

Child Physical Assault: Law, Equality and Intervention

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I. INTRODUCTION

Section 43 of the *Canadian Criminal Code* provides a defence to the assault of children by parents, teachers and those “in the place of a parent” if the purpose is to correct the child:

Correction of child by force — Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may, who is under his care, if the force does not exceed what is reasonable under the circumstances.¹

As it is perhaps the most startling contravention of equality rights in the Criminal Code, the defence was challenged on constitutional grounds by the Canadian Foundation for Children, Youth and the Law in the Ontario Superior Court of Justice in 2000. The decision was appealed to the Ontario Court of Appeal in 2001 and the Supreme Court of Canada, where argument was heard 6 June 2003.² The lower courts were unanimous in upholding the constitutionality of the defence. If the appeal to the Supreme Court of Canada succeeds, parents and teachers will no longer have a defence to assault based on their status and must rely, like everyone else, on prosecutorial discretion and situational defences to assault—self-defence, defence of property, necessity, among

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¹ *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

² *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 49 O.R. (3d) 662 (Ontario Superior Court of Justice) (July 6, 2000); appeal, (2002) 207 D.L.R. (4th) 632 (Ont. CA) (January 15, 2002); online: <http://www.ontariocourts.on.ca/decisions_index/2002index.htm>. The judgment of the Supreme Court of Canada is forthcoming.

others.³

Will loving parents go to jail? Will child protection intervention rates rise dramatically? What is wrong with a special defence to child assault for those entrusted with the often-difficult task of caring for children? Is any harm done to children by moderate assault? The tension in law reform is between giving children equal protection from assault—as promised by section 15 of the Charter—and giving those who must care for them the authority to correct them if need be by assault. Some Canadians are concerned that abolishing s. 43 will expose parents to criminal investigation and prosecution, overwhelm response systems, and turn caring parents into criminals. Others, including police and social workers, find that s. 43 impedes the development of intervention policies that protect children and enhance children's relationships with their parents and families.

Intervening in child physical assault is the responsibility of two systems. The criminal justice system prosecutes assault. The child protection system is concerned with children in a family context. Both systems operate on discretion and favour a range of alternatives falling short of criminal prosecution or removal of the child from parental custody. Not every assault is prosecuted, nor should it be. Besides the practical need for a provable case, the decision to prosecute must be made in light of public interest. The *Criminal Code* was amended in 1996 to encourage alternative measures and community-based resolutions. Only in the most serious and intractable cases of physical abuse are children removed from their parents. Interaction between systems is important in choosing the path that best balances the child's right to legal protection with the child's interests in family ties. Decisions made in both systems by police, social workers, and by the civil and criminal courts, are influenced by s. 43. That children need better protection from physical assault is clear from recent news stories of child deaths. That parents need and desire better guidance and support in raising children is also clear. Parents who severely injure their children rarely intend to do so. Parents who commit minor assaults might not know the potential long-term consequences for their children.

³ Using force is justified to defend the self or another from assault (Criminal Code sections 34 to 37), to protect property (sections 38 to 42), and to permit persons in authority (e.g. police) to carry out certain tasks (sections 43 to 45). These common law defences were enacted in Canada's first Criminal Code in 1892 (55-56 Vict., c. 29). The common law defence of necessity excuses breaches of law, where the harm done by breaking the law is less than the harm that would have been done by obeying the law.

II. BACKGROUND

A. The Defence of Moderate Correction

Assault is a criminal offence. s. 43 of the *Criminal Code* provides a defence to the assault of children by parents, teachers and those standing in the place of a parent if the force used is by way of correction. This is corporal punishment or 'punishment of the body', also called chastisement, castigation, physical punishment, correction by force and, depending on its form, caning, beating, judicial and penal whipping and, in the case of children, the catch-all category of 'spanking'. Corporal punishment is assault with the intent to cause pain and humiliation in order to correct behaviour. It is not about putting a child in a car seat, stopping a child from touching a hot stove, or doing other things necessary for the child's care, safety, education, health, or nurture, and which are not intended to cause pain. Nor is it about preventing the assault of another, protecting property, or doing what is necessary in the circumstances to prevent a greater harm. Canadian law provides defences for these situations. Section 43 about correcting behaviour by assault.

Section 43 sets the limit of the assault at 'what is reasonable under the circumstances.' Excessive force is punished as assault. If the child dies in the course of a corrective assault, the charge is manslaughter rather than murder. Causing pain and transitory injury such as bruising is viewed by the courts as a necessary part of s. 43. Without pain, corporal punishment has no point. Assault resulting in serious bodily harm, or unusual forms of assault such as forcing children to eat noxious substances, are unlikely to be excused by the courts; yet assaults in which weapons such as belts and paddles were used, and assaults resulting in bruising, lasting pain, and permanent injuries like broken teeth and damaged eardrums, find protection under the law.⁴ Where to draw the legal line—at physical injury, lasting injury, risk of injury, serious injury, at the use of a weapon or implement, at the part of the body struck, at the reason for correction, at the age and ability of the child—remains uncertain despite many hundreds of cases decided in Canadian courts since the defence was codified in 1892.⁵ Judges do not agree on what kind of force, degree of force, or result of force is justified by s. 43. Judges seldom consider whether the assault was motivated by correction or by anger, whether the child needed to be corrected by assault and not in some other way, or whether assault could ever 'correct' the

⁴ See cases cited in Anne McGillivray, "'He'll learn it on his body': Disciplining childhood in Canadian law" (1998) 5 *International Journal of Children's Rights* 193-242 and cases summarized online: <<http://www.repeal43.org/acquittals.html>>.

⁵ *Ibid.* Most cases are unreported. Sentencing digests are perhaps the best source of cases prior to the 1980s.

child given infancy, disability, or behavioural disorder. Nor do they ask how often such assaults occurred in the child's life, or even that day.

Corporal punishment, backed by law, puts children at serious risk. The uncertainty of standards makes s. 43 a legal lottery. While insulating parents from criminal liability might be argued as being good for children, the only legal argument that can be made in favour of corporal punishment is that it serves a social purpose that overrides children's rights to equal protection of the law. If corporal punishment does not socialize children into right behaviour and good citizenship, then it serves no social purpose. Research suggests that even mild corporal punishment negatively affects children and risks serious injury (discussed in Part 2). The purpose and benefit of s. 43, the Ontario courts have so far concluded, is that it provides a defence to assault for parents, guardians, and teachers.

This is because assaulting children was once seen as central to their socialization. In his 1770 *Commentaries on the Laws of England and Scotland*, Blackstone wrote, "The ancient Roman laws gave the father a power of life and death over his children The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience."⁶ Moderate chastisement is a "power" or "right" belonging to the father or his delegate to "lawfully correct his child being under age, in a reasonable manner for this is for the benefit of his education."⁷ Parents, schoolmasters, and masters of apprentices were encouraged by church and state authorities to administer regular beatings to induce children's obedience.

Corporal punishment was not about punishing children for misdeeds. Like breaking horses and hunting hawks, children's wills were to be broken by assault to spur obedience, learning, and right behaviour.⁸ The popular word for such

⁶ Roman law gave judicial authority (*pater potestas*) to the father as head of the household over all family matters, including whether a child should be killed at birth or whether he/she had committed an infraction warranting death or banishment. By imperial edict in 365 C.E., this power was reduced to 'moderate correction.' That this meant corporal punishment—beating—was noted by early Roman commentators on the new law. English common law excused corporal punishment by fathers, masters of apprentices and teachers on grounds of tutorial (corrective) motive, as it was believed that children could not learn without being beaten. This, not nurture or family privacy, is the origin and message of Section 43—children must be beaten to learn. On the history of the defence from Roman law to Canadian law, see McGillivray, *supra* note 4.

⁷ Book 1, ch. 16, para. 452.

⁸ This disciplinary concept is extant in the work of James Dobson, founder of Focus on the Family, online: <<http://www.family.org/topics/a0017909.cfm>>: 'Spanking can be a valuable disciplinary tool [W]illful disobedience or defiance of authority might warrant corporal punishment, while mere childish irresponsibility does not. When spankings are properly managed, there is no reason to fear they will produce harmful emotional or psychological effects in children. *Question*: There is some controversy over whether a parent should spank with

assaults—spanking—comes from the German *spanken*, used in horse training in the 1700s.⁹ ‘Spanking’ has been used to describe everything from taps, smacks, and slaps, to paddling, caning, beating, whipping, belting, and everything between.¹⁰ It is a word without meaning.

Like child corporal punishment, adult corporal punishment was used or excused by criminal law for most of its history. Corporal punishment in England and its colonies included maiming, branding, whipping, ducking, the stocks, and the pillory, for such offences as theft, scolding, sexual misbehaviour, and more generally for defiance of authority. The admitted purpose of all forms of corporal punishment was to degrade the offender in the eyes of the community.¹¹ It was in law a magisterial power—of judges over convicts, wardens over prisoners, fathers over children, schoolmasters over pupils, masters over apprentices, husbands over wives, householders over servants, slave-holders over slaves. Status is both entitlement and defence to assault. This entitlement and defence now exists in Canadian law only between children and their parents and teachers.

When Canada’s criminal law was codified in 1892, slave-holding and the beating of slaves had been banned in the British Empire for six decades. Beating wives and servants was not condoned by the common law in England and Canada after the 1860s.¹² The defence of moderate correction of children, originating in Roman law, taken up in ecclesiastical law and urged as a mode of induc-

his or her hand or with some other object, such as a belt or paddle. What do you recommend? *Dr. Dobson Responds*: I recommend a neutral object of some type the hand should be seen as an object of love—to hold, hug, pat, and caress. However, *if you’re used to suddenly disciplining with the hand, your child may not know when she’s about to be swatted and can develop a pattern of flinching when you make an unexpected move. This is not a problem if you take the time to use a neutral object.* My mother always used a small switch some people (particularly those who are opposed to spanking in the first place) believe that the use of a neutral object in discipline is tantamount to child abuse. I understand their concern, especially in cases when a parent believes ‘might makes right’ or loses her temper and harms the child. That is why *adults must always maintain a balance between love and control, regardless of the method by which they administer disciplinary action*’ [emphasis added].

⁹ Webster’s Dictionary (1913) defines *spank* as ‘[Of unknown origin; cf. LG. *spakken*, *spenkern*, to run and spring about quickly.] To strike, as the breech, with the open hand; to slap.’ Conflicting origins and definitions are given for this word in various sources but it seems that its use with horses in the 1700s predates its use with children.

¹⁰ Cf. Alice Miller, *For Your Own Good: Hidden Cruelty in Child-rearing and the Roots of Violence*, translated from German by H. and H. Hannum. (New York: Farrar, Straus, Giroux, 1983).

