Children's Rights and Corporal Punishment: The Defence of Moderate Correction

By

Andrew Michael Thomas Mitchell

Submitted to the Faculty of Graduate Studies
in Partial Fulfilment of the Requirements
for the Degree of

Master of Laws

Faculty of Graduate Studies
University of Manitoba
Winnipeg, Manitoba, Canada

THE UNIVERSITY OF MANITOBA

FACULTY OF GRADUATE STUDIES

*****

COPYRIGHT PERMISSION

Children's Righ ts and Corporal Punishment: The Defence of Moderate Correction

BY

Andrew Michael Thomas Mitchell

A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirement of the degree

Of

Master of Laws

Abstract

Section 43 of the Canadian *Criminal Code* allows for parents, teachers and those standing in the place of a parent to corporally punish minors who are in their care. This amounts to a justification for assault. No other segment of Canadian society - criminals, the infirm, or even animals - are subject to legally sanctioned abuse.

Through an analysis of history, case law and legal rules and regulations, this thesis attempts to show the problems, both legal and moral, associated with state sanctioned child assault.

The results of my research point to, at best, ignorance of the negative repercussions of corporally punishing children of any age, and at worst, indifference. The conclusion calls for a complete repeal of section 43 and an end to state sanctioned violence.

Acknowledgements

I would like to than my thesis advisor, Professor Anne McGillivray, who provided invaluable insight and guidance throughout the entire process, and also my family, who have always pushed me to stand up for what is right.

I would also like to thank the estate of Samuel Freedman, which provided my graduate funding without which I could not have pursued this degree.

Acknowledgements

I would like to than my thesis advisor, Professor Anne McGillivray, who provided invaluable insight and guidance throughout the entire process, and also my family, who have always pushed me to stand up for what is right.

I would also like to thank the estate of Samuel Freedman, which provided my graduate funding without which I could not have pursued this degree.

The use of 'moderate correction' to both guide and punish children has been viewed as necessary part of childhood since ancient Rome. Historically justified by the "desired outcome of degradation,"[1] the archaic Roman ideology of *parens patriae* still in many ways governs the relationship between parent and child. Moderate correction can be traced back at least as far as the *Code of Justinian*, which under Title XV, 1 – *Concerning the Correction of Relatives*, states:

> We grant the power of punishing minors to their elder relatives, according to the nature of the offence which they have committed, in order that the remedy of such discipline may exert its influence over those whom a praiseworthy example at home has not induced to lead an honorable life. We, however, are not willing that the right to inflict extremely severe castigation for the faults of minors should be conferred, but that the exercise of paternal authority may correct the errors of youth, and repress them by private chastisement. If, however, the enormity of the deed should exceed the limits of domestic correction, We decree that those guilty of atrocious crime shall be brought before the courts of justice.[2]

This imperial edict was advanced as a measure of protecting children, benefiting them by limiting the extent of corporal punishment.[3] Professor Anne McGillivray notes that "while 'correction' and 'chastisement' do not necessarily imply corporal punishment, the identification with corporal punishment was established by early annotators of the Novels."[4] This principle, now legislated as section 43 of the *Criminal Code*,[5] influences how the law and society view the relationships between parent and child, and parents and the state.

---

[1] Anne McGillivray, "'He'll Learn it On His Body': Disciplining Childhood in Canadian Law" 5 International Journal of Children's Rights 193 at 199 [hereinafter "*He'll Learn*"].
[2] Given on the day before Kalends of December, during the Consulate of Valentinian and Valens, 365. *The Code of Our Lord Emperor Justinian*, Book IX, trans. Samuel Parsons Scott , online: <http://www.vitaphone.org/history/justinianc.html> (date accessed: 10 February 2005).
[3] Anne McGillivray, "Childhood in the Shadow of Parens Patriae" in Hillel Goelman, Sheila K. Marshall and Sally Ross, eds., *Multiple Lenses, Multiple Images: Perspectives on the Child Across Time, Space, and Disciplines* (Toronto: University of Toronto Press, 2004) 38 at 58 [hereinafter "*Shadow*"].
[4] *He'll Learn*, *supra* note 1 at 201.
[5] *Criminal Code*, R.S.C. 1985, c. C-46, s. 43 [hereinafter "*Criminal Code*"].

The pall cast on childhood by archaic doctrines of parental rights extends well past Justinian. The common law powers vested in the new and rising middle class of the seventeenth and eighteenth centuries can be traced to the Roman Magistrate. Eminent jurist Sir William Blackstone, in his *Commentaries on the Law of England (1765-1769)*, uses the laws of Rome to provide a justification for corporal punishment:

> THE power of parents over their children is derived from...their duty; this authority being given them, 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. And upon this score the municipal laws of some nations have given a much larger authority to the parents, than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away. But the rigor of these laws was softened by subsequent constitutions; so that we find a father banished by the emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere.*" But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life. THE power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education.[6]

To Blackstone, the 'power' parents had over their children stemmed directly from a duty. Blackstone continues:

> FROM the duty of maintenance we may easily pass to that of protection; which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defense of the persons of his children: nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards, died; it was not held to be murder, but manslaughter merely. Such indulgence does the law show to the frailty of

[6] Sir William Blackstone, *Commentaries on the Laws of England (1765-1769)*, Book 1, Chapter 16 "Of Parents and Child" at para. I - 2, online: The Laws of Nature and Nature's God <http://www.lonang.com/exlibris/blackstone/index.html> (date accessed: 3 February 2005).

> human nature, and the workings of parental affection.[7]

This 'duty' lasts until the child reaches the age of twenty-one:

> The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect) the power of a father, I say, over the persons of his children ceases at the age of twenty one: for they are then enfranchised by arriving at years of diferetion [*sic*], or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason.[8]

Blackstone's 'empire of reason' is advanced as a justification for parental violence. Such were the laws of England in the time of Blackstone.[9] Parents, slave owners, teachers and masters of apprentices were encouraged and duty bound to administer regular assaults on those in their care, as this ensured obedience. Professor McGillivray notes that "in a manner consistent with both his lack of knowledge of legal history and his superb descriptive powers,"[10] Blackstone's insistence that corporal punishment was a "right" which stems from the "duty" parents owe to their children goes beyond the word of Justinian.

The common law defence of moderate correction was legislated as section 55 of Canada's first *Criminal Code* in 1892. Under the heading "Discipline of Minors," this section allowed for "...every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances."[11] By this time, the beating of slaves had been banned in Great Britain and its empire for sixty years, and the

---

[7] *Ibid.*, at para. I – 1.
[8] *Ibid.*, at para. I – 2.
[9] Professor McGillivray writes: "This is because assaulting children was once seen as central to their socialization." See Anne McGillivray, "Child Physical Assault: Law, Equity and Intervention" (2004) 30 Manitoba Law Journal 133 at 136 [hereinafter "*McGillivray*"].
[10] *He'll Learn*, *supra* note 1 at 202.
[11] *Shadow*, *supra* note 3 at 58.

corporal punishment of wives and servants had been abhorred by the common law in England and Canada for thirty.[12] An examination of the Hansard from the House of Commons debates at this time gives no indication why such a section would be included in the Canadian *Criminal Code*. However, Canada's first *Criminal Code* was based largely on the English *Draft Code* of 1879, written primarily by Sir James Stephen.[13] Stephen's *Digest of the Criminal Law*, a work that develops his principles and no doubt informed the text of the English *Draft Code*, states, with respect to child corporal punishment:

> It is not a crime to inflict bodily harm by way of lawful correction, or by any lawful application of force...to a person of another; 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 greater harm than the occasion requires.[14]

This appears to be a restatement of the common law position based on *Hopley's* case.[15] However, Stephen's other writings give us a deeper understanding of his concept of equality, which in turn would inform his concept of law. In *Liberty, Equality, Fraternity*, a work published in 1873, Stephen explains his notion of equality. Equality

> ...may mean that all men should be equally subject to the laws which relate to all. It may mean that law should be impartially administered. It may mean that all the advantages of society, all that men have conquered from nature, should be thrown into one common stock, and equally divided amongst them. It may be, and I think it is in a vast number of cases, nothing more than a vague expression of envy on the part of those who have not against those who have, and a vague aspiration towards a

---

[12] *McGillivray*, *supra* note 9 at 137.
[13] Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed. (Toronto: Carswell, 2001) at 2 [hereinafter "*Stuart*"].
[14] Sir James Fitzjames Stephen, *A Digest of the Criminal Law* (Crimes and Punishments (4th ed.) London: Macmillan, 1887) at 147. This is taken from *He'll Learn*, *supra* note 1 at 206. It may be noted that the date of the publication of the 4th edition is 1887, almost ten years after the English *Draft Code*. However, Professor Don Stuart cites the first edition of Stephen's *Digest of the Criminal Law* from 1878, a year prior to the English *Draft Code*. See *Stuart*, *Ibid.*
[15] *R.* v. *Hopley* (1860), 2 F. & F. 204.

> state of society in which there should be fewer contrasts than there are at present between one man's lot and another's.[16]

This dreary notion of equality as 'a vague expression of envy' coloured Stephen's *Draft Code*, which in turn influenced Canada's first *Criminal Code* in 1892.

In 1955, section 55 was revised and renumbered as section 43, "Correction of a Child by Force," and the corporal punishment of apprentices by their masters was abolished. In 1972, the corporal punishment of prisoners was similarly eliminated. In 2002, the corporal punishment of those aboard ships or vessels was also repealed.[17] These revisions made no substantive change to the wording of section 43, and while the word "reasonable" was retained, "[t]here is no limit on the circumstances or nature of punishment except that implied by 'reasonable correction.'"[18] This left children, already one of the most vulnerable elements of Canadian society, the only Canadian citizens who are legally subject to state sanctioned violence.

Commenting on the uninformed revisions to the *Criminal Code* in 1986, the Law Reform Commission of Canada noted:

> Our present *Criminal Code* has its roots in nineteenth-century England. Enacted in 1892, it has undergone a number of *ad hoc* revisions, with the result that we now have a *Criminal Code* which does not deal comprehensively with the general principles of criminal law, which suffers from a lack of internal logic and which contains a hodgepodge of anachronistic, redundant, contradictory and obsolete provisions. The end result is that Canadians living in one of the most technologically advanced societies in human history, are being governed by a *Criminal Code* rooted in the horse-and-buggy era of Victorian England.[19]

---

[16] James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Adapted from the Print Edition, London: Smith, Elder & Co., 1873) chpt. 5, online: <http://terrenceberres.com/stelib.html> (date accessed: 10 February 2005).
[17] *Shadow*, *supra* note 3 at 56.
[18] *He'll Learn*, *supra* note 1 at 208.
[19] Law Reform Commission of Canada (1985-1986), *15th Annual Report* (Ottawa: Government of Canada) at 15.

These '*ad-hoc*,' ahistorical and atheoretical revisions to the *Criminal Code* neglected and continue to neglect those who need its protection the most.

The 1955 *Criminal Code* revisions left the wording of section 43 as it appears today:

> 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 be, who is under his care, if the force does not exceed what is reasonable under the circumstances.[20]

This section provides a justification or defence to assault, when corporal punishment[21] is used by parents, teachers and those "standing in the place of a parent" towards children in their care, providing that this force does not exceed what is reasonable in the particular situation, and that the force is applied in order to correct the child.[22] Developmentally disabled adults are neither a "child" nor "pupil" within the meaning of section 43, and a counsellor at a residential centre for developmentally disabled children who performs personal care is not to be considered a "schoolteacher,"[23] or one "standing in the place of a parent."[24] This defence justifies the use of force only where it is by way of "correction," or for the educational benefit of the child. Where a child is unable to appreciate the purpose of the punishment, section 43 provides no defence or justification.[25] Section 43, therefore, limits state intervention into some aspects of the family proper in cases of assault.

The court, when determining whether or not the force or punishment used "exceed[s] what is reasonable in the circumstances," must consider this question from a modified

---

[20] *Criminal Code*, *supra* note 5 at section 43.
[21] *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2004] S.C.J. No. 6, online: QL (SCJ) [hereinafter "*Foundation*"].
[22] *Ibid.*
[23] *R.* v. *Nixon*, [1984] 2 S.C.R. 197 online: QL (SCJ).
[24] *R.* v. *Ogg-Moss*, [1984] 2 S.C.R. 173 online: QL (SCJ).
[25] *Ibid.*

objective stance: it is "a question of fact, to be determined in the circumstances of each case."[26] In making this determination, the court must consider

> ...*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 the punishment, the circumstances under which it was inflicted, and the injuries, if any, suffered.[27]

If the child suffers "injuries which *may* endanger life, limbs or health or is disfigured, that alone would be sufficient to find that the punishment administered was unreasonable under the circumstances."[28] This list of factors provided in *R.* v. *Dupperon* is not exhaustive, as the court is to consider "such matters," implying that other matters can and should be taken into account. The court may find that section 43 does not provide a justification even if an injury does not occur, as what is needed is simply that an injury "may" occur. While the standard is both objective and subjective, the force must be viewed as "reasonable" under the customs of Canadian society, not the customs of an accused's or victim's former country, where the physical punishment of children may be more widely accepted.[29]

Section 43 lacks specific circumstances that are used to "frame" the defence, circumstances that are typical of other defences enshrined in the *Criminal Code*. This invites the use of judicial subjectivity.[30] Professor Don Stuart notes that "the most startling feature of section 43 is that, while conferring the right to correct with reasonable

---

[26] *R.* v. *Haberstock* (1970), 1 C.C.C. 2d 433 (Sask. C.A.) online: QL (SJ) [hereinafter "*Haberstock*"].
[27] *R.* v. *Dupperon*, [1984] S.J. No. 939 at para. 28 (Sask. C.A.) online: QL (SJ) [emphasis added].
[28] *Ibid.* [emphasis added].
[29] *R* v. *Baptiste and Baptiste* (1980), 61 C.C.C. (2d) 438 (Ont. Prov. Ct.) online: QL (OJ); *R* v. *K.(M.)*, [1992] M.J. No. 334 (Man. C.A.) online: QL (MJ).
[30] *He'll Learn*, *supra* note 1 at 236; *Shadow*, *supra* note 3 at 58.

force, it nowhere defines the circumstances in which correction can ensue. This is in marked contrast to other justifications."[31]

While revisions to the *Criminal Code* have altered how this section appears, the law regulating the assault of children has scarcely changed since the fourth century.[32] Section 43 has recently justified violence towards children with objects such as belts[33] and wooden rulers,[34] and also has been used to allow school teachers to slap their pupils in the face,[35] even when a teacher had mistakenly assaulted the wrong pupil with force powerful enough to chip teeth.[36]

The impact of corporal punishment on children's physical and intellectual development has been a source of tension for decades.[37] Future incidents of violence and heightened levels of aggression are shown to correspond to a poor childhood environment, including being subject to corporal punishment.[38] The 2005 *National Longitudinal Survey of Children and Youth* found that "[c]hildren showed higher levels of aggressive behaviour when their parents were more punitive," as well as "higher levels of anxiety and lower levels of pro-social behaviour."[39] When the punishment changed from punitive to non-punitive, levels of aggression declined.[40]

---

[31] *Stuart*, *supra* note 13 at 504.
[32] He'll Learn, supra note 1 at 195. At 200, Professor McGillivray writes: "The use of corporal punishment to train and teach children has been viewed as both necessary and virtuous since the Roman times."
[33] *R.* v. *L.A.*, [1994] M.J. No. 437 (Man. Prov. Ct.) online: QL (MJ); *R.* v. *A.C.F.*, [1994] O.J. No. 4925 (Ont. Ct. Jus.) online: QL (OJ); *R.* v. *Bell*, [2001] O.J. No. 1820 (Ont. Sup. Ct.) online: QL (OJ).
[34] *R.* v. *O.J.*, [1996] O.J. No. 647 (Ont. Ct. Jus.) online: QL (OJ).
[35] *R.* v. *Thompson*, [1992] O.J. No. 3925 (Ont. Ct. Jus.) online: QL (OJ).
[36] *Haberstock*, *supra* note 26. The teacher mistakenly thought he heard the pupil refer to him as "short ribs."
[37] See the analysis of 88 empirical, statistics based studies of corporal punishment by Elizabeth T. Gershoff, "Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analysis and Theoretical Review" (2002) 128 Psychological Bulletin 539, noted in *McGillivray*, *supra* note 9 at 143.
[38] *Ibid.* This includes problems with relationships, and also increased tendencies to commit crimes as an adult.
[39] Stats-Can – *National Longitudinal Survey of Children and Youth: Home Environment, Income and Child*

There are strong arguments for retaining the defence. Corporal punishment is an important tool for maintaining the structure of the family, and force applied to children, if applied correctly, can have beneficial results.[41] Moreover, concerns exist that certain families, already overrepresented in the criminal justice system and child protection system (underprivileged families, Aboriginal families), will again be marred by an imbalanced use of state power. On opposite ends of the spectrum of those who resist reform or repeal of section 43 "are the religious right and those concerned about uneven application of the law to socially marginal families."[42]

The United Nations *Convention on the Rights of the Child*[43] is a positive step in the recognition and respect of the rights of children on an international level. The Canadian government officially welcomed the statement of rights provided in this document, which grants rights to provision (articles 6, 27, 28, and 31), protection (articles 2, 19, 32 and 34) and participation (articles 12, 13, 14 and 15).[44] The ratification of the *Convention* represents the "recognition of children as rights-holders under international law," a major step forward, "beyond the symbolic."[45] The *Convention* is a consequence of both the "international human rights system and expanding concern about children and their

---

Behaviour (2005), online: <http://www.statcan.ca/Daily/English/050221/d050221b.htm> (date accessed: 2 March 2005).

[40] *Ibid.* This occurred irrespective of the child's prior level of aggressive behaviour.

[41] Laura M. Purdy, *In Their Best Interests: The Case Against Equal Rights for Children* (Ithaca: Cornell University Press, 1992) [hereinafter "*Purdy*"]; Onora O'Neill, "Children's Rights and Children's Lives" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 291; Canadian Council on Children and Youth, *Admittance Restricted: The Child as Citizen in Canada* (Ottawa: Canadian Council on Children and Youth, 1978).

[42] *He'll Learn*, *supra* note 1 at 229.

[43] This *Convention* was adopted by the General Assembly of the United Nations on November 20, 1989. Canada signed and ratified (except for Alberta, which ratified in 1999) this convention in 1990 and 1991, respectively [hereinafter "*Convention*"].

[44] Katherine Covell and R. Brian Howe, *The Challenge of Children's Rights for Canada* (Waterloo, Wilfred Laurier University Press, 2001) at 23 [hereinafter "*Covell*"].

[45] Anne McGillivray and Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System*, (Toronto: University of Toronto Press, 1999) at 152 [hereinafter "*Black Eyes*"].

welfare."[46] By signing it, Canada and Canadian society has made a promise to all of its citizens that children possess fundamental rights, and that it lies to the state to ensure these rights are provided and protected.

What then, has been the impact of the signing and ratification of the *Convention*? Have the rights 'given' to children been protected? The United Nations Committee on the Rights of the Child, the body overseeing the implementation of the *Convention* by ratifying states, has stated that they are "deeply concerned" that Canada has not enacted legislation prohibiting the use of corporal punishment, recommends that Canada remove the existing authorization of the use of corporal punishment to discipline children, and "explicitly prohibit all forms of violence against children, however light."[47]

This condemnation is poignant given the recent decision by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, a ruling that was delivered *after* this pronouncement by the United Nations Committee on the Rights of the Child. McLachlin C.J., who authored the majority decision, makes no mention of this report, even though it was cited in dissent.[48] This indicates that Canada's highest court is unwilling to take the rights of children seriously, even in the face of a ratified international commitment.

Other problems with the *Convention* have been pointed out by Professor Thomas W. Simon. The *Convention* "makes a misleading reference to rights in its title...[it] places

---

[46] Christine Lundy, *An Introduction to the Convention on the Rights of the Child* (St. Thomas, Full Circle Press, 1997) at 25.
[47] United Nations – Concluding Observations of the Committee on the Rights of the Child: Canada (3 October 2003) at paras. 32 and 33, online: United Nations <http://www.canadiancrc.com/PDFs/UN_CRC_Concluding_Observations_03OCT03_20CO2.pdf> (date accessed: 17 January 2005)
[48] *Foundation*, *supra* note 21 at para. 188.

more emphasis on obligations and harms than it does on rights and entitlements."[49] Instead of this model, Simon suggests a "strategy that begins with obligations to do something about harms offers a better way to stimulate action on behalf of children."[50] Professor Stephen Toope points out that the *Convention* is rife with formless and unclear provisions that make it difficult to apply on an international level, particularly given such issues as the plurality of cultures.[51]

However, the implementation of the *Convention* is also viewed as a positive step toward international recognition and protection of the rights of children.[52] It represents not only a morally important stand, but also a legally binding obligation. The *Convention* "established a new childhood – the child as rights bearer – and a new set of claims on the collectivity."[53]

The Supreme Court of Canada recently examined the constitutionality of section 43 in *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General).* McLachlin C.J., writing for the majority, held that section 43 does not offend sections 7, 12 or 15 of the Canadian *Charter of Rights and Freedoms.* She was "satisfied that this section provides a workable, constitutional standard that protects both children and parents."[54] The Chief Justice significantly reads down the defence, and the new parameters for applying section 43 allowed her to find it constitutionally sound. Parents, and those in places of authority: (1) must not use corrective force against children under the age of two, children in their teens, or at any age if the child suffers from a disability

---

[49] Thomas W. Simon, "United Nations Convention on Wrongs to the Child" (2000) 8 The International Journal of Children's Rights 1 at 1.
[50] *Ibid.*
[51] Noted in *Covell*, *supra* note 45 at 28.
[52] *Ibid.*, at 20.
[53] *Shadow*, *supra* note 3 at 60.
[54] *Foundation*, *supra* note 21 at para. 2.

or other contextual factor which would render the child incapable from learning from the correction;[55] (2) must not use corrective force that "causes harm or raises a reasonable prospect of harm," as the operation of section 43 is limited to "the mildest forms of assault";[56] (3) must not use "[d]egrading, inhuman or harmful conduct," and this includes discipline "by the use of objects or blows or slaps to the head";[57] (4) must not strike out in anger, as "conduct stemming from the caregiver's frustration, loss of temper or abusive personality" are not covered under this provision.[58] McLachlin C.J. cites no precedent, empirical studies or academic authors to support this formulation of restrictions.

The Supreme Court of Canada missed an historic opportunity to do some good.[59] Not only has evidence established that violence towards children is dangerous and damaging to future potential,[60] but it seems only natural in a progressive Canadian society that the removal of state sanctioned violence against children would be viewed by the keepers of the *Constitution* as a positive and meaningful step. Nevertheless, the Supreme Court carved down the defence with the assumption that future cases of corporal punishment will be examined within this new framework. This appears to be erroneous.[61]

Is the 'moderate correction' of children through violence acceptable in contemporary Canadian society? What 'rights' do children possess? Does section 43 unfairly infringe on any of these rights? This paper will examine all of these issues.

---

[55] *Ibid.*, at para. 25; *Ogg-Moss*, *supra* note 9.
[56] *Ibid.*, at para. 30.
[57] *Ibid.*, at para. 40.
[58] *Ibid.*
[59] I thank Madame Justice Clair L'Heureux-Dubé, who suggested this wording to me in a conversation at the University of Manitoba Faculty of Law during a visit on October 19, 2004.
[60] See *supra*, note 38.
[61] See *R.* v. *D.K.*, [2004] O.J. No. 4676 (Ont. Ct. Jus.). For a more in-depth discussion, see Part IV of this paper.

First, I will examine the 'new liberalism' that emerged from the social climate that followed the Second World War and the social movements of the 1960s, and how this new philosophy allowed for a reconsideration of the issues surrounding the rights of the child.[62] Children came to be viewed more as citizens of the state, with dignity and basic rights, and less as the property of the father and subject to paternalistic care. The children's rights movement, at its most extreme termed the "Liberationist" movement, challenged those who argued that equal status for children could be achieved by bestowing greater protections on them. Emphasis, as Professor Michael Freeman points out, "shifted from protection to autonomy, from nurturance to self-determination, from welfare to justice."[63] The shift toward children's rights was incorporated into international rights declarations throughout the 1940s and 1950s,[64] culminating in the 1989 United Nations *Convention on the Rights of the Child,* to which Canada is a signatory.

The momentum gained by the children's rights movement, the concept of children's rights, and the *Convention on the Rights of the Child* itself, is viewed by some as problematic and, possibly, dangerous. The divisive nature of the rights debate was key in shaping the core and spirit of the *Convention.* Professor Laura Purdy, a detractor of the children's rights movement, questions whether the advancement of children's rights

---

[62] Anne McGillivray, "Reconstructing Child Abuse: Western Definition and Non-Western Experience" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 213 at 218.

[63] Michael Freeman, "Rights, Ideology and Children" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 3 at 3.

[64] See the 1948 *Universal Declaration of Human Rights* and the 1959 *Declaration of the Rights of Children.* The *Universal Declaration of Human Rights* does not specifically mention children, however Article 1 states that all "*human beings* are born free and equal in dignity and rights" [emphasis added]. Moreover, Article 16 states that all "men and women *of full age*...have the right to marry" [emphasis added]. The reference to "full age" in Article 16 implies that the framers intended for children to be covered by all other Articles of the Declaration.

"represents the forward march of justice or a confused and undesirable detour."[65] Proponents of the institution of the family view any state interventions into the family as abusive, and demand they be curtailed.[66]

Essential to this discussion is an evaluation of the term "rights." In one sense, rights can be seen as privileges that are given or conferred by legal documents or rules. Rights such as this are often seen as a positive definition of what one is allowed to do,[67] but may also include the privilege of legal protections from the actions of others and of society. By way of example, the provisions of the *Criminal Code* governing assault assert that those who commit assault are guilty of either an indictable or summary conviction offence.[68] 'Legal rights' are provided to different people at different times, but are not the only type of rights that exist in Canadian society.

Another significant sense of the term 'rights' is with respect to human rights, which inform and shape legal rights. Human rights, in this sense, are separate and distinct from legal rights, in that they are not given or provided by statute, but are rights that human being 'have' by virtue of their status as human beings. Whichever view of rights is adopted, legal rights or human rights, it is a *fact* that children have long possessed rights, at least in the Western world. Part II will examine this.

In Part III of this paper, I will examine Canada's obligations under the *Convention*, and determine, through an analysis of case law, Canada's compliance with this document. Cases prior to the signing and ratification of the *Convention*, in 1990 and 1991,

---

[65] *Purdy*, *supra* note 42 at 7.
[66] See the Canadian Council on Children and Youth, *Admittance Restricted: The Child as Citizen in Canada* (Ottawa: Canadian Council on Children and Youth, 1978) at 153-160. This is noted in *Covell*, *supra* note 45 at 21.
[67] See *R.* v. *Zundel* (1987), 58 O.R. (2d) 129 (C.A.).
[68] *Criminal Code*, *supra* note 5 at s. 266.

respectively, will be considered to determine the Canadian ethos prior to the signing of the document. I then examine the case law following the ratification of the *Convention*, in order to determine what, if any, difference this obligation has made in the Canadian social and legal communities. This analysis will attempt to bring out the spirit of the *Convention* and its promises to Canadian childhood, and determine what steps have been taken thus far to provide for equality and protection of children. As pointed out by McGillivray and Comaskey: "The essence of discrimination is not the failure to criminalize intimate violence – most aspects of intimate violence are already crimes in most countries – but rather the failure to enforce laws equitably...."[69] The legal justification provided to parents to corporally punish children creates a society in which children are reified, their interests pushed aside and their rights trodden under the foot of anachronistic social policy and indolent law makers.

Part IV will examine the recent ruling by the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law* v. *Canada (A.G.)*. Here the Supreme Court rewrote the rules surrounding section 43 in order to support the use of reasonable force for the correction of a child as constitutionally valid. This Part will trace the development of this case in the four years it wound through the Ontario Superior Court of Justice, the Court of Appeal and finally the Supreme Court. I will conduct a critical study of the reasoning employed in order to understand the rational behind upholding the constitutional validity of this controversial section of the *Criminal Code*.

While the decisions of these courts upset many child and rights advocates,[70] some solace can be taken in the fact that the Supreme Court limited the availability of this

---

[69] *Black Eyes*, *supra* note 46 at 153.
[70] *McGillivray*, *supra* note 9.

defence.[71] It remains to be seen how strictly this precedent will be followed, given the personal nature of child corporal punishment and section 43. The last section of Part IV, therefore, will examine cases which chronologically follow this recent Supreme Court pronouncement in an effort to understand and determine the impact this ruling has had on children's rights and the application of section 43.

On December 2nd of 2004, the Honourable Senator Hervieux-Payette introduced Bill S-21, *An Act to Amend the Criminal Code (Protection of Children),*[72] which would repeal section 43 of the *Criminal Code*, removing the justification available to schoolteachers, parents and those standing in the place of a parent for using force as a means of correction toward a pupil or child. On December 9th 2004, Bill S-21 was debated, with the Honourable Sharon Carstairs supported its passage with the following words:

> Children are not born violent. Some unfortunate children with serious mental disabilities will sometimes act in violent ways, and quite often this violence is directed against themselves. These children need appropriate treatment programs, and no one would suggest that treating them violently would help them moderate their behaviour. Why then would we think it would work with other children?
>
> Honourable senators, it is now 2004. We have accepted that beating wives is not acceptable. We have accepted that beating prisoners is not acceptable. We have accepted that mental defectives should not be beaten. We have accepted that apprentices should not be beaten. Why do we still accept that the most vulnerable among us, children, should be subjected to corporal punishment? It is wrong. It is time to move forward. It is time to repeal section 43 of the *Criminal Code* of Canada.[73]

It is time for Canada, a progressive first world country to move forward and forbid what the criminal law long considered the most degrading form of punishment: violence on the

---

[71] Sanjeev Anand, "Reasonable Chastisement: A Critique of the Supreme Court's Decision in the "Spanking" Case" (2004) 41 Alta. L. Rev. 871, online: QL (JOUR).
[72] Bill S-21, *An Act to Amend the Criminal Code (Protection of Children)*, 1st Sess., 38th Parl., 2004, (1st reading 2 December 2004).
[73] Debates of the Senate (Hansard) (9 December 2004) at 1540 (Hon. Sharon Carstairs). The Bill received its second reading in March of 2005.

body that functions to degrade and humiliate.[74] I will show that violence against children "both violates and impairs or nullifies the enjoyment...of their human rights and fundamental freedoms."[75] This cannot be allowed in Canadian society. Section 43 should be repealed.

[74] *He'll Learn*, *supra* note 1; *McGillivray*, *supra* note 9 at 141.
[75] *Black Eyes*, *supra* note 46 at 163. McGillivray and Comaskey are actually speaking of violence against women in this passage, but the same logic and reasoning can and should be applied to violence against children.

Part II

Introduction

For centuries, children have been objects of adult protection and power, with the resulting hierarchy being one of vulnerability and helplessness. This state of affairs had been uncontroversial for many years, perhaps due to an idealized notion of adult-child relationships, or perhaps stemming from the belief that since we avoid exercising responsibility in childhood, so too do we avoid exercising rights.[1] Nevertheless, in the late 20th century, a movement began on behalf and for children's rights, growing gradually out of both the Second World War, from which the notion that children have fundamental rights to have their basic needs fulfilled matured,[2] and the bedlam of 1960s social movements, which disparaged public and private violence. These movements alerted much of society to the veiled forms oppression can take, and the resulting liberalism allowed the public to see children as they actually existed: "powerless, dominated, ignored, invisible."[3]

This nascent liberalism permitted a direct consideration of the issues surrounding and informing the rights of children,[4] and while many were unprepared to accept the notion that children should be treated exactly as adults, gradually children came to be viewed more as citizens of the state, with dignity and basic rights, and less as property in need of

---

[1] Michael Freeman, "Taking Children's Rights More Seriously" in *The Moral Status of Children: Essay on the Rights of the Child* (Cambridge: Kluwer Law International, 1997) 19 at 24 [hereinafter "*Seriously*"].
[2] Katherine Covell and R. Brian Howe, *The Challenge of Children's Rights for Canada* (Waterloo, Wilfred Laurier University Press, 2001) at 19 [hereinafter "*Covell*"]. Professor Jane Fortin also credits the American Civil Rights Movement which "encouraged, in the 1960s and early 1970s, a far more sympathetic attitude to the treatment of all minority groups, including children." See Jane Fortin, *Children's Rights and the Developing Law*, 2nd ed. (London: Reed Elsevier, 2003) at 4 [hereinafter "*Fortin*"].
[3] Richard Farson, *Birthrights* (New York: Macmillan Publishing Co., Inc., 1974) at 2 [hereinafter "*Birthrights*"].
[4] Anne McGillivray, "Reconstructing Child Abuse: Western Definition and Non-Western Experience" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 213 at 218 [hereinafter "*Reconstructing*"].

paternalistic care. This movement, often termed the "Liberationist" movement, challenged those who believed or argued that the equal status of children could be achieved simply by bestowing greater protections on them. Emphasis, as Professor Michael Freeman points out, "shifted from protection to autonomy, from nurturance to self-determination, from welfare to justice."[5] This concept was incorporated into legal declarations during the 1940s and 1950s,[6] and culminated in the 1989 United Nations *Convention on the Rights of the Child*.[7]

When the government of Canada signed the *Convention*, it made a promise to *all* of its citizens, and the international community, that it would recognize certain and specific children's rights. It committed itself "to the principle that children have fundamental rights as individual persons and that parents, adults, and state authorities have responsibilities for providing for those rights."[8] The importance of preserving this principle is clear:

> Children who are not protected, whose welfare is not advanced, will not be able to exercise self-determination: on the other hand, a failure to recognize the personality of children is likely to result in an undermining of their protection with children reduced to objects of intervention.[9]

That the *Convention* is an important document is without a doubt. However, regardless of its importance, and the momentum the children's rights movement has

---

[5] Michael Freeman, "Rights, Ideology and Children" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 3 at 3.

[6] See the 1948 *Universal Declaration of Human Rights* and the 1959 *Declaration of the Rights of Children*. The *Universal Declaration of Human Rights* did not specifically mention children, however Article 1 states that all "*human beings* are born free and equal in dignity and rights" [emphasis added]. Moreover, Article 16 states that all "men and women *of full age*...have the right to marry" [emphasis added]. The reference to "full age" in Article 16 implies that the framers intended for children to be covered by all other Articles of the declaration.

[7] This *Convention* was adopted by the General Assembly of the United Nations on November 20, 1989. Canada signed and ratified (except for Alberta, which ratified in 1999) this convention in 1990 and 1991, respectively [hereinafter "*Convention*"].

[8] *Covell*, *supra* note 2 at 22.

[9] Michael Freeman, "Laws, Conventions and Rights" in *The Moral Status of Children: Essay on the Rights of the Child* (Cambridge: Kluwer Law International, 1997) 47 at 53.

gained, the notion of children's rights, and the *Convention* itself, is viewed by many as problematic, or even dangerous. Moreover, it is the divisive nature of this debate that eventually helped to shape the eventual core and spirit of the *Convention.*[10] Academics such as Professor Laura M. Purdy, an influential contemporary critic of the children's rights movement, question whether this movement "represents the forward march of justice or a confused and undesirable detour."[11] Others, such as staunch defenders of the family institution, view state intervention into the family as abusive, and should therefore be as constrained as possible.[12] These groups see the raising of children and family as a type of social *laissez-faire*, subscribing to the conservative philosophy of Adam Smith:

> The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.[13]

Similar to Smith,[14] these groups explicitly recognize the usefulness of some forms and functions of government,[15] while at the same time are critical of government meddling.

---

[10] For an interesting discussion on the impact of cross-cultural factors on the drafting of the *Convention* see David Johnson, "Cultural and Regional Pluralism in the Drafting of the UN *Convention on the Rights of the Child*" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 95.

[11] Laura M. Purdy, *In Their Best Interests: The Case Against Equal Rights for Children* (Ithaca: Cornell University Press, 1992) at 7 [hereinafter "*Purdy*"]. See also Onora O'Neill, "Children's Rights and Children's Lives" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 291 [hereinafter "*O'Neill*"]. In Michael Freeman, "The Future of Children's Rights" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 2 (Burlington: Ashgate Publishing Company, 2004) 289 at 291-292, Freeman notes other opponents to children's rights.

[12] See the Canadian Council on Children and Youth, *Admittance Restricted: The Child as Citizen in Canada* (Ottawa: Canadian Council on Children and Youth, 1978) at 153-160. This is noted in *Covell*, *supra* note 2 at 21. Professor Anne McGillivray points out that these groups "base much of their arguments on the value of family privacy and autonomy: freedom from state intervention is the only way to strengthen the family and a strong family is the cure to social ills." *Reconstructing*, *supra* note 4 at 217.

[13] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. by R.H. Campbell, A.S. Skinner and W.B. Todd (Oxford: Clarendon Press, 1976) vol. 1 at 456. The editors note that Smith articulates similar sentiment throughout the work.

While Smith's *Wealth of Nations* argued for an economic *laissez-faire* in the late 18th century, staunch defenders of the family argue for a social *laissez-faire*: the less government intervention into family life the better.

Nevertheless, as pointed out by Richard Farson, the greatest resistance to children's rights comes predictably from those closest to the discussion: parents, teachers and paradoxically enough, children:

> Derision and ridicule always come from groups where interdependence is greatest. Married men against women, Southern whites against blacks, and parents against children...Just as blacks and women who have not had their consciousness raised are the greatest burdens of those movements, the Uncle Toms and Aunt Toms, we can predict that children will be their own worst enemies in the movement for their liberation.[16]

Ironically, the greatest resistance to change is often brought by those who stand to benefit the most.

