allows to take into account the various forms of children's and parents' needs and their interdependence.

The second task for a recognitional approach is to set up the intervention in the wider recognitional context of the legal and social spheres, by addressing the systemic causes of child maltreatment, such as race and socio-economic inequalities, and the lack of social cohesion and solidarity.[126] The social recognition of parents, in that sense, is a key determinant of children's wellbeing. A child whose parent has a place in society, feels connected to and respected by its community, and has the material means through a just

[124] Loring Paul Jones, "'Was Taking Me Out of the Home Necessary?' Perspectives of Foster Youth on the Necessity for Removal" (2015) 96:2 Fam in Soc 108.
[125] Sabine van der Asdonk et al, "Improving Decision-Making Agreement in Child Protection Cases by Using Information Regarding Parents' Response to an Intervention: A Vignette Study" (2019) 107 Child Youth Serv Rev 104501; Chantal Cyr et al, "An Attachment-Based Parental Capacity Assessment to Orient Decision-Making in Child Protection Cases: A Randomized Control Trial" (2022) 27:1 Child Maltreat 66.
[126] These are the systemic causes we surveyed in chapter one.

distribution of resources, is much less likely to suffer from child maltreatment. In the case he does suffer from a form of maltreatment, the child is more likely to have means of resilience than is he had been brought up in poverty, exclusion and isolation. As long as oppression and domination, acting as systemic denials of recognition, are dominant features of our societies, we will not have a context in which the eradication of child maltreatment is conceivable.

4. Building a Recognitional Critique of Law : Child Protection as a Case Study

At its core, the critique of the legal understanding of childhood, parenthood and child protection is a subset of a more general critique of the liberal foundation of western law. Translating any social reality into law always amounts to a reduction of a phenomenon. As much as any language, legal concepts create artificial boundaries. Law is performative, it does not only describe the world, but generates it. While attempting to translate a reality into law, law always creates a new reality. This process of reification creates two distinct realities that mirror each other, but are never quite the same: the two-dimensional subject of law will never be an accurate reflection of the three-dimensional living person it tries to conceptualize, with its psychology, rationality but also attachments, fears, passions, desires. By describing a legal subject, we concentrate on one dimension of the person. For example, a woman will have multiple legal identities (she is a neighbour with duties of care, she is a party to consumer contracts when she buys goods and services, she may be an employee or an employer, etc.), and, if she happens to be a mother to a child, one of those will be that of parent. But in the eyes of the law, our understanding of her as a parent will be limited by our legal understanding of what being a parent entails, regardless of the person's other dimensions. For that woman, being a mother is associated with a

bundle of emotions and memories and expectations that cannot be captured in the law. Motherhood is a reflection on her own childhood, her need to be loved and cared for herself, her desire to maybe give back and nurture, or maybe a feeling of constraint and overwhelming sense of becoming a slave to a helpless and entirely dependent being. Every experience of parenthood is unique and fraught with unconscious expectations, and a puzzling mixture of joys and sorrows. Being recognized as the legal parent of a child, or being assigned parental duties with regards to a child, only capture a tiny fraction of that experience. In the same way, the law does a poor job at anticipating the consequences of a fraught parent-child relationship on the child. While we recognize that the child has some needs that have to be met by its parents, by the time it comes to the attention of the legal world that these needs are not met, the law does not have the tools to assess the damages that are already done and to shape and repair the relationship when possible.

This general argument about the limitations of the legal definitions of childhood and parenthood, like any radical critical perspective on law,[127] can lead to two coexisting conclusions: one pessimistic and one cautiously optimistic. The pessimistic conclusion is that the incapacity of the Anglo-American (and, arguably, western) law to grasp the essence of the parent-child relationship stems from such deep ideological roots, from the conceptualization of what a being a subject of law means and what a legal norm is, that it cannot be remedied. In that perspective, the legal answer to child maltreatment will always fail, because, by definition and structure, the law built in the ideals of liberalism. Therefore, legal structures can never properly address human issues as complex as child maltreatment, which involves complicated notions such as intimacy, attachment, loyalty, and developing

[127] I employ the term radical in its etymological sense, a critique of the roots of concepts.

maturity. Short of rethinking how we can create institutions and legal norms that are based on a much more nuanced and rich understanding of human interactions, there is no way law can grasp the essence of what a child's needs are in a case of child maltreatment.

Nevertheless, this conclusion can be sound and true at the same time as the cautiously optimistic one: that a thorough analysis of the failings of the Anglo-American legal system and the documented needs of children and families can lead to, if not solutions, then substantial improvements of the existing, if always limited, legal apparatus in place. To be fair, the legal world does try to adapt to the evolution of social sciences regarding family dynamics and children's development. As Gilbert and al. have shown in their later comparative study, following an international trend since the beginning of the twenty-first century, the Anglo-American systems of child protection have moved from a focus on the parental behaviours that endanger children to a more child-focused approach, with an emphasis on children's rights, their good development and general wellbeing.[128] This turn to a child-centred approach evolved from the development of scientific knowledge on human development, notably the role parenting plays in child development and child psychology, but also in how to intervene efficiently in parent-child relationships. This is also what drives decision-making agents in child protection to integrate into their analysis perspectives that take a child's attachments more seriously than they did before.[129] My argument in this chapter has been that we need to walk a step further, and think about how legal norms impact that project.

[128] Gilbert, Parton, & Skivenes, *supra* note 62.
[129] Forslund et al, "Attachment Goes to Court", *supra* note 76.

In accordance with the optimistic and pessimistic conclusions I suggested, there are two corresponding ways to envision a recognitional critique of child protection law: the realistic approach and the idealistic approach. Optimism in this context is associated with realism, since it means using recognition theory as a measuring tool to evaluate laws' possibilities and shortcomings. In contrast, the pessimistic conclusion can, paradoxically, open up to a more idealistic endeavour. If a law does not and cannot, structurally, answer the demands of a theory of recognition, we should at least start trying to elaborate new ways of thinking about social and legal normativity through the ideal of recognition.

The realistic approach serves to analyze current legislation and to suggest reforms that would compensate the shortcomings created by the liberal foundations of law. This approach of a recognitional critique of child protection law takes for granted that the traditional liberal foundations of law are too fundamental to western law systems to change in our lifetimes. In consequence, I suggest using the theory of recognition I outlined in the precedent chapters as an analytical framework to critically evaluate current legislation, systems and reforms in child protection. My proposition is to use concepts and perspectives grounded in the general norm of recognition as a way to understand laws' limitations, to imagine reforms in substantive law and devise compensation mechanisms to alleviate the problems of adversarialism in child protection contexts. The analytical framework I suggest is, broadly put, to evaluate substantive law and adjudication mechanisms through the lenses of the three spheres of recognition. Legal norms and mechanisms should, ideally, foster each of those spheres. When evaluating statutes, provisions or dispute resolution mechanisms, we should ask: does it foster interpersonal recognition? Social recognition? Institutional recognition? In the fifth chapter, I apply this analytical framework of the

theory of recognition using a case study, the Québec legislative framework of child protection.

The recognition framework is not meant to find definitive solutions to the problems of child protection legal processes, but rather, to identify how legislation and judicial processes tend to unknowingly amplify child protection systems' problems by focusing on creating more law. Building on how parents and children need recognition in their interpersonal, social, and institutional relationships, I contend that we can better evaluate what works, what does not work, and why some legislative endeavours seem to never quite reach the goals they set. Knowing that the basic conception of the legal subject is essentially at odds with the theory of recognition, evaluating legal norms and practices through recognition will eventually lead to identify unsurpassable limitations. However, understanding the intrinsic limitations of the law is essential for good public policy decision-making. This is true in child protection as much as with any other fields of law. This first step is pragmatic, with the goal of contributing to child protection as it functions today. We cannot delay that task. After all, as most legislations in child protection now recognize, time is a different concept for children. But the urgency of building a better response to child maltreatment should not prevent us from thinking further and going to the roots of the problem. We owe it to future generations to address the fundamental issues of our legal systems.

In contrast, the idealistic approach opens the possibility of rethinking what legal norms are and how society could regulate itself outside of a traditional liberal framework. This is a programmatic argument for a much wider philosophical project, endeavouring to

imagine how norms could come to embody a recognitional concept of justice. This project unfortunately goes beyond the scope of this dissertation. But what I hope this chapter demonstrates is that the ability of the legal vocabulary to integrate a substantive relational perspective on childhood is intrinsically limited. It also shows why the relational approaches in the current legal scholarship are at best unsatisfying. They tend to focus on highlighting our intrinsic vulnerability and relationality without thoroughly analyzing how it impacts substantive norms of law,[130] or they try to fix the way we intervene within the concepts already in place,[131] rather than challenge the law's more fundamental conceptual flaws and taking stock of how deep that critique goes.

In that sense, this study of the legal aspects of child protection is, in fact, a case study of a much wider and deeper issue. The problems of child protection are symptoms of a systemic issue in law. They reveal a radical critical perspective on western law that cannot be the object of a quick fix. Since law is built on the premise of individual autonomy, and its main role is to protect and foster that autonomy, replacing that conception of autonomy by a substantively different one not only brings us to different models of legal approaches, but it shakes law, both as a vocabulary and a system, to its very core. This is true in the field of child protection, but it could be just as true in any other field of law. As we will see in the next chapter, it is not only the vocabulary of substantive law that is grounded in rationalistic liberalism. The conceptualization of

[130] Herring, *supra* note 99.
[131] Gordon-Bouvier, *supra* note 99; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011).

conflict and how we adjudicate it is also premised on a problematic liberal conception of individual autonomy.

Chapter 4

A Recognitional Critique of Adversarialism in Child Protection

It is now somewhat trivial to say that the adversarial judicial system generates a problematic dynamic for solving family matters, including ones of child protection.[1] Most authors agree that collaborative approaches and alternative dispute resolution techniques are more appropriate for those types of cases.[2] Despite this fact, changing the court experience for families seems to remain a challenge in Anglo-American jurisdictions.[3] Even with the multiplication of legislative reforms and training programs to foster the use of mediation and trauma-informed approaches, the adversarial process still shapes the child protection intervention. Indeed, in the United States, for example, "despite almost three decades of at least nominal implementation of the new family court model, court structures 'still largely reflect the ... adversarial system'," according to a 2018 study.[4] The situation is similar in other Anglo-American jurisdictions.[5]

---

[1] Gregory Firestone & Janet Weinstein, "In the Best Interests of Children: A Proposal to Transform the Adversarial System" (2005) 42:2 Fam Ct Rev 203.
[2] For just a few examples in the literature, see *ibid*. See also: Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (Routledge, 2018); Jane C Murphy, "Rethinking the Role of Courts in Resolving Family Conflicts" (2020) 21:3 Cardozo J Conflict Resol 625; Lorraine Thomson, Morag McArthur & Peter Camilleri, "Is It 'Fair'? Representation of Children, Young People and Parents in an Adversarial Court System" (2017) 22 Child Fam Soc Work 23.
[3] Thomson, McArthur & Camilleri, "Is It 'Fair'?", *supra* note 2; Robert Porter, Vicki Welch & Fiona Mitchell, "Adversarialism in Informal, Collaborative, and 'Soft' Inquisitorial Settings: Lawyer Roles in Child Welfare Legal Environments" (2019) 41:4 J Soc Welf Fam Law 425.
[4] Murphy, *supra* note 2 at 630, citing "Family Justice Initiative: The Landscape of Domestic Relations Cases in State Courts" [Report] (2018), at: https://iaals.du.edu/sites/default/files/documents/publications/fji-landscape-report.pdf , at 26.
[5] For example, in Australia see Sheehan, *supra* note 2. In Québec, see Laurence Ricard, "Le rapport entre le juridique et le clinique dans l'application de la Loi sur la protection de la jeunesse: une perspective relationnelle" (2013) 43:1 RGD 49.

In this chapter, I investigate the impacts of the way law frames interpersonal conflict and societal responsibility, to better understand why it so often fails in addressing child maltreatment. I contend that judicial drafting, interpreting, and processes are all less neutral than they purport to be in their presuppositions about human nature. Their limitations are evident when the legal system tries to integrate clinical concerns, or when it fails to put alternative dispute resolution mechanisms at the heart of child protection processes. This leads to an inability to successfully address the pressing and crucial issues at stake in cases of child maltreatment.

This chapter is divided in four parts. In the first part, I argue that the adversary system is a fixture of the liberal principles of the law because it is an extension of its logic, and that relational critique of liberal procedural justice underscore the limits of adversarialism. In the second, I suggest that the adversarial logic is not only at play in procedural law, but also in substantial law and interpretative principles of the law. Consequently, procedural law reforms are limited in their ability to move away from the adversarial nature of the child protection process. I also argue that the theoretical underpinnings of Anglo-American judicial processes limit the abilities of legal reforms or alternative dispute resolution methods to resolve the problems outlined in the precedent chapters regarding child protection legal systems. In the third part, I analyze the strengths and weaknesses of alternatives to the traditional adversarial system. I argue that problem-solving courts and alternative dispute resolution mechanisms, which are central in the current Anglo-American child protection judicial systems, do not depart from adversarialism. In the fourth part, I argue that understanding the intrinsic limitations of those alternatives is a crucial step in knowing what the law in its current state can or cannot

do to impact the phenomenon of child maltreatment. The existing options within the judicial system can be contrasted with a relational critique of adversarialism, in which the concept of recognition serves as a normative ideal to imagine an alternative conception of justice.

The arguments in this chapter rely mainly on the analysis of scholarly literature in law, philosophy of law, and child welfare, supplemented by references to the Youth Protection Act of Québec and the Child, Youth and Family Services Act of Ontario, which serve as examples of Anglo-American child protection legislations.[6] Even though I rely on empirical examples for clarity, my argument is philosophical. I do not intend to factually demonstrate the limitations of adversarialism in all of the Anglo-American judicial systems; rather, I argue that, given the rationalistic liberal foundations of law, conceptually, these judicial systems cannot be anything but adversarial. The competitive stance of this system is antithetical to the recognitional approach.

1. The Logics of the Adversary System

In this part, I explain the foundational principles of the adversary system, and why it structures the system of child protection not only through procedural law, but within substantive law. I then suggest that a relational approach to procedural justice based on the concept of recognition would better serve the aims of dispute resolution in child maltreatment cases.

[6] *Youth Protection Act,* CQLR c P-34.1[YPA]; *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sched 1 [CYFSA].

1.1 Principles of the Adversarial System in Child Protection

Critiques of the adversary system of law abound in the legal academic literature, and have been influential for decades. But to understand the role of adversarialism in child protection systems, it is necessary to go back to the conceptual roots of those critiques. The adversarial system is firmly anchored in the traditional legal liberal understanding of individual dignity, autonomy and reason. As long as the adversarial process is understood to be the only appropriate mechanism to ensure the safeguard of these principles, and as long as the primacy of these principles and their liberal interpretation remains unchallenged, any attempt to move away from the adversary system as the dominant approach to conflict resolution is doomed to fail.

As we saw in chapter three, the legal definition of childhood and parenthood rests principally on a vocabulary of rights and responsibilities. In consequence, the adjudication of legal conflicts when it comes to child protection matters requires the same basic functioning system as that of all legal matters: a procedure to establish facts, evaluate whether the factual situation represents a breach of rights and/or responsibilities, and to put in place remedies when applicable. In Anglo-American legal systems, this is done through the adversarial system.

Concretely, it means that whenever parents or an older child disagrees with a child protection agency to which child-protection duties are devolved, the child protection agency has the legal power to bring the matter to trial, where each party will bring forward their arguments on the situation in front of a judge. The dispute can be about whether a child is in danger, or about the measures necessary to protect the child. For example, in

Québec, the Director of youth protection (DYP) files a motion under section 38 of the *Youth Protection Act* (YPA), asking the court to find that the child is in danger pursuant to one or many of the motives enumerated, and to order certain measures to put an end to the situation, pursuant to section 91 YPA.[7] The DYP has the burden of proof, on the balance of probabilities: it has to provide preponderant evidence that the child is in danger and that the measures proposed are in their best interests. This means that a social worker will have to testify on the facts that led them to conclude that the child is suffering from abuse or neglect while under the care of their parents. Since the case was brought to trial, it means that the parent (or the child) opposes the DYP. To win their case, they have to show that the DYP's evidence is insufficient or misconstrued, that the best interests of the child require different measures than those asked for by the DYP, or both. The process is similar in other jurisdictions: for example, in Ontario, a Children's Aid Society "may apply to the court to determine whether a child is in need of protection" pursuant to the definition provided in section in the statute and obtain a court order.[8] A motion for summary judgment or a trial then ensues.

As J. A. Jolowicz exposes, the adversarial system aims at the resolution of disputes made of competing claims through contradictory debate.[9] Although the conceptual architecture of defences of the adversary system can be much more complex than this, following the distinction made by Meyerson and al., [10] I contend that most justifications in

[7] YPA s 38, 91.
[8] CYFSA s 74(2), 81(1), 90(1) and 101.
[9] J A Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52:2 Int'l & Comp LQ 281.
[10] Meyerson and al., "Introduction", in Catriona Mackenzie, Therese MacDermott & Denise Meyerson, eds, *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives*, 1st ed (Routledge, 2020) at 3. The distinction made by the authors is with regards to the methodological individualism predominant in procedural justice, not specifically about the adversary system. Here, I apply

favour of adversarialism can be subsumed under two overarching arguments. First, from an instrumentalist perspective, the adversarial process is a rational epistemic structure to attain truth and the best legal interpretation of that truth. Second, from a dignitarian perspective, it offers the best protection of individual rights and dignity.

The instrumentalist argument can be summarized as follows: through a competitive process, the adversary system generates a better factual knowledge of a case, of the law that should be applied, and the possible interpretations of that law. This argument focuses on the outcome of the process. Ray Finkelstein, a judge at the Federal Court of Australia, citing Lord Denning, explains that in the adversarial system, "the judge's object 'above all, is to find out the truth, and to do justice according to law' and that justice is best done 'by a judge who holds the balance between the contending parties without himself taking party in their disputations'".[11] The premise of this view is similar to basic economic principles: competition creates an incentive to produce better evidence and more compelling arguments. In the same way as the market, the adversary system uses the pursuit of self-interest as a device to produce a social good – in this case, truth and justice.[12] Having the other party arguing against one's position serves as a fact-checking device. This dynamic is thought to offer the best possible information for a judge to impartially take an informed decision on a case.

---

it to adversarialism since in the Anglo-American context, since procedural justice implies a contradictory principle.

[11] Ray Finkelstein, "The Adversarial System and the Search for Truth" (2011) 37:1 Monash U L Rev 135 citing Lord Denning in *Jones v National Coal Board* (1957) 2 QB 55, 63.

[12] Robert Gilbert Johnston & Sara Lufrano, "The Adversary System as a Means of Seeking Truth and Justice" (2002) 35:2 J Marshall L Rev 147.

From the dignitarian perspective, the adversary system has an intrinsic value, as it is the best way to honour the supremacy of individual dignity in Anglo-American legal systems.[13] The ability of the individual to take an equal part in legal disputes against anyone who makes a claim against them, including the State, is a manifestation of their autonomy and thus, an essential way to honour their dignity.[14] Early critics of alternative dispute resolution defended the superiority of adjudication by trial on the basis that it offered procedural safeguards to the equal rights of participation of each party, insisting on the importance of procedural justice, not only to secure rights for the benefit of the individuals, but also to make sure the spirit of the law is respected.[15] The adversary system is a pillar of the judicial branch of power, whose role is to protect individual rights in public and private disputes, but also to review rules and regulations adopted by the majority to make sure they do not entrench on individual rights and freedoms.[16]

In child protection as in other fields such as criminal law, the judicial process is considered the main safeguard against the intrusiveness of the State, but also a process to guarantee that the rights of children, including the right to protection, will be respected. Since child protection is meant to be an exceptional infringement on the private lives of families and the autonomy of parents, the process of judicial adjudication of matters relating to child maltreatment has been instated in the middle of the 20th century, to act as

---

[13] Mackenzie, MacDermott, & Meyerson, *supra* note 10 at 3-4. Again, I am borrowing a philosophical argument to apply it to the judicial system. As with the instrumentalist account, in the introduction to this edited book, Meyerson and al. explain the dignitarian account of procedural justice from a generalized philosophical standpoint, which I am applying about the procedural judicial safeguards, for the reasons explained in note 10.

[14] Monroe H Freedman, "Our Constitutionalized Adversary System" (1998) 1 Chap L Rev 57; Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in James E Fleming, ed, *Getting to the Rule of Law* (New York University Press, 2011) 3.

[15] Owen M Fiss, "Against Settlement" (1984) 93 Yale LJ 1073.

[16] Freedman, *supra* note 14.

a firewall against abuse from the State or from State-mandated agencies or associations.[17] This judicial intervention is deemed necessary given the exceptional powers given to social workers to get information about family matters and make decisions about whether a child should see, live, or have contact with their biological parents, for example. Judicial oversight is meant to act as a mechanism preventing arbitrary or excessive use of those powers. It also serves as a way to make sure that the measures chosen to remedy a situation where the child is endangered are sufficient to protect the child. As such, its role is to ensure that rights protecting the autonomy of the parents and the integrity of the child are respected.

1.2. Critiques of the Adversarial Process in Child Protection

In light of the arguments in favour of adversarialism both from procedural and substantive law, the ethical and moral significance of due process is evident. Respect for the autonomy of individuals demands that each person be heard when it comes to decisions regarding their personal lives. But adversarialism gradually fell out of favour for good reasons, especially in fields such as family law.[18] The fact that family courts in most if not all Anglo-American jurisdictions have made efforts to make the process less adversarial or to promote alternative dispute resolution mechanisms shows that the arguments against the adversary system in the context of family law have won, at least politically.[19] Following

[17] Nico Trocmé et al, "Child Welfare Services in Canada" in Lisa Merkel-Holguin, John D Fluke & Richard D Krugman, eds, *National Systems of Child Protection* Child Maltreatment (Springer, 2019) 27.
[18] Firestone & Weinstein, "In the Best Interests of Children", *supra* note 1.
[19] For example, this is what problem-solving courts in the United States strive to do, see Eileen M Ahlin & Anne S Douds, "The Problem with Problem-Solving Courts: The Black Box Remains Unopened after Thirty Years" in Cassia Spohn & Pauline K Brennan, eds, *Handbook on Sentencing Policies and Practices in the 21st Century* (Routledge, 2019) 339. In many jurisdiction, the judges are often explicitly encouraged by legislation to refer matters to ADR or mediation. For example, this is the case in Australia (see Therese MacDermott, "The Framing of Tribunal Procedures: A Question of Balance or a Participation-Centred Approach" in Denise Meyerson, Therese MacDermott & Catriona Mackenzie, eds, *Procedural Justice and*

the distinction earlier between the instrumentalist and the dignitarian, the arguments against this model of adjudication are, first, that the adversarial system does not produce the best outcomes when it comes to searching for the "truth", and second, that it does not succeed in making parties feel heard and considered.

The instrumentalist argument favours the adversarial system as a truth-finding device. However, as Judge Finkelstein explains, by relying exclusively on the parties' defence of their own self-interests, which tend to distort or obscure the truth more than shine light on it, the adversarial process fails to serve the quest of truth.[20] Besides, to find the truth, the adversarial process relies heavily on the testimony of experts, which can be prone to implicit and explicit biases,[21] and judges are often ill-equipped to arbitrate scientific evidence in court.[22] What is more, in the context of family disputes, establishing an objective truth might not be the most desirable or necessary goal of dispute settlement. Private matters are opaque, tainted with relational expectations. Sometimes individual

---

Relational Theory: Empirical, Philosophical, and Legal Perspectives (Routledge, 2021) 252). It is also the case in Québec, where a reform of the Code of Civil Procedure in 2014 led draft a new preamble to the Code that states that "This Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through appropriate, efficient and fair-minded processes that encourage the persons involved to play an active role." (see *Code of Civil Procedure,* CQLR, c C-25.01, preliminary disposition para 2).

[20] Finkelstein, *supra* note 11.

[21] Dana E Prescott & Tim Fadgen, "Adversarial Systems and Forensic Experts in Child Custody: How About Adding a Hot Tub?" (2019) 32 J Am Acad Matrim Law 117; Nicholas Bala, "Making Better Use of Expert Knowledge in the Family Justice Process: Social Facts, Facts from Experts, Focused Reports, Single Joint Experts & 'Hot-Tubbing'" (2014) Queen's University Legal Research Paper No 031, online: <https://papers.ssrn.com/abstract=2587792>; Jason M Chin, Michael Lutsky & Itiel E Dror, "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges" (2019) 42 Man LJ 21.

[22] Joelle Anne Moreno, "Einstein on the Bench: Exposing What Judges Do Not Know About Science and Using Child Abuse Cases to Improve How Courts Evaluate Scientific Evidence" (2003) 64 Ohio State LJ 531; Nicholas Bala, "Tippins and Wittmann Asked the Wrong Question": (2005) 43:4 Fam Court Rev 554; Nicholas Bala, Rachel Birnbaum & Carly Watt, "Addressing Controversies About Experts in Disputes Over Children" (2017) 30:1 Can J Fam L 71; Ian Binnie, "Science in the Courtroom: the Mouse that Roared" (2007) 56 UNBLJ 307.

perceptions, as skewed as they can be, are themselves facts to be reckoned with, when they determine the positions of the parties.

One example of this limitation of the truth-finding object of trials is in the rules of evidence regarding testimonies. One basic common law rule is that an ordinary witness may only testify to facts.[23] But in child protection contexts, this poses problems for all parties. Social workers usually need to qualify some facts to convince the court that, from a clinical perspective, they represent child maltreatment, but they are not usually considered expert witnesses allowed to state opinions, because they are party to the case.[24] This procedural limitation means that their clinical reading of the situation cannot easily be considered as admissible evidence – technically they can only convey facts, and their opinions will be considered as such. Conversely, parents and children exercising their right to be heard may not only want to testify about what factually happened to them, but how they interpret it and what their wishes are concerning the next steps.[25] The admissibility of this kind of evidence relies on the assumption that the subject-matter (determining the best interests of the child, most of the time) does not require special knowledge.[26] This is a contentious postulation, especially considering the regular use of child development experts in family matters.[27]

---

[23] It is also a rule in Québec's law of evidence, see *Civil Code of Québec*, CQLR c CCQ-1991 s 2843.
[24] Kenneth Burns et al, "What Social Workers Talk About When They Talk About Child Care Proceedings In The District Court In Ireland" (2018) 23:1 Child Fam Soc Work 113; Clare Tilbury, "Obtaining Expert Evidence in Child Protection Court Proceedings" (2019) 72:4 Aust Soc Work 392.
[25] Some jurisdictions may decide that rules of evidence do not apply in some situations. This is the case for example in Idaho, like in many types of hearings related to child protection: Elizabeth Brandt, "Child Protection Bench Cards for Idaho Judges" (2018) 67.
[26] Sydney N Lederman, Michelle K Fuerst & Hamish Stewart, *The Law of Evidence in Canada*, sixth ed (LexisNexis, 2022) at chapter 12: "Opinion Evidence".
[27] Bala, "Tippins and Wittmann Asked the Wrong Question", *supra* note 22.

Second, it is generally acknowledged that the adversarial process, in no small part through the feature of cross-examination, damages the relationships they are arbitrating when it comes to family matters and even more in child protection.[28] In that sense, it fails to accomplish what the dignitarian posture holds as its primary function: respect for each party. If we accept the argument that interpersonal, social, and institutional relationships are constitutive not only to an individual's wellbeing but also to its sense of self (as most relational theories demonstrates and as the theory of recognition postulates), then an adjudication process that harms relationships also harms the parties in the same breath.[29] Therefore, saying that we have to preserve the adversarial nature of judicial processes to respect the dignity of each party, by recognizing their right to be heard, is not a sound argument. If we accept the idea that relationships are foundational to personal autonomy, the goal of respecting the dignity of all parties has to be fulfilled in a way that acknowledges the relational nature of each party's interests, and that does not do further harm to these relationships.

2. Relational Procedural Law in Child Protection

In this part, I present the arguments for a relational approach to procedural law. I then argue that the attempts at a relational theory of procedural justice and procedural law

---

[28] Karin Aronsson, "Negative Interrogatives and Adversarial Uptake: Building Hostility in Child Custody Examinations" (2018) 136 Journal of Pragmatics 39; Frank E Vandervort, Robbin Pott Gonzalez & Katlheen Coulborn Faller, "Legal Ethics and High Child Welfare Worker Turnover: An Unexplored Connection" (2008) 30:5 Child Youth Serv Rev 546; Firestone & Weinstein, "In the Best Interests of Children", *supra* note 1.

[29] I do not expand much on this aspect since, as I stated earlier, the arguments about the harms of the adversary system in the context of personal relationships have been numerous and tend to now form a strong consensus in the literature. The multiplication of works on non-adversarial law, therapeutic jurisprudence and problem-oriented courts demonstrates this fact. For an example of the wide acceptance of the argument, it is a central premise of edited works like Lyn R Greenberg, Barbara J Fidler & Michael A Saini, eds, *Evidence-Informed Interventions for Court-Involved Families: Promoting Healthy Coping and Development* (Oxford University Press, 2019).

fail to take into account the impact of substantive law on procedural law, and therefore falls short of presenting a genuine alternative to the adversarial system.

2.1. Relational Procedural Justice and Law

In response to the problems of traditional procedural justice, a relational approach to procedural justice tries to reconcile the respect for agency (as a relational version of autonomy), without subscribing to the argument that adversarial process is the only or best way to accomplish that goal, or that discovering an objective truth is a necessary step of applying social norms and resolving conflicts. Meyerson et al., in their introduction to a collection of essays on relational approaches to procedural justice, describe the relational approach to procedural justice in those terms:

> […] while a relational account agrees with the dignitarians about the importance of respect, it rejects their emphasis on rational agency, arguing for an expanded conception of agency as social, embodied, and emotional as well as rational. It also highlights the critical role of social relationships in fostering respect and self-respect, and the ways in which these attitudes can be undermined by social injustice, oppression, and inequality.[30]

As Meyerson and Mackenzie point out, there "is a large body of empirical research in social psychology that investigates people"'s perceptions of what makes procedures just".[31] They describe three main findings in this field. First, people care as much about the process by

[30] Meyerson and al., "Introduction", in Mackenzie, MacDermott, & Meyerson, *supra* note 10 at 4.
[31] Denise Meyerson & Catriona Mackenzie, "Procedural Justice and the Law" (2018) 13:12 Philosophy Compass, online: <https://onlinelibrary.wiley.com/doi/10.1111/phc3.12548> at 6.

which a justice decision is taken as they care about the result. This finding challenges the assumption about the relative importance of self-interest and of "winning" in the liberal adversarial context.[32] Second, "people evaluate procedures from an interpersonal and relational perspective, in terms of their capacity to enhance the quality of their interpersonal interactions with authorities, this being something that they value for its own sake".[33] This means that the relational aspect of the procedure itself is its main value. Third, perception of procedural fairness leads to better compliance with the decisions, more trust in the authorities and reduces recidivism in criminal context.[34] In consequence, the authors conclude that relational procedural justice should aim to: foster faith in legal institutions and willingness to comply with the decisions; give individuals the sense that their viewpoint was considered; provide support for individuals to fully take part in the decision-making process.[35] To evaluate those objectives, the fairness of procedures should be judged on its ability to create four factors of justice: voice, respect, trustworthiness and neutrality.[36] Mackenzie and Meyerson base these values on about well-established research in social psychology developing relational models of procedural justice.[37]

While I subscribe to the description suggested earlier of relational procedural justice and its named objectives, I believe relational approaches to procedural justice suffer

---

[32] *Ibid* at 7.
[33] *Ibid*.
[34] *Ibid*.
[35] Mackenzie, MacDermott, & Meyerson, *supra* note 10 at 9.
[36] Catriona Mackenzie, "Procedural Justice, Relational Equality, and Self-Respect" in Denise Meyerson, Therese MacDermott & Catriona Mackenzie, eds, *Procedural Justice and Relational Theory* (Routledge, 2020) 194; Meyerson & Mackenzie, *supra* note 31.
[37] The general approach they suggest is grounded in the work of Lind and Tyler: E Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988); Tom R Tyler & E Allan Lind, "A Relational Model of Authority in Groups" in *Advances in Experimental Social Psychology* (Elsevier, 1992) 115. The specific enumeration of those factors is inspired by Tom R Tyler, "Procedural Justice and the Courts" (2007) 44:1/2 Ct Rev 26 at 30.

from two main problems. The first problem is the same as the one faced by relational theories of substantive law: they lack a unifying normative principle. This will be addressed in the fourth and last part of the chapter, since I argue that the theory of recognition can, once again, constitute a theoretical tool to construct a normative argument on the relational components of procedural justice, as an extension of substantive legal norms.

