Chapter 3
The Human Rights Imperative and Minimum Voting Age

3.1 The Gatekeeper Model of Recognition of a Human Rights Claim as Legitimate and it's Application to the Youth Voting Rights Struggle: Introduction

We consider next Clifford Bob's gatekeeper model of the emergence and legitimization of 'new' human rights claims [59]. We will explore in much of the remainder of the book the potential relevance of the model to the youth voting rights issue. The model, it will be shown, is quite helpful in thinking about why the issue of youth voting rights continues to be considered by most in the power elite, and by the majority of the general public in most Western democratic societies, as a fringe topic. There appears to be a de-legitimization process at work. In applying the Clifford Bob model to the youth voting rights issue, we seek also to gain some insight into why the struggle for youth voting rights in the democratic States of the West (i.e. a minimum voting age of 16) is regarded by and large as a struggle for a supposed novel, *invented* right for an undeserving 'special interest' group. It is relevant to note, however, that Clifford Bob in his very valuable work on the processes involved in rights recognition by the international community makes no reference, even in the briefest of terms, to the global youth voting rights movement. This despite the fact that: (a) the right at stake is so essential to young peoples' potential for improvement of their overall human rights situation and social status in society (i.e. the youth vote at 16 would provide young people aged 16 and 17 years a more effective advocacy tool for themselves, and potentially also for all those under age 18 years), and (b) the right to vote is generally regarded as amongst the most fundamental of the basic human rights (as reflected, for instance, by its inclusion in the *Universal Declaration of Human Rights* as a right belonging to *every* person). On the very first page of his book, 'The International Struggle for New Human Rights,' Clifford Bob states: 'Children are one example, with their rights developed primarily by adults' [60]. While in large part this may

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be true, in recent years youth aged 14–17 themselves have been prominently active in the struggle for the youth vote (i.e. grant of the vote at age 16 years) as will be discussed.

The Clifford Bob model concerns how persons who claim to be 'repressed, abused, neglected or excluded' have framed their complaints as 'violations of international [human rights] norms' and suggests factors that likely contribute to the failure or success of particular human rights struggles [61]. For instance, according to the model, human rights gatekeepers who resist a shift away from the status quo are a key factor in the failure of many human rights struggles. With the model's human rights gatekeeper notion in mind, in later sections we will consider certain unique legal cases concerning attempts by youth to assert various inherent civil rights and consider how these gatekeepers contributed to the youths' success or failure in these initiatives. The cases involve: (a) *the right to the vote*: we will examine a Canadian case concerning the unsuccessful attempt of two Alberta teens to win the legal right to vote in Albertan municipal and provincial elections; a case that the youths lost and where there was a *denial* of leave to appeal to the Supreme Court of Canada; (b) *the right to make federal political campaign contributions*: we will examine a U.S. Supreme Court case concerning the successful attempt of teen plaintiffs to win the legal right to make contributions to the political campaigns of federal candidates), and (c) *the right of under 18s to file a human rights complaint to a human rights commission relating to age discrimination*: we will consider an Ontario Human Rights Tribunal case which addressed the issue of whether the statutory bar preventing persons *under* 18 years old in Ontario from advancing cases before the Ontario Human Rights Commission (in their own right or via a representative) concerning the prohibited discriminatory ground of age constitutes a failure to provide these young people equal protection and benefit of the law. Each of the aforementioned cases involve claims of fundamental human rights violations relating to age discrimination made by or on behalf of persons under age 18 years.

The Clifford Bob model highlights the fact that human rights claims are *not* automatically considered as such. Using that perspective, we will also explore throughout the remainder of the book whether the grant of voting rights to youth aged 16–17 (with perhaps the possibility under certain conditions for even younger children to access the vote) is akin to an acceptance that individuals in this group have the *inherent* 'right to have rights' (possess the intrinsic right to certain basic universal human rights). This in contrast to youth being considered to be persons entirely reliant on adults conferring at *their* (adult) *discretion* whatever rights and freedoms youth might enjoy in practice; even when it comes to fundamental constitutional rights. We will consider the vote then as a mechanism for agitating on one's

own behalf for further rights (for the 'right to have rights') as opposed to relying on the discretionary judgment of those in power (persons aged over 18 years; adults) to prioritize what is, or is not important in meeting the interests of minors.

In thinking about children's 'participation rights'; the question arises as to whether *The Convention on the Rights of the Child* (CRC), in actuality, fully affirms those rights. That this is the case is disputable given that: (a) the CRC does *not* speak at all to the issue of voting rights for persons of any age under 18 years; and (b) the CRC, at present, provides no mechanism for victimized individual children, or groups of such children belonging to an identifiable class, to bring forward complaints under the *Convention on the Rights of the Child*, or pursuant to the Optional Protocols additional to the Convention. These then represent instances where the United Nations itself is acting as human rights gatekeeper by contributing to: (a) the legitimization of the disenfranchisement of all minors, even those aged 16 and 17 years (i.e. due to the CRC exclusion of suffrage as a right for minors under any conditions), and (b) the disempowerment of minors within the UN children's human rights system itself as a consequence of the denial of opportunity for minors to file individual or group complaints under the CRC or its protocols and so advocate on their own behalf (with or without representatives) before the UN in respect of their human rights concerns.

The plan then is: (a) to examine the Clifford Bob human rights gatekeeper model of how allegedly 'new' human rights are validated by the international community, and, (b) in what follows thereafter to investigate whether the model in this regard 'fits' the youth voting rights struggle. We will investigate in this and later sections some of the basic characteristics of the youth voting rights struggle in Western States and the societal justifications that have been proffered for the denial of the vote to 16 and 17 year olds. A prime objective is to consider whether the youth voting rights movement has, in reality, been successfully articulated as a fundamental human rights struggle, or whether, in contrast, it has simply been reduced to a political policy issue by high profile human rights gatekeepers. An examination will be made of the gate-keeping role of high profile national organizations (for instance, the U.S. National Education Association; the U.S. Civil Liberties Association, the U.K. Electoral Commission) and of international human rights NGOs (such as Amnesty International), international human rights organizations (i.e. the United Nations) in causing the youth voting rights struggle to flounder in the West. All this is with a view to better understanding some of the institutional barriers to date in the enfranchisement of 16- and 17-year-olds and what changes in thinking and practice in respect of human rights gatekeepers would be necessary for the success of the movement.

3.1.1 The Clifford Bob Model on the Process for International Legitimization of 'New' Human Rights Claims

Clifford Bob suggests that if 'human rights gatekeepers' such as prominent NGOs (i.e. Human Rights Watch, The United Nations High Commission on Human Rights, Amnesty International etc.) take up the cause of a so-called novel human right, this is likely to: (a) bring widespread recognition of the right; and (b) increase the chance that States will act to end infringements of the right as well as perhaps take positive steps to facilitate enjoyment of the right for the vulnerable groups in their respective jurisdictions. Clifford Bob contends that there are four steps which mark the progressive evolution of a group's grievance into a widely affirmed internationally recognized human rights claim. That rights claim may be perceived as novel, or one that may long have been articulated but never come fully to life in the imagination of the international community, or in practice, or one that, in contemporary times, has gone into disfavour. Those progressive steps to international validation of a fundamental human rights claim are in Clifford Bob's view as follows:

> First, politicized groups frame long-held grievances as normative [human rights] claims. Second, they place these rights on the international agenda by convincing gatekeepers in major rights organizations to accept them. This is crucial because a handful of NGOs and international organizations hold much sway in certifying new rights. Third, states and international bodies, often under pressure from gatekeepers and aggrieved groups, accept the new norms. Finally, national institutions implement the norms [62].

Let us then apply Clifford Bob's refreshingly straightforward, but highly useful model to the youth struggle for voting rights. This in an attempt to formulate some plausible explanations as to why, in recent years, the youth voting rights issue (i.e. the attempt in Western democratic States to lower the eligible voting age to 16 in all elections from local to national and perhaps grant limited voting rights to 14 and 15 year olds such as the right to vote in municipal elections) has most often faltered. That is, why the struggle for the youth vote at age 16 has been in recent times regarded by the powers that be (namely; State governments, certain high profile international NGOs, international human rights institutions, domestic civil libertarian groups etc.) as an unrealistic prospect and/or a fringe issue not worthy of serious consideration, a 'non-issue' and certainly not a fundamental human rights matter. We begin by considering how the youth rights struggle in recent contemporary times has been formulated or framed. We do so by examining a select (given the space constraints of this monograph), but hopefully representative sample of pronouncements on the issue by: (a) *supporters* (i.e. youth human rights advocates; human rights/constitutional law academics, human rights advocates; and select

politicians who tend to view minors as not simply an extension of the family but as autonomous rights holders), and (b) *opponents* of voting age reform (those politicians, academics, and members of the judiciary and others tending to endorse more conservative family values and/or traditional views regarding the competencies, capacity for moral integrity and appropriate status of minors). The resources culled are mostly materials originating in the U.S., Canada, the United Kingdom and parts of Europe. There is, relative to other interdisciplinary topics, very little published on the issue of youth voting rights. However, we will hopefully gain some considerable insight into the obstacles facing those struggling for the vote at 16 by examining academic, governmental and other publications in the area. This exercise is directed to highlighting the manner in which both the youth voting rights claimants (those struggling for a minimum vote age at 16 years) and their opponents have *implicitly* characterized the youth voting rights issue. That is, we are interested in examining here whether claimants and/or opponents of a minimum voting age of 16 have formulated the youth voting issue as: (a) a social policy issue falling within the discretionary choice of the State government or, in contrast, (b) a fundamental rights issue with international human rights legal and moral imperatives attaching that supersede individual State preferred social policy options. We are especially interested in the next section then in determining whether the youth struggle for the vote in the last number of decades in the West has effectively been articulated as a fundamental human rights question by the youth claimants and their supporters; but not so by opponents of any lowering of the minimum voting age from the current 18 years. It should *not* be assumed, for reasons that will become clear, that the claimants, despite their using 'rights talk,' always successfully frame the issue of lowering of the minimum eligible voting age to 16 as a fundamental human rights matter. The question then becomes how to effectively frame the youth voting struggle as a basic human rights matter; something we will consider throughout the discussion.

3.2 The Devolution of the Youth Voting Age Struggle from 'Human Rights Struggle' to 'Social Policy Issue': The Canadian Example

Clifford Bob contends that framing a grievance as a human rights claim is a 'political choice' and there is 'nothing automatic about it' [63]. In the case of the youth voting rights issue, however, adults had already framed voting as a fundamental democratic human right in both Western State constitutions and international conventions. For instance, the *International Covenant on Civil and Political Rights* (ICCPR) prohibits discrimination in the grant of the fundamental human rights contained therein on the basis of *any* status and guarantees universal suffrage:

Article 2 ICCPR

1. Each State Party to the present Covenant undertakes to *respect and to ensure* to *all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*, *without distinction of any kind*, *such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status* (emphasis added).

Article 25 ICCPR

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives.
(b) *To vote* and to be elected at genuine periodic elections which shall be by *universal and equal suffrage* and shall be held by secret ballot, guaranteeing the *free expression of the will of the electors* . . . (emphasis added). [64].

