

Upholding Corporal Punishment: For Whose Benefit?

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I. INTRODUCTION

In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*¹ a divided Supreme Court of Canada upheld s. 43 of the *Criminal Code*.² Section 43 provides a defence to assault for parents, guardians and teachers who use reasonable force in disciplining children. Specifically, s. 43 provides:

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

The Court was divided 7:2 as to whether s. 43 violates the *Canadian Charter of Rights and Freedoms*³ (the “Charter”) in the context of parents and 6:3 in the context of teachers. The majority (per McLachlin C.J.) held that no Charter right is violated, whereas Mr. Justice Binnie held that s. 43 violates s. 15 of the Charter, but that it is a reasonable limit under s. 1, at least insofar as parents are concerned. Madam Justice Arbour and Madam Justice Deschamps each dissented; the former focussed on s. 7 of the Charter and the latter on s. 15. Both dissenting justices held that the violations could not be upheld under s. 1.

In the first section of this paper, we will examine in some detail the four judgments in this case. We will then set out why the majority decision is problematic not only in terms of the Charter analysis generally, but also more specifically on the issue of violence against children.

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¹ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 [*Canadian Foundation*].

² R.S.C. 1985, c. C-46.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.) 1982*, c. 11.

We will argue that the void for vagueness issue distracts attention from the real s. 7 concerns about why one could deny children security of the person simply because of the nature of parental and student-teacher relationships. Related to this position, we will argue that the majority treated s. 43 as if it were a limited offence of assault, rather than a defence. In doing so, it put the rights of the potential accused (*i.e.* parents and teachers) above those of potential victims (*i.e.* children). This creates a situation where it is almost impossible for the child/victim to challenge the defence. This transformation ties into the s. 15 analysis where we will argue that the majority, contrary to the instructions in the leading decision of *Law*,⁴ failed to look at s. 43 from the perspective of the child. Further, the Court failed to view the vulnerability of the child in its contextual analysis. It is precisely this vulnerability that demands special protection for children under s. 15. Finally, we will argue that certain parts of the analysis of the child's needs in the majority judgment are reminiscent of arguments made to privatize intimate violence and marital rape against women. We would have hoped that the struggle of the women's movement would have informed the majority's analysis here with a realization that the privatization of family violence in any context endangers the weaker members of that family.

In the following section we look at each of the judgments, beginning with the majority decision of Chief Justice McLachlin.

II. THE JUDGMENTS

A. The Majority and Section 7 of the Charter

The majority judgment found no *Charter* violation. The bulk of the majority judgment is devoted to s. 7, largely in response to Madam Justice Arbour's dissent, which held that the section is unconstitutionally vague. The majority agreed that s. 43 implicates security of the person, but not in a manner that is contrary to the principles of fundamental justice. The appellants put forward three potential ways in which the provision is contrary to the principles of fundamental justice: i) the principle that the child must be afforded independent procedural rights; ii) the principle that legislation affecting children must be in their best interests; and iii) the principle that criminal legislation must not be vague or overbroad.

With respect to providing procedural safeguards for the victim, McLachlin C.J. noted that our criminal justice system has not developed to the point of providing such protections for victims, a telling finding for this decision. Nonetheless, she held that even if the victim were entitled to such protection, the

⁴ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [Law] at para. 59.

Crown at trial would represent the child's interests, after the potential deprivation of the child's security had taken place.

The majority also rejected "best interests of the child"⁵ as a principle of fundamental justice. McLachlin C.J. pointed to the international *Convention on the Rights of the Child*,⁶ which describes the best interests of the child as "a primary consideration" instead of "the primary consideration." She made the same point with a quote from *Baker v. Canada*,⁷ a case dealing with humanitarian and compassionate reasons for a parent of Canadian-born children to become a permanent resident of Canada:

The decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.⁸

To demonstrate further that this principle is not always paramount, McLachlin C.J. provided the following example: a person who has been convicted of a crime may be sentenced to imprisonment even if it is not in the best interests of his or her child. As we will discuss below, this example is simply not on point because the law's connection to the child is too remote. It demonstrates a failure to understand how s. 43 directly implicates the physical security and the equality rights of the child.

Most of the majority's judgment was spent refuting the void for vagueness argument. The majority identified the components of s. 43 that are most unclear in scope: the idea that the force must be "by way of correction" and that it must be "reasonable under the circumstances." The majority noted that courts are often called upon to assess reasonableness in the context of criminal law defences. To give content to the reasonableness requirement, the majority created its own limits on the type and circumstances of force that will be justified based largely on the expert evidence at trial. The vital passage, which identifies the limits of reasonable corrective discipline, is worth quoting in full:

Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two

⁵ *Canadian Foundation*, *supra* note 1 at para. 8. The majority described the principles of fundamental justice as having three requirements: first that the principle be a legal principle; second, that there must be a consensus that the principle is vital or fundamental to our societal notion of justice and third, that the principle must be capable of being identified with precision and applied in a predictable way. The best interest principle failed the second and third criteria.

⁶ Can. T.S. 1992 No. 3, Art. 3(1).

⁷ [1999] 2 S.C.R. 817.

⁸ *Ibid.* at para. 75, *per* L'Heureux-Dubé J..

years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour. Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful. Corporal punishment which involves slaps or blows to the head is harmful. These types of punishment, we may conclude, will not be reasonable.⁹

These directions do not extend to teachers, who can apply force only to remove a child from a classroom or secure compliance with instructions. According to the majority, with these new limits, s. 43 is not too vague but “delineates a risk zone for criminal sanction.”¹⁰

B. The Majority and Section 15 of the Charter

McLachlin C. J. gave short shrift to s. 15. The majority acknowledged that the legislation does make a distinction on the basis of age, but found that there is no discrimination because of the correspondence between the provision and the needs of the child within a family unit. Essentially, the appellants argued that children do not receive the same protection from assault as do adults and this sends the message that children are “less capable, or less worthy of recognition or value as a human being”.¹¹ The majority dismissed this argument as being grounded in a formal equality perspective where “same” treatment is equated with equality. A substantive equality approach, by contrast, recognizes that s. 43 in fact “responds to the reality of [children’s] lives by addressing their need for safety and security in an age-appropriate manner.”¹²

In finding the distinction based on age non-discriminatory, the majority rejected the perspective of the child, which would “confront us with the fiction of the reasonable, fully apprised preschool-aged child.”¹³ Instead, it adopted the perspective of the “reasonable person acting on behalf of a child, who seriously considers and values the child’s views and developmental needs.”¹⁴ In the majority’s view, Parliament balanced the need of children to be safe from physical abuse and their need for guidance and discipline from parents and teachers. Force that physically harms children will not be protected, nor will violence resulting from a frustrated or angry parent. At the same time, according to the

⁹ *Canadian Foundation*, *supra* note 1 at para. 37.