However, the second problem is deeper. The relational approach to procedural justice suggested by Meyerson and Mackenzie fails to distinguish itself from the instrumentalist and dignitarian accounts it intends to critique. Mackenzie and Meyerson argue that relational procedural justice relies on voice, respect, trustworthiness and neutrality;[38] it is hard to see in what sense those values differ from what the proponents of a liberal adversarial system of law strive for. The *audi alteram partem* principle and the principle of judicial impartiality are regarded as rules of natural justice and foundational values of Anglo-American judicial systems. The liberal legal understanding of due process aims exactly at respecting a party's autonomy by giving them a right to be heard, and at offering guarantees of trust and neutrality in the adjudication process through rules of procedure and of evidence, and the independence of the judiciary. In sum, if the system fails to give a voice to parties and to make them feel respected, it is not because it does not aspire to it; it is because its design is flawed.

To achieve the goal of rejecting the "emphasis on rational agency" and "arguing for an expanded conception of agency as social, embodied, and emotional as well as rational" in procedural justice,[39] we need to understand how the process of resolving legal dispute is

[38] *Idem.*
[39] Meyerson and al., "Introduction", in Mackenzie, MacDermott, & Meyerson, *supra* note 10 at 4.

intimately tied to the substantive rules of law. In fact, the adversarial nature of the handling of child maltreatment under child protection statutes is tied to the way the parent-child relationship is defined and to the cultural understanding of the role of the community in the case of child maltreatment. The legal conceptual framework of child protection posits the parties as adversaries by default.

2.2. From Dispute Creation to Dispute Settlement

The adversary system is an extension of the traditional liberal foundations of the Anglo-American legal system. Since child protection is the chosen type of societal response to the phenomenon of child maltreatment in Anglo-American jurisdictions, it obviously was designed within this ideological framework. Adversarialism, as part of the larger liberal legal culture, structures the child protection paradigm. Child protection statutes are specifically designed in an adversarial manner. They treat child maltreatment as an individualistic phenomenon, meant to be handled and remedied case by case, relying on the individual responsibility of the parents to care for children and address any issues that could impair their ability to fulfill their duties.[40] Those statutes are meant to reflect the power differential between the State and the parties, and are geared towards the protection of both parent's and children's rights. For example, in Québec, the YPA has been recently amended to reiterate the principle consecrated in the Civil Code that the responsibility to educate and supervise children rests primarily with the parents.[41] Furthermore, the recently amended YPA aims to reaffirm more clearly the two opposing forces that shape child

[40] Nigel Parton, "Addressing the Relatively Autonomous Relationship Between Child Maltreatment and Child Protection Policies and Practices" (2020) 3:1 Int J Child Maltreat 19; Susan B Boyd, "Autonomy for Mothers? Relational Theory and Parenting Apart" (2010) 18:2 Fem Leg Stud 137.
[41] YPA s 11.4.

protection intervention. On the one hand, the State's responsibility towards vulnerable children is stated in section 2 ("The purpose of this Act is to protect children whose security or development is or may be considered to be in danger. […]"). On the other hand, the enunciation of children's and parents' rights, is now gathered in the second chapter of the YPA (entitled "General Principles, Rights of the Child and of his Parents and Parents' Responsibilities"), in a bid to underline its importance.[42] This structure shapes situations of child maltreatment as though they oppose parents' rights and duties, children's rights, and State responsibility, in the adversarial context where one or two parties "win" at the expense of the others.

In this perspective, courts give the chance to parents and children who disagree with the assessment and recommendations of child protection agencies to be heard in court and to defend their right to be free of outsider intervention when it comes to family life. The judicial system, by offering due process to families, safeguards their autonomy, understood in the traditional liberal sense. In consequence, any reform of procedural law that aims at moving away from adversarial adjudication cannot effectively change the adversarial nature of child protection cases, if it does not challenge the very notion of child protection and the liberal concepts that underlie it. A child protection statute does not only define what a child in need of protection is and the measures that can be taken by the State to remedy the situation; it defines the parameters of the legal conflicts that will arise from applying the law it creates.

[42] YPA chapter 2; Bill 15, An Act to Amend the Youth Protection Act and Other Legislative Provisions, 2nd Sess, 42th Leg, Québec, 2021 s 4, 7-15.

To understand the persistence of the adjudicative model and how it influences alternative dispute resolution mechanisms (or indeed, why they are considered *alternative* and not could not become mainstream), it is necessary to understand how legal norms come to create the disputes. De Sousa Santos, in "The Law of the Oppressed", distinguishes three phenomena at play in dispute contexts: dispute creation, dispute prevention, and dispute settlement.[43] He explains that those phenomena are intrinsically related: "the fact that settlement of disputes in one society is dominated by adjudication ("win or lose") and in another by mediation ("give a little, get a little") will not be fully explained until we analyze the different structures and processes of dispute creation and prevention in those societies".[44] This distinction is useful to demonstrate how substantive law and procedural law are two sides of the same coin, and not two distinct sets of norms. I argued in chapters 2 and 3 that the Anglo-American law is an ideologically situated system: legal norms function under the assumptions of methodological individualism and rationalism. This posture informs the nature of legal conflicts and their form. The adversarial nature of child protection judicial procedures do not stem only from procedural law. The structure and content of substantive law and the rules of legal interpretation all contribute to this approach to dispute settlement, because they define what the conflict or the dispute will be.[45]

---

[43] Boaventura De Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada" (1977) 12 Law Soc Rev 5 at 11.
[44] *Ibid*.
[45] The widely discussed critical essay on adversarialism by Carrie Menkel-Meadow makes a very similar argument: Carrie Menkel-Meadow, "The Trouble With the Adversary System in a Postmodern, Multicultural World" (1996) 38 Wm & Mary L Rev 5.

Before a legal dispute arises, there are two distinct phenomena: a factual situation and legal norms. For a dispute to be considered a legal one, the law has to regard the facts as legally contentious. The way the law describes what is legally at stake defines what constitutes the dispute, and how it can legally be resolved. In child protection cases, the factual situation is not necessarily experienced as conflictual by the parties. Often, a parent does not recognize their behaviour or omissions as harmful, or the child does not have any measure of what could be different in the way they are brought up, and therefore does not experience their relationship with their parent as abusive or neglectful.[46] From the perspective of those parents and children, their situation is just a parent-child relationship with all its complexities and difficulties, and as such, it cannot be considered as a matter of child protection. And if the parents and the child, on their own or through social intervention, come to recognize that the nature of their relationship is actually a form of child maltreatment, or that at least it is dysfunctional enough that they need help, and come to an agreement with the social worker about how to try to remedy the situation, then the case does not go to court, and there is no legal dispute. The social intervention can unfold without the use of the coercive power of the law. It only becomes a matter of legal disputes if child protection services are notified of a situation of maltreatment, decide to take action, and the child or the parent disagree with their assessment or their proposed plan of action. Every legal dispute is created by the law, not by the facts themselves. Therefore, legal disputes in child protection systems mainly arise from the legal definition of child maltreatment (parties debating if the child in need of protection) and the definition of the

[46] Robyn Munford & Jackie Sanders, "Shame and Recognition: Social Work Practice with Vulnerable Young People" (2020) 25:1 Child Fam Soc Work 53; Wendy Haight et al, "'Basically, I Look At It Like Combat': Reflections on Moral Injury by Parents Involved with Child Protection Services" (2017) 82 Child Youth Serv Rev 477.

measures the State is empowered to apply to remedy it (parties debating the measures to be applied, for example, if the situation warrants that a child be removed from its biological family).

Consequently, the legal concept of child protection, the vocabulary that legally defines the parent-child relationship through rights and responsibilities, and the framework that defines the role of the State in that relationship are all essential elements that set up the legal dispute for an adversarial process of adjudication. A parent has a responsibility to care for a child following a certain legal threshold. If they do not meet that threshold, the State intervenes, and the child can come in (through legal representation) to defend its rights against their parents or the State. The role of the social worker representing the State is to investigate, build evidence to prove that the child is endangered and that the measures they propose are proportionate to the situation. What will be debated is whether the facts meet the threshold of protection or whether the measures are appropriate.

Even before child protection cases come to court, they are built as a zero-sum game. In all cases, when the case goes to court, one party is bound to lose its case, because the terms of the debate are set by the law in a clear-cut manner: either the child is maltreated or not, and the set of solutions possible when they are maltreated is usually limited.[47] It also undeniably sets parents and social workers as adversaries even before they disagree, since it is legally inevitable that if they ever come to disagree, both of them will have to prove their case in front of a judge. Studies show that parents distrust social workers working for child protection because they know that they can forcefully take action against

[47] An example of this is that in Québec, the YPA limits the powers of the tribunal in ordering remedies to the situation. YPA s 91 exhaustively lists the possible orders to be made to protect the child.

their will, even if a court arbitrate those actions.[48] The inequality of power and the threat of judicialization is always looming. Even worse, the conflict can oppose a child and its parents if they do not share the same opinion about their situation.

3. Alternatives to the Adversarial Model of Adjudication and Their Limitations

In this part, I survey ways in which Anglo-American jurisdictions have tried to make child protection less adversarial in the past three decades, to evaluate how successful these reforms have been at resolving the issue of adversarialism. In light of the adversary system's shortcomings, many propositions have been made in order to reform the legal process. I will critically analyze two types of endeavour: the creation of problem-solving courts, inspired by a literature current named "therapeutic jurisprudence", and the referral of cases to alternative dispute-resolution mechanisms. For both of them, I explain the gains and the limitations observed by commentators. I demonstrate that their limitations are function of the argument presented in the second part, that is, that changing the adjudication or dispute resolution process cannot change the structure of the dispute. In that sense, problem-solving courts and alternative dispute resolution mechanisms are still ensnared in the boundaries of the legal definitions of what is at stake in the conflict. In child protection cases, it means that they still lack the ability to resolve the structural opposition of the State *versus* the parents and/or the child, and to address in a systematic manner the causes and relational impacts of child maltreatment on all parties.

---

[48] Haight et al, "'Basically, I Look At It Like Combat'", *supra* note 46; Annie Lambert, "L'intervention sociojudiciaire en contexte de protection de la jeunesse: points de vue de parents" (2021) 152 Intervention 51.

3.1.Therapeutic Jurisprudence and Problem-Solving Courts

Therapeutic jurisprudence, an approach developed by David Wexler and Bruce Winick in the late 1980s and 1990s, has influenced the way family matters, and especially child protection matters, are adjudicated in Anglo-American jurisdictions.[49] This approach to legal issues and processes originated in concerns about mental health law, but came to influence many other fields, including family law, criminal law and even constitutional law.[50] The principle of therapeutic jurisprudence is to treat "law as a therapeutic agent",[51] that is, that the substantive rules, the practice and the procedures of law should aim at the psychological wellbeing of individuals. In this sense, it is similar to the relational approach to procedural justice. In the latter, authors emphasize the psychological impacts and ethical significance of procedural justice in itself, not just from a consequentialist point of view, but as a morally significant experience for the subjects of the law.[52] Restorative justice, which is gaining momentum in criminal law, is an example of a therapeutic use of the legal system: it seeks to heal the harm done by a criminal behaviour.[53]

Concretely, in the United States, the growing influence of therapeutic jurisprudence coincided with the creation of "problem-solving courts". Those courts were designed as an

---

[49] Michael L Perlin, "'Changing of the Guards': David Wexler, Therapeutic jurisprudence, and the Transformation of Legal Scholarship" (2019) 63 Int J Law Psychiatry 3; Michael L Perlin, "'Have You Seen Dignity?': The Story of the Development of Therapeutic Jurisprudence" (2017) 27 NZULR 1135.
[50] Vicki Lens, "Against the Grain: Therapeutic Judging in a Traditional Family Court" (2016) 41:03 Law Soc Inq 701; David B Wexler, "Therapeutic Jurisprudence and the Criminal Courts" (1993) 35 Wm & Mary L Rev 279; Nathalie Des Rosiers, "From Telling To Listening: A Therapeutic Analysis Of The Role Of Courts In Minority-Majority Conflicts" (2000) 37:1 Ct Rev 54.
[51] Following David B. Wexler's book: David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990).
[52] Mackenzie, MacDermott, & Meyerson, *supra* note 10.
[53] Suzanna Fay-Ramirez, "Therapeutic Practice through Restorative Justice: Managing Stigma in Family Treatment Court" (2016) 16:3 QUT Law Review 50; Michael S King, "Restorative Justice, Therapeutic Jurisprudence And The Rise Of Emotionally Intelligent Justice" (2008) 32 Melb UL Rev 1096.

alternative to traditional courts to deal with people cycling in and out of courtrooms for problems such as drug addiction (the first problem-solving court being a "drug court" in Miami-Dade County, Florida).[54] "Drug courts and subsequent therapeutically grounded problem-solving courts serve as the arbiter of two competing needs: supervision provided by the corrections arm and treatment delivered by human services."[55] Today, these courts are numerous and are part of the American and Canadian systems. In the United States, problem-solving courts are found as drug courts integrated with family and criminal matters, domestic violence courts, veteran treatment courts, etc.[56] In Canada, they can be found as aboriginal courts, domestic violence courts, community courts, mental health courts, youth courts and drug courts.[57] In Canada, the National Judicial Institute published in 2005 a voluminous handbook (revised in 2011) entitled "Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice", advocating for judges to incorporate "problem-solving skills" in the traditional courtroom.[58] Jane M. Spinak argues that the American Children's Court, now part of the Family Court, was the original "problem-solving court", since its concerns was with the needs of the child, not with the offence the parent committed.[59] This model of court is today a standard in Anglo-American jurisdictions of child protection.[60] In Québec, for example, the Court of Québec has a Youth

---

[54] Ahlin & Douds, *supra* note 19.
[55] *Ibid* at 342.
[56] National Institute of Justice website, "Problem-Solving Courts", online: <https://nij.ojp.gov/topics/articles/problem-solving-courts>.
[57] *Problem-solving in Canada's Courtrooms A Guide to Therapeutic Justice*, by Susan Goldberg (National Judicial Institute, 2011); Sherry L Van de Veen, "Some Canadian Problem Solving Court Processes" (2004) 83 Can B Rev 91; Emily Slinger & Ronald Roesch, "Problem-Solving Courts in Canada: A Review and a Call for Empirically-Based Evaluation Methods" (2010) 33:4 Int J Law and Psychiatry 258.
[58] Goldberg, *supra* note 57.
[59] Jane M Spinak, "Romancing the Court" (2008) 46:2 Fam Ct Rev 258.
[60] Ahlin & Douds, *supra* note 19; Goldberg, *supra* note 57; "Problem-Solving Courts", online: *Australasian Institute of Judicial Administration* <https://aija.org.au/research/australasian-therapeutic-jurisprudence-clearinghouse/problem-solving-courts/>. In the UK, there are now Family Drug and Alcohol Courts, and the Youth Courts do have a problem-solving approach: Gillian Hunter & Jessica Jacobson, *Exploring*

Division, which is considered a specialized court. The YPA excludes some civil rules of procedure to allow the judge to adopt a problem-solving approach.[61] Judges also have a wider mandate, which allows them, for example, to require more evidence than provided by the parties.[62] Furthermore, section 89 YPA states that "The tribunal must explain to the parties, especially the child, the nature of the measures envisaged and the reasons justifying them. It must endeavour to obtain the assent of the child and of the other parties to the measures." This is one of the main features of the problem-solving process: trying to get participants to accept the judicial decision, to get them to cooperate in order to solve the underlying problem.[63]

There have been two interestingly opposite trends of literature regarding therapeutic justice and problem-solving courts. The defenders generally take a more reformist approach to the court system, while the opponents question the very value of problem-oriented courts for complex social issues. Defenders argue that as an iteration of therapeutic justice, problem-solving courts have the most potential to remediate the problems of adjudication in issues concerning vulnerable people, such as child protection.[64] Problem-solving courts are defined by their mission and their practices. On the one hand, they aim at solving fundamental problems such as mental health, drug use, or violence, instead of punishing them.[65] In that sense, these courts have been an attempt to institutionalize therapeutic jurisprudence's project: that law and judicial processes become part of the

Procedural Justice and Problem-Solving Practice in the Youth Court, (HM Inspectorate of Probation, 2021).
[61] YPA s 85.
[62] YPA s 77.
[63] Goldberg, *supra* note 57.
[64] Lens, "Against the Grain", *supra* note 50; Penelope Welbourne, "Adversarial Courts, Therapeutic Justice and Protecting Children in the Family Justice System" (2016) 28:3 Child & Fam L Q 19.
[65] Goldberg, *supra* note 57.

solution to big societal problems, instead of exacerbating them. The fact that tribunals hearing child protection matters are constituted according to civil legislation and not criminal law, and that the involvement of the courts aims at making sure that situations of endangerment of children are remediated, make them, in a sense, intrinsically problem-solving courts.[66] But problem-solving is more than an institutional structure to address legal issues with therapeutic aims, it also is an alternative approach to traditional adjudication. Instead of aiming at resolving disputes, it aims at addressing the problem underlying the dispute, and it is supposed to emphasize people's needs and interests and their interdependence in a more collaborative manner, instead of focusing on individual rights and responsibilities in an adversarial context.[67]

Studies show that problem-solving courts do have a general positive effect compared to traditional courts.[68] As Vicki Lens describes, "outwardly, specialized problem-solving courts and traditional courts look the same; both take place in a courtroom with the usual actors—judges, lawyers, and respondents".[69] She goes on to argue that, nevertheless, they actually are more different than alike, since problem-solving courts focus on providing help and treatment instead of guilt condemnations, and sanctions are used "as an educational and reflective tool rather than a punitive one".[70] However, problem-solving courts have many shortcomings. Indeed, critics point out many structural problems with this interpretation of therapeutic jurisprudence. I retain two arguments

[66] Spinak, *supra* note 59. The idea that family courts are the original problem-solving courts (and therefore suffer the same pathologies) is also defended in the book Jane C Murphy & Jana B Singer, *Divorced from Reality: Rethinking Family Dispute Resolution* (NYU Press, 2015).
[67] Goldberg, *supra* note 57.
[68] Lens, "Against the Grain", *supra* note 50; Suzanna Fay-Ramirez, "Therapeutic Jurisprudence in Practice: Changes in Family Treatment Court Norms Over Time" (2015) 40:1 Law Soc Inq 205–236.
[69] Lens, "Against the Grain", *supra* note 50 at 702.
[70] *Ibid* at 703.

against them that stand out: first, they are too dependent on the problem-solving and general social and emotional skills of individual judges, and second, they tend to replicate the problems of traditional courts, since they are still relying on judicial answers to social problems.

The first critique is that problem-solving courts tend to rely too much on the attitude, behaviours and skills of individual judges.[71] The principles of therapeutic justice are seemingly in conflict with the traditional characteristics of a judge, who needs to be impartial, neutral, distant. Therefore, the way judges apply principles of therapeutic jurisprudence in their handling of cases and the management of their courtroom differs widely.[72] The pull of traditional adjudication in problem-solving courts seems to be strong. For example, a study showed that while some judges positively acknowledged social workers in child protection cases in a way that fostered collaboration, others were critical and punitive, "engaged in antagonistic dialogues with caseworkers, speaking in condescending and paternalistic tones while reprimanding and criticizing them", confounding them with the agency they represent.[73] Furthermore, child protection cases numbers have been exploding in every Anglo-American jurisdiction over the past decades, and courts have little to no control over the surge in volume.[74] Yet, the bureaucratic pressures of everyday courtroom practices, the increasing number of complex cases and high turnover of personel can erode the principles and values of therapeutic justice in the

[71] *Ibid*.
[72] *Ibid*.
[73] Vicki Lens, Colleen Cary Katz & Kimberly Spencer Suarez, "Case Workers in Family Court: A Therapeutic Jurisprudence Analysis" (2016) 68 Child Youth Serv Rev 107 at 112.
[74] Parton, *supra* note 40; Spinak, *supra* note 59.

case management and regress back to more traditional methods of adjudicating.[75] In the context of problem-solving courts, this can lead to an approach centred more on social control than on therapeutic outcomes.[76]

The second argument against problem-solving courts is that they operate as if they were the only institutions capable of addressing the individual manifestations of complex social issues.[77] In a sense, this argument is part of the general thesis that, as long as the law sets a problem up to be handled as a legal problem, with parties competing for a specific outcome, it will focus on individual rights and duties and operate on a truncated view of the issue at stake. As we have seen in the first part of this chapter, the mere fact that problem-solving courts are still courts creates an adversarial setting. Problem-solving courts adjudicate issues defined by substantive law as contentious, with a limited set of solutions also defined by the substantive law, where each party argues for what they determined is their position on the case. The parties are still structurally opposed, and their debate is arbitrated by an individual entrusted with the authority to impose decisions against a party's will. As long as substantive legal norms assume that individuals act according to either their rational duty or their selfish interests, it will generate legal disputes that sets them as opponents to each other or to the State (as the representative of a collective interest). As Jane M. Spinak argues, the inequality of power between parties creates conditions in which "defenders", that is, lawyers representing parents or a child, have no incentive to consider themselves as part of a collaborative endeavour.[78] They are likely to

[75] Fay-Ramirez, *supra* note 68.
[76] *Ibid*.
[77] Ahlin & Douds, *supra* note 145; Spinak, *supra* note 59.
[78] Spinak, *supra* note 59.

prefer a traditional adversarial system that, from their perspective, would protect better their clients' rights.[79]

Since problem-solving courts are trying to address wide social problems with limited legal tools, I argue that they fail in two main ways. First, they fail to address the deep-rooted causes of the problem they are trying to solve. In the case of child maltreatment, as we have seen in chapter one, the causes and factors surrounding child maltreatment are multi-levelled and cannot be addressed only in an individualized manner. Problem-solving courts can only address a problem as it is defined by law, and child maltreatment, a public health and societal issue, is defined by law as a failure of parents to fulfill their legal duties. They will therefore seek individual solutions to a problem that often requires a relational and collective answer. They are ill-equipped to understand the emotional resistance of parents or children, the traumas of parents and children, the complex family dynamics at play, and the role of the community in supporting both the parents and the child. Second, they have no power over the services and treatment they prescribe.[80] The availability of services to treat adequately the causes and consequences of child maltreatment is entirely independent from the power of judges and courts. Therefore, they do not have the means to ensure that the goals of a therapeutic jurisprudence approach are met once they finalize their judicial order.

[79] Jane M Spinak, "Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts" (2003) 40 Am Crim L Rev 1617.
[80] Spinak, *supra* note 59.

3.2. Alternative Dispute Resolution Mechanisms and Child Protection Litigation

Other than problem-solving courts, alternative dispute resolution mechanisms have been considered one of the main solutions to decrease the use of adversarial practices in child protection law.[81] The case for alternative dispute resolution processes in child protection matters has been well established in the specialized literature for decades, and encouraged in many jurisdictions for more than thirty-five years.[82] The argument is simple and convincing: mediation and other alternative dispute resolution mechanisms create the therapeutic impact of the increased participation of the parties in finding lasting solutions. The insistence on alternative dispute resolution in the context of a field like child protection law, who is already adjudicated by specialized or problem-solving court, is in a way an admission of the failure of specialized tribunals to offer a real alternative to adversarialism. Since family courts and children's courts have always been a sort of problem-solving court,[83] if problem-solving courts were truly non-adversarial, the need for alternatives would be less pressing.

Although alternative dispute resolution mechanisms are generally widely accepted as best practice for most child protection cases, the literature on their specific use in that field is very limited. The idea of implementing those methods of conflict resolution to child

---

[81] As we have seen earlier in this chapter, this is now true of most if not all fields of law. See note 29 of this chapter.

[82] Joanne Wildgoose, "Alternate Dispute Resolution of Child Protection Cases" (1987) 6:1 Can J Fam L 61; Rosemary Sheehan, "Alternative Dispute Resolution" in *Magistrates' Decision-Making in Child Protection Cases*, 1st ed (London, UK: Routledge, 2001) 183. In California, for example, the California Welfare and Institution Code was amended in 1997 to include a section enjoining juvenile courts to encourage the development of a child welfare mediation program: Kelly Browe Olson, "Family Engagement and Collaborative Decision-Making Processes Provide Multiple Benefits in Child Welfare Cases" (2020) 58:4 Fam Ct Rev 937 at 939.

[83] Spinak, *supra* note 59; Murphy & Singer, *supra* note 66.

protection has been around for more than thirty years,[84] but they are still not used as widely and systematically as their proponents would like them to be. Although there is little data on the subject, the overall landscape of the literature on courts and child protection show that, despite significant and widespread efforts to make room for non-adversarial or "less-adversarial" processes, alternative dispute resolution mechanisms are still not the norm. The traditional adversarial system, or at least a version of it through problem-solving courts, remains the last resort for highly disputed cases.[85] According to Justice Leonard Edwards, a retired judge who served in the Santa Clara County, California for over twenty years, one of the main barriers for the use of mediation in child protection cases is that alternative dispute resolution methods are at odds with the legal culture, since the legal training focuses on the adversarial process.[86] This diagnosis seems to be shared in many jurisdictions. Researchers in British Columbia surveyed the implantation of a mediation program in child protection over a period of eleven years. The initial resistance of the lawyers and judges to the program was as strong as that of the families, and the authors of the study concluded that the way the program was implemented was even more fundamental than the content of the program itself.[87] In a study on child protection mediation program, participants noted that lawyers generally do not have working understanding of the role of mediation and what can be mediated or not.[88] Non-adversarial

---

[84] Wildgoose, *supra* note 82.
[85] Nicholas Bala & Hon Marjorie A Slabach, "The Role of Courts in Supporting Therapeutic Interventions" in Lyn R Greenberg, Barbara J Fidler & Michael A Saini, eds, *Evidence-Informed Interventions for Court-Involved Families: Promoting Healthy Coping and Development* (Oxford University Press, 2019) 19.
[86] Leonard Edwards, "Child Protection Mediation: A 25-Year Perspective" (2009) 47:1 Fam Ct Rev 69.
[87] M Jerry McHale, Irene Robertson & Andrea Clarke, "Building a Child Protection Mediation Program in British Columbia" (2009) 47:1 Fam Ct Rev 86.
[88] Rebecca Murphy, *Beyond The Courtroom Door: Exploring The Feasibility Of Child Protection Mediation In Ireland* (Doctor of Philosophy (Ph.D.) in Law, Maynooth University, National University of Ireland Maynooth, Department of Law, 2021) [thesis unpublished] at 211.

processes involve not only different processes, but changes completely the roles of lawyers and judges.[89] Asking jurists to take part in non-adversarial processes takes them out of their preconceived roles in the legal system. Lawyers are trained to be "zealous advocates" of their clients, not to help their client bend their positions to reach a consensus.[90] And in child protection matters, judges' role is to weigh the best interests of children, not to arbitrate conflicts between a social worker and families.[91]

But the main problem with alternative dispute resolution is caused by the unequal distribution of powers between the parties and the paramountcy of the best interests of the child. On one hand, mediation between a social worker representing the State and a parent and/or a child in a situation of child maltreatment is skewed in terms of the balance of powers. As Jane C. Murphy points out, this "'new paradigm's emphasis on resolving disputes through private agreements, and the limited role of courts in scrutinizing those agreements, assumes parties have sufficient personal and financial resources to support effective participation in consensual dispute resolution processes".[92] On the other hand, in the case of child protection matters, it also assumes the capacity of the parties to put the best interests of the child first. There is a common and understandable fear that mediation is not appropriate for serious child maltreatment cases and that it would not result in the promotion of the child's best interests.[93] Since the very nature of mediation is that parties need to compromise to reach an agreement, the concern that this process could lead to a

[89] Deanne M Sowter, "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor YB Access Just 401. It also is a conclusion reached by Sheehan, *supra* note 82.
[90] Spinak, *supra* note 79.
[91] This rigidity of the roles of lawyers and judges even in mediation contexts is noted by Robert Leckey, "Child Welfare, Indigenous Parents, and Judicial Mediation" (2022) 49 J Law Soc 151at 161-162.
[92] Murphy, *supra* note 2 at 636, citing Murphy & Singer, *supra* note 66 at 74-75.
[93] Edwards, "Child Protection Mediation", *supra* note 86.

diluted intervention when it comes to the best interests of the child is reasonable. This is why in most child protection mediation programs, the question of whether a child is in need of protection or not is usually not debated through mediation, which greatly limits its scope.[94] The mediation then can only determine the measures to be taken to remedy the situation, and cannot be used when there is a dispute about whether an intervention is needed or not.

Nonetheless, in the present system where the alternative is a highly legalistic court process, mediation and other alternative dispute resolution processes are still more likely to foster collaboration between social services and the families than court-imposed orders.[95] Parents are broadly satisfied by the use of child protection mediation, and it has been shown to be more efficient in settling disputes in a way that promotes the wellbeing of the child than traditional court proceedings.[96] It is also significant that respect for Indigenous culture in child protection matters has led to the adoption, in some jurisdictions, of alternative dispute resolution processes such as family group conferencing, which have commonalities with the traditional decisional processes of Indigenous communities.[97] The distinct Indigenous lifeworld views create a different understanding of what is at stake and how to resolve it, emphasizing the partiality of the liberal conception of legal conflict and

---

[94] Murphy, *supra* note 88 at 211.
[95] Olson, *supra* note 82.
[96] *The Impact of Child Protection Mediation In Public Law Proceedings on Outcomes for Children and Families: A Rapid Evidence Review*, by Emma Retter, Catrin Wallace & Judith Masson (London: Nuffield Family Justice Observatory, 2020).
[97] Sarah Ciftci & Deirdre Howard-Wagner, "Integrating Indigenous Justice into Alternative Dispute Resolution Practices: A Case Study of the Aboriginal Care Circle Pilot Program in Nowra" (2012) 16:2 Aust Indig Law Rev 81; Tara Ney, Carla Bortoletto & Maureen Maloney, "Strategies to Revive Traditional Decision-Making in the Context of Child Protection in Northern British Columbia" (2020) 7:2 FPCF Rev 60.

adjudication.[98] In contrast with the Western approach that emphasizes agreement between individuals parties, "Indigenous approaches to addressing conflict are more accurately described as conflict transformation in that they seek to address the conflict in ways that heal relationships and restore harmony to the group".[99] By consequence, its treatment of disputes surrounding child maltreatment is fundamentally non-adversarial.[100]

Mediation and other alternative dispute resolution approaches can bring parties to change their positions and to come to an agreement. But legal concepts such as parental rights and responsibilities, children's rights and protection, and the State power to enforce those, all amount to an adversarial adjudication process by default. This is a consequence of the demonstration made in the preceding chapter. The legal conception of personal autonomy takes for granted that the interests of each individual are independent of that of others, and that individuals inherently focus on receiving what legal rights describe as their due. This posits individual parties in opposition to the interests of the others, rather than in relation to each other.