Hence, that youth would rely on human rights rhetoric in their struggle for enfranchisement at 16 years was something of a foregone conclusion. In this particular respect, the model that Clifford Bob provides regarding the international legitimization of purportedly 'new' human rights does *not* fit the youth voting rights struggle. This is a very unique state of affairs as the Clifford Bob model is a good fit for widely diverse movements in describing: (a) the establishment of newly recognized inherent rights (i.e. the right to clean water), or (b) revival of respect for already recognized inherent rights that have been wrongfully disavowed or disregarded (i.e. the right of children to be protected from child soldiering; a right, as mentioned, long recognized in the customary rules of war). In the case of the youth voting rights movement, we have a situation where the majority of adults in Western democratic States who themselves endorsed and continue to endorse legitimization and internationalization of the notion of voting rights as a universal fundamental human right (as reflected in their support of the *Universal Declaration of Human Rights*, democratic constitutional documents and international human rights treaties such as the ICCPR)—*oppose* youth in their own countries who wish to realize that right for themselves by at least age 16 years. Normally under the Clifford Bob model, as this author understands it, one would expect that once a human right is well entrenched and internationally legitimized by international human rights institutions and advocates—such as is equal universal suffrage for all citizens of a State—the majority of these adults would be supporting inclusion of excluded citizens of the State (i.e. 16 and 17 year olds who seek the vote). In democratic States, entrenched constitutionally guaranteed and internationally recognized universal basic human rights are *not* commonly restricted for an indefinite period through legislated statutory law. There is instead typically a progressive enlargement in practice, and not just in theory, of the 'rights holder' category in respect of such

well-recognized rights. Thus, with respect to voting rights; although 'no country allows all *adults* to vote. . .*the basic trend over the last 200 years has been to remove one barrier after another*, [though] many restrictions remain (emphasis added)' [65]. Blais et al. state that:

> Throughout the 19th and early 20th centuries, the franchise was a lively issue. Whether women and less affluent citizens should be enfranchised was a hotly debated topic. *In contrast, contemporary disqualifications affect numerically smaller groups* like prison inmates or mentally deficient persons . . . (emphasis added). [66]

Yet, when it comes to voting rights for persons under age 18 years, there has *not* been in contemporary times a steady, incremental evolution of a more inclusive enfranchisement. For the most part, the issue has been kept by the powers that be well 'under the radar'; though it involves a very fundamental human right. The topic has not been designated as a State priority issue and, in some jurisdictions; youth voting rights is not even considered, at a minimum, a worthwhile topic for serious consideration. At the same time, it is the case that minimum eligible voting age was lowered from 21 to 18 years in most Western States with age of majority consequently set at 18 years in most legislative domains within these States by the mid 1970s. In addition, a very few have the age of majority for the vote set at 16 in some, but not all elections (i.e. certain German municipalities), while Austria is unique among Western States in establishing a minimum voting age of 16 in 2007 for all elections including federal. There has also been a steadfast opposition in most Western democratic States to any lowering of the eligible voting age to a set point below 18 years. Most States internationally also for that matter have declined to grant the vote at age 16 years.

The ambivalence, in practice, in most Western democracies on the issue of voting rights as a universal, inherent, fundamental human rights entitlement is no more clearly illustrated than in Finland. The Finnish constitution [67] includes an explicit prohibition on age discrimination in the law (where there is no legitimate justifiable reason for that discrimination). The same constitutional provision also specifically refers to the right of children to be treated equally and as individuals (section 6). This is rather unique as Western constitutions generally make no reference to age discrimination in regards to children. At the same time, the Finnish constitution at section 14: (a) affirms that every Finnish citizen of age 18 years and older has a right to vote in national elections and federal referendums; and (b) affirms that every Finnish citizen *and* every foreigner permanently resident in Finland who is 18 years or older has the right to vote in municipal elections and municipal referendums. Hence, even certain non-citizens (those who are permanent residents of Finland and at least 18 years old) have their voting rights *expressly* affirmed in the constitution, while this is not the case for Finnish citizens who are minors, or minors who are not Finnish citizens but who are permanent residents of Finland. Thus, the

Finnish constitution on the one hand prohibits age discrimination in law, while on the other it fails to *explicitly* endorse universal suffrage regardless of age. It is important to appreciate, however, that while the Finnish Constitution explicitly affirms certain rights of enfranchisement only for Finnish citizens and foreign permanent residents of Finland, it does *not* strip those under age 18 years of those rights (a similar issue arises in respect of the 26th Amendment to the U.S. Constitution regarding the right to the vote and age discrimination which will be discussed).

One might argue (erroneously) that this apparent inconsistency is not problematic in that the Finnish Constitution states that age discrimination is prohibited only where there is no acceptable reason for that discrimination. It might be presumed that there is an acceptable reason for exclusion of, for example, 16- and 17-year-olds from the vote (this being the group mentioned as it is primarily this age group actively seeking the vote internationally). The prime allegedly acceptable reason for exclusion of minors from the vote might be a *presumed* lack of competence for the vote amongst *all* minors regardless of specific age. However, a political competency standard for the vote is *not* being applied at all in Western democratic States in regards to the general adult population (nor is this the case in regards to any voting standard regarding autonomy, income, literacy, civic engagement or the like). Hence, any such alleged acceptable reason for age discrimination in the vote is itself being applied in a discriminatory manner based on age. This is a point we will discuss in some considerable detail in later sections.

One may take issue with the contention of Blais e al. that contemporary disqualifications from the vote typically affect numerically smaller groups than was the case in the past (i.e. the implication then being that the exclusion of youth from the vote in Western States in contemporary times directly affects but a relatively small population group). Consider, for example, that excluding those aged 14 and over from the vote in the United States impacts on the rights of many millions of young people in that country:

> . . . the number of *high school-age children (age 14 to 17)* increased, from 16.1 million and 5.7 percent of the total [U.S.] population in 2000 to 16.9 million, or 5.6 percent of the total [U.S.] population, in 2008 (emphasis added) [68].

Given the fundamental nature of the human right at stake in the youth struggle for the vote one would likely expect, under the Clifford Bob model, that international human rights organizations/institutions and international human rights advocates would offer vigorous support for youth acquisition of the vote. Instead, these latter entities, as we shall see, either take no position on the issue of the vote at 16 years, or support the status quo. Equally damaging to the future potential success of the youth voting rights movement is the reframing of the issue by opponents as something other than a fundamental human rights issue:

1. Opponents of a minimum voting age of 16 years in Western democratic States have successfully (and erroneously) transformed the youth voting rights issue from a human rights issue to a *social policy issue* (the latter being something within the purview of government's discretionary choice). This has been accomplished given that these opponents are comprised of the majority of adults in the populations of Western democratic States some of whom hold high political office and other influential positions with associated significant power and high social status;
2. Opponents of a minimum voting age of 16 years have successfully (but erroneously) argued that the age restriction of 18 years and older for the vote is a *non-discriminatory standard qualification* for the vote; *universally applicable* to all citizens under the particular State's jurisdiction;
3. Opponents of a minimum voting age of 16 years have successfully (but erroneously) argued that the age qualification of 18 years for the vote is *not* akin to previous voting qualifications found subsequently by the courts to be unconstitutional violations of a fundamental human right (i.e. those previous voting qualifications included, for instance, being male, having an acceptably high economic status, being literate as allegedly accurately assessed by a test regarding political knowledge or by some other 'voting test', being a free man; that is, not being a bonded labourer or in some sort of forced servitude or slavery.

Note that the youth voting rights claimants themselves, despite their using rights rhetoric, have essentially 'played the game' by their opponents' rules. This the youth rights claimants have done by arguing points that are *irrelevant* from a human rights perspective (i.e. by arguing that youth aged 16–17 are sufficiently mature, responsible, rational, autonomous, and civically engaged to be capable of casting an independent, free and informed vote).

Thus, there has been a 'devolution' of the youth voting rights issue (from human rights matter to State government social policy preference) as will become evident in what follows. Let us begin with an example of the endorsement by the powerful in society of a 'social policy' characterization of the youth voting rights issue. That example comes to us courtesy of the Supreme Court of Canada (SCC) ruling in *Sauvé* [69] The judgment in that case discusses age restrictions on the vote but was in fact a ruling on the constitutional claim to the vote advanced by persons disenfranchised due to having been sentenced in a criminal matter to incarceration in a penitentiary for two or more years. The inmate claimants held their disenfranchisement to be unconstitutional arguing that: (a) it violated their right to the vote under s. 3 of the *Canadian Charter of Rights and Freedoms* [70] which guarantees universal suffrage to all Canadian citizens,

and (b) their right under s. 15(1) of the Charter to be protected against discrimination in respect of voting rights. Further, the latter claimants held that there was no justification in a free and democratic society for their disenfranchisement (i.e. no section 1 Canadian Charter justification). The Court ruled as unconstitutional the disenfranchisement of these penitentiary inmates. The judgment provides highly instructive pronouncements on: (a) the nature of the human right implicated in any restriction of the vote, and on (b) whether restriction of the vote is likely to foster societal integration of disenfranchised persons or respect for the electoral process and the rule of law. Further, the judgment is one of the very few that address the issue of the age restriction on the vote. How the Supreme Court of Canada in its *Sauvé* judgment completely dissected the fundamental human rights claim from the disenfranchisement of youth issue (unjustifiably on this author's view) provides great insight into the key strategy of opponents of the vote at age 16. Hence, we will examine those portions of the *Sauvé* judgment that have relevance to the youth voting rights issue in some detail in what follows. Much of what the SCC in *Sauvé* had to say in support of enfranchisement for inmates serving two or more years in penitentiary is applicable also to non-incarcerated and incarcerated youth seeking the vote at 16 years. Yet, the Court manages to hold contradictory, mutually exclusive positions on enfranchisement depending on the identity of the citizen rights holder being considered i.e. youth under age 18 years versus adult penitentiary inmates serving two or more years (in Canada, persons under 18 years are normally dealt with in a juvenile court and detention system. There have been, however, some exceptions in which juveniles have been incarcerated in the same facility with adult offenders and Canada has given no assurance to the UN that this practice will be completely eliminated in the country. Hence, in limited instances, it may be the case that a minor is serving a sentence in a Canadian penitentiary where adults are also housed. For this, Canada has been roundly criticized by the U.N. Committee on the Rights of the Child which monitors the *Convention on the Rights of the Child* which instrument Canada has ratified).

3.3 The Supreme Court of Canada's Downgrading of the Youth Human Rights Struggle for the Vote to a Social Policy Issue

[**Author's Note**: All quotes in the immediately following are from the Supreme Court of Canada decision in *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519. Internal references are omitted from those quotes.]

3.3.1 Acknowledgement by the Supreme Court of Canada in Sauvé of the Fundamental Nature of the Right in Question (Voting Rights)

The Supreme Court of Canada (SCC) acknowledges that voting rights are fundamental to democracy so that any infringement is discriminatory and requires, *not* deference, but close judicial scrutiny of the government-proffered justification to ensure that the violation is constitutional:

> . . . *The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination*. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense (emphasis added) . . . [71]

Yet, when it comes to the disenfranchisement of Canadian young people under 18 years old—even 16 and 17 year olds—the SCC *does* defer to government.

3.3.2 The SCC Denial—When the Rights Holders Are Young People Under 18 Years—that Age Restrictions on the Vote Need to be Justified by the Government as Compatible with the Values of a Free and Democratic State

The *Canadian Charter of Rights and Freedoms* guarantees universal suffrage to every Canadian citizen bar none. Therefore, *from a constitutional rights perspective,* under 18s also have the right to vote:

> *Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly* and to be qualified for membership therein (emphasis added) [72].

The Canadian Charter requires that government justify any restriction in the grant of rights and freedoms and meet the section one requirement for constitutionality of such infringements i.e. the infringement must be for a compelling legitimate reason in the view of the court, relevant to the governmental legitimate objectives, no more of a disadvantage or burden to those whose rights are infringed than absolutely necessary to achieve the governmental objectives, and above all consistent with the values of a free and democratic society.