¹⁰ *Ibid.* at para. 42.

¹¹ *Ibid.* at para. 50.

¹² *Ibid.* at para. 51.

¹³ *Ibid.* at para. 53.

¹⁴ *Ibid.* The court went on to note that “[t]o say this, however, is not to minimize the subjective component; a court assessing an equality claim involving children must do its best to take into account the subjective viewpoint of the child, which will often include a sense of relative disempowerment and vulnerability.”

majority, the provision ensures that the blunt instrument of criminal law will not swoop in and break up families as a result of reasonable force used legitimately as a tool for correction and education.

The majority extended this *in terrorem* argument even further. Without s. 43, “Canada’s broad assault law would criminalize force falling far short of what we think of as corporal punishment, like placing an unwilling child in a chair for a five-minute ‘time-out’.”¹⁵ The potential scope of criminalization was said to run the risk of “ruining lives and breaking up families—a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.”¹⁶

In essence, the majority stated that s. 43 was enacted for the child’s benefit. Its position was that children benefit from the educative value of reasonable corrective force and that s. 43 benefits children by protecting them from the rupture of their family, or the disruption of their education, if a parent or teacher is arrested, detained without bail and potentially imprisoned.¹⁷ Thus, s. 43 was found to be grounded in the needs and circumstances of children and, as such, could not be discriminatory.¹⁸

C. The Dissenting Judgments

Several dissenting judgments addressed many of our concerns about the majority judgment. We will highlight the important points from each judgment. Binnie J. dissented only in part. He found that s. 43 violated s. 15 of the *Charter* but that the violation, *vis-à-vis* parents only, was a reasonable limit under s. 1. In contrast, Binnie J. found that the violation of s. 15 by allowing teachers to use corrective force could not be upheld under s. 1. Deschamps J. found that there was a s. 15 violation that could not be upheld under s. 1 while Arbour J. held that there was a violation of s. 7, which also could not be saved by s. 1. We will begin with the Arbour J. dissent and then highlight the concerns raised by each Binnie and Deschamps JJ. under s. 15 before moving on to our own concerns with the majority position.

¹⁵ *Ibid.* at para. 62.

¹⁶ *Ibid.*

¹⁷ It is not clear why a teacher would be denied bail in such a circumstance and this example further demonstrates the approach of the majority in creating unlikely counter-factual scenarios to support its argument.

¹⁸ The s. 12 argument, concerning cruel and unusual treatment or punishment, is dealt with so summarily that it will not be addressed here. The majority concluded that reasonable corrective force could not “outrage standards of decency” and hence could not be cruel and unusual. It also raised a doubt, in the context of parents, that the “punishment” imposed implicates the state as an actor.

1. *Madam Justice Arbour: Void for Vagueness*

We begin with the Arbour J. dissent because it addressed the void for vagueness doctrine and is the judgment to which the majority directs most of its attention. Arbour J. concluded that s. 43 violates the rights of children to security of the person in a manner that is not consistent with the principles of fundamental justice because the phrase "reasonable in the circumstances" as applied in this context is unconstitutionally vague. She described the case law under s. 43 in some detail, demonstrating a lack of standards and consistency in its application. Many of the cases she described in which s. 43 was used successfully would not pass muster under the standards enunciated by the majority. She described cases where children were hit about the face,¹⁹ where implements/weapons were used,²⁰ where the children involved were under two years of age²¹ or teenagers²² and where more than transitory harm was inflicted,²³ thus demonstrating that the standards espoused by the majority are new and have not guided the interpretation of s. 43 in the past. Canadian courts, in Arbour J.'s view, have been unable to "articulate a legal framework for s. 43 despite attempts to establish guidelines."²⁴

Madam Justice Arbour conceded that reasonable force may be a meaningful standard in other contexts, such as self-defence. She distinguished such contexts from those where the rights of children are involved and thus a stricter standard may be necessary. She noted the great efforts to which the majority resorted to impose some degree of consistency:

In the Chief Justice's reasons, it is useful to note how much work must go into making the provision constitutionally sound and sufficiently precise: (1) the word "child" must be construed as including children only over age 2 and younger than teenage years; (2) parts of the body must be excluded; (3) implements must be prohibited; (4) the nature of the offence calling for correction is deemed not a relevant contextual consideration; (5) teachers are prohibited

¹⁹ *R. v. Wetmore* (1996), 172 N.B.R. (2d) 224 (Q.B. (T.D.)); *R. v. James*, [1998] O.J. No. 1438 (QL) (Prov. Div.); *R. v. Wood* (1995), 176 A.R. 223 (Prov. Ct.).

²⁰ *R. v. G.C.C.* (2001), 206 Nfld & P.E.I.R. 231; *R. v. Fritz* (1987), 55 Sask. R. 302; *R. v. Bell*, [2001] O.J. No. 1820 (QL); *R. v. L.A.K.* (1992), 104 Nfld & P.E.I.R. 118 (Nfld. Prov. Ct.); *R. v. Robinson*, [1986] Y.J. No. 99 (QL) (Terr. Ct.).

²¹ *R. v. Atkinson*, [1994] 9 W.W.R. 485 (Man. Prov. Ct.).

²² *R. v. Pickard*, [1995] B.C.J. No. 2861 (QL); *R. v. Holmes*, [2001] Q.J. No. 7640 (QL) (C.S.); *R. v. Harriot* (1992), 128 N.B.R. (2d) 155 (Prov. Ct.).

²³ *R. v. Graham* (1995), 160 N.B.R. (2d) 273 (Prov. Ct.); *R. v. Goforth* (1991), 98 Sask. R. 26 (Q.B.); *R. v. Wheeler*, [1990] Y.J. No. 191 (QL) (Terr. Ct.); *R. v. V.L.*, [1995] O.J. No. 3346 (QL) (Prov. Div.).