The arguments made against the adversarial system are usually, as we saw, based on its consequences: notably, that it does not succeed in elucidating the truth, or that it exacerbates conflict. However, the philosophical critique of the liberal subject and the arguments in favour of a recognitional framework makes a stronger case against adversarialism. If we accept the arguments that the traditional liberal understanding of

---

[98] Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.
[99] Polly O Walker, "Decolonizing Conflict Resolution: Addressing the Ontological Violence of Westernization" (2004) American Indian Q 527 at 528.
[100] Ney, Bortoletto & Maloney, *supra* note 97.

personal autonomy is unfaithful to the reality of how people actually become autonomous and experience autonomy, then it is easier to understand that, beyond its dysfunctions and dire consequences, there are foundational reasons why the adversarial system fails. These reasons are the same as the ones that make the concept of child protection problematic in itself. They are both premised on these liberal assumptions: that personal autonomy means individualistic freedom, that rights are the best conceptual vehicle to protect this autonomy, and that an infringement of rights engages someone's responsibility. Challenging those assumptions creates fractures in the foundations of liberal procedural justice and its inherent adversarialism, in the same way that it shakes child protection systems to their core. In consequence, there are two ways for the relational critique of the legal subject: the first is to understand the intrinsic limits of the current legal system, and the second is to allow the critique to reach its full conclusion, that is, envisioning alternative ways of elaborating and maintaining social norms.

4. The Four Principles of Relational Procedural Justice, and Recognition

In this last part, I demonstrate how a theory of recognition structures a critique of the adjudication system, and orients toward tentative suggestions to remediate key issues.

I explained in detail what I meant by fostering recognition in the context of substantive law in the preceding chapters. In light of the arguments made in this chapter, I suggest that the concept of recognition can, once again, serve as a strong conceptual basis to critically analyze procedural issues of justice, and this can serve as the second part of an analytical framework of child protection based on the concept of recognition. The concept of recognition leads to practices that are usually compatible with the principles of trauma-

informed practices,[101] which, as we have seen in chapter one, are more and more seen as a standard of practice to implement in child protection settings.[102] But the advantage of using the concept of recognition instead of relying on the concept of trauma is that the process of acknowledgment of the other's reality and subjectivity is not mediated by the advent of an external event. The fact that someone exists in the world is enough to engage the moral obligation of others to engage in processes of recognition, without the mediation of the concept of trauma.[103]

To do so, I build on the argument by Catriona Mackenzie, who claims that procedural justice matters as much to citizens as substantive justice because of the relational nature of self-respect.[104] She rests her argument on social psychology research and the concept of "group-value theory", which she describes as contending "that relational concerns are central to people's judgements about procedural justice".[105] "According to the theory, people's sense of self-identity is based on their membership in valued groups, and they are very attuned to their perceived standing or status in such groups."[106] It is essentially the same argument that describes the importance of social recognition for individual autonomy and agency. Mackenzie argues that the legitimacy of procedural justice is produced by a sense of having been treated fairly, relative to a relational understanding of

---

[101] Sarah Katz, "Trauma-Informed Practice: The Future of Child Welfare" (2019) 28:1 Widener Commw L Rev 51.
[102] Lisa Bunting et al, "Trauma Informed Child Welfare Systems—A Rapid Evidence Review" (2019) 16:13 Int J Environ Res Public Health, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6651663/>.
[103] The concept of trauma is certainly useful to understand how events trigger not only suffering but an altering of one's sense of their own subjectivity. But the debates about what counts as trauma, how widespread it is, and what appropriate answer it should trigger weakens its conceptual force as a foundation for durable changes in practices. See Kathryn A Becker-Blease, "As the World Becomes Trauma–Informed, Work to Do" (2017) 18:2 J Trauma & Dissociation 131.
[104] Mackenzie, *supra* note 36.
[105] *Ibid* at 195. She refers to the theory elaborated by Lind & Tyler, *supra* note 37.
[106] Mackenzie, *supra* note 36.

self-respect.[107] I subscribe to this general argument and appreciate the values of relational procedural justice Meyerson and Mackenzie identify following the social psychologist specialized in law Tom R. Tyler (voice, respect, trustworthiness and neutrality)[108]. Nevertheless, I would argue that all of those values need to be enriched by the theory of recognition to retain their relational content. For a relational theory of procedural justice to prove different from the traditional liberal argument, it needs a normative concept such as recognition. The argument made by relational theorists that, when it comes to justice, the process is more important to people than outcomes only takes its full expression when we understand procedural justice as a process of recognition.

To explain this point, let's take the first value: voice. As I pointed out earlier, the idea that each party has a right to be heard is firmly anchored in the traditional liberal principles of procedural justice, through the principle of *audi alteram partem.* If it is to take a relational meaning, it needs to be described as more than the mere fact of having a voice in the process. Tyler originally described the principle of voice as "the opportunity to tell [one's] side of the story".[109] The process of recognition implies that, to be recognized fully as an agent, a person must not only have the chance to voice their perspective and to have it heard, but also to have it listened to. For recognition to happen, there needs to be a hermeneutical stance from the interlocutor, whether the interlocutor is an individual, a social group, or an institution. The voice and the perspective it vehiculates have to be acknowledged as a valuable perspective. Even when people's perspective is in the end

[107] *Ibid*.
[108] *Ibid*. Meyerson & Mackenzie, *supra* note 31.
[109] Tyler, *supra* note 37 at 30.

decided to be wrong or false, they are saying something about the conflict they are in and how it affects them.

For example, a parent who refuses a child's removal needs not only to be heard on his arguments about how the child's best interests is to stay with them; they are also saying something about their relationship to the child, their relationship to the child protection services, and they are voicing a suffering that needs to be addressed. It does not mean that in the end, the decision they hope for will be the one that will be reached. But it does mean that to be heard in a fully relational sense, they also need to feel seen and heard. This can only be done by stepping out of the traditional adjudication of the conflict as it is defined by the law, where each person has a fixated self-interest, and the role of the judge is to ascertain the facts, interpret the law, and decides who wins. It also brings nuances to the problem-solving approach of adjudication and weight to the importance of mediation processes.

The fact that the second principle of procedural justice is respect confirms this interpretation of the importance of voice. In Honneth's theory of recognition, self-respect is the by-product of social recognition. Being acknowledged, not only as an equal status member of a group, community, or society, but as someone who brings unique value to it, is essential for the foundation of self-respect. Similarly, Tyler describes the procedural principle of respect as "affirm[ing] to people that they are viewed as important and valuable", emphasizing that the way officials and authorities interact with people "communicate[s] important messages to people about their status in society".[110] Thinking

[110] *Ibid*.

of respect through the prism of recognition helps to understand the scope of behaviours and attitudes it should include.

For example, officers representing any sort of legal or social authorities should be mindful about how they treat families involved in child protection processes. They should always bear in mind that these people are going through a vulnerable time and are likely to be intimidated by anything, from the differential of power allowed by the law between them and state representative, to the physical infrastructure in which processes happen. Problem-solving courts are still courtrooms, and the decorum of the tribunal, coupled to the apprehension of having a decision imposed on them by a third party is inherently stressful. This is especially true for children,[111] but also of parents, particularly when they are part of oppressed groups because of their ethnicity, gender or class.[112] Respect implies not only politeness, but adequate information about the legal process, to make sure each person understand that they do have equal standing.[113] While making sure parents and children are informed is fundamental, the way this information is relayed is also critical. Receiving information in times of stress and emotion can be overwhelming and, again, without the principle of recognition in mind which reminds the interlocutor to take into account the specific situation of the person they are addressing, the act of sharing information can be a failure as an act of communication.[114]

---

[111] Robert H Pantell et al, "The Child Witness in the Courtroom" (2017) 139:3 Pediatrics, online: </pediatrics/article/139/3/e20164008/53469/The-Child-Witness-in-the-Courtroom>; Karen J Saywitz & Rebecca Nathanson, "Children's Testimony and their Perceptions of Stress In and Out of the Courtroom" (1993) 17:5 Child Abuse Negl 613.
[112] Kyndra C Cleveland & Jodi A Quas, "What's Fair in Child Welfare? Parent Knowledge, Attitudes, and Experiences" (2022) 27:1 Child Maltreat 53; Vicki Lens, "Judging the Other: The Intersection of Race, Gender, and Class in Family Court" (2019) 57:1 Fam Ct Rev 72.
[113] *Ibid.*
[114] *Ibid.*

The third factor in relational procedural justice, trustworthiness, is in a sense a necessary condition for respect to occur and unfold. Respect builds trust. As Tyler explains, the key elements in assessing the character of the decision-maker are sincerity and caring.[115] These are two elements of the posture one take in the act of recognition. Treating a person as a not only a subject of their own experience, by recognizing their shared humanity as much as the uniqueness of their life story, but also as an agent which should be empowered as much as possible, requires telling the truth in an authentic and caring manner, and being as transparent as possible about one's motivations and reasoning.

These considerations on trustworthiness bring us to the last factor, neutrality. Tyler explains neutrality in reference to how decisions are made according to rules and not personal opinions, and highlights the importance of transparency on how decisions are made to increase the perception of neutrality. A large body of literature questions whether the liberal ideal of neutrality is ever possible.[116] The problematic nature of the neutrality ideal comes in sharper focus in the context of child protection. In that field, or indeed any child-related matters, the neutrality of the judge can only be a function of the neutrality of any possible interpretation of the legal concept of the best interests of the child. As long as the deciding factor, as a rule of law, has no normative content other than its own indeterminacy, it is hard to imagine how neutrality can stem from "mak[ing] decisions based upon rules and not personal opinions".[117] I would take a different approach to this

[115] Tyler, *supra* note 37 at 31.
[116] For just a few examples of this debate (and these are far from exhaustive or even representative), see Chantal Mouffe, "Political Liberalism. Neutrality and the Political" (1994) 7:3 Ratio Juris 314; Peter De Marneffe, "Liberalism, Liberty, and Neutrality" (1990) 19:3 Philos Pub Aff 253; Alan Patten, "Liberal Neutrality: A Reinterpretation and Defense" (2012) 20:3 J Pol Philos 249. The debate on positivism and natural law also brings up similar questions. It would be beyond the scope of this thesis to analyze in detail the arguments of those two debates.
[117] Tyler, *supra* note 37 at 31.

criterion, by submitting that a "neutral" decision-maker is someone whose authority is grounded in a form of selflessness, or fiduciary duty towards the public good, fostered by a form of self-reflectiveness about their inevitable biases. Any effort to actualize the four factors of relational procedural justice through processes of recognition would be a step forward. It would be an acknowledgment of the limits of our current procedural law to produce procedural justice, and a move towards a less adversarial system of adjudication.

Furthermore, the recent literature on epistemic injustice lies a fertile ground to build a theory of procedural justice based on recognition. Miranda Fricker made the influential argument that there are two types of epistemic wrongs.[118] The first type is testimonial injustice: a wrong done to "the subject in his capacity as a giver of knowledge", that happens "when a speaker receives a deflated degree of credibility from a hearer owing to prejudice on the hearer's part".[119] For example, a racialized parent would be given a different type of credibility than a white parent. The second type is hermeneutical injustice. This second one comes from a structural prejudice due to a gap in the collective knowledge, "a hermeneutical lacuna whose existence is owing to the relative powerlessness of a social group to which the subject belongs".[120] This is especially relevant to a critical analysis of adjudication in child protection, since marginalized communities are overrepresented in child protection systems.[121] Because of their marginalization, it can be harder to make sense

---

[118] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2007).
[119] Miranda Fricker, "Forum: Miranda Fricker's Epistemic Injustice. Power and the Ethics of Knowing" (2008) 23:1 Theoria 69 at 69.
[120] *Ibid.*
[121] Hayley Hahn, Johanna Caldwell & Vandna Sinha, "Applying Lessons from the U.S. Indian Child Welfare Act to Recently Passed Federal Child Protection Legislation in Canada" (2020) 11:3 Int Indig Policy J 1; J Stokes & G Schmidt, "Race, Poverty and Child Protection Decision Making" (2011) 41:6 Br J Soc Work 1105; Paul Banahene Adjei & Eric Minka, "Black Parents Ask for a Second Look: Parenting under 'White' Child Protection Rules in Canada" (2018) 94 Child Youth Serv Rev 511.

of the context in which the parenting relationship unfolds. In a broader manner, I would argue that our collective denial of the extent of the phenomenon of child maltreatment creates a hermeneutical lack when it comes to making sense of its sources and consequences.

Understanding testimonial and hermeneutical injustices as instances of misrecognition allows to assess the impact of those wrongs on the process of identity-formation.[122] Misrecognition impairs the conditions of possibility of personal autonomy, the central value of our legal systems.[123] It is only by establishing relationships of mutual recognition that those wrongs can be righted. The relationship between recognition theory and critical social epistemology is burgeoning, just as relational procedural justice theory is emerging.[124] As it unfolds, this conversation will be a fruitful contribution in the aim of conceptualizing norms of procedure coherent with a recognitional account of justice.

[122] Cynthia R Nielsen & David Utsler, "Gadamer, Fricker, and Honneth: Testimonial Injustice, Prejudice, and Social Esteem" in Paul Giladi & Nicola McMillan, eds, *Epistemic Injustice and the Philosophy of Recognition* (Routledge, 2022) 63.
[123] See chapter 2.
[124] Paul Giladi & Nicola McMillan, eds, *Epistemic Injustice and the Philosophy of Recognition* (New York: Routledge, 2022); Mackenzie, MacDermott, & Meyerson, *supra* note 10.

Chapter 5

A Case-Study for a Recognitional Theory of Child Protection Law: Québec

I suggested in the last chapters that a relational critique of law based in recognition theory could lead to two paths of investigation. The first would be to engage in a philosophical project that would entail a deconstruction of the current legal systems and a quest to imagine how society could be regulated in a way that fosters the recognition relationships that make possible personal autonomy. The second, more modest, option is to rely on this relational critique of law to evaluate the use of legal norms and the legal system in addressing social issues such as child maltreatment. This evaluative function aims at understanding how jurists tend to envision social problems, how they use legal norms to solve social issues, and what impact this use of positive law has on the social issues they are trying to address.

This chapter is an example of this second application of the recognitional critique of law. I analyze Québec's legislative framework and the recent legal reforms in the field of child protection through the lens of recognition theory. The relational approach based in recognition theory offers a framework to explain how social issues become redefined within legal liberalism's vocabulary, and how this reductive operation tends to obliterate important aspects of the issue at hand. Using the example of Québec, I hope to show that when child maltreatment becomes an issue of child protection, it triggers a panoply of assumptions and reactions that can come to derail the initial objective of serving the best interests of the child, sometimes to the point of making the social and judicial interventions

plainly counterproductive. This analysis serves as an illustration of how recognition theory can nourish a reflection on how to make sure the creation and enforcement of legal rules and processes acknowledge their inherent limits.

The chapter is divided in three parts. In the first part, I present the social and legislative context in which the child protection system in Québec has been created. I briefly survey the different reforms it has gone through since its creation, through the Youth Protection Act (YPA). I go into certain details regarding the legislative provisions in effect before the latest reform of the YPA, to lay the groundwork for the last part of my analysis. In the second part, I analyze how the recognitional critique of child protection applies to Québec's system. I briefly summarize the arguments of the previous chapters. I then argue that Québec's child protection law distorts the parent-child relationship in a way that impairs the healing of child maltreatment situations, and that it wrongly individualizes the phenomenon of child maltreatment. The third part is dedicated to the 2022 legislative reform of child protection legislation. This reform was prompted by the creation of a wide investigative commission on children's rights and child protection in 2019, and the publication of its report in 2021.[1] I describe the mandate of the commission, its main objectives and recommendations when it comes to legal issues surrounding child maltreatment, and the legislative reform (by the adoption of the Bill 15)[2] that has taken place since. I argue that the Laurent Report and Bill 15 reinforced in part the legalistic premises of the child protection system, and inadvertently created a fertile ground for

[1] Régine Laurent et al., *Instaurer une société bienveillante pour nos enfants et nos jeunes: Rapport de la Commission spéciale sur les droits des enfants et la protection de la jeunesse* (Québec Government, 2021) [Laurent Report].
[2] Bill 15, *An Act to Amend the Youth Protection Act and Other Legislative Provisions*, 2nd Sess, 42th Leg, Québec, 2021 (assented to 26 April 2022) SQ 2022 c 11[Bill 15].

adversarialism, against its own recommendations. I also highlight a few recommendations and changes that are more likely to foster interpersonal, social, and institutional recognition in the child protection system. I conclude by highlighting the need to come to terms with the limits of the concept of child protection and invite us to imagine other ways to address the relational suffering of children.

1. Québec's Child Protection System: The Youth Protection Act

In this first part of the chapter, I survey the historical and social context of child protection services in Québec. In Canada, child protection issues are of provincial jurisdiction, since they are a matter of health and social services or local matters.[3] Accordingly, each province has its own legal framework for child protection. The adherence to the UNCRC standardizes some principles, and all provinces have an Anglo-American type of child protection system.[4] The province of Québec, which has the particularity of being a civil law jurisdiction for private law matters, following its French cultural roots, is no exception when it comes to child protection matters.[5] While the YPA is interpreted in accordance with the Civil Code provisions, it still sets up a child protection system with partial mandatory reporting, investigative powers from the State, and individualized intervention. Furthermore, even though its expressed purpose is to prioritize

[3] *Constitution Act, 1982*, s 92(16), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[4] Neil Gilbert, Nigel Parton & Marit Skivenes, eds, *Child Protection Systems: International Trends and Orientations* (Oxford University Press, 2011).
[5] Québec is a mixed jurisdiction of common and civil law. Child protection falls under civil law, but the judicial process is based in the adversarial common law principles. See Vernon Valentine Palmer, "Quebec and Her Sisters in the Third Legal Family" (2009) 54 McGill LJ 321.

voluntary measures, the YPA deploys a judicialized approach to child maltreatment, based in the legal vocabulary of parents and children's rights.

1.1.The Origin of Québec's Youth Protection Act

Québec's health and social services were mainly run by the Catholic Church until the 1960s.[6] This historical feature sets it apart from other Canadian provinces and explains the importance of the model of institutional care in the province.[7] The first legislation aimed at maltreated or orphaned children came into effect in the mid-nineteenth century. In the first half of the twentieth century, societies of child protection were created and funded by private enterprises and government funds.[8] The first child protection law ("Loi concernant la protection de l'enfance") was granted royal assent in 1944, but was never applied. Welfare courts were created in 1950 and they acquired jurisdiction over children in need of protection.[9] In the following three decades, a series of efforts led to the creation of the current YPA in 1977, instituting Québec's child protection system.[10]

The YPA instated the child as a right-bearer and aimed at protecting those rights in a perspective that supported the parents, with the goal of maintaining the child in its biological family.[11] The main principle of the act was that of "de-judicialization": the primacy of social intervention over judicial intervention in matters of child protection.[12]

---

[6] Oscar D'Amours, "Survol historique de la protection de l'enfance au Québec, de 1608 à 1977" (1986) 35:3 Service social 386.
[7] Karen J Swift, "Canadian Child Welfare: Child Protection and the Status Quo" in Neil Gilbert, Nigel Parton & Marit Skivenes, eds, *Child Protection Systems: International Trends and Orientations* (2011) 36.
[8] D'Amours, *supra* note 6 at 398.
[9] *Ibid* at 399.
[10] Renée Joyal & Mario Provost, "La Loi sur la protection de la jeunesse de 1977. Une maturation laborieuse, un texte porteur" (1993) 34:2 C de D 635.
[11] D'Amours, *supra* note 6 at 406.
[12] *Ibid* at 407. See also Joyal & Provost, *supra* note 10.

As Joyal and Provost point out, this principle comes from the work of the Prévost Commission, created in 1967, which recommended that the cases of maltreated, neglected or abandoned children be treated through local social intervention, and that the court intervene only in cases where a child or a parent's freedom has to be restricted.[13] This de-judicialization objective remains central to Québec's child protection system.[14]

The act created two main instances to protect children's rights: a Director of Youth Protection ("DYP"; in French, "Directeur de la protection de la jeunesse"), a person in charge of children whose security or development are found to be in danger,[15] and a Committee of Youth Protection ("Comité de la protection de la jeunesse"), with a larger social mandate.[16] The essential features of the function of the DYP have not changed since 1977, and the role is still the pillar of today's Québec child protection system. There is one DYP for every region of the province of Québec.[17] The function is personal; the legislative intent was to have a person instead of a general administration to bear the ultimate responsibility of the decisions affecting children in need of protection.[18] In contrast, the Committee of Youth Protection evolved into the "Commission de protection des droits de la jeunesse", and in 1995 the organization was merged with the "Commission des droits de la personne" (the adult equivalent), to create the "Commission des droits de la personne et

[13] Joyal & Provost, *supra* note 10 at 642.
[14] Laurent report, *supra* note 1 at 219 : "Intervention in youth protection should privilege social intervention before judicial intervention" (my translation).
[15] The original French version of the act uses the term "compromis" instead of "en danger", which does not have the connotation of urgency and gravity that "in danger" suggests (which is the official English translation of the Act): *Youth Protection Act*, CQLR c P-34.1 [YPA], see for example s 2.
[16] D'Amours, *supra* note 6 at 408.
[17] The 2022 reform created a National DYP overseeing the work of regional DYPs: see Bill 15, *supra* note 2, explanatory notes.
[18] D'Amours, *supra* note 6.

des droits de la jeunesse" (CDPDJ).[19] The original purpose of the committee was to create an ombudsman of children's rights, with a mission of information and prevention, working with community-based organizations, in an effort to lead a more global approach to child protection to complement the individualized interventions of the DYP.[20]

Despite its explicit commitment to prioritize social intervention over legal intervention, the structure of the YPA follows the Anglo-American model of response to child maltreatment. It is a child protection approach, where children are to be "protected" from their parents, with a focus on "investigating deviance in a highly legalistic way", in an adversarial process towards the parents.[21] It sets up a system of partly mandatory reports, the evaluation of those reports, and recommendations of measures to be implemented by social services. Throughout this process, parents' and children's rights are protected through the use of courts in the vast majority of cases (in 2020, almost 70% of cases where the DYP chose to intervene following a report of a child's situation had been judicialized at one moment or another during the child protection process).[22]

1.2. The Legislative Context and the Evolution of Québec's Youth Protection Act

The particularity of Québec's child protection system is that all services are part of the larger public healthcare and social services system. In consequence, changes to the governance and management in the health and social services network have a direct impact

[19] Commission des droits de la personne et des droits de la jeunesse website, « Origin and Mission » : <https://www.cdpdj.qc.ca/en/our-services/about-us/origin-and-mission>.
[20] D'Amours, *supra* note 6 at 408.
[21] Gilbert, Parton, & Skivenes, *supra* note 4 at 3.
[22] YPA. Laurent Report, *supra* note 1 at 219.

on how child protection operates. The 2015 reform initiated by Bill 10, led by then Health Minister Gaétan Barrette, merged health and social services individual establishments into one mega-structure per region.[23] This integrated the child protection services, which used to be provided by youth centres, to the new regional entities (Centres intégrés de santé et de services sociaux et Centres intégrés universitaires de santé et de services sociaux – or CISSS and CIUSSS). At the time the reform was announced, many specialists and actors of the child protection system raised flags, worrying that the merger would result in a loss of expertise.[24] Today, the DYP is integrated to a CISSS or a CIUSSS, and the family services provided under the YPA are part of the general youth and family services offered by the regional CISSS or CIUSSS.[25]

The YPA is interpreted in accordance with the Civil Code of Québec and Québec's Charter of Human Rights and Freedom. Articles 32 to 33 of the Civil Code of Québec state the following:

> 32. Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are able to give to him.

---

[23] Bill 10, An Act to modify the organization and governance of the health and social services network, in particular by abolishing the regional agencies, 1st Sess, 41st Leg, Québec, 2014 (assented to 9 February 2015) SQ 2015 c 1 [Bill 10]; Act Respecting Health Services and Social Services, RSQ, c S-4.2 [ARHSSS].

[24] For just two examples, see Trocmé, Nico and al. "Letter: Bill 10 will hurt youth protection services", Montreal Gazette (8 October 2014), online: <https://montrealgazette.com/opinion/letters/letter-bill-10-will-hurt-youth-protection-services>; Goyette, Martin and al. "Letters: Bill 10 and its effects on youth protection services", Montreal Gazette (29 October 2014), online : <https://montrealgazette.com/opinion/letters/letters-bill-10-and-its-effects-on-youth-protection-services>.

[25] YPA s 31; ARHSSS s 79.

> 33. Every decision concerning a child shall be taken in light of the child's interests and the respect of his rights.
>
> Consideration is given, in addition to the moral, intellectual, emotional and physical needs of the child, to the child's age, health, personality and family environment, including the presence of family violence, which includes spousal violence, and to the other aspects of his situation.
>
> 34. The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it.

Section 3 of the YPA, until November 2022, reiterated article 33 of the Civil Code almost verbatim.[26] The child is also a person, entitled to the same basic human rights as adults under the Charter of Human Rights and Freedom. In addition, the Charter reaffirms the right of the child to the protection of its parents, and it states the right of parents to give their children a "religious and moral education in keeping with their convictions".[27]

The Civil Code also details the rights and responsibilities of children and parents in its Book Two ("The Family").[28] The YPA being a law of exception, parental obligations of support, care, maintenance and education stated in the Civil Code apply even when a child comes under the protection of the DYP. Until 2022, this was the object of section 2.2

[26] As we will see in the next part of the chapter, the current version does not change the essence of the principle, but is phrased differently.
[27] *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10, s 39, 42.
[28] *Civil Code of Québec*, CQLR c CCQ-1991 [CCQ], book 2.

of the YPA, which stated: "The primary responsibility for the care, maintenance and education of a child and for ensuring his supervision rests with his parents."[29]

In contrast with family law cases, which are heard in the Superior Court, cases of child protection are heard in the Court of Québec, Youth Division.[30] This division is considered as a "specialized tribunal", since it only hears matters of child protection and youth criminal law cases.[31] This categorization, along with the explicit objective of the YPA to favour the participation of parties to the resolution of their case, makes this tribunal fall under the description of a "problem-solving court", insofar as it is focused on solving the issue of child maltreatment at hand instead of punishing it.[32]

While earlier discarded versions of the YPA prioritized the best interests of the child as the main standard for decisions concerning children in need of protection, the 1977 Act was premised mainly around the concept of children's rights and made few references to the standard of the best interests of the child.[33] The project of creating a Québec Charter of Children's Rights bearing a quasi-constitutional status was debated in the parliamentary commission preceding the creation of the Act.[34] The Minister of Justice declined to create such a Charter. He defended his position by arguing that the social nature of those rights would make them detached from reality and difficult to enforce by the courts.[35] Instead, the 1977 Act included a chapter detailing children's rights under the act. In parallel, the

---

[29] YPA (2017) s 2.2.
[30] *Code of Civil Procedure*, CQLR c. C-25.01, s 37.
[31] In the sense described by the Supreme Court in para 85 of *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27; In matters of youth criminal law, see *R c M (SH)*, [1989] 2 RCS 446.
[32] *Problem-solving in Canada's Courtrooms A Guide to Therapeutic Justice*, by Susan Goldberg (National Judicial Institute, 2011).
[33] Joyal & Provost, *supra* note 10 at 650-651.
[34] *Ibid* at 644.
[35] *Ibid* at 645.

best interests of the child standard, in the first version of the YPA, fell out of favour as the main criteria guiding decisions concerning children, because of its indeterminacy.[36] However, the first major reform of Act in 1984, reintegrated the best interests of child standard as a principle of equal importance as respecting children's rights, following the work of the Commission Charbonneau and the 1982 reform of the Civil Code on family law.[37]

Arguably the most in-depth and comprehensive reform that transformed the YPA since its creation was the 2006 reform which, among other things, overhauled the description of the situations in which the child could be considered in danger, insisted on the concepts of continuity of care and permanence, and created a special status for persons who are of significant importance to the child.[38] I argued elsewhere that this reform was inherently relational and explicitly premised on attachment theory's principles.[39] Its goal was to tie the legal principles of child protection down to the current state of clinical knowledge about attachment.[40] The revision of the grounds for intervention of the DYP was also representative of a shift towards an even more child-centred approach.[41] Indeed, the new enumeration focused on the experience of the child, instead of the actions or

---

[36] *Ibid* at 649.
[37] *Ibid* at 651. See Charbonneau et al., *Rapport de la Commission parlementaire spéciale sur la protection de la jeunesse* (Québec, Assemblée nationale, Commission parlementaire spéciale sur la protection de la jeunesse, 1982) [Charbonneau Report]; Bill 89, *Loi instituant un nouveau Code civil et portant réforme du droit de la famille*, 4th Sess, 31st Leg, Québec, 1980 (assented to 19 December 1980) SQ c 39. See Laurence Ricard, "Le rapport entre le juridique et le clinique dans l'application de la Loi sur la protection de la jeunesse: une perspective relationnelle" (2013) 43:1 RGD 49.
[38] Laurence Ricard, "L'évolution récente de la conception de l'enfant dans le droit québécois: l'exemple de la Loi sur la protection de la jeunesse et des récents projets de loi en matière d'adoption" (2014) 44:1 RDUS 27–69.
[39] *Ibid*.
[40] *Ibid*.
[41] I make this reflection following the observations of Gilbert, Parton, & Skivenes, *supra* note 4, which noted a general movement towards a child-focused approach to child protection in multiple countries, between 1997 and 2011.

inactions of the parents.[42] They also align, for the most part with the scientific definitions found in specialized literature on child maltreatment.[43] With minor changes in 2017,[44] this new version of the law has been the legal touchstone of child protection in the past two decades.

2. Québec's Child Protection System and Recognition Theory

In this part, I review Québec's child protection system in light of the critical analysis of child protection based on recognition theory developed in previous chapters of this thesis. I argue that since the legal structure of Québec's child protection system is deeply grounded in legal liberalism, it is set up in a way that creates instances of misrecognition instead of recognition. This argument is made in three steps. First, I describe the parent-child relationship in the legal framework of Québec's family law and child protection law, and how it sets the stage for experiences of misrecognition in judicial processes, especially for vulnerable children. Second, I argue that while the YPA emphasizes the importance of parents' participation to the process, it operates in a context that inhibits a therapeutic implication from the parties. Third, as an instance of an Anglo-American child protection system, Québec's child protection system individualizes child maltreatment and fails to address its systemic causes. In consequence, it fails to acknowledge the limitations of an impoverished understanding of the legal recognition of child maltreatment issues, and the

---

[42] Dumais, Jacques et al. *La protection des enfants au Québec: une responsabilité à mieux partager, Rapport du Comité d'experts sur la révision de la Loi sur la protection de la jeunesse* (Québec: Ministère de la Santé et des Services sociaux, 2004) at 52 and following.

[43] There is an exception : YPA, s 38(f), "serious behavioural disturbance". *Ibid* at 54; See Kelli Connell-Carrick & Maria Scannapieco, *Understanding Child Maltreatment: An Ecological and Developmental Perspective* (Oxford University Press, 2005). At 11 and following.

[44] Bill 99, *An Act to amend the Youth Protection Act and other provisions*, 1st Sess, 41st Leg, Québec, 2016 (assented to 5 October 2017) SQ 2017 c 18.

necessity of establishing structures of social recognition to address this complex and wide phenomenon.

2.1. Recognition of the Child : The Detrimental Impacts of the Judicial Process

Recognition theory challenges the assumption that personal autonomy is an individualized attribute, based on the exercise of rationality. Honneth suggests that, rather than society being the sum of individuals exercising independently their autonomy, society is made of processes of mutual and intersubjective recognition on three different levels: interpersonal, social, and institutional. Using this structure to understand child maltreatment allows us to account for the interpersonal dynamic between parents and a child, and the social and institutional factors that contribute to this dynamic.