> The *Charter* distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified [where justification refers to whether the limitation of rights meets the s. 1 *Canadian Charter of Rights and Freedoms* test for constitutionality] (emphasis added) . . . [73]

The Supreme Court of Canada (SCC) in *Sauvé*, however, treats the age restriction on voting rights as non-discriminatory. This is the Court's position on the matter despite the fact that Canadian citizens under the minimum eligible voting age of 18 years (as per electoral statutory law) are *constitutionally guaranteed* the right to vote (as per the Canadian Charter). Hence, according to the SCC, in regards to the age restriction on the vote, there is no need for the Court to proceed to the next level of analysis. That next level of analysis would require the government to persuade the Court that the age restriction on the vote is justifiable in a free and democratic State as per the requirements of section one of the Canadian Charter:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law *as can be demonstrably justified in a free and democratic society* (emphasis added) [74].

The Supreme Court of Canada (SCC) in *Sauvé* describes the age restriction on the vote as reflecting but a *standard qualification for the vote*; a component of Canada's 'legitimate voting regulations' that is applicable to all citizens and, on that basis, allegedly non-discriminatory. The specific phraseology that the SCC employs in this regard characterizes the government's imposition of the age restriction on the vote as simply the government 'regulating a modality of the universal franchise' (see the *Sauvé* judgment excerpt below) such that all citizens under 18 years are not eligible to vote, but can access the constitutional guarantee of universal suffrage when they reach age of majority for the vote. With respect, one can justifiably contend that this is a bit of deft, though not very convincing, mental and semantic gymnastics on the part of the SCC justices who decided *Sauvé.* Afterall, the universal suffrage guarantee for every Canadian citizen as articulated in s. 3 of the Canadian Charter is by definition non-exclusionary in respect of all Canadian citizens regardless of age or any other personal attribute or status.

One might legitimately query then what part of 'universal' in the Canadian Charter s. 3 'universal suffrage' guarantee is unclear to the SCC justices who decided *Sauvé* and why. That is, why was the constitutionally guaranteed right to the vote for *under* 18s considered by the Court in *Sauvé* to be legitimately inoperative. The answer seems to be the fact that age is not a fixed immutable trait. That alleged justification for an age-based restriction on the vote is to be discussed here in a later section and will be shown to be deeply flawed.

The SCC then in *Sauvé* makes mention of its affirmation of the age-based restriction on the vote notwithstanding the fact that the Court, in the same case, also held that: (a) to deprive someone of the right to vote is to render them 'deprived of the most basic of their constitutional rights'; and that (b) to legislate a deprivation of the right to vote 'is not the lawmakers' decision to make' since '[T]he Charter makes this decision for us by guaranteeing

the right of 'every citizen' to vote.' (see excerpt below from the *Sauvé* judgment). Despite the Supreme Court of Canada's affirmation of the Canadian Charter's universal suffrage guarantee then, the Court, at the same time in *Sauvé*, had no compunction about endorsing the age restriction on the vote based on just that discretionary decision-making of lawmakers which the Court rejects as legitimate in restricting the vote for any other Canadian citizen; including penitentiary inmates:

> The government's vague appeal to 'civic responsibility' is unhelpful, as is the attempt to lump inmate disenfranchisement together with *legitimate voting regulations* in support of the government's position. The analogy between youth voting restrictions and inmate disenfranchisement breaks down because the type of judgment Parliament is making in the two scenarios is very different. *In the first case, Parliament is making a decision based on the experiential situation of all citizens when they are young. It is not saying that the excluded class is unworthy to vote, but regulating a modality of the universal franchise*. In the second case, the government is making a decision that some people, whatever their abilities, are not morally worthy to vote – that they do not 'deserve' to be considered members of the community and hence may be deprived of *the most basic of their constitutional rights*. *But this is not the lawmakers' decision to make. The Charter makes this decision for us by guaranteeing the right of* 'every citizen' *to vote* . . . . (emphasis added). [75]

Implicit in the disenfranchisement of some (i.e. minors) is acceptance of the notion that the disenfranchised can be governed by others not of their choosing according to laws and policies in which they had no voice (i.e. having been denied the opportunity, for instance, to vote for or against particular candidates who endorsed or would likely endorse those laws and policies now impacting the lives of the disenfranchised). There would appear to be no basis for the Supreme Court of Canada's suggestion in *Sauvé* that disenfranchising young people is any less stigmatizing than it is for adult penitentiary inmates. In both cases, to be disenfranchised is to be denied a Charter-guaranteed universal right to access a significant vehicle for full societal participation. Denial of the right to vote is a ticket to marginalization. The disenfranchised Canadian citizen is, hence, rendered a second-class citizen and not considered as fully a member of society as are those who have the vote. This marginalization of the disenfranchised inevitably is associated also with a devaluing of the person. Recall that the lowering of the vote below the typical age of majority has been, in bygone eras, associated with recognition of the person's particular worth to society. Hence, as previously mentioned, young people below the age of majority have, in certain historical periods and societies, been granted the vote in recognition of their military service which has elevated their *perceived* moral worth. It is evident then that assessments of the moral worth of an age-defined class of persons (i.e. persons under the age of 18, persons over the age of 18, persons of an eligible age for military service, persons not eligible for military service on account of age etc) is one of the key causal factors in the grant or denial of the vote. Enfranchisement

or disenfranchisement can further respectively either raise or lower the perceived societal value of the class of persons involved. We will shortly consider the lowering of the minimum voting age from 21 to 18 years in the United States during the Vietnam era, and the role of the enhanced perceived moral worthiness of young people 18 and over but under age 21 years in the enfranchisement of this group.

3.3.3 The Supreme Court of Canada's Holding that the Government's General Social and Political Philosophy is an Unconstitutional Basis for Denial of the Vote to Canadian Citizens with the Exception of Canadians Under Age 18 Years

Since the Supreme Court of Canada (SCC) characterizes the age restrictions on the vote as non-discriminatory differential treatment (i.e. framing the exclusion of minors from the vote instead as but a 'regulating of a modality of the universal franchise' which is not an affront to their human dignity), the Court, in effect, held in *Sauvé* that the age restrictions on the vote are constitutional based solely on the government's unfettered prerogative to make social policy and political choices (i.e. in the area of electoral law). In the view of the SCC then no further justification is required to meet the constitutional threshold when it comes to the voting age restrictions. The SCC thus, in essence, held in *Sauvé* that setting the minimum voting age at 18 years is purely a governmental policy choice legitimately considered as within the discretionary power of the government. This effectively gave the *illusion* of transforming a fundamental human rights issue (the youth voting rights issue) into a social policy question on which the Court must defer to the presumed wisdom of the legislature in making the choice that it did. Note that disenfranchisement of penitentiary inmates—in contrast to the denial of the vote to those under age 18 years—was considered by the SCC, in the first instance, to be discriminatory. Given this, the Court held the government would have to provide a *demonstrably* justified reason for the restriction on the vote in the case of penitentiary inmates which was compatible with the values of a free and democratic society as per s. 1 of the Canadian Charter. The SCC then went on to hold that a mere statement of political and social philosophy was insufficient to render the violation of the Charter universal suffrage guarantee for penitentiary inmates constitutional under s.1 of the Charter:

> *At the s. 1 stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that the* 'general claim that the infringement of a right is justified under s. 1' *does not warrant deference to Parliament* . . . Section 1 [of the Canadian Charter of Rights and Freedoms] does *not* create a presumption of constitutionality for limits on rights; rather, it *requires the state to justify such limitations* (emphasis added) [76].

While the *federal government of Canada* conceded in *Sauvé* that disenfranchisement of penitentiary inmates was a violation of their right to the vote under s. 3 of the Canadian Charter, the *government* maintained (erroneously) that there was a s. 1 Charter justification which rendered the violation constitutional. That justification was vaguely articulated in terms of the government's general social and political philosophy. That social and philosophical perspective included, for example, the presumption, among others, that penitentiary inmates voting would demean the electoral system, and that it would undermine respect for the rule of law. However, the Supreme Court of Canada held that the test for the constitutionality of a rights infringement under s. 1 of the Charter is *not* met by reliance on general statements of social and political philosophy such as proffered by the government in the penitentiary inmate voting rights matter. Yet, general social and political philosophy perspectives also underlie the denial of the vote to Canadian citizens aged under age 18 years regardless of whether or not they are developmentally capable of understanding what voting means and interested in voting (we will consider issues surrounding the right to vote for those under age 16 years in a later section as well. That is, the voting rights issue as pertaining to those young people under 16 years; some of whom are *as individuals* developmentally incapable of understanding the voting process, or of autonomously casting their own vote).

The Supreme Court of Canada in *Sauvé* then held that collective societal concerns (i.e. about upholding the rule of law, maintaining the integrity of and respect for the electoral system etc.) cannot automatically serve as an allegedly constitutional basis for denying an individual citizen his or her voting rights (thus rendering the violation non-discriminatory and in no need of a s. 1 Charter justification). Hence, all such restrictions, including disenfranchisement of penitentiary inmates, must meet the s.1 Canadian Charter test as justified and compatible with the values of a free and democratic society. Further, the Court maintained that the need to justify any restriction in voting rights under s. 1 of the Charter (as consistent with democratic values) is reflected in the fact that voting rights *cannot* be overridden via use of the Charter's notwithstanding clause which allows for violation of certain specified equality rights under certain conditions:

> The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by *exempting it from legislative override under s. 33's notwithstanding clause. I conclude that s. 3 [s. 3 of the Charter stipulating democratic rights including the right to vote] must be construed as it reads, and its ambit should not be limited by countervailing collective concerns, as the government appears to argue. These concerns are for the government to raise under s. 1 in justifying the limits it has imposed on the right* (emphasis added) [77].

When it came to penitentiary inmates then, the Supreme Court of Canada (SCC) in *Sauvé* held that collective (societal) concerns leading to restriction of the vote, even if legitimate, cannot change the fact that denial

of the vote to these individual adult claimants amounts to discrimination (i.e. considering that the Canadian Charter contains a universal suffrage guarantee and the exclusion is an affront to the human dignity of those citizens). Any restriction of voting rights for penitentiary inmates must thus be considered as *ipso facto* discriminatory according to the Court in *Sauvé*. These restrictions then require that the government provide justifications that are constitutional (i.e. the government's justifications for excluding penitentiary inmates from the vote must be compatible with democratic values, the objectives the government hopes to achieve with the voting rights restrictions must be pressing and achievable in this way, and voting rights restrictions must be a reasonable and not a disproportionate infringement of rights for the achievement of the alleged important societal goals). As discussed above, the SCC in *Sauvé* did *not* accept general statements of social and political philosophy as sufficient justification under s. 1 of the Canadian Charter for restrictions on the right to vote when it came to penitentiary inmates. In the case, of *age restrictions* on voting rights, however, the Court held that these were *not* discriminatory in the first instance, but rather reflected 'standard qualifications' for the vote (i.e. constitutional, non-discriminatory differential treatment). Thus, according to the SCC in *Sauvé*, the age restrictions on the vote required *no* s. 1 Charter justification. These age restrictions on the vote, therefore, could, in the view of the Court, be based solely on discretionary governmental philosophical and political perspectives and preferences and be presumed constitutional without judicial scrutiny. Thus, the Supreme Court of Canada's analysis in *Sauvé* holds that: (a) the government's choice regarding what is the appropriate legal age of majority for the vote does *not* involve violation of a fundamental human right and, therefore, (b) the disenfranchisement of minors does *not* require further justification as to the constitutionality issue.