²⁴ *Canadian Foundation*, *supra* note 1 at para. 181.

from utilizing corporal punishment; and (6) the use of force that causes injury that is neither transient nor trifling (assault causing bodily harm) is prohibited (it seems even if the force is used by way of restraint). At some point, in an effort to give sufficient precision to provide notice and constrain discretion in enforcement, mere interpretation ends and an entirely new provision is drafted.²⁵

Arbour J. also noted that Canada's international treaty obligations are consistent with invalidating s. 43.²⁶

She thus concluded that the phrase "reasonable under the circumstances" is void for vagueness. She dismissed the s. 1 argument because a law that is unconstitutionally vague cannot meet the s. 1 threshold standard of "prescribed by law". Arbour J. determined that the best remedy was to strike down the whole provision because Parliament is the more appropriate forum for considering all the interests involved when deciding whether to re-draft and re-enact a new provision.

In Arbour J.'s view, striking down s. 43 would not leave parents and teachers open to criminal prosecution for the slightest use of force with children. In her view, parents and teachers facing such prosecutions could rely upon the defences of necessity and *de minimis*.²⁷

2. Mr. Justice Binnie

Mr. Justice Binnie also found a s. 15 violation because s. 43 denies children protection from physical violence and thus treats them as second-class citizens, stripping them of their dignity: "[T]here can be few things that more effectively designate children as second-class citizens than stripping them of the ordinary protection of the assault provisions of the *Criminal Code*."²⁸ He found protection of physical integrity against the use of unlawful force to be a fundamental value

²⁵ *Ibid.* at para. 190.

²⁶ The *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland* criticized a similar provision, arguing that such a provision should be abolished and not revised. The Committee's *Concluding Observations on Canada's First Report on the Rights of the Child* state clearly that s. 43 should be abolished in the name of a child's right to physical integrity and the best interests of the child: Committee on the Rights of the Child, Report adopted by the Committee at its meeting on 9 June 1995, Ninth Session, CRC/C/43, at para. 93.

²⁷ While we agree with Arbour J.'s conclusion we have some difficulty with this part of her argument. The necessity defence is a very narrow defence and is only available under very strict conditions (See *R. v. Latimer*, [2001] 1 S.C.R. 3). It might cover the situation, for example, where a child runs out onto the street and has to be forcefully pulled back. It would not provide a defence to the majority of cases involving corporal punishment of children. Furthermore, the *de minimis* principle, while perhaps strictly speaking is available, is not a defence for which we could find any strong case authority.

²⁸ *Canadian Foundation*, *supra* note 1 at para. 72.

that is applicable to everyone, child or adult. Binnie J. doubted the necessity of correcting children with conduct that would otherwise constitute common assault:

I do not accept that the use of force against a child (that in the absence of s. 43 would result in a criminal conviction) can be said to “correspond” to a child’s “needs, capacities and circumstances” from the vantage point identified by the Chief Justice, namely, that of a “reasonable person acting on behalf of a child, who seriously considers and values the child’s views and developmental needs.”²⁹ [emphasis *per* Binnie J.]

One of Binnie J.’s concerns with the majority judgment was the way the majority used social considerations at the s. 15 equality stage of the analysis (where the applicant has the burden of proof), rather than at the s. 1 stage (where the state has the burden of proving that social concerns outweigh individual rights).³⁰ He described the problem as follows:

While the child needs the family, the protection of s. 43 is given not to the child but to the parent or teacher Section 43 protects parents and teachers, not children. A child “needs” no less protection under the *Criminal Code* than an adult does. That is why, in my view, the social justification for the immunity of parents and teachers should be dealt with under s. 1.³¹

Mr. Justice Binnie, in accord with the other dissenting judges, was troubled by the degree to which the majority re-wrote the legislation to meet the constitutional standard:

The fact that the Chief Justice finds it necessary to undertake an interpretive exercise that reads into s. 43 multiple sub-classifications of children (according to age) and assault behaviour (according to type) shows that a “one size fits all” approach to the “needs, capacities and circumstances” of children does not fit reality. Such an extensive “reading in” exercise if appropriate, should take place only after an infringement of s. 15(1) is acknowledged, and the Court turns to the issue of the s. 1 justification and the appropriate remedy.³²

²⁹ *Ibid.* at para. 102.

³⁰ Binnie J. cautioned that this factor in the s. 15 analysis risks bringing back the old “relevance” analysis from the *Egan* trilogy. Under that analysis, there was no violation of s. 15 if the personal characteristic involved in the impugned legislation was functionally relevant to the fundamental values of the law’s purpose. Because this test required an assessment of the purpose of the law at the s. 15 stage, it blurred the line between s. 15 considerations and s. 1 justifications, where the government must prove that the objective of the legislation is pressing and substantial. This test was first introduced by Gonthier J. in *Miron v. Trudel*, [1995] 2 S.C.R. 418 and was later applied in *Egan v. Canada*, [1995] 2 S.C.R. 513 and *Thibaudeau v. R.*, [1995] 2 S.C.R. 627.

³¹ *Canadian Foundation*, *supra* note 1 at para. 100.

³² *Ibid.* at para. 103.

Mr. Justice Binnie J. then turned his attention to the issue of dignity, upon which the Court's resolution of a s. 15 issue is usually based. Corporal punishment was described as being an inherent violation of the child's dignity "partly due to the humiliation he or she is likely to feel, but mainly due to the lack of respect inherent in the act."³³

It is surprising, given the strength of his rhetoric under s. 15, that Binnie J. found s. 43, as it applies to parents, to be a reasonable limit under s. 1 of the *Charter*. His finding was largely based on the very broad definition of assault, which includes threatened physical force, not just actual force. He found that it could be legitimate for Parliament to conclude that state intervention in correction of children would interfere with the resolution of problems within the family. Again we are presented with a scenario that lacks credibility as an example of the kind of force that would be subject to criminal sanctions in the absence of s. 43:

[A] father would assault his daughter if he attempted to place a scarf around her neck to protect her from the cold but she did not consent to that touching, thinking the scarf ugly or undesirable....³⁴

In what appears to be quite a turn-around from his position under s. 15, Binnie J. concluded:

To deny children the ability to have their parents or persons standing in their parents' place, to be successfully prosecuted for reasonable corrective force under the *Criminal Code* does not leave them without effective recourse. It just helps to keep the family out of the criminal courts. In my view, s. 43 in relation to parents and persons standing in their place is justified on this basis.³⁵

Thus, the central difference between his judgement and that of the majority seems more structural than substantive: that the social values at stake should be considered under s. 1 and not under s. 15. What remains of dignity is unclear.