Just like all western law, Québec's child protection's legal framework, is premised on certain principles based in the fundamental respect for personal autonomy. [45] According to civil law, parents have an unalienable right to privacy. Moreover, children are represented by their tutors, usually their parents, to exercise their civil rights, as they are implicitly understood to lack legal capacity under a certain age. The first article of the Civil Code of Québec affirms: "Every human being possesses juridical personality and has the full enjoyment of civil rights."[46] Article 3 lists the right to privacy as an unalienable personality right,[47] while article 4 affirms the presumption of legal capacity for all.[48] However, article 158 states that, as a general rule, "a minor is represented by his tutor for

[45] See chapter 2.
[46] CCQ s 1.
[47] CCQ s 3.
[48] CCQ s 4.

the exercise of his civil rights."[49] The age of majority is set at 18, although medical decisions can be made at 14.[50] The distinction between minority and majority is established because minors are deemed in need of protection.[51] As we can see in debates surrounding the capacity of majors to make medical decisions, the legal capacity to make binding decisions is based on the concept of informed consent, which is essentially a basic rationality test, about whether a person can understand the consequences of their actions.[52] Therefore, the concept of autonomy distinguishes children from adults on the basis of rationality. Adults can be rational and therefore have the right to live their life free of interference, including raising their offspring; children do not yet have the capacity to be rational, so they are in need of protection.[53]

The contrast we have seen in chapter 3 between the legal definition of the parent-child relationship and the clinical and relational definition is exemplified by Québec's civil law norms. Articles 597 and following, in particular, describe how the civil law concept of parental authority structures this relationship. The Civil Code enumerates a definite number of rights and duties, of both parents and children. Among others, parents have the rights and duties of custody, supervision, and education of their children, and the duty to maintain

[49] CCQ s 158.
[50] CCQ s 153; s 16.
[51] CCQ s 177.
[52] CCQ s 11; *Institut Philippe Pinel de Montréal c AG*, 1994 CanLII 6105 (QC CA). The Pinel test includes a series of questions that aim to establish whether a patient understands the nature of their disease, the nature and goal of the proposed treatment, the risk and advantages of the treatment, the risks to not take the treatment and the effect of the disease on the patient's capacity to understand. These are basic logical inferences. Therefore, I contend that it is essentially a rationality test, in a narrow sense of rationality, understood as the capacity to use instrumental reason. It is the *potential* to be rational that is important for legal capacity. A person deemed to have the legal capacity to make decisions for themselves has a capacity to understand the consequences of their actions, and therefore a possibility to act rationally.
[53] The limitation of children's legal capacity is traditionally justified by their lack of rationality. See Lynda Gaudemard, "Droits de l'enfant, droits à l'enfant: les fondements éthiques de l'autorité parentale" (2021) 62:4 C de D 1181; Katherine Hunt Federle, "On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle" (1993) 42 DePaul L Rev 983.

their children;[54] children have the implicit corresponding rights, but they also have the legal duty to respect their parents;[55] both parents and children owe each other support.[56] The structure of the Civil Code makes clear how the legal vocabulary of rights and duties is the substance of the parent-child relationship in the law. Furthermore, the right of parents to educate their children within their culture and beliefs, as the general rights to parental authority, are a logical extension of the right to privacy.[57] The family is the ultimate symbol of the private sphere, free of State intervention.[58] The YPA is a "loi d'exception", a law of specific application, that can go against general individual rights and freedoms for the purpose of child protection.[59] The legal architecture of child protection implies that parents are having their right to privacy infringed when the YPA applies. This is a direct function of the legal conception of autonomy as a negative right: the right to autonomy implies that the State *refrains* from interfering with private lives, including with how parents raise their children.

A recognitional approach to personal autonomy challenges these categories by unsettling the alignment between autonomy and rationality.[60] The theory of recognition argues that personal autonomy is not a given ability that comes to its full expression for every individual at an arbitrary number of years of age, but it is built through relationships of recognition, first in the intimate sphere, and through the social and institutional

[54] CCQ s 599.
[55] CCQ s 597.
[56] CCQ s 585.
[57] David Archard, "Child Abuse: Parental Rights and the Interests of the Child" (1990) 7:2 J Appl Phi 183.
[58] Janet Halley, "What is Family Law?: A Genealogy Part I" (2011) 23:1 Yale JL & Human 1.
[59] Boutin, Marie-Claude, Des Marchais Myriam et al., *Loi sur la protection de la jeunesse annotée*, Montreal, SOQUIJ, updated February 1, 2019 [online], section 2.
[60] Chapter 2.

spheres.[61] As I have argued in the third chapter, this theoretical framework is useful to integrate clinical and therapeutic concerns, since it can model findings in social sciences regarding child maltreatment.[62] By opposition, the legal framework reduces the parent-child relationship to fundamental mutual obligations.

Building on the general civil law background, the YPA has evolved through the years to integrate concerns supported by specialized literature on child maltreatment. As we have seen, the YPA integrated attachment theory concepts into Québec's child protection law in 2006.[63] This reform was prompted by a wider scientific consensus on the importance of the continuity of care for displaced children and the impact of coming in contact during their placement with unstable or abusing biological parents.[64] But, as with other western legal child protection systems, since the legislative reform tried to import principles of child development psychology into a liberal conceptual framework, the interpretation of those principles became restricted by a limited understanding of the relational (and therefore dynamic) nature of children's wellbeing.[65] The general structure of the judicial process, the cultural persistence of certain myths about the primacy of the biological family, combined with the indeterminacy of the best interests of the child

---

[61] *Ibid.*
[62] Chapter 3.
[63] Ricard, "L'évolution récente de la conception de l'enfant dans le droit québécois", *supra* note 38.
[64] Yvon Gauthier, Gilles Fortin & Gloria Jéliu, "Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care" (2004) 25:4 Infant Ment Health J 379.
[65] See Tommie Forslund et al, "Attachment Goes to Court: Child Protection and Custody Issues" (2021) Attach Hum Dev 1.

principle, all concur to often divert individual decisions from the objectives stated in the law.[66]

One of the most common examples of these complicated interactions arises when a young child is entrusted to a foster family, and the child reacts strongly to visits with her biological parents. The YPA states that, regardless of the DYP's intervention, parents retain the general right to custody of the child.[67] This right has to be exercised in accordance with the best interests of the child's standard, since the Supreme Court has long established that the relationship between a child and a parent is to be maintained to the benefit of the child, and not of the parent.[68] Currently, when a child placed in foster care by an order of the court reacts to visits with one of his biological parents, the judicial delays[69] make it likely that debates about a suspension of contacts are usually heard in an emergency hearing.[70] This creates situations where a judge has to make a decision that impacts the trajectory of a child's relationship with their parent, based on summary evidence only. It is not rare that judges will decline to rule on such an important matter without hearing the full evidence at trial.[71] The balance between the best interests of the child standard and the rights of the parties to be fully heard does not always sway in favour of the former.

---

[66] Ricard, "Le rapport entre le juridique et le clinique dans l'application de la Loi sur la protection de la jeunesse", *supra* note 37.
[67] YPA s11.4(a).
[68] *Racine v Woods,* [1983] 2 SCR 173 at 185: "... it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. As has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations."
[69] Laurent Report, *supra* note 1 at 224 and following.
[70] This is what happened in the case *Protection de la jeunesse — 121775,* 2012 QCCQ 10624, which is described in what follows.
[71] It is hard to document, since those provisional decisions are not published (unlike most final judgments). We can only find traces of them in the history of cases, such as in *Protection de la jeunesse — 157126*, 2015 QCCQ 20042, where judge Line Gosselin, at paragraph 12, explains that she declined in an emergency hearing to rule on a contact suspension with a mother, considering that the mother strongly

The case of X and Y, two and six years old, is an example of this issue. X and Y were the object of the DYP's intervention for severe neglect, and were directly exposed to domestic violence in their biological family. They were placed in foster care when X was a few months old and Y was five years old. At the time of their initial placement, they both suffered from major developmental delays. After their placement, the children reacted strongly following the visits with their biological parents. X refused to eat and had severe tantrums. Y isolated herself and became aggressive. Y said that her father warned her that she could be molested in her foster family, and that her parents promised her that they would move to a house with a pool and a cat if she came home. A year later, a judge prolonged their placement in foster care until their majority. The judicial decision suspended all contacts with the biological mother, but ordered visits with the biological father once every two weeks for a duration of an hour and a half.[72]

About six months after this decision, an emergency application for the review of their protection order is presented. The two siblings are showing signs of distress after the visits with their biological father.[73] The reactions include the two-year-old banging her head on the crib bars, while the six-year-old pulls her own teeth after the visits, has episodes of encopresis and bedwetting, and shows signs of obsession, aggression, and agitation.[74] In the context of the emergency hearing, the social worker testifies by hearsay from information given by the foster family. At this stage, the judge has to decide whether, in

contested the application. She explains : "That is why suspending immediately all contacts, as suggested by the applicant, would presume what the outcome of the [final] hearing whereas the evidence from the mother and the child have not been heard by the undersigned" (my translation).

[72] Protection de la jeunesse — 106330, 2010 QCCQ 16072.

[73] Protection de la jeunesse — 113036, 2011 QCCQ 9129.

[74] Protection de la jeunesse — 121775, 2012 QCCQ 10624 at para 8.

light of the best interests of the child, they should grant a suspension of contacts before the full hearing of the case, set three months later. At the emergency hearing, the judge declines to temporarily order the suspension of contacts, and children continued to have visits with their father, albeit less frequently,[75] over the course of three months until the full hearing of the case. There are no records publicly available of the reasons for this provisional decision but the most likely reasons are that the judge either declined to rule on summary evidence, or he did not think he had sufficient evidence to prove that the reactions of the children could be tied to their relationship with their biological father.[76] Fortunately, the trial judge (a different judge) at the final hearing was more sensitive to the description of the troubling reactions of the siblings. In her decision, the trial judge describes facts proved at trial that are not different from the ones described at the emergency hearing. Evidently, during the three months delay, the children's reactions did not improve.[77] She expresses shock that these children had to live in distress for so long. She even declines the demands of the father's lawyer to postpone her final decision to obtain a pedopsychiatrist's advice, ruling that waiting for expert evidence in this case would be against the best interests of the children.[78]

In this instance, the children suffered from the limitations of the judicial system. The fact that a person solely trained in law (the emergency hearing judge) was asked to interpret their emotional distress as a sign that the relationship with their biological father

[75] *Ibid* at para 6.
[76] As explained before (see note 70), emergency orders are usually consigned in the minutes instead of a judgment, so there is no public record of the reasons given by this judge. These two options are the two most likely in this case.
[77] *Ibid* at para 20-40.
[78] *Ibid* at para 46.

was damaging. They had to go months exhibiting serious signs of distress when meeting their biological father, even after their case was brought the attention of the court. The trial judge blames the DYP for not acting sooner to stop the situation,[79] but it is hard to see what they could have done more once their application for the suspension of visits was declined. From that moment on, they had no other recourses under the YPA. They could have applied for judicial review, but it is hard to guess the outcome of such a proceeding in the face of the standard of reasonableness.[80]

This example is typical of a situation where the decision-making based on factual evidence in child protection cases structurally leads to situations that can go against the wellbeing of children. In other terms, the law did not substantively nor procedurally have the capacity to assess whether a process of interpersonal recognition, that is, a mutually benefitting relationship, was displayed, in the timely manner necessary to protect these children.

In this instance, the law, both substantively and procedurally, could not provide the conceptual means to qualify the relationship between the parent and the child based solely on factual evidence. The procedural requirements of a fair trial in the context of an adversarial system structurally created delays in the decision-making process, while the indeterminate best interests of the child standard was not enough to compel to the judge presiding over the emergency hearing to take a decision overriding those procedural

[79] *Ibid* at para 32-38.
[80] On the judicial review threshold, see *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65.

safeguards. Furthermore, the vocabulary of rights and duties that defines the parent-child relationship does not provide any evaluative criteria when it comes to determining whether it is in the best interests of the child to maintain contact with their biological parents. In fact, these legal concepts say nothing of what can happen to that relationship once the parental duties have not been met. It does not allow to take into account in the legal reasoning the emotional grief of the parent who risks losing contact with their child, or the trauma a child suffers when a parent could not meet their affective and developmental needs.

In general, framing the respect of children's rights as primarily a legal obligation tends to encourage the use of judicial means to address inadequate clinical decisions, notably through applications seeking remedies for children's rights violation, pursuant to section 91 in fine of the YPA. In fact, the number of trials regarding children's rights violations has exponentially grown in the past decades, hinting at an increasing legal reading of the social intervention in child protection.[81] As I argued elsewhere, this tendency to judicialize systemic failings or professional faults further takes the focus away from the social intervention and tends to give courts a role in reviewing institutional rules and decisions that they were not meant to take on in the first place.[82]

2.2. Recognition of the Parents: The Problem of Participation

While, on the one hand, the legal system is ill-equipped to understand the needs of children, especially traumatized children, on the other hand, it does not take into account

[81] Laurence Ricard, "Un regard sur la notion de lésion de droits en matière de protection de la jeunesse" (2021) 62:2 C de D 605–638.
[82] *Ibid*.

the emotions that parenting raises in parents. This void makes the judicial decision-making process potentially harmful to collaboration of the parties to put an end to the situation of child maltreatment. From a recognition perspective, it creates instances of social misrecognition, by ignoring the lived experience of parents throughout the process, while focusing on their rights and duties. Furthermore, despite its express purpose to prioritize social intervention, the current model of child protection structurally encourages judicialization, by focusing on the individual responsibility of the parent to care for a child, and by framing social intervention as a last resort measure before the removal of a child. This emphasis on the individual responsibility of the parent, in the context of a concrete authority of the DYP who can take action to act against the parent's will if the parent does not comply, sets up an adversarial scene where collaboration between the DYP and the parent will inevitably tend to be superficial.

This problem can be illustrated by the issues surrounding the application of the principle stated in section 4.3 YPA: "Any intervention in respect of a child and the child's parents under this Act must, if the circumstances are appropriate, favour means that allow the child and his parents to take an active part in making the decisions and choosing the measures that concern them."[83] This principle of "active participation" is at the heart of the aim to divert cases trajectories away from judicial measures, and also reflects a clinical principle of social intervention, that is, the importance of the parties' collaboration to put an end to the situation endangering the child.[84] The priority given to alternative dispute

[83] YPA s 4.3.
[84] James Gladstone et al, "Looking at Engagement and Outcome from the Perspectives of Child Protection Workers and Parents" (2012) 34:1 Child Youth Serv Rev 112; Marie-Christine Saint-Jacques, Julie Noël & Catherine Turbide, "Mieux comprendre l'engagement des parents dans l'intervention en protection de la

resolution in the YPA are expressions of this principle. The YPA states that judicialization is to be taken when voluntary measures fail,[85] and offers the option of settlement conferences and draft agreements once the case is judicialized.[86] Even when the case is decided by a judge, the tribunal "must endeavour to obtain the assent of the child and of the other parties to the measures" it orders.[87]

In fact, this principle of "active participation" has been demonstrated to be, in many cases, "reinterpreted" by social workers to simply mean sharing information to the parent or the child, or getting them to answer their questions, instead of engaging in a process of recognition of the experience of the child and the parents.[88] This structural bias could be, at least in part, explained by the recognitional critique of the legal framework of child protection. Under the Anglo-American model of child protection, the parent is structurally in an adversarial position with the social worker, who can always bring the case to trial.[89] When a child is apprehended by youth protection services, to avoid the judicial path and reach a voluntary agreement with the DYP on the measures to put in place, the parents are expected to recognize that they are not meeting their legal duties as parents. Voluntary measures imply that the DYP and the parents agree on a qualification of the situation that puts the security or development of a child in danger.[90] To do so, parents are asked to

---

jeunesse (Annexe 3)" in Sonia Hélie et al, eds, *L'évaluation des impacts de la Loi sur la protection de la jeunesse Qu'en est-il huit ans plus tard? Rapport final* (2015).

[85] YPA s 51 and following.

[86] YPA s 76.3.

[87] YPA s 89.

[88] Carl Lacharité, Tristan Milot & Vicky Lafantaisie, "L'ethnographie pour explorer comment les représentations des situations de négligence se construisent à l'intérieur de l'institution de la protection de la jeunesse" in Marie-Josée Letarte, Mélanie Lapalme & Anne-Marie Tougas, eds, *Recherches qualitatives et quantitatives en sciences humaines et sociales Pour une formation théorique et pratique appuyée empiriquement*, (Éditions JFD, 2018) 264 at 274.

[89] Marilyn Coupienne, "La fragilisation du lien de confiance au sein de l'intervention sociale en protection de la jeunesse: peut-on blâmer le droit?" (2021) 34:1 Can J Fam L 79.

[90] YPA s 52.

identify with the legal terms that define child maltreatment, such as abandonment, neglect, and abuse.[91] This moral vocabulary is inherently a negative judgment. It not only creates a barrier to the formation of a therapeutic alliance between the social worker and the parent from the get-go, but it also distorts the complexity of the phenomenon of child maltreatment.[92]

The limited research published in Québec on the perspectives of parents in the child protection system overwhelmingly point to a lack of recognition of their experiences and their voices.[93] From a recognition perspective, we can see that in the adversarial process of child protection, the parents' feelings about the situation cannot possibly matter, since the vocabulary to explain their legal situation is one of rights, duties, abuse, and neglect. In the legal framing of child protection, they are the perpetrator of the deviant behaviour the system is trying to put an end to. They need to be reformed or set aside, not heard. Of course, this is a structural argument that cannot be generalized to how individual actors of the system decide to exercise their role. Some judges and some social workers could, individually, be more sensitive to recognitional patterns, either intuitively or by virtue of their training. But the system does not make room for parents' experiences. The evidence

---

[91] Stan Houston, "Empowering the 'Shamed' Self: Recognition and Critical Social Work" (2016) 16:1 Journal of Social Work 3; Brid Featherstone Kate Morris & Susan White, *Re-imagining Child Protection: Towards Humane Social Work with Families* (Policy Press, 2014); Matthew Gibson, "Shame and Guilt in Child Protection Social Work: New Interpretations and Opportunities for Practice" (2015) 20:3 Child Fam Soc Work 333; Wendy Haight et al, "'Basically, I Look At It Like Combat': Reflections on Moral Injury by Parents Involved with Child Protection Services" (2017) 82 Child Youth Serv Rev 477.

[92] Coupienne, *supra* note 89; Saint-Jacques, Noël & Turbide, *supra* note 84; Annie Lambert, "L'intervention sociojudiciaire en contexte de protection de la jeunesse: points de vue de parents" (2021) 152 Intervention 51.

[93] Lambert, *supra* note 92; Julie Noël & Marie-Christine Saint-Jacques, "Quelle valeur s'accorde-t-on quand on est une mère d'enfant placé ?: Une analyse basée sur la théorie de la reconnaissance sociale" (2020) 31:2 Nouvelles pratiques sociales 298; Amilie Dorval, Karine Croteau & Julie Noël, "Des parents d'enfants suivis en protection de la jeunesse se racontent: analyse du recours au récit de vie par le prisme de trois études en travail social" (2021) 67:1 Service social 151; Lacharité, Milot & Lafantaisie, *supra* note 88.

evaluated by social workers to determine if their intervention is needed is factual, as is the evidence presented to the court in trials.[94] Parents' testimonies are technically meant to either establish or deny facts in accordance to evidence rules, not to convey their feelings or opinions.[95] The outcome of cases is too often based on the sheer will and ability of the parent to recognize their difficulty while working with a social worker whose main client is not them but the child, and capacity to turn around their parenting methods or sometimes their entire life.[96]

By contrast, understanding the parenting relationship as one of interpersonal recognition, instead of as a mix of rights and duties, yields a portrait that gives a more accurate sense of the problem at hand and, as a consequence, could make room for devising services to the families and decision-making processes that are more nuanced and adapted. Moreover, it highlights the importance of recognition in the way we address parents to allow them to take part in a relational healing process. As we have seen in chapter 2, social intervention for women whose children had been taken into care was experienced as positive when it embodied a recognitional dynamic.[97] Furthermore, it affords a larger role to attachment theory in the assistance relationship between the social worker and the parent. Parents have been children themselves and they carry their own "internal working

[94] The social worker's testimony is based on their psychosocial report, which is distinct from expert evaluations: YPA s 86-87.
[95] CCQ s 2843. On the effects that this can have on the parents, see Lambert, *supra* note 92.
[96] Eve Pouliot & Daniel Turcotte, "Facteurs invoqués dans l'évaluation de la compétence parentale en protection de la jeunesse: comparaison des perspectives sociale et judiciaire" (2019) 11 Sciences et actions sociales, online: <http://journals.openedition.org/sas/975>; Coupienne, *supra* note 89.
[97] Janet Boddy & Bella Wheeler, "Recognition and Justice? Conceptualizing Support for Women Whose Children Are in Care or Adopted" (2020) 10:4 Societies 96.

models of close relationships",[98] which influence their parenting style, but also their parenting abilities.[99] These can evolve through, for example, relational intervention coaching, which have been successful in experimental settings.[100]

2.3. Recognition and the Systemic Causes of Child Maltreatment

The general context of the YPA does not lay the ground for a relational social work approach, which takes into account the social, economic, and political factors that play into child maltreatment.[101] By centring on the wrongdoing of the parent in its duties towards the child, by leaving the best interests of the child standard undefined, and by offering legal rights as the only guarantee of recognition through the process of intervention, Québec's child protection system, just as other Anglo-American systems, is wired to generate experiences of misrecognition. But even more than that: it creates the illusion that the solution to child maltreatment rests on this individualized model of intervention when specialists know that the main causes are elsewhere.

Against this tendency, a recognition approach gives a general framework within which the answer to child maltreatment must be apprehended: that is, on multiple levels of intervention. As I detailed in the first chapter, social sciences research points to numerous

---

[98] W Rholes Rholes et al, "Adult Attachment Styles, the Desire to Have Children, and Working Models of Parenthood" (1997) 65:2 Journal of Personality 357. The article refers to John Bowlby, *Attachment and Loss: Volume II: Separation, Anxiety and Anger* (New York: Basic Books, 1973).
[99] Jason D Jones, Jude Cassidy & Phillip R Shaver, "Parents' Self-Reported Attachment Styles: A Review of Links with Parenting Behaviors, Emotions, and Cognitions" (2015) 19:1 Pers Soc Psychol Rev 44 at 67. Sheri Madigan, Greg Moran & David R Pederson, "Unresolved States of Mind, Disorganized Attachment Relationships, and Disrupted Interactions of Adolescent Mothers and their Infants" (2006) 42:2 Dev Psychol 293.
[100] Chantal Cyr et al, "An Attachment-Based Parental Capacity Assessment to Orient Decision-Making in Child Protection Cases: A Randomized Control Trial" (2022) 27:1 Child Maltreatment 66.
[101] Karen Winter, "Relational Social Work" in Malcolm Payne & Emma Reith-Hall, eds, *The Routledge Handbook of Social Work Theory* (Routledge, 2019) 151.

layers of risk factors for child maltreatment. The ecological-transactional model of child maltreatment shows that there is a multiplicity of factors that lead to child maltreatment, from the individual characteristics of the child, to the general societal values impacting violence in a society.[102] This model shows that tackling child maltreatment from a prevention and therapeutic perspective means elaborating a diversity of initiatives. At the macro-level, social and economic inequality must be addressed, since they have been shown to be determinants of child maltreatment.[103] At the exo-level, it means encouraging local initiatives that create social cohesion, since social recognition is a protective factor for parents.[104] Giving the proper attention to the micro and ontogenic levels of determinants implies initiatives such as wider access to a diversity of mental health and relational therapeutic services.[105] All of these factors simply cannot be addressed by the YPA, or by the child protection system in general as it stands. Even more than ignoring those issues, the legal structure of child protection, with its focus on the personal responsibility of the parents, tends to obscure and obstruct actions that could be taken to prevent maltreatment on each of these levels.

---

[102] Anna E Austin, Alexandria M Lesak & Meghan E Shanahan, "Risk and Protective Factors for Child Maltreatment: A Review" (2020) 7:4 Curr Epidemiol Rep 334.

[103] Kelley Fong, "Neighborhood Inequality in the Prevalence of Reported and Substantiated Child Maltreatment" (2019) 90 Child Abuse Negl 13; Jill D McLeigh, James R McDonell & Osnat Lavenda, "Neighborhood Poverty and Child Abuse and Neglect: The Mediating Role of Social Cohesion" (2018) 93 Child Youth Serv Rev 154.

[104] Beth E Molnar et al, "Neighborhood-Level Social Processes and Substantiated Cases of Child Maltreatment" (2016) 51 Child Abuse Negl 41; James R McDonell, Asher Ben-Arieh & Gary B Melton, "Strong Communities for Children: Results of a Multi-Year Community-Based Initiative to Protect Children from Harm" (2015) 41 Child Abuse & Neglect 79; McLeigh, McDonell & Lavenda, "Neighborhood Poverty and Child Abuse and Neglect", *supra* note 103.

[105] Mark Assink et al, "The Intergenerational Transmission of Child Maltreatment: A Three-Level Meta-Analysis" (2018) 84 Child Abuse & Neglect 131; Samiha Islam, Sara R Jaffee & Cathy S Widom, "Breaking the Cycle of Intergenerational Childhood Maltreatment: Effects on Offspring Mental Health" (2023) 28:1 Child Maltreat 119.

The relative inaction of the State on the multiple risk factors of child maltreatment in Anglo-American systems of child protection is well documented. Reforms tend to modify legislative rules to profess intentions of centring interventions on the best interests of the child, without addressing the roots of the issue.[106] The same could be said of the fact that children and parents feel unheard in child protection proceedings, which is also well established in the literature.[107] Some have already pointed out that the law may be the main culprit either through the structure of the system,[108] or through the concept of protection.[109] What a general critique of law through the theory of recognition brings to the table is the fact that all of these critiques are philosophically bound to a same source: a liberal bias in how the legal system understands interpersonal and social phenomena, which influences the substantive legal norms and the judicial processes to adjudicate those norms. The utility, and even necessity, of such an approach becomes evident when analyzing legislative reforms aiming to improve child protection systems.

3. The Laurent Report and the 2022 Legislative Reform: A Recognitional Critique

In this part, I use the example of the recent proposed (and in part implemented) reforms of Québec's child protection system to highlight the practical utility of the recognitional critique of law. They serve to show how legal norms can go against their

[106] Nigel Parton, "Social Work, Child Protection and Politics: Some Critical and Constructive Reflections" (2014) 44:7 Br J of Soc Work 2042.
[107] Lambert, *supra* note 92; Noël & Saint-Jacques, "Quelle valeur s'accorde-t-on quand on est une mère d'enfant placé ?", *supra* note 93; Dorval, Croteau & Noël, "Des parents d'enfants suivis en protection de la jeunesse se racontent", *supra* note 93; Lacharité, Milot & Lafantaisie, *supra* note 88.
[108] Coupienne, *supra* note 89.
[109] Trevor Spratt, "The Influence of Child Protection Orientation on Child Welfare Practice" (2001) 31:6 Br J Soc Work 933; Parton, "Social Work, Child Protection and Politics", *supra* note 106.

expressed purpose, by relying on a distorted concept of the individual at the heart of the system.

To this end, I briefly present the Laurent Commission created in 2019 by the Québec government to revise child protection services and children's rights in the province, and the repercussions of this Commission on Québec's child protection system. The Commission led to a legislative reform which has taken effect in November 2022. In light of recognition theory, I propose a critical analysis of how this initiative was led, of its recommendations, and of the way some of the recommendations have already been implemented. I focus on the observations and recommendations made by the Commission that directly impact the legislative framework and the judicial aspects of youth protection, since I aim to analyze the effects of the legal answers to child maltreatment in Québec. Those are found in chapters 1 and 6 of the Laurent Report, which address respectively children's rights and judicial intervention in child protection.

3.1. Alicia's Story and Laurent Commission Mandate

On April 30, 2019, a seven-year-old girl (known under the pseudonym of Alicia in the media) died in sordid circumstances in the city of Granby, Québec. At the time of her death, she was under the custody of her father and his partner. She had been followed by the DYP since her birth. She suffered neglect, physical abuse, and psychological maltreatment. Alicia was born in 2011 from a teenage mother who consumed hard drugs during her pregnancy and from a father who had sexually assaulted his sister and brother

growing up.[110] She spent her first three years in the care of her paternal grand-parents before the court granted full custody to her father and stepmother, in the context of what was read by courts as a conflict between the grand-parents and the father.[111] The grand-parents' had made complaints and allegations against the father, notably of sexual abuse. The DYP and the two judges intervening in her situation (in youth protection and family law) both concluded the allegations were unfounded.[112] Moreover, the father and stepmother already had custody of Alicia's younger brother since he was an infant.[113] In granting custody to the father, the court denied the grand-parents access to the child and closed her child protection file in 2015, since she was under the custody of her biological parent and no ground for maltreatment had been found in this environment.[114]

In 2017, the DYP investigated a report for physical abuse and exposure to domestic violence after Alicia was hit by her stepmother during a conflict between her and the father. Many incidents of violence requiring police intervention were listed in the evidence presented to the court, reporting that the couple were often inebriated and fought in front of the child.[115] In the context of the DYP's investigation, the father revealed the difficulties the couple had in handling the extreme behaviours of Alicia. She harmed herself by hitting her head on walls, defecated, and spread her feces on the walls, urinated in her room, often had crisis and tried to leave the house during the night.[116] The judge noted that the father

---

[110] Ducas, Isabelle, "Fillette morte à Granby: un tragique destin", La Presse, May 3, 2019 : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2019-05-03/fillette-morte-a-granby-un-tragique-destin>.
[111] *Protection de la jeunesse — 184769*, 2018 QCCQ 14293 para 14, 20-23.
[112] *Ibid* para 20-26.
[113] *Ibid* para 18.
[114] *Ibid* para 20-26.
[115] *Ibid* para 31-46.
[116] *Ibid* para 47.

presented strengths in his capacity to protect his children.[117] The father had asked for services from social and health services, but it is unclear whether the family received support for these issues.[118] The school confirmed that the child had behavioural issues, lied, and refused to eat.[119] Alicia still had supervised contacts with her mother, which she explicitly stated not enjoying.[120] As a result of her early life traumas, her pediatrist wrote in April 2018 that the current hypotheses were a probable attachment disorder, anxiety, an oppositional defiant disorder, and a severe sleep disorder.[121]

In 2019, she died tied up in tape around her wrists, elbows, shoulders, and ankles, after having been regularly locked up in her room by either her father or her stepmother to handle her crises.[122] Alicia's story shook the province. The media's widely reported and discussed the details of her death, as well as the criminal procedures against her father and stepmother.[123] As we can see from the protection judgment that preceded her death, in May 2018, the situation of this child was reviewed and known by multiple people since her birth, from social workers to judges, but also by police services, school staff, doctors, etc. One

---

[117] *Ibid* para 48.
[118] *Ibid* para 52-56.
[119] *Ibid* para 54.
[120] *Ibid* para 71-78.
[121] *Ibid* para 58.
[122] Ducas, Isabelle, "Fillette morte à Granby: un tragique destin", La Presse (3 May 2019), online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2019-05-03/fillette-morte-a-granby-un-tragique-destin>; Bilodeau, Émilie, "Mort de la fillette de Granby : De nouveaux détails sur le rôle du père", La Presse (15 December 2021), online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2021-12-15/mort-de-la-fillette-de-granby/de-nouveaux-details-sur-le-role-du-pere.php>.
[123] *Ibid.* See also, for just a few examples : Gonthier, Valérie, and Alex Drouin : "La fillette de sept ans aurait été attachée et bâillonnée pendant des heures", Journal de Montréal (30 April 2019), online : <https://www.journaldemontreal.com/2019/04/30/fillette-dans-un-etat-critique--deux-personnes-arretees-1>; Tremblay, Stéphane, "Fillette décédée à Granby: l'alerte avait pourtant été sonnée", HuffPost Québec (2 May 2019) online : <https://www.huffpost.com/archive/qc/entry/fillette-decedee-granby_qc_5cd0f7e8e4b0226c530b7e7e>; Canadian Press, "Le fait divers marquant de 2019 aura été la mort d'une enfant de 7 ans à Granby" Radio-Canada (22 December 2019), online : <https://ici.radio-canada.ca/nouvelle/1445934/-faits-marquants-2019-fillette-granby-dpj>.

possible reason for the fact that her case did not seem to stand out for any of those people is that, although her distress was extremely severe, her situation may have just not been that different from other cases. Just in 2017-2018, while her situation at her father was reported, DYPs around Québec treated 96,014 reports of maltreatment and intervened for 38,945 of those children.[124] Of those, they retained 9,654 for physical abuse and 6,715 for psychological maltreatment.[125] Alicia was one among tens of thousands children in the province (out of about 1,5 million children) [126] in a situation concerning enough to warrant protection services, all of them having faced negligence and abuse, all of them differently affected by these traumas. And while those other children did not die from the maltreatment they incurred, they all will bear forever the consequences of the abuse or neglect they suffered.