One final point needs to be addressed before embarking on a discussion of the theories of children's rights. It is important to remember that many traditional theories of rights (e.g. Utilitarian, Libertarian, Natural Rights, Legal Positivism, etc.) are based on historical and philosophical assumptions that may no longer be acceptable or appropriate. Additionally, over the past twenty-five years, blurry varieties and patchwork

---

[14] Smith writes: "According to the system of natural liberty, the sovereign has only three duties to attend to; three duties of great importance, indeed, but plain and intelligible to common understandings: first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain publick works and certain publick institutions which it can never be for the interest of any individual, or small number of individuals, to erect and maintain; because the profit could never repay the expence to any individual or small number of individuals, though it may frequently do much more than repay it to a great society." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. by R.H. Campbell, A.S. Skinner and W.B. Todd (Oxford: Clarendon Press, 1976) vol. 2 at 687-688.

[15] For example, the Canadian Council on Children and Youth agree that the state has a role to provide economic, social and other support for families, without intervening directly in the life of a family in the name of the rights of children. See *Covell*, *supra* note 2 at 21.

[16] *Birthrights*, *supra* note 3 at 10.

proclamations of the rights of children have emerged, painting an often confusing and convoluted picture. By way of example, Professor Anne McGillivray notes:

> The conservative laissez-faire model of Goldstein, Solnit and Freud supports the family-as-haven ideology of earlier decades; the liberal distributive justice model of Dingwall and Eekelaar sets children's rights into a trust context;[17] Minow's feminist/corrective justice model struggles to bridge the gap between relational interests and children's autonomy interests; the formalist 'rule of law' model would suggest children's rights are, first and foremost, human rights, with child-centred concerns taken into the balance at every stage.[18]

Theories of rights are sometimes based on views "which are themselves rationally questionable and possibly... immoral," or perhaps the rights have been attributed or exercised in ways which are "grossly immoral, ways which often serve nefarious purposes of the already powerful."[19] However, there exists appropriate and morally relevant methods of grounding rights, and putting theories of rights into practice will not necessarily lead to corruption and moral bankruptcy. Cause and effect is lacking: the use of 'moral' reasoning to 'justify' immoral or wicked conduct does not lead logically to the disbandment of morality as a dangerous social phenomenon.[20] The real inquiry and challenge should focus on the appropriate application of current and future morality and moral rights, not languish in past failures and frustrations.

Accounts of children and childhood rights stem from a broadening of historical and social interest, and various forms of critical theory provided further insight into the forms

---

[17] Others are also "sympathetic to this view." See David Archard, "Child Abuse: Parental Rights and the Interests of the Child" (1990) 7 Journal of Applied Philosophy 183 at 187-188.
[18] *Reconstructing*, *supra* note 4 at 219. Professor McGillivray provides an excellent explanation and critique of these proposed models in her essay.
[19] Susan A. Wolfson, "Children's Rights: The Theoretical Underpinning of the 'Best Interests of the Child'" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 7 at 8.
[20] *Ibid.*

of childhood. There exists no natural childhood, it is a culturally and historically specific phenomenon.

In what follows, I will discuss the opposing sides of the children's rights spectrum, Protection and Liberation, noting deficiencies in evidence and argument in both of these ideas. From there, I will undertake an examination of the changing perspective of childhood, and how this transition affects notional opinions on the rights of the child. Following this discussion, I will set down a cogent and persuasive theory of children's rights that underscores the importance of both sides of the spectrum, while at the same time avoiding the pitfalls and philosophical quandaries that plague the adoption of either extreme.

Protectionism

The Protectionist view of childhood rights holds that rights should be withheld from children, and that society must not view children as having the ability or desire for self-determination. The language of Protectionism leads to the inference that the principal method of guaranteeing children's safety and future well being is for adults to have almost complete control over them.[21] Those who advocate this thesis, as Michael Freeman points out, generally advance one of the following three arguments, or a combination thereof.[22]

---

[21] Joseph M. Hawes, *The Children's Rights Movement: A History of Advocacy and Protection* (Boston: Twayne Publishers, 1991) at 117 [hereinafter "*Hawes*"].

[22] *Seriously*, *supra* note 1 at 24-25. Professor Anne McGillivray points out other anti-rights arguments and contributes to the debate in Anne McGillivray, "Childhood in the Shadow of Parens Patriae" in Hillel Goelman, Sheila K. Marshall and Sally Ross, eds., *Multiple Lenses, Multiple Images: Perspectives on the Child Across Time, Space, and Disciplines* (Toronto: University of Toronto Press, 2004) 38 at 60 [hereinafter "*Shadow*"]. Michael Freeman mentions similar arguments in "The Limits of Children's Rights" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 29 at 30 [hereinafter "*Limits*"].

First, Protectionists argue that the significance and social weight of rights has been greatly exaggerated, particularly with respect to children. In this account of children's position in the social order, morally significant principles, such as love, care and compassion privilege the parent-child relationship, giving it precedence over a simple observance of duty, which is necessary for the realization of rights.

In a perfect world, parents could be relied upon to provide love, care and compassion, but the world is not perfect. As Freeman points out, the current social, political and legal culture is far from ideal, particularly in the case of children. Children are the most vulnerable group in contemporary society, and rights are required to ensure their development and protection.[23]

Second, the idealized parent-child relationship, at the centre of the Protectionist account of child rights, leads directly to the postulate that all adults love and care for their children, and that this love colours and determines the way parents act and react towards their children. Given this relationship, children's rights become redundant, as the loving parents, in making decisions for and concerning the child, are motivated only by the child's best interests. Thus, continues the argument, the only right possessed by children is the right to have autonomous parents, generally free from state intervention: "The law, then, ought to and generally does prefer the private ordering of interpersonal relationships over state intrusions on them."[24]

This *laissez-faire* account of children's rights and familial relationships may be objected to on various grounds. First, the state is simply incapable of avoiding

---

[23] *Seriously, Ibid.*

[24] Joseph Goldstein, Anna Freud and Albert J. Solnit, *Beyond the Best Interests of the Child* (London: Burnett Books, 1979) at 50 [hereinafter "*Goldstein*"]. Appended to this is the view that parents will be incapable of carrying out their responsibilities toward their children if they are subject to constant state scrutiny. See *Fortin*, *supra* note 2 at 8.

intervention into family life, and consequently shaping relationships through decisions and laws regulating the sanctity of relationships, and the codification of directives regulating disputes. The state has in place a far-reaching and multifaceted social welfare system, which is particularly important with respect to the development and care of children.[25] In addition, privacy proposals such as those demanded by advocates of a *laissez-faire* approach may provide a shield to conceal or ignore abuse of women and children, as Nicholas Rose has observed, "...family privacy is all too often a license for men to dominate women and children."[26] Similarly, it is worth recalling that nineteenth century restrictions on child labour and laws requiring compulsory education were also objected to by parents who contended they represented an "unacceptable interference with family responsibility and parental rights."[27]

Professor Anne McGillivray has observed that parental love, similar to love between husband and wife, is more "the offspring of social convention than it is of biologic substrate which characterizes our species."[28] Just as terms such as "abuse" and "neglect" have different and dissimilar meanings from culture to culture, so too are "love" and "compassion" open to different interpretations. A practice considered violent or cruel by one culture or society may be seen as a necessary occurrence in another.[29]

The third notion of Protectionist discourse on child rights posits that childhood is a time of growth and innocence, a time where children are spared the responsibilities and

---

[25] Nikolas Rose, "Beyond the Public/Private Division: Law, Power and the Family" (Spring 1987) 14 Journal of Law and Society 61 at 65 [hereinafter "*Rose*"].
[26] *Ibid.*, at 66.
[27] *Fortin*, *supra* note 2 at 8.
[28] Anne McGillivray, "Why Children do Have Equal Rights: In Reply to Laura Purdy" (1994) 2 The International Journal of Children's Rights 243 at 247 [hereinafter "*Reply*"].
[29] Practices include things such as female circumcision, trafficking and sexual exploitation, and the forced marriage of young females. See *UNICEF – Child Protection: The Big Picture*, online: UNICEF <http://www.unicef.org/protection/index_bigpicture.html> (date accessed: 21 October 2004).

hardships of adult life. Given this premise, there is no necessity to provide children the rights that are bestowed on adults.[30] Children require freedom to gain life experience and to grow, without the responsibilities of an adult, and the imposition of the rights and responsibilities of adulthood would simply create "little adults," and "cheat [children] out of their childhood."[31]

How realistic is such an account of the experience of childhood for many Canadian children? Too many Canadian children live in environments of abuse,[32] neglect[33] and poverty,[34] environments that undermine both intellectual and social potential of children, affecting all levels of present and future socio-economic and ethno-cultural status.[35] John Holt, an early advocate of a Liberationist approach to children's rights, observes that "being seen by older people as a mixture of expensive nuisance, slave, and super-pet, does most young people more harm than good."[36] The view of childhood as a safe haven for play and fun is unrealistic. For too many children, the Hobbesian account of life before the state as "solitary, poore, nasty, brutish, and short"[37] may be more accurate.

---

[30] *Seriously*, *supra* note 1 at 24. Tied to this is the importance of the role that parents play in the lives of their children, particularly with respect to the child's physical dependence on his or her parents, and also the need and desire to protect children from being forced into becoming adults before they are mature enough. See *Fortin*, *supra* note 2 at 6-7.

[31] *Birthrights*, *supra* note 3 at 5.

[32] Canada, Minister of Health, *Canadian Incidence Study of Reported Child Abuse and Neglect* (Ottawa: National Clearinghouse on Family Violence, (2001); Anne McGillivray, "'He'll Learn it on His Body': Disciplining Childhood in Canadian Law" (1997) 2 The International Journal of Children's Rights 193 [hereinafter "*He'll Learn*"]; Trevor Butt, Lorraine Green and Nigel King, "Spanking and the Corporal Punishment of Children: The Sexual Story" (2003) 11 The International Journal of Children's Rights 199.

[33] *Incidence Study*, *Ibid.*

[34] *Covell*, *supra* note 2 at 40-43. Covell and Howe point out that child poverty in Canada, as well as other industrialized nations, has been greater following the signing of the *Convention*.

[35] *Ibid.*, at 46.

[36] John Holt, *Escape from Childhood* (New York: E.P. Dutton & Co., 1974) at 18 [hereinafter "*Holt*"].

[37] Thomas Hobbes, *Leviathan* (London, J.M. Dent & Sons LTD., 1914) at 64-65. Hobbes analogises a time of war, when "every man is Enemy to every man," to a time "wherein men live without other security, than what their own strength, and their own invention shall furnish them withall." Both, postulates Hobbes, result in "continued feare, and danger of violent death."

At the core of modern liberal discourse is the claim that all adult human beings are capable of making rational and independent decisions concerning the important aspects of their lives. This autonomy to decide is curtailed only when this freedom interferes with the equivalent freedom of others. As John Stuart Mill writes in his treatise *On Liberty*:

> ...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[38]

In short, individuals are generally the best and most appropriate judges of what is in their best interests, and to assume otherwise is incorrect and often abusive.

It is important to note that Mill's doctrine applies "only to human beings in the maturity of their faculties," and that "those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury."[39] Mill explicitly is not speaking of "children or of young persons below the age which the law may fix as that of manhood or womanhood."[40] Orthodox liberal discourse provides Protectionists with perhaps the strongest argument for their approach to children's rights. In this account, rights become a result, a product of maturation:[41]

> ...as soon as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion, compulsion, either in the direct form or in that of pains and penalties for noncompliance, is no longer admissible as a means to their own good, and justifiable only for the security of others.[42]

---

[38] John Stuart Mill, *On Liberty*, ed. by Gertrude Himmelfarb (London: Penguin Books, 1974) at 68 [hereinafter "*Mill*"].
[39] *Ibid.*, at 69
[40] *Ibid.*
[41] *Purdy*, *supra* note 11 at 54.
[42] *Mill*, *supra* note 38 at 69.

Mill equates "capacity" with age, a position that leads logically to the presumption that *no* persons "below the age which the law may fix as that of manhood or womanhood" is *capable* of exercising liberty.

This position is open to criticism as it assumes that all children of all ages, providing they have not reached the age of majority, are equally incapable, or at least equally lack the capacity, to advantageously exercise rights. It also assumes that all persons who have reached the age that law has fixed as "that of manhood or womanhood" are capable of exercising their liberty. While it is true that children and adults are different, the fact remains that there is a "developmental trajectory" through which all humans pass, and age is a suspect classification; if a double standard is to be applied, those who apply it must be prepared to justify it.[43] Surely, denying *all* children rights and awarding *all* adults rights poses a problem, as substantive equality demands at least individual consideration of each case.

If the position of Mill is adopted, David Archard argues that anyone who fails to display a requisite amount of rationality and cogent autonomy could be treated paternalistically, including adults. Since people learn and mature through their errors, and a freedom which allows only for one course of action, the "right" course of action, would be an inadequate form of liberty, it seems appropriate to provide children with the

---

[43] *Seriously*, *supra* note 1 at 36. Importantly, Mill also writes: "He who lets the world, or his own portion of it, chose his plan of life for him has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself employs all of his faculties." See *Mill*, *Ibid.*, at 123. A similar sentiment is echoed in Fyodor Dostoyevsky, *Crime and Punishment*, trans. David McDuff (London: Penguin Books, 1991) at 251 where Razumikhin exclaims that "to talk nonsense in one's own way is almost better than to talk a truth that is someone else's; in the first instance you behave like a human being, while in the second you are merely a parrot!" See also *Goldstein*, *supra* note 24 at 13 where the authors note that "the effort to highlight the differences between the adult and child, however, should not obscure the enormous variations in the quality and degree of such differences not only among different children but also in each individual child during the fluctuating course of his growth and development as a member of a family."

same freedom adults possess to make choices, even if they do not always choose what is best for themselves.[44] Society unfairly labels every child as incompetent, a group that is unable to make important decisions and exercise autonomy.

In addition, it is worthwhile at this stage of the discussion to note that while both children and adults will make mistakes, children will make different kinds of mistakes than adults. What is concerning about this, it is argued, is that a child allowed to do anything they want may make choices that permanently damage future potential.[45] While a valid point if structured this way, Archard notes that there are at least two observations that need to be made.[46] First, there is every reason to assume that autonomous adults can and do make similarly irreversible decisions, and therefore could also be subject to paternalistic control.[47] Second, even if we accept this argument, it would only justify a paternalism limited to the prevention of those particular choices or mistakes which would forever endanger future progress and well being. While a valid concern, it in no way supplies a blanket justification for paternalism and complete adult control.[48]

---

[44] David Archard, *Children: Rights & Childhood* (London: Routledge, 1993) at 53-54 [hereinafter "*Archard*"].

[45] Professor Purdy, for example, argues that allowing children autonomy would mean, among other things, "that a six-year-old's announcement that she's not going to school today (or ever) should be respected." *Purdy*, *supra* note 11 at 32. John Eekelaar calls this the "most dangerous but most precious of rights: the right to make their own mistakes." John Eekelaar, "The Emergence of Children's Rights" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 191 at 212 [hereinafter "*Eekelaar*"].

[46] *Archard*, *supra* note 44 at 54.

[47] Erasmus notes: "And the farther the old proceed in age, the nearer they come back to the semblance of childhood..." Desiderius Erasmus, *Praise of Folly*, trans., Hoyt Hopewell Hudson (Hertfordshire: Wadsworth Editions Limited, 1998) at 15.

[48] Mill writes that if "we were never able to act on our opinions, because those opinions may be wrong, we should leave all our interests uncared for, and all our duties unperformed." See *Mill*, *supra* note 38 at 78.

Liberationism

"Liberationists," or proponents of equal rights for children, argue that a protective and paternalistic society unfairly limits the freedom of children. Liberationists reject the 'idealized child' at the heart of the Protectionist account, and challenge that perspective's "heavy reliance on power and authority by which adults impose excessive and arbitrary controls on children."[49] The language of Liberationism espouses a deep dissatisfaction with the basic assumptions of Protectionism, and would bestow on children rights that are virtually identical to those possessed by adults.[50] Predictably, this view of childhood and rights has attracted substantial criticism.[51] However, the importance of this movement may lie largely "in the fact that they [Liberationists] also generated a reassessment of children's capacity for autonomy and responsible action."[52]

In the Liberationist's account of children's rights, children are given capacities similar to adults. Children are not incompetent, nor do they lack the ability to properly make significant decisions.[53] Liberationist discourse contends that the decisions made by children, while possibly different than the decisions that an adult would have made, are not necessarily 'worse,' or incorrect. Therefore, continues the argument, since there exist

---

[49] *Birthrights*, *supra* note 3 at 3. See also *Reconstructing*, *supra* note 4 at 218 where Professor McGillivray notes that "few are prepared to concede that children should be treated exactly like adults," as this would "pose too great a threat to adult rights and the social order."

[50] *Hawes*, *supra* note 21 at 115.

[51] Much of this criticism focused on the dangers of ignoring the differences between child and adult development, and on the problems that could be created by interfering in the relationship between a parent and a child. See *Fortin*, *supra* note 2 at 5, citing M. Wald, "Children's Rights: A Framework for Analysis" (1979) 12 University of California Davis Law Review 255 and Lorraine Fox Harding, *Perspectives in Child Care Policy*, 2nd ed. (Harlow: Longman, 1997).

[52] *Ibid.*

[53] The language of Protectionism implies that those who subscribe to this ideology believe that "children do not fail to make decisions and plans on matters that they know about. What we [Protectionists] really think of them is not that they cannot make decisions but rather that they are incapable of making good ones." See Ann Palmeri, "Childhood's End: Toward the Liberation of Children" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 149 at 158.

no morally relevant reasons for maintaining this paternalistic double-standard, justice is only served when the special rules that apply solely to children are removed.

There are conditions: children should not be given the freedom to do *anything* they want. As Richard Farson, an advocate of child Liberation, explains:

> Children's liberation does not mean a negation of all standards, just double standards. Behaviour will still be guided by ethics, morals, beliefs, and laws. Just as adults must abide by regulations, standards, and schedules, so children must responsibly abide by these same rules...After all, the objective of any liberation effort is to reduce the many ways in which people victimize each other. The fundamental rule should be no victimization, in either direction.[54]

No parent would be compelled to cater to the unpredictable and dangerous choices of a child anymore than the same parent would have to cater to the reckless whims of another adult family member. Howard Cohen writes:

> ...the program for pursuing a policy of equal rights for children should not be agitation for a new or special set of rights. Rather it should be a program to eliminate the legal and customary barriers which support the double standard and to begin to establish a system of child agents who have specific obligations of performance towards children.[55]

In the language of Liberationism, a strict separation of the world into adults and children is presented as a form of unfair discrimination. In this idiom, to be a "child" is not necessarily to be "childish."[56] Liberationists would allow children to exercise rights for themselves, and society should grant such a dispensation not because it would be 'good' for children, but:

> ...for the same reason we grant rights to adults, not because we are sure that children will then become better people, but more for ideological reasons,

---

[54] *Birthrights*, *supra* note 3 at 5. See also *Reply*, *supra* note 28 at 244 where Professor McGillivray points out that the Liberation of children is often incorrectly looked at "not in terms of respect and freedom of will...but as an improbable license to do what you want freed of any sort of relational or situational constraints."

[55] Howard Cohen, *Equal Rights for Children* (New Jersey: Rowman and Littlefield, 1980) at 102 [hereinafter "*Cohen*"].

[56] *Archard*, *supra* note 44 at 46.

> because we believe that expanding freedom as a way of life is worthwhile in itself. And freedom, we have found, is a difficult burden for adults as well as children.[57]

Just as the language of the civil rights movement advanced the position that a person's status should not be dependant on race or sex,[58] the discourse of Liberation maintains that a person's status should not be dependant on age.[59]

Nevertheless, the two key and principle Liberationist texts,[60] Farson's *Birthrights*, *supra* and Holt's *Escape From Childhood*, *supra* draw a distinction between the classes of rights that children should be provided. Lineal descendants of liberal theorists of rights, they argue for and lay out two types of rights which can and should be accorded to children.[61]

First, within this discourse, some rights exist that are inherent to the child rights bearer. These rights include guarantees of certain forms of treatment, such as the right to a minimum standard of education,[62] and the right to justice,[63] and guarantees to be free

---

[57] *Birthrights*, *supra* note 3 at 31. See also *Mill*, *supra* note 38 at 136 where he writes that "the only unfailing and permanent source of improvement is liberty."

[58] There is an important distinction between distinctions based on race and sex and distinctions based on age, as childhood is a fact of life that is eventually left behind, unlike one's sex or race. Onora O'Neill points out that problems may arise if we too closely analogize the plight of children to the plight of other oppressed groups. See *O'Neill*, *supra* note 11 at 309.

[59] Mark Gerzon writes: "the oppression of children by adults has continued after every previous revolution that adults have engineered." See Mark Gerzon, *A Childhood for Every Child: The Politics of Parenthood* (New York: E.P. Dutton, 1973), quoted in Michael Freeman, *The Rights and Wrongs of Children* (Dover: Pinter, 1983) at 22 [hereinafter "*Rights and Wrongs*"].

[60] Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 133-134 [hereinafter "*Image*"]; *Archard*, *supra* note 44 at 45; H*awes*, *supra* note 21 at 115.

[61] *Birthrights*, *supra* note 3; *Holt*, *supra* note 36. *Archard*, *ibid* contains a discussion of this topic at 46-51. Essentially, Enlightenment thinking concerning the rights of man has finally began to place the focus on children.

[62] *Birthrights*, *Ibid.*, at 83.

[63] *Ibid.*, at 191; See also Michael Freeman, "Whither Children: Protection, Participation, Autonomy?" (1994) 22 Man. L.J. 307, online: QL (JOUR) at para. 27 [hereinafter "*Whither*"].

from certain forms of treatment,[64] including freedom from physical punishment and cruelty.[65] Implicated within this discourse is the duty of adults and society to ensure appropriate conditions for a child's well being: children must be furnished with an environment that is conducive to their growth and future development. This environment must protect children both by ensuring the requirements of life, and by frustrating their desires when they conflict with their future well-being.[66]

While acknowledging the existence of legislation that approaches these rights,[67] Liberationists dismiss the existing rights language as illusory. Within this discourse, any rights held by children are presented as a method not of freeing children, but of protecting them;[68] these sorts of rights are simply an extension of paternalistic attitudes, as it is precisely a child's alleged vulnerability that requires that they be given these rights in the first place. As Howard Cohen explains:

> In response to a perceived need for more structure in adult-child relationships, those with the caretaker outlook has sought new ways to protect children from real and potential abuses. Caretakers have been responsible for institutionalizing compulsory education, limitations on child labour, laws prohibiting child abuse and neglect, aid to families with dependant children, school lunch programs, infant health programs, some public support for day care, and so on.[69]

---

[64] *Whither*, *Ibid.*, at 26. Freeman writes that the "protective rights can be divided into rights against the world and rights of protection from inadequate care. 'Liberating' rights may be sub-divided into conferring adult legal status and rights against parents."
[65] *Birthrights*, *supra* note 3 at 113.
[66] *Whither*, supra note 63 at para. 27.
[67] For example, Section 3 of the *Canada Health Act* provides that "the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers." Moreover, even Section 43 of the Canadian *Criminal Code*, which allows parents and teachers to corporally punish children, demands that the punishment be "by way of correction toward 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*" [emphasis added].
[68] *Archard*, *supra* note 44 at 47.
[69] *Cohen*, *supra* note 55 at 5.

In Liberationist's discourse, such entitlements have been put forward not to provide rights, but to protect children.

Second, from the perspective of Liberation, a further tier of rights exist that should be made available to children only if children wish lay claim to them.[70] These may include, for example, the right to vote, to work and to make sexual choices.[71] Rights such as these allow children an opportunity to act on their desires, and presuppose an understanding of how to exercise these rights.[72] It is accepted that the exercise of such rights may pose various risks and dangers to children, and so in making such claims, the Liberationist discourse is open to criticism as a triumph of ideology over common sense.

For instance, proponents of Liberation argue for a right to vote at any age: no one should be left behind. The reason is one of simple justice: "if I am going to be affected by what you decide, I should have a say in it. If you are going to have some control over me, then I should have some over you."[73] Within this discourse, to be subject in any way to the laws and regulations of a society, without having recourse or a voice to say what those laws should be, is unacceptable. Liberationists assert that giving people a voice in government, irrespective of age, is apt to result in a more informed and responsible polity.[74] Taken literally, such a discourse provides a critique of Canada's claim to be a 'self-governing society,' as everyone under the age of majority is prohibited from voting.

---

[70] *Holt*, *supra* note 36 at 18. Professor Fortin notes that "the fact that children might be too young to wish to exercise any of these rights was merely part of their freedom of choice; they could exercise them, when and if they choose, in precisely the same way as adults do." See *Fortin*, *supra* note 2 at 5.
[71] See generally, *Holt*, *Ibid.* There are other rights enumerated in Holt's and Farson's work, but these are the three I will concentrate on. Howard Cohen also advances a list of rights. See *Cohen*, *supra* note 55.
[72] *Whither*, *supra* note 63 at para. 28.
[73] *Holt*, *supra* note 36 at 156.
[74] *Ibid.*

Since children are unable to exercise the right to vote, any voice they have in the state is hushed. As Richard Farson has observed, "[c]hildren are no one's constituency."[75]

In this untrammelled liberal idiom of rights, even if competency is an issue,[76] it is unjust to assume that competency is always related to an individual's age. In the course of Canadian history, sex, race and property ownership were at one time taken as indicative of one's right, interest or ability to cast a ballot.[77] They are no longer. Why, ask Liberationists, is age? Competency and age, in Liberationist discourse, are not necessarily related. Moreover, competency is not at issue in determining whether someone over the age of majority should be allowed to vote:

> We do not deprive a senile person of this right, nor do we deprive any of the millions of alcoholics, neurotics, psychotics and assorted fanatics who live outside hospitals of it. We seldom even prevent those who are hospitalized for mental illness from voting. Yet, we deprive the child.[78]

If a child is not allowed to cast a vote because of an inability to make a rational decision, then an equally irrational decision by an adult should so too be disqualified. The case against enfranchising children is only valid if applied to *all* Canadian citizens, irrespective of age. In a democratic society, suffrage suggests citizenship. Such is the logic of contemporary democratic ideology.

---

[75] *Birthrights*, *supra* note 3 at 177.

[76] Which it may be, see *Rights and Wrongs*, *supra* note 59 at 23. Freeman writes that the "assertion of irrelevance of age does not square with our knowledge of biology, psychology or economics." In fact, other writes have voiced concern over this ideology's failure to accord sufficient weight to the physical, mental and psychological discrepancies between children and adults, referring to this oversight as "the most obvious weakness of the liberationists' ideas." See *Fortin*, *supra* note 2 at 5.

[77] I use voting here to denote all the rights of participation in politics, including actually casting a ballot, running for elected offices, initiating referenda, and organizing and accessing political parties and lobby groups. Adopting *Cohen*, *supra* note 55 at 104.

[78] *Birthrights*, *supra* note 3 at 177-178.

David Archard offers a pragmatic critique of this ultra-liberalism.[79] Archard first argues that simply because children are affected by laws, this does not suggest that children should be given the vote. The range of people who may be described as having their interests affected by governmental action is exceptionally broad, and it would not be appropriate to enfranchise them all: these include temporarily resident foreigners, future generations of citizens and even citizens of other states affected by internal and foreign policy.[80] Even though children are not given the right to vote, they do not represent a "distinctly disadvantaged group" in this respect.[81]

Archard also rejects the Liberationist notion that no one should have their interests affected without having fair representation. In fact, Archard notes, this principle does more to underline the necessity of the competence criterion than it does to circumvent it.[82] The Liberationist's account of democracy presupposes that someone could act to protect or advance their interests through voting, and this presupposes a capacity to understand and appreciate what one's interests are, and which governmental agencies or parties would best protect or advance them. In Archard's view, even if children are affected by the decisions of government, they would deserve the right to vote only if they

---

[79] Professor Laura Purdy also advances arguments against child suffrage. However, she argues from a position which places children in "a class for which access to the vote would be an honour, not a right..." While Purdy notes that there might be ways to enfranchise children by such means as a competency test, and that "given the decisions of the last few years, it's hard to have much confidence in their [adult] ability to make sensible choices," she then argues that the inherent problems in universal tests for voters are "apparent," and in the past have been twisted to exclude on "irrelevant grounds whole classes of citizens." See *Purdy*, *supra* note 11 at 191. It seems strange that Professor Purdy sees the best solution to this question as denying all children the vote, until some specified age, on the possibility of exclusion on "irrelevant grounds," when she earlier argues that the morally relevant differences between children and adults disappear over time. *Purdy*, *Ibid.*, at 54. Would age not, at least in some cases, be one of Professor Purdy's "irrelevant grounds" that she uses to exclude children from the vote, particularly given the large degree of difference in maturity and competency levels among those disenfranchised on age alone ?

[80] *Archard*, *supra* not 44 at 71.

[81] *Ibid.*

[82] *Ibid.*

possessed the competency to exercise it.[83] This, of course, does not entail that *all* children should be denied the right to cast a vote, only those who are not conscious of who and what would advance their interests.

In the Liberationist's analysis, the right to work is also advanced as one that should be open to children to claim, as "any attempt to strengthen the rights of children without giving them access to economic power would surely be a futile exercise."[84] Work may provide children with rich life experience, and can provide the financial resources required for independent living.[85] To deny children entry into the paid labour force is simply to perpetuate their status as dependant persons.[86]

Professor Purdy dismisses such arguments as dangerously foolish. She asserts that children would in fact be more exploited if they were allowed to work, as knowledge, prudence and experience protect us from exploitation, and these are the areas in which children are most incomplete:

> Knowledge, experience, and prudence help protect us from exploitation; but as we have seen, it is in these areas that children are most deficient. Many [children] might be willing to work grueling hours for inadequate wages, trapped in dead-end jobs.[87]

Some children may be willing to take health and safety risks that they would later regret, such as not taking appropriate measures to protect themselves from toxic chemicals or

---

[83] *Ibid.* A similar view is advanced by Carl Cohen, who argues against enfranchising children because they do not possess the "reasonable maturity" needed to participate. Carl Cohen, *Democracy* (Athens: University of Georgia Press, 1972) at 41. Moreover, Howard Cohen, a proponent of children's rights, agrees that "if children were really *unable* to participate in the political process, then it would be idle to insist that they be entitled to do so." However, he notes that children seem to understand the political process without undue indoctrination, and so the argument that children, in general, are incapable of political participation is flawed. *Cohen*, *supra* note 55 at 107.

[84] *Birthrights*, *supra* note 3 at 154.

[85] *Holt*, *supra* note 36 at 173-174.

[86] *Birthrights*, *supra* note 3 at 155.

[87] *Purdy*, *supra* note 11 at 176. A similar point is stressed by *Fortin*, *supra* note 2 at 6. Fortin writes that "a failure to regulate childhood would lead to more exploitation of children, rather than less."

dangerous machinery, and this risk is particularly pointed when dealing with a strata of society which often lacks the ability imagine one-self at twenty-five, let alone fifty.[88] Purdy rejects Holt's claim that in the nineteenth century, "the mines and the mills were no less horrible for them [adults]."[89]

Liberationists dismiss such cautions. They assert that the child exploitation of the industrial revolution and the nineteenth century reflected conditions in which even adults laboured.[90] What is more, children in the nineteenth century could not choose or refuse to work; they were pressed into employment by parents, either through greed or necessity. The issue today would not be one of exploitation of children, but of exploitation of workers, child and adult. What is important in contemporary society is not to protect children by denying them access to the workplace, but to make labour and employment standards better for everyone.

Liberationist discourse also would grant children the right to make sexual choices, including the right to express oneself sexually, and have access to information about sex.[91] This account of children's rights initiates questions about who should administer the information, and when a child is capable of expressing themselves sexually.[92]

Farson argues that "with all the variations of sexual behaviour found around the world and throughout history, it is ridiculous to limit by law the ways in which people should be together sexually."[93] Problematically, however, this leads him to contend that "incest and sexual activity within the family…is far more common and far less traumatic

---

[88] *Purdy, Ibid.*
[89] *Holt, supra* note 36 at 187.
[90] *Archard, supra* note 44 at 47.
[91] *Birthrights, supra* note 3 at 130-136. This information would inform children about birth control and sexually transmitted disease, but also provide them access to stores and theaters that are "adults only."
[92] *Ibid.*; *Archard, supra* note 44 at 74-75.
[93] *Birthrights, Ibid.*, at 152.

that we have always been led to believe," and therefore the dangers of incest have been "highly overrated."[94] This unfortunate stream of argument weakens Farson's overall claim that his interest is in promoting the rights of children.

Purdy argues that the extension of sexual rights to children will lead to serious and far-reaching consequences, including increases in sexually transmitted diseases and substantial teenage motherhood, which generates further consequences, such as rising high-school dropout rates and more low-income families.[95] Existing increases in sexual intercourse among teens has been attributed not to affection between two people, but rather to increased peer pressure.[96] Equally if not more disturbing are the ideas of sexual relationships between adults and children, or parents and their children.[97]

Archard notes that a more acceptable claim would be that society must combine an appropriate and adequate scheme of protection of children with a fair and reasonable attribution of sexual freedom.[98] Moreover, age is not a measure of sexual competence, and children should be thought capable of making some decisions under conditions which provide competence can be provided, secured and protected.[99] Liberationists should not argue that children of any age could engage in sexual acts. Rather, they should maintain that age should not be the litmus test used to determine competency or lack thereof, and therefore ability to make decisions. As Professor Fortin notes, it is "obviously impossible

---

[94] *Ibid.*, at 148.
[95] *Purdy*, *supra* note 11 at 146-147.
[96] David Elkind, *All Grown Up and No Place to Go: Teenagers in Crisis* (Mass: Addison-Wesley, 1998).
[97] In situations such as this, difficulties may also arise with respect to different cultural beliefs and ideals, which further complicate the issue. See Michael Freeman, "Children's Rights and Cultural Pluralism" in *The Moral Status of Children: Essay on the Rights of the Child* (Cambridge: Kluwer Law International, 1997) 129.
[98] *Archard*, *supra* note 44 at 75.
[99] *Ibid.*, at 81.

to set a single age when all children can be deemed competent to reach any particular type of decision."[100]

Other problems arise when closer scrutiny is applied to the contention that rights should simply be made available to children, who then decide themselves whether or not to exercise such rights.[101] As Archard points out, Holt's suggestion that rights be "made available" is confusing, as there is an important difference between possessing a right, and choosing to use or exercise that right once possessed: "It is entirely possible that someone should elect to take up a right which they prefer not to exercise. They might...wish to be enfranchised but never vote."[102]

Additionally, since it stands to reason that many children will not desire to exercise these rights, Holt's thesis would have us remove the ability to exercise these rights upon inaction, and then return it upon action. As Archard notes, there is something backward about "making the possession of these rights conditional upon an interest which is likely to be absent and which will be activated only by the very exercise of these rights."[103] Once an adult is provided the right to vote, should we remove that right if the adult decides not to exercise it, only to return the right when the adult decides to?

At its most extreme, the children's rights discourse asserts that children should be provided with all of the rights that adults enjoy. This ideology can be seen as a marked departure from the aims and notions of more traditional child caretakers and advocates, and presents children as an oppressed minority that is worthy of making important decisions, rather than as a group of vulnerable and dependant human beings. Professor

---

[100] *Fortin*, *supra* note 2 at 5.
[101] See note 70, *supra*.
[102] *Archard*, *supra* note 44 at 50-51.
[103] *Ibid.*, at 51.

Fortin argues that Liberationists have over-emphasized the importance of bestowing adult rights on children.[104] However, she also recognizes their

> ...invaluable contribution to this field of thought. In particular they [Liberationists] generated considerable interest in children's ability to take greater responsibility for their lives, which in turn lead to a reassessment of the legal principles relating to children's capacity for decision-making.[105]

The language of Liberation has broad implications not only for those adults who would fall into the category of child-abusers, but for all parents and authority figures, no matter how virtuous.[106] This discourse is inexorably bound to the impression that the very institution of childhood is in need of repair, and that society's "fundamental ways of relating to children are inadequate, and that we must restructure them."[107] Society must acknowledge that there is not only child violence, abuse and neglect, but also "systemic mistreatment of children."[108]

Criticisms abound for the Liberationist idiom of child rights, but as Michael Freeman points out, in the era in which the Liberationist account originated – the 1960s – optimism was in the air: "child sexual abuse had yet to be 'discovered,' and drugs were not seen as the social problem they constitute today."[109] Perhaps in light of this, contemporary proponents of the Liberationist school advance less radical breeds of this idiom than their forbearers.[110] The central premise of the original ideology remains: children, even some very young children, are competent to make informed decisions. It

---

[104] *Fortin*, *supra* note 2 at 3.
[105] *Ibid.* Fortin continues: "The ideas of the 'children liberationists' generated a wealth of valuable debate about the extent to which society should encourage children to develop their powers of self-determination." *Ibid.*, at 4.
[106] Hawes writes that Protectionists and Liberationists "differ most vigorously on the issue of the role of adults in improving conditions for children in our society." See *Hawes*, *supra* note 21 at 118.
[107] *Cohen*, *supra* note 55 at 9.
[108] *Ibid.*
[109] *Whither*, *supra* note 63 at para. 14.
[110] See, for example, Joel Feinberg, "The Child's Right to an Open Future" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 213.

is further noted that the arguments advanced against endowing children with rights on account of a deficiency in competence are just as cogent and persuasive when applied to adults.[111]

The Relevance of the Changing Conceptions of the 'Child'

Since the Second World War, historians have made society more aware of how our thinking about children is of a historical nature. In different historical periods, diverse ideas about children and childhood existed. New accounts of citizenship, growing out of the seminal work of T.H. Marshall, provoked wide ranging debates on forms of citizenship within the liberal state, with much of the postwar theory making citizenship almost exclusively dependant on the possession of rights.[112] Since 1945, various discourses of rights, most profoundly post-colonial discourses, have asserted that groups previously denied rights, colonized peoples, women, Aboriginal peoples and children, have a legitimate claim to equal treatment. Each of these bodies of literature comes to bear on our thinking and understanding of children's rights and the conception of childhood in the twenty-first century.