That the age restrictions on the vote are merely a 'standard qualification' rather than a human rights infringement was then the SCC position in *Sauvé*. The Court took the latter position even though the age restrictions on voting are based on much the same collective societal concerns as were operative for the penitentiary inmate voting matter (i.e. maintaining the integrity of the electoral system, and upholding respect for the rule of law etc.). Note also that penitentiary inmates are disproportionately less rational, less emotionally well balanced, less educated and less civically engaged than the general population [78]. However, this, too, was *not* viewed by the SCC in *Sauvé* as a barrier to *their* enfranchisement. In contrast, such negative and, in many cases, suspect attributions to *all* young people under age 18 years are commonly relied upon by government to justify age restrictions on the vote without interference from the courts. Yet, only in regards to the disenfranchisement of penitentiary inmates did the Supreme Court of Canada hold that the voting restrictions were both discriminatory and unconstitutional when justified only with reference to broad social and

political objectives and philosophy. Not so for the disenfranchisement of young people under the age of majority for the vote.

3.3.4 The s. 3 Canadian Charter Guarantee of Universal Suffrage as Shielded from Suspension under the Notwithstanding Clause (s. 33 of the Charter)

The SCC in *Sauvé* notes, as previously mentioned, that: 'The framers of the *Charter* signaled the special importance of this right [to the vote] not only by its broad, untrammeled language, but by *exempting it from legislative override under s. 33's notwithstanding clause*' [79]. That is, neither the provincial governments, nor the federal government can by referendum suspend voting rights for a period of five years as they can under the Canadian Charter in regards to certain other Charter rights. Yet, one might legitimately argue that Canadian youth under age 18 years in being restricted from the vote are in fact living under the burden of what amounts to a de facto *unconstitutional* imposition of the s. 33 Charter notwithstanding clause in respect of the right to vote. The age restriction on the vote for Canadians under age 18 years is unconstitutional under the Canadian Charter for several reasons: (a) the Canadian Charter does not contemplate a restriction on the vote for Canadian citizens based on age; (b) the restriction is not permissible using the s. 33 Canadian Charter notwithstanding clause (which allows, under specific conditions, for violations of the equality guarantee pertaining to certain designated Charter rights), and c) the violation of the equality guarantee with respect to universal suffrage (as provided for under s. 3 and s. 15(1) of the Canadian Charter) has been instituted without the requisite Charter-mandated legal process for imposition of such a rights infringement (i.e. government demonstrating a s. 1 Charter justification acceptable to the Courts) and for an indefinite period.

Sauvé demonstrates that the same legal standard is *not* being applied by the Supreme Court of Canada (SCC) in deciding the constitutionality of age restrictions on the right to vote as compared to restrictions on the vote (now rejected) based on other personal characteristics (i.e. penitentiary inmate, gender, property ownership etc). This is the case no doubt also in most other Western courts. For instance, one could just as well hold that the denial of the vote to Canadian penitentiary inmates simply constitutes 'regulating a modality of the universal franchise' and is, hence, non-discriminatory (as the Court held was the case in regards to the issue of age restrictions on the vote). The same could be said also in regards to, for instance, the gender restrictions and property ownership requirements for the vote of yesteryear. As we shall discover, exclusion from the vote renders minors second-class citizens considered, in practice, to be of lesser societal worth just as surely as this was the case for disenfranchised Canadian penitentiary inmates.

It appears that the Supreme Court of Canada's erroneous presumption in *Sauvé* that age-based restrictions on the vote are but a standard qualification and not a rights infringement would auger against 16 and 17 year olds, for instance, receiving equal benefit of the law in the judicial hearing and analysis of a constitutional challenge to the age restrictions on the vote in electoral law. The Supreme Court of Canada's refusal to hear the constitutional challenge of two 17-year-old Albertans to Alberta's provincial electoral law (restricting the vote in municipal and provincial elections to those 18 years and older) [67] would seem to suggest that this is indeed the case.

The contention here then is that the struggle for the right to vote at age 16 or 17 years (or younger for that matter) is an issue that implicates a fundamental human rights matter and raises significant constitutional issues; not one simply concerning competing social or political policy and philosophy. This conclusion is in fact consistent with the Supreme Court of Canada's (SCC) rejection in *Sauvé* of the voting rights issue as just a matter of social and political policies within the discretion of the government to which the courts must defer:

> The core democratic rights of Canadians do ***not*** fall within a 'range of acceptable alternatives' among which Parliament may pick and choose at its discretion. ***Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights.*** *This case* [involving disenfranchisement of penitentiary inmates] is ***not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote – one of the most fundamental rights guaranteed by the Charter – and Parliament's denial of that right.*** Public debate on an issue does not transform it into a matter of 'social philosophy', shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*(emphasis added) [80].

It is contended thus that the Courts *cannot* legitimately take a sideline position choosing to defer to governmental discretion on the matter of the youth vote at age 16 or 17 years. Yet this is, in effect, precisely what did occur when the Supreme Court of Canada declined to hear the Alberta teen voting rights case concerning a constitutional challenge to the age restrictions in Alberta's electoral law. No reasons were given for declining to hear the case as is the normal practice for the Court. However, presumably the decision was based on the erroneous presumption that, when it comes *exclusively* to the question of age-based restrictions on the vote, the issue is one of competing social and political policies (where the court can defer to the government's discretionary position), rather than a fundamental human rights dispute. The Supreme Court of Canada in regards to exclusion of citizens from the vote on any basis other than age would hold (as *Sauvé* reveals) that the matter is one concerning the limitation placed by the State on a basic human right and, hence, one deserving of careful judicial scrutiny [81].

3.4 Disenfranchisement of Citizens under Age 18 Years—the 'Taking Away' of a Pre-existing Inherent Fundamental Human Right and an Ongoing Human Rights Violation

It is important to understand the deeper meaning of the fact that voting rights are constitutionally guaranteed for *every* Canadian citizen without age or any other restrictions (as is the case for voting rights in all other Western constitutional democracies in respect of their citizens save a few that impose extra requirements such as residency requirements etc.). One such key implication is that the refusal to permit voting at any age below 18 years is, in reality, a disenfranchisement—a taking away of a *pre-existing* human right affirmed in international human rights law and domestic constitutional law—as opposed to a refusal to enfranchise. This point is most often lost due to the style of the discourse used in discussing the youth voting rights issue. For instance, we speak of *granting* the vote at age 16 years, lowering the minimum eligible voting age to *permit or allow* voting at age 16; to provide enfranchisement, enlarging the category of eligible voters to include 16 and 17 year olds in the electoral process (the vote) etc. This discourse, however, refers exclusively to *electoral statutory law* and *not* to international human rights law regarding the right to vote or to domestic democratic constitutional law that incorporates *no age restrictions* with respect to the voting rights guarantee. Nonetheless, those considering the youth voting rights question tend to forget that should we revise the electoral laws to include some, or all citizens under age 18 years as eligible voters, we would have simply affirmed the *pre-existing* constitutional and fundamental human right to vote of this group as recognized in domestic constitutional law and international human rights law. We would *not* have granted a 'new right' or a 'special right' or an '*invented* new basic human right'.

Recall now the previous discussion on the right to vote as a 'natural right' based on one's humanity, and one's inherent right to participate *fully* in society through exercising the right of free speech and free association (the latter liberty rights then underpinning the right to vote). The grant of universal suffrage in Western *constitutions*, at least for all citizens, would appear to be based on an implicit acknowledgement of voting rights as grounded on these natural liberty rights. By the same token, denial of the vote to some or all citizens under age 18 years is an *ongoing fundamental human rights violation*, and not a failure to provide a new or 'special right' constitutionally (though the legal right to the vote for minors of a certain age would be new as incorporated in reformed *electoral* law). Opponents of the vote at age 16 years have cleverly, but incorrectly characterized the issue as one of: (a) only whether to grant a 'new' *legal* right in electoral law (i.e. enfranchisement of a new identifiable group; namely citizens aged 16 years and over but under 18 years) and (b) insofar as minors are

concerned; a political and social policy question rather than a constitutional matter concerning a basic inherent human right (i.e. those minors being considered by opponents of lowering the minimum voting age not to be part of that humanity inherently eligible for universal suffrage; that positive right not to be infringed without a demonstrably reasonable justification). Hence, the opponents of the minimum voting age being lowered to age 16 years have erroneously, but successfully, transformed the voting age question in the public consciousness *from* a fundamental human rights issue *to* a social and political policy matter within the purview of the government's discretionary decision-making.

The reality is that the voting age rights issue concerns *abandoning disenfranchisement* of some or all citizens under age 18 years. That is, it involves a demand to end an ongoing fundamental human rights violation of an affirmed inherent human right under constitutional and international human rights law. This is *not* at all the same as enfranchisement in the sense of establishing a new right. The youth voting rights 'problem', framed as one involving the struggle to end an ongoing State infringement of an inherent fundamental human right, is a much different one then than the problem of the State's positive obligation to grant a supposed 'new right' as a revision of its traditional socio-political policy choice (i.e. the right to vote starting at age 16 years granted based on the government's discretionary preference as embodied in the electoral statutory law).

The *Sauvé* penitentiary inmate right to vote case was framed by the Supreme Court of Canada (SCC) as a case of disenfranchisement in the sense of the *taking away* of a pre-existing, inherent and fundamental human right to universal suffrage. Of course, at some point prior to conviction and incarceration, these inmates had the vote subsequent to reaching the age of majority for the vote. Others who reached age of majority while still incarcerated, however, and who had never in the past exercised the vote, were also considered disenfranchised by the Court in *Sauvé* (i.e. based on the constitutional guarantee of universal suffrage which the Court acknowledged also applied to penitentiary inmates). The SCC in *Sauvé* thus transformed the issue of penitentiary inmates gaining the vote *from* a governmental policy choice *to* a fundamental human rights issue while, in the same judgment, the Court did the reverse with respect to the youth voting age question (i.e. transformed what is, in reality, a fundamental human rights issue—concerning the citizen's *inherent* right to the vote—into a social and political policy matter regarding how the government chooses to set qualifications for the vote in electoral law). At the level of analysis involving constitutional and international human rights law, both with respect to penitentiary inmates and minors, the voting rights issue concerns unjustified *disenfranchisement* (i.e. denial of the inherent fundamental right to suffrage) *not* a novel enfranchisement issue. The grant of a new legal right of 16- and 17-year-olds to the vote *in electoral law* would in fact then simply represent actualization, in practice, of the

enfranchisement that this group already enjoys under most democratic constitutional law (and certainly under international human rights law).

It should be appreciated that it is generally not too difficult, depending on the appropriate circumstances being present; to proceed from the notion of having *lost* a *pre-existing* right to the notion of a potential unjust human rights violation as did the Supreme Court of Canada (SCC) in *Sauvé* in respect of the penitentiary inmates' right to the vote. This is especially the case where the right was previously actually exercised by the currently excluded group (as was the case for those inmates in the penitentiary who were incarcerated sometime after turning 18 years old and *then* lost their right to vote in Canadian elections). In fact, the SCC in *Sauvé* (as evidenced by the previous excerpts from the judgment) waxed poetic with flowery references to democratic values and ideals in respect of the vote in holding that the disenfranchisement of penitentiary inmates was *not* just a statutory electoral law policy matter (as the government claimed), but one concerning constitutional and fundamental human rights imperatives.