Binnie J. took a very different approach to teachers under s. 1. He likened the pupil/teacher relationship to one of an apprentice and master and distinguished it from that of child and parent on the basis that the parent/child relationship is usually a loving one. He found that giving teachers immunity from assault is not a proportionate response to the need to maintain order in the classroom.

³³ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Corporal Punishment as a Means of Correcting Children*, (November 1998) at 8.

³⁴ *R. v. Jobidon*, [1991] 2 S.C.R. 714 at 743-744, cited by Gonthier J. in *Canadian Foundation*, *supra* note 1 at para. 117.

³⁵ *Canadian Foundation*, *supra* note 1 at para. 124.

3. *Madam Justice Deschamps*

Deschamps J. found that the distinction between children and adults created by s. 43 is discriminatory, noting that the historical vulnerability of children is based on the traditional treatment of children as the property of their parents. Section 43, in her view, reinforces this notion by withdrawing from children the protection of the criminal law. Because the accused is the one with the control and trusteeship of the child, she found this section to exacerbate the already vulnerable position of children.

Unlike the majority judgment, which barely addresses literature on the effectiveness of using force in disciplining a child, Deschamps J. cited the finding of the trial judge that the only benefit of spanking is short-term compliance. More serious uses of force are not only unhelpful in educating children, they are potentially harmful to their health and development:

It cannot be seriously argued that children need corporal punishment to grow and learn. Indeed, their capacities and circumstances would generally point in the opposite direction—that they can learn through reason and example while feeling secure in their physical safety and bodily integrity.³⁶ Section 43 “compounds the pre-existing disadvantage of children as a vulnerable and often powerless group whose access to legal redress is already restricted.”³⁷

Deschamps J. went on to conclude that s. 43 is not a reasonable limit under s. 1 of the *Charter*. In evaluating the legislature’s objective, she stressed that s. 43 is not about child protection. Rather, it is about protecting parents and teachers. Nonetheless, in light of the importance of the family unit, she found a compelling objective in providing parents and teachers with flexibility in the exercise of child rearing.

The rational connection test is easily passed when the objective is defined in this way. Section 43 obviously enhances the authority of parents and teachers. She held, however, that s. 43 fails the minimal impairment branch of the s. 1 inquiry. Because the infringement of s. 15 deals with the physical integrity of a group as vulnerable as children, she concluded that the approach to this part of the test should not be overly deferential. She found s. 43 to be over-broad in the scope of its protection, noting that it is the only section in the *Code* that provides a defence to a criminal charge on the basis that the victim is a member of an enumerated ground in s. 15.

With respect to proportionality, Deschamps J. found that it would take a very compelling objective to justify the serious violation of the rights of children as it is precisely when violence against children is at issue that the criminal justice system should become involved. According to Deschamps J., s. 43 sends the

³⁶ *Ibid.* at para. 230.

³⁷ *Ibid.* at para. 231.

troubling message that children are less worthy of protection from assault than others.

III. OUR CRITIQUE OF THE MAJORITY JUDGEMENT

What went wrong in the majority judgment? Our first and central point is that this case ignores, distorts or marginalizes the perspective of the child, both in its s. 7 and s. 15 analyses. In our opinion the case should have been decided under s. 15 as a denial of equal protection under the law. Section 43 permits violence against children because children are in a relationship of dependence and vulnerability vis-à-vis their parents and teachers. Deference to parents using corporal punishment against children does not hold families together. The absence of the child's perspective is also evident in the s. 7 analysis through the dismissal of "best interests" as a principle of fundamental justice.

Second, we will argue that the void for vagueness argument under s. 7 is flawed and cannot stand on its own without relying on the violation of the s. 15 right to equal protection. Void for vagueness, we will argue, is not a doctrine designed to protect potential victims of crime. Rather it is a doctrine designed to protect those accused of crime from the unfettered discretion of the state.

The focus on void for vagueness is simply one manifestation of the majority's tendency towards portraying s. 43 as if it were a qualified offence of assault rather than a defence. This shifts the concern from the rights of the child to the rights of the accused. In our view, the vagueness argument distracts attention from the degree to which children are entitled to have the security of their person protected from violence.

Finally, much of the majority's s. 15 analysis is premised on the importance of protecting the integrity and privacy of the family. Such views are reminiscent of arguments that violence against women was a private family matter that should not engage the intervention of criminal law. The impact of this view on women has been well documented. We had hoped that we had learned from our mistakes.

A. Section 7

In our view, this case should have been decided under s. 15 as an equality issue. Equality is the concept that lies at the core of the problem with s. 43: its failure to protect children equally from assaults. We also think that the s. 7 claim could have been successful, but for different reasons than those of *Arbour J.* in dissent. Section 43 threatens the security of the person of children in serious and profound ways that are not in their best interests. That alone should have been enough to demonstrate the unconstitutionality of the provision.

Because the dissent of *Arbour J.* found a s. 7 violation based on the "void for vagueness" doctrine, the bulk of the majority's s. 7 argument was spent respond-

ing to the vagueness argument. Thus, it is important to address that argument in some detail here.

Void for vagueness is a doctrine developed primarily to protect accused persons from legislation that is so unclear that it fails to give proper warning about the scope of criminalized behaviour. The rationale for the doctrine of void for vagueness is that a provision must provide an adequate basis for legal debate and that statutory provisions must curtail the scope of discretion for those enforcing the law, be they legislators, police or judges. In other words, clarity is needed both for those subject to the law and those who are asked to enforce it. The law is too vague if "the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances".³⁸ As *Grayned v. City of Rockford*, an American case cited by the majority, noted,

A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for the law enforcement officers and judges to determine whether a crime has been committed. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."³⁹

In the criminal context, the challenges based on vagueness are almost exclusively brought by the accused.⁴⁰ The accused challenges a substantive offence, arguing that the scope of the offence is not sufficiently clear as to know what conduct is criminalized.⁴¹

Vagueness usually arises in cases where the net of criminal liability is allegedly too wide. Here, by contrast, we have a victim saying that the defence is too

³⁸ *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 983. The leading case on void for vagueness is *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 [*Nova Scotia Pharmaceutical Society*].

³⁹ 408 U.S. 104 (1972) at 109, cited in *Canadian Foundation*, *supra* note 1 at para. 16.

⁴⁰ See e.g. *Nova Scotia Pharmaceutical Society*, *supra* note 38 and *R. v. Heywood*, [1994] 3 S.C.R. 761.