Both as individuals and groups, adults have both conscious and unconscious opinions and conceptions of childhood that affect and influence how they view the topic of children's rights. Understanding the various attitudes toward children and children's rights helps clarify this issue, and also assists us in understanding how and why different adults and groups of adults view children. As Malfrid Grude FlekkØy points out, "the

---

[111] *Fortin*, *supra* note 2 at 6.

[112] Will Kymlicka & Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1994) 104 Ethics 352 at 354. Marshall's argument is that "citizenship is essentially a matter of ensuring that everyone is treated as a full and equal member of society. And the way to ensure this sense of membership is through according people an increasing number of citizenship rights."

values and roles of children may play an important part in determining strategies, difficulties and how far we feel it is reasonable to go in defending and promoting the rights of children."[113]

Historically, the conception of childhood has undergone considerable change, with lines being roughly drawn between three eras. First, children appear within the language of property. They are noticed historically because they are a feature of the property held under the Roman Common Law doctrine of *parens patriae*. Second, Enlightenment thinkers, such as Locke and Rousseau, provided the basis for a new way of thinking about childhood and children. These theorists implanted the notion of children as people requiring moral guidance, education and paternalistic protection by the state. Such ideas came to replace the earlier notions of children as property, and led to the emergence of a middle-class campaign to extend legal protections to children. The late twentieth century introduced the third era, an era which challenged this paternal idiom with an account of children as bearers of rights.[114] This era still breathes and influences contemporary views of childhood and children's rights.

Our conceptions of children and childhood are "socially produced, contingent on time and place, ideology and cultural practice."[115] "Childhood" as a social construct is a product of existing value systems, but even more so, a product of the languages available to us to talk about "childhood." Importantly, the debate concerning childhood is of great

---

[113] Malfrid Grude FlekkØy, "Attitudes to Children – Their Consequences for Work with Children" in Michael Freeman and Phillip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 135 at 136 [hereinafter "*Attitudes*"]. See also *Fortin*, *supra* note 2 at 10 where Professor Fortin writes that "Ideas about children's rights undoubtedly reflect the nature of the society in which they are being brought up and the type of childhood they will experience."

[114] *Covell*, *supra* note 2 at 16; See also *Shadow*, *supra* note 22 at 38. There are also those that argue that the changes in the relationship between adults and children, and consequently the perception of children, have not been this uniform or linear. See *Rights and Wrongs*, *supra* note 59 at 15.

[115] *Shadow*, *Ibid.*, at 39. Citing George Lakoff, *Women, Fire and Dangerous Things: What Categories Reveal about the Mind* (Chicago: University of Chicago Press, 1987).

consequence, as it determines the way in which we treat and view children within the social order.[116] In practical terms, children are going to pay the cost or reap the benefits.

In the first era, children were taken note of only within the context of a patriarchal legal order. Children were viewed largely as pieces of property, owned and therefore controlled by their parents. The father was the spiritual, emotional, political and physical head of the family, and the family unit was the primary social institution:

> The family was, in effect, a comprehensive, organic unit, 'a little church and a little commonwealth, at least a lively representation thereof, whereby triall may be made of such as are fit for any place of authoritie, or of subjugation in Church or commonwealth. Or rather it is a schoole wherein men are fitted to greater matters in Church or commonwealth'.[117]

Although in Canada it was generally understood that parents would responsibly perform their duties toward their children (e.g. educate, feed, etc.), the young were typically viewed as the property and the private domain of male head of the family.[118] These parental rights were absolute.

Adult males acquired such property rights over their offspring simply by virtue of the fact that they fathered these children, a notion of property Lockean in flavour:[119]

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with it, and joyned to

---

[116] Gary B. Melton, *Child Advocacy* (New York: Plenum Press, 1983) at 193.
[117] William Gouge, *Of Domesticall Duties* (London, 1622), taken from *Hawes*, *supra* note 21 at 1.
[118] *Covell*, *supra* note 2 at 17. See also Hillary Rodham, "Children Under the Law" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 29 at 30 where she writes: "Children were regarded as chattels of the family and wards of the state, with no recognized political character or power, and few legal rights."
[119] It should be noted that John Locke did not write until the seventeenth century, and the notion of children as property dates back to the Roman doctrine of *parens patriae*, the state as the father of all people – which originates in Roman Common Law. *Shadow*, *supra* note 22 at 38. Nevertheless, it has been discussed with respect to parent ownership of children through parents owning the fruits of their labour. See David Archard, "Do Parents Own Their Children?"(1993) 1 The International Journal of Children's Rights 293 at 295 [hereinafter "*Do Parents*"].

> it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *Labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for other.[120]

People have the entitlement to their own bodies, and that logically includes those talents or capacities appended to the body. Locke argues that the when a person uses these talents to create, this "'work' of his hands" rightfully belongs to them. Archard writes: "The Lockean argument is, in sum, that self-ownership generates ownership of the fruits of one's labour as long as others are not made worse off by that ownership."[121]

Children, according to this argument, are appropriately represented as the "work" of their parents' hands, and were therefore properly viewed as the "fruits" of their parents' labour. Assuming that others are not made worse off by this ownership, the parents' self-ownership generates property rights in their children.[122]

It is not difficult to see how the notion of parental ownership of the child militates against ascribing rights to the child, as ownership would entail "the rights to form one's child's values, one's child's life plan and the right to lavish attention on the child," as these rights are simple extensions "of the basic right not to be interfered with in doing these thing for oneself."[123] The interests of the child were seen as identical to the

---

[120] John Locke, *Two Treatises on Government* (Cambridge: Cambridge University Press, 1967) at 305-306.
[121] *Do Parents*, *supra* note 119 at 295.
[122] *Ibid.* David Archard more fully explains this argument and reactions to it, such as problems of ownership in *perpetuum* and the ownership qualities of the father versus the mother. Moreover, Howard Cohen uses other passages from Locke's work to dispel the notion of children as property. See *Cohen*, *supra* note 55 at 5-7.
[123] *Do Parents*, *Ibid.*, at 294 citing Charles Fried, *Right and Wrong* (Cambridge: Harvard University Press, 1978) at 152.

interests of the father,[124] and as John Eekelaar notes, it would not be an exaggeration to say that "the social role of children was primarily seen as furthering the interests of the family group as a whole and over time maintaining and perhaps extending the family's land-holding."[125]

Since approximately the nineteenth century, the concept of children as property has been challenged by an account of children as human beings requiring conditions appropriate to their full development. The Enlightenment bequeathed a new way of thinking about childhood as an important period of basic character formation. Locke writes:[126]

> Let us then suppose the mind to be, as we say, white paper, void of all characters, without any ideas: - How comes it to be furnished? Whence comes it by that vast store which the busy and boundless fancy of man has painted on it with an almost endless variety? Whence has it all the *materials* of reason and knowledge? To this I answer, in one word, EXPERIENCE...Our observation employed either, about external sensible objects, or about the internal operations of our minds perceived and reflected on by ourselves, is that which supplies our understandings with all the *materials* of thinking. These two are the fountains of knowledge, from whence all the ideas we have, or can naturally have, do spring.[127]

A child's mind when they are born is a blank slate, a *tabula rasa*, and environmental influences shape individual consciousness and future character.[128] Here was a period in which in order to ensure that children developed into responsible members of society,

---

[124] Professor McGillivray notes that "although the Roman patriarchy was abolished by edict...the property nature of the interest continues to influence the treatment and valuation of children." *Reconstructing*, *supra* note 4 at 218.
[125] *Eekelaar*, *supra* note 45 at 193.
[126] Hawes also makes the point that this new regulation was Lockean in its foundation. *Hawes*, *supra* note 21 at 11.
[127] John Locke, "An Essay Concerning Human Understanding" in *The Empiricists* (New York: Anchor Books, 1974) 7 at 10.
[128] I am not going to undertake an examination of Locke's simple versus complex ideas. For more information on this topic or Locke in general, see E.J. Lowe, *Locke on Human Understanding* (London: Routledge, 1995) and J.D. Mabbott, *John Locke* (London: The Macmillan Press, 1973).

they received moral instruction and protection from the wayward influences of the public. This approach to childhood became a middle-class norm that eventually 'child savers' would attempt extend to the less fortunate.

The long standing supposition that the head of the family, the father, knew how to best raise 'his' children was replaced with the notion that state intervention could be justified when parents shirked their responsibilities, responsibilities based on middle-class norms established by the state. Children were still largely viewed as parental property, and familial privacy maintained much importance, only to be interfered with by the state when absolutely necessary:

> While parents had obligations toward their children under the law, children had no rights to demand anything from their parents. If their parents failed, then the state must intervene, not because children have rights, but because their parents failed.[129]

While this philosophy may have been used to ameliorate some children's poor living conditions, it was not a proposal which granted them rights. It was not the interests of the children that reformers sought to address, but rather the interests of society.

By the 1920s, this movement had been institutionalized in the new social and healthcare professions. This new paternalism gave rise to child "professionals," experts such as psychologists and social workers as well as a host of volunteers who exposed mothers to a precise set of child-rearing guidelines.[130] By that time reforms affecting education, health care, orphans and child labour had been introduced by the state to attend to some of the worst social blights affecting children.[131] For example, typical of

---

[129] *Covell*, *supra* note 2 at 18.
[130] *Hawes*, *supra* note 21 at 27. See also Jeroen J.H. Dekker, "The Century of the Child Revisited" (2000) 8 The International Journal of Children's Rights 133 at 141-143.
[131] Neal Sutherland, *Children in English Canadian Society: Framing the 20th Century Consensus* (Toronto: University of Toronto Press, 1976) 13-36.

this era was the *Juvenile Delinquents Act* of 1908, which established a paternalistic justice system for juveniles with a "welfare-oriented" philosophy.[132] From the 1920s, it was increasingly the case that the state entered and regulated the parent-child relationship. The parenting credentials of the average Canadian, particularly the mother, who shouldered the responsibility for her child's later failure in life, were scrutinized.[133]

A child's upbringing in this era was largely a combination of the view of children as the future,[134] mingled with the state's disbelief that Canadian families were up to the task of ensuring this future.[135] The public was repeatedly told that the nation was in the hands of their children, and their children's future ultimately depended on receiving critical experiences during childhood: "Proper, informed child-rearing was essential if 'normal' and productive individuals were to be created for an urban-industrial community vulnerable to personality breakdown and deviancy."[136] It was the interests of the nation, not the interests of children, which were at stake.

This interest extended to the medical and psychological regulation of pregnancy, as child birth became a growing preoccupation of the state. Children were raised by mothers inundated with child-rearing guides that advised, among other things, that "a baby is born without habits," so "teach him only good ones."[137] Through affirmations of

---

[132] Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin law, 2003) at 7.
[133] Veronica Strong-Boag, "Intruders in the Nursery: Childcare Professionals Reshape the Years One to Five, 1920-1940" in Joy Parr, ed., *Childhood and Family in Canadian History* (Toronto: McLelland and Steward, 1982) 160 at 161 [hereinafter "*Intruders*"].
[134] *Hawes*, *supra* note 21 at 28.
[135] *Intruders*, *supra* note 133 at 161. Explains how experts criticized women for "running homes" without "even the fundamentals of house management and dietetics." In addition, the high Canadian infant and maternal mortality rates buttressed the state's contention that many mothers were unfit to raise their children as they chose.
[136] *Ibid.*, at 172.
[137] *Ibid.*, at 164-165. See this article generally for the treatment of Canadian mothers during the Inter-War period. At 162 Strong-Boag writes of "little mother classes, expectant mothers' clinics, well-baby clinics, better baby contests, and baby welfare centres." Writing about updating child-rearing practices was also a popular pursuit in the newspapers and magazines. At 163.

particular social and personal conduct, parents should condition children to act appropriately: "The infant as machine succeeded the...image of the child as flower.[138] Given that the contemporary home in the early twentieth century was "the poorest run, most mismanaged and bungled of all human industries,"[139] this new paternalism demanded state intervention into the rights and lives of children, eroding the authority and relationship between parent and child.

Within this idiom, the public value of privacy diminished, while a growing concern with the future welfare of children was privileged. Still, it is important to note that it was not "rights" that were being provided to children; it was protection to secure the future of society. As Rose has observed:

> Throughout the nineteenth century and into the twentieth one sees a proliferation of hundreds of little and large projects which sought to shape, mould, regulate and utilise the family and 'what goes on' in it, for social ends and to secure social objectives.[140]

While state intervention into problem families was profound, the family was still considered the basic societal unit, with the freedom to function with minimal state intrusion.[141] Even as most parents were at liberty to reject or minimize state intervention into their family, many saw a gradual erosion of their parental authority; professional advisors "joined and sometimes supplanted fathers and mothers in the nursery and the classroom."[142] Nonetheless, children were still largely regarded as objects, as Covell and Howe write, children

---

[138] *Ibid.*, at 166.
[139] *Ibid.*, at 161.
[140] *Rose*, *supra* note 25 at 70. Also see *Reconstructing*, *supra* note 4 where Professor McGillivray writes that "the family was co-opted to serve state socialization goals not through force but through tutelage: parents seek out the advice of a variety of experts and participate in the education and care of themselves and their families."
[141] *Covell*, *supra* note 2 at 18.
[142] *Intruders*, *supra* note 133 at 173, 178.

> ...were seen as "not-yets" – potential persons in need of care – rather than as existing persons with inherent rights...At best, while the policy of state paternalism offered children certain protections from abusive parents, it left them exposed to conditions that denied them voice and value as independent persons.[143]

Children were entitled to protection, but had no *rights* to impose requirements on their parents. From first stage to the second, children 'progressed' from subjugation by their parents to subjugation by the state.

The third or contemporary idiom of childhood dates from the years following the Second World War, when the concept of state paternalism eroded under the tide of the children's rights movement. Children slowly began to be viewed more as "subjects or existing persons in the here and now, with dignity and basic rights of their own."[144]

In 1962, Philippe Ariès' *Centuries of Childhood*[145] ushered in a new era in the study and philosophy of childhood. Childhood was not to be considered an invariable concept, and must instead be understood in its historical context, taking into account "both repeated patterns and wide disparities in the way children have been treated and been expected to behave at different periods of time and in different cultural contexts."[146] Ariès argued that the entire modern concept of childhood was socially constructed, stemming from seventeenth century European notions and ideas.[147] He writes:

> In medieval society, the idea of childhood did not exist; this is not to suggest that children were neglected, forsaken or despised. The idea of childhood is not to be confused with affection for childhood: it corresponds to an awareness of the particular nature of childhood, that particular nature

---

[143] *Covell*, *supra* note 2 at 18-19.
[144] *Ibid.*, at 19. However, Michael Freeman traces the notion of children's rights back to the middle of the nineteenth century. See *Rights and Wrongs*, supra note 59 at 18.
[145] Philippe Ariès, *Centuries of Childhood: A Social History of Family Life*, trans. Robert Baldick (New York: Vintage Books, 1962) [hereinafter "*Centuries*"].
[146] *Rights and Wrongs*, *supra* note 59 at 8.
[147] *Centuries*, *supra* note 145 at 47. Ariès believes that the discovery of childhood began in the thirteenth century, but its development became more "plentiful and significant from the end of the sixteenth and through the seventeenth [centuries]."

> which distinguishes the child from the adult, even the young adult...Language did not give the word 'child' the restricted meaning we give it today: people said 'child' much as we say 'lad' in everyday speech. The absence of definition extended to every sort of social activity: games, craft, arms.[148]

Childhood itself was not a phase of life, it was simply a period of miniature adultness.

According to Ariès, childhood became a very important stage of life following the Renaissance and Reformation. Given this importance, special attention had to be paid to a child's upbringing to ensure their future development and success. As Farson writes:

> Childhood became preparation for adulthood. Before this period children just grew up; after this period they had to be raised. Before that time they were inconsequential, undefined little people; after that time they became "children," meaning adults-in-training.[149]

Ariès is not without his critics. For example, Patrick H. Hutton writes that it "was not that medieval man had no conception of childhood. Rather, he had no idea of the developmental link between the child's and the adult's mentality."[150] Others argue that *Centuries of Childhood* professes to deal with the general topic of children, while actually only critically examining children of higher classes.[151] Others agree that a change in attitudes has occurred, but criticize Ariès for failing to adequately explain why this change took place.[152]

Centuries of Childhood was followed by a number of historical accounts of children, including Lawrence Stone's *The Family, Sex and Marriage in England 1500-1800.*[153] Stone builds on the finding of Ariès, but drew his evidence from a wider source base to

---

[148] *Ibid.*, at 128.
[149] *Birthrights*, *supra* note 3 at 19.
[150] *Image*, *supra* note 60 at 4, quoting Patrick H. Hutton, "The History of Mentalities: The New Map of Cultural History" (1981) 20 History and Theory.
[151] *Ibid.*, at 5. Affixed to this is David Archard's attack that Ariès' work is irredeemably value laden. See *Archard*, *supra* note 44 at 18-20.
[152] *Rights and Wrongs*, *supra* note 59 at 10-11..
[153] Lawrence Stone, *The Family, Sex and Marriage in England, 1500-1800* (New York: Harper and Row, 1977).

identify changes in family and child ideology. Stone finds that the ideologies of childhood, and therefore the treatment of children

> ...oscillates between 'the repressive' (the sixteenth and nineteenth century emphasis on filial piety, ritual beating and the 'utter subordination of the child') and 'the permissive' (the affective individualism of the seventeenth and twentieth centuries which, in emphasizing individual happiness, threatens parental bonds and social cohesion). While treatment of children oscillates (and varies within those oscillations), concern for children steadily increased throughout the modern period.[154]

Others, such as Lloyd DeMause, view the evolution of the ideology of childhood as more linear:

> ...The farther we go back in history...the lower the level of child care and the more likely children were to be killed, abandoned, beaten, terrorised, and sexually abused...The origin of this evolution lies in the ability of successive generations of parents to regress to the psychic age of their children and work through the anxieties of that age in a better manner the second time they encounter them than they did during their own childhood.[155]

This new burgeoning historical literature, in which accounts of childhood were understood to be historically and socially specific, laid the basis for the debate about contemporary forms of childhood. It is in this new intellectual environment that the child Liberationists deployed their language of childhood. Farson, one of the principle advocates of Liberation ideology, asserts for example that "...childhood is not a natural state. It is a myth. The myth of childhood constantly changes in response to other developments in civilization."[156]

---

[154] Anne McGillivray, "Governing Childhood" in Anne McGillivray, ed., *Governing Childhood* (Dartmouth: Aldershot, 1997) 1 at 6 [hereinafter "*Governing*].

[155] *Image*, *supra* note 60 at 10, quoting Lloyd DeMause, "The Evolution of Childhood" in Chris Jenks, ed., *The Sociology of Childhood, Essential Readings* (London: Baksford Academic and Educational Ltd, 1982).

[156] *Birthrights*, *supra* note 3 at 18. Farson continues: "[Ariès'] *Centuries of Childhood* is the major source of information about the incredible development of the idea of childhood." Ariès' impact on the importance of understanding the changing conception of childhood helped drive the movement for children's rights, and laid much of the basis for Liberation arguments that, as noted above, have played a significant role in the present condition of children and children's rights.

In the same year that *Centuries of Childhood* was published, the paediatric study of Dr. C. Henry Kempe, "The Battered Child Syndrome,"[157] was also released. As noted by Professor McGillivray, the "dark side of Ariès' 'new childhood' was about to receive a name: child abuse."[158] Ironically, historically the child rescue movement, and organizations such as the National Society for the Prevention of Cruelty to Children, grew out of the commitment of middle class reformers to end the abuse of children in the Victorian era.[159] In that era, laws were passed to protect children. In the contemporary era, reformers wish to confer rights on children.

The recognition of child abuse "has wide implications for how children are viewed by society and how children are treated by parents and adults."[160] As the brutality of child abuse and its implications for the future of children came to light,[161] a "child-centred focus" emerged, impelling the children's rights movement forward. Children came to be seen as having certain entitlements or rights, and these rights did not flow from paternalism or ownership, but rather from the notion of children as rights-bearers.

---

[157] C. Henry Kempe *et al.*, "The Battered Child Syndrome" (1962) Journal of the American Medical Association, 181, 17.

[158] *Governing*, *supra* note 154 at 5. However, this is not to say that child abuse itself, rather than its recognition, is a new fact, nor is it to say that child abuse is worse today than in the past. See *Archard*, *supra* note 44 at 147-148.

[159] Michael B. Katz, "Child-Saving" (1986) 26 3 History of Education Review 413 at 416-416. This society was established in 1884, and specializes in "child protection and the prevention of cruelty to children." National Society for the Prevention of Cruelty to Children, online: NSPCC <http://www.nspcc.org.uk/html/Home/Aboutus/aboutus.htm> (date accessed: 17November 2004).

[160] Anne McGillivray, "Abused Children in the Courts: Adjusting the Scales After Bill C-15" (1990) Manitoba Law Review 549 at 555.

[161] Anne McGillivray, "Child Physical Assault: Law, Equality and Intervention" (2004) 30 Manitoba Law Journal 133 at 142-144 [hereinafter "*Equality and Intervention*"]. See also Alice Miller, *For Your Own Good: Hidden Cruelty in Child Rearing and the Roots of Violence*, 3rd ed. trans. Hildegarde and Hunter Hannum (New York: Farrar, Straus, Giroux, 1990) and Lonnie H. Athens, *The Creation of Dangerous Violent Criminals* (New York: Routledge, 1989).

Claims of children were to be heard because of their status as subjects and independent persons.[162]

This reassessment of the capacity and independence of children provoked a critical and analytical re-examination of the function of law and its treatment of children. The advancements of this analysis and re-examination have been gradually incorporated into legal and social documents, both national and international, partly on account of society being "goaded by the child advocacy movement,"[163] and partly because child abuse is a "powerful concept that can be the basis for strong international action to improve the status of all children."[164] This legal and social advancement culminated in the signing and ratification of the United Nations *Convention on the Rights of the Child*,[165] which provides, in a *de jure* form at least,[166] all children of all ratifying countries[167] with the rights of provision, protection and participation.[168]

The changing views of children and their abilities has led to a changing conception of children's rights, and a petition to protect these rights. Contemporarily speaking, children are no longer to be viewed as familial property or wards of the state, but rather as individuals worthy of recognition and respect. This new societal position, combined with the backing of law and international covenant, has placed the advancement of children's rights in the domain of public policy. As noted by Covell and Howe: "A

---

[162] *Covell, supra* note 2 at 19.
[163] Carl M. Rogers and Lawrence S. Wrightsman, "Attitudes toward Children's Rights: Nurturance or Self-Determination?" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 59 at 60.
[164] *Reconstructing*, *supra* note 4 at 229.
[165] *Convention*, *supra* note 7.
[166] Onora O'Neill notes that while the rights in the *Convention* are not "spurious," they are "patently no more than 'manifesto' rights, that cannot be claimed unless or until practices and institutions are established that determine against whom claims on behalf of a particular child may be lodged." *O'Neill, supra* note 11 at 306.
[167] The *Convention* has been ratified by all countries except the United States of America.
[168] *Covell, supra* note 2 at 22-23, citing Thomas Hammarberg, "The UN *Convention on the Rights of the Child* – and How to Make it Work" (1990) 12 Human Rights Quarterly 97-105.

convention is an expression not only of a moral stand but also of a legal agreement and international obligation."[169]

This changing paradigm of childhood and of children's rights has also had profound effects on society, both legally and morally, creating an atmosphere more inclined to assent to the granting of children's rights. Professor Fortin writes:

> Indeed, contemporary society may have contrived a situation whereby its children can only thrive if they are able to take on more responsibility for their own lives at an earlier age than before and in more complex situations...quite simply because society needs more sophisticated children.[170]

Parents and educators of today may need to provide children with rights, as this will endow children with the future fitness to make decisions that will not be harmful to themselves or society.

It must be appreciated that childhood is not disappearing into nothingness. Childhood is an evolving concept, but that does not lead invariably to its destruction or invisibility:

> Childhood has changed and will continue to do so. But those who toll the knell of its passing, often interpreting, what they consider to be, its demise to moral decadence, oversimplify, exaggerate and, in making the link with the children's rights movement, dangerously distort.[171]

Different cultures and historical periods have different concepts and conceptions of childhood, including different claims about the length of childhood, and how much care and control children need at different ages.[172] Indeed, the significance of childhood is more pronounced for our time than it has been for previous societies and cultural groups, viewed as an extended stage before adulthood, which requires its own distinct culture.[173]

---

[169] *Ibid.*, at 20.
[170] *Fortin*, *supra* note 2 at 11.
[171] Michael Freeman, "The Moral Status of Children" in *The Moral Status of Children: Essay on the Rights of the Child* (Cambridge: Kluwer Law International, 1997) 1 at 7 [hereinafter "*Moral Status*"].
[172] See *Attitudes*, *supra* note 113 at 143 for a good discussion on the length of childhood.
[173] *Archard*, *supra* note 44 at 31.

While childhood may be changing, it is no way dissolving as a concept, nor will it begin to. The granting of rights and an appropriate moral status is not the end of childhood, but rather, the beginning of a better one.[174] Childhood changes, and the accretion of rights and status simply signifies another change in the conception of childhood, not its destruction.

The current conception of children as bearers of rights finds its justificatory vigour in social policy and the law. Children's rights have never been so widespread or significant, and the changing conception of childhood has contributed to the substance of these rights. However, given the progress child advocates have made, it is important for the children's rights movement to ground itself deeply, and protect what it has accomplished. As can be seen from the preceding, the changing conception of the child has dramatically affected the treatment of children and their access to rights, and this conception may change again.[175]

The movement for children's rights has always encountered strong resistance, and child advocates must ensure that its current popularity is not simply a fad or "fashion." The children's rights movement "may well be in the spotlight for a certain period but be left in the dark again when the spotlight switches to another subject."[176] Yet, children's rights must not be used as a pawn in political/ideological debates, and instead should be examined as a serious subject of law and history. Child advocates must understand the historical and legal development of children's rights, and keep this important debate within a domain capable of advancing this discussion.

---

[174] *Moral Status*, *supra* note 171 at 7.
[175] Farson writes that the concept of childhood will "undoubtedly" change again "in response to the rapid shifts in human affairs which characterize the twentieth century." See *Birthrights*, *supra* note 3 at 17-18.
[176] *Image*, *supra* note 60 at 400.

The Proper Model of Children's Rights

It is important here to note the significance of thinking in terms of childhood and children's rights. As Onora O'Neill points out:

> Children easily become victims. If they had rights, redress would be possible. Rather than being powerless in the face of neglect, abuse, molestation and mere ignorance they (like other oppressed groups) would have legitimate and (in principle) enforceable claims against others. although they (unlike many other oppressed groups) cannot claim their rights for themselves, this is no reason for denying them rights.[177]

Given the above noted problems associated with both Liberation and Protection, neither provides an adequate model for theorizing children's rights. Adopting one extreme or the other will lead to folly, as seen by much of the "dichotomised" literature on children's rights.[178] The fundamental rights approach is essentially a critique of the traditional Protectionist approach to children, but its simplistic ideological assertion is clearly inadequate in dealing with the reality of children and children's lives. We must both recognize the abilities of the child to make decisions, as well as realize the peril that follows absolute liberty. Still, the autonomy of children must be respected at the same time as the needs of children are recognized, and any belief in autonomy is a belief that the autonomy of one person is as morally significant as that of any other person. This autonomy should not hinge entirely on life stage (i.e. age), but the extent to which a person is allowed to exercise this autonomy may be influenced by the stage of life the person has attained.[179]

Important to this discussion is an analysis of the term "rights." In one sense, it is possible to speak of rights that are given or conferred by legal documents or rules. Rights

---

[177] *O'Neill*, *supra* note 11 at 291.
[178] *Whither*, *supra* note 63 at para. 29.
[179] *Ibid.*, at para. 31.

such as this are often seen as a positive definition of what one is allowed or privileged to do,[180] but also include rights to legal protections from the actions of others. For example, the assault provisions of the *Criminal Code* state that those who commit assault are guilty of either an indictable or summary conviction offence.[181] These 'legal rights' are provided to different people at different times, but are not the only type of 'rights' that exist in Canadian society. As noted by C.A. Wringe:

> That legal rights are the only 'real' rights may, however, well be the use of the hard-headed layman, inclined to ridicule claims to rights not backed by the force of law. Such a view may consequently be an important source of contention and misunderstanding when the rights of individuals – including children – are disputed in an actual situation of conflict....[But] without bad faith we cannot say 'this the law allows or forbids and that is the end of it.' If laws are pernicious, cruel or unjust, it may be that they ought not normally to be obeyed and that the rights they confer may often justifiably be withheld and ought to be frustrated.[182]

Human rights inform and fashion what come to be seen as legal rights. Human rights can be understood as:

> ...high-priority entitlements, or justified claims, that we all have to those objects which we vitally need as the kind of creatures we are. Such objects, in abstract terms, might include personal security, material subsistence, liberty, equality and recognition.[183]

Human rights are not rights that are given or provided, they are rights that human being 'have' simply by virtue of the fact that they were born human beings. These rights exist, according to the preamble of the United Nations *Universal Declaration of Human Rights*:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation

---

[180] See *R.* v. *Zundel* (1987), 58 O.R. (2d) 129 (C.A.).
[181] *Criminal Code*, R.S.C. 1985, c. C-46, s. 266 [hereinafter "*Criminal Code*"]. These are considered "legal rights" because there exists a prohibition in law preventing such assaults. People have the right, in law, to be free from assault.
[182] C.A. Wringe, *Children's Rights: A Philosophical Study* (London: Routledge & Kegan Paul, 1981) at 44 [hereinafter "*Wringe*"].
[183] Brian Orend, "Terminating Wars and Establishing Global Governance" (1999) 12 Can. J.L. & Jur. 253 at 260, online: LEXIS (Canada, CANJNL).

> of freedom, justice and peace in the world,
>
> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
>
> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law...[184]

Human rights may be viewed as rights that people, by virtue of their human-hood, ought to have. These rights should be viewed as legal entitlements precisely because it is human rights that have historically informed and enlightened the legal rights that regulate society. As noted by Professor C.A. Wringe, "one valid reason for saying that a certain interest ought to be protected by the law is precisely that this interest corresponds to a moral right."[185]

By protecting human rights through criminalization of certain activities, a stigma is attached to the prohibited acts that society has deemed to be unacceptable. As noted by Professor Anne McGillivray and Brenda Comaskey, criminalization becomes a "symbolic denunciation" and "promises some real benefits in terms of safety."[186] Often human rights are not protected legally, leading to an infringement of human rights with legal sanction. It is also the case that some human rights, which have been legally solidified in legislative documents, do not apply equally to all 'human beings,' such as the right to be free from assault.

---

[184] United Nations *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly on December 10, 1948.
[185] *Wringe*, *supra* note 182 at 43.
[186] Anne McGillivray and Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 2004) at 146 [hereinafter "*Black Eyes*"].

Section 265 of the *Criminal Code* states that:

> 1) A person commits an assault when
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;[187]

The assailant may directly or indirectly apply force to another person, but that force must be intentional.[188] Those who attempt or threaten to directly or indirectly apply force to another human being, are also guilty of assault.[189] Those who commit an assault under section 265 are guilty of either and indictable offence or guilty of an offence punishable by summary conviction; either may result in incarceration.[190] This section protects Canadian society from unwanted invasions of their bodily integrity, a legislative encoding of the human right to be free from unwanted and often violent contact with other human beings.[191]

Section 43 of the *Criminal Code* provides a defence for adults who assault children, a justification excusing them from criminal sanction and a method adults may use to extricate themselves from the grasp of the assault provisions.[192] This section provides a justification for an adult assaulting a child, a legal attitude that not only symbolizes the inequitable position of children in society, but also reinforces that attitude. Professor

---

[187] *Criminal Code, supra* note 181 at s. 265.
[188] In *R.* v. *Burden* (1981), 64 C.C.C. (2d) 68 (B.C.C.A.), it was held that the accused need not use any degree of force or strength when making contact with the victim. In addition, where the application of force is the result of carelessness or a reflex action, the fundamental element of intent is absent, and no assault has occurred. See *R.* v. *Starratt*, [1972] 1 O.R. 227 (C.A.) and *R.* v. *Wolfe* (1974), 20 C.C.C. (2d) 382 (Ont. C.A.).
[189] It was held in *R.* v. *Byrne*, [1968] 3 C.C.C. 179 (B.C.C.A.) that the simple speaking of words alone, without any gesturing, is not enough to convict an accused of assault. However, it was held in *R.* v. *Horncastle* (1972), 8 C.C.C. (2d) 253 (N.B.C.A.) that if a person threatens to apply force to another person, and has the ability to do so, an assault has been committed.
[190] *Criminal Code, supra* note 181 at s. 266.
[191] C.A. Wringe writes: "Barring manifest injustice, however, the fact that something is a legal right would also seem to be a reason for holding that it is a moral right also." See *Wringe*, *supra* note 182 at 45.
[192] Professor McGillivray writes that "The defence legally and morally justifies assaulting children. This has a licensing effect seen in defendants' claims of corrective motives in cases of torture, severe injury, deal even sexual assault." *He'll Learn*, *supra* note 32 at 237.

McGillivray writes: "The defence legally and morally justifies assaulting children. This has a licensing effect seen in defendants' claims of corrective motives in cases of torture, severe injury, deal even sexual assault."[193] Why, it must be asked, are the human and legal rights of children less important than those of adults? Is it, as it has been contended, that children do not deserve to possess rights, or if they do, only a limited variant of the rights possessed by adults?[194] Or is it a fear of the provision of rights to a stratum of society that has been "widely constructed as involving a frail and centrally familial population lacking in autonomy and deserving compassion"?[195]

Whichever opinion is adopted, it is *fact* that children have long had rights, at least in the Western world. Rights in contract, tort, family and criminal law, including the right to be free from unwanted invasion of bodily integrity or assault, all belong to those below the age of majority. Section 43 does not remove children from the provisions of the *Criminal Code*, as a child can be charged with assault for assaulting another child or, ironically, and adult. However, an adult who assaults a child is provided a legislated defence to the charge, in essence removing a child's right to be free from attack. Michael Freeman writes that "*ubi ius, ibi remedium*...Where rights exist redress is possible."[196] Since children lack redress from an assault by an adult, they also lack the legal and human right to be free from such assaults. In denying Canadian children equal protection under the law, section 43 of the *Criminal Code* denies their rights as members of the

---

[193] *Ibid.*
[194] See generally *Purdy*, *supra* note 11.
[195] *Black Eyes*, *supra* note 186 at 152.
[196] *Seriously*, *supra* note 1 at 20.

human family. A law that is "pernicious, cruel [and] unjust," and "ought not normally to be obeyed."[197] Rights provided by one section, rights removed by another.

The concept of rights is irrevocably tied to the notions of dignity and respect,[198] deference children have yet to be accorded. The dignity of children is trampled by the simple fact that an assault on a child by an adult is legally justified when an assault of an inmate by a prison guard is not. Corporal punishment is a method of degrading and flattening dignity, this, in fact, is why it has so long been favoured as a method of punishment in criminal law.[199] The protection of the dignity of children is necessary in a just and equal Canadian society:

> The recognition and protection of these interests is that which makes human life more human. In this sense civilization is dependent in part upon a culture which acknowledges the integrity and personality of each individual. That is why apartheid and racial segregation are wrong, why the marital rape immunity could not be defended and why the sexual abuse of children, which reduced them to objects, disciplinary practices like 'pindown', rationalized as control measures, and corporal punishment, legitimate only in the case of children are grave infringements of the interests of the human beings targeted by the practices in question.[200]

The notion of rights as a morally important aspect of Canadian culture must not used to deny protection from violence to children based on unfounded views of childhood, which is an almost constantly changing paradigm.[201] As pointed out by the Canadian Council on Social Development, "It is a basic fundamental right of all people to live in a non-violent environment."[202]

---

[197] *Wringe*, *supra* note 182 at 44.
[198] In *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12 at para. 47, online: QL (SCJ), the majority noted that when examining the equality provisions under section 15(1) of the Charter, "a focus is quite properly placed upon the goal of assuring human dignity.." See also *Seriously*, *supra* note 1 at 21.
[199] *Equality and Intervention*, supra note 161 141.
[200] *Seriously*, *note* 1 at 21.
[201] *Covell*, *supra* note 2 at 16.
[202] Noted in *Black Eyes*, *supra* note 186 at 151.