It is much more difficult to reason from the *presumed* absence of a right (i.e. the *alleged* absence from the outset of the human and constitutional right to vote for under 18s) to the notion of the positive obligation of the State to grant a *purportedly* 'new' right i.e. the vote at age 16 years. Arguing the need to end disenfranchisement of minors (the need to end an ongoing human rights violation—a negative right) is a much easier burden. Opponents of the vote at any age under 18 years tend to argue their position *as if* under 18s being *unable to exercise* their inherent right to the vote (i.e. due to domestic statutory electoral law) is equivalent to their having no *inherent* voting rights as human rights (i.e. under constitutional and international human rights law). This then changes the nature of the debate in precisely the manner the opponents of the youth vote at age 16 years desire. That is, those supporting lowering the voting age to 16 years, are (as a result of these false characterizations of the youth voting rights issue as a social and political policy matter) put in the position of having to argue and/or demonstrate the societal benefits to the electoral reform they propose. In making those arguments supporters are unwittingly complicit in transforming the youth voting rights struggle from a perceived universal human rights struggle into a local domestic political and social policy debate. Even if there were no direct or indirect potential benefits to democratic society of setting the minimum voting age at 16 years (which this author will later show is not the case), this would not detract from the fact that denial of the vote to under 18s is a fundamental human rights violation (given the right to universal suffrage incorporated in constitutional and international human rights law and the underlying natural basis of this right).

The opponents of lowering the minimum voting age to 16 years have thus deftly succeeded in promulgating the minimum voting age question as one concerning competing social and political perspectives and expectations

rather than one involving an ongoing fundamental human rights infringement. That is, the legislature, the courts, many prominent academics and the general public in the Western democracies, for the most part, conceive of the voting age question as a social policy concern not a human rights matter. As a result, the government in actual fact is *not* pressed to meet its obligation not to infringe a fundamental human right (i.e. the right to vote) *irrespective of the age of the citizens involved.* Thus, despite the fact that the word 'rights' or 'human rights' may punctuate the debate in reference to the struggle for 'enfranchisement' of youth at age 16 years in Western democratic States, the debate has not been, in actual fact, effectively formulated as a human rights issue. Enfranchisement of youth at age 16 years *in practice*, for instance, has not been conceived as it should be as ending the ongoing violation of a pre-existing inherent basic universal human right as opposed to simply the grant of a new 'legal right' as defined in electoral law.

3.5 The Right to Vote as an Indicia of Moral Worth: The Example of Suffrage Movements for Women and Felons and Lessons Regarding the Youth Voting Rights Struggle

3.5.1 The Exclusionary Aspects of Various Voting Rights Movements and the Implications for the Perceived Moral Worth of the Citizen

Consider that the women's 'suffrage' movement and the movement to gain the right to the vote for felons (the latter still ongoing in some jurisdictions) both have relied on human rights rhetoric. That is, both movements were premised on the notion that these populations had been 'disenfranchised' *at age of majority* for the vote. The term 'disenfranchisement' here is used to refer to both those who have lost their right to vote and those who never had the opportunity to enjoy the vote *despite being of age of majority and a citizen* due to unconstitutional alleged disqualifying characteristics incorporated into electoral law in certain Western jurisdictions (i.e. relating to criminal convictions, being under a guardianship order , being female etc.). The women, of course, were not afforded the opportunity to cast a vote in yesteryear even when they had reached age of majority for the vote; the felons, in contrast, most often had enjoyed that opportunity if they had reached age of majority for the vote prior to conviction, and then lost it due to their criminality (or, in some instances, may never have had the opportunity to exercise the vote even as male citizens if their conviction pre-dated their reaching age of majority). The aforementioned voting rights movements with their focus on ineligibility to vote (due respectively to gender or criminal history or both) despite being of age of majority for the vote,

in reality both relied to a degree on an exclusionary definition of voting rights which undermines the universal inherent aspect of the right. That is, these movements involved fighting for the right of every citizen to vote *at age of majority*. A non-exclusionary human rights position would be to argue that both women and felons possess the right to vote even below age of majority. Hence, women did *not* struggle for the voting rights of persons under the age of majority (males and females); that is the right of every citizen to the vote. This though women's rights and children's human rights issues are most often inextricably intertwined. Human rights violations affecting women more often than not also significantly impact their children for whom they are still generally the primary caregiver. Likewise advancements in children's human rights (such as girls going to school) can have beneficial implications for the family as a whole and also elevate the status of all females in the community regardless of their age. Thus, previous human rights movements in Western democratic States concerning the vote (i.e. the women's suffrage movement, the voting rights movement of African-Americans in the U.S., the movement to enfranchise felons in Canada which was successful etc.) have generally all taken, as a given, that the vote should be granted only at age of majority for the vote. In doing so, these civil rights movements thus erroneously contributed in an important psychological way to a devaluing of the worth of the minor as a full citizen. That is, the perception was that if these fervent believers in the right to vote as an inherent, basic human right could exclude minors; then surely it must be true that the segment of the citizenry under the age of majority for the vote must not be entitled to the vote on moral and other justifiable grounds.

Note that the youth voting rights movement can also be considered exclusionary to the extent that non-citizen youth who are tied to a particular country (i.e. as immigrants, refugees, long-time residents; perhaps stateless long-time residents whose family has been in the country for generations etc.) have *not* been to date identified as a part of the group struggling for the right to vote at 16 or 17 years old (or at least not in any marked visible way). This is the case since the youth voting rights movement also generally pre-supposes, in the first instance, a right to vote premised on citizenship, and not based on ties to the country manifest in terms of immigration or refugee status or residency. Of course, one could argue that many non-citizens, depending on the extent of their ties to the country in question, are also stakeholders and, as such, should have the opportunity to further their interests through the vote.

The suffragettes argued that since they met all the same qualifications for the vote (i.e. age, citizenship) as did the men, they should be granted the vote given that they were of equal worth as human beings compared to men. So, too, in the Canadian penitentiary voting rights case *Sauvé*, the Supreme Court of Canada held that the government was *not* entitled to regard the inmates as being of lesser moral worth, and, therefore, justifiably

disenfranchised (even though at age of majority and a citizen eligible for the vote on that basis).

When it comes to youth struggling for the vote at age 16 years in Western democracies, opponents again have created a barrier; this time a minimum voting age of 18 years. The minimum voting age is an unjustified purported constitutional entrance qualification to a polity which these young people actually *already* have a right to participate in fully (i.e. through the vote among other vehicles as per international human rights and domestic constitutional law, and according to notions of inherent, universal, natural human rights). The set age of majority for the vote, applicable to all citizens, is then a *purported* bright line demarcating the polity from the non-polity in principle as well as practice. However, that line in fact translates into but an *arbitrary statutorily created* bar to any potential for fully exercising an inherent human right to free speech and free association (through the vehicle of the vote) as far as all citizens under age 18 years are concerned. It is also an undermining of the inherent right to self-governance as an autonomous human being for persons under age 18 years expressed in the form of electing one's own representatives. The end result is the fashioning of a social category of *second class citizens.*

3.5.2 Opponents to the Vote at 16 and Their Refusal to Acknowledge the Impact of an Age-Based Exclusion in the Vote on the Perceived Moral Worth of 16- and 17-Year-Olds as Citizens

The situation of young people struggling for the vote at age 16 years is *not*, however, parallel to that of the struggle for women's suffrage or suffrage for penitentiary inmates in Canada. In the latter two cases, the public, the scholarly community and the courts came to accept that it was a violation of the basic human rights of women and penitentiary inmates to deny them the vote (at age of majority) as it fallaciously reinforced the societal notion that they were members of a class of less worthy human beings. In contrast, opponents of lowering of the minimum voting age to 16 years (including the judiciary in some cases) do *not* yet concede that the denial of the vote to those aged 16 years and over but under 18 years sends the social message that young people in this category are unworthy to vote:

> . . . Parliament is making a decision based on the experiential situation of all citizens when they are young. *It is not saying that the excluded class [persons under the age of majority for the vote] is unworthy to vote*, but [rather] regulating a modality of the universal franchise (emphasis added) [82].

The opponents of the vote at age 16 years thus do *not* acknowledge that the denial of the vote to those aged 16 years and over but under 18 years

lessens their *perceived* societal or moral worth. This is the opponents' position even though the reality is that devaluing of the members of a group excluded from the vote is intrinsic to disenfranchisement. The fact that the discriminatory bar (age of 18 years or more as a voting qualification based on stereotypical views of the excluded citizens; namely persons aged 16 and over but under 18 years) is made a transparent, official positive qualification for the vote does *not* eliminate the devaluing of those disenfranchised on account of age. Opponents of the lowering of the voting age to 16 years have much to gain from the denial that excluding this group is tantamount to a devaluing of their worth and human dignity. Such a strategy is one of the keys to creating the illusion that fundamental human rights are not even at issue in the minimum voting age dispute. A similar tact was used by opponents of women's suffrage and suffrage for the poor in the United States. In the latter instances, opponents of the grant of voting rights to members of these groups also argued that there was no denial of the excluded group members' equal worth. Rather, they maintained that the denial was based solely and entirely on quite different factors:

> . . . *nearly all political thinkers have explicitly justified the political exclusion of persons on the basis of [alleged] insufficient fitness, whereas few if any explicit assertions of fundamental inequality can be found* . . . the claim that men and women . . . are naturally unequal was long pervasive, but it was a claim of unequal aptitude for political participation, not of unequal moral worth . . . In some accounts, the sexes were supposed to perform different yet equally valuable tasks . . . *the inferiority of women [it was held] stemmed from their presumed political unfitness, not from their sex [gender], which was only a feature that allegedly signaled their fitness [gender was considered an indicia of or a proxy for their fitness as a person for the vote*] (emphasis added) [83].

In the case of Africans forcibly brought to the U.S. as slaves, however, there was the claim *initially* that they were being denied the vote, the right to property etc. due to their alleged lesser worth as human beings. In fact, in the Supreme Court of United States 1857 decision in *Dred Scott v Sandford*, African-Americans were held by the Court to be the property of the slave-owner and non-citizens of the United States whether or not they were emancipated in a U.S. State to which they fled where slavery was prohibited [84] In the latter instance then the 'masters' (i.e. Caucasian men with voting rights) had little compunction about casting the 'denial of the vote to slaves' issue in terms of a human rights matter. This given the extent of marginalization of the group excluded from the vote and the state of absolute oppression under which they (the African-American slaves) labored. The powers that be of the time did not contemplate that casting the issue in terms of a human rights matter would foster any meaningful measure of resistance given the excluded group's subjugated state due to the application of force by those in power. In later years, during contemporary times, and before the 1965 U.S. federal Voting Rights Act, this claim that African-Americans were excluded from the vote due to their alleged lesser worth

as human beings gave way to the equally fallacious but narrow claim of purported political unfitness. The alleged justification for disenfranchisement based on the purported lack of 'political fitness' for the vote of the excluded group is, however, but a sanitized version of the 'inequality as human beings' claim originally used to attempt to justify the denial of the vote to the group in question.

Whether the vote is denied to 'children' (defined generally under the *Convention on the Rights of the Child* as persons under age 18 years except where domestic law stipulates a different age boundary between adult and child) [85] or to women, the poor or to former slaves, or whatever other category of persons, 'ambiguity stems from making an expected consequence of the rule [rule expressing the statutorily-defined qualification for the vote] part of the rule itself' [86]That is, here *young* age is being used implicitly as a hypothetical marker or proxy for 'political incompetence' and the alleged *presumed* adverse social consequence which would ensue for society should child citizens (even citizens aged 16 and 17 years and older but under 18 years) be given the vote. The personal quality or qualities which are purportedly missing in citizens of this age that would lead to this presumed, anticipated adverse social consequence if under 18s of any age were granted the vote, as Guerra notes, is not made explicit [87]. For instance, there is no specification of a voting qualification stipulating that only the rational citizen, capable of an independent vote who has sufficient civic responsibility and engagement and political sophistication is eligible for the vote. Further, there is no indication that only adults with the aforementioned qualities are in fact accessing the vote. *Hence, we are left with an exclusion from the vote that appears based in and of itself solely on* ***who*** *the excluded citizen is*—a citizen falling into a particular age range (having an age under 18 years) apart from any other consideration. Perceptions of the moral worth of minors thus become more negative as a result. There is no indication whatsoever as to whether or not, in reality, the voting qualification of having an age of 18 years or more (current age of majority for the vote in most Western democratic States and most States globally) is being used as a proxy for anything meaningful or relevant to the vote and for maintaining the integrity of the electoral system.