¹¹ The genealogy of s. 43 from child murder to moderate correction and from Roman to common law is outlined in McGillivray, *supra* note 4 and *R. v. K. (M.): Legitimizing Brutality* (1993), 16 Criminal Reports (4th) 125-132.

¹² Maeve E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (Columbia, S.C.: University of South Carolina Press, 1993).

ing obedience in the protestant reformation, was taken up into English common law. According to Blackstone, it is a “right” derived from parental duties to maintain and educate children, “partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.”¹³ *Eirenarcha*, Lambarde’s 1581 handbook for justices of the peace, stated that “some are allowed to have privately, a *natural*, and some a *civile* power (or authoritie) over others, so that they may be excused themselves if but (in reasonable manner) they correct and chastise them for their offenses.”¹⁴ Correction of the child by a parent fell under the first power and by a master or schoolmaster under the second. The power ends with the child’s emancipation, “when”, according to Blackstone, “the empire of the father ... gives place to the empire of reason.”¹⁵

By the late eighteenth century, criminal prosecution had become a more frequent response to severe child assault. Linda Pollock found 385 such cases from murder to assault to incest reported in *The Times* between 1785 and 1860.¹⁶ Physical assault cases involved severe beating and lasting injury, well beyond the scope of moderation even for the time. One defendant, for example, tortured and mutilated his child and claimed the right of physical correction. The court said that it would “demonstrate the error of that claim.” *Hopley & Case* (1860)¹⁷ defined the defence of moderate correction for the present era. Hopley, a boarding school master, wrote to the father of 13-year-old Reginald Cancellor—“a dull boy”—for permission to “chastise him severely” and “that if necessary he should do it again and again” and “continue it at intervals even if he [the boy] held out for hours.” The headnote reads:

A schoolmaster, who, on the second day after a boy’s return to school, wrote the parent, proposing to beat him severely to subdue his alleged obstinacy, and on receiving the father’s reply, assenting, beat the boy for two hours and a half secretly, in the night, and with a thick stick, until he died: Held, liable to a charge of manslaughter.

Hopley was tried at the Assizes and sentenced to four years penal servitude. The Court ruled, “By the law of England, a parent or a schoolmaster ... may for the purpose of correcting what is evil in the child inflict moderate and reason-

¹³ Book 1, ch. 16, para. 453.

¹⁴ The reference to the ‘civile power’ of a husband to correct his wife disappeared in later editions. The power also extended to gaolers over prisoners and to lords over vassals. Maeve E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (Columbia: University of South Carolina Press, 1993) at 5.

¹⁵ Book 1, ch. 16, para.453.

¹⁶ Linda A. Pollock, *Forgotten Children: Parent-Child Relations from 1500 to 1900* (Cambridge; New York: Cambridge University Press, 1983).

¹⁷ *R. v. Hopley* (1860) 2 F. & F. 204.

able corporal punishment, always, however, with this condition, that it is moderate and reasonable." Punishment in passion or rage, excessive in nature and degree, protracted beyond the child's endurance, or 'with an instrument unfitted for the purpose' is excessive. If the child dies, the charge is manslaughter rather than murder. This is the essence of the law today.

In his *Digest of the Criminal Law*, jurist and Draft Code Commissioner James Fitzjames Stephen, citing *Hopley's Case*, wrote:

It is not a crime to inflict bodily harm by way of lawful correction ... but if the harm inflicted on such an occasion is excessive the act which inflicts it is unlawful, and, even if there is no excess, it is the duty of every person applying the force to take reasonable precautions against the infliction of other or greater harm than the occasion requires.¹⁸

In 1892, the defence was codified together with other common law defences in the first Canadian Criminal Code. The Code justified corporal punishment of children by parents, schoolmasters, and masters of apprentices; the same Code also provided for corporal punishment (as a penalty ordered by judges and prison wardens) and hanging. The defence is the last remnant of an earlier age.

The first s. 43 case heard by the Supreme Court of Canada was *R. v. Ogg-Moss* (1984).¹⁹ The Charter was not raised, as s. 15 had not yet been proclaimed in force. Even so, the judgment is tuned to equality issues. Dickson C.J. cited Blackstone in terming s. 43 a "disciplinary prerogative" and a "justification", as "it considers such an action not a wrongful, but a *rightful* one". Since corporal punishment violates the rights of one party—the child—it must be 'strictly construed' against the other party. This is not the case with such defences as self-defence, which require a liberal construction. For only the second time in Canadian history, twenty years later, the Supreme Court will consider s. 43. Dickson posed the central question. "Unless the force is ... for the benefit of the education of the child, the use of force will not be justified."²⁰

Canadian society is increasingly rights-conscious and intolerant of violence in the exercise of public authority. This is seen in the abolition of capital punishment, the abolition of corporal punishment of convicted and imprisoned people, and the increasingly strict limits placed on actions of police and others carrying out legal duties. Masters of apprentices were removed from the protec-

¹⁸ James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* 4th ed. (London: Macmillan, 1887) at 147. Stephen's Draft Code of 1877 did not include defenses and justifications. Although *Hopley's Case* is clearly the source of s.43, its formulation is identical to the 1905 Queensland Code suggests a common origin. This may or may not flow from the Commission Draft Code of 1879.

¹⁹ *R. v. Ogg-Moss*, [1984] 2 S.C.R. 173, 14 C.C.C. (3d) 116. The case involved a care worker who repeatedly hit a mentally challenged adult on the head with a big metal spoon for spilling food. He was denied the defence as he was not *in loco parentis* and an adult with the mind of a child is not a child.

²⁰ *Ibid.* at 132

tion of s. 43 in 1953.²¹ Whipping prisoners was abolished in 1972. The *Criminal Code* was recently amended to provide stiff penalties for wilfully causing pain to an animal.²² Only children remain legally subject to assault. Beliefs about raising children also have changed. There is increasing respect for children's rights as present members of society, and their discipline is no longer seen as requiring corporal punishment. Most school boards have abolished it, legislation in a number of provinces prohibits its use by teachers and foster parents, the Canadian Teachers Federation opposes it (although it supports the retention of s. 43), and many parents are committed to other ways of disciplining their children. More children are growing up without being hit by parents or teachers than even a generation ago.

On its plain wording, s. 43 justifies the assault of children for correction. This means that the assault is not a wrongful act that should be *excused* in the circumstance but a rightful act *justified* by law. The status of children is deeply affected by this. Children are to be cared for, protected from harm, trained in caring behaviour, and socialized as peaceable members of the community, yet their assault is justified by an archaic law. It is a troubling contradiction.

B. Human Rights

In denying children the equal protection of the law, s. 43 denies their rights as human beings under the *Canadian Charter of Rights and Freedoms*. The Charter promises every human being on Canadian soil the right to equal protection and equal benefit of the law. Section 43 also breaches Canada's international obligations under the *United Nations Convention on the Rights of the Child*. Canada ratified the Convention in 1991, indicating the state's intent to bring its laws and practices into conformity with the Convention, report to the UN Committee on the Rights of the Child, and heed its advice. The Convention speaks directly to the issue of corporal punishment. Article 3 requires that the best interests of the child prevail in all legal and administrative decisions affecting the child. Article 19 requires that all appropriate measures be taken to protect children from all forms of physical injury or abuse by parents and others in a position of authority, and to provide programs supporting children and preventing violence. Article 28 requires that school discipline be consistent with the child's dignity. Article 37 requires that children not be subjected to degrading treatment.

The Committee on the Rights of the Child told Canada in 1995 that "Further measures seem to be needed to effectively prevent and combat all forms of corporal punishment and ill-treatment of children in schools or institutions ...

²¹ R.S.C. 1953-54, c. 51.

²² Bill C-15B, enacted June 4 2002, amended the *Criminal Code* to provide stiffer penalties for the assault of an animal. Wilfully causing pain to an animal is unambiguously a criminal offence. There is no defence of moderate correction for training animals.

the existence of child abuse and violence within the family and the insufficient protection afforded by the existing legislation in that regard” and recommended “that the physical punishment of children in families be prohibited.”²³ Canada responded:

The government has been seeking to reinforce and clarify protection under the Criminal Code. A non-government organization, the Canadian Foundation for Children, Youth and the Law has received funding from the government-funded Court Challenges program to apply to a Canadian court for a determination as to whether s. 43 of the *Criminal Code* infringes children's constitutional rights under the Canadian Charter of Rights and Freedoms.²⁴

This is the challenge discussed in Part 3, below. Reform, in other words, is left to the private sector and the courts rather than to the orderly process of parliamentary reform called for by the Committee.

Human rights violations involve two kinds of harm—symbolic and actual. Symbolic harm is caused by attributing dehumanizing or denigrating characteristics to an identified group. Symbolic harm is used to promote or justify actual harm to the members of that group—violence, lapses in or lack of legal protection, denial of equality, denial of rights. Empirical study establishes both the fact and nature of actual harm. Human rights claims draw the attention of government and the courts to both kinds of harm.

Central to the Charter, the Convention on the Rights of the Child and all other human rights documents is respect for the dignity of the person. Corporal punishment denies dignity—it degrades and humiliates. This is why it was so long favoured as a punishment in criminal law. Section 43 gives children a legal label like “kick me” pinned to the back of a shirt. In the long history of Western law from Roman times to recent history, only slaves, children and others without legal status—prisoners, felons at large, outcasts—carried such a label. Even convicted persons had to commit a known offence before corporal punishment could be legally administered. This is the symbolic harm of s. 43.

III. DIMENSIONS OF CHILD PHYSICAL ASSAULT

A. Introduction

Child corporal punishment has so long been an accepted practice and an inevitable aspect of childhood that the actual harm it does was largely unexamined

²³ UN Committee on the Rights of the Child, 9th session, *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention: Canada* (UN/CRC/C/15Add, 37, June 20 1995)

²⁴ Convention on the Rights of the Child: Second Report of Canada (January 1993 to December 1997). Canada, 1999.

until recent years. This is not to say that it has had no critics before the 20th century: “Most of the ancient philosophers and law-makers were in favour of flogging children, not only as a means of inducing them to conduct themselves well and tell the truth, but also as an aid to education itself.”²⁵ But Plutarch argued that whipping should be confined to slaves, as free-born children benefit from encouragement, blame and reproach, and whipping young offenders provokes hatred and idleness. Quintilian called it “a base and slavish” practice which “were it not for the youth of those who are made to suffer it” would be “an injury that would call for redress”—the child becomes inured to blows, severe injury results, and it is the negligence of teachers that occasions it. English pamphlet writers drew attention to the baseness of the practice and its sexual connotations in the whipping of apprentices and schoolboys, while such classic children’s books as *Tom Brown’s School Days*, *David Copperfield*, and *Little Women* denounce it.