In viewing the advancement of rights for children we must recognize the limited applicability of the Protectionist language of rights, while at the same time understand the natural problems that arise from full Liberation. This requires a delicate balancing of the two extremes in an effort to ensure that children are not disadvantaged by how rights are structured and implemented. While few contemporary children's advocates would jettison all paternalistic legislation with respect to children's rights, they view most claims that children need protection with scepticism.[203]

Whichever language of children's rights is to prevail, it must recognize the "moral integrity" of children:

> We have to treat them as persons entitled to equal concern and respect, and entitled to have both their present autonomy recognised insofar as it exists, and their capacity for future autonomy safeguarded. And this is to recognise that children, particularly younger children, need nurture, care and protection.[204]

Respect for the eventual capacity for autonomy needs to be a fundamental tenant in any cogent theory of children's rights. This understanding restricts, without eliminating, the need for paternalistic intervention, which underlies the Protectionist thesis. Indeed, Professor Fortin notes that few contemporary advocates maintain that all children should have complete personal autonomy. Often, claims for children's autonomy amount merely to claims that children should acquire more extensive rights to self-determination than they are already provided, both legally and socially.[205]

Both adults and children realize that disparities exist (between adults and children, children and children, and adults and adults) in intellectual, moral, mental and physical might, and that these variations often demand intervention into people's lives to protect

---

[203] *Limits*, *supra* note 22 at 36.
[204] *Whither*, *supra* note 63 at para. 36.
[205] *Fortin*, *supra* note 2 at 19.

them from "irrational" or dangerous actions which could damage their future prospects. These interventions must be limited so as to prevent an immediate negative result, or to serve as a lesson used to develop future capacity to determine what is in the individual's future best interest. As Freeman writes:

> We cannot allow children the autonomy to indulge in actions or activities which will irreparably damage their full lives as adults. There is a case for interventions in children's lives to cushion them against irrational actions.[206]

What should constitute the "irrational"? Views of what is "good" or "rational" cannot be the product of predisposed theories, nor can actions be adjudged "irrational" based simply on subjective standards of those who wish to intrude:

> ...what is to be regarded as "irrational" must be strictly confined. The subjective values of the would-be protector cannot be allowed to intrude. What is "irrational" must be defined in terms of a neutral theory capable of accommodating pluralistic visions of the "good."[207]

Additionally, while paternalistic intervention may be justified in some cases, it should not unduly restrict a child's capacity to make decisions.[208] Children cannot be adjudged incompetent to make decisions before given the chance to do so, as this becomes a self-fulfilling prophecy: "Presumed unable to do something, children may simply not be allowed to show that in fact they can."[209] Simply because a choice that is being made can be viewed as a mistake does not warrant intrusion. We would not be respecting autonomy if we allowed children only to make choices "when we considered the [child] was doing the right thing"; persons will not be treated as equals "without respecting their

---

[206] *Whither*, *supra* note 63 at para. 38. See also *Limits*, *supra* note 22 at 38 for a similar argument. Freeman draws much of the inspiration for this argument from John Rawls and his *A Theory of Justice* (Cambridge: Harvard University Press, 1971).
[207] *Whither*, *Ibid.*
[208] *Fortin*, *supra* note 2 at 23.
[209] *Archard*, *supra* 44 at 68.

capacity to take risks and make mistakes."[210] Additionally, it is often better to learn from mistakes than be paternalistically protected from consequences, and it is more difficult for the intervener to know that certain actions are mistakes than it is for the subject of the paternalism.[211]

It is clear that paternalism is an essential element in the relationship between adults and children, and a complete abandonment of parental authority and paternalistic care would be uncaring and immoral. What is much less clear is exactly how much autonomy should be denied to children, and the ends that are served by such a denial.[212] Freeman suggests that we attempt to delineate which sort of actions or conduct children would wish to be shielded from, taking into account the assumption that all children desire to mature, to become rationally autonomous adults capable of deciding on their own system and ends as rational human beings.[213] Nevertheless, "autonomy does not include the right to impose upon oneself, for no good reason, great harm." Therefore, paternalism may be justified to "prevent anyone from doing to his future self what it would be wrong to do to other people."[214]

Freeman believes that the conduct that children should be shielded from would be conduct that would prevent a child from maturing to free and independent adulthood, and so "irrational" conduct would include actions and choices that would thwart such a goal.[215] Thus, a limited Protectionist stance should be adopted. This would have well defined parameters that would demand that those who wish to constrain a child's exercise

---

[210] *Limits*, *supra* note 22 at 38.
[211] Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984) at 321 [hereinafter "*Parfit*"].
[212] *Fortin*, *supra* note 2 at 23.
[213] *Whither*, *supra* note 63 at para. 40. Fortin notes that this theorem has been generally called "justified paternalism" or "liberal paternalism." See *Fortin*, *Ibid.*, at 26.
[214] *Parfit, supra* note 211 at 321.
[215] *Whither*, *supra* note 63 at para. 40.

of autonomy must do so only in a way that facilitates the child developing their capabilities and capacities.[216] Whether or not those who are subject to paternalism recognize the harm prevented is irrelevant, as Gerald Dworkin writes: "Paternalism might be thought of as the use of coercion to achieve a good which is not recognized as such by those persons for whom the good is intended."[217]

However, it is also important to curtail the amount of emphasis placed on a child's ability to make decisions. A theory of children's rights is inadequate if it ignores the need and importance of paternalism, particularly when a child's physical, mental and psychological incapacity threatens to result in a poor decision that negatively affects present and future interests.[218] However, paternalism is not the same thing as oppression. What is important, after all, is to "bring a child to the threshold of adultness with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice."[219] While we should not allow a child to drop out of school at the age of six, that child's desire to attend a different school or to choose her own classes should be at least considered if not determinative. Such a view of children's rights would be in line with Canada's obligations under Article 12(1) of the *Convention*, which states that

> State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in *all matters affecting the child*, the views of the child being given due weight in accordance with

---

[216] *Seriously*, *supra* note 1 at 38-39.
[217] Gerald Dworkin, "Paternalism" in Joel Feinberg and Hyman Gross, eds., *Philosophy of Law*, 5th ed. (California: Wadsworth Publishing Company, 1995) 209 at 213 [hereinafter "*Paternalism*"].
[218] Nevertheless, some argue that a rights theory with any mention of capacity further disadvantages children. See Katherine Hunt Federle, "Rights Flow Downhill" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 243 at 265.
[219] From John Eekelaar, "The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism" (1994) 8 International Journal of Law and the Family 42 at 53, as quoted in *Fortin*, *supra* note 2 at 24. Eekelaar terms this rights philosophy "dynamic self-determinism."

the age *and* maturity of the child.[220]

This formulation of children's rights avoids giving children and even mature adolescents complete control over their lives and futures, if their choices and decisions appear detrimental to their current or future well-being. This does not invariably mean that those who are deemed unable to exercise self-determination and make choices are completely without autonomy, and completely unable to determine what is in their best interests. As Archard observes:

> Possession of a right may be all-or-nothing, but estimation of the appropriate competence, and the amount of weight to give to their express choices, need not be. A child's desire to do X constitutes some kind of claim upon those in a position to allow it to do X, even if it does not amount to a right of self-determination on the child's part.[221]

Choices and desires expressed by those seemingly unable to know or discover what is in their current and future best interests should not be completely disregarded, as the above formula demands paternalistic intervention *only* to prevent those "irrational" actions that would thwart the goal of future physical, emotional and intellectual independence and well-being.

This theory involves a discussion not only of the idiom of rights, but also the corresponding dialect of obligation. Because children are often unable to exert pressure on those who determine their choices, children's rights are in some ways different from the rights of other oppressed groups. Demands for freedom from racial or sexual

---

[220] *Convention*, *supra* note 7 [emphasis added]. Article 12(2) notes that "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child..." The inclusion of the term "in particular" indicates that while judicial and administrative proceedings are an important aspect of the Article 12(1) guarantee, they are not the only circumstances in which it applies.

[221] *Archard*, *supra* note 44 at 87. See also Michael Freeman, "The Sociology of Childhood and Children's Rights" (1998) 6 The International Journal of Children's Rights 433 at 440. Here Freeman writes that "Dependency should not be a reason to be deprived of choice and respect."

inequality can often be voiced by the groups that are being oppressed in a much more vocal way than children can voice their concerns. A central component of this theory involves appealing to those whose actions affect children (i.e. adults).[222] If those who demand rights are to gain the recognition they claim, "those on whom the counterpart obligations fall must acknowledge and fulfill them."[223] Therefore, this theory requires not only adult intervention to prevent "irrational" actions, but also intervention to ensure that actions that are *not* "irrational" are allowed or tolerated.

On account of the preceding, it appears that paternalistic intervention into the lives and choices of children, whatever their age or competency, should be cautiously circumscribed, while at the same time the dangers of complete delegation to children of decision making authority can be accepted. As Gerald Dworkin notes:

> Parental paternalism may be thought of as a wager by the parent on the child's subsequent recognition of the wisdom of the restrictions. There is an emphasis on what could be called future oriented consent – on what the child will come to welcome, rather than what he does welcome.[224]

Advocates acknowledge that while such a theory avoids intrusive paternalism and perilous freedom, it intrinsically involves a difficult and delicate balancing act: What is important is not what someone claims they truly want, but what they actually would want if, at the time the decision is made or the action is taken, they knew of all pertinent facts and was free from preconceived or prejudicial authority or control.[225]

---

[222] *O'Neill*, *supra* note 11 at 308.
[223] *Ibid.*, at 306.
[224] *Paternalism*, *supra* note 217 at 215.
[225] *Whither*, *supra* note 63 at para. 42. Freeman is citing *Parfit*, *supra* note 211 and his principle of "ideal deliberation." Parfit himself notes other formulations of this theory, citing H. Sidgwick, *The Methods of Ethics* (London: Macmillan, 1907) at 111-112 that "what is ultimately good for someone is what this person would desire if his desires were in harmony with reason." According to *Parfit*, *supra* note 211 at 500, this phrase "in harmony with reason" is essential "to exclude the cases where someone's desires are '*irrational*'" [emphasis added]. Parfit's "ideal deliberation" has also been described in a different context by Jan Steutel and Ben Spiecker of Free University, Amsterdam: "such a form of deliberation can be

The movement for children's rights demands societal cooperation in both understanding and implementation. There is a "common assumption" that the rights of children are of incalculable importance, but that they must be balanced against any formulation that would engender either further paternalism or unbridled, and possibly dangerous, freedom.[226] This is not a question of whether the language of child Liberationists or Protectionists is correct, as both theories play a role in establishing a convincing and rational theory of rights. Freeman writes:

> The dichotomy drawn is thus to some extent a false divide. Dichotomies and other classifications should not divert us away from the fact that true protection of children does protect their rights. It is not a question of whether child-savers or liberationists are right, for they are both correct in emphasizing part of what needs to be recognised, and both wrong in failing to address the claims of the other side.[227]

Both sides of the child rights spectrum must be accorded weight in proportion to their importance.

Notable to this theory, in opposition to writers such as Holt and Farson, is the theoretical impossibility of compiling a list or inventory of children's rights.[228] Children will be adjudged capable of making decisions based on whether the decision made is "irrational," and some children will be capable of making some decisions and not others, but this will be a context driven exercise. Moreover, what is "irrational" in some instances will be completely rational in others, making the creation of a rights catalogue impracticable and unnecessary.

---

described as critical reflection on preferences, in a cool hour and clear state of mind, without making logical errors, and on the basis of all relevant information." See Jan Steutel and Ben Spiecker, "Good Sex as the Aim of Sexual Education," (1996) The Philosophy of Education Yearbook, online: <http://www.ed.uiuc.edu/EPS/PES-yearbook/96_docs/steutel-spiecker.html> (date accessed: 9 November 2004).

[226] *Fortin*, *supra* note 2 at 27.

[227] *Seriously*, *supra* note 1 at 40.

[228] For a brief description of these lists, see *Image*, *supra* note 60 at 134-141.

This is important for at least two reasons. First, given the difficulty of securing any rights for children, it would seem irresponsible to codify an exhaustive list, particularly since rights and rights theory are always progressing. By delineating the rights of children through paper and pen, advocates may be foreclosing the possibility of future advances for child autonomy. A cogent and responsible theory of children's rights allows for a gradual accretion of rights to children as they become available, and prevents social forces from hijacking the "list" as political and social winds blow. This is particularly important given the strong possibility that the conception of childhood may once again change: an altered conception of childhood could all but obviate this register. While, it is acknowledged, the changing conception of childhood could fundamentally alter the above theory of children's rights, it would take a much more fundamental change in this conception to prevent the accretion of new rights to children.

Second, and partially related to the first, child rights advocates should be concerned not only with children in nations with developed law and social policy, but with children worldwide. The above theory of children's rights and autonomy is applicable across political and social borders, as part of its strength lay in Parfit's "ideal deliberation," and very little of it lay in subjective principles that may be coloured by political or prejudiced opinions.[229] This becomes increasingly important given the shrinking world-society and the culture clash that occurs when traditions collide.[230] Children in developing countries deserve, and are often more in need of, rights. The above theory can transcend borders

[229] See *supra*, note 207. "What is 'irrational' must be defined in terms of a neutral theory capable of accommodating pluralistic visions of the 'good.'"
[230] See for example Chuma Himonga, "Implementing the Rights of the Child in African Legal Systems: The *Mthembu* Journey in Search of Justice" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 2 (Burlington: Ashgate Publishing Company, 2004) 209.

and cultures, and provide at least a measure of rights to all children, regardless of location, religion, culture or sex.

To adequately and efficiently protect children and guarantee their rights, care must be taken to apply a theory that avoids the pitfalls of radical Protectionism or Liberationism. As adults, it is imperative that we approach children with this theory, and refrain from automatic dismissal of their wishes and desires. Therefore, of primary importance is a greater understanding of ourselves, through which the creation of conditions to improve the lives of children can be attained. There still exists in Canada and internationally a great confusion with the topic of the rights of children: what rights? who has them? is competency a requirement? Hopefully, the above theory can improve our understanding of the needs and contributions of children, and help explain and justify a more egalitarian and level society. The ability to improve oneself is only manifested in those given the option to try.

Conclusion

The preceding demonstrates the different conceptions and theories on the rights of children, and the discordant relationship between Protection and Liberation. While there exists widespread agreement that the rights of children are of importance, not only to children, but to the growth of society, there is the further concurrence that any attempt to advance the rights of children be done with considerable care.[231]

The controversy surrounding the rights of children raises important and distinctive philosophical questions. What, if any, rights should children have? Given that children already exercise at least some rights, what is the proper model for these rights, and how

[231] *Fortin*, *supra* note 2 at 27.

should society ensure that these rights are protected? Is the age limit set by the state before certain rights can be exercised a just use of state coercive power, or an arbitrary line in the sand? Does the growing appreciation of children's rights mean a correlative diminishment of parental rights?

One important consideration concerns the future of Canadian society: "It seems self-evident that the character of adult society will derive from the ways in which its children are brought up, and that, in turn, the nature of child-rearing will reflect the values and priorities of adult society."[232] The nature of Canadian society is the sum of both social and physical factors. Children must be nurtured and allowed to grow, not only physically, but morally, emotionally and intellectually. However, the amount of freedom children are to be given to make decisions and choices on their own must be restrained by the logic and power of common sense, as the nature of adulthood owes much of its authority to developmental processes that occur at the beginning of life.

The above theory of children's rights attempts to take into account the needs and constraints of childhood, while at the same time recognizing children's inherent status as citizens and their ability and intelligence as human beings. A rational theory of children's rights must sidestep radical philosophies that attempt to inflame the debate and transform this important question into a battle of ideologues; children's rights are too important, and children have already been used as pawns in far too many circumstances and debates.

---

[232] *Archard*, *supra* note 44 at 161.

Part III

Introduction

In 1991, Canada formally ratified the United Nations *Convention on the Rights of the Child*,[1] a document which binds the Canadian state to the Articles therein. This agreement constitutes a significant undertaking by the government of Canada, and a "very important promise to children" that "every effort would be made through legislation, policies, and programs to actualize the rights of children, shielding them from the risks of living in a socially toxic environment."[2] The signing and ratification of the *Convention* can be understood as the result of an evolution in the theory and view of childhood.[3] Children, once viewed as objects owned and controlled by a patriarch, are now to be seen as citizens with basic rights and privileges. No longer mere objects or parental property, children are to be seen as legal subjects, bearers of rights independent of state or parental authority.[4]

This Part will first examine the guarantees provided to children by the *Convention*, and then, through an analysis of Canadian case law, determine how well, if at all, these promises are being kept with respect to section 43 of the *Criminal Code*.[5] I first examine pre-*Convention* case law to determine the Canadian ethos prior to ratification. I then turn to post-*Convention* case law to determine what, if any, difference ratification has made.

---

[1] This *Convention* was adopted by the General Assembly of the United Nations on November 20, 1989. Canada signed and ratified (except for Alberta, which ratified in 1999) this convention in 1990 and 1991, respectively [hereinafter "*Convention*"].
[2] Katherine Covell and R. Brian Howe, *The Challenge of Children's Rights for Canada*, (Waterloo: Wilfrid Laurier University Press, 2001) at 15 [hereinafter "*Covell*"].
[3] Please see Part II of this thesis for an explanation of the shift from children as property, to children as rights holders.
[4] Myriam S. Denov, "Children's Rights of Rhetoric? Assessing Canada's *Youth Criminal Justice Act* and its Compliance with the UN *Convention on the Rights of the Child*" (2004) 12 The International Journal of Children's Rights 1 at 1.
[5] R.S.C. 1985, c. C-45 [hereinafter "*Criminal Code*"].

The *Convention* represents an important and necessary step in the battle to recognise children as human beings with equal rights and privileges to adults (with modifications to protect their vulnerability). However, the momentous signing of such a document is ineffectual if the courts charged with upholding the rights of all Canadians refuse to acknowledge that they are bound by this document.

The *Convention*

The ratification of the *Convention* represents not only a "moral stand," but also a "legal agreement and international obligation."[6] This is fundamentally different than documents such as the United Nations *Declaration on the Rights of the Child*,[7] signed in 1959, which represent not a binding international commitment, but rather a moral or policy statement suggestive of a future model of rights. By ratifying the *Convention*, Canada is committed to an official policy of recognising and providing rights to all children, not simply to adopt a forward looking moral stand of potential equality. Whether or not Canadians are prepared to accept it, Canada has committed itself "to the principle that children have fundamental rights as individual persons and that parents, adults, and state authorities have responsibilities for providing those rights."[8] Canada's ratification indicates 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."[9]

---

[6] *Covell*, *supra* note 2 at 20.
[7] Proclaimed by General Assembly resolution 1386(XIV) of 20 November, 1959. This Declaration contains 10 'Principles,' include protection from all forms of cruelty, entitlements to education and the benefits of social security.
[8] *Covell*, *supra* note 2 at 22.
[9] Anne McGillivray, "Child Physical Assault: Law, Equality and Intervention" (2004) 30 Manitoba Law Journal 133 at 140 [hereinafter "*Child Physical Assault*"].

International treatises and conventions are not officially part of the Canadian legal landscape until Parliament has implemented them by statute.[10] While the *Convention* has not yet been implemented by Parliament, and its provisions therefore have no direct application to Canadian jurisprudence, its values as "reflected in international human rights law may help inform the contextual approach to statutory interpretation."[11] The principles of the *Convention* emphasize the importance of recognising the rights of children when decisions are being made that relate to and affect their future.[12] As such, the judiciary must take the principles of the *Convention* into account when making determinations regarding the protection of children, particularly when dealing with the defence enshrined in section 43 of the *Criminal Code*.

In 1995, the United Nations Committee on the Rights of the Child told Canada that "[f]urther measures" must be taken "to effectively prevent and combat all forms of corporal punishment and ill-treatment of children in schools or institutions."[13] According to McLachlin C.J. in *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*,[14] this does not indicate that the forms of mild corporal punishment protected by section 43 of the *Criminal Code* engage any of the Article of the *Convention*. In 2003, the United Nations Committee noted that they were "deeply concerned" that Canada had not enacted legislation prohibiting the use of corporal punishment, and recommended that Canada remove the existing authorization of the use

---

[10] *Francis* v. *The Queen*, [1956] S.C.R. 618 at 621.
[11] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69.
[12] *Ibid.*, at para. 71.
[13] 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). Noted in *Child Physical Assault, supra* note 9.
[14] *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2004] S.C.J. No. 6, online: QL (SCC) [hereinafter "*Foundation*"]. For a greater explanation of this case, along with the lower court decisions, please see Part IV.

of corporal punishment and "explicitly prohibit all forms of violence against children, however light."[15] The 2003 recommendation was not cited in the majority decision, although it was cited and discussed in Arbour J.'s dissent.[16]

The *Convention* provides the substantive rights of provision, protection and participation.[17] 'Provision' refers a child's right to basic welfare, fostering and care. Article 6, for example, states that "State Parties recognise that every child has the inherent right to life," and this obliges these Parties to "ensure to the maximum extent possible the survival and development of the child." Article 28 demands that all children have the right to education, and "with a view to achieving this right progressively and on the basis of equal opportunity," they shall ensure compulsory primary education.

'Protection' indicates a right to be safe from harm. Article 19 provides a right to be protected from "*all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.*" This would, presumably, include protection from the 'mild corporal punishment' that, according to McLachlin C.J., section 43 protects. Article 32 provides protection from "economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development," and Article 34 protects children from "all forms of sexual exploitation and sexual abuse."

---

[15] United Nations – Concluding Observations of the Committee on the Rights of the Child: Canada (3 October 2003) at paras. 32 and 33, online: United Nations <http://www.canadiancrc.com/PDFs/UN_CRC_Concluding_Observations_03OCT03_20CO2.pdf> (date accessed: 3 May 2005).
[16] *Foundation*, *supra* note 14 at para. 188.
[17] *Covell*, *supra* note 2 at 23.

With respect to 'Participation,' according to Article 13, children have the right to "freedom of expression," which includes the right to "seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice." Article 12 affords children the right to express their views "freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

How then, has the judicial interpretation of section 43 changed following the ratification of the *Convention*? Has this binding international agreement made any difference in Canadian courts? I turn to the interpretation of section 43 in the courts, prior to, and following, the implementation of the United Nations *Convention on the Rights of the Child*.

Pre-*Convention* Case Law

The following will examine a segment of pre-*Convention* case law in an effort to determine the prevailing Canadian culture with respect to section 43, and the mild corporal punishment of children.[18]

R. v. *Wheaton* (1982 N.B. P.C.)[19]

Wheaton, a high school mathematics teacher, was charged with assaulting his grade nine student, John Angell. The accused had "admonished" the student three times, asking

[18] It should be noted at the outset that there is a dearth of reported cases dealing with section 43 prior to the signing and ratification of the *Convention* in 1991.
[19] [1982] N.J. No. 213 (N.F.L. Prov. Ct.), online: QL (NJ) [hereinafter "*Wheaton*"].

him to quite down and get to work.[20] Losing his temper, the accused slapped the victim across the face, and then grabbed him by the hair and "forcefully pushed Angell's face right into the books laying on his desk."[21]

Citing *Campeau* v. *R.*,[22] which states that that the corporal "punishment naturally may cause pain...otherwise its whole purpose would be lost," the court held that the "exercise of disciplinary powers by a school-teacher...is to be regarded as a delegation of parental authority."[23] Noting that the victim was "defiant of the teacher's slap across the face," and that "no desks were overturned, no books fell from Angell's desk and John Angell's eyeglasses remained on throughout the entire incident," Woodrow J. held that that the force used by Mr. Wheaton "did not exceed what is reasonable under the circumstances."[24] Wheaton was acquitted.

R. v. *Burtt* (1986 N.B. Q.B.)[25]

Burtt was acquittal of assaulting her 15 year old daughter with an electrical cord. The mother testified that she had "repeatedly" instructed her child not to associate with a certain friend, an instruction which the daughter disobeyed.[26] Upon returning from the hospital, the accused found her daughter in her bedroom with the friend she was supposed to avoid. The accused left the house with her friends, telling the accused to

---

[20] *Ibid.*, at para. 2.
[21] *Ibid.*
[22] (1951), 103 C.C.C. 355; 14 C.R. 202. Noted in Anne McGillivray, "'He'll Learn it On His Body': Disciplining Childhood in Canadian Law" 5 International Journal of Children's Rights 193 at 212 [hereinafter "*He'll Learn*"]. The court in *Campeau* also stated that "[i]f in the course of punishment the [child] should suffer bruises or contusions it does not necessarily follow that the punishment is unreasonable. Bruises or contusions alone will not be unreasonable."
[23] *Wheaton*, *supra* note 19 at para. 5.
[24] *Ibid.*, at para. 6.
[25] [1986] N.B.J. No. 820 (N.B. Q.B.), online: QL (NBJ).
[26] *Ibid.*, at paras. 16-17.

"fuck off," and adding that the "day you [the accused] pick my friends is the day you die."[27] The daughter returned some hours later.

Upon her return home, the accused struck her daughter with a rolled-up cord from a mixer, first across the buttocks two or three times and then, "several times," on the arms and shoulder.[28] This assault resulted "superficial abrasions over several parts of [the daughter's] body," with the skin being tender and broken in two areas; the assault was administered with "some degree of force."[29] A doctor told the victim that these marks "ought to leave in six months," or "she should see a plastic surgeon."[30]

The court noted that the accused has "had more than her hands full in trying alone to rear five children," and that she sincerely believed that disciplinary correction upon her daughter "was in order and required."[31] Holding that the injuries to the victim were "relatively significant but transient," Higgins J. concluded that the court was "not satisfied beyond a reasonable doubt that the acts of the accused in this matter warrant or support a conviction."[32] A finding of not guilty was entered.

R. v. *Dunfield* (1990 N.B. Q.B.)[33]

Dunfield concerned an appeal from a conviction for assault. The accused, a foster mother, admitted to striking her 9 year old daughter on the arm with a weapon in order to motivate her to do her homework. The trial judge found that the accused used excessive force, as there was evidence of bruising on the child's arms and other parts of her body

---

[27] *Ibid.*, at para. 16.
[28] *Ibid.*, at para. 17.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*, at paras. 26-27.
[32] *Ibid.*, at para. 29.
[33] [1990] N.B.J. No. 115 (N.B. Q.B.), online: QL (NBJ) [hereinafter "*Dunfield*"].

four days after the incident.[34] The weapon used was a 12 inch ruler with a tin edge, which broke upon the second strike.[35] The appeal court found that the "fact that the piece of ruler broke cannot be seen as proof of excessive force given the evidence as to the width and thickness of the stick."[36] Accordingly, Creaghan J. set aside the conviction and entered a finding of not guilty.[37]

R. v. *Deuling* (1986 Y.T.C.)[38]

Deuling concerned an assault by a teacher on a 16 year old student at Junior Secondary school. The victim had, on numerous occasions, been reprimanded by the accused, and was not inclined to listen to persons in authority.[39] Teachers, including the accused, were insistent that firmer steps needed to be taken to control the behaviour of unruly students, including the victim "in particular."[40]

On December 17, 1985, the victim was playing basketball in the gymnasium with other students, an activity which quickly turned into a game of throwing balls at one another. After throwing a ball at a friend, the victim was grabbed by the neck by the accused, and fell to the floor. The court found that the accused was not only justified in taking such action, but was also "duty bound to do so."[41] Barnett J. found that the victim was not a reliable witness, and "deliberately exaggerated" his testimony. The Crown did not prove its case beyond a reasonable doubt. Deuling was "justified in using force by way of correction" towards the victim, and was acquitted.

---

[34] [1989] N.B.J. No. 551 (N.B. P.C.), online: QL (NBJ).
[35] *Dunfield*, *supra* note 33.
[36] *Ibid.*
[37] The accused was initially only given a $500 fine, and put on probation.
[38] [1986] Y.J. No. 87 (Y.T.C.), online: QL (YJ).
[39] *Ibid.*
[40] *Ibid.*
[41] Ibid.

R. v. *Robinson* (1986 Y.T.C.)[42]

Robinson was charged with assaulting his 12 year old daughter, who was becoming "increasingly difficult at home," and refused to obey her parents when they told her not to borrow clothing from her friends at school.[43] The father strapped the victim five times with a leather belt that was doubled over twice. This apparently was a custom in the home.[44]

The assault resulted in bruising, an outcome "abhorrent in the general community concept."[45] However, Bladon J. entered an acquittal for two reasons:

> Firstly, the evidence of the accused that the child on the morning following this incident behaved in the normal way in the home; she got up, she made his breakfast for him, and life, at least up until that point, went on as might normally be expected. Secondly, the doctor testified that the bruising would disappear within seven to ten days and, did not require any medical treatment. There was no suggestion of any permanent or lasting injury suffered by the child. It [was] an administration of short-term pain in the hope that it will have a corrective effect on the child.[46]

Despite the violent nature of the assault, and the resulting bruising, the accused was acquitted on the basis of section 43. The assault, according to the court, was "justified."[47]

R. v. *Wheeler* (1990 Y.T.C.)[48]

Arnelle Wheeler was charged with assaulting her 7 year old foster child, Terry. Terry was "developmentally delayed," and required extra care and attention.[49] Terry was observed stealing lunches from school, an action he had performed on more than one

---

[42] [1986] Y.J. No. 99 (Y.T.C.), online: QL (YJ).
[43] *Ibid.*, at para. 2.
[44] *Ibid.*, at para. 3.
[45] *Ibid.*, at para. 5.
[46] *Ibid.*, at para. 7.
[47] *Ibid.*, at para. 8.
[48] [1990] Y.J. No. 191 (Y.T.C.), online: QL (YJ).
[49] *Ibid.*

previous occasion. When Terry returned home, Wheeler was sitting in the living room. Wheeler took the victim's hand, and gave him several slaps on the wrist, "possibly as many as a dozen."[50] This resulted in visible bruising on the victim's hand and wrist.

Noting that "less drastic measures" had failed, and that "it is certainly reasonable to punish the boy for stealing, and it would have been reasonable to administer corporal punishment, especially where, as here, there were repeated incidents of theft, coupled with a defiant attitude on the child's part," Faulkner J. acquitted. Bruising is not indicative of excessive force, as "[p]ersons differ in their susceptibility to bruising," and no medical evidence as to the amount of force needed to produce such a bruise was entered.[51] The court did not find "that slapping the child several times on the wrist using an open hand was so clearly excessive as to amount to criminal conduct."[52]

R. v. *Fritz and Fritz* (1987 Sask. Q.B.)[53]

Mr. and Mrs. Fritz were charged with assaulting their two nieces with a belt, just teens at the time of the attacks. The young girls had lived with their uncle and aunt for approximately two years, making them, "for all intents and purposes," the children's foster parents.[54] Following occasions of misbehaving, disrespectful behaviour and inappropriate conduct, Mr. Fritz took out his belt and told the girls to drop their pants, meaning, according to him, their jeans.[55] Fritz gave the girls three smacks each, smacks

---

[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] [1987] S.J. No. 885 (Sask. Q.B.), online: QL (SJ).
[54] *Ibid.*, at para. 6.
[55] *Ibid.*, at para. 31.

which, according to the court, "did not leave welts and bruises."[56] Accordingly, the Hrabinsky J. found that

> ...at the time, and under the circumstances that the punishment was administered, it was reasonable. I am satisfied that at the time the punishment was administered the girls were guilty of misconduct deserving punishment which was more severe than they experienced before, not only because of their conduct but also because they did not respond to the other methods of punishment to which they had been subjected.[57]

The accused were justified in using the force that was by way of correction, and the force used did not exceed what was reasonable in all of the circumstances of the case. Each accused was acquitted.

R. v. *Haberstock* (1970 Sask. C.A.)[58]

Haberstock, a teacher, was charged and convicted of assaulting a pupil. On appeal, the conviction was overturned and an acquittal was entered. The accused incorrectly thought that the victim, a 12 year old child, called him "short ribs" as he was boarding the school bus to go home for the weekend. The following Monday, Haberstock slapped the victim across the face, chipping a right front molar. The court held that, even though the victim did not participate in the name calling,

> ...there were reasonable and probable grounds upon which the appellant could conclude that [the student] had engaged in conduct deserving punishment. I think it is abundantly clear that the appellant, in punishing [the accused], did so in the honest belief that he had participated in the name-calling. Therefore, in my opinion, with deference to the learned trial Judge, the appellant was entitled to use force by way of correcting [the victim], who was a pupil under his care at the time.[59]

---

[56] *Ibid.*, at para. 35.
[57] *Ibid.*, at para. 46.
[58] (1970), 1 C.C.C. (2d) 433 (Sask. C.A.), online: QL (CCC) [hereinafter "*Haberstock*"].
[59] *Ibid.*

If the victim had been slapped immediately after the name calling, and not three days later, "he would not have found the force used excessive, or at least would have had a reasonable doubt in respect thereto." Therefore, "to hold that force, which was otherwise reasonable, became unreasonable because of three days' delay, is an erroneous basis upon which to make such a finding, and one which cannot be supported."[60] The appeal was allowed.

R. v. *Dupperon* (1984 Sask. C.A.)[61]

This was an appeal from a conviction for assault causing bodily harm. The Crown argued that that the evidence did not support a finding of assault causing bodily harm, but did support a finding of assault. The appellant strapped his developmentally disabled 13 year old son on the buttocks with a leather belt, leaving four or five welts; each bruise was approximately four inches long, and one-half an inch thick.[62] The son was caught smoking outside of the house, and was grounded. He then swore at his father, and refused to abide by the grounding given by his father. The victim had also been in trouble at school, including lying, fighting and stealing. The father's motive was to punish his son to prevent him from "growing up to be a bum on 20th street."[63]

The victim's statement asserted that his had father grabbed him by the hair, put him in his room, pulled down his pants and strapped him about ten times, although the victim later testified that much of the statement taken by police contained lies.[64] The court held

---

[60] *Ibid.*
[61] [1984] S.J. No. 939 (Sask. C.A.), online: QL (SJ) [hereinafter "*Dupperon*"].
[62] *Ibid.*, at para. 3.
[63] *He'll Learn*, *supra* note 22 at 214.
[64] *Dupperon*, *supra* note 61 at paras. 9-12.

that the strapping was done for the purpose of correction;[65] preventing your developmentally disabled child from 'growing up to be a bum' is a corrective motive.

When the court examined whether the force used exceeded what was reasonable under the circumstances, the court held that they must consider, from both 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 the punishment, the circumstances under which it was inflicted, and the injuries, if any, suffered. If the child suffers injuries which may endanger life, limbs or health or is disfigured that alone would be sufficient to find that the punishment administered was unreasonable under the circumstances.[66]

Brownridge J.A. agreed that "[t]en strokes of a leather belt on the bare buttocks is a severe beating, particularly under the circumstances in which it was inflicted here on an emotionally disturbed boy."[67] Given all of the circumstances of the case, the beating was excessive. The conviction for assault causing bodily harm was quashed, and a verdict of assault was substituted.[68]

Many of the decision released prior to the signing and ratification of the *Convention* are plagued with specious reasoning, logical error and, consequently, iniquitous results. Children have been beaten and harmed, and the law has justified these assaults through section 43. While, it is true, there have been assaults which have resulted in convictions, a great many assaults have resulted in acquittals when section 43 has been employed by an accused. The forgoing demonstrates the Canadian climate with respect to child

---

[65] *Ibid.*, at para. 17.
[66] *Ibid.*, at para. 28.
[67] *Ibid.*, at para. 32.
[68] Ibid., at para. 34. Pointedly, at para. 25 Brownridge J.A. states that there "is some anomaly in the fact that corporal punishment of criminals is now prohibited while corporal punishment of children is still permitted."

corporal punishment prior to the signing and ratification of the *Convention*. It must be noted, in fairness, that there exists many reported cases which resulted in convictions for assault, even when section 43 of the *Criminal Code* was advanced as a defence.[69]

Most decisions apply inconsistent reasoning, and fail to follow precedent. Even lists of things to consider, as provided by the courts in *Dupperon* and *Ogg-Moss*, make little difference, as they are rarely considered and offer little direction.[70] As pointed out by Professor McGillivray:

> The defence is legally incoherent. As 'kiddie-law,' it does not invite the strict use of precedent accorded other defences, nor is it controlled by 'community values.' There is no discernable interpretive framework other than the vagaries of the courts.[71]

There is no typical case, and the standard of harm allowed varies immensely. This analysis agrees with that provided by Professor McGillivray in 1997.

Post-*Convention* Case Law:

Following the ratification of the *Convention* in 1991, Canadian courts became obligated to take the Articles of the *Convention* into account when determining the rights and standing of children. I will now examine case law following the implementation of the United Nations *Convention* in an effort to determine whether or not its ratification has been influential in cases concerning section 43. How have Canadian courts interpreted the Articles of the *Convention*? Has the implementation of this momentous document made any difference in the legal treatment of Canadian children?

---

[69] See, for example, *R.* v. *Fell*, [1990] O.J. No. 3208 (Ont. Prov. Ct.), online: QL (OJ); *R.* v. *M.D.S.*, [1979] O.J. No. 1722 (Ont. Prov. Ct.), online: QL (OJ); *R.* v. *Sweet*, [1986] O.J. No. 2083 (Ont. Dist. Ct.), online: QL (OJ); *R.* v. *Smarch*, [1990] Y.J. No. 248 (Y.T.C.), online: QL (YJ); *R.* v. *F.(V.A.)*, [1989] S.J. No. 540 (Sask. Q.B.), online: QL (SJ); *R.* v. *Veinot*, [1988] S.J. No. 633 (Sask. C.A.), online: QL (SJ).
[70] *He'll Learn*, *supra* note 22 at 235.
[71] *Ibid.*

R. v. *Gallant* (1993 P.E.I. Prov. Ct.)[72]

Gallant concerned the case of a teacher charged with assaulting his 11 year old pupil, C.M. Labelled a 'problem child' by school officials, the victim was struck across the left cheek by his teacher in an effort to "get him back to reality."[73] There was evidence that the blow was struck with enough intensity to bruise the victim's cheek, however, given that there was "a lack of consensus on the issue of whether or not marking of C.M. occurred," the court found that, "in fairness to the accused," the issue had to be resolved in his favour.[74]

Holding that the accused struck the pupil for the purpose of correction, and that the "blow was not of sufficient force to apparently cause any physical injury,"[75] the court acquitted the accused on the basis of section 43 of the *Criminal Code*. The cases cited by the court are all prior to the signing and ratification of the United Nations *Convention*, and Thompson J. makes no mention of this document. No mention is made of, nor consideration given to the Articles of the *Convention*.

R. v. *Harriott* (1992 N.B. Prov. Ct.)[76]

Harriott was a teacher accused of assaulting his 14 year old student. The child was being disruptive and not completing assignments, which amounted to a "breach of discipline...in need of some corrective discipline."[77] The accused had on previous

[72] [1993] P.E.I.J. No. 157 (P.E.I. Prov. Ct.), online: QL (PEIJ).
[73] *Ibid.*, at para. 5.
[74] *Ibid.*, at para. 4.
[75] *Ibid.*, at para. 17.
[76] [1992] N.B.J. No. 761 (N.B. Prov. Ct.), online: QL (NBJ).
[77] *Ibid.*, at para. 11.

occasions attempted to correct the behaviour of the victim through non-violent means, without success.

Harriott, in an attempt to "maintain control and to have the student return to his place, to stop his disruption and attend to his work,"[78] grabbed the student's head, shook it, and pushed the student back into a chair. Despite this violent outburst, the court found that there was "no suggestion that it was done in anger, there [was] no suggestion that it was done in frustration because other means employed by this teacher on previous occasions had been unsuccessful."[79] The result was an acquittal on the basis of section 43. Apparently, if other mean are employed prior to grabbing a student by the head and shaking it, this implies that the assaulter is neither angry nor frustrated, and this in turn justifies the attack. The United Nations *Convention on the Rights of the Child* did not find its way into the reasons of Brien J..