⁴¹ The only case that we can find that is anything close to a victim raising the doctrine is in the civil case of *French Estate*, although the case did not involve a challenge to a defence. The parents of two of Paul Bernardo's victims did not want the public to hear the audio portion of pornographic tapes of the brutalization and torture of their daughters. They challenged the constitutionality of s. 486(1) of the *Criminal Code*, arguing that the "public morals" exception to the open court principle under the section should be void for vagueness. They also argued that such pornography was contrary to the rights of women and children under s. 15 of the *Charter*. The Ontario Court of Appeal rejected both arguments. Mr. Justice Moldaver concluded that "public morals" was not too vague because the concept was linked to serious harm to society and that violation of the s. 15 rights of women and children would be an example of the type of harm that could be taken into account: *French Estate v. Ontario (Attorney General)* (1998), 157 D.L.R. (4th) 144 (Ont. C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 139 (QL) [*French Estate*].

broadly cast and, correspondingly, that the range of criminal liability is too *narrow*. The argument is that s. 43 provides too much protection for parents and teachers because “reasonableness” and “correction” do not sufficiently limit the scope of the defence. Defences, by definition, need to leave room for determinations of reasonableness based on the circumstances of the accused in each case. Defences, perhaps unfortunately, are not generally designed to protect victims. Nor is there any guarantee that each defence will clearly delineate the range of its exculpatory power.⁴²

The majority’s focus on void for vagueness reflects its tendency to portray s. 43 as a limited *offence* of assault rather than as a *defence* to assault. The majority fails to recognize this, as evidenced by the fact that it puts new limits on the scope of s. 43 without acknowledging that, in doing so, it is significantly widening the scope of criminal liability. Invalidating s. 43 would also widen the scope of criminal liability, but it would have done so in accordance with the Court’s mandate under s. 52 of the *Constitution Act*. To simply impose new limits on a defence, with no clear support in the jurisprudence, effectively means the crime of assault has been widened for parents and teachers. Rather than finding s. 43 too vague and then reading it down, the majority read it down first and then concluded it is not too vague. The majority suggested that the section has clear limits, but then proceeded to make up those limits and define “reasonableness” for future cases, victims and future accused based on the expert evidence at trial.

The power of Arbour J.’s dissent lies in the degree to which it demonstrates that the limits imposed by the majority are not based on the s. 43 case law. Arbour J. stated that it is “wholly unpersuasive for this Court to declare today what the law is *de novo* and to assert that this now frames the legal debate: *i.e.*, anything outside the framework was simply wrongly decided!”⁴³

In response to the criticism that it re-wrote the legislation in order to save it from the vagueness attack, the majority asserted that it simply engaged in “judicial interpretation” based on the evidence presented at trial—a common practice given “the number of criminal *offences* conditioned by the term ‘reasonable.’”⁴⁴ The majority failed to note that the evidence used in this case to define

⁴² A defence which is not available to a large group of those accused who might avail themselves of the defence may, however, be invalid, see e.g. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

⁴³ *Canadian Foundation*, *supra* note 1 at para. 181.

⁴⁴ *Ibid.* at para. 43 [emphasis added]. Ironically, defences are in fact just as likely to use the word “reasonable” as are offences and yet the majority is still stuck in the language of offences. (See, for example, *Criminal Code* ss. 34, 35 (self defence) and 232 (provocation, which uses the “ordinary” person instead of the “reasonable person”) as well as the common law defences of necessity and duress.)

“reasonableness” will be used to bind police, prosecutors and judges in future cases as well. Contrary to the majority’s suggestion, reasonableness is usually considered on a case-by-case basis and is influenced by the evidence and by the perceptions and circumstances of the accused rather than delineated in advance by the Supreme Court of Canada.

In our view, a void for vagueness challenge based on the *Charter* does not invite a court to rewrite entirely the limits of the law based on the expert evidence presented. Arbour J. argued that, in order to expand the scope of criminal liability, as the majority did, it must be in the name of “higher constitutional imperatives.”⁴⁵ But the majority did not acknowledge such an imperative, and “[t]o essentially rewrite it before validating its constitutionality is to hide the constitutional imperative.”⁴⁶

The most compelling s. 7 argument presented by the appellants, although not without its own difficulties, was the suggestion that “best interests of the child” is a principle of fundamental justice. This argument was quickly dismissed by the majority and not picked up on by the dissenting justices who, with the exception of Arbour J., focused on s. 15. We would assert that a law that allows violence against children (thus limiting their security of the person) must be interpreted with the best interests of children as the guiding principle (a principle of fundamental justice).

The majority’s dismissal of “best interests” as a principle of fundamental justice is especially puzzling in light of the Court’s decision in *Eaton*,⁴⁷ where the Court disagreed with parents who asserted that access to integrated education was guaranteed as an aspect of the equality rights of their daughter, who had significant disabilities.⁴⁸ The Court found it was not in Emily Eaton’s best interest to be in a regular class. The relationship between equality rights and best interests insofar as children are concerned was not seriously considered. Rather, the case was decided on the basis of the best interests of this individual child, which led to her being denied access to the same education to which typical students are entitled. The primacy of the best interests of the child in the *Eaton* analysis stands in sharp contrast to its dismissal as a principle of fundamental justice in *Canadian Foundation for Children, Youth and the Law*.

⁴⁵ *Canadian Foundation*, *supra* note 1 at para. 138.

⁴⁶ *Ibid.* at para. 139.

⁴⁷ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [*Eaton*].

⁴⁸ Almost inevitably, the Court’s attitude to the particular parents is relevant to cases about their children. For example, the overall orientation to the *Eaton* parents, where the equality claim was denied and the case decided on the best interests principle, was somewhat negative. In *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, the mother’s application to sterilize her adult daughter was denied. The Court decided that it was the mother’s own interest that motivated her application.

The Supreme Court has yet to determine the relationship between the constitutional guarantee of equality and the best interests principle, the latter of which is inherently individualistic. However, we believe that best interests is a principle of fundamental justice where violence against children is concerned.⁴⁹ If physical discipline were legitimate, one would expect the empirical studies to show that physical punishment had a positive effect on children or, at the very least, no negative effects. In Professor McGillivray's view, the best cumulative analysis of long term studies shows that mild and moderate physical punishment puts children at increased risk for problems in childhood and predisposes them to violence as adolescents and adults.⁵⁰ Other studies indicate a strong connection between incidents that begin as discipline and develop into abuse. The process appears to be that both children and parents become habituated to punishment, thereby requiring an escalation. According to McGillivray, "Moderate correction escalates by incremental stages into abuse. There is no dividing line."⁵¹

In various contexts, the Court has decided that parental rights do not trump the best interests of the child.⁵² In our view, it does not make sense to reject equality in an educational context in favour of best interests, as was done in *Eaton*, only to deny that best interests is a principle of fundamental justice in cases of assault against children.