3.6 Voting Rights and the Issue of Personal Autonomy

The question of personal autonomy is inextricably bound up with the issue of the right to vote and this has historically been the case:

> For many political writers of the 18th and 19th centuries, the poor were considered unfit to participate in politics *because they lacked independence* . . . Montesquieu argued that all citizens 'should have the right to vote except those whose estate is so humble that they are deemed to have no will of their own.' . . . These authors did not regard the poor as mentally incapable of developing their own political

> views. The specific concern was different: in a situation of economic dependence, a destitute individual could be deliberately and effectively coerced to vote for the alternative favored by those upon whom he is financially dependent . . . As Benjamin Constant put it: "The property holders are the masters of his existence, since they may refuse him work. *Only he who possesses the necessary revenue to subsist independently of any external will can exercise the right of citizenship* [the right to vote]. (emphasis added) [88]

Lopez-Guerra points out that the solution is to prevent such coercion, rather than to exclude the vulnerable group from the vote [89]. The same can be said about excluding youth from the vote based on the presumption that they will not cast an independent vote. Are youth aged 16 years and over but under 18 years any more susceptible to coercion in their vote *given the secret ballot* than are adult employees working for minimum wage or less? There is, in fact, little that can be done regarding undue influence on the vote other than, for instance, public education campaigns on the need for a free vote. As most minors aged under 18 years are still attending school, such a civics basic regarding the need for integrity of the electoral process could be taught at school as part of a civics education curriculum. Consider that youth aged 16 and older but under age 18 years are most often still almost entirely financially dependent on their parents for all significant expenses. Should they thus be denied the vote on the basis of a *presumed* lack of independence in the vote? What of youth who are legally emancipated from their parents at age 16 or 17 years and living independently on social assistance (more commonly allotted to adults), or with financial assistance from a governmental child welfare agency while attending school? What of youth emancipated from parents supporting themselves entirely with minimum wage positions as do so many adults and paying taxes? Should they be granted the vote regardless how meager their existence since they are no longer dependent on parents, and they are supporting themselves? Afterall, adults in the modern day in the same low socio-economic bracket are *not* barred from accessing the vote? The reality is that *emancipated minors* aged 16 and older but under age 18 years in Western democracies even though legally considered adults in many ways (i.e. no longer subject to parental control) are also denied the vote based on age *even if self-supporting*. Hence, these exceptions prove the point that excluding citizens aged 16 years and older but under 18 years from the vote is ***not*** in actuality based on presumptions about their lack of independence. Blanket bars on the vote (i.e. based on age) belie the fact that the rationalizations proffered for the exclusion are in fact disingenuous.

The right to vote is an exercise, in principle, of *self-governance* by the polity through the mechanism of self-selected representatives (though individual minority voices may, at times, appear to have little impact on the ultimate electoral outcome). However, *the principle* of the vote as a vehicle for self-governance by a polity of autonomous, independent and free persons may appear to conflict with traditional notions of the child (persons

under the age of majority). Children/youth are *not* traditionally considered as fully autonomous persons free from the governance of others in personal decision-making (with the exception of legally emancipated minors). They are, afterall, governed in large part by parents. They are managed in terms of their ability to fully exercise their right to free expression and free association by these legal guardians and by school officials acting as delegates of the parents or other legal guardian acting *in loco parentis*. There is then a tension between traditional notions of the child as non-autonomous, and the idea of the inherent right to the vote without age restrictions. Kant supported the idea of excluding women and children from the vote based on their alleged lack of autonomy/independence (i.e. he held that since they could not own property; they were not their own masters) [90].

Modern conceptions of persons younger than age 18 years under international human rights law, however, view minors as autonomous rights holders in important ways. That is, persons under age 18 years are considered under international human rights law such as the *Convention on the Rights of the Child* (CRC)(Article 12) [91] as having the right to fully express their personal views, and as being a person in their own right with an inherent human right to participate in decision-making that directly affects them (with their views accorded weight consistent with the age and maturity of the child expressing those views). On the latter view, children and youth have full personhood; though parents also have a right under the CRC to care for and guide their children; including in respect of parental religious and other beliefs (presumably in a non-oppressive fashion). An affirmative answer to the question 'are persons aged 16 and 17 years autonomous enough to cast a free and independent vote', as previously explained, would still *not* likely garner the right to vote for this age group (as evidenced by the fact that legally emancipated minors below the general age of majority cannot exercise the right to vote though they are as self-sufficient as many adults). The question of personal autonomy is thus, in practice, irrelevant with respect to the grant of the vote to any minor developmentally capable of casting a vote on whatever basis he or she chooses (i.e. as are most persons aged 16 years and older). That is, the blanket bar on minors voting, given its lack of individuation, is *not* screening for level of personal autonomy in any meaningful way. Nor is such screening occurring with respect to the adult voter based on age. Nevertheless, the personal autonomy issue *is* a critical one in considering whether it is, or is not legitimate to have an adult proxy voting for infants and very young children (and possibly for youth below the age of majority for the vote); the proxy thus exercising these young persons' right to universal suffrage on their behalf. Let us consider then in more detail the issue of personal autonomy and age of the potential voter.

There is, of course, some validity in the notion that some minors may be more susceptible to coercion in the vote despite the secret ballot; especially the very young. By the same token, segments of the very

elderly population may also be susceptible to coercion due to age-related brain pathology impacting cognitive processing, financial dependence and other factors. The question then becomes how does a society ensure the basic universal human right of suffrage while yet taking into account the personal autonomy issue as it relates to age of the voter. The problem is not beyond resolution, but the reality is that any burdens placed on the very elderly to demonstrate their personal autonomy in voting would not be socially acceptable in a democratic State. Such burdens would represent a novel restriction on the vote for the very elderly where none previously existed. Such a regressive move, no matter how well reasoned or intentioned, would not be deemed 'politically correct.' It would, furthermore, run counter to the increasingly more inclusive category of those eligible to vote that has marked historical trends in voting rights.

What follows is an example of a voting model that is more inclusive than the current commonly used 'democratic' model which incorporates a blanket bar prohibiting any citizen under age 18 years from voting. The model to be discussed incorporates universal suffrage while finessing the issue of age-related problems in personal autonomy that may affect the very young voter. The model is offered here purely as an illustration of the fact that blanket bars denying the vote to any category of citizen can be avoided while still considering the issue of personal autonomy which is so central to being able to cast a free vote. Afterall, a vote that is not freely made is not in essence one's own vote and truly undermines the integrity of the democratic electoral system. Yet, the model to be discussed, though more inclusive in that it abandons the statutory age-related blanket absolute bar to the vote for persons under age 18 years is still fundamentally unfair. This in that: (a) the burdens it imposes on persons of a certain age under 18 years are *not* also likely to be imposed on those adults who are, scientifically speaking, also more likely to have compromised personal autonomy (the very elderly) than the general adult population (though one might argue that a presumption of personal autonomy in the vote is more likely to be correct as applied to the elderly than when applied to persons under age 14 years though that is still an undetermined empirical question), and (b) the age boundaries in the model, while reasonably based on what is known about personal autonomy and developmental process in the young, are yet arbitrary to an extent, and may not be applicable in every particular individual case. Yet, the model to be discussed is closer to the notion of universal suffrage than is the voting rights framework which characterizes most Western democratic States (i.e. the latter being a voting model with a set age of 18 years for enfranchisement and a blanket absolute bar against voting by anyone under that arbitrary age of majority for the vote). The model is offered here then simply to stimulate discussion for it is certain that someone who is more clever than this author can devise a more equitable approach. Of course, there remains always the tricky and crucial

problem of how to stimulate the political will to implement a more equitable and inclusive voting rights model that respects the right to universal suffrage of the young.

3.7 A More Proportional Response to the Question of Age Considerations and the Vote: A Model Which Does Not Incorporate an Absolute Bar on Voting for Under 18s

3.7.1 Introduction

The model that follows, in principle, provides for the *possibility* of universal suffrage for all citizens of a State independent of age. The model is thus an example (offered here for discussion purposes only) of a more proportionate response to any claimed legitimate societal objective in using age criteria in regards to access to the vote. The model is a more proportionate (less restrictive) alternative to the current system in that it incorporates no *absolute* bar on the right to vote for any citizen based on age. However, at the same time, the developmental limitations of infants and younger children are acknowledged and addressed in that a significant burden is placed on any citizen under the age of 14 years wishing to vote (i.e. under 14s must meet a judicial test for autonomy; that is, persuade a judge in an interview of their capability to cast a free and independent vote). The under 14s need not demonstrate then that they will vote rationally or wisely or in their own best interest or with any level of political sophistication. They must only convince the judge through a personal interview that their vote will be their own. Of course, the judge may, on occasion, get it wrong and that would then result in a fundamental human rights violation. One might argue, and justifiably so, that the model in requiring those under age 14 to demonstrate that their vote would be genuinely their own, is unfair and undemocratic in that particular respect. This, in that no such requirement (to demonstrate capacity for an independent vote) is placed on those aged 14 years and over under the model just as it is not a requirement under modern democratic constitutions for each citizen of age of majority to prove his or her personal autonomy to demonstrate eligibility to vote. (However, in some jurisdictions, those adults under a partial or full guardianship order are excluded from the vote likely due, in part at least, to concerns over their ability to cast a free and independent vote). With the model's foregoing burden in accessing the vote relating to age (the need for the under 14s to demonstrate that they can cast an independent vote), it is unlikely that a significant proportion of the population under age 14 years would both express a desire to vote *and* be able to meet the judicial test for competence in casting an autonomous vote. Yet, the possibility of citizens under age 14 years voting in their own right is contemplated by the model. The model, for reasons to be discussed, does *not* entertain the

notion of official proxy voting (i.e. even for the very young; with parents, legal guardians or any other legal representative of the infant or child acting as the proxy).

3.7.2 Voting Rights for Youth Aged 14 Years and Older but Under 18 Years

It is generally agreed that infants and even very young children are generally not interested in voting or developmentally capable of understanding what a vote is, or of casting a vote in their own capacity. The issue of whether their vote should be cast by a proxy is something we will consider shortly. The current model provides that citizens aged 16 years and older but under 18 years *automatically* have the vote in their own right such that all citizens 16 and up would have their names on the list of eligible voters as a matter of course. Further, the model stipulates that those aged 14 and 15 years who wish to vote should be permitted to do so upon expressing their desire to exercise their right to vote to the appropriate officials well in advance of the polling dates. The mechanisms for having the wish of any 14- or 15-year-old to vote duly recorded and honoured would, of course, need to be easily, effectively and freely accessible to this group such that, at their request, their names would be added to the list of registered potential eligible voters. The alleged level of socio-emotional and cognitive maturity, rationality and political sophistication of youth (aged 14 years and older but under 18 years) eligible to exercise the vote then is, on this model, considered irrelevant (as it currently is, in practice, in respect of the adult's right to exercise the vote).