Attempts to distinguish moderate correction from excessive force and, for that matter, from child abuse, have not succeeded in over a century of Canadian jurisprudence and education policy statements. Unless the method used or the damage done is extreme, excessive force is in the eye of the beholder. With or without injury, corporal punishment hurts and humiliates children, as it is meant to do. We now know that this in itself contributes to negative outcomes for the child and for society in the longer term.

B. Impact on Children

The association between corporal punishment and children’s social and psychological development has been the subject of study for decades. Not all studies lead to results that are significant in statistical terms. Statistically significant studies cannot be compared unless there is a match of definitional grounds. Applying accepted tools of meta-analysis, Elizabeth Gershoff located 88 studies of child corporal punishment that could be compared fairly and measured as a group. The resulting meta-analysis showed that the impact of mild and moderate corporal punishment—slaps and spankings not resulting in physical injury—puts children at risk for social, behavioural, and psychological problems in childhood and sets children up for violence as adolescents and as adults.²⁶ All findings are statistically significant.

Gershoff found that corporal punishment has a negative impact on children’s behaviour, mental health, relationships with parents, peers, and others,

²⁵ George Ryley Scott, *The History of Corporal Punishment: A Survey of Flagellation in its Historical, Anthropological and Sociological Aspects*. (London: T. Werner Laurie, 1938).

²⁶ Elizabeth T. Gershoff, “Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review” (2002) 128 *Psychological Bulletin* 539–579.

and the development of moral reasoning. To summarize the study:

- 12 of 12 studies of the association between corporal punishment and mental health found that it was associated with poorer mental health in children.

- 13 of 13 studies examining parent-child relationships found that corporal punishment was associated with poorer quality in relationships between the child and the parent, including fear and resentment of the parent, aggression against the parent, and erosion of trust and closeness between child and parent.

- 27 of 27 studies on the relationship between corporal punishment and the level of aggression in children found corporal punishment to be associated with increased aggression—bullying, fighting, and 'acting out' against siblings, peers, and parents.

- 12 of 13 studies on the relationship between physical punishment and antisocial behaviour found that physical punishment is associated with increased delinquency and other anti-social behaviour.²⁷

- 13 of 15 studies documented a relationship between physical punishment and lower levels of moral internalization—children who receive physical punishment are less likely to internalize moral reasoning and values, and are more likely to demonstrate lower levels of empathy and pro-social reasoning (*i.e.* thinking about others and about consequences for other people).

There are consequences for adults who were subjected to corporal punishment as children:

- 4 of 4 studies on adult aggression confirmed the relationship between corporal punishment and heightened aggression in adulthood.

- 5 of 5 studies on adults who abuse a spouse or a child confirmed the relationship between receiving corporal punishment as a child, and violence against a spouse or child (domestic violence) as adults.

- 5 of 5 studies on adult criminal and anti-social behaviour confirmed the relationship between corporal punishment in childhood and criminal activities in adulthood.

- 8 of 8 studies on adult mental health problems confirmed the relationship between corporal punishment in childhood and depression, anxiety disorders, substance abuse, and other mental health problems in adulthood.

²⁷ A large-scale longitudinal study of the causal relationship between corporal punishment and anti-social behaviour (ASB)—the child who cheats or tells lies, bullies, or is cruel or mean to others, does not feel sorry after misbehaving, breaks things deliberately, is disobedient at school and has trouble getting along with teachers—found that the more spanking at the start of the period studied, the higher the level of ASB two years later. "When parents use corporal punishment to reduce ASB, the long-term effect tends to be the opposite." Non-violent modes of discipline "could reduce the risk of ASB among children and reduce the level of violence in American society." Murray.A. Straus et al., "Spanking by Parents and Subsequent Antisocial Behavior of Children" (1997) 151 *Archives of Pediatrics & Adolescents Medicine* 761–767.

Gershoff concluded, "Until researchers, clinicians, and parents can definitively demonstrate the presence of positive effects of corporal punishment, including effectiveness in halting future misbehaviour, not just the absence of negative effects, we as psychologists can not responsibly recommend its use."

In 1990, corporal punishment histories were taken from 9953 Ontario residents over the age of 15.²⁸ Mild and severe physical violence were carefully distinguished. Almost half of respondents (4888) reported that they did not experience severe physical abuse in childhood. The majority of those who did not experience severe violence, however, were slapped or spanked—5 of 10 often, 3 of 10 sometimes, 4 of 10 rarely, 2 of 10 never. These responses were used to study the relationship between 'spanking' and a lifetime prevalence of psychiatric disorders including anxiety disorders, alcohol dependence, and one or more externalizing problems, including aggression against spouses, children, and others.

Those who were often or sometimes slapped or spanked had significantly higher lifetime rates of anxiety disorders and alcohol dependence—internalized violence—and externalized violence against a spouse or other, than those who were never slapped or spanked. There is a linear association between the frequency of slapping and spanking during childhood and a lifetime prevalence of disorders—the more slapping and spanking, the stronger the probability of internal and external violence.

C. Corporal Punishment and Physical Abuse

Studies examining the association between corporal punishment and the likelihood of physical abuse are consistent in finding a strong association.²⁹ Physical abuse, as defined by the United States National Clearinghouse on Child Abuse and Neglect, is "the infliction of physical injury as a result of punching, beating, biting, burning, shaking or otherwise harming a child. *The parent or caretaker may not have intended to hurt the child and the injury may have resulted from over-*

²⁸ Harriet L. MacMillan et al., "Slapping and spanking in childhood and its association with lifetime prevalence of psychiatric disorders in a general population sample [Ontario Health Supplement]", (1999) 161 *Canadian Medical Association Journal* 805–810. On physical abuse, see MacMillan et al., "Prevalence of Child Physical and Sexual Abuse in the Community: Results From the Ontario Health Supplement" (1997) 278 *The Journal of the American Medical Association* 131–135. Physical abuse was defined as pushing, grabbing, shoving and throwing objects if these acts occurred sometimes or often, and kicking, biting, punching, hitting with an object, choking, burning, scalding and physically attacking. One in 3 boys and one in 4 girls were physically abused. Of these, 1 in 10 boys and just under 1 in 10 girls were severely abused. As girls grew older, severe abuse declined. There was no significant change for boys. In this study, biological fathers were most often physical abusers. These rates are consistent with those found in culturally similar countries.

²⁹ Gershoff, *supra* note 26.

*discipline or physical punishment*³⁰ [emphasis added]. The majority of physical abuse cases—assault with a weapon, serious physical injury—began as moderate correction or had a corrective motive. A 1970 study of all reported cases of physical abuse in the United States during a two-year period showed that 63 per cent of cases resulted from “incidents developing out of disciplinary action taken by caretakers.”³¹ A 2001 study of reported physical abuse cases in Canada, using the selection criteria of the U.S. study, showed that 69 per cent of substantiated cases resulted from disciplinary action by caretakers.³² The dynamic is straightforward:

When parents use corporal punishment, they have usually learned through previous patterns of reinforcement that the child stops misbehaving when hit. Parents expect positive results from the punishment. They often do not intend to physically injure the child. But heightened levels of arousal caused by anger, frustration or stress ‘independently act on the intended degree of physical punishment to produce responses involving a dangerous or injurious level of force. What begins as an act of physical discipline, thus, becomes an act of interpersonal violence.’³³

Children as well as parents become habituated to punishment. To cause the same effect as the first few times corporal punishment is used—ending the behaviour, inducing compliance—more frequent and more severe punishment may be needed. Moderate correction escalates by incremental stages into abuse. There is no dividing line.

These studies do more than raise disturbing implications. They show with an exceptionally high degree of reliability that corporal punishment does exactly the opposite of what it is presumed to do. It makes children and the adults they become more, not less, violent. It makes them less, not more, functional and able to contribute as members of society. The studies show that physical abuse is not different in essence from corporal punishment. Abuse flows from corporal punishment in stages imperceptible to the user, although possibly not to an observer. Children also become habituated to corporal punishment: “The strongest predictor of adult approval of a particular form of punishment is the experience of that form of punishment as a child.”³⁴ Adults who received severe physical punishment in childhood tend to believe that such punishment is nor-

³⁰ Cited in Gershoff, *supra* note 26 at 540.

³¹ David G. Gil, *Violence against children: Physical child abuse in the United States* (Cambridge, MA: Harvard University Press, 1970) at 126.

³² Nico Trocmé et al., *Canadian Incidence Study of Reported Child Abuse and Neglect: Final Report* (Ottawa: Minister of Public Works and Government Services Canada, 2001) at 32.

³³ R. Vasta, “Physical Child Abuse: A Dual-component Analysis” (1982) 2 *Developmental Review* 125–149 at 135.

³⁴ Joan E. Durrant and Anne McGillivray, “Child Corporal Punishment: Violence, Law and Rights” (forthcoming).

mal. A 1994 U.S. study of 11 000 adults showed that 74 per cent of those who were punched, kicked, and choked when they were children, 49 per cent of those hit with more than five different types of objects, 44 per cent of those who sustained more than two types of injuries from the punishment, and 38 per cent of those who needed two different types of medical services for their injuries, did not think that they had been abused.³⁵

The experience of corporal punishment in childhood when inflicted by a parent or person in authority raises the threshold for defining an act as violent or abusive. Punishment considered to be normal by the adult who experienced it as a child—although not necessarily seen that way by others, including the criminal justice and child protection systems—is then carried into future intimate relationships. Unless interrupted by other values, the internalized view of right punishment feeds the inter-generational cycle of violence.

D. Criminal Law Application

Many parents who physically abuse their children believe that they have a right to use corporal punishment and that their behaviour is justified.³⁶ This sense of justification is bolstered by the defence justifying corporal punishment found in U.S. state criminal codes, European criminal codes where not repealed, English law, law in countries based on the English legal system, and the Canadian *Criminal Code*. In a study of reported criminal cases in Canada over the past century, McGillivray found wide inconsistency in legal criteria used to distinguish 'moderate correction' from excessive force.³⁷ The limit set in England and the United States—lasting and severe injury—was rejected in Canada over 100 years ago in favour of the standard of moderate correction; yet judgments are still all over the map. Judicial attempts to set limits at lasting injury, at use of belts, straps, and paddles, at parts of the body struck, at the child's age, level of ability, or gender, or at community standards, have failed. There is no discernible pattern to the case law. Serious injury has been excused. Whips and belts have been excused. Lasting pain and deep bruising have been excused. In cases where the fear seemed to be incipient female sexuality, however, the defence is most likely to succeed. Other determinations lacked consistency.³⁸ Lasting pain,

³⁵ John F. Knutson and Mary B. Selner, "Punitive childhood experiences reported by young adults over a 10-year period." (1994) 18 *Child Abuse & Neglect* 155–166.