The example given by the majority to justify rejecting best interests as a principle of fundamental justice is unpersuasive at best—that when we imprison someone for committing a crime, that imprisonment indirectly hurts the accused's children. This is advanced as proof that laws need not comply with the best interests of children. In our view this example is flawed. If s. 43 is to be justified under s. 7, the argument should have been based on an example that addresses how a law relating *directly* to violence against children need not be in their best interest.

When reading this case, one senses that the appellants knew there was something wrong with this legislation under s. 7 but couldn't find the right hook to hang it on—*i.e.* there is no clearly established principle that would lead to its invalidation under s. 7. It is extremely difficult to conceptualize a successful ar-

⁴⁹ Anne McGillivray, "Child Physical Assault: Law, Equality and Intervention" (2004) 30 *Man. L.J.* 133 at 160 [McGillivray, "Child Physical Assault"] makes a similar point, that best interests is "...a principle running through Canadian and international law, suggesting that it may be a new principle of fundamental justice."

⁵⁰ *Ibid.* at 150.

⁵¹ McGillivray, *ibid.*, points out that this experience is eventually considered to be normal by the child and perpetuates intergenerational cycles of intimate violence.

⁵² See e.g. *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [B.(R.)] and *R. v. Jones*, [1986] 2 S.C.R. 284.

gument by the victims of s. 43 because s. 7 doctrine has not developed in a manner that recognizes victims' rights. By placing the burden of proof on the victim to show that a principle of fundamental justice is violated, rather than on the State to show why it is permissible to assault children with impunity, the challenge becomes exceedingly difficult.

B. Section 15

The majority judgment on s. 15 was perhaps most notable for its brevity. Section 15 equality challenges have become increasingly complex and, at times, formulaic despite cautions to the contrary. In this case, the analysis is neither complex nor formulaic. The majority's s. 15 argument refused to look at both the perspective of the child and the context in which children experience the application of force, which includes children's vulnerability to violence and abuse from within their family. Most parents do not abuse their children, but it is common enough to create a real concern about the vulnerability and powerlessness of the child within the family.

The current general approach to equality as outlined in *Law*⁵³ is well-known. The court must determine:

- whether a law imposes differential treatment between the claimant and others, in purpose or effect;
- whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
- whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

All of the Justices conceded that s. 43 draws a distinction based on age, an enumerated ground under s. 15. The determining factor was the third stage of the *Law* test, whether this distinction is discriminatory and denies children their "dignity", which has become the pinnacle of a s. 15 analysis.

We have two related concerns about the majority's s. 15 analysis of discrimination: first, we believe the majority erred in not looking at the case from the perspective of the potential claimant in the case: the child. Second, we believe the Court failed to engage in the complex contextual analysis that was called for in this case. It is true that a child is a member of a family, and true that criminal law should only rarely intervene in families. It is also true, however, that the Court must be alive to those (not so rare) instances where the child is victimized in his or her family. These are the instances where the intervention of the criminal law is essential. The child is, without question, the most powerless member of a family and the one with the most limited access to outside protection.

⁵³ *Law*, *supra* note 4.

1. No Subjective Perspective

Law held that the proper starting point of the discrimination inquiry is the perspective of the claimant. That is, "Whether legislation has the effect of demeaning a claimant's dignity must be conducted from the perspective of the claimant."⁵⁴ In this case the majority quickly rejected the perspective of the "fiction of the reasonable, fully apprised preschool-aged child."⁵⁵ It is true that the subjective dimension of dignity must always be followed by an objective assessment, but here the majority dismissed the possibility that a child could have a valid perspective. In this case the objective standard is a reasonable person who seriously considers the perspective of the child and his or her developmental needs, taking into account the child's feelings of disempowerment and vulnerability. This reasonable person sounds very much like a parent or a teacher, the very person from whom the child may need protecting. The effect is that the perspective of the child is substituted for that of the potential accused in a case where s. 43 is in issue. Discounting the child's perspective and replacing it with the adult perspective in these circumstances trivializes the child's sense of relative disempowerment and vulnerability. It is this very sense of disempowerment and vulnerability that is exacerbated by excluding children from the usual assault provisions of the *Criminal Code*.

Rejecting the subjective perspective in this case raises significant questions about equality rights for children in a more general sense. Again we see the majority using extreme examples. The fiction of the "reasonable, fully apprised preschool child" does not cover the situation of older children. Why would the reasonable adult necessarily replace the perspective and voice of the older child in this context? Furthermore, what does dignity mean for children? How are the special conditions of childhood, such as dependency and incapacity, factored into equality claims? The interest at stake here is a distinction in the *Criminal Code* that goes directly to the physical integrity of children in their family. If there is a presumption that children are not capable of asserting that their dignity is infringed in these circumstances because they do not know what is best, we cannot imagine in what circumstances their perspective would be considered.

Cases involving children reflect a tension between two dominant ideas about childhood that are especially problematic in this case. The first idea is that children are vulnerable beings with diminished capacity who need protection as they evolve into adulthood. With this view of childhood, the perspective of children is less important than that of an adult who has more knowledge and experience. The second idea is that children have rights, with some amount of autonomy depending on their age, and have some say in their lives, including

⁵⁴ *Ibid.* at para. 59.

⁵⁵ *Canadian Foundation*, *supra* note 1 at para. 53.

an assertion of their rights.⁵⁶ Building on the first idea that children need protection, the majority portrays children as evolving beings whose perspective is valued little, who require the guidance of their parents in development, and who are vulnerable in their reactions to family intrusions by the criminal justice system. In other circumstances the Court has acknowledged that the state must impinge on parental authority to protect children from danger.⁵⁷ However, the substantive law that the majority upholds in this case removes criminal law protection from children, thereby obviously increasing their general vulnerability. In short, the majority says it is protecting children by removing the protections of the *Criminal Code*.⁵⁸ The second idea, that children have rights, is the basis of the equality claim. This is rejected or totally lost in the decision of the majority.