R. v. *Plourde* (1993 N.B. Prov. Ct.)[80]

Plourde again concerned the assault on a student by a teacher. Plourde was an eighth grade teacher who assaulted two of his pupils after first stopping an altercation between them, and then demanding that they take their seats.

Plourde instructed his students to be quiet, following which one of the victims kicked a metal file cabinet and, after being told to leave the classroom, refused to comply. The accused proceeded to grab the student by the arms, and lift him up to escort him of the classroom. At this time, Plourde allegedly pushed the victim's back against the

[78] *Ibid.*, at para. 27.
[79] *Ibid.*, at para. 28.
[80] [1993] N.B.J. No. 487 (N.B. Prov. Ct.), online: QL (NBJ).

blackboard, causing a red mark on his back and red marks on his forearm as a result of being pushed against the blackboard and being grabbed by the arm.[81]

Upon re-entering the classroom, the second victim told the accused that he should not act that way toward his students. The defendant then walked over to the second victim and allegedly slapped him on the head while grabbing him by the shoulders to make him return to his chair.[82] According to Desjardins J., in light of the "utter confusion" that had gripped the classroom, there is not "one homeroom teacher who would not have reacted in such a situation."[83]

The court found that Plourde was justified in using the force to compel obedience, as "the defendant had to deal with the insolent behaviour of the two students in order to maintain his authority and order in the classroom."[84] Irrespective of the marks on the back of one of the victims, the court had a "reasonable doubt whether the force used in the two cases exceeded what was reasonable."[85] An acquittal was entered.

Desjardins J. make no reference to Canada's obligation under the *Convention*. Instead, the court cites pre-*Convention* case law, some of which relying on principles as old as 1899,[86] to justify acquitting the accused.

R. v. *Graham* (1994 N.B. Prov. Ct.)[87]

Graham was the Principal of the elementary school which the 9 year old victim, A.P., attended. Described as a "problem child" who often "needed individual care," the victim

---

[81] *Ibid.*, at para. 4.
[82] *Ibid.*, at para. 5.
[83] *Ibid.*, at para. 7.
[84] *Ibid.*, at para. 11.
[85] *Ibid.*, at para. 13.
[86] *R.* v. *Robinson* (1899), 7 C.C.C. 52.
[87] [1994] N.B.J. No. 335 (N.B. Prov. Ct.), online: QL (NBJ) [hereinafter "*Graham*"], aff'd [1995] N.B.J. No. 167 (N.B. Q.B.), online: QL (NBJ) [hereinafter "*Graham 2*"].

had been yelling, screaming and not paying attention in math class.[88] After arguing with the pupil, the accused approached the victim's desk, "lifted her up and struck her with his open hand on the buttock area."[89] According to the victim's mother, who saw her daughter after school on the day of the assault, the victim had a "very bright red hand mark on her left side."[90] The accused testified that he did indeed 'spank' the victim, but argued that while it was "not a light tap," he certainly "could have hit her harder."[91]

Citing the 1951 Quebec Court of Appeal decision in *Campeau*, discussed above, Harper J. argues that the court "could easily have ended its judgment with its *proprio motu* pronouncement as to the nullity of the charge itself," and that, "on the merits, it seemed apparent "that the charge should never have been laid, and if laid, should never have been prosecuted."[92]

> It is not so long ago that any complaint at home about being physically disciplined in school would result in an immediate trip to the woodshed rather than a call to the local police. As far as I am aware, no one was ever permanently traumatized by either place of discipline, so long as it was not excessive.[93]

This *obiter* remark is followed by Biblical quotations, buttressed by citing the opening clause of the 1982 Canada *Constitution Act*, which states that "WHEREAS Canada is founded upon principles that recogize the supremacy of God and the rule of law." According to Harper J., "it is difficult to recognize His supremacy without giving import

---

[88] *Graham, Ibid.*, at paras. 6-10.
[89] *Graham 2*, *supra* note 87 at para. 3.
[90] *Graham*, supra note 87 at para. 12.
[91] *Ibid.*, at para. 27.
[92] *Graham*, supra note 87 at para. 37.
[93] *Ibid.*, at para. 38.

to His words."[94] The assault was not only within the rights of the accused, but also "in the best interests of both 'A.P.' and her class as a whole."[95] Graham was acquitted.

The *Convention* was not mentioned in either the initial case, or the appeal. The court instead quoted scripture and outdated notions of punishment.

R. v. *Godin* (1996 N.B. Q.B.)[96]

Godin was an appeal from a teacher who had been previously convicted of two counts of assault on two of his students, aged 10 and 11. The two victims, S.D. and M.L., has been repeatedly chastised for fighting, and testified that one two occasions the appellant had slapped them in the face. There was conflicting evidence from other students as to the nature and force of the blows.[97]

Holding that there can not be "any doubt that Mr. Godin applied force to the complainants which would normally constitute the offence of assault,"[98] Riordon J. nevertheless invoked section 43 to overturn the convictions and substitute a verdict of not guilty. The court notes that in the present case "were it not for Section 43 of the *Criminal Code*, there should be a conviction." However, Godin was "entitled to the benefit and protection given to a person in authority such as a schoolteacher standing in the place of a parent and is justified in using force by way of correction provided the force used is not unreasonable."[99] Given that "there was no injury inflicted on the boys and their disrespective misbehaviour required an intervention and correction,"[100] the force used on

---

[94] *Ibid.*, at para. 46.
[95] *Ibid.*, at para. 47.
[96] [1996] N.B.J No. 148 (N.B. Q.B.), online: QL (NBJ).
[97] *Ibid.*, at paras. 6-8.
[98] *Ibid.*, at para. 10.
[99] *Ibid.*, at para. 13.
[100] *Ibid.*, at para. 16.

the young boys was reasonable. Again, no mention is made of the legal or ethical obligations under the *Convention*.

R. v. *Wetmore* (1996 N.B. Q.B.)[101]

The respondent, a gym teacher with a brown belt in Karate, was charged and acquitted of assaulting four of his high school students. The four victims, apparently "discipline problems in the past," were acting rudely and distrustful to the respondent during class.[102] The Crown appealed the finding of not guilty.

In an effort to "correct the behaviour of the four complainant students," Wetmore removed his socks and shoes and called forward the four victims.[103] Perhaps in an effort to hide this unorthodox method of castigation, Wetmore posted a student as a guard at the door of the classroom to keep all students inside, and to keep others out. The respondent struck one of the victims on the shoulder and one on the arm with the back of his hand. In reaction, one of the victim's hands went in front of his face, likely in an attempt to protect himself, at which time the respondent struck the back of the victim's hand as they covered his face. There was further testimony that the respondent pulled a desk into the middle of the room and proceeded to strike one of the victims in the face.[104]

The court notes that to "equivocate between whether the force was used to teach respect or to correct behaviour is to put to fine a line on the definition of correcting behaviour." In the court's opinion, "teaching of respect through force is included in

[101] [1996] N.B.J. No. 15 (N.B. Q.B.), online: QL (NBJ).
[102] *Ibid.*, at paras. 5-6.
[103] *Ibid.*, at para. 8.
[104] *Ibid.*, at para. 9.

behaviour in need of correction."[105] Irrespective of the fact that at least one student was struck in the face, Clendening J. found that the punishment rendered, while "unorthodox," was not unreasonable.[106]

Disciplinary action taken to instill respect for teachers, even though fear, was found to be acceptable, as there "is always an element of fear possible in any disciplinary action taken."[107] The appeal was dismissed. No mention is made of the *Convention*.

R. v. *J.W.P.* (2003 N.S. S.C.)[108]

This was an appeal by the Crown to J.W.P.'s acquittal for assaulting his daughter. The victim was upset and had used foul language to her father, causing her father to kick, from a sitting position, the chair the victim was sitting on. He also berated her for not respecting her elders.

The Crown argued that the father's kick was unjustified given present standards of parental conduct, and claimed that the kick was not parental guidance, not done while the daughter was under her father's care, and that it was motivated by anger, not educational intent. The court found that the action of the father was one of discipline or correction, as he "viewed her conduct and foul language as non-respect for her elders which required discipline."[109] Accordingly, the appeal was dismissed and the original verdict of not guilty stood. Goodfellow J. made no mention of the *Convention*.

---

[105] Ibid., at para. 19.
[106] *Ibid.*, at para. 22.
[107] *Ibid.*, at para. 24.
[108] [2003] N.S.J. No. 388 (N.S. S.C.), online: QL (NSJ).
[109] Ibid., at para. 10.

R. v. *Kearney* (1992 N.F.L. Prov. Ct.)[110]

Kearney was charged with assaulting his 11 year old daughter with a leather belt. The attack consisted of a strike with a belt on the upper and outer part of the victim's thigh, which resulted in a bruising. The accused and his daughter had been arguing about the disposition of a family pet, which had suffered an eye injury. The victim was very fond of the animal, and accordingly was very upset with the notion of getting rid of the animal. She made this know to her father, partially by presenting an upturned finger and admonishing him to 'sit on it and rotate.'[111] The accused became angry, and after telling his daughter repeatedly to go to her room, struck her as she attempted to turn the corner to her bedroom. This resulted in a bruise. The accused did not strike his daughter again.

In acquitting the father of assault, the court noted that the accused "saw himself with no resort but then to strike her because he had told her twice to go to her room without response," and the victim's "further refusal continued and her defiance increased to the level of disrespect and was marked by obscenity."[112] Given that there were no "significant" injuries sustained by the daughter, the court could not accept that this punishment was "out of proportion to [the victim's] defiant behaviour," nor was it improper, "given her seriously disrespectful conduct and his earlier efforts at verbal admonition of her."[113] Accordingly, the accused was acquitted. No mention is made of the *Convention* or any of its Articles.

---

[110] [1992] N.J. No. 294 (N.F.L. Prov. Ct.), online: QL (NJ).
[111] *Ibid.*
[112] *Ibid.*
[113] *Ibid.*

R. v. *Park* (1999 N.F.L. S.C.)[114]

Park concerned an appeal from a conviction for assault. The appellant, a teacher, was convicted of assault after striking one of her 9 year old pupils on the leg with her hand. At the time of the assault, the 9 year old child suffered from contextual factors which rendered her mental age approximately 6, and exhibited some behavioural problems.[115]

At the end of the school day, the appellant noticed that the victim was not dressed for the bus. She refused to put on her winter clothes and screamed when the appellant attempted to force her into them. She was lying on her back on the floor, and tried to kick at the appellant with a free leg. Park slapped her on the right leg, and the victim stopped 'fighting.'[116]

Testimony from a co-worker of the appellant who witnessed the attack stated that the slap "wasn't a pat, and it wasn't a real hard slap, but I --it was enough to make the child cry out and comply. ... I, I was stunned, I didn't say anything, I didn't do anything about it, I was just stunned."[117] This slap left a mark on the victim's leg that was noticed by her mother when the victim returned home.[118]

The court, in allowing the appeal, noted that it was never established in evidence that the mark on the victim's leg was caused by the slap administered by the appellant, and "may just have readily been caused by the restraint applied to [the victim] by the appellant as she attempted to dress [her]."[119] The victim was unruly, and despite her obvious developmental disability, the court was satisfied that "the age and character of

---

[114] [1999] N.J. No. 168 (N.F.L. S.C.), online: QL (NJ).
[115] *Ibid.*, at para. 4.
[116] *Ibid.*, at para. 6.
[117] *Ibid.*, at para. 7.
[118] *Ibid.*, at para. 12.
[119] *Ibid.*, at para. 14.

[the victim] was such that a modest physical correction such as that applied here would have a salutary effect upon her behaviour."[120] The court allowed the appeal, and overturned the conviction. No mention was made of the *Convention on the Rights of the Child.*

R. v. *Pickard* (1995 B.C. Prov. Ct.)[121]

Pickard was charged with assaulting his 15 year old son. The accused had received reports from his son's school that the victim was defying the authority of his teachers and causing discipline problems.[122] The victim admitted that one the evening in question he purposely set out to annoy his father by making noises and singing the same song over and over. The accused repeatedly asked his son to desist.

The accused admitted that he was angry, and that he wised to teach the victim "who was boss," a reaction the court found to be "precisely the kind of corrective measure that was called for in the face of his persistent rejection of his father's authority and of his rude, insolent and provocative behaviour that evening."[123] The accused proceeded to evict the victim from the living room.

The court found that the victim sustained scratches, and was punched in the neck by his father. The victim felt "considerable pain and discomfort, and this lasted for some days."[124] The victim also sustained a bruise to the forehead after falling to the ground following the punch to the back of the head he sustained.

---

[120] *Ibid.*, at para. 25.
[121] [1995] B.C.J. No. 2861 (B.C. Prov. Ct.), online: QL (BCJ).
[122] *Ibid.*, at para. 7.
[123] *Ibid.*, at para. 10.
[124] *Ibid.*, at paras. 12-13.

Invoking section 43 of the *Criminal Code*, the court noted that while the character of the child must not be considered for the purpose of determining whether force was necessary to correct him or her, if the purpose of the force is correction, then the parent is entitled to consider not just the age and strength of the child, but also the child's personality.[125] Accordingly, while a teenager who has never been spanked by a parent may find even a light slap so traumatic as to respond immediately, "a battle hardened bully may physically resist his parent's authority unless and until he is subdued after a fight."[126] Given that the victim and the accused were "evenly matched," and "[a]nything less than a hard blow to [the victim's] body would have failed to evoke a submissive response,"[127] de Villiers J. held that the force used did not exceed what was reasonable in all of the circumstances of the case. The accused was acquitted. Again, no mention was made of the *Convention*.

R. v. *Murphy* (1996 B.C. C.A.)[128]

Murphy concerned an appeal by an accused from a conviction for assaulting the 3 year old nephew of his common law wife by taping him to a chair. The accused and his common law wife babysat the child two to four times a week, providing food and shelter without any form of compensation.

Following a fight between the victim's biological mother and her boyfriend, the accused and his common law wife agreed to baby-sit the victim. From the outset, the victim was "very rambunctious," and efforts to calm the child down were unsuccessful.

---

[125] *Ibid.*, at para. 18.
[126] *Ibid.*, at para. 18.
[127] *Ibid.*, at para. 19.
[128] [1996] B.C.J. No. 1549 (B.C. C.A.), online: QL (BCJ).

Subsequently, the appellant taped the victim's hands to a chair, and left the child attached to the chair for two to three minutes, during which time the victim was videotaped by the appellant.[129] When the victim began to complain, the tape was removed. The appellant later re-taped the child's wrists and ankles in a "playful manner."[130]

When the victim's biological mother arrived to collect her child, she found the victim lying on the couch, wrists and ankles taped, and had urinated all over himself.[131] The appellant admitted to taping the child.

After first finding that the appellant was 'standing in the place of a parent,'[132] Williams J.A. went on to hold that, given the 'rambunctious' way in which the child was behaving, the taping of the victim was done for the purpose of correction.[133] Given this, and the fact that the victim was only "temporarily confined for a very short period of time," it would "be an injustice to characterize the appellant's conduct as a criminal offence." This "minor" incident "could hardly be described as the use of excessive force." [134] The appeal was allowed, and an acquittal was entered.

The actions of the appellant were both violent and degrading. Yet no mention is made of the United Nations *Convention* by Williams J.A..

---

[129] *Ibid.*, at para. 6.
[130] *Ibid.*, at para. 7.
[131] *Ibid.*
[132] *Ibid.*, at para. 32.
[133] *Ibid.*, at para. 36.
[134] *Ibid.*, at para. 37-38.

R. v. *L.A.* (1994 M.B. Prov. Ct.)[135]

The accused was charged with three counts of assault. Two of the victims were foster children of the accused, while the third victim was the accused's niece. The accused was in charge of disciplining the children.

Evidence existed that the accused had hit the victims through their diapers, leaving red welts but not bruises.[136] The court found that with respect to the foster children, the accused was clearly standing in the place of a parent, and with respect to the third victim, the niece, it was not unreasonable to conclude parental control to punish had been delegated to the accused.[137] Moreover, there existed at least "some evidence that the force used by the accused was used for the purpose of correction," at least enough for the court to find that the accused had done so.[138]

Interestingly, after holding that "under most circumstances, the use of a belt to discipline young children such as those in this case is prima facie unreasonable,"[139] Giesbrecht J. goes on to argue that since the court had no knowledge of what kind of belt it was, how the belt was used, what the belt was made of, or then length and width of the belt, the court was "unable to say that in these particular circumstances the force used by the accused was unreasonable or excessive."[140] The accused was acquitted on the basis of section 43. No mention is made of the United Nations *Convention*.

---

[135] [1994] M.J. No. 437 (M.B. Prov. Ct.), online: QL (MJ).
[136] *Ibid.*, at para. 8.
[137] *Ibid.*, at para. 12.
[138] *Ibid.*, at para. 14.
[139] *Ibid.*, at para. 21.
[140] *Ibid.*, at para. 22.

R. v. *M.K.* (1992 M.B. C.A.)[141]

M.K. concerned an application for leave to appeal a conviction for assault. The assault consisted of the appellant kicking and 8 year old child who persisted in harassing his 2 year old sibling.

Citing the rising crime rate in Winnipeg, and the fact that the kick was "mild indeed compared to the discipline [O'Sullivan J.A.] received in [his] home," the court held that this case should "never have come to the courts."[142] O'Sullivan J.A. agreed that while it "sounds nice to say we will have zero tolerance for domestic violence," the "result of such a policy is a case such as we have here where a family is torn apart by judicial proceedings."[143]

The assault was precipitated by the accused's realization that his wife had squandered six mortgage payments of over $500 each, which he had given her to pay. This resulted in their marital home being put up for mortgage sale. It was in this difficult setting that the 8 year old victim decided to open a bag of sunflower seeds, an action he had specifically been instructed not to take for fear of the victim's younger sibling choking on them. The seeds fell onto the carpet, and the younger sibling picked some up, stuck them in his mouth, and began chocking. The victim was hit and then kicked by his father as a result.

The trial judge "could understand spanking and even hitting, but he felt he could not condone kicking of the child."[144] O'Sullivan J.A. felt that it was "not sound policy to mandate that every violation of the law requires the laying of charges," as such as policy

---

[141] [1992] M.J. No. 334 (M.B. C.A.), online: QL (MJ).
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*

"has the undesirable effect of nullifying prosecutorial discretion; such discretion should be exercised in favour of values in society such as family life."[145] In granting the appeal and ordering a stay of proceedings, the court noted that:

> It is said that allowing the appeal means we are saying that a father may kick his child as he pleases. On the other hand, it is said that by dismissing the appeal we will be protecting children from being kicked by their parents or anyone else. I do not regard my task as one of determining whether a child may be kicked or not. A case of this kind cannot be judged by a nice calculation of the degree of force used in this particular case. The answer to this appeal is, in my opinion, that this case should never have been proceeded with.[146]

Concerned more about what the court deems as "real criminals," O'Sullivan J.A. sees proceeding against a father who kicks a child in his care as a waste of judicial resources. Indeed, the court goes so far as to say that cases such as this are the reason why the criminal justice system has difficulty dealing with 'real' crimes.[147] Apparently, prosecutors should not waste the court's time with assaults on 8 year old children. O'Sullivan J.A. makes no mention of the *Convention*, perhaps not surprising given the court's admonishing of the prosecution for even bringing this case of assault to the judiciary.

R. v. *Thompson* (1992 Ont. Ct. Jus.)[148]

Thompson was applying for a dismissal of an assault charge that was filed following an attack on one of his students. The accused was a high school teacher, the victim was a student.

---

[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*
[148] [1992] O.J. No. 3925 (Ont. Ct. Jus.), online: QL (OJ).

During a particularly noisy session of class, the complainant voiced a 'sarcastic' comment to the accused, who in turn slapped the young student in the side of the face, which 'stung,' and made the student move his head, ears ringing.[149] The accused relied on section 43 for his defence.

Citing Blackstone's statement that "[s]uch correction of a child is countenanced by the law because it is for the benefit of his education,"[150] Morrison J. holds:

> It seems to me that on any interpretation a jury properly instructed would have to acquit this accused. It is clear that this was done for correctional purposes. It was necessary because of the rowdiness of the class and the joining in of the accused in the general rowdiness. He (the accused) acknowledges that a person in the position of a parent would have done nothing untoward in acting the way the accused person did...[151]

The accused was found not guilty. While the court cites antiquated notions of the punishment of children, no mention is made of the *Convention*.

R. v. *V.L.* (1995 Ont. Ct. Jus.)[152]

The accused was charged with assaulting his stepson. Prior to the attack, the accused and the victim had a friendly relationship, as the accused had lived with the victim and his mother for five years. The day in question had been difficult on account of the victim voicing his desire to switch from a parochial to a public school.

The accused met the victim for lunch in a restaurant, at which time the victim stated certain views and added that he thought that Hitler was a 'cool guy.' The accused, taken

---

[149] *Ibid.*, at para. 1.
[150] *Ibid.*, at para. 2.
[151] *Ibid.*, at para. 3.
[152] [1995] O.J. No. 3346 [hereinafter "*V.L.*"].

aback, suggested that the victim should perhaps research the area before announcing such a controversial opinion. The victim told the accused to 'shut up.'[153]

The accused struck the victim in the mouth, causing the victim's lip to swell up, while at the same time swearing at the victim in Russian.[154] The accused then offered the victim a quarter to phone the police. The victim declined.

Vaillancourt J. held that the case at bar involved an accused who, "in a parental role" was "faced with the stated opinions of the complainant that were emotionally painful for him."[155] The dialogue was initially conducted in a calm manner, until the victim responded to his step father's reasonable suggestion by telling him to shut up. According to the court, this behaviour "warranted corrective action on the part of the parent."[156]

With respect to the reasonableness of the force employed, Vaillancourt J. held that the "fact that an injury results from the punishment of a child does not in and of itself prove that the force was excessive."[157] Acknowledging the accused's anger, the court adopts the comments of Justice Menzies in *R.* v. *Robinson*:[158]

> It is unrealistic to assume that parents discipline their children, whatever the nature of the infraction, in a state of detached calm. Anger is part and parcel of correction of the child. What is relevant is not whether the parent is upset, distraught, frustrated, annoyed or angry, but whether the parent is in control of his or her anger or emotions.[159]

The court found that the accused was in full control of his emotions, and therefore, the force used was reasonable. The accused was acquitted of the charge of assault. No mention is made of the United Nations *Convention on the Rights of the Child.*

---

[153] *Ibid.*, at para. 11.
[154] *Ibid.*, at para. 13.
[155] *Ibid.*, at para. 22.
[156] *Ibid.*
[157] *Ibid.*, at para. 23.
[158] [1995] O.J. No. 1366 (Ont Ct. Prov. Div.).
[159] *V.L.*, *supra* note 152 at para. 27.

R. v. *O.J.* (1996 Ont. Ct. Jus.)[160]

O.J. was charged with assaulting her 6 year old daughter following difficulties preparing her child for school on consecutive mornings. The victim refused to brush her teeth and get dressed. The accused first sent the child to her room, but when the victim continued to defy her mother, the accused spanked the victim on the buttocks with an open palm. Following this, when the victim continued to ignore her mother's admonitions, O.J. spanked the child with a ruler. The victim was clad in her pyjamas.

The following day at school, the authorities observed red marks on the child's bottom and called the Children's Aid Society to report the abuse. The victim was subsequently examined by a physician, who confirmed the presence of bruising and red marks. O.J. raised the defence enshrined in section 43 of the *Criminal Code.*

Finding that "for several days the child had been misbehaving in a manner which justified some corrective measures being taken by the accused,"[161] MacDonnell J. held that "the evidence establishes that the spanking, in its entirety, was administered for the purposes of correction."[162] The court then notes that while there are "differing opinions in the community with respect to whether it is *ever* reasonable to use force to correct a child,"[163] it is not the function of the judiciary "to express or to give effect to personal opinions with respect to those issues."[164] MacDonnell J., after examining the evidence notes that

> ...the spanking was not administered onto the child's bare bottom but rather over the child's pyjamas, no effort was made to remove the pyjamas, the accused moved the child's hands away from her bottom to

[160] [1996] O.J. No. 647 (Ont. Ct. Jus.), online: QL (OJ).
[161] *Ibid.*, at para. 8.
[162] *Ibid.*
[163] *Ibid.*, at para. 9 [emphasis added].
[164] *Ibid.*

> avoid hurting them, there were in total four or five blows, the spanking occurred at the time of the misbehaviour and not at some later time, it was resorted to only after attempts to talk to the child about the continuing problem had failed, and while any degree of injury is necessarily a matter of concern, the bruising which resulted was transitory in nature.[165]

Even given the "elusive nature of the standard of reasonableness in relation to the use of force to correct children,"[166] the court found that the "conduct in this case is close to the line,"[167] and the Crown had not proven beyond a reasonable doubt that the force was unreasonable. An acquittal was entered on the basis of section 43 of the *Criminal Code*. No mention or reference is made to the *Convention*.

R. v. *James* (1998 Ont. Ct. Jus.)[168]

The accused was charged with assaulting his 11 year old son following an altercation in which the accused smacked his son across the face, leaving a bruise. The accused argued that he was attempting to hit his son on the shoulder to correct his abusive behaviour, when the victim moved to dodge the blow and was struck in the face.

After noting that the rules surrounding section 43 and "that legal allowance are anything but clear," and that "[e]xactly what is needed to establish, or what legal test demonstrates that the force exceeds what is reasonable, is a matter of some variance across this nation,"[169] Weagant J. goes on to explain the "court must still, at the end of the

---

[165] *Ibid.*, at para. 13.
[166] *Ibid.*, at para. 12.
[167] *Ibid.*, at para. 14.
[168] [1998] O.J. No. 1438 (Ont. Ct. Jus.), online: QL (OJ) [hereinafter "*James*"].
[169] *Ibid.*, at paras. 5-8.

day, grapple with the basic question of whose set of values come into play when determining if the punishment was excessive."[170] This, however, is difficult.

Weagant J. cites previous cases where a slap to the face was found to fall within the protective sphere of section 43,[171] and argues that "the very fact that persuasive Canadian case-law contains examples of face-slapping which has resulted in acquittals in enough to inject reasonable doubt into the case." The court refuses to supplant the decisions of "one Court of Appeal panel, one superior court judge sitting on appeal, and one local provincial court judge" who "have all determined that face slapping can be within the realm of reasonable force by way of correction,"[172] and argues that in order to find a slap to the face a measure of unreasonable force, the court "would have to substitute my personal views on physical correction and then either distinguish those cases or declare them incorrect."[173] Weagant J. was unprepared to do so, even though it is noted that the court was "not bound by any of the above decisions."[174] An acquittal was entered.

Interestingly, the court makes brief reference to the *Convention*, pointing out that this document "does not carry the force of law, but may be used as an interpretive aid where legislation is vague or open-ended."[175] Therefore, a proper interpretation depends on the intention of Parliament.[176] However, the court is quick to point out that "section 43 defies interpretation using the *Convention*, because the *Convention* stands in direct conflict with the state of the law."[177] "One wonders," the court continues, "how section

---

[170] *Ibid.*, at para. 11.
[171] *V.L.*, *supra* note 152; *Haberstock*, *supra* note 58; *R.* v. *Godin*, [1996] N.B.J. No. 148.
[172] *James*, *supra* note 168 at para. 19.
[173] *Ibid.*, at para. 19.
[174] *Ibid.*, at para. 20.
[175] *Ibid.*, at para. 10.
[176] Citing *R.* v. *Videoflicks et al.* (1984), 15 C.C.C. (3d) 353 (Ont. C.A.)
[177] *James*, *supra* note 168 at para. 10.

43 can remain in the *Criminal Code* in the face of Canada's international commitment."[178]

While an acquittal was entered in *James*, it is positive that Weagant J. acknowledged Canada's commitment under the *Convention*, albeit only in passing and with no decisive result. Given the judicial reticence, or perhaps ignorance, toward the *Convention* and Canada's international commitment to children, even a brief mention in a low level case concerning section 43 is a useful step.

R. v. *Storey* (2004 Ont. Ct. Jus.)[179]

Storey was an experienced teacher charged with assaulting his 16 year old pupil, Mohamed Nur, with whom the accused had had some disagreements in the past. On the day of the assault, the victim was supposed to submit an assignment for Storey's class, which the victim did not have completed, and then proceeded to use a computer which he was not given permission to use.[180] Storey raised the section 43 defence.

The court held that Storey was dealing with a student who was acting contrary to his instructions in full view of his classmates, and blatant disregarding the repeated directions of his teacher.[181] Storey approached the victim, grabbed him by the vest lapels and slapped him in the face, albeit with a force the court found to be "minor."[182] The attack was "of very brief duration, it followed in close time and proximity to the pulling

---

[178] *Ibid.*
[179] [2004] O.J. No. 760 (Ont. Ct. Jus.), online: QL (OJ).
[180] *Ibid.*, at para. 6. It should be noted that there is conflicting evidence that points to the notion that the victim did, indeed, have permission to use the computer in question.
[181] *Ibid.*, at para. 30.
[182] *Ibid.*, at para. 34.

motion out of the chair," and "[i]t was done with an open hand."[183] Therefore Libman J. found:

> In all of the circumstances, while it will be offensive to many that he applied force to the face of the student, I do find as a fact that it was in the nature of a tap to the face in the context of attempting to get "into the face" of this student and to bring the activity to an end, which it did. My having arrived at this finding after much reflection, ultimately, must result in the defence sought to be raised having been made out.[184]

Storey was found not guilty, as the court found that the accused was "entitled to deal with Nur in the manner that he did, as the *Criminal Code* provides a justification for him to do."[185] Libman J. makes no reference to the *Convention*, or any of its Articles.[186]

R. v. *Bell* (2001 Ont. Sup. Ct.)[187]

This concerned an appeal by Bell from his summary conviction for assault with a weapon and from the sentence imposed. The complainant was Bell's 11 year old son. The violence stemmed from Bell's belief that the victim had stolen some candy and lied about it, and that this incident was merely a part of a pattern of theft and dishonesty.

The appellant used a belt to administer a spanking of two or three blows, one of which left a bruise on the victim's body in the shape of the belt's buckle. At trial, the judge was unconvinced that the bruise amounted to 'bodily harm,' and instead convicted

---

[183] *Ibid.*
[184] *Ibid.*, at para. 36.
[185] *Ibid.*, at para. 32.
[186] Of course, there also exist cases following the signing and ratification of the *Convention* that result in convictions, even when section 43 of the *Criminal Code* was employed as a defence. See, among others, *R.* v. *Myers*, [1995] P.E.I.J. No. 180 (P.E.I. Prov. Ct.), online: QL (PEIJ); *R.* v. *Poulin*, [2002] P.E.I.J. No. 88 (P.E.I. S.C.), online: QL (PEIJ); *R.* v. *Snodgrass*, [1998] N.B.J. No. 328 (N.B. Prov. Ct.), online: QL (NBJ); *R.* v. *Firlotte*, [1998] N.B.J. No. 210 (N.B. Prov. Ct.), online: QL (NBJ); *R.* v. *Hubaty*, [1997] B.C.J. No. 2421 (B.C. Prov. Ct.), online: QL (BCJ); *R.* v. *R.D.H.*, [1999] B.C.J. No. 3126 (B.C. S.C.), online: QL (BCJ); *R.* v. *W.(A.)*, [2003] M.J. No. 171 (M.B. Prov. Ct.), online: QL (MJ); *R.* v. *Bielenik*, [1999] O.J. No. 4104 (Ont. Ct. Jus.), online: QL (OJ); *R.* v. *Komick*, [1995] O.J. No. 2939 (Ont. Ct. Jus.), online: QL (OJ); *R.* v. *Beattie*, [1996] O.J. No. 3620 (Ont. C.A.), online: QL (OJ); *R.* v. *M.A.*, [2003] O.J. No.2209 (Ont. Ct. Jus.), online: QL (OJ).
[187] [2001] O.J. No. 1820 (Ont. Sup. Ct.), online: QL (OJ).

the appellant of assault with a weapon. The accused argued that this conviction was mistaken, as his actions were covered by section 43 of the *Criminal Code*.

Langdon J. notes that while the issues raised by the application of section 43 are "mercifully simply,"[188] there are two issues that clearly fall outside the scope of this provision:

> The first is whether corporal punishment ought to be permitted at all. That is an issue of social policy on which Parliament has spoken in section 43. The second issue outside the scope of section 43 is the particular system of values that the parent must apply in deciding whether or not to use corporal punishment as a means of correction.[189]

The *Criminal Code* does not address the issue of values or beliefs, and so the court is bound to defer to parental judgement when examining the use of force under section 43. The court cannot, according to Langdon J., "impose its own particular system of values on any family."[190]

Following this, the court argues that when appropriate deference is shown to the value system of the appellant and his decision that the transgression is serious, "then the infliction of some pain and a bruise that is merely transient or trifling in nature, as the trial judge found, cannot as a matter of law, constitute unreasonable force."[191] Moreover, the force "cannot be considered unreasonable solely because it was accompanied by a degree of anger or frustration."[192] The court concludes that the conviction was dependent upon a mistaken view of the role of the court in assessing parental conduct, and must be set aside. The appeal was allowed, and a verdict of not guilty was substituted.

---

[188] *Ibid.*, at para. 7.
[189] *Ibid.*, at paras. 8-9.
[190] *Ibid.*, at para. 9.
[191] *Ibid.*, at para. 30.
[192] *Ibid.*

Conclusion

The ratification of the *Convention* should have ushered in a new era of rights for Canadian children, and in particular the right to (at least) equal protection under the law of assault. The foregoing cases demonstrate that it has not. Whether through indolence, ignorance, or apathy, the Canadian judiciary have failed in their task of ensuring that rights agreements are respected and implemented.

Canadian children remain subject to violent corporal punishment at the hands of those charged with their protection. The *Convention* should have put an end to such barbaric practices, and conferred on children the right to be free from unwanted, often vicious, invasions of their bodily integrity. If agreements such as the *Convention* are to have any teeth, Canadian courts must take them, and the rights they provide, seriously. However, a blind application of such a document also will lead courts and legislators astray. According to Michael Freeman:

> The *Convention* is a beginning, but only a beginning. Those who wish to see the status and lives of children improved must continue to search for the moral foundation of children's rights. Without such thinking there would not have been a *Convention*: without further critical insight there will be no further recognition of the importance to children's lives of according them rights.[193]

The *Convention* is the beginning. If judges and legislatures fail to build on this foundation the rights and lives of children will continue to be trampled and brushed aside. The repeal of section 43 is an ideal place for the Canadian state to demonstrate its commitment to children's rights, a commitment already signed, sealed but not yet delivered. The treatment of the vulnerable must not be worse than the treatment of the strong.

---

[193] Michael Freeman, "Taking Children's Rights More Seriously" in *The Moral Status of Children: Essay on the Rights of the Child* (Cambridge: Kluwer Law International, 1997) 19 at 36.

Part IV

Introduction

In 2000, a constitutional challenge was launched by the Canadian Foundation for Children, Youth and the Law to section 43 of the Canadian *Criminal Code*,[1] a section viewed by some as "perhaps the most startling contravention of equality rights in the *Criminal Code*."[2] This challenge was initially heard by the Ontario Superior Court of Justice,[3] which ruled that this controversial defence did not offend sections 7, 12 or 15 of the Canadian *Charter of Rights and Freedoms*.[4] An appeal was heard in 2001, with similar results.[5] The Supreme Court of Canada granted leave to appeal, and heard arguments in late 2003, but found no constitutional violation.[6] Instead, McLachlin C.J., writing for the majority, simply revised the rules surrounding this section in order to find it constitutionally sound.

This controversial section of the *Criminal Code* provides that:

> 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 be, who is under his care, if the force does not exceed what is reasonable under the circumstances.[7]

---

[1] R.S.C. 1985, c. C-45 [hereinafter "*Criminal Code*"].
[2] Anne McGillivray, "Child Physical Assault: Law, Equality and Intervention" (2004) 30 Manitoba Law Journal 133 at 133 [hereinafter "*McGillivray*"].
[3] *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2000] O.J. No. 2535, online: QL (OJ) [hereinafter "*Foundation 1*"].
[4] Part I of the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "*Charter*"].
[5] *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2002] O.J. No. 61, online: QL (OJ) [hereinafter "*Foundation 2*"]. Goudge J.A. was willing to proceed on the assumption that section 43 of the *Criminal Code* infringed section 15 of the *Charter*, due to the fact that section 43 "is clearly justified under section 1 of the *Charter*." At paras. 56-57.
[6] *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2004] S.C.J. No. 6, online: QL (SCC) [hereinafter "*Foundation 3*"].
[7] I lay out the wording of this section again for the convenience of the reader.