³⁶ Joan E. Durrant, "Physical Punishment & Physical Abuse" (2001) 8 *Newsletter of the BC Institute Against Family Violence* Issue 3 (citing Dietrich, Berkowitz, Kadushin, & McGloin, 1990, Gil, 1970 and Peltoniemi, 1983).

³⁷ McGillivray, *supra* note 4.

³⁸ Handcuffing a young boy to a radiator for ten minutes is reasonable, according to the Ontario District Court in 1988 in *R. v. Schnick* (1988) O.J. No. 1037 (unreported) but, according to the Alberta Court of Appeal in 1985 in *R. v. Taylor* (1985), 44 C.R.(3d) 263, tying

bruising, and the use of belts and straps were excused by Canadian courts throughout the 1990s.

Judges are more likely to consult their own views on corporal punishment in explaining their decisions than they are to consider precedent set by earlier cases. This is unique to s. 43, as the judiciary have developed comparatively consistent standards for what is 'reasonable' in other defences to assault. The conclusion that must be drawn is that the legal history of s. 43 shows not the lack of effort of Canadian courts to set limits, but the impossibility of setting limits. The problem is not a lack of consistency that can be fixed by judicial or legislative edict. The problem is that moderate correction cannot be defined in a way that protects children. Perhaps it cannot be defined in law at all.

Another complication is the deeply private nature of family relations as they are socially and legally constructed. The courts and those who bring cases forward might hesitate to interfere in family relationships when the consequences are criminal and when the assaults complained of may have been a formative part of their own childhood, a part unknown or perhaps unknowable. A further difficulty is that the criminal justice system is usually concerned with the incident charged rather than incidents not charged. Abusive patterns of moderate correction (in frequency, degree, or contiguous circumstances) might not be revealed in the evidence. The act charged may seem trivial or the injury accidental, when it may in fact it be the only observed incident and injury of many.

E. Child Protection Application

The child protection system is concerned with patterns rather than incidents. Child protection response in physical assault cases is confounded by the legality of corporal punishment, as the British Columbia Gove Inquiry into the death by 'spanking' of five-year-old Matthew showed. The Canadian Incidence Study of Reported Child Abuse and Neglect (CIS) is the first national study of cases investigated by child protection agencies.³⁹ A representative sample of 7672 cases reported to Child and Family Services in 51 centres was taken in 1998. Physical abuse was the reason for involvement in 3 of 10 cases, second only to neglect. Substantiated cases of physical abuse represent 2.5 per thousand of all Canadian children—and, even so, they are only the tip of the iceberg.

the hands of an adolescent girl to a basement post for fifteen minutes is not.

³⁹ Nico Trocmé and David Wolfe, *Child Maltreatment in Canada: Selected Results from the Canadian Incidence Study of Reported Child Abuse and Neglect*. (Ottawa: Minister of Public Works and Government Services Canada, 2001): <<http://www.hc-sc.gc.ca/pphb-dgspsp/publicat/cissr-ecirc/>>.

Physical abuse in this study is “the deliberate application of force to any part of the child’s body, which results or may result in a non-accidental injury. It may involve hitting a child a single time, or it may involve a pattern of incidents” and it includes dangerous use of force or restraint including shaking, choking, biting, kicking, burning, or poisoning a child, holding a child under water, and risking or causing physical harm.⁴⁰ In almost half of cases, physical harm was documented—bruises, cuts, and scrapes in 9 of 10 cases and burns, broken bones, head trauma, and death in the rest.

Other problems were noted in over half of the physical abuse cases—behavioural problems in 4 in 10 cases, problems with peers in 1.5 in 10 cases, depression or anxiety in 1.5 of 10 cases, (serious or notable) violence toward others in 1 of 10 cases, and developmental delay in 1 of 10 cases. “Inappropriate corporal punishment” was noted in 7 of 10 cases. Poverty, ethnicity, race, and immigrant status were not risk factors for physical abuse. No association was found between abuse and income or culture. Most cases involved white parents with a steady income and home life. Fathers were perpetrators in almost half of cases and mothers in just over 4 of 10 cases. This may not reflect maternal roles in two-parent families, as almost half of the families investigated were parented by women alone. A statistically insignificant number of cases involved teachers. Boys were victims in 6 of 10 cases, slightly more often than girls, but age patterns were the same for both—lower reported and substantiated cases from birth to three years, increasing in stages, with the highest number in adolescence.

Children were more likely to report physical abuse than any other type of abuse. School personnel were more likely to report physical abuse than any other professional group. Parents were referred to support programs in over 1 of 3 cases and to substance abuse and domestic abuse programs in 1 of 10 cases. Children were referred to counselling services in 2 of 5 cases. Police laid charges in 1 of 5 substantiated cases of abuse. Although sexual abuse was the smallest category of cases investigated (as most sexual assaults of children are reported directly to police), 70 per cent of all criminal charges laid were for sexual assault. By contrast, physical assault accounted for only 20 per cent of charges laid.

Child protection agencies already deal with the large majority of corporal punishment cases, as further analysis of CIS data suggests. Nico Trocmé and Joan Durrant conclude on the basis of these data that:

⁴⁰ *Ibid.* at 12.

The overall profile emerging from this analysis does not support the argument that the child welfare system would not be in a position to respond to changes to the Criminal Code provisions ... The child welfare system is already processing a large number of inappropriate punishment cases and does not appear to have any particular difficulty in dealing with this particular form of maltreatment.⁴¹

If s. 43 is repealed, there will be no 'over-run' of child protection resources.

F. Police Charging Practices

The number of acts of violence against children that are reported to police or child protection agencies is low compared with actual incidence. Even so, one in every five assaults, physical or sexual, reported to police in 1996 involved a child assaulted (in most cases) by a family member.⁴² Tammy Landau compared police files in child physical assault cases in Toronto, Winnipeg, and Timmins in 1999.⁴³ These findings are a snapshot of what police see and what Canadian parents do.

Police files showed that 5 of 10 children were struck on the head or face. Physical injury was noted in over 6 of 10 cases—bruising, swelling, and lingering pain in 2 in 5 cases, and injury needing medical attention in almost 1 of 10 cases. Weapons were used in over 3 of 10 cases—belts, wooden spoons, electrical cords, window blind cords, shoes. Disobedience, 'acting up' or 'mouthing off' provoked punishment in 8 of 10 cases

Landau notes that the vagueness of s. 43 invited wide discretion. Interviews with police officers enforced the impression. Some liked its broad wording because it gave them personal discretion. Others disliked s. 43 because it interfered with the development of sound intervention policy.

Child and Family Services were involved in 8 of 10 cases, reported the assault to police in over half of cases and removed the child in 3 of 10 cases. Winnipeg police were more likely to be contacted by Child and Family Services than police in Toronto or Timmins. The involvement of Child and Family Services had a huge impact on charging decisions in Winnipeg. Winnipeg police took no further action in almost 9 of 10 cases and, like Timmins police, laid charges in fewer than 1 of 10 cases. Toronto police laid charges in four times as many cases. . Common assault was the charge usually laid, but there were regional variations in charging for aggravated assault and assault with a weapon.

Local police culture, as Landau's study shows, plays a large role in responding to child physical assault—deciding whether to investigate and charge, and

⁴¹ Nico Trocmé and Joan E. Durrant, "Response of the Canadian Child Welfare System to Reports of Corporal Punishment" 2002 (in publication).

⁴² Canadian Centre for Justice Statistics (qtd. in Winnipeg *Free Press*, 8 November 1997).

⁴³ Tammy Landau, "Charging Practices Under Section 43—Summary of Research" (May 21 1999, on file with the author).

deciding the level or type of charge laid. Like judges, police draw upon their personal views of corporal punishment in making these decisions.

G. Summary

The Canadian Incidence Study documents the substantial role played by corporal punishment in physical abuse. The lack of symmetry in charging practices—sexual assault compared with physical assault—suggests the shadow of s. 43 over the criminal evaluation of physical assault. The meta-analysis of studies on corporal punishment discussed above agrees with the findings of the Canadian studies. A 1995 review of corporal punishment studies shows similar results.⁴⁴ Not one study showed that corporal punishment benefits children. It does not increase children's compliance except in the very short term. It is positively associated with childhood aggression. Its use predicts delinquency in adolescence and violence in adulthood. It is the primary risk factor in child physical abuse.

Corporal punishment studies, the childhood experiences reported in the Ontario Health Supplement, and the Landau and Canadian Incidence studies of what police and social workers see, are compelling. Corporal punishment and physical abuse are part of a spectrum of assault ranging from mild occasional slaps or spanks to injury and death. Child abuse is not a startling aberration in parenting conduct. It is the logical end-point of a predictable pattern of parenting that includes the use of physical punishment. If the tip of the iceberg in physical assault cases is what we see in police and social work files, the bulk of the iceberg is not unreported cases—we know a lot about those—but the impact of corporal punishment on the physical, mental, and social health of children and on the adults they become.

Direct causation is never proven in the complex arena of human development and behaviour—the evidence is always associational. The stronger the association or relationship between outcome and supposed cause, the more likely it is a causal factor. That corporal punishment 'causes' children to become more aggressive, or adults to become clinically depressed, engaged in criminal activities, or violent toward a spouse or child, can never be absolutely proven. Clinical studies comparing the efficacy of assault with other methods of discipline could be designed that would prove causation, but such studies would be highly unethical. What counts is the strength of the association and the consistency of strong association across time, place, and research context.

⁴⁴ Joan E. Durrant and Linda Rose-Krasnor, "Corporal Punishment: Research Review and Policy Recommendations", Report to the Family Violence Prevention Division of Health Canada (Winnipeg: 1995).

IV. THE CHALLENGE—SECTION 43, EQUALITY RIGHTS, AND THE CHARTER

A. The Challenge

In 2000, The Canadian Foundation for Children, Youth and the Law ('the Foundation') launched a challenge to s. 43 of the *Criminal Code* on the grounds of sections 15, 7, and 12 of the *Canadian Charter of Rights and Freedoms* and the *United Nations Convention on the Rights of the Child*. Sponsored by the Court Challenges Program for equality litigation, the challenge was brought under the *Ontario Code of Civil Procedure*. This permits legal questions to be taken directly to the courts. Intervention into direct litigation would expose the child victim to media attention and breach the child's privacy. Expert witnesses for the Foundation and for Canada testified by way of sworn affidavit and were cross-examined. Research evidence was submitted, including much of that surveyed in Part 3.

The Ontario Association of Children's Aid Societies (OACAS) was granted intervener status for the Foundation. Intervener status for Canada was granted to the Canadian Teachers Federation and 'Coalition on the Family' consisting of Focus on the Family,⁴⁵ R.E.A.L. Women,⁴⁶ Home School Legal Defence Association⁴⁷ and Canada Family Action Coalition.⁴⁸ At the Supreme Court level,

⁴⁵ 'Focus on the Family began in 1977 in response to Dr. James Dobson's increasing concern for the American family. With a Ph.D. in child development from the University of Southern California, Dr. Dobson had served 14 years as associate clinical professor of pediatrics at the USC School of Medicine What he saw during those years included massive internal and external pressures on American households, causing unprecedented disintegration.' See <<http://www.family.org/welcome/>> and extended web sites. Dobson is author of *Dare to Discipline*, (Carol Stream, IL: Tyndale House Publishers, 1992), promoting corporal punishment (see note 8 above).