There is, of course, an element of arbitrariness in: (a) selecting age 16 years as the minimum age for *automatic* inclusion on the registered eligible voters' list, and (b) age 14 years and older but under 16 years as the age at which youth may become eligible to vote simply upon their request to the appropriate officials to have their name added to the registered eligible voters' list. The age of 16 years on this model as the minimum age for automatic inclusion on the voter registration list is not based on any mystical insights or some airtight logic. Rather, it is simply based on the rationale that: (a) the global movement for youth voting rights has centered on youth age 16 years and older but under age 18 years gaining the vote, (b) this international youth voting rights movement is driven, in large part, by the 16- and 17-year-olds themselves (often with the support of adult advocates), though some younger youth around 14 and 15 years old have also been involved, and (c) youth 14 years and older but under 18 years are presumed to be capable of casting a free vote given the secret ballot; a minimal fitness criteria. Note, however, that under this model there is no absolute bar (relating to any presumption) against those under 14 years voting as will be discussed shortly.

Youth in this age group—14 years and older but under 18 years; especially 16- and 17-year-olds—then have tended to be the ones most likely to express an interest in exercising the right to vote, and in advocating for the same. In respect of the voting age question, the central question is whether youth are to have a voice through the ballot in elections from local to federal to any extent. If those 16 years and older but under 18 years are automatically granted the vote in all elections from municipal to federal (with those 14 years and older but under 16 years also able to access the vote without undue burden), this population of youth is likely to become a de facto symbolic force representing all persons under 18 in the State in which they vote. While by no means an ideal solution to the problem of young people's disenfranchisement, the automatic grant of the vote to citizens aged 16 and 17 years, and to those 14 and 15 year olds expressing the desire to vote, *is* a vehicle for the grant of political power to the young which is likely to benefit persons under age 18 years generally. That is, of course, if the 14- to 17-year-old voter chooses to champion the interests of all young people under age 18 years in the State through their vote. The older youth (14 and older but under 18 years) then could conceivably, if they chose to do so, indirectly act as unofficial voting proxy for the younger members of the society (whether citizen or non-citizen aged under 14 years) voting so as to further the interests of all minors in the society.

No doubt some adult manipulation of young people's vote is a possibility for some 16- and 17-year-olds, and the presumably smaller number of 14- and 15-year-olds granted the vote under this model if they wish. However, certain safeguards—admittedly not fail proof—can be built into the basic education system to encourage some reasonably sophisticated knowledge of the electoral system and an understanding of the solemnity of the exercise of the vote as well as the importance of an independent vote. Further, public information campaigns educating youth about the electoral system and the responsible exercise of the vote are also a realistic possibility as an adjunct to this model. (We will examine the role of the schools in relation to the political education of the young and the potential grant of voting rights to youth in a later section). In any case, adults, too, it must be acknowledged, are often unwittingly subject to at least *some* manipulation of their vote in various ways (such as through political propaganda which may or may not be accurate and which is disseminated through diverse mass media, the influence of *their* parents' and relevant ethnic or other community's political persuasions and the like), and this does not disqualify *them* from the vote. Hence, the spectre of the voter being manipulated by various influences to an extent (but not coerced) is not a sufficient rationale for excluding all youth under age 18 years from the vote. Youth aged 14 years and older but under 18 years would appear to be potentially capable of exercising their vote as reasonably autonomous persons just as are adults (persons over 18 years); especially if these youth are exposed to relevant civic education in school which encourages the responsible and free

exercise of the vote. In any case, there is no non-discriminatory basis for excluding minors (even 16- and 17-year-olds) from the vote on the basis of alleged concerns regarding their personal autonomy when many adult voters are compromised in their personal autonomy and yet are not disenfranchised (i.e. many elderly voters suffer dementia to varying degrees and the rates of dementia are increasing significantly in North America).

3.7.3 Voting Rights for Persons under Age 14 Years

With respect to young people under age 14 years, there are, considering what is known from child and youth developmental studies, objectively speaking, more likely to be cognitive and socio-emotional developmental limitations present for this younger group that are more significant than in an older group of youth. These developmental factors then are more likely to affect the potential for the authentic exercise of the vote (i.e. where an 'authentic' vote is here considered to be one freely and purposively cast based on some reasoning regardless how well or ill-informed or how rudimentary or relevant). For instance, there is more likely to be an issue in regard to whether the vote is in fact free and not coerced (though the vote may properly be influenced by a myriad of factors as are all votes including those cast by adults). Problems may also arise in respect of whether the vote is a meaningful one for the child. The young child under age 14 years is less likely to have developed any conception—realistic or otherwise—of what their vote in any particular election may mean for society and for them personally.

There would appear to be no non-arbitrary solution to the problem of reconciling age limitations on the *automatic* right to exercise the vote and universal suffrage as a fundamental human right. The model under discussion, however, does *not* bar any person from the exercise of the vote based on age *per se*, and in that sense is more inclusive than the current approach. Rather, the model sets out a burden correlated with age of the voter for those under 14 years in the exercise of voting rights. Under this model, the *automatic* right to vote is denied to citizens under 14 years on the ground of there being an unacceptably high risk of the vote not being a product of their own free expression. If a minor under age 14 years can persuade a judge who is specifically tasked and trained to assess such cases, that he or she (the minor) has determined on his or her own how he or she wishes to vote, then the minor under age 14 years, on this model, will be permitted to vote The mechanism for access to such a judicial hearing/interview under this model would be free and accessible in practice as well as child-friendly in all respects (i.e. the child would *not* need an adult intermediary to act as 'next friend' in making such application; counsel for the child would be freely provided through the courts, and court assistants would be available to assist the child in completing the application for such

a voting rights hearing. Further, the hearing would have present only the judge, court reporter and relevant counsel and any other party with a direct interest such as the child's advocate). In other words, those children under 14 years who can successfully ***rebut*** the presumption (before a judge to that judge's satisfaction, through a simple interview at a hearing) that their vote is not their own, would be permitted to vote under the scheme suggested. Some standardized general criteria as to how such interviews are conducted would be developed, though the judge's interview would also be tailored to the individual case to some extent. The possibility of an appeal would also be available such that, at every stage, it would be necessary for the judicial decision to be issued with reasons.

We can look to other North American contexts, albeit far removed from the voting age eligibility controversy, for examples of systems in place involving young people attempting to *rebut*, before a judge, societal presumptions regarding their *alleged* inability to make autonomous fully voluntary decisions on a significant matter. This in order that the young person be potentially permitted to lawfully exercise certain constitutional rights and make particular major decisions that affect their personal lives. One such scenario in which youth are permitted to access the courts to challenge a *rebuttable societal presumption* exists in the context of abortion matters. Female youth in the United States are provided a venue for *potentially* exercising their constitutional privacy rights and accessing an abortion *without* parental consent in U.S. jurisdictions where parental consent for abortion is required by law. The young person who resides in a U.S. jurisdiction requiring parental consent where a minor seeks an abortion may present her case on her own behalf to a judge (i.e. without an adult intermediary acting as 'next friend', and with court-appointed counsel where the child is indigent). That is, in some U.S. States, minors are able to bypass the need for parental consent for an abortion in those particular States by successfully convincing a judge, via answering questions and making any other relevant submissions in a manner satisfactory to the judge, that her decision to abort is an informed, autonomous and completely voluntary one (and of course not prejudicial to her health in any way). In these cases, however, the judge is required by statutory law also to determine (based on the child's testimonial evidence and any relevant documentary information as well as all other available evidence before the court) whether, even if the child appears immature, and the abortion decision *not* duly considered, the abortion is nonetheless in the child's best interest.[92] If these tests are met (successful demonstration that the decision is a mature, autonomous voluntary and informed one by the child ***or*** voluntary and in the child's best interest, *whether or not the decision is informed and based on mature reasoning*), the judge will grant legal authorization for the youth to access the abortion procedure without parental consent.

In the voting age eligibility context, in contrast, whether: (a) the particular minor under age 14 years would be able to cast a vote in his or her own

'best interest' (i.e. vote for a candidate likely to advance the child's interests), and whether (b) the particular minor under 14 years is able to cast a vote based on 'informed' and 'mature' reasoning are *not* appropriate considerations on the model being discussed. The right to universal suffrage is *not* premised on such qualifications and these eligibility criteria are *not* applied to citizens over the age of majority exercising the vote. Suffrage in a democratic State, however, by definition, implies an autonomous vote. Thus, the qualification of being able to cast a free vote appears to be more legitimate than are other considerations. However, there is still the problem that: (a) no burden in proving such a qualification is imposed on those 18 years and over under the current system, and (b) any eligibility qualification for the vote imposes a restriction on voting rights of the citizen that is not countenanced by the notion of universal suffrage for *every* citizen of the State (polity). In any case, the main point here is that mechanisms other than an absolute bar on voting rights for those under the age of majority for the vote (whether that age is set at 18 or lower) are possible in addressing concerns related to the developmental capabilities of the child (i.e. the ability of the minor to cast a free vote).

The intention of the model under discussion is to ensure, to the extent feasible, that the vote of a minor aged less than 14 years, if cast, would in reality likely be his or her own i.e. a manifestation of his or her own *free expression*. Thus, the test for grant of the vote to a minor under 14 (the ability to rebut the presumption of lack of personal autonomy) is, in actuality, an effort to preserve *the minor's* right to his or her *own* vote. The latter does constitute differential treatment of those below age 14 years compared to those over age 14 based on certain developmental realities that are much more likely to apply to under 14s than to those over age 14 years (i.e. higher suggestibility and vulnerability to manipulation for the younger group). The distinction is no doubt then, at least to some degree, discriminatory as it does involve, in the first instance at least, an age-based group distinction. However, since society is likely not at all ready at present for the abolition of all age-related distinctions in ease of access to the vote, this approach is something of a compromise. The important point is that the distinction does *not* amount to an outright denial of universal suffrage to all citizens under 14 years old since the system allows for the grant of voting rights to persons under age 14 years on a case-by-case basis if they meet the requisite test (ability to rebut the presumption of lack of personal autonomy in their potential vote). Hence, there is *no* absolute bar on voting for those under age 14 years (such a bar being based on stereotypical presumptions about 14 year olds *as a group* which are then automatically extrapolated to every individual member of this age group).

Presumably, it is most often the case that children who are unable to express a desire to vote, given their developmental limitations, have parents, other legal guardians or other adults who are interested in voting for candidates who will act in the best interests of those young children as well as for families. The likelihood of such voting and the potential for

it having an impact on government policy advancing children's interests is appreciably greater in societies where children are valued highly such that their interests in all or most relevant domains become a political priority in practice and not just in theory. Clearly, this is not the case in all Western democracies in every respect as evidenced, for instance, by the comparatively high infant mortality rate in the United States relative to other Western States; especially among African-Americans (indicating a devaluing of these children who themselves have no political power) [93]. Likewise, children of particular ethnic groups may be shamelessly devalued in society at large such that their interests suffer relative to children that belong to the majority ethnic culture. Such an example is found in the comparatively poorer health status of indigenous children compared to non-indigenous children in Western States such as Canada [94] and the United States as well as various European countries (i.e. note the abysmal overall health status of Roma children across Europe due to discriminatory factors often promoted, or at least actively and intentionally tolerated by the various States over decades). [95] Clearly, candidates voted into office by the majority are not sufficiently prioritizing the interests and rights of minors.

Of special concern, likewise, are minors who are in government care as permanent wards of the State in that they have no parental lobby voting en bloc in advancing their interests through the parents' own votes. Thus, the unique problems and needs faced by minors in care are often not adequately addressed by Western democratic governments. In contrast, parents with infants, young children and/or youth living with them tend through their votes (cast in their own behalf) to favour candidates who endorse educational, health, daycare and other child-relevant polices that the parents feel are in the best interests of their children and the family. Of course, not all parents vote and not all cast their own votes in the best interests of their children.