This section supplies a justification for the use of corporal punishment[8] by parents, teachers and those "standing in the place of a parent" towards children in their care, providing that this force does not exceed what is reasonable in the particular situation, and that the force is applied in order to correct the child.[9] Since this section of justifies the use of force only where it is by way of "correction," or for the educational benefit of the child, where the child is unable to appreciate the purpose of the punishment, section 43 provides no defence or justification.[10]

The most prevalent use of corporal punishment is as a response to high levels of parental frustration.[11] Parents lose control and strike their children in anger, an "assault with the intent to cause pain and humiliation,"[12] not a spanking to correct a misbehaving toddler. While the law is largely based on the assumption that parents and educators will make decisions with the best interests of the child in mind,[13] this type of 'moderate correction' often results in increased levels of anti-social behaviour,[14] increased aggression[15] and increased criminal behaviour and mental health problems once the child reaches adulthood.[16] The 2005 *National Longitudinal Survey of Children and Youth* found that "[c]hildren showed higher levels of aggressive behaviour when their parents were more punitive," as well as "higher levels of anxiety and lower levels of pro-social

---

[8] *Foundation 3*, *supra* note 6.
[9] *Ibid.*
[10] *R.* v. *Ogg-Moss*, [1984] 2 S.C.R. 173 online: QL (SCC) [hereinafter "*Ogg-Moss*"].
[11] Katherine Covell and R. Brian Howe, *The Challenge of Children's Rights for Canada* (Waterloo, Wilfred Laurier University Press, 2001) at 75 [hereinafter "*Covell*"].
[12] *McGillivray*, *supra* note 2 at 135.
[13] Joan E. Durrant, "The Abolition of Corporal Punishment in Canada: Parents' versus Children's Rights" (1994) 2 The International Journal of Children's Rights 129 at 130. Professor Durrant notes at 130 that "cultural support for corporal punishment in Canada is evident," stating that 75% of Canadian parents employ this method of castigation. This number is echoed in *Covell*, *supra* note 11 at 74.
[14] *McGillivray*, *supra* note 2 at 143; *Covell*, *Ibid.*, at 77.
[15] *Covell*, *Ibid.*
[16] *McGillivray*, *supra* note 2 at 143.

behaviour."[17] When the discipline changed from punitive to non-punitive, levels of aggression declined.[18]

Why then, given the overwhelming evidence that even slapping and spanking that does not cause physical injury has negative social and psychological results,[19] would Canadian courts, the protectors of the *Charter* and the rights of all Canadians, uphold the constitutional validity of such a section? Even in the shadow of the societal support for corporal punishment evidenced by the writings of Professor Durrant and Professors Covell and Howe, the right of children to be protected from unwanted invasions of their bodily integrity should trump, particularly given Article 19 of the United Nations *Convention on the Rights of the Child*, which demands that:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[20]

By signing and ratifying this document, Canada has committed itself to the principle that children, like adults, possess inalienable rights as persons, while state authorities have the duty and obligation to ensure these rights are provided and protected.[21] When the legislative arm of government refuses to do so, the judicial arm must.

---

[17] Stats-Can – *National Longitudinal Survey of Children and Youth: Home Environment, Income and Child Behaviour* (2005), online: <http://www.statcan.ca/Daily/English/050221/d050221b.htm> (date accessed: 2 March 2005).

[18] *Ibid.* This occurred irrespective of the child's prior level of aggressive behaviour.

[19] *McGillivray*, *supra* note 2 at 142. Professor McGillivray draws this from Elizabeth Gershoff's 'meta-analysis' of 88 studies of child corporal punishment. See Elizabeth Gershoff, "Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analysis and Theoretical Review" (2002) 128 Psychological Bulletin 539. See also Randall R. Curren, "Punishment and Inclusion: The Presuppositions of Corrective Justice in Aristotle and What they Imply" (1995) 8 Can. L.J. & Juris. 259 at para. 38.

[20] This *Convention* was adopted by the General Assembly of the United Nations on November 20, 1989. Canada signed and ratified (except for Alberta, which ratified in 1999) this convention in 1990 and 1991, respectively [hereinafter "*Convention*"].

[21] *Covell*, *supra* note 11 at 22.

This paper will first provide a cursory examination of the decisions in the Ontario Superior Court of Justice and the Ontario Court of Appeal, and then move to scrutinize the decision in the Supreme Court of Canada, considering both arguments and evidence. Following this, this Part will examine decisions which have been released following the Supreme Court's decision of January 2004.

The History

In 2000, the Canadian Foundation for Children, Youth and the Law ("Foundation"), a non-profit Toronto-based child advocacy organization, launched a constitutional challenge against section 43 of the Canadian *Criminal Code* in the Ontario courts. In seeking to have this section declared unconstitutional and of no force or effect, the Foundation argued that section 43 infringes the rights of children under sections 7 (security of the person), 12 (to be free from cruel and unusual punishment) and 15(1) (equality before and under the law) of the *Charter*, and cannot be justified under section 1.[22]

Mccombs J., of the Ontario Superior Court of Justice, begins his decision by noting that while this challenge did not arise from a specific set of facts or circumstances, no objection was taken or noted to the standing of the applicant Foundation to bring such a challenge. The case was to be heard because "it raises a serious legal question and there is no other reasonable and effective way for the issue to be raised."[23] This legal question, as phrased by the court, was as follows:

---

[22] For an interesting discussion of this case at the Ontario Superior Court, see Jeffrey Miller, "Parliament Should be Spanked Over s. 43" *The Lawyers Weekly* 20:12 (21 July 2000), online: QL (JOUR) [hereinafter "*Miller*"].

[23] *Foundation 1*, *supra* note 3 at para. 8.

> ...whether section 43 is unconstitutional and must be struck down or whether it can be construed in a manner that accords with the values enshrined in the *Charter*, protecting children from child abuse, while at the same time ensuring that responsible parents and teachers are protected from unfair criminal prosecution.[24]

Intervening for the Foundation was the Ontario Association of Children's Aid Societies, and for the Attorney General the Canadian Federation of Teachers and the Coalition for Family Autonomy.[25] Both sides tendered expert evidence that indicated consensus or common-ground had been reached on various points, such as that corporal punishment that causes injury is child abuse, and slaps or blows to the head should never occur.[26]

After acknowledging that "some of the judicial decisions applying section 43 to excuse otherwise criminal assault appear to some to be inconsistent and unreasonable,"[27] and that there "is a growing consensus that corporal punishment of children does more harm than good,"[28] Mccombs J. held that section 43 passed constitutional muster. Before turning to the constitutional analysis, Mccombs J. laid out the purpose of keeping section 43 in the *Criminal Code*:

> I conclude that Parliament's purpose in maintaining section 43 is to recognize that parents and teachers require reasonable latitude in carrying out the responsibility imposed by law to provide for their children, to nurture them and to educate them. That responsibility, Parliament has decided, cannot be carried out unless parents and teachers have a protected sphere of authority within which to fulfil their responsibilities. That sphere of authority is intended to allow a defence to assault within a limited domain of physical discipline, while at the same time ensuring that children are protected from child abuse.[29]

The effect of this section is to excuse from criminal liability conduct that would typically attract the attention of the law. This notion, according to Dickson J. (as he then was),

---

[24] *Ibid.*, at para. 13.
[25] The four groups comprising this Coalition are: Focus on the Family (Canada), Home School Legal Defence Association of Canada, REAL Women of Canada and Canada Family Action Coalition.
[26] *Foundation 1*, *supra* note 3 at para. 17. See full text of case for other areas of agreement.
[27] *Ibid.*, at para. 4.
[28] *Ibid.*, at para. 5.
[29] *Ibid.*, at para. 47.

finds its justificatory vigour in historical notions of the interests of the child, as described by Sir William Blackstone:

> The power of a parent by our English laws is much more moderate [than that of the *paterfamilias* in Roman law]; but still sufficient to keep the child in order and obedience. He may lawfully correct his child being under age, in a reasonable manner; for this is for the benefit of his education...[30]

The right and duty of the parent to corporally punish their children derives from their duties of support, education and protection.

With respect to section 7 of the *Charter*, Mccombs J. agreed that section 43 involves a potential deprivation of the "security of the person" interest, but disagreed that this deprivation contravened the principles of fundamental justice.[31] Section 43 "strikes the correct balance between the right of children to be protected from child abuse, and the protection of parents and teachers from unwarranted criminal prosecution."[32] Therefore, according to Mccombs J.:

> ...the strategy adopted by Parliament recognizes the complexity of dealing with the family; the difficulties in raising children; the state's responsibility to monitor or intervene; and the inherent limitations of the criminal law. In my view, this strategy more properly accords with the principles of fundamental justice than would outright criminalization of all conduct that would fall under the assault provisions without section 43...In the result, I conclude that, although section 43 of the *Criminal Code* infringes the section 7 *Charter* right to security of the person, the infringement is in accordance with principles of fundamental justice.[33]

---

[30] *Ogg-Moss*, *supra* note 10.
[31] *Foundation 1*, *supra* note 3 at paras. 52-118. The Foundation had argued that section 43: (a) is void for vagueness; (b) is overbroad; (c) sanctions procedural unfairness; (d) denies children equal treatment under the law and (e) infringes an additional principle of fundamental justice that the applicant submits applies to this case, that all laws that affect children should be interpreted in accordance with the best interests of the child.
[32] *Ibid.*, at para. 118.
[33] *Ibid.*, at paras. 120-121.

Section 43 more properly lines up with the principles of fundamental justice than outright criminalization of corporal punishment by parents and teachers. The law may refuse to criminalize behaviour that society, or at least many parts of society, finds inexcusable.

Section 12 of the *Charter* states that all people in Canada have the right to be free from cruel and unusual treatment or punishment.[34] In order to come under the protection of this section, an appellant must demonstrate two things: first, that he or she is subjected to treatment or punishment at the hands of the state, and second, that this treatment or punishment is cruel and unusual.[35] Mccombs J. notes that in *Rodriguez*, a case of assisted suicide, the Supreme Court reflected on the applicability of section 12 within the context of a provision of the *Criminal Code* that had the effect of imposing cruel and unusual punishment on someone other than the accused. The majority of the Supreme Court:

> ...held that the negative effects of a *Criminal Code* provision upon a person not facing a criminal charge could *not* amount to being subjected by the state to any form of punishment within the meaning of section 12.[36]

Mccombs J. held that the "same reasoning applies to this application."[37] Section 43 does not amount to 'punishment' within the ambit of section 12.

Although the term "treatment" has a broader scope than the term "punishment" in section 12,[38] a distinction needs to be drawn between prohibiting certain acts, and subjecting individuals to certain acts.[39] There "must be some more active state process in operation, involving an exercise of state control over the individual," in order for the state

---

[34] In *R.* v. *Smith*, [1987] 1 S.C.R. 1045, the Supreme Court held that the criterion that must be applied to determine whether a punishment will be viewed as "cruel and unusual" is whether the punishment handed out is so excessive that it outrages the standards of decency [hereinafter "*Smith*"].
[35] *Rodriguez* v. *British Columbia (AG)*, [1993] S.C.J. No. 94 at para. 177, online: QL (SCC) [hereinafter "*Rodriguez*"].
[36] *Foundation 1*, *supra* note 3 at para. 124 [emphasis added].
[37] *Ibid.*
[38] *Rodriguez*, *supra* note 35 at para. 182.
[39] *Ibid.* Per Sopinka J.: "...it is my view that a mere prohibition by the state on certain action, without more, cannot constitute 'treatment' under section 12."

action in question to constitute "treatment" under section 12 of the *Charter*.[40] Section 43 does not involve the 'treatment' of children in any way that was contemplated by the framers of the Canadian *Constitution*. Mccombs J. puts a further caveat on the section 12 ruling:

> If I am wrong in concluding that section 43 does not involve "treatment" or "punishment" of children, then, in my view, for the reasons I have already outlined, section 43, when properly construed, involves treatment or punishment that is neither cruel nor unusual.[41]

With regard to section 15 of the *Charter*, Mccombs J. acknowledged that section 43 does subject children to differential treatment based on the enumerated ground of age, but held that this distinction does not have a discriminatory purpose or effect that is contrary to the equality provisions of section 15.[42] The distinction based on age is "an appropriate response to the unique circumstances of children's psychological development and limitations."[43] Section 43 "does not represent state action based upon stereotypes about children. Instead, section 43 is based upon the inherent capacities and circumstances of childhood..."[44] This is an interesting, and circular argument. Section 43 is not based on stereotypes, but rather on the incapacities inherent to *each and every child*, bar none.[45] Confusingly, Mccombs J. also notes that section 43 demands an "individual assessment of a person's situation and needs."[46] This implies that courts take into account the age,

---

[40] *Ibid.* Mccombs J. notes this in *Foundation 1*, *supra* note 3 at para. 125.
[41] *Foundation 1*, *Ibid.*, at para. 127.
[42] *Ibid.*, at para. 130.
[43] *Ibid.*
[44] *Ibid.*, at para. 131.
[45] See the discussion of childhood competence in Part II, above.
[46] *Foundation 1*, *supra* note 3 at para. 131.

intelligence and other personal features of each child victim. Historically this has not been the case.[47]

In conclusion, Mccombs J. again agrees that the evidence shows that "even mild forms of corporal punishment do no good and may cause harm," and that "public attitudes toward corporal punishment are changing." He dismisses the application because "judges...are not legislators, nor should they be."[48] The court's only job is to determine whether the application to strike down section 43 of the *Criminal Code* should succeed. The courts must leave the development of "specific criteria to guide parents, teachers and law enforcement officials" to Parliament.[49]

The Foundation's appeal was heard by the Ontario Court of Appeal in 2001.[50] For a unanimous court, Goudge J.A. held that section 43 does not infringe sections 7 or 12 of the *Charter.* Acknowledging that it infringes section 15, this infringement is justified in a free and democratic society. Goudge J.A. begins with section 7:

> Given the strict construction that it must be given, and the broader context in which it must be placed, the legislative purpose of section 43 is 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 to them, to their tasks and to the families concerned. This legislative purpose is congruent with two particularly vital aspects of the context in which section 43 operates, namely, Parliament's use of educational measures to promote better ways of disciplining children and the existence of non-criminal legislation that protects against child abuse.[51]

---

[47] See the discussion of the case law on section 43, both pre and post United Nations *Convention on the Rights of the Child* in Part III, above.
[48] *Foundation 1*, *supra* note 3 at paras. 132-134.
[49] *Ibid.*, at paras. 133-134. Interestingly, in *Foundation 3*, *supra* note 6 at para. 138, Arbour J. in dissent argues that the significant reading down of the statutory defence by McLachlin C.J. amounted to an "an abandonment by the courts of their proper role in the criminal process." It seems perhaps Arbour J. is, at least in some way, agreeing with this part of Mccombs J.'s analysis.
[50] For commentary on *Foundation 2*, see Iain T. Benson and Brad Miller, "Should Spanking be a Criminal Act?"*Lex View* (27 February 2002) and John Jaffey "Ontario Court of Appeal Upholds Code Provision on Spanking Children" *The Lawyers Weekly* 21:35 (25 January 2002).
[51] *Foundation 2*, *supra* note 5 at para. 30.

While section 43 implicates a child's security of the person under section 7 of the *Charter*, it is not inconsistent with the principles of fundamental justice.

Section 7 is not concerned about "whether the physical punishment of children is good or bad. The government has clearly and properly determined that it is bad."[52]

> Given that the infringement of the child's security of the person is carefully circumscribed, that there is an important state interest to be achieved by not criminalizing the specified conduct and that there are other mechanisms in place to significantly reduce the risk of physical harm to children, I think section 43 represents a fair balance between the interest of the state and the interest of the individual child. Hence, in my opinion, the section conforms to the principles of fundamental justice.[53]

Goudge J.A. agreed that physical punishment is not the best method of parental control, but held that criminalizing such conduct is not in the interests of the state or of parents. Emphasizing that the family, and in particular, the parent-child relationship is the principal social context for the operation of section 43, he states:

> The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit.[54]

Given the harm that could result through state intervention into families with the "blunt instrument of the criminal law,"[55] the use of educational and other state programs to discourage physical punishment strikes an appropriate balance between the interests of the government, and the interests of the child and family. This ground of the appeal is dismissed.

---

[52] *Ibid.*, at para. 52. *The Lawyers Weekly* 20:12 (21 July 2000), online: QL (JOUR).
[53] *Ibid.*, at para. 51.
[54] *Foundation 2*, *supra* note 5 at para. 18. Goudge J.A. is quoting the Supreme Court's decision in *Winnipeg Child and Family Services* v. *K.L.W.*, [2000] 2 S.C.R. 519 [hereinafter "*K.L.W.*"].
[55] *Foundation 2*, *Ibid.*

On the section 12 argument, the court held that section 43 simply creates a defence for persons who apply reasonable force to children, and "is not the legislative foundation for any state imposed punishment on a child, nor does it subject the child to treatment by the state."[56] The defence does not equate to the state administering, or being responsible for, the infliction of corporal punishment. When a child is physically punished, there is no active "state process in operation involving an exercise of state control over the child,"[57] needed to engage section 12 since *Rodriguez*. Goudge J.A. concludes that section 43 of the *Criminal Code* does not infringe section 12.

On the section 15 argument, the court was prepared to accept that section 43 infringed section 15(1) of the *Charter*, as assault diminishes children's "dignity and worth as human beings within Canadian society."[58] This infringement is justified under section 1 of the *Charter*. Given that the objective and purpose of section 43 is to permit parents and teachers to apply a limited amount of force for the purpose of correction, and that this correction is necessary so that these groups can carry out their important responsibilities, section 43 is, according to the court, "obviously rationally connected to the aim of the legislation."[59] Section 43 minimally impairs the equality rights of children, as the area of conduct which is decriminalized is strictly circumscribed.[60] Section 43, in creating an exemption to the assault provisions in the *Criminal Code*, sets strict limits on the force that can be applied, who can apply it and the purpose of its application. This, combined with government education programs and other child protection legislation, shows that

---

[56] *Ibid.*, at para. 54.
[57] *Ibid.*
[58] *Ibid.*, at para. 56.
[59] *Ibid.*, at paras. 59-61.
[60] *Ibid.*, at para. 62.

the proportionality requirement under section 1 had been met. Section 43, while infringing section 15 of the *Charter*, is saved under section 1.[61]

The proportionality branch of the *Oakes* Test[62] was met even though the court acknowledged that there is "significant associational evidence linking corporal punishment to poor outcomes for children." The balance is found in the negative impact on children and the problem of "prosecuting non-abusive physical punishment" that would hinder parents and teachers in the discharge of their duties.[63] The Foundation's appeal was dismissed. Leave to appeal to the Supreme Court of Canada was granted by McLachlin C.J., Iacobucci and Arbour J.J. on October 17, 2002.

The Supreme Court of Canada

When the constitutional challenge to section 43 of the *Criminal Code* reached the Supreme Court of Canada in June of 2003, a tremendous amount of public attention, both positive and negative, had been generated.[64] By a majority of 7 to 2,[65] the Supreme Court upheld the defence, rejecting the constitutional challenge launched four years earlier by the Foundation and delivering a significant blow to child rights advocates.

Whatever one's opinion on section 43 and the corporal punishment of children, the majority decision is, at minimum, an attempt by the Supreme Court to redefine the boundaries of section 43, without the support of precedent, cases or, arguably, social

---

[61] *Ibid.*, at paras. 63-64.
[62] *R* v. *Oakes*, [1986] 1 S.C.R. 103 [hereinafter "*Oakes*"].
[63] *Foundation 2*, *supra* note 5 at para. 63.
[64] Sanjeev Anand, "Reasonable Chastisement: A Critique of the Supreme Court's Decision in the "Spanking" Case" (2004) 41 Alberta Law Review 871, online: QL (JOUR) [hereinafter "*Anand*"].
[65] Chief Justice McLachlin penned the majority judgment for Justices Bastarache, Gonthier, Iacobucci, Lebel and Major. Justice Binnie agreed, but dissented in part by arguing that section 43 violates section 15(1) of the *Charter*, but is saved by section 1 for parents, but not for teachers. Arbour and Deschamps J.J. dissented.

science evidence. Agreeing with Mccombs J. of the Ontario Superior Court of Justice,[66] McLachlin C.J. for the court notes that "judicial decisions on section 43 in the past have sometimes been unclear and inconsistent, sending a muddled message as to what is and is not permitted."[67] The Supreme Court can be commended for attempting to establish "a more uniform approach" to section 43 through significant reading-in of limitations.[68] Given this admission, some argue that the refusal to strike down section 43 was a decision based on aesthetics:

> ...the judges feared striking down the section would give the political right another stick to beat courts with, over supposed judicial activism. The Supreme Court was afraid, the argument goes, to seem to overrule elected Parliaments. Certainly the majority's anxiety to limit the spanking defence - to striking children between two and 13 years; no sticks or other objects; not on the head; etc. - shows how equivocal the judges felt about their decision.[69]

Nevertheless, the Supreme Court of Canada is the guardian of the *Charter* and the rights and freedoms it guarantees,[70] and therefore must not be swayed by political disagreement or the possibility of being labelled unfairly. As noted by Justice Rosie Abella of the Ontario Court of Appeal:

> What Canada got with the *Charter* was a dramatic package of guaranteed rights, subject only to those reasonable limits which were demonstrably justified in a free and democratic society, a package assembled by the legislature, which in turn, it bears repeating, assigned to the courts the duty to decide whether its laws, politics or practices met the constitutional standards

---

[66] *Foundation*, *supra* note 3 at para. 4. Mccombs J. writes: "..some of the judicial decisions applying section 43 to excuse otherwise criminal assault appear to some to be inconsistent and unreasonable."
[67] *Foundation 3*, *supra* note 6 at para. 39.
[68] *Ibid.* Unfortunately, recent decisions that purport to follow this pronouncement continue to be 'muddled' and often hinge on the subjective opinions of the presiding judge. See below.
[69] *Miller*, *supra* note 22. Miller also argues that even with the new rules set out by the high court, by preserving the defence "[a]ll that child abusers will hear is that our highest court says spanking is fine. They will not read the fine print." Miller appears to be correct. See below.
[70] See Chief Justice Dickson's decision in *Hunter* v. *Southam* (1984), 41 C.R. (3d) 97 (S.C.C.). The judiciary are the guardians of the *Charter* and the protectors of individual rights.

set out in the *Charter*.[71]

It is the *duty* of the court, not an option, to make rulings based on *Charter* values, irrespective of possible negative repercussions. This is particularly true following the Supreme Court's ruling in *R* v. *Ruzic*, where the court held that statutory defences, like any other provision enacted by the legislature, are not immune to *Charter* scrutiny. Simply because the impugned provision is a statutory defence, such as that enshrined in section 43, there is no basis or reason for the court to adopt a position of strong deference.[72]

However, the comments of Lamer C.J. in *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.* are instructive and must also be given their due. The power of judges is restricted to incremental change

> ...based largely on the mechanism of extending an existing principle to new circumstances; courts will not extend the common law where the revision is major and its ramifications complex...major revisions of the law are best left to the legislatures. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.[73]

McLachlin C.J. for majority upheld the constitutionality of section 43 of the *Criminal Code*:

> I am satisfied that the substantial social consensus on what is reasonable correction, supported by comprehensive and consistent expert evidence on what is reasonable presented in this appeal, gives clear content to section 43. I am also satisfied, with due respect to contrary views, that exempting parents and teachers from criminal sanction for reasonable correction does not violate children's equality rights. In the end, I

---

[71] This speech is noted in Don Stuart, *Charter Justice in Canadian Criminal Law*, 3rd ed. (Toronto: Thomson Canada Limited, 2001) [hereinafter "*Stuart*"]. Justice Abella is now a Justice on the Supreme Court of Canada.
[72] (2001), 153 C.C.C. (3d) 1 (S.C.C.).
[73] [1997] 3 S.C.J. No. 96, online: QL (SCJ) at para. 18.

> am satisfied that this section provides a workable, constitutional standard that protects both children and parents.[74]

McLachlin C.J. disagreed with the contentions of the Foundation that section 43: (1) violates section 7 of the *Charter* because it fails to give procedural protections to children, does not further the best interests of the child and is void for both over breadth and vagueness; (2) violates section 12 of the *Charter* because it constitutes cruel and unusual punishment or treatment; and (3) violates section 15(1) of the *Charter* because it denies children the legal protections accorded to adults. In her view, "the exemption from criminal sanction for corrective force that is 'reasonable under the circumstances'" passed constitutional muster.[75]

On the face of the decision, McLachlin C.J. simply rewrote the rules to ensure the constitutionality of section 43. These rules, based on the findings of the court of first instance, demand that those who fall under the ambit of section 43: (1) must not use corrective force against children under the age of two, children in their teens,[76] or at any age if the child suffers from a disability or other contextual factor which would render the child incapable of learning from the correction;[77] (2) must not use corrective force that "causes harm or raises a reasonable prospect of harm," as the operation of section 43 is limited to "the mildest forms of assault";[78] (3) must not use "[d]egrading, inhuman or harmful conduct," including discipline "by the use of objects or blows or slaps to the head";[79] and (4) must not be motivated by "the caregiver's frustration, loss of temper or

---

[74] *Foundation 3*, *supra* note 6 at para. 2.
[75] *Ibid.*, at paras. 1-2.
[76] The court prohibits teachers from corporally punishing their students of any age. However, teachers still "may reasonably apply force to remove a child from a classroom or secure compliance with instructions." *Ibid.*, at para. 40.
[77] *Ibid.*, at para. 25; *Ogg-Moss*, *supra* note 10.
[78] *Foundation 3*, *Ibid.*, at para. 30.
[79] *Ibid.*, at para. 40.

abusive personality."[80] Presumably, since any "prudent parent or teacher will refrain from conduct that approaches those boundaries, while law enforcement officers and judges will proceed with them in mind,"[81] any derivation from these rules will fall outside of the sphere of protection established by section 43.[82] The court cites no case law, empirical studies, or academic authors to buttress this formulation of rules.

Section 7 of the *Charter*

Section 7 of the *Charter* is triggered when state action deprives an individual of life, liberty or security of the person in a way that is contrary to a principle of fundamental justice. The applicant must prove both the deprivation of life, liberty or security, and that this deprivation amounts to a breach of fundamental justice. In *Foundation 3*, the Crown conceded that this section of the *Criminal Code* infringed on children's security of the person, thus fulfilling the first requirement of the breach.[83]

The Foundation argued that this infringement offended three principles of fundamental justice: (1) the principle that a child must be given independent procedural rights; (2) the principle that all legislation that affects children must do so in their best interests; and (3) the principle that criminal legislation must not be vague or overbroad. Therefore, section 43 of the *Criminal Code* violated section 7 of the *Charter*.

---

[80] *Ibid.*
[81] *Ibid.*, at para. 42.
[82] McLachlin C.J. writes: "The purpose of section 43 is to delineate a sphere of non-criminal conduct within the larger realm of common assault. It must, as we have seen, do this in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids *ad hoc* discretionary decision making by law enforcement officials. People must be able to assess when conduct approaches the boundaries of the sphere that section 43 provides." *Ibid.*, at para. 19.
[83] *Ibid.*, at para. 3.

Section 7 of the *Charter* – Procedural Rights

With respect to independent procedural rights, the Foundation argued that since it is a principle of fundamental justice that all accused persons be given adequate safeguards when traversing the criminal justice system, it should be a principle of fundamental justice that children who are subjected to corporal punishment that is exempted from criminal sanction have an analogous right to due process. Since section 43 fails to provide such due process, it infringes section 7 of the *Charter* in a way contrary to a principle of fundamental justice.[84]

McLachlin C.J. rejected this argument, noting first that the law has yet to recognize procedural rights for the victims of an offence, and second that children already have procedural safeguards that protect their interests:

> The child's interests are represented at trial by the Crown. The Crown's decision to prosecute and its conduct of the prosecution will necessarily reflect society's concern for the physical and mental security of the child. There is no reason to suppose that, as in other offences involving children as victims or witnesses, the Crown will not discharge that duty properly. Nor is there any reason to conclude on the arguments before us that providing separate representation for the child is either necessary or useful.[85]

The state, those responsible for codifying the common law defence of moderate correction, is also responsible for ensuring a child's interests are represented.[86] Therefore, no failure of provision of procedural safeguards could be established by the Foundation.

Section 7 of the *Charter* – "Best Interests" as a Principle of Fundamental Justice

---

[84] *Ibid.*, at para. 5.
[85] *Ibid.*, at para. 6.
[86] For an interesting discussion of prosecutorial discretion in Canada and section 43, see Mark Carter, "Corporal Punishment and Prosecutorial Discretion in Canada" (2004) 12 The International Journal of Children's Rights 41.

The Foundation then argued that the best interests of the child should be recognised as a principle of fundamental justice under section 7 of the *Charter*. The phrase 'principle of fundamental justice' does not describe a right, but rather, qualifies the right to have life, liberty and security of the person protected. These principles are to be located within the basic doctrines and beliefs of the entire criminal justice system, and whether any given principle might be said to be one of 'fundamental justice' will depend upon an analysis of the nature and role of that principle within the process of justice.[87] The scope of these principles will vary according to context and interests at stake.[88]

These 'principles of fundamental justice' must fulfill three basic criteria.[89] First, the principle must be a legal principle. This is to ensure that it both provides meaningful content for the guarantees of section 7, and also avoids entangling the court in the adjudication of matters of pure policy.[90] Second, there must exists within society sufficient consensus that the advanced 'principle of fundamental justice' is "vital or fundamental to...societal notions of justice."[91] As noted by McLachlin C.J.:

> The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice.[92]

Third, the principle advanced must be capable of being precisely identified and qualified so as to be applied to varying situations with predictable results. It is imperative that

---

[87] *Reference re. Section 94(2) of the Motor Vehicles Act*, [1985] 2 S.C.R. 486 [hereinafter "*Motor Vehicle Reference*"].
[88] *Chiarelli* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711.
[89] Professor Sanjeev Anand notes that when dealing with these principles, "[w]ith a few exceptions, the Chief Justice's analysis...focuses on relatively established principles articulated in previous cases." *Anand*, *supra* note 64 at para. 5. See *R.* v. *Malmo-Levine*, [2003] 3 S.C.R. 571 for a recent articulation of the criteria.
[90] *Motor Vehicle Reference*, *supra* note 87 at 503.
[91] *Rodriguez*, *supra* note 35 at para. 141.
[92] *Foundation 3*, *supra* note 6 at para. 8.

society know, with a high degree of certainty, what types of conduct is prohibited or allowed.[93]

McLachlin C.J. is quick to agree that 'the best interest of the child' is a legal principle, acknowledged in both international and domestic documents. Article 3(1) of the *Convention* states that in "all actions concerning children...the best interest of the child shall be a primary consideration,"[94] and section 27(1) of the *Youth Criminal Justice Act* states that a court may, if "in its opinion the presence of the parent is necessary or in the best interest of a young person," require the parent to attend any court proceedings.[95]

McLachlin C.J. is equally quick to argue that the 'best interests of the child' fails to meet the second criteria needed for a principle to be considered one of 'fundamental justice,' that this principle be "vital or fundamental to...societal notions of justice." While the 'best interest of the child' finds wide support in legislation and both social and legal policy, it is not "a foundational requirement for the dispensation of justice."[96] Citing Article 3(1) of the *Convention* and observing that the best interests of the child are '*a*' and not '*the*' primary consideration when dealing with children, McLachlin C.J. argues that the legal principle of the 'best interests of the child' "may be subordinated to other concerns in appropriate contexts."[97] Since the best interests of the child do not always trump all other concerns in the administration of justice,[98] this legal principle is

---

[93] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 [hereinafter "*Prostitution Reference*"].
[94] Professor Nick Bala points out that the "tiny but crucial qualifying term to the use of 'best interests' – that this factor shall be 'a' primary consideration – indicates that considerations other than the best interests of the child may also be factors in decision making about children." Nick Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) at 131 [hereinafter "*Bala*"].
[95] *Youth Criminal Justice Act*, S.C. 2002, c. 1.
[96] *Foundation 3*, *supra* note 6 at para. 10.
[97] *Ibid.*, at para. 10. This seems to echo Professor Bala's remarks. See *Bala*, *supra* note 94.
[98] McLachlin C.J. notes that, for example, while it may not always be in the best interest of a child to imprison a parent for committing a crime, the state will do so. *Foundation 3*, *Ibid.*

not vital or fundamental to Canadian notions of social or legal justice, and therefore does not qualify as a principle of fundamental justice within the ambit of section 7 of the *Charter*.[99]

As for the third requirement, that the principle must be capable of being precisely identified and qualified so as to be applied to varying situations with predictable results, McLachlin C.J. argues that the 'best interests of the child' again falls short.[100] This legal principle functions only as a factor to be considered in tandem with others, and since its application is highly contextual, reasonable people in varying circumstances could easily disagree about the results of its application. Therefore, the 'best interests of the child' does not function "as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice."[101]

Professor Sanjeev Anand notes that this holding by the Supreme Court is "one of the most surprising pronouncements to emanate" from *Foundation 3*.[102] Citing previous Supreme Court decisions,[103] Professor Anand argues that:

> On a number of occasions, various judges of the Supreme Court have suggested that it is one of the principles of fundamental justice that decisions about children must be made according to the best interests of the child.[104]

In *R.B.* v. *Children's Aid Society of Metropolitan Toronto*,[105] for example, Lamar C.J. writes that:

---

[99] In *McGillivray*, *supra* note 2 at 159-160, Professor McGillivray notes that "[t]he principle that 'the best interest 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's judgment in *R* v. *Baker* (1999), 174 D.L.R. (4th) 193 at para. 70 (S.C.C.). It is a principle running through Canadian and international law, suggesting that it may be a new principle of fundamental justice."
[100] *Foundation 3*, *supra* note 6 at para. 11.
[101] *Ibid.*
[102] *Anand*, *supra* note 64 at para. 8.
[103] *New Brunswick (Minister of Health)* v. *G.(J.)*, [1999] 3 S.C.R. 46 [hereinafter "*New Brunswick*"]; *K.L.W.*, *supra* note 54. There are also others, as I discuss below.
[104] *Anand*, *supra* note 64 at para. 8.

> The state's interest in legislating in matters affecting children has a long-standing history...More particularly, the common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its *parens patriae* jurisdiction...The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure.[106]

The principles of fundamental justice are both substantive and procedural, and government or legal intervention is appropriate when it is necessary for the protection of the best interests of the child. In *New Brunswick (Minister of Health)* v. *G.(J.)*, the Supreme Court held that if a parent in a child custody hearing is without the benefit of counsel, the parent:

> ...would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's section 7 right to security of the person.[107]

On account of these cases, among others, Professor Anand argues that:

> ...it can be asserted that the Supreme Court...is not merely failing to recognize that the best interests of the child constitutes a principle of fundamental justice. In fact, the Supreme Court is repudiating that this recognition was previously made at all.[108]

Another problematic holding of the majority is with respect to the second step of the test to determine whether a principle is one of fundamental justice, that is, that the principle be "vital or fundamental to...societal notions of justice." McLachlin C.J. holds that since "the legal principle of the 'best interests of the child' may be subordinated to other concerns in appropriate contexts,"[109] it cannot be a principle of fundamental justice.

---

[105] [1995] S.C.J. No. 24, online: QL (SCC).
[106] *Ibid.*, at para. 88.
[107] *New Brunswick*, *supra* note 103 at para. 81.
[108] *Anand*, *supra* note 64 at para. 8.
[109] *Foundation 3*, *supra* note 6 at para. 10.

Professor Anand notes the implications of this pronouncement: "The first implication is that principles of fundamental justice must be absolute, not qualified, principles...The second implication is that there can be no role for section 1 justifications of section 7 breaches."[110] If McLachlin C.J.'s analysis is correct, then the accepted wisdom of conducting section 1 analyses for infringements of section 7 *Charter* rights is wasteful of the court's time.

Last, Professor Anand points out that even if the best interests of the child were to be viewed as a principle of fundamental justice, this is no way means the court would hold that section 43 infringes section 7. Given McLachlin C.J.'s characterization of section 43 as "firmly grounded in the actual needs and circumstances of children,"[111] Anand argues that she would likely have found no infringement of section 7 rights of children.[112] The court, therefore, could have taken a positive step forward by agreeing with past jurisprudence that the best interests of the child is a principle of fundamental justice, without necessarily finding an infringement of section 7 of the *Charter* and striking down section 43.

Section 7 of the *Charter* – Vagueness

The Foundation also argued that the inclusion of the phrase "reasonable under the circumstances" in section 43 was unconstitutionally vague,[113] and therefore infringes section 7 in a way that is not in accordance with the principles of fundamental justice.

---

[110] *Anand*, *supra* note 64 at para. 11.
[111] *Foundation 3*, *supra* note 6 at para. 68.
[112] *Anand*, *supra* note 64 at para. 13.
[113] The doctrine of vagueness was recognized as a principle of fundamental justice in the *Prostitution Reference, supra* note 93, but, according to Professor Stuart, *Stuart*, *supra* note 71 at 103, it was given its most thorough consideration in *R* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 [hereinafter "*Nova Scotia*"].

The Foundation contended that this section of the *Criminal Code* did not give sufficient notice as to what conduct is prohibited, and failed to constrain discretion in enforcement.[114]

Vagueness as a principle of fundamental justice is rooted in the notion that a just society would provide fair notice of the requirements of law to all citizens, while at the same time limiting the discretion of law enforcement officials. According to Lamer J. in the *Prostitution Reference*:

> ...there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards.[115]

The doctrine of vagueness, however, does "not require that a law be absolutely certain..." as "no law can meet that standard."[116]

Based on this, a law will be unconstitutionally vague if it "does not provide an adequate basis for legal debate, [an adequate basis] for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria."[117] A vague provision "does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion."[118] Laws must be plain and understandable for both the governing and the governed, and this will both inform citizens when they are entering an area of risk for criminal sanction, and make it easier

---

[114] *Foundation 3*, *supra* note 6 at para. 13.
[115] *Prostitution Reference*, *supra* note 93 at para. 34.
[116] *Ibid.*, at para. 40.
[117] *Nova Scotia*, *supra* note 113 at para. 63.
[118] *Ibid.*

for law enforcement officials to determine when a true breach of the criminal law has occurred.[119]

According to McLachlin C.J., the purpose of section 43 is to "delineate a sphere of non-criminal conduct within the larger realm of common assault." In order to ensure this provision is not void for vagueness, it must delineate this sphere "in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids *ad hoc* discretionary decision making by law enforcement officials."[120] Citizens must be capable of correctly assessing when their conduct is nearing the boundaries of the protective sphere provided by section 43, or the provision will be found unconstitutionally vague.