⁴⁶ "Federally incorporated in the fall of 1983, REAL [Realistic, Equal and Active for Life] Women of Canada has been actively involved in presenting our pro-family, pro-life views to the provincial and federal governments, the courts and the media. We promote equality for all women including homemakers. We believe the family is the most important unit in society. We speak for traditional values of marriage and family life." See <<http://www.realwomenca.com>>.

⁴⁷ "The Home School Legal Defense Association is a non-profit advocacy organization established to defend and advance the constitutional right of parents to direct the education of their children and to protect family freedoms. ... filing actions to protect members against government intrusion and to establish legal precedent [and] ...Advocates for Family & Freedom." See <<http://www.hsllda.org/about/default.asp>>. The Canadian branch states, "If a government official challenges your right to home school, HSLDA is there as your advocate..... We help our members through the initial stages of child abuse and neglect investi-

intervener status on behalf of the Foundation was also granted to the Quebec Children's Rights Commission, representing the Canadian Association of Children's Advocates.

Justice McCombs for the Ontario Superior Court (2000) and the Ontario Court of Appeal (2002)⁴⁹ upheld the constitutionality of s. 43. A full bench of the Supreme Court of Canada heard argument on 6 June 2003. Judgment is pending. The following discussion is based on the judgment of the Ontario Court of Appeal unless otherwise referenced. In that discussion, I canvass the Court's approach to the evidence, equality rights, and legal rights under the Charter, as well as judicial standards, shifting legislative purposes, and burden of proof.

B. The Evidence

The Ontario Court of Appeal summarized the findings of Justice McCombs for the Superior Court:

[T]here is no empirical evidence establishing a definitive long term causal link between corporal punishment and negative outcomes for children, [nor is there] reliable empirical evidence that non-abusive or mild forms of physical discipline such as spanking have a positive corrective effect. ... In short, it is impossible to determine with scientific precision whether corporal punishment leads to negative outcomes or whether it is simply a factor among other negative environmental factors that cumulatively impact negatively upon a child's future.⁵⁰

McCombs J. doubted that corporal punishment causes harm to children because the association between punishment and harm cannot be determined "with scientific precision." Precision in the social sciences is the strength and reliability of the association between a behaviour and its outcome. 'Scientific precision' is not the standard of proof in the social sciences or in law, and it has not been required by the courts in any other case involving such outcomes as, for example, the damage done by sexual abuse or the impact of pornography on women's safety. It is a standard that, as the court recognized, can never be met.

gations. HSLDA supports innocent families who are harassed by social workers [and] provides advice and counsel to member families when faced with [...] contact by a social worker in a child abuse or neglect investigation.' See <http://www.hsldacanada.org/legal/case.htm>.

⁴⁸ "Canada Family Action Coalition (CFAC) was founded in early 1997 with a vision to see Judeo-Christian moral principles restored in Canada. ... We promote and defend life, family, parental rights, democratic reform and religious freedoms." See <<http://www.familyaction.org/about.htm>>.

⁴⁹ *Canadian Foundation for Children, Youth and the Law v. The Attorney General in Right of Canada*, Ontario Superior Court of Justice (July 6, 2000) and Ontario Court of Appeal (January 15, 2002) at: http://www.ontariocourts.on.ca/decisions_index/2002index.htm.

⁵⁰ Ont S.C., *supra* note 2 at para. 9.

Yet the absence of such precision was used to uphold the constitutionality of s. 43.

Justice McComb's ten-point list of "significant areas of agreement" between expert witnesses for both sides was endorsed by the Court of Appeal as a finding of fact.⁵¹ The court defined spanking as "the administrating of one or two mild to moderate 'smacks' with an open hand, on the buttocks or extremities which does not cause physical harm", adding that "all social science witnesses in this application" accepted the definition. Children under two and 'teenagers' should not be spanked. No objects such as belts or rulers should be used. Corporal punishment "should never involve a slap or blow to the head." "Punishment causing injury is child abuse." Other forms of discipline "such as withdrawal of privileges or removing a child from the room" may be as effective as spanking. "The only benefit of spanking to be found in the research is short-term compliance." "Time out is an effective alternative." "Spanking is not child abuse." "Only abusive physical punishment should be criminalized":

The consensus among the experts is that not every instance of physical discipline by a parent should be criminalized. Many believe that the desirable objective of changing societal attitudes regarding child discipline would be best achieved through educational incentives, rather than the use of criminal sanctions to prosecute non-abusive physical punishment. The experts agree that extending the reach of criminal law in this way would have a negative impact upon families and hinder [parents' and teachers'] efforts to nurture children.⁵²

Laudable though such limits may be, the record shows that expert witnesses did not agree that extending criminal sanctions is 'always undesirable.' Nor did they agree on the value of 'time-out', the age limits set, or the definition of spanking given by the court as two slaps on the buttock.⁵³ The list is a startling contrast to the studies and affidavits placed in evidence.

⁵¹ Ont CA, *supra* note 2 at para. 8.

⁵² All quotes, including block quote, are taken from CA decision, para. 8.

⁵³ D.E. Day and M.W. Roberts, "An Analysis of the Physical Punishment Program of a Parent Training Program" (1983) 11 *Journal of Abnormal Child Psychology* 141-152. Children were 'spanked' as many as 11 times in a single session. Both methods were equally effective. The authors stated that compliance should not be taught using spanking. Also see A.W. Bean and M.W. Roberts, "The Effect of Time-out Release Contingencies on Changes in Child Non-compliance" (1981) 91 *Journal of Abnormal Child Psychology* 95-105. In that study, mothers of clinic-referred children with conduct problems were instructed to give the children 30 chore-type commands within a short period to heighten their oppositional behaviour and then make them sit in a time-out chair. Three of the eight children who were spanked required as many as 11 spankings before complying. Children were spanked by parents once every three minutes, with the median session lasting 22 minutes. Such studies would not be allowed today.

The appeal court cited with approval *R. v. Dupperon*,⁵⁴ which set out a list of factors for judicial consideration:

[F]rom an objective and subjective standpoint, such matters as the nature of the offence calling for correction, the age and character of the child and the likely effect of the punishment on this particular child, the degree of gravity of punishment, the circumstances under which it was afflicted, and the injuries, if any, suffered, the nature, gravity and circumstances of the punishment, the child's age, character and offence, [and] injury to the child.⁵⁵

The Court of Appeal accepted Canada's admission that many cases were wrongly decided after *Ogg-Moss* and *Dupperon* and that "many of the more recent cases are consistent in adopting the approach" set out in *Dupperon*.⁵⁶ But Canada's submission showed that *Dupperon* was followed in only some 18 of the many cases decided after it. The court excused this, stating that "there have been cases in the past where s. 43 was applied to excuse applications of force that, in light of today's standards and the unprecedented body of expert evidence filed in this court, should be rightly considered as assault."⁵⁷ The list set out by the Ontario courts exempts children under two and over 12 and specifies that assault not be on the head or with an implement.⁵⁸ This specificity begs the questions: is child corporal punishment justified? That is, does it meet constitutional standards? Is there merit or utility for children or society in corrective assault?

The Criminal Code preserves judge-made defences. These remain in the purview of the common law and enjoy a protected legal status.⁵⁹ The list is an

⁵⁴ *R v. Dupperon* (1985), 16 C.C.C.(3d) 453 (Sask. CA); deep and lasting bruising from a 'severe' belt-lashing did not qualify as bodily harm. The trial judge had stated, "I'm aware that some fundamentalist sects seem to believe that spare the rod and spoil the child gives them the licence to practise all kinds of brutality ... but I didn't think we were going to argue the benefits of that kind of religiosity or morality in connection with children." Both levels of court denied the father a s. 43 defence. Both courts agreed that the father's motive—to prevent his mentally challenged son "from growing up to be a bum on 20th Street"—was not a corrective motive. The appeal court reduced the charge from assault causing bodily harm to common assault.

⁵⁵ Ont. CA, *supra* note 2 at para. 43.

⁵⁶ *Ibid.* at para. 44.

⁵⁷ *Ibid.*

⁵⁸ A committed but law-abiding discipliner would mark off the days until the child turns two and get in as much in as possible before adolescence, slapping the buttocks twice each time, as many times a day as desired. This facetious scenario, suggested by Peter Newell of EPOCH, has an element of truth that points out the basic fallacy of the Ontario court's list.

⁵⁹ *Criminal Code*, s. 8(3). "The only result which can follow from preserving the common law as to justification and excuse [defences] is, that a man morally innocent, not otherwise protected, may avoid punishment. In the one case you remove rusty spring-guns and man-traps

example of that judicial power. The list is, however, *obiter dicta*. It is not binding because it is not responsive to the question asked—whether s. 43 is constitutional—and because there is insufficient foundation for it in the evidence or case law. It ignores the violation of children's bodies, feelings, and rights at the heart of the question. It ignores the consistent failure of Canadian courts, in over more than a century, to develop and sustain a standard of evaluation.

The legislative purpose of s. 43, according to the Court of Appeal, is:

[T]o permit parents and teachers to apply strictly limited corrective force to children without criminal sanctions, so that they can carry out their important responsibilities to train and nurture children without the harm that such sanctions would bring to them, to their tasks and to the families concerned.⁶⁰

This is repeated twice more, in paragraphs 47 and 59. Is s. 43 about nurture? It arose from imperial limits on *pater potestas* under Roman law, and was taken up into ecclesiastical law and then into the common law to bolster the power of the new middle class father in the protestant reformation, in the belief that children will not learn, love, or obey without the humiliation and pain of regular corporal punishment. Confederation required a federal criminal law and various draft codes was at hand. The formulation of the defence in the 1892 Code is identical to that of the 1905 Queensland Code. That s. 43 was a careful and considered balance of rights set by Parliament to protect a nurturing relationship between child and parent is sheer judicial fiction. It is unusual to find such an ahistorical approach in a Charter case.

Can the courts rewrite legislation against its original meaning, to serve a purpose not intended by the legislator? This is the 'shifting purposes' problem of putting new wine in old bottles, new purposes into old law—it sours. Shifting legislative purpose approaches the creation of new law, which is not in the power of the courts.⁶¹

C. The Charter

The Charter guarantees fundamental freedoms, legal rights and the right to the equal protection and equal benefit of the law without discrimination. All laws,

from unfrequented plantations, in the other you decline to issue an order for the destruction of every old-fashioned drag or life-buoy which may be found on the banks of a dangerous river," wrote James Fitzjames Stephen in *A History of the Criminal Law of England* (London, 1883). Judges cannot create new offences, made clear in the 1953 reforms to the Canadian Criminal Code. This is left to legislation.