In the days following her death, at the National Assembly, the questions period was dominated by her story. The plea made by Granby's DYP to refrain from drawing hasty conclusions seemed to have not been heard through the media frenzy.[127] The first question asked on May 2, 2019, during the parliamentary debates was whether there would be an inquiry, not only on the specific death of Alicia, but on the whole youth protection system, as it "had gravely failed to its task".[128] All opposing parties interrogated the government on what they would do to improve the youth protection system and make sure this would

[124] La cause des enfants tatouée sur le cœur : Bilan des directeurs de la protection de la jeunesse/Directeurs provinciaux, (Québec Government, 2018) at 11.
[125] *Ibid* at 16.
[126] *Ibid* at 34.
[127] "Attention aux conclusions hâtives, dit la DPJ de l'Estrie", TVA Nouvelles (1 May 2019) : <https://www.tvanouvelles.ca/2019/05/01/en-direct--la-dpj-reagit-apres-le-deces-dune-fillette-de-7-ans-a-granby>.
[128] Journal des débats, 1st sess 42 leg, Thursday 2 May 2019, vol 45 nr 38, at 2452 (Hélène David).

never happen again.[129] The government admitted promptly that "the system had failed".[130] These exchanges and the media coverage of the situation prompted the creation of an inquiry commission into the child protection system, the Special Commission on the Rights of the Child and Youth Protection (thereafter referred to as "Laurent Commission", after the name of its president, Régine Laurent).[131] The Commission published its report in 2021.[132] Soon after the Laurent Commission made public its recommendations, Bill 15 was passed, modifying the YPA in accordance to some recommendations of the Laurent Commission.[133]

The Laurent Commission had a wide mandate: examining "not only […] youth protection services but also the law that governs them, as well as the role of the courts, social services and other actors involved", their evolution over the last forty years and the evolution of the best practices in social intervention with children in need and their families.[134] The mandate also included the examination of the specific realities of the Indigenous populations regarding child protection issues.[135] They had only one year to

[129] The sense that a death was the symbol of the ultimate failure of the system was clearly shared by politicians of all parties. See *ibid*, Hélène David, Liberal Party : "But we must turn over every stone, every stone of the youth protection system. We never ever want to be in such a terrible grief again, Mr. President", at 2453; Pascal Bérubé, Parti Québécois : "Mr. President, a seven-year-old girl, neglected, starved, beaten, abandoned, killed. If the words to translate our emotions are hard to express, today we must find those words and the means to understand and make sure that no other child goes through this sad fate." at 2456; Sol Zanetti, Québec Solidaire (after asking a specific commitment of the minister, on the matter of human resources devoted to the DYP) : "Given the urgency, I insist that the Minister answer the question, because we cannot wait for an inquiry for this" at 2459, which also denotes a sense of urgency to act (my translation for all quotes).
[130] *Ibid*, at 2457 (Prime minister François Legault).
[131] Administrative Decree 534-2019 (30 May 2019) Q Gaz II, 151-24, 1939.
[132] Laurent Report, *supra* note 1.
[133] Bill 15, *supra* note 2.
[134] Special Commission on the Rights of the Child and Youth Protection presided by Ms. Régine Laurent website: "A Willingness to Act for Our Children": <https://www.csdepj.gouv.qc.ca/home/?L=1>; Laurent Report, *supra* note 1 at 13.
[135] *Ibid.*

review not only the entire social and judicial systems of child protection, from the prevention stages to the aftercare support, but also to address the protection of all children's rights. The vastness of these ambitions, paired with a short schedule to publish the report, should have hinted to the limitations in the conclusions the Commission reached in the end. Trying to address so many issues within one inquiry process was doomed to lead to fairly conservative recommendations, since the Commission could not possibly have had the time and means to explore the fundamental causes of each problem it surveyed.

The Commission submitted a 552-page report of 15 chapters. Of those, only two chapters (chapters 1 and 6) were directly aimed at making observations and recommendations about the legislative framework and judicial treatment of child protection cases. In addition, chapter 14 denounced the impacts of the 2015 Bill 10 reform of child protection and general social services, and made recommendations about re-establishing a strong leadership when it comes to at-risk and troubled youth.

In its introduction, the report presents an overview of the general social context in which children's rights and child protection evolve, by describing the social support for families in Québec.[136] The description of the history of youth protection services in the province highlights chronic problems since their inception: budgetary constraints, insufficient prevention programs, lack of specialized resources, complexity of cases.[137] The Laurent Report notes that, over the years, previous governmental reports on child protection in Québec all tended to tackle the same themes and reaffirm the same principles, such as, among others, the priority of social intervention over judicial intervention, the

[136] Laurent Report, *ibid* at 13-37.
[137] *Ibid* at 39.

collective responsibility towards child maltreatment, participation of the parents and children to the process, or continuity of care for children involved.[138] The main observations of the report regarding the legal and structural aspects of child protection do not depart much from these perennial issues.

The introduction of the report also mentions, in passing, that the number of reports of child maltreatment in the province has skyrocketed in the last 20 years.[139] However, this fact is not analyzed further in the report. The Commission does not seem to take into account that this increase is an international trend and not an isolated provincial issue.[140] The international perspective points to a systemic and wider cultural trend regarding child protection and the evolution of public sensitivity in these matters, rather than just a regional multiplication of child maltreatment cases.[141] Analyzing the worldwide evolution of child maltreatment awareness and the evolution of the Anglo-American model of child protection in other jurisdictions would have given a better context to understand the recurrence of structural issues.

Considering my earlier analysis of Québec's child protection system through the theory of recognition, some recommendations aim at improving the experience of children and parents in the system, and therefore are in line with recognitional purposes. However, in the end, the Laurent report does not challenge the core structure of child protection as a general approach to child maltreatment and therefore, the structural issues of that model

---

[138] *Ibid* at 40.
[139] *Ibid* at 37.
[140] Nigel Parton, "Addressing the Relatively Autonomous Relationship Between Child Maltreatment and Child Protection Policies and Practices" (2020) 3:1 Int J Child Maltreat 19.
[141] *Ibid*.

remain. Moreover, as we will see, the recommendations on children's rights and judicial intervention were almost all recycled versions of recommendations that have been restated for decades in different commission reports, or stem from issues that have been identified and debated for just as long. Consequently, from the point of view of a recognitional approach to child maltreatment, the results of the Commission's work are mixed. On the one hand, the Laurent report relies heavily on legislative solutions, while paradoxically affirming that over-judicialization is a major issue. These legislative solutions could arguably not only be ineffective, but could aggravate the issue of overreliance on the courts. On the other hand, thankfully, some long-standing recommendations reiterated in this report are finally being heard, and could contribute to mitigate the negative impacts of the judicial intervention.

3.2. Children's Rights

The Laurent Commission makes three main recommendations regarding children's rights: the creation of a "Commissaire au bien-être et aux droits des enfants", the creation of a Charter of Children's Rights, and the revision of the YPA (which has been actualized in 2022 by the adoption of Bill 15).[142] These recommendations all have in common to suggest purely legal answers to children's rights issues.

In its first chapter, the report states that children's best interests are still too often not the most important considerations in decisions that regards them, especially when it comes to the continuity of care and stability of their relationships.[143] It does so without

[142] Bill 15, *supra* note 2.
[143] Laurent Report, *supra* note 1 at 79.

specifying how or why the Commissioners came to that conclusion. The report also observes that children are still not heard enough, both quantitatively and qualitatively, in all matters that concern them.[144] This point is conflated with a general affirmation that "certain rights are not adequately respected for all of Québec's children".[145] While the report argues that this statement is supported by the evidence reviewed, it does not explain which rights are not respected or how they are not respected before jumping to their corresponding recommendations to reinforce children's rights.[146]

In the following sections, I make the argument that there is what I will call a "legislative bias" in the Laurent report's recommendations regarding children's rights. The legislative bias is the idea the phrasing of rules of law will change how the actors interpret them. The general affirmations of the Laurent Commission regarding children's rights led to recommendations that, following a legal mindset, assume that changing the written law will change the reality of citizens living under that jurisdiction. The unspoken rationale behind those recommendations is that making the logic and importance of children's rights plainer in legal instruments and institutions will change the way children's rights are, in fact, respected. This position is coherent with the way law conceptualizes people: it takes for granted that people are autonomous and rational and that if a legal rule is more plainly stated and more obviously justifiable in its reasoning, people will abide by it. This line of thinking obscures how recognitional needs are actually a stronger motive for people's action than their volition or their rational motives. What we will see is that a recognitional

[144] *Ibid* at 68.
[145] *Ibid* at 53 (my translation).
[146] *Ibid*, see chapter 1 in general, but for an example, see 79 and following.

account of personal autonomy shines light on the unintended effects legal rules can have, since people's motivation are more complex than what law assumes.

3.2.1. Commissaire au bien-être et aux droits des enfants

The first recommendation concerning children's rights is to create a new office, a "Commissaire au bien-être et aux droits des enfants" (which could be translated to "Commissioner for the Welfare and Rights of Children"). This suggestion was inspired by similar offices in other Canadian provinces.[147] Comparing the number of children who contacted these offices in other provinces with the number of children who contact the Québec's CDPDJ in a given year, the Laurent report found the number to be significantly lower in Québec.[148] It concluded that an office dedicated to children was necessary and recommended the creation of this new entity. Among its main functions, it would have to: give a voice to children's interests and advocate for them in the context of political or administrative decisions that impact them; create instances where children can express themselves and participate to the democratic life of Québec's society; and, lead inquiries on children's deaths.[149] Those responsibilities are similar to the ones exercised by the actual CDPDJ, with a broader scope, since it would be independent from the YPA and aimed at all children. What is striking is that this mandate is in fact closer to the original purpose of the creation of a "Committee of Youth Protection" in the 1977 version of the YPA; it is a wider mechanism to address the social conditions of children welfare.

---

[147] *Ibid* at 56.
[148] *Ibid*.
[149] *Ibid* at 82.

It is hard to see why the Laurent Commission decided to recommend the creation of a new organization instead of trying to improve the one that already existed, that is, the CDPDJ. Furthermore, the report does not specify the qualifications the Commissaire or its employee will have to hold, leaving important questions unanswered as to what their role exactly would be regarding children who would want to report rights' infringement. The way the Commissaire's office is described in the report seems to be referring to legal knowledge, since the vocabulary used is that of rights.[150] It seems to describe a mechanism by which children's rights issues would be handled as legal issues, by legal professionals, instead of a psychosocial intervention.

However, when the right of a child is not respected, it is never only a legal issue; it is a social issue. Children's rights infringements are by definition traumatic.[151] Violations of rights happen in relational contexts, and trigger emotional responses in the child. Rights exist to ensure that children are treated with respect and care, that they grow up in an environment that allows them to fully and safely develop and that they are respected as individuals, as agents of their own life. Whenever these safeguards are infringed, the most pressing issue it creates is arguably not legal but social and interpersonal. Therefore, the most adequate remedy to a children's right violation cannot be solely legal, it has to be psychosocial as well. It must address the wrong done in a sensitive and relational manner

[150] *Ibid* at 82-83.
[151] Molly R Wolf, Shraddha Prabhu & Janice Carello, "Children's Experiences of Trauma and Human Rights Violations Around the World" in Lisa D Butler, Filomena M Critelli & Janice Carello, eds, *Trauma and Human Rights: Integrating Approaches to Address Human Suffering* (Cham: Springer International Publishing, 2019) 125; Brent Bezo, "A Child Rights Perspective on Intergenerational Trauma" (2017) 4:1 Can J Child Rights 71–91; M Bargeman, S Smith & C Wekerle, "Trauma-Informed Care as a Rights-Based 'Standard of Care': A Critical Review" (2021) 119 Child Abuse Negl (30 Years of the Convention on the Rights of the Child: Challenges and progress in harm prevention) 104762.

that empowers the child to heal the wound that will inevitably have been created.[152] As currently drafted, the Commissaire recommendation, unfortunately, does not seem to meet this objective.

3.2.2. Charter of Children's Rights

The second recommendation is to adopt a Charter of Children's Rights, which would have a quasi-constitutional status. Although the Laurent report makes no reference to this historical fact, this recommendation echoes debates that preceded the adoption of the 1977 YPA when the idea of a Charter of children's rights was first suggested. Not exploring any counterarguments, the report gives six "arguments" in defence of this recommendation. First, it affirms that the rights of children affirmed by the UNCRC are not currently integrated in Québec's domestic law, since there is no legal instrument strictly dedicated to all children's rights.[153] Second, it affirms that such a Charter would send a strong message that children are subjects of law and that children's rights are a priority.[154] Third, the Charter would extend the principle of the best interests of the child to all social and political spheres of decision.[155] Fourth, the Charter is necessary to guarantee the right of participation of all children.[156] Fifth, it would contain a prohibition of physical correction (within the limits of the provincial competence on this matter, since criminal law is a

[152] *Ibid.*
[153] Laurent Report, *supra* note 1 at 65.
[154] *Ibid* at 66.
[155] *Ibid* at 67.
[156] *Ibid*.

federal jurisdiction).[157] Sixth and lastly, the Commissioners deem it necessary that the rights of Indigenous children be enshrined in this instrument.[158]

The report spends more time justifying the necessity of this new legal instrument regarding international legal standards than to justify how it would concretely contribute to protecting children's rights. It does not seem to address though the fact that such laws are not performative, especially when it comes to intimate violence, such as the use of physical correction. Saying that a law is not performative is to say that it is not enough to announce a rule for that rule to be become a fact. As Waldron puts it: "Laws face in two directions: (i) they impose requirements for ordinary citizens to comply with; and (ii) they issue instructions to officials about what to do in the event of non-compliance by the citizens."[159] Prohibiting physical punishment by law does not ensure that physical punishment will not happen; it rather creates a potential legal consequence to this act, which will be enforced by the legal authorities. Addressing an issue by creating a rule of law that further enacts the logic of rights and duties and reinforces adversarialism, by giving rise to more legal claims without establishing alternative means to address the issue.[160] This is a problem feminists have long known: finding adequate legal responses to social patterns of violence within the private sphere is a quest fraught with obstacles.[161]

---

[157] *Ibid*. For a discussion on the prohibition of physical correction, see chapter 1 of this thesis.
[158] Laurent Report, *ibid*.
[159] Jeremy Waldron, "The Rule of Law", (22 June 2016), online: *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/Entries/rule-of-law/#RuleLawRuleLaw>, Summer 2020 Edition.
[160] The non-performativity of human rights in the context of intimate violence has been explored by Shazia Choudhry, "When Women's Rights are Not Human Rights–the Non-Performativity of the Human Rights of Victims of Domestic Abuse within English Family Law" (2019) 82:6 Mod Law Rev 1072.
[161] Elizabeth M Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press, 2008); Mandy Burton, *Legal Responses to Domestic Violence* (Routledge, 2008).

I see three probable negative consequences of enacting a Charter of Rights as an answer to children's rights issues: the first is that it would likely drive an increase of judicial proceedings in cases of child protection, by raising issues of rights violations that further the adversarialism between parents, children and the DYP; the second is that it diverts attention from the actual interpersonal or systemic causes that result in children's rights violations; and the third is that children's rights violations, from the perspective of a child, are psychosocial events that need to be dealt with in a trauma-informed way, which the legal system is still poorly equipped to do.

To develop this argument, I will take the example of the child's right to participation, because it is stated in the report as one of the main purposes for the adoption of the Charter.[162] At the time of the Laurent Commission's inquiry, the right of the child to participate in both social and judicial decision-making processes was guaranteed by many legislative provisions, such as

- section 34 of the Civil Code of Québec: "The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it."[163];

- section 2.3(b) YPA: "Any intervention in respect of a child and the child's parents under this Act […] must, if the circumstances are appropriate, favour the means

[162] Laurent Report, *supra* note 1 at 67.
[163] CCQ s 34.

that allow the child and the child's parents to take an active part in making decisions and choosing measures that concern them";[164]

- section 2.4(4) YPA :"… every person called upon to make decisions with respect to a child under this Act shall, in their interventions, take into account the necessity: […] of giving the child and the child's parents an opportunity to present their points of view, express their concerns and be heard at the appropriate time during the intervention"[165].

These provisions, especially taken together, unequivocally guarantee a legal right of participation for the child. The right to participation was always on of the guiding of the YPA's principles as one of the main children's rights, as early as its first enforced version in 1977. The non-respect of that right, therefore, does not stem from the absence of an explicit legal rule. It must come from other causes. While raising extensively the issue of a lack of children's participation and its consequences on children in its chapter on children's rights, the Laurent report does not dig into why this right is violated. The only cause mentioned in this chapter is that children's lawyers do not always meet with their client and that they are poorly equipped in terms of training.

Building on the general argument of this thesis, I would argue that there are good chances that the systematic problem of a lack of child participation in the decision-making processes is not the result of a lack of clear legal rules. Rather, it is a natural secondary effect of the liberal conception of autonomy. Being a subject of law in the civil law context

[164] YPA (2007 version) s 2.3(b).
[165] YPA (2018 version) s 2.4(4).

means being a right-bearer. Moreover, as we have seen, the ability to exercise these rights is closely tied to rational maturity. Agency (and, therefore, the aptitude to fully participate in decision-making regarding one's life) cannot exist in the legal framework without rationality. Yet, children's brain do have to mature before they are able to exercise the full range of rational judgment humans can access.[166] Therefore, in the context of our legal culture, it is hard to reconcile the vulnerability and lack of rational abilities of children with agency. This difficulty can lead to either not listening to children at all, because they are deemed incapable of having an informative opinion, or to giving too much weight to their expressed will, without balancing it in the context of their relational vulnerability and their relative immaturity. In contrast, a recognition approach considers all persons as vulnerable and interdependent, and it understands autonomy to be the result of relational conditions. Agency becomes the central value in this theoretical framework, instead of autonomy. Therefore, a theory of recognition leaves room for every human being, at any age, to be recognized by others as a subject of their own experience, without objectifying them.

In the same way, the adequate remedy to this problem is not to restate the right to participation in the hopes that this time around, actors of the social and judicial system will understand its purpose and start taking it seriously. Neither is it to multiply the judicial proceedings to have the infringement of rights recognized by the courts. Such recourses drag child protection court cases in order to obtain judicial declarations of wrongdoing in a specific case, that likely will be forgotten the next time around. While a Charter of

[166] BJ Casey et al, "Imaging the Developing Brain: What Have We Learned About Cognitive Development?" (2005) 9:3 Trends in Cognitive Sciences 104; Rebecca L Holt & Mohamad A Mikati, "Care for Child Development: Basic Science Rationale and Effects of Interventions" (2011) 44:4 Pediatric Neurology 239.

Children's Rights could possibly influence the culture around the rights it protects, it certainly is insufficient in that in does not address the underlying causes of those rights infringements, and it paves the way to an even more legalized approach to dealing with rights violations.

3.2.3. Revising the YPA: Bill 15

Finally, the third recommendation of the Commission regarding children's rights is to revise the YPA to employ a plainer language, especially when it comes to children and parents' rights. It recommends creating a preamble to "reinforce the respect of children's rights"[167], to "reaffirm and add directing principles" to the law, and to "reaffirm certain children's rights and parental responsibilities".[168] The recommendation to implement legislative changes to the YPA is completed by the recommendations in chapter 5 of the report, which address the issue of the stability of care. While the stability and continuity of care has been stated as a founding principle of the YPA since the 2006 reform, the commissioners found that it needed to be reaffirmed more clearly in the Act.

This recommendation was met with a quick answer. Bill 15 was adopted just months after the publication of the report and most of its provisions entered into force in November 2022.[169] Bill 15's primary object was to modify the YPA "to facilitate the interpretation and application of that Act by the various actors involved" and to "[reaffirm] that the interest of the child is a primary consideration in the application of that Act".[170] While the changes reorganized the first sections of the YPA and, as was intended,

[167] Laurent Report, *note 1* at 84 (my translation).
[168] *Ibid* at 84.
[169] Bill 15, *supra* note 2.
[170] *Ibid*, explanatory notes.

"reaffirmed" its guiding principles, it did not change its essence, nor did it create any new rights.[171] For example, the first paragraph of section 3 formerly read: "Decisions made under this Act must be in the interest of the child and respect his rights."[172] It now reads: "The interest of the child is the primary consideration in the application of this Act. Decisions made under this Act must be in the interest of the child and respect his rights."[173] Besides, while the emotional stability of the child was already stated as a guiding principle in section 4, the new phrasing now emphasizes that it should always be the main purpose of any intervention under the Act, and that to favour keeping the child in its family environment is a principle that is subsumed under the general objective of continuity of care and stability.[174] Around the same time as Bill 15 was adopted, Bill 2 amended section 599 of the Civil Code of Québec, which describes the rights and duties of parents, to add the following sentence at the end of the provision: "They [the parents] exercise their authority without any violence."[175] This principle was already stated by the prohibition of physical and emotional abuse in the YPA.

While the objective of having a law that can be more easily explained to children and parents is praiseworthy in a spirit of fostering participation, whether the changes implemented really do make the law easier to understand is debatable. The Commission seems to have taken for granted that principles needed to be restated or reaffirmed for them to be better actualized. In that sense, the legal bias of the previous recommendations is still

[171] YPA.
[172] YPA (2019 version) s 3.
[173] YPA (current version) s 3.
[174] YPA s 4.
[175] CCQ s 599; Bill 2, An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status, 2nd Sess, 42nd Leg, Québec, 2022 (assented to 8 June 2022) SQ 2022 c 22 s 106.

at play, arguably even more explicitly through these changes. From a practical standpoint it is hard to imagine how, for example, the reformulation of section 3 of the YPA will have an impact, either on how parents and children understand the YPA's objectives and principles, or on how the multiple actors in the child protection will follow them. Notably, it was always the case, not only from provincial legislation,[176] but from jurisprudence[177] and the international conventions,[178] that the best interests of child had to be the priority in any decision regarding children.

3.3. Judicial Intervention

The report's chapter on judicial intervention begins by reaffirming that social intervention should always be privileged. It observes that child protection cases are getting judicialized at a higher rate than ever, that courts are overworked, and that judicial delays are getting longer. The report explains the augmentation of cases ending up in courts by an increasingly defensive posture of the DYPs, who tend to want to shift the responsibility of decision-making onto judges.[179] This phenomenon is driven by two factors: on the one hand, the public scrutiny has become heavier because of the mediatisation of cases, and on the other hand, judicial procedures seeking to blame the DYP for situations where children's rights have been infringed ("*demandes en lésion de droits"*) have multiplied in the last decades.[180] Furthermore, the report notes that the adversarial approach of the

[176] CcQ s 3; YPA (versions before 2022).
[177] The principle has been affirmed over and over again by the Supreme Court of Canada. For just a few examples of influential judgments, see *Racine v Woods*, [1983] 2 SCR 173; *Young v Young*, [1993] 4 SCR 3. It has been reaffirmed again recently in *BJT v JD*, 2022 SCC 24, in a child protection case.
[178] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, a 3(1).
[179] Laurent Report, *supra* note 1 at 222
[180] *Ibid*. See also Ricard, *supra* note 81.

judicial process tends to antagonize parties, focus on parents' weaknesses instead of their strengths, and limits the ability of all parties, including children, to participate actively in the decision process.[181] It also observes that the alternative dispute resolution tools available to parties are not widely used.[182]

The Commission does not take into account that, as we have seen in the chapter four of this thesis, these issues are not local; they are general trends in Anglo-American child protection systems.[183] Therefore, unsurprisingly, the recommendations are similar to other initiatives taken in Anglo-American jurisdictions, even if they are not informed by a comparative analysis.[184] The recommendations of the Laurent report regarding judicial interventions are: to implement a mediation approach at all stages of the child protection intervention; to create a data-collecting system to analyze judicial delays and find appropriate solutions; to reflect on the possibility of creating a unified family court, which would hear all family matters; to develop an independent mediation process which would precede judicial intervention; to privilege a collaborative and participative approach in youth courts; to improve children's representation by establishing specific deontological

[181] Laurent Report, *supra* note 1 at 219.
[182] Ibid.
[183] See chapter 4.
[184] For example, court delays are also an issue in other jurisdictions. See for example, in the UK: Jonathan Dickens, Chris Beckett & Sue Bailey, "Justice, Speed and Thoroughness in Child Protection Court Proceedings: Messages from England" (2014) 46 Child Youth Serv Rev 103; in the United States: Leonard Edwards, "Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process" (2007) 58:2 Juv Fam Ct J 1. Unified family courts have been discussed in the American context: Barbara A Babb, "Unified Family Courts: An Interdisciplinary Framework and a Problem-Solving Approach" in Richard L Wiener & Eve M Brank, eds, *Problem Solving Courts: Social Science and Legal Perspectives* (New York, NY: Springer, 2013) 65. There are many examples of mediation programs in different Anglo-American jurisdiction, such as in British Columbia (M Jerry McHale, Irene Robertson & Andrea Clarke, "Building a Child Protection Mediation Program in British Columbia" (2009) 47:1 Fam Ct Rev 86) or in California (Leonard Edwards, "Child Protection Mediation: A 25-Year Perspective" (2009) 47:1 Fam Ct Rev 69), among others.

rules and training for children's lawyers; and finally, to adapt the physical environment of the court and the judicial process to make it friendlier for children. [185]

Significantly, many of the Laurent Report's main observations and even recommendations regarding the legislative and judicial aspects of child protection are not new. For example, in 2004, the Turmel Report (following the commission of the same name, created by the Ministry of Justice, on judicial processes in child protection) noted that despite the stated principles of the YPA, cases were judicialized at a higher rate than ever.[186] It suggested the creation of a mediation program.[187] Although it would be outside the scope of this analysis to do so here, it would be interesting to further inquire into why those older recommendations have not been implemented before. Based on the experience of other jurisdictions, it would be reasonable to hypothesize that mediation programs ran (and are still running in some ways) counter to the legal culture of adversarialism and, therefore, were viewed with suspicion.[188]

The two most promising recommendations in the chapter on judicial intervention are the mediation program and the children lawyer's specialized training. The mediation program is being implemented as a pilot project in a few Québec regions.[189] What seems

---

[185] Laurent Report, *supra* note 1. at chapter 6.
[186] Jean Turmel et al., L'intervention judiciaire en matière de protection de la jeunesse : constats, difficultés et pistes de solution, Rapport de l'équipe de travail sur la modernisation des processus judiciaires en matière d'administration de la justice à l'égard des jeunes (Québec Government, 2004) at 31 and following.
[187] *Ibid* at 46. The idea had been studied by an even earlier report: Michel Jasmin et al., La protection de la jeunesse : plus qu'une loi, Rapport du Groupe de travail sur l'évaluation de la Loi sur la protection de la jeunesse (Québec Government, 1992).
[188] McHale, Robertson & Clarke, *supra* note 183.
[189] "Lancement du projet pilote de médiation en protection de la jeunesse dans quatre nouvelles régions du Québec", Québec Government Website, News Section (27 June 2022), online : <https://www.Québec.ca/nouvelles/actualites/details/lancement-du-projet-pilote-de-mediation-en-protection-de-la-jeunesse-dans-quatre-nouvelles-regions-du-Québec-41896>.

especially promising is that it promotes mediation before the case reaches the hands of lawyers, so that it offers a chance for social workers, parents and children to unpack the situation in the context of the social intervention. Of course, it does not change the dynamics of the child protection system and the ultimate authority of the DYP, but it might soften its effects. In a similar way, mandating specialized training for children's lawyers could serve to counteract the narrow legal mindset that tends to end up in experiences of misrecognition for children. It could give lawyers the tools to convey the agency of children while protecting their vulnerability. In fact, the Commission could have gone further and recommended this specialized training for any jurist, lawyer or judge, who works in child protection matters. If the law does not have the tools to apprehend the realities of child maltreatment, maybe the individual jurists can learn them.

4. The Legal Bias, Recognition and Alicia's Fate

While this chapter of this thesis has focused on the recommendations that touched on the legislative and judicial aspects of child protection in the Laurent report, most chapters of the report made recommendations on bettering the social services offered to children and families, and the working conditions of the professionals that provide them. From a recognition standpoint, these recommendations seem more likely to have an impact on how child maltreatment is answered in Québec, since they focus on the relational conditions that can prevent or heal issues of family violence.

It still seems pertinent to ask: would the Laurent Commission's recommendations and the changes implemented by Bill 15, regarding the legislative framework and judicial interventions, have changed anything in Alicia's story? From the perspective of children

who are victim of intergenerational trauma, neglect and abuse, are recommendations such as a Charter of rights, a Commissioner for the Welfare and Rights of Children, a Youth Protection Act that would be more plainly written, a mediation program or the training of children's lawyers, likely to make a positive impact? Would they have had any impact on Alicia's trajectory and dramatic fate?

While no one can know for sure, unfortunately, there are few reasons to think so. When she was sent to live with her father at the age of four, the permanency and continuity of care principles were already well spelled out in the YPA; there is no legal reason to think that the same principles would be applied differently today in the face of the same evidence. Given what we know about her mental health state, she likely would not have been able to speak out to a Commissioner for the Welfare and Rights of Children. Nothing could make us think that she or her family would have received more services for her traumatized state or for their difficulties. Her father and stepmother would not have had more reasons to be more transparent about their difficulties in the adversarial context of the DYP's intervention. The fatal decision in her case seems to have been to put an end to the guardianship of her grandparents to send her back to the custody of her biological father. This decision was made by a judge, in a courtroom, under a law that already had provisions that stated that a guiding principle of the law had to be the continuity of care.[190] Furthermore, that child was suffering from intergenerational trauma since her birth, which the system of child protection and the wider public health and social services were not

[190] YPA s 4.

adequately equipped to address. Arguably, the real failure in Alicia's case was the inability to prevent, and then address, the deep pain engendered by her early life's experiences.