The doctrine of vagueness is not to be considered in the abstract and must be assessed within a larger contextual analysis, and this includes and examination of the purpose, subject matter and nature of the provision, societal values, related judicial provisions and any prior judicial interpretations.[121] Since section 43 is a provision which limits the protection of the criminal law, it must be strictly construed.[122]

The court begins by noting that those adults who may access the protective sphere of section 43 are defined with "considerable precision."[123] The terms "parent" and "schoolteacher" are clear, and the phrase "person standing in the place of a parent" has been interpreted by the courts to designate individuals who have assumed "all the obligations of parenthood."[124] For McLachlin C.J., "these terms present no difficulty."[125]

---

[119] *Foundation 3*, *supra* note 6 at para. 18.
[120] *Ibid.*, at para. 19.
[121] *R.* v. *Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028.
[122] *Ogg-Moss*, *supra* note 10.
[123] *Foundation 3*, *supra* note 6 at para. 21.
[124] *Ibid.*, citing *Ogg-Moss*, *supra* note 10.
[125] *Foundation 3*, *Ibid.*

Professor Don Stuart argues that the wording of section 43 is "wide enough to include natural parents who for any number of reasons are no longer involved in full-time child rearing, adoptive parents and indeed anyone who has legally or *de facto* permanently or temporarily assumed care."[126] Moreover, the phrase "persons standing in the place of a parent," a term which presents "no difficulty" to McLachlin C.J., has been held to include a school bus-driver,[127] and expressly gives school teachers the right to corporally punish whether or not they are standing in the place of a parent.[128] Professor Stuart advocates the repeal of section 43.[129]

McLachlin C.J. then notes that section 43 identifies "less precisely what conduct falls within its sphere,"[130] but argues that the "fact that borderline cases may be anticipated is not fatal" to the inquiry.[131] 'Conduct' is to be defined in two ways: First, the requirement in section 43 that the force be "by way of correction," and second, the requirement that the force be "reasonable under the circumstances." The question, therefore, is whether "taken together and construed in accordance with governing principles, these phrases provide sufficient precision to delineate the zone of risk and avoid discretionary law enforcement."[132]

When examining the term "by way of correction," McLachlin C.J. explains that an examination of case law yields two limitations on the content of the protective sphere proffered by section 43. First, the force must be applied in a way intended to be educative or corrective. On account of this,

---

[126] Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed. (Toronto: Thomson Canada Limited, 2001) at 502 (hereinafter "*Treatise*"].
[127] *Trynchy* (1970), 73 W.W.R. 165 (Y.T. Mag. Ct.), as noted in the *Treatise*, *Ibid.*, at 503.
[128] *Treatise*, *Ibid.*
[129] *Ibid.*, at 506.
[130] *Foundation 3*, *supra* note 6 at para. 22.
[131] *Ibid.*, at para. 41.
[132] *Ibid.*, at para. 22.

> ...section 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour.[133]

Section 43 is not protective of adults who raise their hands in anger, and admits into its protective sphere only those actions designed to address and control actual behaviour.

Second, the child being chastised must be capable of learning or benefiting from the punishment, and this requires the capacity to learn and the possibility that the correction will accomplish this goal. McLachlin C.J. reads this limitation as constraining the use of force to children who are over the age of two years, since on the evidence children under the age of two are incapable of understanding why they are hit.[134] Force used against children who are incapable of learning on account of a disability or some other factor will not be "corrective" within the compass of section 43,[135] and thus will not fall within the sphere of protection established by this provision.

The second limitation in section 43, that the force be "reasonable under the circumstances," requires the court to examine, from both an objective and subjective standpoint, matters such 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 or gravity of the punishment, the circumstances under which it was inflicted, and the injuries, if any, suffered. If the child suffers injuries which may endanger life, limbs or health or is disfigured that alone would be sufficient to find that the punishment administered was unreasonable under the circumstances.[136]

Unreasonable uses of corrective force will not be sanctioned by section 43.

---

[133] *Ibid.*, at para. 24.
[134] *Ibid.*, at para. 25.
[135] *Ogg-Moss*, *supra* note 10.
[136] *R* v. *Dupperon*, [1984] S.J. No. 939 (Sask. C.A.), online: QL (SJ) at para. 28 [hereinafter "*Dupperon*"].

The Foundation argued that the term "reasonable under the circumstances" failed to sufficiently demarcate an area of risk, thus inviting discretionary uses of law enforcement powers. State actors have too often used personal experiences and subjective beliefs to assess the reasonableness of correction in a way that renders the application and enforcement of section 43 arbitrary and uninformed.[137] This gives section 43 an aleatory nature, or as Anne McGillivray terms it, a provision that amounts to a "legal lottery."[138]

The majority argues that the "law has long used reasonableness to delineate areas of risk, without incurring the dangers of vagueness,"[139] and that the term "reasonable" provides actors with varying degrees of guidance. In each case, continues McLachlin C.J., "the question is whether the term, considered in light of principles of statutory interpretation and decided cases, delineates an area of risk and avoids the danger of arbitrary *ad hoc* law enforcement."[140]

Based on the behaviour for which section 43 provides an exemption,[141] international treaty obligations,[142] the directive to consider under which circumstances corrective force is used,[143] social consensus, expert evidence[144] and past judicial consideration,[145]

---

[137] *Foundation 3*, *supra* note 6 at para. 26. As evidence, the Foundation noted the decision in *R* v. *M.(K.)*, [1992] M.J. No. 334, where O'Sullivan J.A. writes that "[t]he discipline administered to the boy in question in these proceedings was mild indeed compared to the discipline I received in my home. There were times when I thought my parents were too strict, but in retrospect I am glad that my parents were not subjected to prosecution or persecution for attempting to keep the children in my family in line."

[138] *McGillivray*, *supra* note 2 at 136.

[139] *Foundation 3*, *supra* note 6 at para. 27. The court also notes that the "criminal law is thick with the notion of 'reasonableness'."

[140] *Ibid.*, at para. 28.

[141] *Ibid.*, at para. 30. "It can be invoked only in cases of non-consensual application of force that results neither in harm nor in the prospect of bodily harm. This limits its operation to the mildest forms of assault."

[142] *Ibid.*, at para. 31. "Canada's international commitments confirm that physical correction that either harms or degrades a child is unreasonable."

[143] *Ibid.*, at para. 34. "The focus under section 43 is on the correction of the child, not on the gravity of the precipitating event. Obviously, force employed in the absence of any behaviour requiring correction by definition cannot be corrective."

[144] *Ibid.*, at para. 36. "It is implicit in this technique that current social consensus on what is reasonable may be considered. It is wrong for caregivers or judges to apply their own subjective notions of what is

McLachlin C.J. holds that "a solid core of meaning emerges for 'reasonable under the circumstances,' sufficient to establish a zone in which discipline risks criminal sanction."[146] Section 43 of the *Criminal Code*

> ...exempts from criminal sanction only minor corrective force of a transitory and trifling nature. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered by section 43. It is wrong for law enforcement officers or judges to apply their own subjective views of what is "reasonable under the circumstances"; the test is objective. The question must be considered in context and in light of all the circumstances of the case. The gravity of the precipitating event is not relevant.[147]

These are the factors laid out by McLachlin C.J. to limit the applicability of section 43, and establish a 'solid core' meaning for the term "reasonable under the circumstances," ensuring it abides by the protections enshrined in section 7 of the *Charter*.[148]

On account of the preceding, the wording of section 43 was found not to be void for vagueness, as it provides sufficient accuracy so as not to infringe section 7 in a way that

---

reasonable; section 43 demands an objective appraisal based on current learning and consensus. Substantial consensus, particularly when supported by expert evidence, can provide guidance and reduce the danger of arbitrary, subjective decision making."

[145] *Ibid.*, at para. 39. "'The fact that a particular legislative term is open to varying interpretations by the courts is not fatal': *Prostitution Reference*, *supra* note 93 at para. 41. This case, and those that build on it, may permit a more uniform approach to 'reasonable under the circumstances' than has prevailed in the past. Again, the issue is not whether section 43 has provided enough guidance in the past, but whether it expresses a standard that can be given a core meaning in tune with contemporary consensus."

[146] *Ibid.*, at para. 40.

[147] *Ibid.*

[148] Professor F.C. DeCoste notes that the court "curiously" fails to mention many of the "threads" laid out in *Dupperon* in their decision. See F.C. DeCoste, "On 'Educating Parents': State and Family in *Canadian Foundation for Children, Youth and the Law* v. *Canada (A.G.)*" (2004) 41 Alberta Law Review 879 at para. 3 [hereinafter "*DeCoste*"].

offends the principles of fundamental justice.[149] It is natural in the Canadian legal system that some conduct will be seen as falling along the boundaries of the area of risk, with no definite way of predicting the outcome of prosecution. However, it is guidance of conduct, not the direction of action, that should be the objective of the Canadian judicial system.[150] The majority held that section 43 of the *Criminal Code* achieves this objective:

> It sets real boundaries and delineates a risk zone for criminal sanction. The prudent parent or teacher will refrain from conduct that approaches those boundaries, while law enforcement officers and judges will proceed with them in mind. It does not violate the principle of fundamental justice that laws must not be vague or arbitrary.[151]

Interestingly, when examining Canada's international treaty obligations, McLachlin C.J. notes that Canadian statutes should be construed in a way that complies with international covenants and agreements to which Canada is a signatory.[152] McLachlin C.J. points out that the 1995 Report of the Human Rights Committee of the United Nations[153] did not express the view that mild corporal punishment of children engages articles of the *Convention*, and that neither the *Convention* nor the *International Covenant on Civil and Political Rights* explicitly require state bans on all forms of corporal punishment of children.[154]

In 2003, the United Nations Committee on the Rights of the Child, the body overseeing the implementation of the *Convention* by signatory states, noted that they were "deeply concerned" that Canada had not enacted legislation prohibiting the use of

---

[149] Professor F.C. DeCoste argues that the court made its case that section 43 is "properly construed" and "not unduly vague" through "a hodgepodge of argumentative strategies." *Ibid.*
[150] *Nova Scotia*, *supra* note 113 at para. 62.
[151] *Foundation 3*, *supra* note 6 at para. 42.
[152] *Ibid.*, at para. 31.
[153] This body monitors compliance with the *International Covenant on Civil and Political Rights.*
[154] *Foundation 3*, *supra* note 6 at para. 33.

corporal punishment, and recommended that Canada removes the existing authorization of the use of corporal punishment to discipline children, and "explicitly prohibit all forms of violence against children, however light."[155] This committee's remarks were not included in the majority decision, but were specifically referred to in Arbour J.'s dissent.[156]

McLachlin C.J. also refers to social consensus and expert evidence when determining what is "reasonable under the circumstances." According to the majority, "[s]ubstantial consensus, particularly when supported by expert evidence, can provide guidance and reduce the danger of arbitrary, subjective decision making."[157] If expert evidence is properly used to determine reasonableness, it is just as proper to use it to show the deleterious and often life altering effects corporal punishment has on children. Elizabeth Gershoff examined 88 studies on child corporal punishment and determined 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 up children for violence as adolescents and as adults."[158] While McLachlin C.J. agrees that corporal punishment can be harmful, her decision implies that this is only the case for children less than two years of age and teens.[159]

---

[155] United Nations – Concluding Observations of the Committee on the Rights of the Child: Canada (3 October 2003) at paras. 32 and 33, online: United Nations <http://www.canadiancrc.com/PDFs/UN_CRC_Concluding_Observations_03OCT03_20CO2.pdf> (date accessed: 17 January 2005).
[156] *Foundation 3*, *supra* note 6 at para. 188.
[157] *Ibid.*, at para. 36.
[158] This is noted in *McGillivray*, *supra* note 2 at 142.
[159] *Foundation 3*, *supra* note 6 at para. 40.

Professor F.C. DeCoste points out that the court proceeds in its determination completely in the absence of facts, a path specifically against its own instruction.[160] This challenge to section 43 of the *Criminal Code* was not initiated by a factual set of circumstances, but rather, the case was to be heard because "it raises a serious legal question and there is no other reasonable and effective way for the issue to be raised."[161] Professor DeCoste writes:

> To be plain about it: because the Court had before it no facts and because, in consequence it was led to ground its discourse in the extra-legal ether of "social consensus" and "expert consensus," the standards it articulates descend not from principle, legal or otherwise, but from unblemished opinion whose authority resides alone in the legislating utterance of them by this Court.[162]

In the absence of facts, the court proceeds by conceptualizing section 43 and condemns itself to the articulation of standards based *not* on a 'case by case basis,' but rather on the arbitrary and subjective commands and opinions it rails against when dealing with this section.

Section 7 of the *Charter* – Overbreadth

Like vagueness, a law will be overbroad if it fails to provide fair and appropriate notice to citizens of what types of conduct are prohibited, or fails to place any limits on the use of discretion by law enforcement officials.[163] The Foundation argued that because section 43 refers generally to corrective force against children, it is overbroad

---

[160] The court holds that it is "wrong for caregivers or judges to apply their own subjective notions of what is reasonable..." *Ibid.*, at para. 36. McLachlin's decision is rife with such references: At para. 28, the Chief Justice notes that what is reasonable will depend on the "factual context." At para. 40, McLachlin C.J. writes that the question of what is reasonable "must be considered in context and in light of all the circumstances of the case." See *DeCoste*, *supra* note 148 at para. 6.

[161] See *Supra*, note 23.

[162] *DeCoste*, *supra* note 148 at para. 6.

[163] Kent Roach, *Criminal Law*, 2nd ed. (Toronto: Irwin Law Inc., 2000) at 71 [hereinafter "*Roach*"].

because children under the age of two are incapable of being effectively corrected and teens will only be harmed by such force. Therefore, these classes of children should have been excluded from the protective ambit of this provision.[164]

According to Gonthier J. in *R.* v. *Nova Scotia Pharmaceutical Society*, overbreadth

> ...is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*.[165]

Overbreadth has no autonomous value under Canadian law, and, according *to Nova Scotia*, is always related only to an inquiry under section 1 of the *Charter*. Professor Don Stuart notes that in *R* v. *Heywood*,[166] while the majority "appears to rely on *Nova Scotia Pharmaceutical*, *Heywood* surely overrules it to the extent that it recognizes a section 7 challenge grounded solely on overbreadth."[167] Future accusations of overbreadth are to be expected by all levels of court based on the majority holding in *Heywood*.[168]

According to *Heywood*:

> Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective...In the case of overbreadth the means are too sweeping in relation to the objective. Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: Are those means necessary to achieve the state objective? If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law

---

[164] *Foundation 3*, *supra* note 6 at para. 45.
[165] *Nova Scotia*, *supra* note 113 at para. 35.
[166] *R* v. *Heywood* (1994), 94 C.C.C. (3d) 481 (S.C.C.), online: QL (SCC) [hereinafter "*Heywood*"].
[167] *Treatise*, *supra* note 126 at 33.
[168] *Ibid.*

> is arbitrary or disproportionate. Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the state interest against that of the individual.[169]

The majority deals with the issue of overbreadth in a cursory way. McLachlin C.J. writes that the Foundation's

> ...concern is addressed by Parliament's decision to confine the exemption to reasonable correction...Experts consistently indicate that force applied to a child too young to be capable of learning from physical correction is not corrective force. Similarly, current expert consensus indicates that corporal punishment of teenagers creates a serious risk of psychological harm: employing it would thus be unreasonable. There may however be instances in which a parent or school teacher reasonably uses corrective force to restrain or remove an adolescent from a particular situation, falling short of corporal punishment. Section 43 does not permit force that cannot correct or is unreasonable.[170]

From this, McLachlin C.J. holds that section 43 of the *Criminal Code* is not overbroad.

Professor Anne McGillivray disagrees. Section 43 provides little or no guidance to parents and teachers, those employing this section to avert criminal assault charges. This section provides no guidance to children, "who have no entitlement to know when or why their security will be violated."[171]

The majority's pronouncements on section 7 of the *Charter* leaves children in the unenviable position of being the only class of persons still subject to corporal punishment. Moreover, given amendments to animal cruelty laws, "they are also the only sentient beings who can be assaulted for their correction. There is no live comparison."[172] According to Professor Anand, McLachlin C.J.'s conclusion that section

---

[169] *Heywood*, *supra* note 166 at 516.
[170] *Foundation 3*, *supra* note 6 at para. 46.
[171] *McGillivray*, *supra* note 2 at 160.
[172] *Ibid.*, at 162. See also *Miller*, *supra* note 22 where Miller writes: "In beating people to correct them, the only distinction between criminals and allegedly naughty children is one of degree, not kind."

43 does not violate section 7 of the *Charter* is "incomplete, lacks cogency, and is difficult to reconcile with past cases."[173]

Section 12 of the *Charter* – Cruel and Unusual Treatment or Punishment

When determining whether a punishment qualifies as cruel or unusual within the range of section 12, the punishment prescribed must be so excessive as to outrage the standards of decency.[174] The effect of the punishment proscribed for the offence must be "grossly disproportionate" to what would be an appropriate sanction.[175] According to Lamer J., as he then was, this demands that

> ...the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law," then the purpose which it seeks to attain will fall to be assessed under section 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while section 1 permits this right to be overridden to achieve some important societal objective.[176]

Lamer J. adopts this test pronounced by then Chief Justice Laskin in *R* v. *Miller*.[177]

---

[173] *Anand*, *supra* note 64 at para. 3.
[174] *Smith*, *supra* note 34.
[175] *Ibid.*, at para. 53.
[176] *Ibid.*, at para. 55. See also *Harvey* v. *New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, online: QL (SCC).
[177] [1997] 2 S.C.R. 680.

In order to engage section 12 of the *Charter*, the impugned conduct must involve some treatment or punishment by the state, and this treatment or punishment must be cruel and unusual.[178] According to the McLachlin C.J., with respect to section 43, these "conditions are not met."[179]

Section 43 of the *Criminal Code* only absolves corrective force when applied by parents or teachers. Such force applied by parents within the setting of the family does not amount to treatment by the state, and while teachers may be employed by the state, the conduct permitted by section 43 amounts to only corrective force that is reasonable. According to McLachlin C.J., conduct "cannot be at once both reasonable and an outrage to standards of decency."[180] According to case law, corrective force that reaches the pitch of "cruel and unusual," therefore, will not fall within the protective sphere established by section 43.

Even if the state bears none of the responsibility for what parents and teachers do, they do have the responsibility to ensure that all people live in environments of free from violence. Professor McGillivray notes, "[h]uman rights violations are not tolerated [by the state] on the grounds that the relationship between the violator and violated is private or that the act of violation is not required or mandated by law."[181]

In 2001 the Supreme Court of Canada ruled that any law will "fall into suspicion" if it "substantially orchestrates, encourages or sustains the violation of fundamental

---

[178] *Rodriguez*, *supra* note 35.
[179] *Foundation 3*, *supra* note 6 at para. 47.
[180] *Ibid.*, at paras. 48-49.
[181] *McGillivray*, *supra* note 2 at 163. Professor McGillivray cites the 1992 *Draft Declaration on the Elimination of Violence Against Women*, which was adopted by the United Nations General Assembly on 20 December, 1993. This *Declaration* recognized that violence by private actors in a domestic context amounts to a human rights violation.

freedoms."[182] While section 43 does not *require* parents to corporally punish their children, it does sustain and possible encourage such conduct. "Legislation that gives a 'green light' to private violations of *Charter* rights is a *Charter* problem. Section 43 is a case in point."[183]

In *Smith* the Supreme Court held that

> ...some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, *the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed*, or, to give examples of treatment, the lobotomisation of certain dangerous offenders or the castration of sexual offenders.[184]

Such punishments will "always" amount to a violation of section 12 of the *Charter*. Section 43 of the *Criminal Code* authorizes and justifies the corporal punishment of children. According to the court in *Dunmore*, the state cannot claim immunity from *Charter* scrutiny simply because the actors are private citizens.[185]

Last, the term "principles of fundamental justice" in section 7 of the *Charter* represents not a protected right, but rather is to be determined with regard to the purpose of the section and its interplay with sections 8-14 of the *Charter*. In the *Motor Vehicle Reference*, Lamer J. writes:

> Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of section 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in section 7.[186]

Sections 8 to 14 of the *Charter*, therefore, are illustrative of deprivations which may occur under section 7.[187]

---

[182] *Dunmore* v. *Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para. 26, online: QL (SCC).
[183] *McGillivray*, *supra* note 2 at 163.
[184] *Smith*, *supra* note 34 at para. 56 [emphasis added].
[185] Professor McGillivray very convincingly makes this argument in *McGillivray*, *supra* note 2 at 163-164.
[186] *Motor Vehicle Reference*, *supra* note 87 at para. 27.

Professor Anand asks if there "is a residual element of cruel and unusual punishment contained within the principles of fundamental justice" and, if this residual element does exist, whether "there is enough of this element to call into question the constitutional validity of section 43."[188] Given the *Motor Vehicle Reference*, such a residual element would exist. Professor Anand notes that "an exploration of this issue by the Supreme Court would have had benefits that extend beyond the area of corrective force against children."[189] McLachlin C.J. missed an opportunity to explicate the relationship between section 7, "the most powerful vehicle for the establishment of new protections,"[190] and the remainder of the rights provided by the Canadian *Charter of Rights and Freedoms*.[191] Instead, the McLachlin C.J. may have further confused it.

Section 15(1) of the *Charter* – Equality Guarantee

The Foundation argued that, as section 43 of the *Criminal Code* permits violence toward children that would be deemed criminal if the victim were an adult, it violates section 15(1) of the *Charter*. This guarantees that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on…age." The Foundation also argued that section 43 provided a supplementary ground of discrimination because decriminalizing some assaults, here, assaults against children, sends the destructive message that a child is "less capable, or less worthy of recognition

---

[187] Professor Don Stuart writes: "The section was…held to be a residual right in the sense that the rights guaranteed in sections 8 to 14 are specific examples of the broader principles of fundamental justice." See *Stuart*, *supra* note 71 at 47.
[188] *Anand*, *supra* note 64 at para. 7.
[189] *Ibid.*
[190] *Stuart*, supra note 71 at 47.
[191] *Anand*, *supra* note 64 at para. 7.

or value as a human being or as a member of Canadian society."[192] Section 43 offends the very purpose of section 15(1) of the *Charter*, which is

> ...to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[193]

To bring the criminal law into line with the *Charter*, simple assaults on children must be treated the same as simple assaults on adults, and the context in which they occur is irrelevant.[194]

Section 15 of the *Charter* does not amount to simply a general guarantee of equal treatment, and does not provide for equality between individuals or groups within society in a "general or abstract sense." Instead, this section is concerned with the application of the law.[195] Section 15 provides four basic rights which apply to *all* persons, whether Canadian citizens or not: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law.[196] A violation of section 15 will be found if there is an infringement of any of the four heads that results in discrimination or a distinction based on grounds that relate to personal characteristics of the individual, or a group of individuals, which results in imposed burdens, obligations or disadvantages not imposed on other individuals or groups.[197] This discrimination can be intentional or inadvertent.[198] The Foundation

---

[192] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51, online: QL (SCC) [hereinafter "*Law*"].
[193] *Ibid.*
[194] *Foundation 3*, *supra* note 6 at para. 50.
[195] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 25, online: QL (SCC) [hereinafter "*Andrews*"].
[196] *Ibid.*, at para. 33.
[197] *R* v. *Turpin*, [1989] 1 S.C.R. 1296, online: QL (SCC) [hereinafter "*Turpin*"].

argued that section 43 makes a distinction on the enumerated ground of age, and that this distinction amounts to discrimination under section 15(1) of the *Charter*.

In *Law*, Iacobucci J. set out certain guidelines that should be examined when dealing with section 15(1) of the *Charter*. Three questions must be asked:

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of section 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?[199]

The impact must be the denial of an equality right, this denial must result in discrimination, and the purpose of the discrimination must not be the amelioration of conditions of disadvantaged individuals or groups.[200]

The majority agreed that section 43 draws a distinction on the basis of age, and that age is an enumerated ground under section 15(1) of the *Charter*.[201] The first and second inquiries in the *Law* test were satisfied, leaving open only the question of whether this differential treatment discriminated against children in a substantive sense, bringing into play the purpose of section 15(1).

Citing *Law*, McLachlin C.J. poses the question of substantive discrimination as such:

> ...viewed from the perspective of the of the reasonable person acting on behalf of a child, who seriously considers and values the child's

---

[198] *Andrews*, *supra* note 195.
[199] *Law*, *supra* note 192 at para. 39.
[200] *R* v. *Nguyen*, [1990] 2 S.C.R. 906. See also section 15(2) of the *Charter*.
[201] *Foundation 3*, *supra* note 6 at para. 52.

> views and developmental needs,[202] does Parliament's choice not to criminalize reasonable use of corrective force against children offend their human dignity and freedom, by marginalizing them or treating them as less worthy without regard to their actual circumstances?[203]

According to Iacobucci J. in *Law*, this question must be answered by taking into account four contextual factors: (1) pre-existing disadvantage; (2) relationship between the distinction and the claimant's characteristics or circumstances; (3) ameliorative purpose or effects; and (4) nature of the interest affected.[204] McLachlin C.J. holds that all factors except the second, the relationship between the distinction and the claimant's characteristics or circumstances, fall in favour of an infringement of section 15(1) of the *Charter*.[205]

First, the court must look to vulnerability or pre-existing disadvantage, which, according to *Law*, is the "most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory."[206] Pre-existing disadvantage compounds any further differential treatment, contributing to the perpetuation or promotion of unfair social beliefs and stigma. Children are one of the most vulnerable groups in Canadian society, and this vulnerability is reinforced through state sanctioned

---

[202] It should be noted that the majority used this altered formulation of the reasonable person because "[t]he test is whether a reasonable person possessing the claimant's attributes and in the claimant's circumstances would conclude that the law marginalizes the claimant or treats her as less worthy on the basis of irrelevant characteristics. Applied to a child claimant, this test may well confront us with the fiction of the reasonable, fully apprised preschool-aged child." *Ibid.*, at para. 53.
[203] *Ibid.*, at paras. 53-54.
[204] *Law*, *supra* note 192 at para. 62-73. Importantly, just as section 15(1) is not limited to the enumerated or listed grounds, Iacobucci J.'s list of "contextual factors" is not exhaustive, and not all four factors will be relevant in every case.
[205] *Foundation*, *supra* note 3 at para. 56.
[206] *Law*, supra note 192 at para. 63. Citing *Andrews*, *supra* note 195 and *Turpin*, *supra* note 197, among others.

violence toward them. McLachlin C.J. agrees, noting that this factor "is clearly met in this case."[207]

The third factor, the ameliorative purpose or effect of the impugned legislation, may come into play in some cases given that the purpose of section 15 of the *Charter* is not only to prevent discrimination against individuals, but "also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society."[208] However, this factor will "only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense."[209] According to McLachlin C.J., "[n]o one contends that section 43 is designed to ameliorate the condition of another more disadvantaged group."[210]

Similarly, the fourth factor, the nature of the interest affected, also points to a finding of discrimination within the meaning of section 15. All things considered, the more dire the consequences for the group affected by the differential treatment, the more likely that this distinction is discriminatory within the meaning of section 15 of the *Charter*.[211] McLachlin C.J. states that the "nature of the interest affected -- physical integrity -- is profound."[212]

This left McLachlin C.J. with only the second factor, the relationship between grounds of discrimination and the claimant's actual characteristics or circumstances. On this issue alone she hangs her ruling that section 43 is not discriminatory under section 15

---

[207] *Foundation 3*, *supra* note 6 at para. 56.
[208] *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 66.
[209] *Law*, *supra* note 192 at para. 72.
[210] *Foundation 3*, *supra* note 6 at para. 56.
[211] *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 63, online: QL (SCC).
[212] *Foundation 3*, *supra* note 6 at para. 56.

of the *Charter*.[213] Citing *Law*, she states that "a law that 'properly accommodates the claimant's needs, capacities, and circumstances' will not generally offend section 15(1)."[214] Children are vulnerable members of society and need to be both protected from abusive treatment, and guided by parents and teachers. Parliament has provided parents and teachers with section 43 in order to accommodate both of these requirements. Section 43 "provides parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law."[215] Established patterns of abuse and assaults stemming from frustration or anger are not reasonable and will be dealt with through the criminal law. The decriminalization of minimal force promotes a society that is "sensitive to children's needs for a safe environment,"[216] and to introduce the blunt instrument of criminal law into "educational environments would harm children more than help them." Parliament has instead settled on the less intrusive approach of educating parents against physical discipline.[217]

McLachlin C.J. concludes that

> ...without section 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." The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks 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.[218]

---

[213] Professor Anne McGillivray writes: "Section 43 is based on the 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." See *McGillivray*, *supra* note 2 at 157.
[214] *Foundation 3*, *supra* note 6 at para. 57.
[215] *Ibid.*, at paras. 58-59.
[216] *Ibid.*
[217] *Ibid.* Although the government has done very little in the way of educating parents on the problems associated with the corporal punishment of children.
[218] *Ibid.*, at para. 62.

The Supreme Court was satisfied that a reasonable person acting on the child's behalf, "apprised of the harms of criminalization that section 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law," would conclude that section 43 does not discriminate in a manner contemplated by section 15 of the *Charter*.[219] Parliament's choice not to criminalize minor assaults on children does nothing to "devalue or discriminate," but instead is actually a method of responding "to the reality of their lives by addressing their need for safety and security in an age-appropriate manner."[220] This decision, "far from ignoring the reality of children's lives, is grounded in their lived experience."[221] The Foundation's argument "equates equal treatment with identical treatment, a proposition which our jurisprudence has consistently rejected."[222]

The Supreme Court's judgment does injustice to its decision in *Law* in stating that "a law that 'properly accommodates the claimant's needs, capacities, and circumstances' will not generally offend section 15(1)."[223] In fact, the actual passage from *Law* states merely that "it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation," and more difficult "to

---

[219] *Ibid.*, at para. 68. However, see *Anand*, *supra* note 64 at para 15. Professor Anand writes that "it seems an inescapable conclusion that section 43 infringes section 15 of the *Charter*. By virtue of this legislative provision, children are now the only class of persons in Canada -- including convicted criminals -- who can be corporally punished with criminal impunity."

[220] *Foundation 3*, Ibid., at para. 51. It is interesting that the Chief Justice would claim that section 43 is Parliament's way of responding to a child's need for safety, given some of the case law mentioned in Part III of this paper.

[221] *Ibid.*, at para. 60.

[222] Ibid. In *Andrews*, *supra* note 195 at para. 26, the court cites *R* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 347 [hereinafter "*Big M*"], where Chief Justice Dickson writes: "In fact, the interests of true equality may well require differentiation in treatment."

[223] *Foundation 3*, Ibid., at para. 57.

the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances."[224] In the same passage, *Law* states that the focus in section 15 inquiries

> ...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 dignity. *The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the section 15 guarantee.*[225]

The Supreme Court states that the "valid social purpose" of section 43 is the protection and education of children.[226] Since *Law*, this education and protection must benefit children. Given that many other jurisdictions have criminalized child corporal punishment,[227] and still have programs in place to protect and educate children, why would other methods of child protection and education not be implemented?[228] If the valid social purpose of section 43 is education, there are clearly other, less violent, ways of accomplishing this goal.

Or is the actual "valid social purpose" of section 43 to shield parents and teachers from the assault provisions in the *Criminal Code*?[229] McLachlin C.J. notes that by

---

[224] *Law*, *supra* note 192 at para. 70. There is no mention of laws that "properly accommodate needs" 'generally' not offending section 15.
[225] *Ibid.* [emphasis added].
[226] *Foundation 3*, *supra* note 6 at para. 58. It is important to note that the Chief Justice does not advocate or suggest that children benefit from corporal punishment.
[227] See *McGillivray*, *supra* note 2 at note 86. Professor McGillivray writes: "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)." More recently, Latvia (1998), (Croatia), Iceland (2003), Romania (2004), Ukraine (2004) and Hungary (2005) have specifically prohibited corporal punishment. See also Rhona Schuz, "'Three Years On': An Analysis of the Delegalization of Physical Punishment of Children by the Israeli Courts" (2003) 11 The International Journal of Children's Rights 235.
[228] Professor Joan E. Durrant writes that one of the most important reasons why some countries have banned corporal punishment was "the recognition that children are human beings with inherent rights to physical integrity and dignity." Joan E. Durrant, "Legal Reforms and Attitudes Toward Physical Punishment in Sweden" (2003) 11 The International Journal of Children's Rights 147 at 147.
[229] McLachlin C.J. mentions this at *Foundation 3*, *supra* note 6 at para. 58, but notes that this protection from the criminal law is important to ensure they can perform their duties.

criminalizing conduct that now might fall under section 43, the state runs 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."[230] Undoubtedly, a large part of such a burden would also fall on the shoulders of the parent who loses their family or the teacher who is charged with assault. If a "valid social purpose" of section 43 is to provide parents and teachers with a shield from the criminal law for their own benefit, then according to *Law*, this would violate section 15 of the *Charter*. As Iacobucci J. points out in *Law*, simply because legislation may achieve a valid social purpose for one group (keeping adults out of jail or keeping families together), this "cannot function to deny an equality claim where the effects of the legislation upon another person or group [(children)] conflict with the purpose of the section 15 guarantee."[231] Professor Anand points out, it is

> ...clear that McLachlin C.J.'s section 15 analysis of section 43 is premised upon the need to shield from criminal liability the parent that uses mild spanking on his or her children. The majority assumes that if section 43 is struck down, parents will continue to use corporal punishment and risk criminal liability rather than alter their child-rearing practices.[232]

The protection of risk-taking parents is not the life blood of section 15 or of Canadian *Charter* jurisprudence. McLachlin C.J. grounds her section 15 analysis in the notion that children need to be protected and educated, and section 43 allows parents and teachers to do this without undue state intervention. This section protects the interests of parents and teachers, with the discriminatory result of endangering children.

---

[230] *Ibid.*, at para. 62.
[231] *Law*, *supra* note 192 at para. 70. Understandably, keeping families together is in the interests of both child and adult. However, it is only children that must be corporally punished to protect such interests.
[232] *Anand*, *supra* note 64 at para. 17. Professor Anand notes that on account of this, the majority ignores the "educative effect of criminal law."

Also problematic with the majority's treatment of section 15 is McLachlin C.J.'s assertion that by repealing section 43, Canada's broad assault provisions "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.'"[233] This argument lacks vigour. As pointed out by Professor McGillivray:

> 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.[234]

How many times has a parent relied on section 43 to extricate herself from an assault conviction because she placed her "unwilling child in a chair for a five minute 'time-out'"? Never. Even if assault charges were brought under such circumstances, Canadian common law deals with situations of unwanted or accidental touching through defences such as necessity and *de minimis*.[235]

The Supreme Court deviates from the "reasonable person" standard set out in *Law* and *Egan*, which states:

> ...the focus of the discrimination inquiry is both subjective and objective...The objective component means that it is not sufficient, in order to ground a section 15(1) claim, for a claimant simply to assert, without more, that his or her dignity has been adversely affected by a law... the relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant.[236]

---

[233] *Foundation 3*, *supra* note 6 at para. 62.
[234] *McGillivray*, *supra* note 2 at 135.
[235] Arbour J.'s dissent details these defences, so I will leave my discussion of them until then.
[236] *Law*, *supra* note 192 at paras. 59-60.

Instead, given the "fiction of the reasonable, fully apprised preschool-aged child," McLachlin C.J. adopts the perspective of "the reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs."[237] According to Professor Anand, by forgoing the perspective of a reasonable child, the majority risks "ignoring significant concerns that children may possess simply because those concerns are not deemed reasonable by a mature adult." Adopting such a perspective "opens the Court to criticisms that its approach to section 15 claims brought by children is paternalistic."[238]

As a result of the foregoing, the majority found that section 43 of the *Criminal Code* passed constitutional muster. McLachlin C.J. significantly rewrote the rules surrounding this section in an effort to achieve this objective. As it now stands, those who fall under the ambit of section 43: (1) must not use corrective force against children under the age of two, children in their teens,[239] or at any age if the child suffers from a disability or other contextual factor which would render the child incapable of learning from the correction;[240] (2) must not use corrective force that "causes harm or raises a reasonable prospect of harm," as the operation of section 43 is limited to "the mildest forms of assault";[241] (3) must not use "[d]egrading, inhuman or harmful conduct," and this includes discipline "by the use of objects or blows or slaps to the head";[242] (4) must not strike out in anger, as "conduct stemming from the caregiver's frustration, loss of temper

---

[237] *Foundation 3*, *supra* note 6 at para. 53.
[238] *Anand*, *supra* note 64 at para. 18.
[239] The court prohibits teachers from corporally punishing their students of any age. However they still "may reasonably apply force to remove a child from a classroom or secure compliance with instructions." *Foundation 3*, *supra* note 6 at para . 40.
[240] *Ibid.*, at para. 25; *Ogg-Moss*, *supra* note 10.
[241] *Foundation 3*, Ibid., at para. 30.
[242] *Ibid.*, at para. 40.

or abusive personality" are not covered under this provision.[243] The court cites no case law, empirical studies or academic authors to buttress this formulation of rules.

Dissenting Judgments

Justice Ian Binnie sided with the majority for most of his judgment, but held that section 43 infringed section 15 of the *Charter*. Binnie J. goes on to hold that section 43 could be saved under section 1 of the *Charter* when dealing with parents, but not when dealing with teachers.

Binnie J. argues that "there 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*."[244] This dismantling of protections so vital and obvious to the *Criminal Code* results in the destruction of dignity from any perspective, including the perspective of a child being 'spanked' by a parent. While section 43 infringes the equality rights of children, Binnie J. balances "the needs of the claimants against the legitimate needs of our collective social existence," and finds that "the infringement is a reasonable limit"[245] justified under section 1.

According to Binnie J., the objective of section 43, which is to allow parents to "apply strictly limited corrective force to children without criminal sanctions so that they can carry out their important responsibilities without the harm that such sanctions would bring to them," is an objective that is pressing and substantial. Moreover, providing "a defence to a criminal prosecution in the circumstances stated in section 43 is rationally

---

[243] *Ibid.*
[244] *Ibid.*, at para. 72.
[245] *Ibid.*, at para. 75. Binnie J. continues at para. 76: "On the other hand, the section 1 justification for extending parent-like protection to teachers is not convincing. In my view, the references to 'schoolteacher' and 'pupil' should be struck out of section 43 and declared to be null and void."

connected to this objective."[246] With respect to the minimal impairment under section 1, "the wording of section 43 not only permits calibration of the immunity to different circumstances and children of different ages, but it [also] allows for adjustment over time."[247] This permitted 'calibration,' taken together with McLachlin C.J.'s guidance, allows section 43 to pass the minimal impairment section of the *Oakes* Test.