⁶⁰ Ont. CA, *supra* note 2 at para. 30.

⁶¹ Shifting the purpose of legislation to rejuvenate old law was rejected by the Supreme Court of Canada, in *R. v. Big M Drug Mart Ltd.*, [1985] 160 R.C.S. 295 and *R. v. Zundel*, [1992] 248 R.C.S. 731. In *R. v. Butler*, [1992] 1 S.C.R. 452, the Supreme Court nevertheless permitted a shift from a morality-based analysis to a harms-based analysis, in leaving intact the legislation in question.

state programs and state policies are subject to the Charter. Key is section 15, which states: "Every individual is equal before and under the law and has the rights to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" [emphasis added]. No right or freedom is absolute. Individual rights and freedoms must be balanced with the interests of the majority—the "reasonable limits prescribed by law" under s. 1. That limits are reasonable must be "demonstrably justified". This requires a pressing and substantial objective. Furthermore, the means used to achieve it must be rationally connected to that objective and interfere with the right or freedom no more than is necessary. Finally, the harm done in violating the right must not be greater than the good done in furthering the social objective. Section 43 can only be upheld under s. 1 if giving parents and teachers a special defence to child assault serves a pressing and substantial social objective, if assaulting children is logically tied to that objective, if the interference with the children's right to equal protection of the law of assault is minimal, and if the good it does as a defence outweighs the harm done to those whom it is supposed to be good for.

Section 43 is a *prima facie* violation of s. 15. Equality under s. 15 means that an adult who assaults a child should be prepared to answer for it on grounds that apply to any assault—self defence, protecting another, protecting property, necessity, de minimis and others. Section 43 can meet s. 15 standards only if it can be shown that assaulting children is a 'program' that ameliorates their social inequality. As the social science evidence shows, it is not. It labels children as a group deserving assault, diminishes their dignity and worth, denigrates their value as human beings, and exposes them to harm.

McCombs J. held that s. 43 does not violate s. 15 of the Charter:

Although it subjects children to differential treatment based on age, the distinction does not have a discriminatory purpose or effect that is contrary to the purpose of s.15(1). The age distinction in s. 43 is an appropriate response to the unique circumstances of children's psychological development and limitations, in light of their needs and capabilities, and the relationship of parents and children.⁶²

When "properly construed," the law:

does not increase the vulnerability of children, particularly when viewed in the context of other legislation designed to protect children. Finally, s. 43 does not represent state action based upon stereotypes about children. Instead, s. 43 is based upon the inherent capacities and circumstances of childhood, and demands an individual assessment of a person's situation and needs.⁶³

That a court would find no violation of s. 15 is unexpected.

McCombs J. decided on the basis of contextual factors set out by the Su-

⁶² Ont. S.C., *supra* note 2 at para. 130.

⁶³ *Ibid.* at para. 131.

preme Court of Canada in *Law v. Canada*⁶⁴ that s. 43 draws a distinction based on an enumerated ground of discrimination under s. 15 but does not discriminate in purpose and effect. *Law* identified human dignity as the *sine qua non* of equality.⁶⁵ Corporal punishment denies dignity—that is its historical value and purpose. The questions *Law* sets are, first, does the distinction on enumerated or analogous grounds relate to members of groups subject to disadvantage, and does it serve to propagate negative stereotypes?⁶⁶ Section 43 denies children equal protection on the enumerated ground of age—or at least those with the bad luck of being raised or taught by people who choose to assault them. Second, is the distinction non-discriminatory because it addresses particularities of the claimant's characteristics or circumstances?⁶⁷ Section 43 is based on presumptions of lack of capacity, an already-breached integrity of the person and devaluation of human dignity in the absence of legal status. Children can be assaulted because they are children.

Third, is the distinction one that serves an ameliorative purpose by addressing the special situation of a group of people who are less advantaged than the claimant?⁶⁸ With no evidence in support and in the face of significant evidence to the contrary, the court decided that s. 43 addresses the “unique circumstances of children's psychological development and limitations.” These limitations, it would seem, can be remedied by the intentional infliction of pain and humiliation. Children are already disadvantaged by physical and emotional vulnerability—by “psychological development and limitations.” Section 43 makes worse children's pre-existing position of social and physical disadvantage. It does not ameliorate their vulnerability; it makes them *more* vulnerable to assault and its consequences.

Fourth, is the nature of the affected interest one that deserves constitutional protection?⁶⁹ Children are shown here as having a deferred social value, a value dependent only on the adults they will become. They do not deserve equal protection from assault as children, but their social value as adults should not be permanently impaired by assault in childhood. This is the underlying message of McCombe's ten-point list of ‘dos and don'ts’. Unless adult impairment by child corporal punishment can be demonstrated at a direct causal level of proof—an impossible task—s. 43 is good. McComb J.'s conclusion treats as settled the controversy that he earlier stated is a matter of continuing debate. As this is not supported by the evidence, his analysis of the other contextual factors set out in

⁶⁴ *Law v. Canada* [1999] 1 S.C.R. 497 at 548–549.

⁶⁵ *Ibid.* at 549.

⁶⁶ *Ibid.* at 550.

⁶⁷ *Ibid.* at 551.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 552.

Law is undermined.

The Court of Appeal barely corrected the failure to address s. 15. The appeal decision ignored McCombs J.'s equality analysis "because [s. 43 is] clearly justified" under s. 1.⁷⁰:

The appellant argues that s. 43 violates s. 15 of the Charter. It says that by decriminalizing physical assaults only against children the section subjects them to differential treatment on the enumerated ground of age. This treatment is said to diminish their dignity and worth as human beings within Canadian society (paragraph 56)... *I am prepared to proceed on the basis that this is so, because in my view s. 43 is clearly justified under s. 1 of the Charter*' (paragraph 57, emphasis added).

This is the sole discussion of s. 15 by the Court of Appeal. It suggests that the Court was determined to uphold s. 43 at any cost.

In its s. 1 analysis, the Court of Appeal identified the objective of s. 43 as permitting parents and teachers apply "strictly limited corrective force" free of criminal sanctions.⁷¹ "Parents, teachers and families play very significant roles in our society. Facilitating those roles in a way that keeps *them* from harm is an objective that is undoubtedly pressing and substantial [emphasis added]."⁷² The law is rationally connected to that objective. "Assuming that s. 43 violates the rights of children, in doing so it is obviously rationally connected to the aim of the legislation."⁷³ The "area of conduct which is decriminalized by s. 43 is strictly limited ... s. 43 minimally impairs the rights of children."⁷⁴ The Court returned to the evidence:

While there is significant associational evidence linking corporal punishment to poor outcomes for children, there is no empirical evidence establishing a definitive long term causal link between the two. On the other hand, prosecuting non-abusive physical punishment by parents or teachers would hinder them in the discharge of their responsibilities toward those children and harm families.⁷⁵

The pressing and substantial objective is to prevent the prosecution of parents and teachers as this "would hinder them in the discharge of their responsibilities ... and harm families." Children's rights are only minimally impaired because harm cannot be proven. To assert, as the court did here, that no direct evidence links corporal punishment with negative outcomes then or later in life is strange. First, the courts generally do not require a "scientific" standard of proof. In a Charter case, proof is established on the balance of probabilities. The

⁷⁰ Ont. CA, *supra* note 2 at paras. 56–57.

⁷¹ *Ibid.* at para. 59.

⁷² *Ibid.* at para. 60.

⁷³ *Ibid.* at para. 61.

⁷⁴ *Ibid.* at para. 62.

⁷⁵ *Ibid.* at para. 63.

courts also recognize that proof of causation in human behaviour is not possible and that experiments to prove causation are unethical. Strong associational evidence is as good as it gets.⁷⁶

Second, once *prima facie* breach of a right or freedom is established, the ultimate burden of proof is on the state to justify the law under s. 1. If the violation of rights is justified because any harm caused is overbalanced by the good done, the state must prove it. No burden of proof was needed to abolish the power given to husbands, householders, masters, slave owners, judges, or prison wardens to administer corporal punishment to those under their control. To put the burden of proof on the rights claimant under s. 1 is simply wrong.

Although harm to children is the essence of the challenge, the harm identified by the court is the hindrance to the 'discharge of the responsibilities' of parents and teachers. Section 43 is justified because it protects adults who assault children in the interests of these children even if it is not in the interests of children—legally, emotionally or physically—to be assaulted. This twisted logic is a strange result in a Charter challenge directed at the rights of children.

The courts did not consider the application of other defences to assault. (But if correction by assault takes place after the fact, these defences will not apply: spanking the robber after the theft may relieve feelings of anger or revenge but the law does not support it.) The constitutional question raised is not whether s. 43 is good for adults. It is.

D. Section 7 — Principles of Fundamental Justice

Sections 7 to 14 of the Charter set out legal rights. Section 7 is key to the legal rights set out in sections 8 to 14. Section 7 states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The section requires procedural and substantive fairness when administering any law that imposes detention or punishment and interferes with security of the person. Section 43 justifies assault—a clear interference with security of the person—with no regime of fairness. The principles of fundamental justice include the right to fair process, including a hearing and making answer and defence, and the rule of law requirement that the law be fixed, knowable, and certain. The category is not closed.

The principle that 'the best interests of the child must be considered in all proceedings affecting the child' is a right or principle of justice under the UN Convention on the Rights of the Child and is explicit in the Supreme Court

⁷⁶ See above Part III and *e.g.*, the decision of the Supreme Court of Canada in *R. v. Butler*, *supra* note 60, which recognized a relationship between violent pornography and violence against women despite the impossibility of proof. Although a direct link was not established, the court found that it is reasonable to presume that there may be a causal relationship between pornography and harm to women.

judgment in *R. v. Baker*.⁷⁷ It is a principle running through Canadian and international law, suggesting that it may be a new principle of fundamental justice. Even if it is not, s. 43 sets up a punitive regime that would ordinarily require the application of the classic principles of fundamental justice. The Court of Appeal concluded, however, that the defence does *not* set up a procedure to be tested against the principles of natural justice or procedural fairness. Rather, the section is purely a matter of substantive law, setting up a defence for conduct that would otherwise constitute a criminal assault.

*The infringement of the child's personal security interest arises from Parliament's decision to enact the section, not from any legal process conducted pursuant to the section. Given that this decision is embodied in a properly passed law there can be no question of the section violating the procedural aspect of fundamental justice*⁷⁸ [emphasis added].

As "properly passed law" is always subject to Charter scrutiny, this bizarre statement ignores over 20 years of Charter jurisprudence.