There is no satisfying solution philosophically to the plight of the infant or young child developmentally incapable of exercising his or her inherent right to universal suffrage. It is essential thus that human rights advocates and parents work to improve the status of children in society through: (a) legislative reform; eliminating laws and policies adverse to children's interests, (b) public educational campaigns promoting young children's interests as well as (c) input into government policy by advocates for child and youth interests such that children and youth become more highly valued and this is then reflected in government policy and government prioritizing of child and youth issues. Such was the result, for instance, in Sweden where child advocates managed to effect elimination of corporal punishment of children as lawful and massive public education campaigns were launched on the issue regarding the notion of corporal punishment of a child as a form of abuse [96]. Let us turn now to the notion of parents or other legal guardians voting on behalf of the minors in their charge such that the parent has

plural votes (i.e. one vote for him or herself, and some extra apportionment of votes to allow for proxy voting on behalf of his or her children)

3.7.4 The Proxy Voting Notion

In 2003, in Germany, there was a legislative proposal for electoral reform supported by the then opposition Green Party and Social Democratic Party of Germany. The proposal was that parents (or presumably also other legal guardians of minors in Germany) should be permitted to vote on behalf of their children not of voting age (eligible voting age at the time was 18 years in Germany). The German proposal suggested: (a) an automatic right to a proxy vote by a parent on behalf of their children who were under age 18 years, and that (b) children over age 12 years have the right to rescind the parent's ability to cast a proxy vote by formally informing the State that he or she (the minor) did not wish to have his or her parent vote on his or her behalf any longer. The German proposal also recommended that if the parental proxy voting system turned out to pose too many practical difficulties in its implementation, that the alternative adopted be lowering the minimum voting age from 18 years to 16 for elections 'where wider issues were at stake' and 14 years for local elections. The drafters of the proposal envisioned that parents would discuss with their children, even with elementary school-age children, at least particular political issues that directly affect children and do so in terms the children would hopefully comprehend. The practical issue concerning how the vote on behalf of children would be cast if in a two-parent household each parent had opposing political affiliations and views was not resolved (though solutions on this could conceivably be worked out in the household i.e. parents could alternate in voting on behalf of the child though this, too, might conceivably be problematic). The legislative bill for such proposed voting rights reform in Germany was introduced in the German parliament in 2003 but did *not* pass.

The introductory remarks to the 2003 German voting reform bill are of special relevance to our discussion here and, in part, read as follows:

> If it is written in the constitution that all power goes to the people, then children must also be given the right to vote . . . [It is] unjust that every fifth German is excluded from voting in elections . . . *We can only secure the future of our society, when the concept of* ***the family*** *is given the chance to influence politics* (emphasis added) [97].

The authors of the 2003 German voting rights reform bill noted that its passage would result in the addition, at that time, of an estimated 13.8 million voters (via proxy voting by parents on behalf of their children under age 18 years) in a society which, as in other Western democracies, had a gross underrepresentation of young voters participating in the vote in the

age bracket 18–30 years [98]. The emphasis in the aforementioned 2003 German proposal on the influence of the *family* on politics, as opposed to the potential influence of minors *per* se exercising the right to participate in the electoral process through a proxy, is of note. It may be that more democratic political parties, such as the Green Party, envisioned that larger families are likely to be in the lower socio-economic group and, hence, more likely to have democratic political party preferences. If this be the case, then, in actuality, the party's preference for permitting adult parental proxy voting on behalf of citizens under age 18 years may have been a strategy for recruiting more *adult voters* to their party who would cast their own and extra ballots on behalf of their children in the party candidates' favor. It is of special interest in this regard that this proxy voting system was considered the first preference; with lowering the voting age to 16 but a backup plan if the proxy voting system proved unworkable. One would think that if the concern was implementing universal suffrage, then lowering the voting age to 16 years (or lower) would have been the *first* preference (combined with proxy voting for children developmentally incapable of voting).

3.7.5 Philosophical Problems with the Notion of a Proxy Vote on Behalf of Minors

On first impression, it would seem necessary, if one accepts the notion of voting rights as a basic human rights entitlement, that there be a grant of the vote to the very young through proxy voting by the parents or other legal guardians acting on their behalf. The very young, on the previous model discussed, would refer to infants and children under age 14 years who have expressed no interest in voting in their own right and who make no application to State officials in this regard. These are those minors most likely, from an objective perspective, and based on their *individual* characteristics, to be developmentally incapable, as a function of their age, of exercising their right to vote on their own. The issue of whether there ought to be proxy voting by parents on behalf of their children too young to express a desire to vote in their own right and/or incapable of doing so is highly complex. One troubling difficulty with notion of proxy voting on behalf of infants and younger children is that there is no guarantee that the proxies can imagine how the minors would vote had the minors possessed the interest and developmental capacity to do so. Further, there is no guarantee that the proxies would vote for candidates likely to act in the best interests of persons under age 18 years rather than according to their own self-interest.

It might be suggested that parents and legal guardians quite commonly act on behalf of their children; for instance, in regards to decision-making concerning educational and health decisions directly concerning

the children. In those instances also we cannot, in actuality, assume necessarily that the parent or legal guardian is always acting in the child's best interests, or even with the intent to act in the child's best interests; though this is the operative societal presumption. There is, however, a more fundamental difficulty with the proxy voting notion and it is a philosophical one. Consider that exercising the right to vote is a form of *free expression* which is highly personal and of necessity, therefore, must be carried out by the self and not a proxy. That is unless the adult proxy is taking effective direction from the minor on whose behalf he or she is exercising the vote which normally would not be the case in at least a huge segment of the cases involving proxy voting for minors. In the case of the developmentally immature child or infant, he or she is unable to provide such instruction. If any minors are capable of directing their adult proxy as to how they wish the vote to be cast on their behalf, they would likely be in a position to vote on their own behalf if legally permissible. Hence, the alternative of lowering the voting age would seem more just than proxy voting in those instances. To use an analogy which perhaps goes at least some way in explaining the problem, consider the dilemma faced by counsel in representing children and youth in a civil judicial process such as an adoption or custody hearing, or perhaps a lawsuit brought by the young person or being defended by the child or youth. If the young person (minor) is capable of providing instruction to counsel, then the lawyer is potentially faced with an ethical dilemma. Counsel can try to explain to his or her young client what counsel considers to be in the client's best interest and feasible in the circumstance and make representations to the court in that respect. However the minor may *not* agree with counsel regarding what counsel thinks is in the child's best interest. What then is the role of counsel as proxy for the minor in this circumstance where the minor is instructing counsel to take a position counsel considers will ultimately adversely affect the child? If the child client declines to follow legal advice, must counsel yet follow the client's instruction even if the consequences of doing so are not in the young persons' best interest. The American and Canadian Bar Associations (ABA and CBA respectively) Codes of Ethics in fact mandate that, in such instances, counsel is to act as per the child's instruction and *not* in accord with counsel's assessment of the child's best interest where there is a conflict between the two [99]. In other words the ABA and the CBA require that counsel act as a *genuine proxy* for their young clients; that is, standing in the stead of the client and expressing the client's preferences. (Some counsel have recused themselves when these disputes between child client and counsel have arisen as to the best course of action or suggested to the court that a separate counsel acting as *guardian ad litem* be appointed whose only concern is the child's 'best interest'). A genuine proxy thus must give voice to the child's preferred choice, and the latter may not always accord with the child's best interests. The same would be true for an adult voting as a proxy on behalf of the child.

To continue with the analogy then; where the child is developmentally incapable of giving instructions to his or her legal representative, counsel is *not* giving voice to the child's *expressed* wishes, but rather in point of fact acting as a *guardian ad item* to protect the independent interests of the young person. Counsel, at that point, then is no longer in effect operating as a proxy for the client. The guardian ad litem role for the child's legal representative (where the child is incapable of instructing counsel) makes sense in the judicial context where the court itself must ensure the proper administration of justice. The Court itself in fact operates on the principle of *parens patriae* looking out for the vulnerable (such as minors) and protecting their legal rights when parties are in dispute. The latter requires that all parties understand the process adequately as well as which of their rights and interests are in jeopardy and what their options are. The Western judicial system has long operated with the principle that those who are developmentally incapable due to age (or incapable due to cognitive incapacity unrelated to age) to adequately participate in the judicial process should have a 'guardian at law' appointed to safeguard their legal interests. This 'guardian of best interests' type principle poses an intractable problem, however, in the context of voting. This in that the legal guardian (or parent) *cannot* justifiably assume a *parens patriae* role as a proxy in the voting context looking out foremost for the child's best interest. This is the case since a free and autonomous vote assumes the right to vote (objectively speaking) for or against one's own alleged interests. The parent voting for their child as a proxy thus cannot assume that the young person—were he or she cognitively mature—would necessarily (based on objective criteria) vote in his or her (the young person's) own best interest since this may simply not be the case (as with many adults who, objectively speaking, unwittingly vote against their own short and/or long-term best interests in their candidate selection).

Further, if the parent or legal guardian votes for candidates who significantly undermine the child's best interests, unlike decision-making by guardians that seriously undermines the child's interests in other domains such as health, the State cannot intervene. For one thing, the proxy vote is by secret ballot so that the State has no way of knowing whether intervention is called for in this instance. In addition, State intervention in such a scenario as described is not feasible since voting in a democratic State must be an autonomous private matter unencumbered by State intervention of any sort. The State could not, in any case, legitimately appoint someone to take over the parental role and that appointee vote on behalf of the child in accord with the child's 'best interests.' The vote in the 'best interests of the child' is *not* then the marker for a legitimate genuine proxy vote. This is the case as we have no idea how the child would have voted on his or her own behalf had the child been developmentally capable of doing so. The impossibility of a proxy voting system for the very young (i.e. who cannot instruct the proxy how they wish the vote to be cast) thus becomes apparent in that

such a system is, in fact, antithetical to the notion of an autonomous vote as a form of free expression in a democratic State. The proxy voter for children in the care of the government would have to be an agent of the State which is in itself problematic as it runs counter to democratic notions of the vote as a private matter which does not involve agents of the State. Also highly problematic is the case of children who are citizens, but who have parents (their natural proxy so to speak) who are non-citizens and themselves ineligible to vote due to non-citizenship [100].

It is here suggested that the possibility of voting through an adult proxy for the infant and very young child who is incapable of expressing an interest in voting or instructing a proxy is an issue which should be considered to be quite distinct from the question of: (a) whether older youth under age 18 years (i.e. 16- and 17-year-olds and conceivably also 14- and 15-year-olds) should be eligible to vote in their own right, and (b) whether there should be the potential also of the grant of voting rights to those *individual* minors under 14 years who wish to vote, and who can demonstrate to a judge that their vote will likely be autonomous and voluntary. It is here contended then that arguments against proxy voting by parents, or difficulties in resolving the question do *not* serve to undermine or mitigate the strength of the arguments in favour of the grant of the vote to older minors who wish to vote in their own name (that is, vote independently without a proxy).

It is important to note that minors have an inherent right to the vote which must be acknowledged even if they are unable, for whatever reason, to exercise it. Proxy voting may not be a solution to the fact that the very young generally have developmental limitations which would interfere with their ability to cast a vote on their own behalf even if legally permissible. Actualizing this inherent right to the vote of the minor with serious developmental limitations may simply not be possible. This given the intrinsic tension between voting as an autonomous personal form of free expression and the proxy's inability to demonstrate that he or she is voting as the child would had he or she (the child) been developmentally capable of doing so. That is, the proxy's vote remains in point of fact that of the proxy and *not* of the child; except in the speculative imagination of the proxy and the latter situation is simply not adequate in a democratic electoral system.