2. Weak Contextual Analysis

As set out in *Law*, the discrimination inquiry requires a contextual analysis to assist in determining “whether a violation of human dignity has been established, in light of the historical, social, political and legal context of the claim.”⁵⁹ *Law* suggests four important factors to assist with an analysis of the discrimination inquiry: i) the nature and the scope of the interest; ii) correspondence with the needs, capacities and circumstances of the claimant; iii) pre-existing vulnerability, disadvantage or stereotyping; and iv) the ameliorative purpose or effect of the impugned legislation. These factors are not written in stone, but depend very much on a contextual approach to the discrimination inquiry. *Law* specifically recognizes that there are undoubtedly other factors, that not all factors will be relevant in every case, and that these guidelines are reference points only.

The majority did not use the contextual approach recommended in *Law*, but conducted the discrimination analysis in a mechanical way⁶⁰ by fastening onto the correspondence between the legislative distinction between children

⁵⁶ For discussions about changing and competing ideas about childhood see for example, Chris Jenks, ed., *The Sociology of Childhood: Essential Readings* (London: Batsford, 1982) and Philip Veerman, *The Rights of the Child and the Changing Image of Childhood* (Dordrecht: Martinus Nijhoff, 1992).

⁵⁷ *B. (R.)*, *supra* note 52 at 433, *per* Iacobucci and Major JJ..

⁵⁸ Put another way, the burden for children created by the availability of a s. 43 defence is cloaked as a benefit. Characterizing “burden-imposing” legislation as “protective” may make it more difficult to establish discrimination. See Jennifer Koshan, “Alberta (Dis)Advantage: The Protection of Children Involved in Prostitution Act” (2003) 2 J.L. & Equality 246.

⁵⁹ *Law*, *supra* note 4 at para. 83.

⁶⁰ The Court specifically warned against the mechanical application of the *Law* test in *Love-lace v. Ontario*, [2000] 1 S.C.R. 950 at para. 54.

and adults and the lives of children. The correspondence factor, although problematic nonetheless,⁶¹ demands more. Its use here is inappropriate because it only examines a small part of the context of the lives of children. The majority focused on the role of a child in a model family where the parents decide when physical discipline is appropriate and when it is not. The majority does not take into account the vulnerability of children within their families, the unequal power relationships within families and the inaccessibility of family dynamics to public view.

Obviously the nature of the interest here—the protection of bodily integrity—is profound. In *Gosselin*⁶² the Court held, “The more important the interest that is affected by differential treatment, the greater the chance that such differential treatment will threaten a group’s self-worth and dignity.”⁶³ In our opinion a proper contextual analysis would, in evaluating any correspondence issues, be mindful of the significance of the interest that is at stake in this case: physical integrity. The majority discounted the argument that children and adults should have the same protections of the Criminal Code, saying that this is a formal equality argument, an approach consistently rejected in Canada. Here the majority ignored the fact that withdrawing the protection of the Criminal Code provisions has starkly similar effects on the dignity of all victims, be they adults or children. Presumably, however, there would be no question about the equality violations of a Criminal Code provision that said a man was allowed to assault his wife when it was reasonable and for correctional purposes only. We doubt the Court would dismiss a challenge to such a law by saying that it was formal equality (only) to suggest that a woman has the same interest in protecting the integrity of her person as does a man.

Law warns specifically that the mere fact that the impugned legislation contemplates the real lives of persons like the claimant will not be sufficient to defeat a s. 15(1) claim but rather “[t]he focus must always remain upon the central question of whether viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human

⁶¹ The correspondence factor brings some of the same problems as the old “relevance” test where a s. 15 claim could be defeated by the claimant failing to establish that the impugned legislation was not relevant to a valid governmental objective, a factor more appropriately considered under s. 1 where the government has the burden of proof. See Donna Greschner, “Does *Law* Advance the Cause of Equality?” 27 *Queen’s L.J.* 299 at 307; Beverley Baines, “*Law v. Canada: Formatting Equality*” 11 *Const. Forum* 65 at 70–73; June Ross, “A Flawed Synthesis of the Law” 11 *Const. Forum* 74 at 82–3; Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals” 80 *Can. Bar Rev.* 299 at 327–328.

⁶² *Gosselin v. Quebec (A.G.)*, [2002] 4 S.C.R. 429 [*Gosselin*].

⁶³ *Ibid.* at para. 251.

dignity.”⁶⁴ McGillivray argues that historically, the purpose of corporal punishment has been to effect an affront to dignity. The objective of physical punishment went beyond a specific misdeed, but was seen to be an essential element of the socialization of children.⁶⁵ More specifically, “Like breaking horses and hunting hawks, children’s wills were to be broken by assault to spur obedience, learning and right behaviour.”⁶⁶ The underlying purpose of physical punishment was to degrade and humiliate, the very antithesis of equality. We agree with Binnie J. that the absence of protections against assault violates dignity no matter what the age of the victim: “Such stripping is destructive of dignity from any perspective, including that of a child.”⁶⁸

Thus, a true contextual analysis would look at correspondence as only one factor to assist with the discrimination inquiry. More importantly, correspondence would involve a more complex understanding of the realities of children’s lives.

3. *The Privatization of Violence Against Children*

For many years feminists have argued that law is implicated in family violence. In particular, law sustains the division between the private realm of the family and the public activity of the state to buttress the family as a primary site of women’s oppression, characterized by patriarchal arrangements⁶⁹ and male violence.⁷⁰

The same idea underlies this case. Section 43 exists to allow the child to grow up under the guidance of her parents, within a private autonomous family unit and without state interference in the process. What may be criminal behaviour in the public sphere is acceptable in the private family context between parent and child as a means of teaching and disciplining children. Where con-

⁶⁴ *Law*, *supra* note 4 at para. 70.

⁶⁵ Anne McGillivray, “He’ll learn it on his body: Disciplining Childhood in Canadian Law” (1998) 5 *Int’l J. Child. Rts.* 195.

⁶⁶ McGillivray, “Child Physical Assault”, *supra* note 49 at 136.

⁶⁷ Canadian Foundation, *supra* note 1 at para. 72.

⁶⁸ The influence of law is particularly problematic when a crime is gendered or based on a relationship between family members who have different vulnerabilities and power, such as the former definition of rape.

⁶⁹ Catherine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989); Frances Olsen, “The Myth of State Intervention in the Family” (1985) 18 *U. Mich. J.L. Ref.* 835; Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988); Ruth Gavison, “Feminism and the Private-Public Distinction” (1992) 45 *Stan.L.Rev.* 1.

flicts exist, disagreements should be worked out within the family itself, rather than involving any state intervention. This strong idea about the privacy of family dynamics is consistent with findings that there is both a weak police response to domestic violence, a tendency for charges not to be laid in these cases, or to later stay such charges.⁷¹ A major effort of feminist law reform has been devoted to bringing the problem of violence against women out of the private sanctum of the family to be made visible and dealt with in the public sphere.⁷² Bringing cases of intimate violence into the criminal courts instead of family courts is just one part of this effort.