Section 43 does not define what is reasonable in the circumstances, which circumstances apply, or what constitutes correction. Don Stuart, author of the leading Canadian criminal law text, observed, "The most startling feature of s. 43 is that, while conferring the right to correct with reasonable force, it nowhere defines the circumstances in which this correction can ensue. This is in marked contrast to other justifications", adding, "Like adults, children surely have a right to protection from physical abuse" and the section "should be totally repealed."⁷⁹ In his text on Canadian criminal law, Eric Colvin wrote:

This justification is surely unacceptably wide as well as vague. Indeed, it risks the physical abuse of children. ... The loose drafting of the section may reflect the political impotence of the children whose interests are at stake rather than a considered response to the issues of parental and educational authority.⁸⁰

Criminal law must be fixed, knowable, and certain. The Court of Appeal held that s. 43 is not so vague as to violate s. 7 because the term "reasonable" permits judges to develop standards. Nor is it over-broad: "The government objective ... is to permit parents and teachers to apply strictly limited corrective force to children ... Section 43 is reasonably tailored to effect this purpose."⁸¹ But the law gives little guidance to parents and teachers. It gives none to children, who have no entitlement to know when or why their security will be violated.

Although the law justifies the assault of children, the state is not responsi-

⁷⁷ *R. v. Baker* (1999), 174 D.L.R. (4th) 193 at paragraph. 70 (S.C.C.)

⁷⁸ CA, *supra* note 2 at para. 35.

⁷⁹ Don Stuart, *Canadian Criminal Law*, 3d ed. (Carswell, 1995) at 466.

⁸⁰ Eric Colvin, *Principles of Criminal Law*, 2d ed. (Carswell, 1991) at 227.

⁸¹ CA, *supra* note 2 at para. 47.

ble. (I return to this issue, below.)

The section does not approve or encourage such punishment. It carefully defines the limits that must be observed [and] infringes the child's security of the person only to the extent of decriminalizing the limited application of force to the child where the risk of physical harm is modest.⁸²

The court quoted a line from a Health Canada video that "spanking is a bad idea and it doesn't work" in concluding that "the s. 7 issue presented by s. 43 is not about whether physical punishment of children is good or bad. *The government has clearly and properly determined that it is bad.*"⁸³

The court made an oblique reference to the 1994 recommendation of the UN Committee on the Rights of the Child that Canada prohibit corporal punishment (Part 1 above). Again, there is a shedding of fact:

A small number of countries in Europe ... have used their civil or family law to ban the physical punishment of children. Importantly, however, these countries attach no criminal penalty to these provisions. Rather, they operate together with educational campaigns designed to change attitudes about parental discipline. *No country in the world has criminalized all forms of physical punishment of children by parents*⁸⁴ [emphasis added].

Further,

While the Committee recommended that corporal punishment of children be prohibited, it nowhere required that this be done by an extension of criminal sanctions. Indeed, where that has been done elsewhere, it has been done by civil law provisions *not criminal sanctions*⁸⁵ [emphasis added].

"No country in the world has criminalized all forms" of child corporal punishment, the court stated. This is false. In countries where the criminal defence was repealed, the reach of the criminal law was in fact extended. All repealing states criminalized child corporal punishment and potentially extended the reach of criminal penalties; some states went further in enacting 'civil' bans in child protection law.⁸⁶ Repeal came first—what happened after is what counts.

⁸² *Ibid.* at para. 49.

⁸³ *Ibid.* at para. 52 [emphasis added].

⁸⁴ *Ibid.* at para. 21 [emphasis added].

⁸⁵ *Ibid.* at para. 22 [emphasis added].

⁸⁶ In 2001, Israel became the first common law state to repeal the child corporal punishment defence. Civil law states repealing the defence include Sweden (1957), Norway (1972), Austria (1977), Finland (1989), Denmark (1997), Cyprus (1994), Italy (1996), and Germany (1957 and further amendments). Admonitory bans are in place in Croatia (1999) and Latvia (1998). See S.H. Bitensky, "Spare the Rod, Embrace our Humanity" at <<http://www.law.msu.edu/faculty/bitensky/abstract.htm>>, on pre-1998 developments. At a preparatory meeting for the UN General Assembly Special Session on Children, May 2001, 51 European and Central Asian states adopted the *Berlin Commitment* to create an

Sweden was the first of these states to repeal its criminal defence to child assault in families in 1957, although Sweden and a number of U.S. states had long banned its use in schools. Repeal in Sweden was accompanied by massive state education campaigns. This reduced the use of corporal punishment and public support for it.⁸⁷ Clarification of the ban in child protection law decades later reinforced the impact of repeal. Educating against the use of corporal punishment, as the Swedish experience shows, is not possible when the most visible area of law—criminal law—continues to justify it.

By granting parents and teachers a magisterial but private authority over the punishment of children, and defining children as a class whose assault is permissible without requiring any form of fundamental justice in when and how punishment is administered, s. 43 denies fundamental justice. The s. 7 analysis applied here was developed in cases in which accused persons who engaged in risky or questionable conduct challenged a law on the grounds that it failed to give fair notice of forbidden conduct and thus infringed or denied their liberty interest. The issue in this challenge is the core value protected by s. 7. It calls for a new approach and a higher level of constitutional scrutiny. The challenge to s. 43 is the first challenge to a defence by those who, on the basis of status, are harmed by it. The nearest comparison would be a challenge by prisoners to the law justifying their moderate whipping. Children are the only class of persons now subject to corporal punishment. Given animal protection law, they are also the only sentient beings who can be assaulted for their correction. There is no live comparison.

E. Green-lighting Assault—Section 12 and Beyond

According to the courts, s. 43 does not violate the s. 12 prohibition of cruel and unusual punishment or treatment because the punishment of children (while clearly unusual and often cruel) is not a punishment imposed by the state:

[N]or does it subject the child to treatment by the state. It simply creates a criminal defence.... Nor when the child is physically punished is there an active state process in operation involving the exercise of state control over the child as there must be if s. 12 is to be engaged.⁸⁸

The state is not responsible for what parents and teachers do. Although the law

'environment fit for children' including a commitment to end corporal punishment; later that year, the UN Committee on the Rights of the Child proposed action to end corporal punishment in a further 10 countries; see: <<http://endcorporalpunishment.org/pages/frame.html>>. Iceland repealed its criminal defence and legislated a positive ban on corporal punishment of children in families in March 2003.

⁸⁷ Joan E. Durrant, "Evaluating the success of Sweden's corporal punishment ban" (1999) 23 *Child Abuse & Neglect* 435–448.

⁸⁸ CA, *supra* note 2 at para. 54.

authorizes some degree of violence in a private relationship, it does not require it. It simply offers a defence to certain persons who commit it.

But it is a fundamental right of all people to live in a non-violent environment. Human rights violations are not tolerated on grounds that the relationship between violator and violated is private or that the act of violation is not required or mandated by law.⁸⁹ The essence of discrimination is not the failure to criminalize private violence—assault is a crime—but to equitably enforce the law. Although states are not accountable at international law for individual acts of violence, the situation changes when the state ignores violence, condones it or, as in s. 43, offers a legal defence to it. The only difference between a law that says children should be assaulted and a law that justifies assaulting children is that it gives a choice. Whatever the choice, the state backs it up. Whether the state commands that an act of violence be done, excuses an act once done, sets up an independent regime in which that act may be done, or ignores the doing of an act, the state must answer to its violation of human rights.

The Supreme Court of Canada ruled in *Dunmore v. Ontario*⁹⁰ that a law that “substantially orchestrates, encourages or sustains the violation of fundamental freedoms” will come under Charter suspicion even if private actors and not state agencies are responsible for the violation. Legislation that gives a ‘green light’ to private violations of Charter rights is a Charter problem. Section 43 is a case in point.

In *R. v. Smith*, the SCC decided that “the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed” violates s. 12. Corporal punishment is “grossly disproportionate and will always outrage our standards of decency.”⁹¹ Cruel and unusual punishment is defined by the SCC as being of a kind or duration that would outrage the public conscience, degrade human dignity, go beyond what is necessary to achieve a valid social aim, or be arbitrary in that it is not applied on a rational basis according to ascertained or ascertainable standards. Section 43 authorizes corporal punishment. This alone violates s. 12. On the other grounds set out in *Smith*, child corporal punishment may be of a kind or duration that outrages the public conscience, degrades children’s dignity and goes beyond the valid social aim of nurturing and socializing children. It is unlikely to be applied on a rational basis, whatever the limits set by Parliament or the judiciary. Section 43 can never satisfy Section 12.

⁸⁹ The 1992 *Draft Declaration on the Elimination of Violence Against Women*, adopted by the United Nations General Assembly 20 December 1993, recognized violence by private actors in a domestic context as a human rights violation, both in itself and as a bar to the access of rights and freedoms by women and children.

⁹⁰ *Dunmore v. Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193.

⁹¹ *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1073-4 and 1097-98.

The state cannot claim immunity from the violation of children's rights on the basis that the violators are private actors. *Dunmore* makes this clear. Section 43 sets up a private regime that green-lights prohibited acts. Whether the rights violation is caught by sections 15, 7, or 12, it is authorized by the state and subject to full Charter scrutiny.

V. INTERVENING IN CHILD PHYSICAL ASSAULT

A. Intervention Alternatives

The short shrift given to s. 15 of the Charter by the Ontario courts ignores the pith of the challenge: the right of children to the equal protection of the law. Section 43 is a defence to the assault of one class of persons—children—by those vested with tutorial responsibilities for them. In a short judgment, the Court of Appeal refers to s. 43 as decriminalizing assault 44 times. The overriding concern of the Court is the prosecution of parents in the absence of s.43.

Is prosecution the only response available to the justice system in a post-section 43 Canada? What impact does section 43 have in child physical assault intervention?

That prosecutorial discretion in the absence of s. 43 will not satisfy those who want immunity from prosecution is noted by Mark Carter in his analysis of discretion:

People who engage in forceful disciplinary conduct do not ... "deserve" to have that conduct insulated from legal liability in the same way that children deserve to see the end of the way in which the law formally compromises their dignity and security interests. It is fully appropriate, therefore, that any leniency that is shown in the application of the criminal law to the use of corrective force should be no more formal or predictable than the nature of discretion itself.⁹²

B. Family Privacy and the Bible

Family privacy emerges as a theme of the Ontario judgments. According to the Ontario Court of Appeal, s. 43 is intended "to permit parents and teachers to apply strictly limited corrective force to children without criminal sanctions, so that they can carry out their important responsibilities to train and nurture children without the harm that such sanctions would bring."⁹³ As the rather different role of teachers is not discussed, it would seem that family privacy is the issue, and that this is equated with immunity from prosecution.