Since Alicia's death, many other children have died of maltreatment in Québec, without stirring up the same kind of public outrage.[191] The children who, like her, are suffering to a point of being dysfunctional do not have the same media coverage and stir political debate the same way, but they are evidence of our society's wider failure to address child maltreatment.[192] Access to mental health services is notoriously restricted in Québec's public health system.[193] Every legal professional who came into contact with Alicia's case had little to no training about the clinical and therapeutic approaches to child

---

[191] Here are stories published about multiple children's deaths since May 2019 (I include reports of deaths from murder, since it is the most extreme form of physical abuse) : Jean-François Nadeau, "Un jeune garçon meurt pendant une intervention de la DPJ", *Le Devoir* (30 March 2020), online : <https://www.ledevoir.com/societe/575992/un-enfant-de-la-dpj-mort-jeudi>; Roxane Trudel, "Une fillette poignardée à mort à Montréal", *Le Journal de Montréal* (25 April 2020), online : <https://www.journaldemontreal.com/2020/04/25/possible-drame-familial-une-fillette-de-4-ans-grievement-blessee-a-larme-blanche>; Judith Desmeules, "Les deux fillettes de Lévis retrouvées mortes, Martin Carpentier toujours en cavale", *Le Soleil* (11 July 2020), online :<https://www.lesoleil.com/2020/07/11/les-deux-fillettes-de-levis-retrouvees-mortes-martin-carpentier-toujours-en-cavale-54deea849ce1486fdbda61891bfcedb7/>; Henri Ouellette-Vézina, "Fillette poignardée à mort: la mère a été arrêtée", *La Presse* (23 July 2020), online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2020-07-23/fillette-poignardee-a-mort-la-mere-a-ete-arretee.php>; Sébastien Tanguay, "Deux garçons trouvés sans vie à Wendake", *Radio-Canada* (11 October 2020), online :<https://ici.radio-canada.ca/nouvelle/1740379/wendake-enfant-double-meurtre>; "La fillette morte à Laval était connue de la DPJ", *Radio-Canada* (4 January 2021), online: <https://ici.radio-canada.ca/nouvelle/1760660/laval-fillette-mort-enquete-autopsie> ; Philippe Teisceira-Lessard, "Deux bébés morts dans une famille : la DPJ et la justice en quête de réponses", *La Presse* (15 February 2023) online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2023-02-15/deux-bebes-morts-dans-une-famille/la-dpj-et-la-justice-en-quete-de-reponses.php>.

[192] For just one example, in 2022, the newspaper La Presse published a series of articles about "Marie-Ève", a traumatized child who had been abused and neglected as an infant: see Katia Gagnon, "*La petite enfant sauvage*", *La Presse* (28 May 2022), online: <https://www.lapresse.ca/actualites/2022-05-28/direction-de-la-protection-de-la-jeunesse/la-petite-enfant-sauvage.php>.

[193] Emmanuel Stip, "Maintenant qu'elle est bien découverte, la psychothérapie devrait être couverte !" (2015) 40:4 Santé Mentale au Québec 7. *Accès aux soins en santé mentale: Un portrait québécois alarmant*, by Médecins québécois pour le régime public (Montreal, 2022). Nahila Bendali, "*La Vérif : comment se porte l'accès aux soins en santé mentale au Québec?*", *Radio-Canada* (20 September 2022), online : <https://ici.radio-canada.ca/nouvelle/1916661/soins-sante-mentale-psychologues-liste-attente>; Christine Grou (president, Ordre des psychologues du Québec), "*Crise en santé mentale : la pointe de l'iceberg?* ", *Le Journal de Montréal* (29 September 2022), online : <https://www.journaldemontreal.com/2022/09/29/crise-en-sante-mentale-la-pointe-de-liceberg>.

maltreatment, or its ecosystemic structure.[194] Building on the background of the theory of recognition and the documentation about the causes and consequences of child maltreatment, I submit that she also suffered from the inability of our justice system to understand the causes and impacts of child maltreatment, and to deal with it effectively.

[194] Sarah Bardaxoglou et al, "Au coeur de l'accès à la justice des jeunes en protection de la jeunesse: des acteurs discutent" (2020) 66:1 Service social 81.

Conclusion

This thesis has shown how child maltreatment – a disquieting but bafflingly common human experience –[1] can help us see the limitations of legal concepts and processes in apprehending complex human dynamics. While the idea of protecting children is intuitive, the nature and causes of child maltreatment are multilayered,[2] and the adequate actions to take are less than evident. Because of the phenomenon of intergenerational transmission, parents who are neglectful or abusive often have been maltreated themselves.[3] The social context in which both parents and children evolve also affect the probability of child maltreatment, as well as the resilience of children.[4] Intervening in a trauma-informed way in these cases means striking a balance between empowerment, trust, and care.[5] All these facts about child maltreatment are at odds with the structure of the legal systems of child protection, which tend to individualize and overemphasize the personal responsibility of the parents,[6] function within their own logics, while having little conceptual means to apprehend the child's trauma precisely from the child's experience of maltreatment.[7]

---

[1] *What Do We Know about Physical and Non-Physical Childhood Maltreatment in Canada?*, by Danielle Bader & Kristyn Frank, Statistics Canada, Economic and Social Reports Catalogue no. 36-28-0001 (Government of Canada, 2023).
[2] Jay Belsky, "Child Maltreatment: an Ecological Integration." (1980) 35:4 Am Psychol 320; Kelli Connell-Carrick & Maria Scannapieco, *Understanding Child Maltreatment: An Ecological and Developmental Perspective* (Oxford University Press, 2005).
[3] Mark Assink et al, "The Intergenerational Transmission of Child Maltreatment: A Three-Level Meta-Analysis" (2018) 84 Child Abuse Negl 131.
[4] James R McDonell, Asher Ben-Arieh & Gary B Melton, "Strong Communities for Children: Results of a Multi-Year Community-Based Initiative to Protect Children from Harm" (2015) 41 Child Abuse Negl 79.
[5] Sarah Katz, "Trauma-Informed Practice: The Future of Child Welfare" (2019) 28:1 Widener Commw L Rev 51.
[6] Nigel Parton, "Addressing the Relatively Autonomous Relationship Between Child Maltreatment and Child Protection Policies and Practices" (2020) 3:1 Int J Child Maltreat 19.
[7] Jon Elster, "Solomonic Judgments: Against the Best Interest of the Child" (1987) 54:1 U Chi L Rev 1; Virginia C Strand & Ginny Sprang, *Trauma Responsive Child Welfare Systems* (Springer, 2017) at 3-4.

With the aim of analyzing those problems, the methodological process of this thesis is dialectical: it is at once a study of child protection systems through the lens of a theory of recognition, and a work of legal philosophy enriched by the study of the phenomenon of child maltreatment. This process was driven by a reflection on the importance of anchoring theory in concrete practice and empirical research, as well as understanding how reality is shaped by the concepts we use to make sense of it.

After defining child maltreatment and child protection in the first chapter, I argued in the second chapter for a transformation of the definition of personal autonomy from a rationalistic, individualistic understanding to a relational concept of autonomy grounded in recognition, inspired by the work of Axel Honneth.[8] The theoretical framework I suggest is a contribution to relational theories of law. It seeks to provide a substantive alternative to the liberal conception of the self. The advantage of a recognition approach, compared to other relational theories of the law, is that it provides a normative framework to evaluate which relationships, whether in interpersonal, social, or institutional settings, foster personal autonomy. This theory of recognition is the foundation of the critical analyses of the substantive and procedural law of child protection, in chapters 3 and 4, and of the recent proposals to reform child protection in Québec, in chapter 5.

Thus, in the third chapter, I challenged the legal conceptualization of the parent-child relationship as one of mainly rights and responsibilities, arguing that again,

[8] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, translated by Joel Anderson, (MIT Press, 1996); Axel Honneth, *The I in We: Studies in the Theory of Recognition*, translated by Joseph Ganahl (Polity Press, 2012); Joel Anderson & Axel Honneth, "Autonomy, Vulnerability, Recognition, and Justice" in Joel Anderson & John Christman, eds, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press, 2005).

recognition was a better theoretical framework to understand what is at stake in the parent-child relationship. The legal characterization of child maltreatment as "neglect" or "abuse" has a moral connotation and is directly tied to the sense that the parent has failed to meet not only their legal responsibilities, but also their moral duties towards a child. It does not question the causes of child maltreatment, only its manifestation.

In contrast, the child and the parent in a situation of child maltreatment are in a relationship of interpersonal misrecognition, which can be exacerbated by other instances of misrecognition in their lives. There is strong evidence to support the view that child maltreatment is, in fact, the result of the parent's own experiences of misrecognition. As we have seen in chapter one, the causes of child maltreatment are still debated, but risk factors include a lack of interpersonal, social, and institutional support, socioeconomic inequalities, and intergenerational patterns. These can all be translated as instances of misrecognition of the parent, which inevitably has an impact on their relationship with their child. This contrast with the individual responsibility framework posture of the child protection system. In a similar way, the law is ill-equipped to assess the impact of the misrecognition a child suffers when it has endured maltreatment. Abused and neglected children need trauma-informed intervention to foster their resilience.[9] The liberal understanding of the self, which does not make room for vulnerability, lacks the nuances to understand the specific needs commended by their traumatic history.[10]

---

[9] Amy L Ai et al, "Reshaping Child Welfare's Response to Trauma: Assessment, Evidence-Based Intervention, and New Research Perspectives" (2013) 23:6 Research Soc Work Pract 651.

[10] Martha A Fineman, "Equality, Autonomy, and the Vulnerable Subject in Law and Politics" in Martha A Fineman & Anna Grear, eds, *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge, 2013) 13; Ellen Gordon-Bouvier, *Relational Vulnerability: Theory, Law and the Private Family* (Springer, 2020); Jonathan Herring, *Vulnerability, Childhood and the Law*, (Springer, 2018).

If we accept the arguments that the traditional liberal understanding of personal autonomy is unfaithful to how people actually become autonomous and experience autonomy, and that the legal understanding of family relationships is unable to grasp the nature of family conflicts such as those that arise in child maltreatment cases, then it is easier to understand why the foundational reasons for the adversary system and, more broadly, the legal concept of child protection, crumble. As we saw, the adversarial system is premised on these two liberal assumptions: that personal autonomy means individualistic freedom, a right to privacy as well as a right to security, and that evaluating the breach of those rights while respecting the autonomy of each party means that each party will compete to provide facts that support their position in a legal conflict. Those principles are an extension of the rights and duties vocabulary of substantive law. That is why I argued in the fourth chapter that alternative dispute resolution mechanisms could only stay "alternatives" and not become a mainstream way to handle conflict in child protection, because adversarialism is firmly grounded not only in procedural law, but in substantive law. I also stated that there was a consensus among legal scholars and other professionals involved in family conflicts about the need to move away from adversarial processes, especially in the delicate realm of child protection.

I defended the view that a critical analysis grounded in a recognition approach can lead to two types of postures: a pessimistic and an optimistic one. From a pessimistic standpoint, the recognition critique is fatal to the legal norms and processes. The critique of the concept of the self at the heart of the law cuts too deep, and the ramifications are too numerous to salvage the legal system. Each attempt the law will make at reforming itself to better adapt to issues such as child maltreatment is doomed to fail, since the conceptual

problems prevent it to rightly apprehend the reality of the dynamics it purports to correct. Perhaps paradoxically, this perspective calls for an idealistic philosophical project: re-thinking what law could be if we rebuilt it from the ground up, starting from the point of view of the relational self that emerges through processes of recognition. In contrast, I suggested that one could take a more modest, but optimistic view. Chapter 5 is an attempt to show how the theory of recognition can shine light on structural defects in legislative reforms, to better anticipate what the law can do, what the law may unintendedly provoke, and what the law cannot do. Recognition theory becomes a diagnosis tool to evaluate how the law can better serve public policies.

Following this thread of thought, I would like to end on a few practical ideas that could, from a reformist perspective, help stir Anglo-American child protection legal systems in a direction that would foster more experiences of recognition for the parents and children involved. Once we acknowledge the structural hold of the adversarial system on child protection systems through both substantive and procedural law, what can still be done to maximise the use of mediation and other alternatives to court, such as family group conferencing? In an attempt to answer this issue, I suggest two sets of recommendations: one that addresses the problem of the adversarial legal culture, and one that addresses the ways those alternatives are implemented.

The first set of recommendations concerns legal education, both in law schools and faculties, and in general continuing professional training. There needs to be a shift in the legal culture about how the role of law role is understood.[11] To that end, I subscribe to

[11] Julie Macfarlane, "What Does the Changing Culture of Legal Practice Mean for Legal Education" (2001) 20 Windsor YB Access Just 191.

Michele M. Leering's plea for an integration of "reflective practice" in legal education, as a key component of this recommendation.[12] Lawyers and jurists need to understand the limitations of their field of specialization and of their craft, and to reflect on the role they play in the broader social issues their field addresses.[13] They have to first see the limits of the system wherein they work to then want to participate in its transformation. Since the practice of law is mainly about resolving conflicts, there needs to be more interdisciplinary courses based in psychology to train lawyers not only how to think, but how to act with clients, including children, from a trauma-informed perspective.[14] For practitioners of law, a shift from an individualistic understanding of legal issues to a relational one could in part compensate for the limitations of the traditional liberal conception of conflicts. It could lead lawyers to more readily understand the issues their clients face as relational, with solutions that build on these relationships, not against them. In the specific case of child protection, the fact that it is a relatively underinvested field of law in legal education and research is also a major obstacle. This oversight is hard to comprehend, especially since

[12] Michele M Leering, "Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism" (2017) 95:1 Can B Rev 47.

[13] In that regard, the multiplication of clinical legal education programs is good news, considering that it raises the question of the interdisciplinary nature of legal work during legal education. See Judith McCormack, "Not So Dangerous Liaisons: A Clinical Perspective on Interdisciplinarity" (2014) 23 JL & Soc Pol'y [i]-29.

[14] There are examples of jurisdictions where trauma-informed pilot program have been instated in the context of child protection that could be of inspiration: Jason M Lang et al, "Building Capacity for Trauma-Informed Care in the Child Welfare System: Initial Results of a Statewide Implementation" (2016) 21:2 Child Maltreat 113. In the context of child protection in Québec, this has already been advocated: Sarah Bardaxoglou et al, "Au coeur de l'accès à la justice des jeunes en protection de la jeunesse: des acteurs discutent" (2020) 66:1 Service social 81; Mona Paré & Diane Bé, "La participation des enfants aux procédures de protection de la jeunesse à travers le prisme de la vulnérabilité" (2020) 61:1 C de D 223.

the issue of child maltreatment is so prevalent.[15] One way to slowly remediate that situation is to make it more widely available in the legal studies curriculum.[16]

The second set of recommendations concerns how mediation and family group conferencing are held. It can be divided in three points. First, given the evidence on the benefits of mediation, there is no reason not to implement it more widely than it has been up until now. An important aspect of the success of child protection mediation programs is the existence of a comprehensive training program for child protection mediators and a well-developed structural process, to counteract the power imbalance between the parties.[17] This should be a requirement in all jurisdictions. Second, it should also be complemented by a recognition approach. The importance of the four principles of relational procedural justice and their application through an overarching norm of recognition should be part of the training of mediators and other professionals leading alternative dispute resolution processes. Most child protection mediation guidelines highlight the importance of voice (sometimes described as "engagement" or "participation"), neutrality, trustworthiness (through transparency) and respect.[18] But, as we have seen, even if mediators and other facilitators are made aware of those principles, if they do not have the training to interpret

---

[15] Bader & Frank, *supra* note 1.
[16] The integration of childhood ethics into the core legal education curriculum would certainly trigger an important shift in that regard: Franco A Carnevale et al, "Childhood Ethics: An ontological advancement for childhood studies" (2021) 35:1 Children Soc 110.
[17] Rebecca Murphy, *Beyond The Courtroom Door: Exploring The Feasibility Of Child Protection Mediation In Ireland* (Doctor of Philosophy (Ph.D.) in Law, Maynooth University, National University of Ireland Maynooth, Department of Law, 2021) [unpublished] at 209; *The Impact of Child Protection Mediation In Public Law Proceedings on Outcomes for Children and Families: A Rapid Evidence Review*, by Emma Retter, Catrin Wallace & Judith Masson (London: Nuffield Family Justice Observatory, 2020).
[18] For two examples: *Guidelines for Child Protection Mediation*, by Marilou Giovannucci & Karen Largent (United States: Association of Family and Conciliation Courts, 2012); *Meaningful Participation of Children And Youth in Child Protection Mediation: Practice Guidelines for Child Protection Mediators and Child Welfare Practitioners* (British Columbia, Canada: Ministry of Children and Family Development and Ministry of Justice, 2015).

them as part of a larger normative objective of acting as agents of recognition, they risk misinterpretations that could hinder the objective of moving away from the adversarial mindset. Third, there needs to be a concerted effort to adopt a general attitude of recognition by all actors of the child protection systems to increase the recourse to mediation and other alternatives. A change of stance from an attitude of control and policing to an attitude of recognition of the agency of the parents and children, and an attitude of care and gentle firmness, creates opportunities for the parties to warm up to the idea that their disagreements can be worked out in a collaborative manner.

These recommendations all point out to the need for a more substantive reform of the law that would incorporate the principle of recognition in the conception of social and legal norms. This idealistic approach, in the context of procedural justice, invites us to re-imagine how legal norms come to define conflicts and how it could suggest other ways of resolving them, through the perspective of recognition theory. The nature of an idealistic approach makes it elusive. As we have seen, law's problems in describing people and their interactions are foundational: it is premised on a plainly wrong understanding of how humans communicate and act, what they need, what motivates them and what makes them autonomous. A successful procedural justice mechanism maintains social norms while arbitrating disputes. It should do so while fostering interpersonal, social, and institutional recognition. In the context of the legal answer to child maltreatment, this would mean, among other things: norms that leave room to understand the complex psychosocial nature of the parent-child relationship; a nuanced understanding of the causes of intimate violence; a tolerance for the intolerable, that is, that we can never accurately predict human behaviours and, as such, child protection endeavours will always be at risk of failing; a

deep compassion for the suffering of children victim of child maltreatment and an understanding of their developmental needs; an awareness of our own personal biases in interpreting the suffering of others. This cannot be done without reframing child maltreatment as both a general public health issue and a pressing individualized issue for those suffering from it. As idealized as these objectives are, we owe it to our society's most vulnerable legal subjects to at least begin thinking about a better way to recognize the depth and complexity of their relational experiences, and to act accordingly.

Bibliography

Legislation

Administrative Decree 534-2019 (30 May 2019) Q Gaz II, 151-24, 1939.

An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, SC 2019, c 24.

Bill 2, *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, 2nd Sess, 42nd Leg, Québec, 2022 (assented to 8 June 2022) SQ 2022 c 22.

Bill 15, *An Act to Amend the Youth Protection Act and Other Legislative Provisions*, 2nd Sess, 42th Leg, Québec, 2021(assented to 26 April 2022) SQ 2022 c 11.

Bill 99, *An Act to amend the Youth Protection Act and other provisions*, 1st Sess, 41st Leg, Québec, 2016 (assented to 5 October 2017) SQ 2017 c 18.

Bill 10, *An Act to modify the organization and governance of the health and social services network, in particular by abolishing the regional agencies,* 1st Sess, 41st Leg, Québec, 2014 (assented to 9 February 2015) SQ 2015 c 1.

Bill 89, *Loi instituant un nouveau Code civil et portant réforme du droit de la famille*, 4th Sess, 31st Leg, Québec, 1980 (assented to 19 December 1980) SQ 1980 c 39.

California Welfare and Institutions Code, US.

Cannabis Regulation Act, CQLR c C-5.3

Civil Code of Québec, CQLR c CCQ-1991.

Charter of Human Rights and Freedoms, CQLR c C-12, s 10.

Child Abuse Prevention and Treatment Act, Public Law 93-247, 42 USC §5101 (1974).

Child, Youth and Family Services Act, 2017, SO 2017, c 14, Sched 1.

The Child and Family Services Act CCSM c C80.

Children Act 1989, UK c 41.

Code of Civil Procedure, CQLR c C-25.01

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Divorce Act, RSC 1985, c 3 (2nd Supp).

Liquor Licence Act, RSO 1990, c L19.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.

Youth Protection Act, CQLR c P-34.1.

Case Law

AC v Manitoba (Director of Child and Family Services), 2009 SCC 30.

BJT v JD 2022 SCC 24.

Canada (Minister of Citizenship and Immigration) v Vavilov 2019 SCC 65.

Institut Philippe Pinel de Montréal c AG, 1994 CanLII 6105 (QC CA).

Protection de la jeunesse — 184769, 2018 QCCQ 14293.

Protection de la jeunesse — 187666, 2018 QCCQ 8260.

Protection de la jeunesse — 157126, 2015 QCCQ 20042.

Protection de la jeunesse — 121775, 2012 QCCQ 10624.

Protection de la jeunesse — 113036, 2011 QCCQ 9129.

Protection de la jeunesse — 106330, 2010 QCCQ 16072.

Reference re Code of Civil Procedure (Que), art 35, 2021 SCC 27.

R c M (SH) [1989] 2 SCR 446.

Racine v Woods [1983] 2 SCR 173.

Troxel v Granville, 530 US 57 (2000).

Young v Young [1993] 4 SCR 3.

Monographs

Bellamy, Donald F & John McCullagh. *A Legacy of Caring: A History of the Children's Aid Society of Toronto* (Dundurn, 2002).

Benjamin, Jessica. *Beyond Doer and Done to: Recognition Theory, Intersubjectivity and the Third* (Routledge, 2017).

———. *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (Pantheon Books, 1988).

Berrick, Jill Duerr & Erika Altobelli. *The Impossible Imperative: Navigating the Competing Principles of Child Protection* (Oxford University Press, 2018).

Bowen, Murray. *Family Therapy in Clinical Practice* (Jason Aronson, 1978).

Bowlby, John. *A Secure Base: Parent-Child Attachment and Healthy Human Development* (Routledge, 1988).

———. *Attachment and Loss: Volume II: Separation, Anxiety and Anger* (Basic Books, 1973).

Featherstone, Brid, Kate Morris & Susan White. *Re-imagining Child Protection: Towards Humane Social Work with Families* (Policy Press, 2014).

Bronfenbrenner, Urie. *The Ecology of Human Development: Experiments by Nature and Design* (Harvard University Press, 1979).

Burton, Mandy. *Legal Responses to Domestic Violence* (Routledge, 2008).

Christman, John. *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (Cambridge University Press, 2009).

Connell-Carrick, Kelli & Maria Scannapieco. *Understanding Child Maltreatment: An Ecological and Developmental Perspective* (Oxford University Press, 2005).

Daly, Aoife. *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill Nijhoff, 2017).

Donati, Pierpaolo & Margaret S Archer. *The Relational Subject* (Cambridge University Press, 2015).

Dufour, Pascale. *Contribution à la réactualisation théorique du rapport entre le contrat et la relation contractuelle au 21e siècle à partir des travaux de Axel Honneth sur la reconnaissance* (Doctor of Philosophy (Ph.D.) in Law, University of Luxembourg, 2021) [unpublished].

Eekelaar, John. *Family Law and Personal Life*, 2nd ed (Oxford University Press, 2017).

Eekelaar, John & Mavis Maclean. *Family Justice: The Work of Family Judges in Uncertain Times* (Bloomsbury Publishing, 2013).

Enonchong, Nelson. *Duress, Undue Influence and Unconscionable Dealing: First Supplement to the Third Edition*, 3rd ed (Sweet and Maxwell, 2021).

Esping-Andersen, Gosta. *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990).

Fanon, Frantz. *Les damnés de la terre* (La Découverte, 1961).

———. *Peau noire, masques blancs* (Seuil, 1952).

Fraser, Nancy & Axel Honneth. *Redistribution Or Recognition?: A Political-Philosophical Exchange*, translated by Joel Golb, James Ingram, & Christiane Wilke (Verso, 2003).

Fricker, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press, 2007).

Gordon-Bouvier, Ellen. *Relational Vulnerability: Theory, Law and the Private Family* (Springer, 2020).

Gilligan, Carol. *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

Herring, Jonathan. *Law and the Relational Self*, 1st ed (Cambridge University Press, 2019).

———. *Vulnerability, Childhood and the Law* (Springer, 2018).

Honneth, Axel. *Freedom's Right: The Social Foundations of Democratic Life* (Columbia University Press, 2014).

———. *The I in We: Studies in the Theory of Recognition*, translated by Joseph Ganahl (Polity Press, 2012).

———. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, translated by Joel Anderson (MIT Press, 1996).

Joyal, Renée. *L'évolution de la protection de l'enfance au Québec: Des origines à nos jours* (Presses de l'Université du Québec, 2000).

Kant, Immanuel. *The Metaphysics of Morals*, translated by Mary Gregor, Lara Denis, ed. (Cambridge University Press, 2017).

Leckey, Robert. *Contextual Subjects: Family, State and Relational Theory* (University of Toronto Press, 2008).

Lederman, Sydney N, Michelle K Fuerst & Hamish Stewart. *The Law of Evidence in Canada*, sixth ed (LexisNexis, 2022).

Lind, E Allan & Tom R Tyler. *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

Lukes, Steven. *Individualism* (ECPR Press, 1973).

Moschella, Melissa. *To Whom Do Children Belong?: Parental Rights, Civic Education, and Children's Autonomy* (Cambridge University Press, 2016).

Murphy, Jane C & Jana B Singer. *Divorced from Reality: Rethinking Family Dispute Resolution* (NYU Press, 2015).

Murphy, Rebecca. *Beyond The Courtroom Door: Exploring The Feasibility Of Child Protection Mediation In Ireland* (Doctor of Philosophy (Ph.D.) in Law, Maynooth University, National University of Ireland Maynooth, Department of Law, 2021) [unpublished].

Nedelsky, Jennifer. *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2011).

Okin, Susan Moller. *Justice, Gender, and the Family* (Basic Books, 1989).

Oshana, Marina. *Personal Autonomy in Society* (Ashgate, 2006).

Provost, Mario. *Droit de la protection de la jeunesse* (LexisNexis, 2019).

Quintero, Steven J. *Child Welfare Issues and Perspectives* (Nova Science, 2008).

Rawls, John. *A Theory of Justice* (Harvard University Press, 1971).

Ricoeur, Paul. *Parcours de la reconnaissance*, Folios Essais (Gallimard, 2005).

Schneider, Elizabeth M. *Battered Women and Feminist Lawmaking* (Yale University Press, 2008).

Sen, Amartya. *Inequality Reexamined* (Harvard University Press, 1992).

Sheehan, Rosemary. *Magistrates' Decision-Making in Child Protection Cases* (Routledge, 2018).

Taylor, Charles. *Sources of the Self: The Making of the Modern Identity* (Cambridge University Press, 1992).

Tyler, Imogen. *Stigma: The Machinery of Inequality* (Bloomsbury Academic & Professional, 2020).

Weinrib, Ernest J. *Corrective Justice* (Oxford University Press, 2012).

Schelbe, Lisa & Jennifer M Geiger. *Intergenerational Transmission of Child Maltreatment* (Springer, 2017).

Seymour, John A. *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press, 2016).

Sheehan, Rosemary. *Magistrates' Decision-Making in Child Protection Cases* (Routledge, 2018).

Strand, Virginia C & Ginny Sprang. *Trauma Responsive Child Welfare Systems* (Springer, 2017).

Wexler, David B. *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990).

White, Sue & Matthew Gibson. *Reassessing Attachment Theory in Child Welfare: A Critical Appraisal* (Policy Press, 2019).

Winnicott, Donald W. *Winnicott On The Child* (Perseus Publishing, 2002).

Book Chapters & Edited Collections

Ainsworth, Mary D Salter et al. *Patterns of Attachment: a Psychological Study of the Strange Situation*, classic edition ed, Psychology Press and Routledge Classic Editions (Routledge, 2015).

Ahlin, Eileen M & Anne S Douds. "The Problem with Problem-Solving Courts: The Black Box Remains Unopened after Thirty Years" in Cassia Spohn & Pauline K Brennan, eds, *Handbook on Sentencing Policies and Practices in the 21st Century* (Routledge, 2019) 339.

Anderson, Joel & Axel Honneth. "Autonomy, Vulnerability, Recognition, and Justice" in Joel Anderson & John Christman, eds, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press, 2005).

Babb, Barbara A. “Unified Family Courts: An Interdisciplinary Framework and a Problem-Solving Approach” in Richard L Wiener & Eve M Brank, eds, *Problem Solving Courts: Social Science and Legal Perspectives* (Springer, 2013) 65.

Bainham, Andrew. “Is Anything Now Left of Parental Rights?” in Rebecca Probert, Stephen Gilmore & Jonathan Herring, eds, *Responsible Parents and Parental Responsibility* (Hart, 2009) 361.

Bala, Nicholas, ed. *Canadian Child Welfare Law: Children, Families and the State* (Thompson Educational Publishing, 2004).

Bandes, Susan A, ed. *The Passions of Law* (New York University Press, 1999).

Brake, Elizabeth & Lucinda Ferguson, eds. *Philosophical Foundations of Children’s and Family Law* (Oxford University Press, 2018) 41.

Bristow, William. “Enlightenment” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, (Stanford University, 2017).

Butler, Judith. “Longing for Recognition” in Kimberly Hutchings & Tuija Pulkkinen, eds, *Hegel’s Philosophy and Feminist Thought: Beyond Antigone?* (Palgrave Macmillan, 2010) 109.

Cassidy, Jude & Phillip R Shaver. *Handbook of Attachment, Third Edition: Theory, Research, and Clinical Applications* (Guilford Publications, 2016).

Chen, Serena, Helen Boucher & Michael W Kraus. “The Relational Self” in Seth J Schwartz, Koen Luyckx & Vivian L Vignoles, eds, *Handbook of Identity Theory and Research* (Springer, 2011) 149.

Cicchetti, Dante & Kristin Valentino. “An Ecological-Transactional Perspective on Child Maltreatment: Failure of the Average Expectable Environment and Its Influence on Child Development” in Dante Cicchetti & Donald J Cohen, eds, *Developmental Psychopathology*, 2nd ed (John Wiley & Sons, Inc., 2015) 129.

Damon, William. “Socialization and Individuation” in Gerald Handel, ed, *Childhood Socialization* (Routledge, 1987) 3.

Diduck, Alison. “Family Law’s Instincts and the Relational Subject” in Daniel Bedford & Jonathan Herring, eds, *Embracing Vulnerability: The Challenges and Implications for Law* (Routledge, 2020) 31.

Dixon, Louise et al, eds. *The Wiley Handbook of What Works in Child Maltreatment: An Evidence-Based Approach to Assessment and Intervention in Child Protection* (Wiley-Blackwell, 2017).

Freeman, Michael "Why It Remains Important to Take Children's Rights Seriously" in Michael Freeman, ed, *Children's Rights: Progress and Perspectives: Essays from the International Journal of Children's Rights* (Brill Nijhoff, 2011) 5.

Gallagher, Shaun, Ben Morgan & Naomi Rokotnitz. "Relational Authenticity" in Gregg Caruso & Owen Flanagan, eds, *Neuroexistentialism: Meaning, Morals, and Purpose in the Age of Neuroscience* (Oxford University Press, 2017) 126.

Giladi, Paul & Nicola McMillan, eds. *Epistemic Injustice and the Philosophy of Recognition* (Routledge, 2022).

Gilbert, Neil, ed. *Combatting Child Abuse: International Perspectives and Trends* (Oxford University Press, 1997).

Gilbert, Neil, Nigel Parton & Marit Skivenes, eds. *Child Protection Systems: International Trends and Orientations* (Oxford University Press, 2011).

Greenberg, Lyn R, Barbara J Fidler & Michael A Saini, eds. *Evidence-Informed Interventions for Court-Involved Families: Promoting Healthy Coping and Development* (Oxford University Press, 2019).

Fineman, Martha A & Anna Grear, eds. *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Gender in Law, Culture, and Society (Routledge, 2013).

Flickinger, Hans-Georg. "Between Civil Society and State: Considerations on Axel Honneth's Critical Theory of Justice" in Nythamar De Oliveira, et al, eds, *Justice and Recognition: On Axel Honneth and Critical Theory* (PUCRS, 2015) 181.

Habermas, Jürgen. "Struggles for Recognition in the Democratic Constitutional State" in Amy Gutmann, ed, *Multiculturalism* (Princeton University Press, 1994) 107.

Hart, Stuart N et al. "Psychological Maltreatment of Children" in J Bart Klika & Jon R Conte, eds, *The APSAC Handbook on Child Maltreatment* (SAGE Publications, 2017).

Herring, Jonathan. "The Welfare Principle and the Rights of Parents" in Andrew Bainham, Shelley Day Sclater & Martin Richards, eds, *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart, 1999) 89.