The justifications for using force with children are virtually identical to those made in the past for husbands using force against their wives. Originating in ideas that made women and children the property of husbands or fathers (an idea referred to by Deschamps J.), law validated the use of force for guiding, correcting or disciplining wives in the domestic context. According to Blackstone's *Commentaries on the Laws of England*:

The husband...might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children.⁷³

The same tension between the privacy of families and state responsibility for children is evident in the Court's decision in *K.L.B.*,⁷⁴ a case addressing the responsibility of the British Columbia government for the physical and sexual abuse of adult plaintiffs when they were children in foster care. In that case the Court found that the government was not vicariously liable for the abuse. McLachlin C.J., wrote that:

Foster families serve a public goal—the goal of giving children the experience of a family, so that they may develop into confident and responsible members of society. However, they discharge this public goal in a highly independent manner, free from close government control.⁷⁵

⁷¹ Dianne L. Martin & Janet E. Mosher, "Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse" (1995) 8 C.J.W.L. 3.

⁷² Dawn Currie, "Battered Women and the State: From the Failure of Theory to a Theory of Failure" (1990) 1 J. Human Justice 77; Gillian Walker, *Family Violence and the Women's Movement: the conceptual politics of struggle* (Toronto; Buffalo: University of Toronto Press, 1990).

⁷³ *Blackstone's Commentaries on the Laws of England*, 15th ed., vol. 1 (London: Strahan, 1809) at 444.

⁷⁴ *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403 [K.L.B.].

⁷⁵ *Ibid.* at para. 23.

Having to check with government on everyday matters, the Court noted, would detract from the family's ability to provide the family context needed by foster children. Not only would this be impractical, it would undermine the authority of the foster family.⁷⁶ It is important for foster families to "deal with day-to-day challenges and problems by working them out within the family, and by sharing responsibility for doing this, demonstrating to foster children that it is possible to resolve difficulties by working together."⁷⁷

In both *K.L.B.* and the present case, the state is kept out of homes that may potentially be dangerous to children because parents must be free to raise their children without the complications that arise from state involvement. Overall this privatization is seen as a great benefit to children. The irony is that both cases deal with significant risks to the safety and security of children. In other situations, such as regarding educational decisions for a child with a disability in *Eaton*⁷⁸ or health care decisions in *B.(R.)*,⁷⁹ the Court has been quite willing to encroach on family privacy in the name of the child's best interests. but here it rejects best interests as a principle of fundamental justice. In this case, the majority judgment underscores the powerlessness of children in the context of family violence and reinforces the privacy of this sphere. The impact of the position of the majority is to condone physical discipline by parents and to justify its use in the family precisely so the law will not intrude on the private realm of family dynamics. Just as society was unaware of the extent of violence against women because of its private nature, the majority's decision in this case both defends and locks away potential violence against children.

IV. CONCLUDING COMMENTS

This case raises significant questions about s. 15, questions which need to be addressed in future papers. First, the case illustrates the difficulties of a s. 15 claimant's perspective in the criminal law context, particularly where the challenge is brought by a victim. In this case, the victim is defined quite narrowly: the child in relation to parents or teachers. The case is about a defence, always

⁷⁶ McLachlin C.J.'s finding on vicarious liability is based on tort principles derived in a commercial context. In a separate judgement Arbour J. found that the government is vicariously liable because the factors relevant to this inquiry should include the victim's and the community's reasonable perception of who is ultimately responsible for the safety of children in foster care, something irrelevant to the commercial context. While Arbour J. found that the plaintiffs made out a successful claim of vicarious liability, she agreed with McLachlin C.J. that the claim was barred by a limitation period.

⁷⁷ *K.L.B.*, *supra* note 74 at para. 24.

⁷⁸ *Supra* note 47.

⁷⁹ *Supra* note 52.

a benefit to an accused, but the discrimination lies in the impact of the defence on the child when the accused uses that defence. The analysis would be easier in the criminal law context if the defence were discriminatory as it applied to the accused. Courts know how to deal with the rights of the accused, but are still struggling to find where victims fit.⁸⁰

Second, the case illustrates unique issues where age is a ground of discrimination. Unlike other enumerated grounds, the Court in *Gosselin* pointed out, all of us experience different ages,⁸¹ and thus age-based distinctions are less likely to be discriminatory.⁸² Professor Hogg states that “a minority defined by age is less likely to suffer from hostility, intolerance and prejudice.”⁸³ Exactly what is alleged to be discriminatory differs according to what point in the lifecycle is in question, such as mandatory retirement and elder abuse with regards to seniors, or access to benefits in adulthood, as seen in *Gosselin*.

The condition of childhood is qualitatively different than the various stages of adulthood and raises a host of questions about development, vulnerability, state responsibilities and legal principles such as best interests and *parens patriae*. Equality issues for children revolve around questions that are less relevant to other parts of the lifespan such as education, as in *Eaton*,⁸⁴ and the provision of benefits for early intervention strategies for children with autistic spectrum disorder in *Auton*.⁸⁵ Section 15 analyses must be conducted in a purposive way. We suggest that, for children, disadvantage stems from their physical weakness, powerlessness, vulnerability to exploitation and lesser access to resources than adults. Where a law that distinguishes children from adults tends to exacerbate these realities, the law is discriminatory. In this case s. 43 aggravates these realities by making children more vulnerable within the family.

⁸⁰ See e.g. *French Estate*, *supra* note 41; and *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

⁸¹ *Gosselin*, *supra* note 62 at para. 225, *per* Bastarache J.

⁸² “[U]nlike race, religion or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. This does not mean that examples of age discrimination do not exist. But age-based distinctions are a common and necessary way of ordering our society.” *Gosselin*, *supra* note 62 at para. 31, *per* McLachlin C.J..

⁸³ Peter Hogg, *Constitutional Law of Canada*, vol. 2, loose-leaf (Scarborough, Ont: Carswell, 1997, updated 2001) at 52.

⁸⁴ *Supra* note 47.

⁸⁵ *Auton (Guardian ad litem of) v. British Columbia (Attorney-General)*, [2004] 3 S.C.R. 657.