In his Foucauldian analysis of the governance of the family, Nikolas Rose

⁹² Mark Carter "Corporal Punishment and Prosecutorial Discretion in Canada" *International Journal of Children's Rights* (forthcoming).

⁹³ CA, *supra* note 2 at para. 30, repeated in paras. 47 and 49.

concludes that privacy from state intervention is a reward for those families who install in children a governed, self-socializing soul.⁹⁴ In its 1984 Report on Assault, the Law Reform Commission of Canada recommended that the defense be retained for parents (but not teachers) to avoid "the risk of wheeling the engines of law enforcement into the privacy of the home for every trivial slap or spanking."⁹⁵ Family privacy is part and parcel of paternal rights in Roman edict, ecclesiastical law, magistrates' handbooks, Blackstone's *Commentaries*, and judicial interpretation of the defence of moderate correction.

In the present challenge, the Court denied intervener status on behalf of the challenger Justice for Children and Youth to Voices of Children in Care and the Canadian Association of Children's Advocates. This suggests that children would not be the focus of the inquiry. The Canadian Teachers Federation was granted intervener status for Canada, even though its policy opposes school corporal punishment. This suggests that the connection between learning and beating is not entirely severed. The Coalition on the Family, consisting of Christian groups supporting family privacy and corporal punishment, was also granted intervener status for Canada. This suggests that the connection between religion and corporal punishment is alive and well.

Northrop Frye asserts that the Book of Proverbs "has probably been responsible for more physical pain than any other sentence ever written. What is behind this is not sadism but the attitude that has given so curiously penal a quality to the education of the young down to our own century."⁹⁶ The sentence referenced is "Chasten thy son while there is hope, and let not thy soul spare for his crying" (Proverbs 19:18). Among the other proverbs exhorting corporal punishment are, "He that spareth the rod hateth his son: but he that loveth him chasteneth him betimes" (13:24) and "Withhold not correction from the child: for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell" (23:13).⁹⁷ For at least one Cana-

⁹⁴ Nikolas Rose, *Governing the Soul: The Shaping of the Private Self* (London: Routledge, 1989); discussed in Anne McGillivray, Introduction, *Governing Childhood* (Aldershot: Dartmouth, 1997).

⁹⁵ Law Reform Commission of Canada, Working Paper 38, *Assault* (Supply and Services Canada, 1984). A minority of Commission members argued that s. 43 is unconstitutional and should be repealed. In its *Recodification of the Criminal Law*, Report No. 31, Vol. 1, 1986, the Commission recommended that the legal line be drawn between "hurting" and "harming"; again, a minority advocated repeal on the basis that the distinction is too vague.

⁹⁶ Northrop Frye, *The Great Code: The Bible and Literature* (Toronto: Harcourt Brace Johonovich, 1986) at 21.

⁹⁷ The maxim "spare the rod and spoil the child" is not from the Bible, as sometimes supposed, but from *Hudibras*, Samuel Butler's 17th century satire on English manners.

dian court in 1994, "The Bible is as valid today as it was in biblical times."⁹⁸

But the 'religious defence', like the cultural defence discussed earlier, does not excuse excessive force in Canadian courts.⁹⁹ Some Christian groups view the Charter and the Convention on the Rights of the Child as an attack on scripture and claim family privacy from state intervention in order to practise scriptural values, notably child corporal punishment. Section 43 is a lightning-rod for values associated with religion and authority. In a pluralistic society, these values are far too diverse, vague, and idiosyncratic to control the application of the criminal law.

VI. CONCLUDING REMARKS

The Ontario Superior Court rewrote the law, confusing criminal assault with acts necessary to nurturing children. The distinctions between 'strictly limited corrective force' and excessive force, between reasonable discipline and child abuse, have no meaning except those given in a specific research or policy context. Child abuse is an emotive term used to describe conduct that someone feels is damaging to a child. It has no inherent legal, medical, or moral content; its meaning is that given by the user. 'Spanking' is similarly problematic. Use of sticks, belts, and paddles has been called spanking, as have prolonged or repeated assaults leading to the death of the child. Arbitrary limits—not under two, not on the head—fail to address the fundamental violation of rights at the heart of s. 43. Such limits might protect some children, but there is nothing in the Court of Appeal decision discussed above that compels future courts to observe them.

The courts erred in concluding that expert witnesses agreed that reform should not entail prosecution. Witnesses for the challenger certainly accepted the possibility. Nor does the UN Committee on the Rights of the Child disapprove of criminal sanctions. Rather, the Committee recommended all legal measures be taken, including repeal of the defence, with the clear possibility of prosecution. The courts failed to consider alternative measures, the fact and extent of the discretion legally given to police and prosecutors, and the use of protocols in domestic violence response, as ways of guiding cases away from

⁹⁸ *R. v. Graham* (1994), 151 N.B.R. (2d) 81, affirmed (1995), 39 C.R. (4th) 339 (Q.B.), per Harper J. in acquitting a teacher who "spanked" a nine-year-old child for disrupting class.

⁹⁹ *R. v. Halcrow*, [1993] B.C.J. No. 1227 (B.C.C.A.). The appellant foster mother was convicted of nine counts of assault for beating adolescent girls on their naked backs with a belt, causing in one case "vast areas" of bruising and "bloody raised blisters from top to bottom". Halcrow argued that, if the force she used was excessive by legal standards, it is justified by her religious freedom under the Charter. The British Columbia Court of Appeal rejected the argument, and the Supreme Court of Canada denied leave to appeal. The punishment was occasioned by the girls' complaints of rape by Halcrow's son; McGillivray, *supra* note 4.

criminal prosecution.¹⁰⁰ Instead, the judgments used the shock tactic of threatened prosecution. If the assault consisted of one or two slaps to the buttock, as the government argued, it is hardly an occasion for prosecution. The courts' reliance on the child protection system as a fail-safe for abused children ignores the fact that assault is a crime and that s. 43 confuses the response of the child protection system as much as it confuses the response of the criminal justice system.

Repeal will not result in a marked increase in prosecution. Few assaults investigated by police result in charges in the general case, although child physical assault prosecutions show a disturbingly low rate by comparison to other assaults. Nor will more families be investigated by child protection agencies. Most parents who regularly use corporal punishment are already in touch with agencies. Repeal would permit development of rational, graduated and consistent responses in child assault that respect children's rights to equal protection from assault and at the same time support children's connections with parents and families. Whether repeal makes life better for children depends on what happens after.

When the law speaks clearly, Canadians can speak clearly in developing a rich, culturally sensitive and caring discourse on how we treat our children. It is to be hoped that the Supreme Court of Canada will speak clearly. Chief Justice Dickson might well have used the Charter to strike it down under s. 15, had that option been open to him. He wrote, "Unless the force is ... for the benefit of the education of the child, the use of force will not be justified."¹⁰¹ If use of force to correct children never benefits children, it can never be lawfully used. His is a perfect Charter argument.

VII. POSTSCRIPT: THE CHILD PHYSICAL ASSAULT WORKSHOP

In August 2001, police officers, service directors, victim and child protection workers, prosecutors, and child advocates came together by invitation with academics in the fields of pediatric medicine, criminology, sociology, social work, family studies, psychology and law, from across Canada and from Sweden, Israel and England, came together in a Workshop on Intervening in Child Physical Assault.¹⁰² Funding was provided by the Court Challenges Program of Canada,

¹⁰⁰ Carter, *supra* note 92.

¹⁰¹ Ogg-Moss, *supra* note 19 at 132.

¹⁰² *Intervening in Child Physical Assault Workshop*, Hotel Fort Garry, Winnipeg, Manitoba, August 31–September 1 2001. Keynote speakers were Peter Newell, EPOCH (End Physical Assault of Children), Dr. Leslie Sebba, Professor of Law and Director of the Institute of Criminology at the Hebrew University of Jerusalem, and Dr. Nico Trocmé, Director of the Centre of Excellence for Child Welfare and the Bell Canada Child Welfare Research Unit.

the Law Foundation of Saskatchewan, the Atkinson Foundation of Ontario, Simon Fraser University, and the University of Manitoba.¹⁰³

The question put was, "With or without s. 43, what needs to change?" Opening keynote presentations were followed by 'break-out' discussion groups who reported in plenary. Discussions centred on legal, social, medical, and ethical dimensions of child physical assault and on all aspects of intervention. Section 43 was not the focus of the Workshop, but its impact on system response and children's rights emerged as a central issue. Recommendations were driven by the experience of participants and the pragmatics of response. From the perspectives of child protection, prosecution, policing, victim services, and child protection, repeal of s. 43 emerged as a necessary, but not sufficient, condition of effective intervention and policy reform.

Plenary keynotes, proceedings and discussion group reports were recorded and transcribed.¹⁰⁴ Emergent themes included children's rights and law reform (repeal or striking down of s. 43), system discretion, resources, designing alternatives—including intervention policies and inter-agency protocols, uniform charging policies, diversion considerations, co-ordinated response, uniformity of response, the role of the child—and prevention through education. The plenary following the first stage of discussion group reporting adopted two principles. Child corporal punishment is a human rights issue. All decision making must be child-centred.

Participants noted that criminal justice and child protection systems have developed charging policies and inter-agency protocols for investigation and reporting child sexual assault to guide decisions on prosecution including diversion and alternate measures. Little attention has been given to child physical assault. Section 43 casts a long shadow over intervention policy, decisions made in the specific case, and the message to be given to parents when a child is hit. Further discussion revealed practice problems caused by s. 43—the inability of child protection workers to frame a clear message about 'spanking' for their clients, confusion facing police officers responding to child assault calls, and the inherent folly of educational campaigns against child physical assault in the presence of s. 43. While intervention practices can be improved now, partici-

at the Faculty of Social Work, University of Toronto. Discussants were Professor Mark Carter, College of Law, University of Saskatchewan, Dr. Joan Durrant, Head of Family Studies, University of Manitoba, Dr. Tammy Landau, School of Justice Studies, Ryerson University, Dr. Ailsa Watkinson, Faculty of Social Work, University of Regina, and Cheryl Milne, Legal Counsel, Justice for Children and Youth.

¹⁰³ Costs of travel, accommodation, meals, meeting sites, taping and transcription were met by these grantors, enabling all participants to attend on an equal basis and speak outside the agency box. The Manitoba Legal Research Institute provided funding for law student Daniella Silaghi whose able work in locating and summarizing law and social sciences materials for the Workshop web site, and analyzing Workshop transcripts, is much appreciated.

¹⁰⁴ Tapes and transcripts are on file with the author.

participants agreed that the defence impedes and confuses response at all levels, including the basic level of child protection, parenting education, and practical support. Effective intervention and prevention, participants concluded, is possible only without s. 43. Some participants had expressed strong support for s. 43 in position papers submitted in advance of the Workshop. All withdrew their support by its end.