Lacharité, Carl, Tristan Milot & Vicky Lafantaisie. "L'ethnographie pour explorer comment les représentations des situations de négligence se construisent à l'intérieur de l'institution de la protection de la jeunesse" in Marie-Josée Letarte, Mélanie Lapalme & Anne-Marie Tougas, eds, *Recherches qualitatives et quantitatives en sciences humaines et sociales Pour une formation théorique et pratique appuyée empiriquement*, (Éditions JFD, 2018) 264.

Lacharité, Carl & Guylaine Fafard. “Research-Practice Partnership in Developing Services for Neglect” in Sophie Léveillé et al, eds, *Research-Community Partnerships in Child Welfare* (Toronto, ON: Centre of Excellence for Child Welfare, 2010) 193.

Leckey, Robert. “Shifting Scrutiny: Private Ordering in Family Matters in Common-Law Canada” in Frederik Swennen, ed, *Contractualisation of Family Law - Global Perspectives* (Springer, 2015) 93.

Lippert-Rasmussen, Kasper, Kimberley Brownlee & David Coady, eds. *A Companion to Applied Philosophy* (John Wiley & Sons, Ltd, 2016).

Lonne, Bob et al. *Re-Visioning Public Health Approaches for Protecting Children* (Springer, 2019).

Mackenzie, Catriona, Therese MacDermott & Denise Meyerson, eds. *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives*, 1st ed (Routledge, 2020).

Mignonette, Keller N & Robert J Noone, eds. *Handbook of Bowen Family Systems Theory and Research Methods: A Systems Model for Family Research* (Routledge, 2020).

Nussbaum, Martha C. “The Feminist Critique of Liberalism” in Alison Jeffries, ed, *Women’s Voices, Women’s Rights: Oxford Amnesty Lectures 1996* (Routledge, 2021) 44.

Morse, Jessica L & Michael F Steger. “Giving Birth to Meaning: Understanding Parenthood Through the Psychology of Meaning in Life” in Orit Taubman – Ben-Ari, ed, *Pathways and Barriers to Parenthood: Existential Concerns Regarding Fertility, Pregnancy, and Early Parenthood* (Cham: Springer International Publishing, 2019) 1.

Parton, Nigel. “Comparing Child Protection Systems: Towards a Global Perspective” in Pat Dolan & Nick Frost, eds, *The Routledge Handbook of Global Child Welfare* (Routledge, 2017) 225.

Pfeiffer, Simone & Tina In-Albon. “1.10—Family Systems” in Gordon J G Asmundson, ed, *Comprehensive Clinical Psychology (Second Edition)* (Oxford: Elsevier, 2022) 185.

Proctor, Laura J & Howard Dubowitz. “Child Neglect: Challenges and Controversies” in Jill E Korbin & Richard D Krugman, eds, *Handbook of Child Maltreatment* (Springer, 2014) 27.

Sampson, Robert J. “Neighborhood-Level Context and Health: Lessons from Sociology” in Ichiro Kawachi & Lisa F Berkman, eds, *Neighborhoods and Health* (Oxford University Press, 2003).

Sanders, Matthew R & Alina Morawska, eds. *Handbook of Parenting and Child Development Across the Lifespan* (Springer, 2018).

Shaw, Mike & Sue Bailey, eds. *Justice for Children and Families: A Developmental Perspective* (Cambridge University Press, 2018).

Stoljar, Nathalie & Catriona Mackenzie, eds. *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000).

Taylor, Charles. "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism* (Princeton University Press, 1994) 25.

Trocmé, Nico et al. "Child Welfare Services in Canada" in Lisa Merkel-Holguin, John D Fluke & Richard D Krugman, eds, *National Systems of Child Protection* Child Maltreatment (Springer, 2019) 27.

Tyler, Tom R & E Allan Lind. "A Relational Model of Authority in Groups" in *Advances in Experimental Social Psychology* (Elsevier, 1992) 115.

Waldron, Jeremy. "The Rule of Law and the Importance of Procedure" in James E Fleming, ed, *Getting to the Rule of Law* (New York University Press, 2011) 3.

———. "Legal and Political Philosophy" in Scott J Shapiro, Jules L Coleman & Kenneth Einmar Himma, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004) 352.

Winter, Karen. "Relational Social Work" in Malcolm Payne & Emma Reith-Hall, eds, *The Routledge Handbook of Social Work Theory* (Routledge, 2019) 151.

Wolf, Molly R, Shraddha Prabhu & Janice Carello. "Children's Experiences of Trauma and Human Rights Violations Around the World" in Lisa D Butler, Filomena M Critelli & Janice Carello, eds, *Trauma and Human Rights: Integrating Approaches to Address Human Suffering* (Springer, 2019) 125.

Journal Articles

Abrams, Kathryn & Hila Kerentt. "Who's Afraid of Law and the Emotions?" (2010) 94:6 Minn L Rev 1997.

Adjei, Paul Banahene & Eric Minka. "Black Parents Ask for a Second Look: Parenting under 'White' Child Protection Rules in Canada" (2018) 94 Child Youth Serv Rev 511.

Ai, Amy L et al. "Reshaping Child Welfare's Response to Trauma: Assessment, Evidence-Based Intervention, and New Research Perspectives" (2013) 23:6 Research Soc Work Prac 651.

Allen, Amy. "Recognizing Domination: Recognition and Power in Honneth's Critical Theory" (2010) 3:1 Journal of Power 21.

Archard, David. “Child Abuse: Parental Rights and the Interests of the Child” (1990) 7:2 J Appl Phi 183.

———. “Do Parents Own Their Children?” (1993) 1:3–4 Int J Child Rights 293.

Aronsson, Karin. “Negative Interrogatives and Adversarial Uptake: Building Hostility in Child Custody Examinations” (2018) 136 J of Pragmatics 39.

Asawa, Lindsay, David Hansen & Mary Flood. “Early Childhood Intervention Programs: Opportunities and Challenges for Preventing Child Maltreatment” (2008) 31 Educ and Treat Child 73.

Asdonk, Sabine van der et al. “Improving Decision-Making Agreement in Child Protection Cases by Using Information Regarding Parents’ Response to an Intervention: A Vignette Study” (2019) 107 Child Youth Serv Rev 104501.

Assink, Mark et al. “The Intergenerational Transmission of Child Maltreatment: A Three-Level Meta-Analysis” (2018) 84 Child Abuse Negl 131.

Austin, Anna E, Alexandria M Lesak & Meghan E Shanahan. “Risk and Protective Factors for Child Maltreatment: A Review” (2020) 7:4 Curr Epidemiol Rep 334–342.

Baker, Amy JL, Marla R Brassard & Janet Rosenzweig. “Psychological Maltreatment: Definition and Reporting Barriers among American Professionals in the Field of Child Abuse” (2021) 114 Child Abuse Negl 104941.

Bala, Nicholas. “Making Better Use of Expert Knowledge in the Family Justice Process: Social Facts, Facts from Experts, Focused Reports, Single Joint Experts & ‘Hot-Tubbing’” (2014) Queen’s University Legal Research Paper No 031, online: <https://papers.ssrn.com/abstract=2587792>.

———. “Tippins and Wittmann Asked the Wrong Question”: (2005) 43:4 Fam Ct Rev 554–562.

Bala, Nicholas, Rachel Birnbaum & Carly Watt. “Addressing Controversies About Experts in Disputes Over Children” (2017) 30:1 Can J Fam L 71.

Bardaxoglou, Sarah et al. “Au coeur de l’accès à la justice des jeunes en protection de la jeunesse: des acteurs discutent” (2020) 66:1 Service social 81.

Bargeman, M, S Smith & C Wekerle. “Trauma-Informed Care as a Rights-Based ‘Standard of Care’: A Critical Review” (2021) 119 Child Abuse Negl (30 Years of the Convention on the Rights of the Child: Challenges and progress in harm prevention) 104762.

Bartholet, Elizabeth. “Thoughts on the Liberal Dilemma in Child Welfare Reform”

(2016) 24:3 Wm & Mary Bill Rts 725.

Bath, Howard. “The Three Pillars of Trauma-Informed Care” (2008) 17:3 RCY 17.

Becker-Blease, Kathryn A. “As the World Becomes Trauma–Informed, Work to Do” (2017) 18:2 J Trauma & Dissociation 131.

Belley, Jean-Guy. “Contrat relationnel” (2020) 66:1 McGill LJ 33.

Belsky, Jay. “Child Maltreatment: an Ecological Integration.” (1980) 35:4 Am Psychol 320.

Bernheim, Emmanuelle & Marilyn Coupienne. “Faire valoir ses droits à la chambre de la jeunesse: état des lieux des barrières structurelles à l’accès à la justice des familles” (2019) 32:2 Can J Fam L 237.

Berrick, Jill et al. “Are Child Protection Workers and Judges in Alignment with Citizens When Considering Interventions into a Family? A Cross-Country Study of Four Jurisdictions” (2020) 108 Child Youth Serv Rev 104562.

Bezo, Brent. “A Child Rights Perspective on Intergenerational Trauma” (2017) 4:1 Can J Child Rights 71.

Binnie, Ian. “Science in the Courtroom: the Mouse that Roared” (2007) 56 UNBLJ 307.

Blake, Michael. “Distributive Justice, State Coercion, and Autonomy” (2001) 30:3 Philos Pub Aff 257.

Boddy, Janet & Bella Wheeler. “Recognition and Justice? Conceptualizing Support for Women Whose Children Are in Care or Adopted” (2020) 10:4 Societies 96.

Boyd, Susan B. “Autonomy for Mothers? Relational Theory and Parenting Apart” (2010) 18:2 Fem Leg Stud 137.

Brandt, Elizabeth. “Child Protection Bench Cards for Idaho Judges” (2018) 67.

Bretherton, Inge et al. “Attachment: The Parental Perspective” (1989) 10:3 Infant Ment Health J 203.

———. “The Origins of Attachment Theory: John Bowlby and Mary Ainsworth” (1992) 28:5 Dev Psychol 759.

Bullinger, Lindsey Rose et al. “Heed Neglect, Disrupt Child Maltreatment: a Call to Action for Researchers” (2020) 3:1 Int J Child Maltreat 93.

Bunting, Lisa et al. “Trauma Informed Child Welfare Systems—A Rapid Evidence

Review" (2019) 16:13 Int J Environ Res Public Health, online: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6651663/>.

Burns, Kenneth et al. "What Social Workers Talk About When They Talk About Child Care Proceedings In The District Court In Ireland" (2018) 23:1 Child Fam Soc Work 113.

Burrell, Michelle. "What Can the Child Welfare System Learn in the Wake of the Floyd Decision: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations" 22:1 NY City L Rev 124.

Butler, Judith. "Longing for Recognition Commentary on the Work or Jessica Benjamin" (2000) 1:3 Stud Gend Sexuality 271.

Cao, Yiwen & Kathryn Maguire-Jack. "Interactions with Community Members and Institutions: Preventive Pathways for Child Maltreatment" (2016) 62 Child Abuse Negl 111.

Calatrava, M et al. "Differentiation of Self: A Scoping Review of Bowen Family Systems Theory's Core Construct" (2022) 91 Clinic Psych Rev 102101.

Casey, BJ et al. "Imaging the Developing Brain: What Have We Learned About Cognitive Development?" (2005) 9:3 Trends Cogn Sci 104.

Carle, Susan. "Theorizing Agency" (2005) 55:2 Am U L Rev 307.

Carnevale, Franco A et al. "Childhood Ethics: An ontological advancement for childhood studies" (2021) 35:1 Children & Society 110–124.

Chin, Jason M, Michael Lutsky & Itiel E Dror. "The Biases of Experts: An Empirical Analysis of Expert Witness Challenges" (2019) 42 Man LJ 21.

Choate, Peter W et al. "Rethinking Racine v Woods from a Decolonizing Perspective: Challenging the Applicability of Attachment Theory to Indigenous Families Involved with Child Protection" (2019) 34:1 Can J Law Soc 55.

———. "Where Do We Go From Here? Ongoing Colonialism From Attachment Theory" (2020) 32:1 Aotearoa NZ Soc Work 32.

Choudhry, Shazia. "When Women's Rights are Not Human Rights–the Non-Performativity of the Human Rights of Victims of Domestic Abuse within English Family Law" (2019) 82:6 Mod Law Rev 1072.

Christman, John. "Relational Autonomy and the Social Dynamics of Paternalism" (2014) 17:3 Ethical Theory Moral Pract 369.

Ciavatta, David V. “The Family and the Bonds of Recognition” (2014) 13 Emot Space Soc 71.

Cicchetti, Dante & Michael Lynch. “Toward an Ecological/Transactional Model of Community Violence and Child Maltreatment: Consequences for Children’s Development” (1993) 56:1 Psychiatry 96.

Cicchetti, Dante & Ross Rizley. “Developmental Perspectives on the Etiology, Intergenerational Transmission, and Sequelae of Child Maltreatment” (1981) 1981:11 New Dir Child Adolesc Dev 31.

Ciftci, Sarah & Deirdre Howard-Wagner. “Integrating Indigenous Justice into Alternative Dispute Resolution Practices: A Case Study of the Aboriginal Care Circle Pilot Program in Nowra” (2012) 16:2 Aust Indig Law Rev 81.

Cleveland, Kyndra C & Jodi A Quas. “What’s Fair in Child Welfare? Parent Knowledge, Attitudes, and Experiences” (2022) 27:1 Child Maltreat 53.

Connolly, Julie. “A Fourth Order of Recognition?” (2015) 16:4 Critical Horizons 393.
Connolly, Marie & Ilan Katz. “Typologies of Child Protection Systems: An International Approach” (2019) 28:5 Child Abus Rev 381.

Coulthard, Glen S. “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada” (2007) 6:4 Contemp Political Theory 437.

Coupienne, Marilyn. “La fragilisation du lien de confiance au sein de l’intervention sociale en protection de la jeunesse: peut-on blâmer le droit?” (2021) 34:1 Can J Fam L 79.

Cyr, Chantal et al. “Attachment Security and Disorganization in Maltreating and High-Risk families: A Series of Meta-Analyses” (2010) 22:1 Dev Psychopatho 87.

———. “An Attachment-Based Parental Capacity Assessment to Orient Decision-Making in Child Protection Cases: A Randomized Control Trial” (2022) 27:1 Child Maltreat 66.

D’Amours, Oscar. “Survol historique de la protection de l’enfance au Québec, de 1608 à 1977” (1986) 35:3 Service social 386.

D’Avila, Fabio Roberto & Giovani Agostini Saavedra. “Legal Good and Recognition: A Study of Axel Honneth’s Social Theory” (2011) 78:2 Dr et soc 325.

Dailey, Anne. “Constitutional Privacy and the Just Family” (1993) 67 Tul L Rev 955.

Dailey, Anne C & Laura A Rosenbury. “The New Parental Rights” (2021) 71:1 Duke LJ 75.

Dale, Milfred D. “Don’t Forget The Children: Court Protection from Parental Conflict is in the Best Interests of Children” (2014) 52:4 Fam Ct Rev 648.

Dansey, Diane, Mary John & Danielle Shbero. “How Children in Foster Care Engage with Loyalty Conflict: Presenting a Model of Processes Informing Loyalty” (2018) 42:4 Adopt Fost 354.

De Marneffe, Peter. “Liberalism, Liberty, and Neutrality” (1990) 19:3 Philos Public Aff 253.

Des Rosiers, Nathalie. “From Telling To Listening: A Therapeutic Analysis Of The Role Of Courts In Minority-Majority Conflicts” (2000) 37:1 Ct Rev 54.

Dickens, Jonathan, Chris Beckett & Sue Bailey. “Justice, Speed and Thoroughness in Child Protection Court Proceedings: Messages from England” (2014) 46 Child Youth Serv Rev 103.

Diduck, Alison. “Autonomy and Family Justice” (2016) 28:2 Child & Fam L Q 133.

Dixon, Louise, Kevin Browne & Catherine Hamilton-Giachritsis. “Risk Factors of Parents Abused as Children: a Mediational Analysis of the Intergenerational Continuity of Child Maltreatment (Part I)” (2005) 46:1 J Child Psychol Psychiatry 47.

Dorval, Amilie, Karine Croteau & Julie Noël. “Des parents d’enfants suivis en protection de la jeunesse se racontent: analyse du recours au récit de vie par le prisme de trois études en travail social” (2021) 67:1 Service social 151.

Dotolo, Danae et al. “Expanding Conceptualizations of Social Justice across All Levels of Social Work Practice: Recognition Theory and Its Contributions” (2018) 92:2 Social Service Rev 143.

Douglas, Heather & Tamara Walsh. “Continuing the Stolen Generations: Child Protection Interventions and Indigenous People” (2013) 21:1 Int J Child Rights 59.

Dubowitz, Howard et al. “A Conceptual Definition of Child Neglect” (1993) 20:1 Crim Justice Behav 8.

Dunkerley, Stacy. “Mothers Matter: A Feminist Perspective on Child Welfare-Involved Women” (2017) 20:3 J Fam Soc Work 251.

Durrant, Joan & Ron Ensom. “Physical Punishment of Children: Lessons from 20 Years of Research” (2012) 184:12 Can Med Assoc J 1373.

Edwards, Leonard. “Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process” (2007) 58:2 Juv Fam Ct J 1.

Edwards, Leonard. “Child Protection Mediation: A 25-Year Perspective” (2009) 47:1 Fam Ct Rev 69.

English, Diana J. “The Extent and Consequences of Child Maltreatment” (1998) 8:1 The Future of Children 39.

Eekelaar, John. “Do Parents Know Best?” (2020) 28:3 Int J Child Rights 613.
Elster, Jon. “Solomonic Judgments: Against the Best Interest of the Child” (1987) 54:1 U Chi L Rev 1.

Fay-Ramirez, Suzanna. “Therapeutic Jurisprudence in Practice: Changes in Family Treatment Court Norms Over Time” (2015) 40:1 Law Soc Inq 205.

———. “Therapeutic Practice through Restorative Justice: Managing Stigma in Family Treatment Court” (2016) 16:3 QUT Law Rev 50.

Felzen Johnson, Charlie. “Child Sexual Abuse” (2004) 364 The Lancet 462.

Finkelstein, Ray. “The Adversarial System and the Search for Truth” (2011) 37:1 Monash U L Rev 135.

Firestone, Gregory & Janet Weinstein. “In the Best Interests of Children: A Proposal to Transform the Adversarial System” (2005) 42:2 Fam Ct Rev 203.

Fiss, Owen M. “Against Settlement” (1984) 93 Yale LJ 1073.

Fong, Kelley. “Neighborhood Inequality in the Prevalence of Reported and Substantiated Child Maltreatment” (2019) 90 Child Abuse Negl 13.

Forslund, Tommie et al. “Attachment Goes to Court: Child Protection and Custody Issues” (2021) Attach Hum Dev 1.

Fotheringham, Sarah, Jean Dunbar & Dale Hensley. “Speaking for Themselves: Hope for Children Caught in High Conflict Custody and Access Disputes Involving Domestic Violence” (2013) 28:4 J Fam Viol 311.

Fraser, Nancy. “Recognition without Ethics?” (2001) 18:2–3 Theory Culture Soc 21.
———. “Rethinking Recognition” (2000) 3 New Left Review 107.

Freedman, Monroe H. “Our Constitutionalized Adversary System” (1998) 1 Chap L Rev 57.

Fricker, Miranda. “Forum: Miranda Fricker’s Epistemic Injustice. Power and the Ethics of Knowing” (2008) 23:1 Theoria 69.

Freeman, Michael. “Why It Remains Important to Take Children’s Rights Seriously” in Michael Freeman, ed, *Children’s Rights: Progress and Perspectives: Essays from the International Journal of Children’s Rights* (Brill Nijhoff, 2011) 5.

Garbarino, James. “Not All Bad Treatment is Psychological Maltreatment” (2011) 35:10 Child Abuse & Neglect (Special Issue on Emotional Maltreatment) 797.

Garrett, Paul Michael. “Recognizing the Limitations of the Political Theory of Recognition: Axel Honneth, Nancy Fraser and Social Work” (2010) 40:5 Br J Soc Work 1517.

Gaudemard, Lynda. “Droits de l’enfant, droits à l’enfant: les fondements éthiques de l’autorité parentale” (2021) 62:4 C de D 1181.

Gauthier, Yvon, Gilles Fortin & Gloria Jéliu. “Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care” (2004) 25:4 Infant Ment Health J 379.

Govier, Trudy. “Self-Trust, Autonomy, and Self-Esteem” (1993) 8:1 Hypatia 99.

Gershoff, Elizabeth T & Andrew Grogan-Kaylor. “Spanking and Child Outcomes: Old Controversies and New Meta-Analyses.” (2016) 30:4 J Fam Psy 453.

Gewirtz-Meydan, Ateret. “The Relationship between Child Sexual Abuse, Self-Concept and Psychopathology: The Moderating Role of Social Support and Perceived Parental Quality” (2020) 113 Child Youth Serv Rev 104938.

Gibson, Matthew. “Shame and Guilt in Child Protection Social Work: New Interpretations and Opportunities for Practice” (2015) 20:3 Child Fam Soc Work 333.

Gilbert et al, Ruth. “Burden and Consequences of Child Maltreatment in High-Income Countries” (2009) 373:9657 The Lancet 68.

Ginsburg, Tom & Nicholas Stephanopoulos. “The Concepts of Law” U Chi L Rev 29.

Gladstone, James et al. “Looking at Engagement and Outcome from the Perspectives of Child Protection Workers and Parents” (2012) 34:1 Child Youth Serv Rev 112.

Glaser, Danya. “How to Deal with Emotional Abuse and Neglect—Further Development of a Conceptual Framework (FRAMEA)” (2011) 35:10 Child Abuse Negl (Special Issue on Emotional Maltreatment) 866.

Granqvist, Pehr et al. “Disorganized Attachment in Infancy: a Review of the Phenomenon and its Implications for Clinicians and Policy-Makers” (2017) 19:6 Attach Hum Dev 534.

Greene, Carolyn A et al. “Intergenerational Effects of Childhood Maltreatment: A Systematic Review of the Parenting Practices of Adult Survivors of Childhood Abuse, Neglect, and Violence” (2020) 80 Clin Psychol Rev 101891.

Greeno, Elizabeth J, Charlotte Lyn Bright & Leslie Rozeff. “Lessons from the Courtroom: Perspectives from Child Welfare Attorneys and Supervisors” (2013) 35:9 Child Youth Serv Rev 1618.

Grossi, Renata. “Understanding Law and Emotion” (2015) 7:1 Emotion Rev 55.

Guggenheim, Martin. “The Not So New Law of the Child” (2017–2018) 127 Yale LJ Forum 942.

Guterman, Neil B et al. “Parental Perceptions of Neighborhood Processes, Stress, Personal Control, and Risk for Physical Child Abuse and Neglect” (2009) 33:12 Child Abuse Negl 897.

Haan, Whitney D de et al. “Out-of-Home Placement Decisions: How Individual Characteristics of Professionals are Reflected in Deciding about Child Protection Cases” (2019) 1:4 Dev Child Wel 312.

Hahn, Hayley, Johanna Caldwell & Vandna Sinha. “Applying Lessons from the U.S. Indian Child Welfare Act to Recently Passed Federal Child Protection Legislation in Canada” (2020) 11:3 Int Indig Policy J 1.

Haight, Wendy et al. “‘Basically, I Look At It Like Combat’: Reflections on Moral Injury by Parents Involved with Child Protection Services” (2017) 82 Child Youth Serv Rev 477.

Halewood, Peter. “Law’s Bodies: Disembodiment and the Structure of Liberal Property Rights” (1996) 18 Iowa L Rev 1331.

Hall, Barbara. “The Origin of Parental Rights” (1999) 13:1 Public Aff Q 73.

Halley, Janet. “What is Family Law?: A Genealogy Part I” (2011) 23:1 Yale JL & Human 1.

———. “What is Family Law?: A Genealogy Part II” (2011) 23:2 Yale JL & Human 189.

Halley, Janet & Kerry Rittich. “Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism Critical Directions in Comparative Family Law: Introduction” (2010) 58:4 Am J Comp L 753.

Hanson, Rochelle F & Jason Lang. “A Critical Look At Trauma-Informed Care Among Agencies and Systems Serving Maltreated Youth and Their Families” (2016) 21:2 Child Maltreat 95.

Harmer, Antoinette L & Jane Goodman-Delahunty. “Practitioners’ Opinions of Best Interests of the Child in Australian Legislation” (2014) 21:2 Psychi Psycho L 251.

Hassan, Hibah & Leda Blackwood. “(Mis)recognition in the Therapeutic Alliance: The Experience of Mental Health Interpreters Working With Refugees in U.K. Clinical Settings” (2021) 31:2 Qual Health Res 399.

Henderson-Dekort, Emmie, Veronica Smits & Hedwig Van Bakel. “The Meaningful Participation and Complex Capacities of Children in Family Law: Based on Transdisciplinary Perspectives and Articles of the United Nations Convention on the Rights of the Child” (2021) 29:1 Int J Child Rights 78.

Henry, Colleen. “Exposure to Domestic Violence as Abuse and Neglect: Constructions of Child Maltreatment in Daily Practice” (2018) 86 Child Abuse Negl 79.

Holt, Rebecca L & Mohamad A Mikati. “Care for Child Development: Basic Science Rationale and Effects of Interventions” (2011) 44:4 Pediatric Neurology 239.

Houston, Stan. “Empowering the ‘Shamed’ Self: Recognition and Critical Social Work” (2016) 16:1 J of Soc Work 3.

Houston, Stan & Pat Dolan. “Conceptualising Child and Family Support: The Contribution of Honneth’s Critical Theory of Recognition” (2008) 22:6 Children Soc 458.

Hunt Federle, Katherine. “On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle” (1993) 42 DePaul L Rev 983.

Huntington, Clare & Elizabeth Scott. “The Enduring Importance of Parental Rights” (2022) 90 Fordham L Rev 2529.

Islam, Samiha, Sara R Jaffee & Cathy S Widom. “Breaking the Cycle of Intergenerational Childhood Maltreatment: Effects on Offspring Mental Health” (février 1, 2023) 28:1 Child Maltreat 119.

Jennings, Wendy. “Separating Families without Due Process: Hidden Child Removals Closer to Home” (2019) 22:1 NY City L Rev 1.

Johnston, Robert Gilbert & Sara Lufrano. “The Adversary System as a Means of Seeking Truth and Justice” (2002) 35:2 J Marshall L Rev 147.

Jolowicz, J A. “Adversarial and Inquisitorial Models of Civil Procedure” (2003) 52:2 Int’l & Comp LQ 281.

Jones, Jason D, Jude Cassidy & Phillip R Shaver. “Parents’ Self-Reported Attachment Styles: A Review of Links with Parenting Behaviors, Emotions, and Cognitions” (2015) 19:1 Pers Soc Psychol Rev 44.

Jones, Karen. “The Politics of Intellectual Self-Trust” (2012) 26:2 Soc Epistemol 237.

Jones, Loring Paul. “‘Was Taking Me Out of the Home Necessary?’ Perspectives of Foster Youth on the Necessity for Removal” (2015) 96:2 Fam Soc 108.

Joyal, Renée & Mario Provost. “La Loi sur la protection de la jeunesse de 1977. Une maturation laborieuse, un texte porteur” (1993) 34:2 C de D 635.

Jung, Courtney. “Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society” in Paige Arthur, ed, *Identities in Transition* (Cambridge: Cambridge University Press, 2010) 217.

Katz, Sarah. “Trauma-Informed Practice: The Future of Child Welfare” (2019) 28:1 Widener Commw L Rev 51.

Kauhanen, Iida & Mervi Kaukko. “Recognition in the Lives of Unaccompanied Children and Youth: A Review of the Key European Literature” (2020) 25:4 Child Fam Soc Work 875.

Kempe, C Henry et al. “The Battered-Child Syndrome” (1962) 181:1 JAMA 17.

Keller, Heidi. “Universality Claim of Attachment Theory: Children’s Socioemotional Development Across Cultures” (2018) 115:45 Proceedings of the National Academy of Sciences 11414.

Kerr, Michael E. “Family Systems Theory and Therapy” in Alan S Gurman & David P Kniskern, eds, *Handbook of Family Therapy* (New York: Routledge, 2013) 226.

King, Bryn et al. “Factors Associated with Racial Differences in Child Welfare Investigative Decision-Making in Ontario, Canada” (2017) 73 Child Abuse Negl 89.

King, Michael S. “Restorative Justice, Therapeutic Jurisprudence And The Rise Of Emotionally Intelligent Justice” (2008) 32 Melb UL Rev 1096.

Kleinhans, Martha-Marie & Roderick A Macdonald. “What is a Critical Legal Pluralism?” (1997) 12:02 Can J Law Soc 25.

Križ, Katrin & Marit Skivenes. “Child Welfare Workers’ Perceptions of Children’s Participation: a Comparative Study of England, Norway and the USA (California)” (2017) 22:S2 Child Fam Soc Work 11.

Kymlicka, Will. “Liberal Individualism and Liberal Neutrality” (1989) 99:4 Ethics 883.
Lacey, Nicola. “Institutionalising Responsibility: Implications for Jurisprudence” (2013) 4:1 Jurisprudence 1.

LaLiberte, Traci et al. “Child Protection Services and Parents with Intellectual and Developmental Disabilities” (2017) 30:3 J Appl Res Intellect Disabil 521.

Lambert, Annie. “L’intervention sociojudiciaire en contexte de protection de la jeunesse: points de vue de parents” (2021) 152 Intervention 51.

Lang, Jason M et al. “Building Capacity for Trauma-Informed Care in the Child Welfare System: Initial Results of a Statewide Implementation” (2016) 21:2 Child Maltreat 113.

Lange, Brittany C L, Eileen M Condon & Frances Gardner. “Parenting Among Mothers Who Experienced Child Sexual Abuse: A Qualitative Systematic Review” (2020) 30:1 Qualitative Health Research 146.

Laufer-Ukeles, Pamela. “The Relational Rights of Children” (2016) 48:3 Conn L Rev 741.

Leckey, Robert. “Child Welfare, Indigenous Parents, and Judicial Mediation” (2022) 49 J Law Soc 151.

Leering, Michele M. “Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism” (2017) 95:1 Can B Rev 47–90.

Lefebvre, Rachael et al. “Examining the Relationship between Economic Hardship and Child Maltreatment Using Data from the Ontario Incidence Study of Reported Child Abuse and Neglect-2013 (OIS-2013)” (2017) 7:4 Behav Sci 6.

Lens, Vicki. “Against the Grain: Therapeutic Judging in a Traditional Family Court” (2016) 41:03 Law Soc Inq 701.

———. “Judging the Other: The Intersection of Race, Gender, and Class in Family Court” (2019) 57:1 Fam Ct Rev 72.

Lens, Vicki, Colleen Cary Katz & Kimberly Spencer Suarez. “Case Workers in Family Court: A Therapeutic Jurisprudence Analysis” (2016) 68 Child Youth Serv Rev 107.

Lynch, Margaret A. “Child Abuse before Kempe: An Historical Literature Review” (1985) 9:1 Child Abuse & Neglect 7.

Levy, Kenneth N et al. “Attachment Style” (2011) 67:2 J Clin Psychol 193.

Lind, Craig & Tom Hewitt. “Law and the Complexities of Parenting: Parental Status and Parental Function” (2009) 31:4 J Soc Welf Fam Law 391.

Lindahl, Robert. “Individualising or Categorising Recognition? Conceptual Discussions Concerning the Relationship Between Foster Children and their Child Welfare Workers” (2021) 24:4 European Journal of Social Work 566.

Macdonald, Roderick A. “Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism Part I: General Themes” (1998) 15:1 Ariz J Int’l & Comp L 69.

———. “Triangulating Social Law Reform” (2016) 21 Lex Electronica 118.

Macfarlane, Julie. “What Does the Changing Culture of Legal Practice Mean for Legal Education” (2001) 20 Windsor YB Access Just 191–210.

MacMillan, Harriet L, Ellen Jamieson & Christine A Walsh. “Reported Contact with Child Protection Services Among Those Reporting Child Physical and Sexual Abuse: Results from a Community Survey” (2003) 27:12 Child Abuse Negl 1397.

Macneil, Ian R. “Relational Contract: What We Do and do Not Know” (1985) Wis L Rev 483.

Mackenzie, Catriona. “Feminist Innovation in Philosophy: Relational Autonomy and Social Justice” (2019) 72 Womens Stud Int Forum 144.

Madigan, Sheri, Greg Moran & David R Pederson. “Unresolved States of Mind, Disorganized Attachment Relationships, and Disrupted Interactions of Adolescent Mothers and their Infants” (2006) 42:2 Dev Psychol 293.

Marshall, Gerry, Karen Winter & Danielle Turney. “Honneth and Positive Identity Formation in Residential Care” (2020) 25:4 Child Fam Soc Work 733.

McCafferty, Paul. “Children’s Participation in Child Welfare Decision Making: Recognising Dichotomies, Conceptualising Critically Informed Solutions.” (2021) Child Care Pract 1.

McCormack, Judith. “Not So Dangerous Liaisons: A Clinical Perspective on Interdisciplinarity” (2014) 23 JL & Soc Pol’y [i]-29.

McDonell, James R, Asher Ben-Arieh & Gary B Melton. “Strong Communities for Children: Results of a Multi-Year Community-Based Initiative to Protect Children from Harm” (2015) 41 Child Abuse Negl 79.

McGillivray, Anne. “Children’s Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada” (2011) 19:1 Int’l J Child Rts 21.

McHale, M Jerry, Irene Robertson & Andrea Clarke. “Building a Child Protection Mediation Program in British Columbia” (2009) 47:1 Fam Ct Rev 86.

McIntosh, Jennifer E, Hon Diana Bryant & Kristen Murray. “Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia” (2007) 46:1 Fam Ct Rev 125.

McLeigh, Jill D, James R McDonell & Osnat Lavenda. “Neighborhood Poverty and Child Abuse and Neglect: The Mediating Role of Social Cohesion” (2018) 93 Child Youth Serv Rev 154.

Melton, Gary B. “Mandated Reporting: a Policy Without Reason” (2005) 29:1 Child Abuse Negl 9.

Meng, Xiangfei et al. “Resilience and Protective Factors among People with a History of Child Maltreatment: A Systematic Review” (2018) 53:5 Soc Psychiatry Psychiatr Epidemiol 453.

Menkel-Meadow, Carrie. “The Trouble With the Adversary System in a Postmodern, Multicultural World” (1996) 38 Wm & Mary L Rev 5.

Meyers, Diana T. “Personal Autonomy and the Paradox of Feminine Socialization” (1987) 84:11 J Philos 619.

Meyerson, Denise & Catriona Mackenzie. “Procedural Justice and the Law” (2018) 13:12 Philosophy Compass, online: <https://onlinelibrary.wiley.com/doi/10.1111/phc3.12548>.

Miller, Keva M et al. “Individual and Systemic/Structural Bias in Child Welfare Decision Making: Implications for Children and Families of Color” (2013) 35:9 Child Youth Serv Rev 1634.

Miller-Perrin, Cindy & Robin Perrin. “Physical Punishment of Children by US Parents: Moving Beyond Debate to Promote Children’s Health and Well-Being” (2018) 31:1 Psicol Refl Crít, online: <https://prc.springeropen.com/articles/10.1186/s41155-018-0096-x>.

Mills, Aaron. “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847.

Minow, Martha. “Children’s Rights: Where We’ve Been and Where We’re Going” (1995) 68:4 Temp L Rev 1573.

———. “What Ever Happened to Children’s Rights” (1995) 80:2 Minn L Rev 267.

Mitchell, Mary. “The Value of Recognition Theory to Family Group Conferencing and Child-Care and Protection” (2021) 51:6 Br J Soc Work 2191.

Mnookin, Robert. “Child Custody Revisited” (2014) 77:1 Law & Contemp Probs 249.
———. “Foster Care—In Whose Best Interest?” (1973) 43:4 Harv Educ Rev 599.

Molnar, Beth E et al. “Neighborhood-Level Social Processes and Substantiated Cases of Child Maltreatment” (2016) 51 Child Abuse Negl 41.

Moore, Benoît. “Culture et droit de la famille: de l’institution à l’autonomie individuelle” (2009) 54:2 McGill LJ 257.

Moreno, Joelle Anne. “Einstein on the Bench: Exposing What Judges Do Not Know About Science and Using Child Abuse Cases to Improve How Courts Evaluate Scientific Evidence” (2003) 64 Ohio State LJ 531.

Mouffe, Chantal. “Political Liberalism. Neutrality and the Political” (1994) 7:3 Ratio Juris 314.

Mulder, Tim M et al. “Risk Factors for Child Neglect: A Meta-Analytic Review” (2018) 77 Child Abuse & Neglect 198.

Munford, Robyn & Jackie Sanders. “Shame and Recognition: Social Work Practice with Vulnerable Young People” (2020) 25:1 Child Fam Soc Work 53.

Munro, Eileen. “Learning to Reduce Risk in Child Protection” (2010) 40:4 Br J Soc Work 1135.

Murphy, Jane C. “Rethinking the Role of Courts in Resolving Family Conflicts” (2020) 21:3 Cardozo J Conflict Resol 625.

Myers, John E B. “A Short History of Child Protection in America” (2008) 42:3 Fam LQ 449.

Navarro, Jessica L et al. “Bored of the Rings: Methodological and Analytic Approaches to Operationalizing Bronfenbrenner’s PPCT Model in Research Practice” (2022) 14:2 J Fam Theory Rev 233.

Neckoway, Raymond, Keith Brownlee & Bruno Castellan. “Is Attachment Theory Consistent with Aboriginal Parenting Realities?” (2020) 3:2 First Peoples Child Fam Rev 65.

Nedelsky, Jennifer. “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1:1 Yale JL & Feminism 1.

Ney, Tara, Carla Bortoletto & Maureen Maloney. “Strategies to Revive Traditional Decision-Making in the Context of Child Protection in Northern British Columbia” (2020) 7:2 FPCF Rev 60.

Niemi, Petteri. “Recognition and the Other in Social Work” (2021) 51:7 Br J Soc Work 2802.

Nijssens, Liesbet et al. “Parental Attachment Dimensions and Parenting Stress: The Mediating Role of Parental Reflective Functioning” (2018) 27:6 J Child Fam Stud 2025.

Noël, Julie & Marie-Christine Saint-Jacques. “Quelle valeur s’accorde-t-on quand on est une mère d’enfant placé ?: Une analyse basée sur la théorie de la reconnaissance sociale” (2020) 31:2 Nouvelles pratiques sociales 298.

Norman, Rosana E et al. “The Long-Term Health Consequences of Child Physical Abuse, Emotional Abuse, and Neglect: A Systematic Review and Meta-Analysis” (2012) 9:11 PLoS Med e1001349.

Nys, Thomas. “Autonomy, Trust, and Respect” (2016) 41:1 J Med Philos 10.

Olsen, Frances E. “The Family and the Market: A Study of Ideology and Legal Reform” (1983) 96:7 Harvard Law Review 1497.

Olson, Kelly Browe. “Family Engagement and Collaborative Decision-Making Processes Provide Multiple Benefits in Child Welfare Cases” (2020) 58:4 Fam Ct Rev 937.

Palmer, Vernon Valentine. “Quebec and Her Sisters in the Third Legal Family” (2009) 54 McGill LJ 321.

Palusci, Vincent J. “Current Issues in Physical Abuse” in Jill E Korbin & Richard D Krugman, eds, *Handbook of Child Maltreatment* Child Maltreatment: Contemporary Issues in Research and Policy (Springer, 2014) 63.

Pantell, Robert H et al. “The Child Witness in the Courtroom” (2017) 139:3 Pediatrics, online: </pediatrics/article/139/3/e20164008/53469/The-Child-Witness-in-the-Courtroom>.

Paré, Mona & Diane Bé. “La participation des enfants aux procédures de protection de la jeunesse à travers le prisme de la vulnérabilité” (2020) 61:1 C de D 223.

Parekh, Bhikhu. “The Cultural Particularity of Liberal Democracy” (1992) 40:Special Issue Political Stud 160.

Parton, Nigel. “Addressing the Relatively Autonomous Relationship Between Child Maltreatment and Child Protection Policies and Practices” (2020) 3:1 Int J Child Maltreat 19.

———. “Social Work, Child Protection and Politics: Some Critical and Constructive Reflections” (2014) 44:7 Br J of Soc Work 2042.

Patten, Alan. “Liberal Neutrality: A Reinterpretation and Defense” (2012) 20:3 J Pol Philos 249.

Pepin, Elise N & Victoria L Banyard. “Social Support: A Mediator between Child Maltreatment and Developmental Outcomes” (2006) 35:4 J Youth Ado 612.

Perlin, Michael L. “‘Changing of the Guards’: David Wexler, Therapeutic jurisprudence, and the Transformation of Legal Scholarship” (2019) 63 Int J Law Psychiatry 3.
———. “‘Have You Seen Dignity?’: The Story of the Development of Therapeutic Jurisprudence” (2017) 27 NZULR 1135.

Porter, Robert, Vicki Welch & Fiona Mitchell. “Adversarialism in Informal, Collaborative, and ‘Soft’ Inquisitorial Settings: Lawyer Roles in Child Welfare Legal Environments” (2019) 41:4 J Soc Welf Fam Law 425.

Pouliot, Eve & Daniel Turcotte. “Facteurs invoqués dans l’évaluation de la compétence parentale en protection de la jeunesse: comparaison des perspectives sociale et judiciaire” (2019) 11 Sciences et actions sociales, online: <http://journals.openedition.org/sas/975>.

Prescott, Dana E & Tim Fadgen. “Adversarial Systems and Forensic Experts in Child Custody: How About Adding a Hot Tub?” (2019) 32 J Am Acad Matrim Law 117.

Raz, Joseph. “Legal Rights” (1984) 4:1 Oxf J Leg Stud 1.

Reece, Helen. “The Paramountcy Principle” (1996) 49:1 Curr Leg Probl 267.

Renault, Emmanuel. “A Critical Theory of Social Suffering” (2010) 11:2 Critical Horizons 221.

Renger, Daniela et al. “A Social Recognition Approach to Autonomy: The Role of Equality-Based Respect” (2017) 43:4 Pers Soc Psychol Bull 479.

Rholes, W Rholes et al. “Adult Attachment Styles, the Desire to Have Children, and Working Models of Parenthood” (1997) 65:2 J Personality 357.

Ricard, Laurence. “Un regard sur la notion de lésion de droits en matière de protection de la jeunesse” (2021) 62:2 C de D 605.

———. “L’évolution récente de la conception de l’enfant dans le droit québécois: l’exemple de la Loi sur la protection de la jeunesse et des récents projets de loi en matière d’adoption” (2014) 44:1 RDUS 27.

———. “L’autonomie relationnelle: un nouveau fondement pour les théories de la justice” (2013) 40:1 Philosophiques 139.

———. “Le rapport entre le juridique et le clinique dans l’application de la Loi sur la protection de la jeunesse: une perspective relationnelle” (2013) 43:1 RGD 49.

Ripstein, Arthur. “Private Order and Public Justice: Kant and Rawls” (2006) 92 Va L Rev 1391.

Roche, Jeremy. “Children’s Rights: In the Name of the Child” (1995) 17:3 J Soc Welf Fam Law 281.

Rodham, Hillary. “Children Under the Law” (1973) 43:4 Harv Educ Rev 487.

Ross, Alexandra S, Adam B Hinshaw & Nancy L Murdock. “Integrating the Relational Matrix: Attachment Style, Differentiation of Self, Triangulation, and Experiential Avoidance” (2016) 38:4 Contemp Fam Ther 400.

Ross-Plourde, Mylène & Dominique Basque. “Motivation to Become a Parent and Parental Satisfaction: The Mediating Effect of Psychological Needs Satisfaction” (2019) 40:10 J Fam Issues 1255.

Rowland, Andrew, Felicity Gerry & Marcia Stanton. “Physical Punishment of Children: Time to End the Defence of Reasonable Chastisement in the UK, USA and Australia” (2017) 25 Int J Child Rights 165.

Santos, Boaventura De Sousa. “The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada” (1977) 12 Law Soc Rev 5.

Saywitz, Karen J & Rebecca Nathanson. “Children’s Testimony and their Perceptions of Stress In and Out of the Courtroom” (1993) 17:5 Child Abuse Negl 613.

Schlag, Pierre. “The Problem of the Subject” (1991) 69 Tex L Rev 1627.

Schofield, Thomas J, Rosalyn D Lee & Melissa T Merrick. “Safe, Stable, Nurturing Relationships as a Moderator of Intergenerational Continuity of Child Maltreatment: A Meta-Analysis” (2013) 53:4, Supplement Journal of Adolescent Health (Interrupting Child Maltreatment Across Generations Through Safe, Stable, Nurturing Relationships) S32.

Scott, Elizabeth S & Robert E Emery. “"Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard” (2014) 77:1 Law Contemp Probs 69.

Scott, Elizabeth S & Robert E Scott. “Parents as Fiduciaries” (1995) 81 Va L Rev 2401.

Sheets, L K et al. “Sentinel Injuries in Infants Evaluated for Child Physical Abuse” (2013) 131:4 Pediatrics 701–707.

Schlag, Pierre. “The Problem of the Subject” (1991) 69 Tex L Rev 1627.

Simon, June, Ann Luetzow & Jon R Conte. “Thirty Years of the Convention on the Rights of the Child: Developments in Child Sexual Abuse and Exploitation” (2020) 110 Child Abuse Negl 104399.

Simpson, Jeffry A. “Influence of Attachment Styles on Romantic Relationships” (1990) 59:5 J Pers Soc Psychol 971.

Slinger, Emily & Ronald Roesch. “Problem-Solving Courts in Canada: A Review and a Call for Empirically-Based Evaluation Methods” (2010) 33:4 Int J Law Psychiatry 258.

Smith, Lionel. “Parenthood is a Fiduciary Relationship” (2020) 70:4 UTLJ 395.

Smith, Mark, Claire Cameron & Daniela Reimer. “From Attachment to Recognition for Children in Care” (2017) 47:6 Br J Soc Work 1606.

Slack, Kristen Shook et al. “Improving the Measurement of Child Neglect for Survey Research: Issues and Recommendations” (2003) 8:2 Child Maltreat 98.

Sowter, Deanne M. “Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code” (2018) 35 Windsor YB Access Just 401.

Spinak, Jane M. “Romancing the Court” (2008) 46:2 Fam Ct Rev 258.

———. “Why Defenders Feel Defensive: The Defender’s Role in Problem-Solving Courts” (2003) 40 Am Crim L Rev 1617.

Spratt, Trevor. “The Influence of Child Protection Orientation on Child Welfare Practice” (2001) 31:6 Br J Soc Work 933.

St-Laurent, Diane et al. “Intergenerational Continuity/Discontinuity of Child Maltreatment among Low-Income Mother–Child Dyads: The Roles of Childhood Maltreatment Characteristics, Maternal Psychological functioning, and Family Ecology” (2019) 31:1 Dev Psychopatho 189.

Stip, Emmanuel. “Maintenant qu’elle est bien découverte, la psychothérapie devrait être couverte !” (2015) 40:4 Santé Mentale au Québec 7.

Stokes, J & G Schmidt. “Race, Poverty and Child Protection Decision Making” (2011) 41:6 Br J Soc Work 1105.

Such, Christine. “History and Development of Children’s Rights” in *Children’s Rights 0-8* (Routledge, 2014) 23.

Summers, Richard F & Jacques P Barber. “Therapeutic Alliance as a Measurable Psychotherapy Skill” (2003) 27:3 Academic Psychiatry 160.

Svrakic, Dragan M & Charles F Zorumski. “Neuroscience of Object Relations in Health and Disorder: A Proposal for an Integrative Model” (2021) 0 Front Psychol, online: <https://www.frontiersin.org/articles/10.3389/fpsyg.2021.583743/full>.

Taylor, Luke. “Domestic Contracts and Family Law Exceptionalism: An Historical Perspective” (2021) 66:2 McGill LJ 303.
Terlazzo, Rosa. “Conceptualizing Adaptive Preferences Respectfully: An Indirectly Substantive Account” (2016) 24:2 Journal of Political Philosophy 206.

Thomson, Lorraine, Morag McArthur & Peter Camilleri. “Is It ‘Fair’? Representation of Children, Young People and Parents in an Adversarial Court System” (2017) 22 Child Fam Soc Work 23.

Tilbury, Clare. “Obtaining Expert Evidence in Child Protection Court Proceedings” (2019) 72:4 Aust Soc Work 392.

Tully, James. “Recognition and Dialogue: the Emergence of a New Field” (2004) 7:3 Crit Rev Int Soc & Pol Phi 84.

Tyler, Tom R. “Procedural Justice and the Courts” (2007) 44:1/2 Ct Rev 26.

Valdes, Francisco, Angela P Harris & Jerome M Culp, Jr. “Subject Unrest” (2003) 55 Stan L Rev 2435.

Van de Veen, Sherry L. “Some Canadian Problem Solving Court Processes” (2004) 83 Can B Rev 91.

Van Wert, Melissa et al. “Intergenerational Transmission of Child Abuse and Neglect: A Transdisciplinary Analysis” (2019) 3 Gender and the Genome, online: <https://doi.org/10.1177/2470289719826101>.

Vandervort, Frank E, Robbin Pott Gonzalez & Katlheen Coulborn Faller. “Legal Ethics and High Child Welfare Worker Turnover: An Unexplored Connection” (2008) 30:5 Child Youth Serv Rev 546.

Waldron, Jeremy. “Theoretical Foundations of Liberalism” (1987) 37:147 Philos Q 127.
Walker, Polly O. “Decolonizing Conflict Resolution: Addressing the Ontological Violence of Westernization” (2004) American Indian Q 527.

Warmingham, Jennifer M et al. “Identifying Maltreatment Subgroups with Patterns of Maltreatment Subtype and Chronicity: A Latent Class Analysis Approach” (2019) 87 Child Abuse Negl 28.

Watson, W H. “Family Systems” in V S Ramachandran, ed, *Encyclopedia of Human Behavior (Second Edition)* (San Diego: Academic Press, 2012) 184.

Webb, Calum et al. “Cuts Both Ways: Ethnicity, Poverty, and the Social Gradient in Child Welfare Interventions” (2020) 117 Child Youth Serv Rev 105299.

Weir, Kirk. “High-Conflict Contact Disputes: Evidence of the Extreme Unreliability of Some Children’s Ascertainable Wishes and Feelings” (2011) 49:4 Fam Ct Rev 788.

Welbourne, Penelope. “Adversarial Courts, Therapeutic Justice and Protecting Children in the Family Justice System” (2016) 28:3 Child & Fam L Q 19.

Westlund, Andrea C. “Rethinking Relational Autonomy” (2009) 24:4 Hypatia 26.

Wexler, David B. “Therapeutic Jurisprudence and the Criminal Courts” (1993) 35 Wm & Mary L Rev 279.

Winter, Karen. “Relational Social Work” in Malcolm Payne & Emma Reith-Hall, eds, *The Routledge Handbook of Social Work Theory* (Routledge, 2019) 151.

Wildgoose, Joanne. “Alternate Dispute Resolution of Child Protection Cases” (1987) 6:1 Can J Fam L 61.

Wilkins, David. “Using Q Methodology to Understand How Child Protection Social Workers Use Attachment Theory: How Social Workers Use Attachment Theory” (2017) 22 Child Fam Soc Work 70.

Woodhouse, Barbara Bennett. “Who Owns the Child: Meyer and Pierce and the Child as Property” (1992) 33:4 Wm & Mary Bill Rts J 995.

Yates, Tuppett M. “The Developmental Consequences of Child Emotional Abuse: A Neurodevelopmental Perspective” (2007) 7:2 J Emot Abuse 9.

Yoon, Susan et al. “Defining Resilience in Maltreated Children from the Practitioners’ Perspectives: A Qualitative Study” (2020) 106 Child Abuse Negl 104516.

Zeanah, Charles H, Lisa J Berlin & Neil W Boris. “Practitioner Review: Clinical Applications of Attachment Theory and Research for Infants and Young Children” (2011) 52:8 J Child Psychol Psychiatry 819.

Zermatten, Jean. “The Best Interests of the Child Principle: Literal Analysis and Function” (2010) 18:4 Int J Child Rights 483.

Zielinski, David S. “Child Maltreatment and Adult Socioeconomic Well-Being” (2009) 33:10 Child Abuse Negl 666.

“The Battered-Child Syndrome” (1962) 181:1 JAMA 42.

Reports, Information Sheets and Parliamentary Papers

Bader, Danielle & Kristyn Frank. *What Do We Know about Physical and Non-Physical Childhood Maltreatment in Canada?* Statistics Canada, Economic and Social Reports Catalogue no. 36-28-0001 (Government of Canada, 2023).

Cameron, Gary et al. *Positive Possibilities for Child and Family Welfare: Options for Expanding the Anglo-American Child Protection Paradigm*, by Gary Cameron et al (Waterloo, ON: Wilfrid Laurier University, 2001).

Charbonneau, Jean-Pierre et al. *Rapport de la Commission parlementaire spéciale sur la protection de la jeunesse* (Québec Government, National Assembly, Parliamentary Select Committee on Youth Protection, 1982).

Cotter, Adam. *Criminal Victimization in Canada, 2019*, Juristat, Statistics Canada, Juristat Catalogue no. 85-002-X (2021).

Dumais, Jacques et al. *La protection des enfants au Québec: une responsabilité à mieux partager, Rapport du Comité d'experts sur la révision de la Loi sur la protection de la jeunesse* (Québec: Ministère de la Santé et des Services sociaux, 2004).

Giovannucci, Marilou & Karen Largent. *Guidelines for Child Protection Mediation* (United States: Association of Family and Conciliation Courts, 2012).

Goldberg, Susan. *Problem-solving in Canada's Courtrooms A Guide to Therapeutic Justice*, by Susan Goldberg (National Judicial Institute, 2011).

Gonzalez, Dulce, Arian Bethencourt Mirabal & Janelle D McCall. "Child Abuse and Neglect" in *StatPearls* (Treasure Island (FL): StatPearls Publishing, 2021).

Hunter, Gillian & Jessica Jacobson. *Exploring Procedural Justice and Problem-Solving Practice in the Youth Court,* (HM Inspectorate of Probation, 2021).

Jasmin, Michel et al., *La protection de la jeunesse : plus qu'une loi, Rapport du Groupe de travail sur l'évaluation de la Loi sur la protection de la jeunesse* (Québec Government, 1992).

Jud, Andreas & Nico Trocmé. *Physical Abuse and Physical Punishment in Canada*, Information Sheet 122E (McGill Centre for Research on Children and Families, 2012).

Laurent, Régine et al. *Instaurer une société bienveillante pour nos enfants et nos jeunes: Rapport de la Commission spéciale sur les droits des enfants et la protection de la jeunesse* (Québec Government, 2021).

Piper, Kathryn et al. *Children's Presence in Court During Child Protection Hearings: Empowering or Re-Traumatizing?*, by Kathryn Piper et al (Columbus, Ohio: The Center for Child Policy, 2019).

Retter, Emma, Catrin Wallace & Judith Masson. *The Impact of Child Protection Mediation In Public Law Proceedings on Outcomes for Children and Families: A Rapid Evidence Review*, by Emma Retter, Catrin Wallace & Judith Masson (London: Nuffield Family Justice Observatory, 2020).
Turmel, Jean et al., *L'intervention judiciaire en matière de protection de la jeunesse : constats, difficultés et pistes de solution, Rapport de l'équipe de travail sur la modernisation des processus judiciaires en matière d'administration de la justice à l'égard des jeunes* (Québec Government, 2004).

Child Maltreatment 2019 (published January 2021) Children's Bureau (Administration on Children, Youth and Families, Administration for Children and Families) of the U.S. Department of Health and Human Services, at 22, online: <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment/>.

Committee on Child Maltreatment Research, Policy et al. *New Directions in Child Abuse and Neglect Research*, by Policy Committee on Child Maltreatment Research et al (National Academies Press (US), 2014).

Definitions of Child Abuse and Neglect, Child Welfare Information Gateway (Washington, DC: U.S. Department of Health and Human Services, Children's Bureau, 2019).

En équilibre vers l'avenir: Bilan des directeurs de la protection de la jeunesse/Directeurs provinciaux (Québec Government, 2023).

Journal des débats, 1st sess 42 leg, Thursday 2 May 2019, vol 45 nr 38.

La cause des enfants tatouée sur le cœur : Bilan des directeurs de la protection de la jeunesse/Directeurs provinciaux, (Québec Government, 2018).

Meaningful Participation of Children And Youth in Child Protection Mediation: Practice Guidelines for Child Protection Mediators and Child Welfare Practitioners (British Columbia, Canada: Ministry of Children and Family Development and Ministry of Justice, 2015).

Médecins québécois pour le régime public. *Accès aux soins en santé mentale: Un portrait québécois alarmant*, by Médecins québécois pour le régime public (Montreal, 2022).

SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach, HHS Publication No. (SMA) 14-4884 (Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014).

Electronic Sources

Boutin, Marie-Claude, Des Marchais Myriam et al., *Loi sur la protection de la jeunesse annotée*, Montreal, SOQUIJ, updated February 1, 2019 [online], section 2.

Commission des droits de la personne et des droits de la jeunesse website, « Origin and Mission » : <https://www.cdpdj.qc.ca/en/our-services/about-us/origin-and-mission>.

"Global Partnership to End Violence Against Children", *Countdown to Universal Prohibition*, online: <https://endcorporalpunishment.org/countdown/>.

"Global Partnership to End Violence Against Children", *Corporal Punishment of Children in the United Kingdom* (November 2020), online: <https://endcorporalpunishment.org/reports-on-every-state-and-territory/uk/>

Loi de la protection sociale Atikamekw d'Opitciwan (Miro nakatawer ma tanak awacak mamo), online: <https://www.sac-isc.gc.ca/DAM/DAM-ISC-SAC/DAM-SOCIAL/STAGING/texte-text/notices_requests_act_respecting_first_nations_inuit_metis_LPSAO_1643317226312_fra.pdf> .

National Institute of Justice website, "Problem-Solving Courts", online: <https://nij.ojp.gov/topics/articles/problem-solving-courts>.

"Problem-Solving Courts", online: *Australasian Institute of Judicial Administration* <https://aija.org.au/research/australasian-therapeutic-jurisprudence-clearinghouse/problem-solving-courts/>.

Special Commission on the Rights of the Child and Youth Protection presided by Ms. Régine Laurent website: "A Willingness to Act for Our Children: <https://www.csdepj.gouv.qc.ca/home/?L=1>;

The Bowen Center for the Study of Family Website: <https://www.thebowencenter.org/family-projection-process >.

Waldron, Jeremy. "The Rule of Law", (22 June 2016), online: *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/Entries/rule-of-law/#RuleLawRuleLaw>.

News Sources

Bendali, Nahila. "*La Vérif : comment se porte l'accès aux soins en santé mentale au Québec?*", *Radio-Canada* (20 September 2022), online : <https://ici.radio-canada.ca/nouvelle/1916661/soins-sante-mentale-psychologues-liste-attente>;

Bilodeau, Émilie, "Mort de la fillette de Granby : De nouveaux détails sur le rôle du père", La Presse (15 December 2021), online :

<https://www.lapresse.ca/actualites/justice-et-faits-divers/2021-12-15/mort-de-la-fillette-de-granby/de-nouveaux-details-sur-le-role-du-pere.php>.

Desmeules, Judith. “Les deux fillettes de Lévis retrouvées mortes, Martin Carpentier toujours en cavale”, *Le Soleil* (11 July 2020), online :<https://www.lesoleil.com/2020/07/11/les-deux-fillettes-de-levis-retrouvees-mortes-martin-carpentier-toujours-en-cavale-54deea849ce1486fdbda61891bfcedb7/>.

Ducas, Isabelle, “Fillette morte à Granby: un tragique destin”, La Presse (3 May 2019), online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2019-05-03/fillette-morte-a-granby-un-tragique-destin>.

Gagnon, Katia. “*La petite enfant sauvage*”, *La Presse* (28 May 2022), online: <https://www.lapresse.ca/actualites/2022-05-28/direction-de-la-protection-de-la-jeunesse/la-petite-enfant-sauvage.php>.

Gonthier, Valérie, and Alex Drouin : “La fillette de sept ans aurait été attachée et bâillonnée pendant des heures”, Journal de Montréal (30 April 2019), online : <https://www.journaldemontreal.com/2019/04/30/fillette-dans-un-etat-critique--deux-personnes-arretees-1>.

Grou, Christine. (president, Ordre des psychologues du Québec), “*Crise en santé mentale : la pointe de l’iceberg?* ”, *Le Journal de Montréal* (29 September 2022), online : <https://www.journaldemontreal.com/2022/09/29/crise-en-sante-mentale-la-pointe-de-liceberg>.

Nadeau, Jean-François. “Un jeune garçon meurt pendant une intervention de la DPJ”, *Le Devoir* (30 March 2020), online : <https://www.ledevoir.com/societe/575992/un-enfant-de-la-dpj-mort-jeudi>.

Ouellette-Vézina, Henri. “Fillette poignardée à mort: la mère a été arrêtée”, *La Presse* (23 July 2020), online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2020-07-23/fillette-poignardee-a-mort-la-mere-a-ete-arretee.php>.

Tanguay, Sébastien. “Deux garçons trouvés sans vie à Wendake”, *Radio-Canada* (11 October 2020), online :<https://ici.radio-canada.ca/nouvelle/1740379/wendake-enfant-double-meurtre>.

Teisceira-Lessard, Philippe. “Deux bébés morts dans une famille : la DPJ et la justice en quête de réponses”, *La Presse* (15 February 2023) online : <https://www.lapresse.ca/actualites/justice-et-faits-divers/2023-02-15/deux-bebes-morts-dans-une-famille/la-dpj-et-la-justice-en-quete-de-reponses.php>.

Tremblay, Stéphane, “Fillette décédée à Granby: l'alerte avait pourtant été sonnée”, HuffPost Québec (2 May 2019) online : <https://www.huffpost.com/archive/qc/entry/fillette-decedee-granby_qc_5cd0f7e8e4b0226c530b7e7e>.

Trudel, Roxane. “Une fillette poignardée à mort à Montréal”, *Le Journal de Montréal* (25 April 2020), online : <https://www.journaldemontreal.com/2020/04/25/possible-drame-familial-une-fillette-de-4-ans-grievement-blessee-a-larme-blanche>.

Canadian Press, “Le fait divers marquant de 2019 aura été la mort d'une enfant de 7 ans à Granby” Radio-Canada (22 December 2019), online : <https://ici.radio-canada.ca/nouvelle/1445934/-faits-marquants-2019-fillette-granby-dpj>.

“Attention aux conclusions hâtives, dit la DPJ de l’Estrie”, TVA Nouvelles (1 May 2019) : <https://www.tvanouvelles.ca/2019/05/01/en-direct--la-dpj-reagit-apres-le-deces-dune-fillette-de-7-ans-a-granby>.

“La fillette morte à Laval était connue de la DPJ”, *Radio-Canada* (4 January 2021), online: <https://ici.radio-canada.ca/nouvelle/1760660/laval-fillette-mort-enquete-autopsie>.

“Lancement du projet pilote de médiation en protection de la jeunesse dans quatre nouvelles régions du Québec”, Québec Government Website, News Section (27 June 2022), online : <https://www.Québec.ca/nouvelles/actualites/details/lancement-du-projet-pilote-de-mediation-en-protection-de-la-jeunesse-dans-quatre-nouvelles-regions-du-Québec-41896>.