Section 43 also passes the proportionality requirement of the section 1 test due to the Parliamentary limitation that this defence applies only where: (1) the force is used for corrective purposes; and (2) the measure of force can be shown to be reasonable under the circumstances. Additionally, given the overall protections afforded to children by legislation other than the *Criminal Code*, the potential deleterious effects of section 43 are exceeded by the salutary effects.[248] In relation to parents, therefore, section 43 is a reasonable limit demonstrably justified in a free and democratic society.

With respect to teachers, Binnie J. was unable to save the violation of section 15, as the "logic for keeping criminal sanctions out of the schools is much less compelling than for keeping them out of the home."[249] In short, while Binnie J. was prepared to accept that maintaining order within the walls of the school is a legitimate objective, he was unable to agree that "giving non-family members an immunity for the criminal assault of children 'by way of correction' [was] a reasonable or proportionate legislative response to that problem."[250] Section 43 did not minimally impair the equality rights of children, and was not a proportionate response to the problem of maintaining order in schools.

---

[246] *Ibid.*, at paras. 120-121.
[247] *Ibid.*, at para. 122.
[248] *Ibid.*, at para. 123.
[249] *Ibid.*, at para. 125.
[250] *Ibid.*, at para. 128.

Binnie's partial dissent can be seen as a principled approach to the doctrine of children's rights. Binnie J. did uphold the section 15 infringement under section 1, but he acknowledged that this antiquated and dangerous provision of the *Criminal Code* flouted the equality provisions of the *Charter*. While some may not agree with Binnie J.'s section 1 analysis, the importance of his recognition of equality rights is laudable, and should not be understated.[251] One step forward is better than standing still.

Arbour and Deschamps JJ. wrote convincing and cogent dissents. Arbour J. first chastised the majority for rewriting the rules of section 43 in order to find it constitutionally sound, "[t]o essentially rewrite [the defence] before validating its constitutionality is to hide the constitutional imperative."[252] The role of the court when examining and applying both statutory and common law defences can be distinguished from the court's responsibility when examining the constitutional validity of criminal law offences. With respect to offences under the *Criminal Code*, the courts must "interpret the provisions that proscribe conduct in a manner that least restricts 'the liberty of the subject,' consistent with the wording of the statute and the intent of Parliament."[253] This technique is incapable of being used by the court to "restrict the scope of statutory defences without the courts compromising the core of their interplay with Parliament in the orderly development and application of the criminal law."[254] The court is the enforcer of the fundamental principles of responsibility for criminal acts, and, "in particular, the fundamental concept of fault which can only be reduced or displaced by

---

[251] Deschamps J., in dissent, also held that section 43 violated section 15 of the *Charter*. However, Justice Deschamps found that this infringement could *not* be saved under section 1. See below.
[252] *Foundation 3*, *supra* note 6 at para. 139.
[253] *Ibid.*, at para. 140. Arbour J. cites *R* v. *Sharpe*, [2001] 1 S.C.R. 45, online: QL (SCC) [hereinafter "*Sharpe*"] for this proposition. *Sharpe* dealt with the possession of child pornography and the implications of such possession given section 2(b) of the *Charter* and section 163.1(4) of the *Criminal Code*.
[254] *Foundation 3*, *Ibid.*

statute."[255] Arbour J. notes that "it is neither the historic nor the proper role of courts to enlarge criminal responsibility by limiting defences enacted by Parliament. In fact, the role of the courts is precisely the opposite."[256]

Arbour J. also argued that section 43 infringes section 7 of the *Charter*, as "the phrase 'reasonable under the circumstances' in section 43...violates children's security of the person interest." This infringement could not be saved under section 1, as the "deprivation is not in accordance with the relevant principle of fundamental justice, in that it is unconstitutionally vague."[257]

The determination of whether or not there has been an infringement of section 7 has three stages:

> The first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle or principles.[258]

Both the Crown and the Foundation agreed that section 43 engages the "security of the person" interest of children.

Arbour J. argues that this deprivation violates the principle of vagueness, as it offends "two values that are fundamental to the legal system."[259]

> I doubt that it can be said, on the basis of the existing record, that the justification of corporal punishment of children when the force used is 'reasonable under the circumstances' gives adequate notice to parents and teachers as to what is and is not permissible in a criminal context. Furthermore, it neither adequately guides the decision-making power of law enforcers nor delineates, in an acceptable

---

[255] *Ibid.*, at para. 136.
[256] *Ibid.*, at para. 135.
[257] *Ibid.*, at para. 192.
[258] *R* v. *White*, [1999] 2 S.C.R. 417 at para. 38, online: QL (SCC).
[259] *Foundation 3*, *supra* note 6 at para. 178.

> fashion, the boundaries of legal debate. The Chief Justice rearticulates the section 43 defence as the delineation of a 'risk zone for criminal sanction.' I do not disagree with such a formulation of the vagueness doctrine in this context. Still, on this record, the 'risk zone' for victims and offenders alike has been a moving target.[260]

Section 43 does not provide adequate guidance to those who wish to hit children, and to those who enforce the law, making its application dangerously, and illegally, uneven.

The significant reading in exercise performed by McLachlin C.J. does not clear up the problem of vagueness. Arbour J. writes: "...we cannot cure vagueness from the top down by declaring that a proper legal debate has taken place and that anything outside its boundaries is simply wrong and must be discarded."[261] She notes that the requirement that a limit be "prescribed by law" under section 1 calls for fair notice to citizens and limitations on the discretion of law enforcement officials.[262] However, as Arbour J. had already found section 43 void for vagueness, it could not "pass the 'prescribed by law' or minimal impairment stage" of the *Oakes* Test.[263] Given her above reprimand of the majority's significant reading in, Arbour J. would strike down section 43, as "Parliament is best equipped to consider this vague and controversial provision."[264]

The majority states that if the court were to strike down section 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.'"[265] Arbour J. acknowledges that while it's "true that Canada's broad assault laws could be resorted to in order to incriminate parents and/or teachers for using force that falls short

---

[260] *Ibid.*, at para. 189.
[261] *Ibid.*, at para. 191.
[262] Ibid., at para. 193. Citing *Nova Scotia*, *supra* note 113.
[263] *Foundation 3*, *Ibid.*
[264] *Ibid.*, at para. 194.
[265] *Ibid.*, at para. 62.

of corporal punishment," the "common law defences of necessity and *de minimis* adequately protect parents and teachers from excusable and/or trivial conduct."[266]

The defence of necessity was "clearly recognised by the Supreme Court of Canada in *Perka*,"[267] and operates by virtue of section 8(3) of the *Criminal Code*. Professor Stuart writes that "[a]t the heart of the defence [is] the perceived injustice of punishing violations where the person had no reasonable choice available. The act was wrong, but it is to be excused because it was realistically unavoidable."[268] The requirements of necessity laid out in *Perka* were reshaped in the British Columbia case of *R* v. *Manning*, which held that: (1) necessity is an excuse rather than a justification; (2) the criterion to be applied is the moral involuntariness of the wrongful act; (3) this moral involuntariness must be measured on the basis of social expectation of appropriate and normal resistance to pressure; (4) a finding of negligence or the involvement in criminal or immoral activity will not bar the actor from using this excuse; (5) circumstances which indicate that the wrongful act was not truly involuntary will bar the actor from using this excuse; (6) the existence of a legal alternative to the wrongful act will also bar an actor from using the excuse of necessity, as to be truly involuntary the act must be inevitable and must not involve alternative choices that would not result in a breach of the law; (7) necessity only applies to circumstances characterized by imminent risk, where the wrongful act was carried out to avoid immediate peril; (8) the infliction of a greater harm so the actor can avoid a lesser evil will not be excused; and (9) where the accused puts before the court

---

[266] *Ibid.*, at para. 195.
[267] *Treatise*, *supra* note 126 at 512. Professor Stuart is referring to *R* v. *Perka* (1984), 42 C.R. (3d) 113 (S.C.C.).
[268] *Treatise*, *Ibid.*, at 513.

sufficient evidence to raise the issue of necessity, the onus will be on the Crown to meet this evidence beyond a reasonable doubt.[269]

Citing precedent,[270] Arbour J. sees "no reason why, if the above requirements are met, the defence of necessity would not be available to parents and teachers should they intervene to protect children from themselves or others."[271] Noting that it is "not inconceivable to think of situations where force might be applied to young children for reasons other than education or correction," Arbour J. argues that the "common law defence of necessity has always been available to parents in appropriate circumstances and would continue to be available if the section 43 defence were struck down."[272]

With respect to the defence of *de minimis*, Arbour J. points out that the "application of some force upon another does not always suggest an assault in the criminal sense."[273] While general acceptance of the maxim of *de minimis non curat lex* as a principle of the criminal law is uncertain, Professor Stuart points out that the Supreme Court of Canada has "expressly left the existence of the defence open."[274] This defence does not justify a wrongful act. The act remains unlawful, but given its triviality, the law allows it to go unpunished.

---

[269] [1994] B.C.J. No. 1732 at para. 24 (B.C. Prov. Ct.), online: QL (BCJ). For an explanation of these factors, see *Roach*, *supra* note 163 at 275-279.

[270] Justice Arbour cites *R. v. Morris* (1981), 61 C.C.C. (2d) 163 (Alta. Q.B.), where the excuse of necessity was used to absolve a husband from a charge of assault on his wife. The husband restrained his wife, who was inebriated, when she tried to jump out of a moving truck and also tried to grab the steering wheel. Arbour J. writes that the "husband honestly and reasonably believed that the intervention was necessary." *Foundation 3*, *supra* note 6 at para. 198.

[271] *Foundation 3*, *Ibid.*

[272] *Ibid.*, at para. 199.

[273] *Ibid.*, at para. 201. Justice Arbour cites the case of *R* v. *Kormos* (1998), 14 C.R. (5th) 312 at para. 34 where the Ontario Provincial Court states that "there are many examples of incidental touching that cannot be considered criminal conduct."

[274] *Treatise*, *supra* note 126 at 595. Professor Stuart cites the case of *R* v. *Hinchey*, [1996] 3 S.C.R. 1128 at para. 69. Here, the majority writes: "Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that 'the law does not concern itself with trifles.'"

While the case law surrounding *de minimis* is limited and unsatisfactory, Arbour J. argues that

> ...an appropriate expansion in the use of the *de minimis* defence -- not unlike the development of the doctrine of abuse of process -- would assist in ensuring that mere technical violations of the assault provisions of the [*Criminal*] *Code* that ought not to attract criminal sanctions are stayed. In this way, judicial resources are not wasted, and unwanted intrusions of the criminal law in the family context, which may be harmful to children, are avoided. Therefore, if section 43 were to be struck down, and absent Parliament's re-enactment of a provision compatible with the constitutional rights of children, parents would be no more at risk of being dragged into court for a 'pat on the bum' than they currently are for 'tasting' a single grape in the supermarket.[275]

Codification of *de minimis* could ease the reluctance of the judiciary to rely on this defence. The present common law formulation provides sufficient protection for trivial infractions of the criminal law.

Similar arguments for the application of the defence of necessity and *de minimis* have been advanced by both McGillivray and Stuart,[276] advocates of the repeal of section 43. Professor McGillivray writes:

> Why should children be singled out for an all-purpose defence based on status rather than circumstances? Other defences are available in circumstances requiring correction...The common law defence of necessity excuses circumstances not otherwise covered, while the doctrine of *de minimis* protects the trivial assailant from prosecution. If the defence [in section 43] were abolished, ministerial guidelines could be set to control criminalization in a manner sensitive to child, family and culture.[277]

The abolition of section 43 would not lead to a flood of prosecutions, nor would it result in an increased population of parents in Canadian jails. Arbour J.'s formulation may in

---

[275] *Foundation 3*, *supra* note 6 at para. 207.
[276] *Treatise*, *supra* note 126 at 506. Professor Stuart writes that difficult cases dealing with section 43 could "be considered under the...emerging defence of necessity."
[277] Anne McGillivray, "'He'll Learn it on His Body': Disciplining Childhood in Canadian Law" (1997) 5 The International Journal of Children's Rights 193 at 240 [hereinafter "*He'll Learn*"].

fact be more protective of parents who wish to protect and nurture their children. She writes:

> ...even if one understands the law as per the Chief Justice, section 43 may be of no assistance to parents who apply some degree of force for the purpose of restraint...For example, a 2-year-old child who struggles to cross the street at a red light will have to be forcibly held back and secured against his or her will. In my view, the force being applied to the child is not for the purpose of correction *per se*, but to ensure the child's safety. Similarly, if a parent were to forcibly restrain a child in order to ensure that the child complied with a doctor's instructions to receive a needle, section 43 would be of no assistance to excuse the use of restraint, but the parent would, in my view, have the common law defence of necessity available to him or her should a charge of assault be pursued. The common law defence of necessity has always been available to parents in appropriate circumstances and would continue to be available if the section 43 defence were struck down.[278]

There will be times, during the maturation of the child, that a parent will have to be forcibly restrained. This would not result in assault convictions.

McLachlin C.J. addresses these arguments:

> The defence of necessity, I agree, is available, but only in situations where corrective force is not in issue, like saving a child from imminent danger. As for the defence of *de minimis*, it is equally or more vague and difficult in application than the reasonableness defence offered by section 43.[279]

Abolishing the defence enshrined in section 43 would have the effect of "leaving parents who apply corrective force to children to the mercy of the[se] defences...."[280] This is the only other reference McLachlin C.J. makes to the use of defences to assault generally available in her decision.

Professor Anand finds it "lamentable" that McLachlin C.J. did not address these defences in a more extensive way, as "it is unlikely that the Supreme Court will have

---

[278] *Foundation 3*, *supra* note 6 at para. 199.
[279] *Ibid.*, at para. 44.
[280] *Ibid.*, at para. 2.

another opportunity to address this issue in the near future."[281] The court's refusal to fully recognise and clarify the defence of *de minimis* is surprising, given its potential as a "useful vehicle of restraint upon the criminal law,"[282] a "vehicle for judges to ensure that in some doubtful cases the criminal law can be used with total restraint, and that the accused can be given full benefit of the doubt even if technically guilty."[283] Professor Stuart notes that this "judicial reticence is associated with the justifiable suspicion that Latin tags obfuscate what principle is really at work."[284] While the majority judgment "does not expressly recognize the defence of *de minimis*...it also does not explicitly refuse to recognize it."[285] The possibility of expanding this defence in the future is, therefore, not implausible.[286]

Deschamps J. in dissent also rebukes the majority for their extensive reading in exercise:

> To read into the text implicit exclusions based on the age of the child, the part of the body hit, the type of assault committed, and whether an implement is used, would turn the exercise of statutory interpretation into one of legislative drafting.[287]

It is the role of the court to interpret the Parliament's statutory provisions and language, not to substitute its own views and opinions.

Deschamps J. finds that section 43 infringes section 15 of the *Charter*. The purpose of section 15 is to promote a society in which all members can feel secure in the knowledge that the law recognizes them as human beings, "equally capable and equally

---

[281] *Anand*, *supra* note 64 at para. 22.
[282] *Ibid.*, at para. 23.
[283] *Treatise*, *supra* note 126 at 598.
[284] *Ibid.*
[285] *Anand*, *supra* note 64 at para. 24.
[286] Professor Anand points out the difficult set of circumstances that would have to arise in order for the court to again address this defence. *Ibid.*, at para. 22.
[287] *Foundation 3*, *supra* note 6 at para. 216. Deschamps J. also agrees with the arguments of Justice Arbour that section 43 infringes section 7 of the *Charter* and cannot be saved under section 1.

deserving." Section 15 catches "government action that has a discriminatory purpose or effect on the basis of an enumerated or analogous ground and impairs a person's dignity."[288]

Applying the *Law* test, Deschamps J. states that section 43 both "on its face, as well as in its result, creates a distinction between children and others," on the enumerated ground of age.[289]

> Parliament decided to criminalize certain conduct which is seen as sufficiently morally blameworthy as to merit the disfavour of the criminal law. It then specifically chose to lift protection for one group while leaving protection intact for all others.[290]

While section 43 applies only in circumstances where the accused is involved in a particular relationship with the child,[291] "this does not alter the fact that children, as a group, are given inferior protection against criminal assault."[292] When examining the four 'contextual' factors enumerated in *Law*,[293] Deschamps J. first argues that by withdrawing the protection against assault from children, Parliament sends the message that "a child's physical security is less worthy of protection, even though it is seen as a fundamental right for all others."[294] A reasonable claimant would believe that his or her rights and dignity are being impaired. With respect to pre-existing disadvantage, Deschamps J. points out that children "have been recognised as a vulnerable group time and again by legislatures and courts."[295] While children are now recognised as

---

[288] *Ibid.*, at para. 219.
[289] *Ibid.*, at paras. 221-222.
[290] *Ibid.*, at para. 221.
[291] The respondent argued that section 43 is not primarily a distinction based on age, but rather, a distinction based on the relationship between parent and child. Deschamps J. finds this "overly formalistic." *Ibid.*, at para. 222.
[292] *Ibid.*
[293] See *supra*, note 204.
[294] *Foundation 3*, *supra* note 6 at para. 224.
[295] *Ibid.*, at para. 225.

individuals with rights, including the right to be protected from incursions on their bodily integrity,[296] section 43 operates as "a throwback to old notions of children as property," reinforcing the vulnerability and disadvantage already faced by children "by withdrawing the protection of the criminal law."[297] This magnifies the already vulnerable position of children in Canadian society. On the relationship between the distinction and the claimant's actual characteristics or circumstances, Deschamps J. states:

> 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.[298]

The anachronistic notion of children as property is perpetuated when allowances are made for parents who assault their children. This does not correspond to the actual needs and circumstances of children, and, in fact, "compounds the pre-existing disadvantage of children as a vulnerable and often-powerless group whose access to legal redress is already restricted."[299]

Deschamps J. finds discriminatory treatment, both on the face of section 43, and in its result.[300] This differential treatment discriminates against children in a substantive sense,

---

[296] Citing *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *K.L.W.*, *supra* note 54; *Sharpe*, supra note 253, and the *Convention*, *supra* note 20.
[297] *Foundation 3*, *supra* note 6 at para. 226.
[298] *Ibid.*, at para. 230. The physical and psychological problems associated with even mild corporal punishment are noted at the beginning of this Part and in Part I.
[299] *Ibid.*, at para. 231
[300] Deschamps J. spends little time on the contextual factor of proposed 'ameliorative purposes of effects,' holding that "[i]n this case, the only other groups that could be said to be affirmatively benefiting from section 43 are parents and teachers charged with assaulting a child and entitled to raise a section 43 defence. It is difficult to see, however, how they, as a group, could be seen as more disadvantaged than children, as a group. Therefore, this factor does not apply and has only a neutral impact on the analysis." *Ibid.*, at para. 228.

bringing into play the purpose of section 15 of the *Charter*. Section 43 turns children into 'second class' citizens.[301]

> By justifying what would otherwise amount to criminal assault, section 43 encourages a view of children as less worthy of protection and respect for their bodily integrity based on outdated notions of their inferior personhood.[302]

Given the legal and social importance of the family unit, the latitude provided to parents and teachers by section 43 to carry out their responsibilities is a pressing and substantial objective under section 1. The psychological and physical development of children is unique, and unnecessary state intervention into the parental or supervisory role should be curtailed. Section 43 gives to parents and caregivers a measure of flexibility in the difficult exercise of raising children.[303]

Section 43 has been since its inception "based in traditional notions of children as property, capable of learning through physical violence, which was left to parents and teachers to mete out at their discretion."[304] It is not, as argued by the majority, to protect children from the intrusion of the criminal law and the damaging effect of criminal sanctions. Parliament's objective was to allow parents a certain flexibility and sphere of authority, an objective of grounded parental rights, not in child protection.[305]

Deschamps J. also agrees that there "does appear to be a rational connection between the objective of giving parents and teachers reasonable latitude in caring for children and limiting the application of the criminal law in the parent-child or teacher-pupil

---

[301] Both Justice Binnie and Justice Deschamps use this phraseology from the decision in *Ogg-Moss*.
[302] *Foundation 3*, *supra* note 6 at para. 232.
[303] *Ibid.*, at para. 234.
[304] *Ibid.*, at 235.
[305] *Ibid.*

relationship."[306] The provision of a sphere of immunity from assault charges serves to increase the domain of parental or caregiver authority when dealing with children or students.

Deschamps J., finds that section 43 cannot pass the minimal impairment phase of section 1, holding that while it "is well established that Parliament need not always choose the absolutely least intrusive means to attain its objectives," it is "clear that less intrusive means were available that would have been more appropriately tailored to the legislative objective."[307] This provision could have been tailored in such a way as to allow only very minor applications of force. Section 43 could have been tailored in such a way as to minimize those to whom it applies, and whom it protects.

Deschamps J., although unnecessary, proceeds to the determination of the proportionality between the 'salutary' and 'deleterious' effects of section 43. Since the deleterious effects of section 43 "impact upon such a core right of children as a vulnerable group," the "salutary effects must be *extremely* compelling to be proportional."[308] The discrimination inherent in section 43 of the *Criminal Code* produces a "most drastic effect," sending the message that children are less worthy of legal protection. Benefits may accrue to families who escape unnecessary intrusions of the criminal law, but when harm or abuse to children is apparent, "this is precisely the point where the disapprobation of the criminal law becomes necessary."[309]

According to Deschamps J., the only appropriate remedy is to strike down section 43, severing it from the *Criminal Code*. This should be done immediately, as there would be

---

[306] *Ibid.*, at para. 236.
[307] *Ibid.*, at paras. 237-238.
[308] *Ibid.*, at para. 241 [emphasis added].
[309] *Ibid.*

no "harm to the public nor budgetary consequences to the government to declare section 43 of no force and effect."[310]

Irrespective of the strong dissents put forth by Arbour and Deschamps JJ., the majority upheld the constitutional validity of this divisive provision. The rules laid down by McLachlin C.J. are intended to circumscribe the applicability of section 43, limiting who and when this defence may be used.

Legally created restraints are only as effective as those courts applying them allow them to be. How then, given the explicit directions given by the Supreme Court of Canada, have lower courts been dealing with recent applications of section 43? The remainder of this Part will examine decisions which chronologically follow the court's ruling in an effort to determine compliance, or lack thereof. Has this Supreme Court checklist made any difference in the treatment of this difficult provision?

Application of the Supreme Court's Ruling

Following the Supreme Court's redrafting of the rules for child corporal punishment, very few cases have emerged. While some cases have resulted in favourable outcomes for children, many have not. It will be argued that those cases which do result in convictions would have been decided similarly in the absence of the Supreme Court's decision in *Foundation 3*. It seems that little has changed. Protection from assault for children is still denied.

---

[310] *Ibid.*, at para. 244.

R. v. *D.K.*:

R v. *D.K.*[311] is an example of the unfortunate reasoning courts will use in order to avoid assault convictions when section 43 can be employed.[312] Here, a mother was charged with assaulting her twelve year old daughter for giving her the "silent treatment" (i.e. ignoring her mother),[313] conduct the court viewed as objectively "unacceptable behaviour which any parent would find called for correction."[314] Following this display, the daughter, A., turned to face her mother who promptly "punched" her in the head, a blow which allegedly caused numbness for the remainder of the day.[315] Southerland J. was "unable to accept that a blow which did not hurt at the time it was delivered caused such a serious consequence," and found that the daughter "was not in a position to be able to tell whether or not the blow was a slap or a punch."[316] Although the court acknowledged that the mother slapped the daughter in the cheek, and "that immediately thereafter A. began to cry and cried off and on through the rest of the evening," Southerland J. found it "unlikely, to say the least, that A. was crying because of any physical pain caused by this 'blow.'" Instead, the court found it "far more likely that she was crying because she was, and continued to be, upset with her mother and, quite possibly, because she was startled by her mother's contact with her cheek."[317]

Citing the *Foundation 3*, Southerland J. maintained that section 43

> ...admits into its sphere of immunity only sober, reasoned uses of

---

[311] [2004] O.J. No. 4676 (Ont. Ct. Jus.), online: QL (OJ) [hereinafter "*D.K.*"].
[312] See *He'll Learn*, *supra* note 277 where Prof. McGillivray notes centuries of wayward reasoning.
[313] D.K., supra note 311 at para. 5.
[314] *Ibid.*, at para. 6.
[315] *Ibid.*, at paras. 8-9.
[316] *Ibid.*, at para. 9. According to the Supreme Court, all "blows or slaps to the head [are] unreasonable." It does not matter if the blow to the head was a punch or a slap. See *Foundation 3*, *supra* note 6 at para. 40. It is strange that Southerland J. would make reference to the daughter being unable to determine which type of hand struck her.
[317] *D.K.*, *Ibid.*, at para. 11.

> force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour. The purpose of the force must always be the education or discipline of the child.[318]

Southerland J. holds that the slap to the face was "for the purpose of correcting [A.'s] disrespectful behaviour and perhaps also for the purpose of expressing symbolic disapproval of that behaviour."[319] Interestingly, the court omits the first two lines of the paragraph taken from the decision of the Supreme Court, which state that "the person applying the force must have intended it to be for educative or corrective purposes. Accordingly, section 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration."[320]

The slap to the head was "minor corrective force of a transitory and trifling nature," and that "this finding would appear to lead inevitably to the conclusion that the force did not exceed what was reasonable under the circumstances and hence that section 43 operates to justify this use of force."[321] The Supreme Court has stated in no uncertain terms that "slaps or blows to the head [are] harmful," and "will not be reasonable."[322] Conduct including slaps or blows to the head or face fall outside of the protective sphere offered by section 43 of the *Criminal Code*.

Given that A. was "not responding to what her mother said; was not looking at her mother when spoken to; and, in general, was not responding to her mother,"[323] A.'s mother's actions were almost certainly "motivated by anger or animated by

---

[318] *Ibid.*, at para. 15. The court references *Foundation 3*, *supra* note 6 at para. 24.
[319] *D.K.*, *Ibid.*, at para. 16.
[320] *Foundation 3*, *supra* note 6 at para. 24.
[321] *D.K.*, *supra* note 311 at para. 21.
[322] *Foundation 3, supra* note 6 at para. 37.
[323] *D.K.*, *supra* note 311 at para. 5.

frustration."[324] What is more, the Supreme Court held that all "[c]orporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour."[325] A. was four months away from her thirteenth birthday, a factor which becomes more important given McLachlin C.J.'s emphasis[326] on examining section 43 matters on a "case-by-case basis."[327] No mention is made of A.'s physical or mental maturity, or lack thereof.

Southerland J. reads the decision of the Supreme Court as meaning that only "slaps to the head which can properly be characterized as 'corporal punishment' or 'discipline' necessarily fall outside the scope of section 43,"[328] but since Ms. D.K.'s slaps to her daughter's head amounted only to "minor corrective force of a transitory and trifling nature," and therefore were not to be considered 'corporal punishment' or 'discipline,' these slaps, although they were assaults, were covered by section 43.[329] The court states:

> It cannot be properly be [*sic*] said that the light slap which did not hurt A. amounted to 'corporal punishment' or 'discipline' and, as I previously found, the slap was an instance of 'minor corrective force of a transitory and trifling nature.' From this it follows that section 43 does justify this use of force by Ms. D.K., and she will accordingly be found not guilty.[330]

Contrary to the pronouncement of the Supreme Court,[331] Southerland J. holds that not "all slaps to the head fall outside the ambit of section 43."[332]

---

[324] *Foundation 3*, *supra* note 6 at para. 24.
[325] *Ibid.*, at para. 37.
[326] The majority's decision stresses this point. At para. 28, McLachlin C.J. states that the definition of 'reasonable' depends on "varying degrees of guidance, depending upon the statutory and factual context." At para. 34, the majority states that when assessing parental treatment of a child, this "assessment must take account of 'all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.'" This is noted by Professor F.C. DeCoste. See *DeCoste*, *supra* note 148 at footnote 24.
[327] *Foundation 3*, *Ibid.*, at para. 17. McLachlin C.J. writes: "Legislators can never foresee all the situations that may arise, and if they did, could not practically set them all out. It is thus in the nature of our legal system that areas of uncertainty exist and that judges clarify and augment the law on a case-by-case basis."
[328] *D.K.*, *supra* note 311 at para. 28.
[329] *Ibid.*, at paras. 33-34.
[330] *Ibid.*, at para. 34.
[331] *Foundation 3*, *supra* note 6 at para. 37.
[332] *D.K.*, *supra* note 311 at para. 32.

Southerland J.'s holding that Ms. D.K.'s slap to her daughter's head was not 'discipline' is surprising, particularly given the court's earlier comments that A. was behaving in a way in "which any parent would find called for correction,"[333] behaving "in a disrespectful manner, a manner which called for correction."[334] If the slap to A.'s head did not amount to corporal punishment or discipline, and this resulted in the attack being within the protected sphere provided by section 43, it follows that a parent could, at any time, slap their child in the head or face providing that this slap was "transitory or trifling in nature," and was *not* done for the purpose of discipline, and shield themselves with section 43.

Just as a parent hitting a child with an object to discourage certain forms of behaviour amounts to corporal punishment or discipline, so too does a slap or blow to the face in an effort to correct. The way in which these rules were enumerated by the Supreme Court was deliberate, and if some light slaps or blows to the head for the purpose of correction might not amount to corporal punishment or discipline within the meaning of section 43, then some light smacks with a stick or belt for the purpose of correction might not either. Southerland J. notes that the Supreme Court's decision "includes the words '…Discipline by the use of objects or blows to the head or slaps to the head is unreasonable.'"[335] Since *only* blows or slaps to the head which amount to "discipline" necessarily fall outside of the sphere of protection afforded by section 43, as Southerland J. argues,[336] presumably

---

[333] *Ibid.*, at para. 6.
[334] *Ibid.*, at para. 13. Southerland J. also notes at para. 16 that there was "no doubt" that the slapping was done for the purpose of correction.
[335] *Ibid.*, at para. 27, citing *Foundation 3*, *supra* note 6 at para. 40.
[336] *D.K*, *Ibid.*, at para. 28. Justice Southerland states: "It appears, therefore, that the Court is saying that only slaps to the head which can properly be characterized as 'corporal punishment' or 'discipline' necessarily fall outside the scope of section 43."

only smacks with weapons or objects that amount to "discipline" necessarily fall outside this sphere as well.

R. v. *W.E.S.*:

D.K. is not alone. In *R* v. *W.E.S.*,[337] a mother was charged with assaulting her eleven year old daughter B.T.[338] According to the mother, W.E.S., upon her return from the store, B.T.'s sister informed her that B.T. had told the family dog, Emma, to bite her. This "upset" W.E.S.[339] W.E.S. noticed blood on B.T.'s sister's arm, and then, in her own words, "lost it."[340] She approached B.T., and without explaining what the punishment was for,[341] struck B.T. first on the hip and then on the behind.

Green J. observed that "[w]hen the accused slapped her daughter...twice on the downstairs' couch, she did so under the mistaken impression that B.T. had sicced the dog" on her sister. "She was obviously distressed by this...." Nevertheless, the court found that

> ...there was an element of correction in her actions downstairs, as she was attempting to teach her daughter not to use the dog in such a fashion. Although the accused was (in fact) mistaken about what had transpired, I find that she did act reasonably and I find that she did act for the purposes of correction in slapping her daughter twice. In all of the circumstances, the two slaps delivered downstairs were reasonable, and section 43 applies to negate culpability for these.[342]

---

[337] [2004] S.J. No. 480 (Sask. Prov. Ct.), online: QL (SJ) [hereinafter "*W.E.S.*"].
[338] These allegations arose out of three separate occasions of actual or threatened force in one afternoon: downstairs on the couch, on the stairs leading up and in the upstairs living room. The mother, W.E.S., was acquitted of the assault on the downstairs couch, based on section 43 of the *Criminal Code*. W.E.S. was convicted of assault for the other incidents, as the court found that section 43 did not apply. On account of this, I will restrict my comments to the assault that occurred in the basement on the couch.
[339] *W.E.S.*, *supra* note 337 at para. 29.
[340] *Ibid.*, at para. 30.
[341] *Ibid.*, at paras. 29-30. W.E.S. admitted that B.T. could have learned from an explanation of what she was being punished for, and also that B.T. had said "no mommy" prior to the punishment.
[342] *Ibid.*, at para. 48.

For at least two reasons, Green J.'s conclusion is inconsistent with the majority ruling in the Supreme Court, which is cited in the decision.[343] First, "the person applying the force must have intended it to be for educative or corrective purposes. Accordingly, section 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration."[344] By her own admission, W.E.S. had "lost it,"[345] and was "at the end of her rope."[346] W.E.S. threatened in anger[347] to "shoot the dog in the neck," so "the dog would suffer."[348] While Green J. acknowledges that the accused was "obviously distressed,"[349] the defence enshrined in section 43 was still accepted.

Second, the Supreme Court has held since *Ogg-Moss* that "the child must be capable of benefiting from the correction. This requires the capacity to learn and the possibility of successful correction."[350] B.T. was not told why she was being punished, and, in fact, the reason W.E.S. did slap B.T. was based on a mistake.[351] How then could B.T. possibly learn or benefit from this correction? What educational benefit is provided when a young person is slapped for reasons unknown to them, or, in this case, no reason at all? Nevertheless, the court held that this behaviour was reasonable, and that W.E.S. "did act for the purposes of correction."[352]

While the above two acquittals can be attributed to specious reasoning and word acrobatics, other cases have emerged that result in acquittals based on paucity of

---

[343] *Ibid.*, at paras. 45-47.
[344] *Foundation 3*, *supra* note 6 at para. 24.
[345] *W.E.S.*, *supra* note 337 at para. 30.
[346] *Ibid.*, at para. 31.
[347] *Ibid.*, at para. 19.
[348] *Ibid.*, at para. 36.
[349] *Ibid.*, at para. 48.
[350] *Foundation 3*, *supra* note 6 at para. 25.
[351] *W.E.S.*, *supra* note 337 at para. 48.
[352] *Ibid.*

evidence. This evidential dearth, as it will be recognised, stems from the low levels of credibility courts attach to child testimony.

R. v. *J.D.B.*:

R v. *J.D.B.*[353] was a case concerning an alleged assault on an eight year old boy by his biological father. Following a weekend spent with his father, the boy, J., returned to his mother's house with bruising on his buttocks. J. responded to his mother's queries by saying that he had been "disrespectful" to his father, and had told him to "shut up,"[354] after which his father grabbed him by the shirt and spanked him "several times."[355] This resulted, according to J., in considerable bruising, "...approximately seven inches in width, four inches in height on the lower back buttock area."[356]

The father testified that the spanking was not out of maliciousness or anger, but rather was to "let him [(J.)] know that I'm [(the father)] in charge, that this is the last ditch effort, that we need to calm down and - - and bring his attitude or his emotions back into - - into control."[357] The court observed that it was "somewhat difficult to believe his [(the father's)] testimony that he was not angry and that this was not a factor in the disciplinary action taken by him."[358] However, the court decided to accept the father's testimony that the spanking was not malicious.

The court placed no evidentiary weight in photographs of the bruises, as the Defence suggested that the bruising was consistent with injuries sustained through tobogganing,

---

[353] [2004] A.J. No. 814 (Alta. Prov. Ct.), online: QL (AJ).
[354] *Ibid.*, at at paras. 5-6.
[355] *Ibid.*, at para. 8. Justice Wilkins eventually accepted the testimony of the father that he had spanked his son "three times" with an open hand. *Ibid.*, paras. 8-9.
[356] *Ibid.*, at para. 8.
[357] *Ibid.*, at para. 10.
[358] *Ibid.*, at para. 24.

an activity J. denied taking part in, and no "evidence was presented to indicate whether the bruises were consistent with a spanking or a tobogganing injury or in fact either."[359] As a result, the bruising was not, for the purpose of the judgment, attributed to the spanking given by the father.

The evidentiary difficulties resulted in an acquittal on the basis of section 43. Given the pronouncement by the Supreme Court that this provision does not "exempt from criminal sanction conduct that causes harm or raises a reasonable prospect of harm," if the court had accepted the evidence of J., that he had not even gone tobogganing, the correct ruling in accordance with *Foundation 3* would be a conviction for assault. The Crown should have been prepared to introduce evidence that either J. did not participate in the tobogganing, or that he did, but that the bruises were inconsistent with such an activity. If, indeed, the bruises were caused by the punishment inflicted by J.'s father, prosecutorial lethargy is just as responsible for this acquittal as judicial discretion to accept or reject evidence.

R. v. *S.I.*:

R. v. *S.I.* [360] concerned S.I.'s plea of not guilty to six charges of assault against two children in her care,[361] O. and D., who were 11 and 13 years of age, respectively. The accusations stemmed from the testimony of the children who recounted being hit with S.I.'s hand, a bat, a shoe, a spoon and a knife.[362] The evidence of the children at the

---

[359] *Ibid.*, at para. 13.
[360] [2004] O.J. No. 5380 (Ont. Sup. Ct.), online: QL (OJ) [hereinafter "*S.I.*"].
[361] The children's biological mother was killed during the civil strife in what was Zaire (now Democratic Republic of Congo). The children's biological father is S.I.'s uncle.
[362] *S.I.*, *supra* note 360 at para. 1

Preliminary Inquiry was entered as part of the Crown's case at trial, with the consent of the Defence. The Crown did not again call the children to testify.[363]

Ratushny J. states that there were "inconsistencies between the children in their evidence of the alleged assaults," such as "their description of the knife incident and the bat incident including where the bat came from and who owned it."[364] Even though Ratushny J. agreed that there was "no evidence of collusion," the court agreed that there was evidence that the children had talked about the assaults, thus creating "the possibility of collusion."[365]

Both S.I. and the children were refugees who fled their birth countries in Africa, and had spent part of their lives in refugee camps. These camps were violent and deadly places, with food shortages often upsetting the delicate balance of peace that existed within. On account of the "most indescribable violence and terror in the refugee camps," Ratushny J. assessed S.I.'s testimony as credible,[366] although not all of S.I.'s evidence was accepted as reliable. With respect to the children, on account of the Crown's decision not to have them testify again,[367] Ratushny J. was unable to determine how the memories of the camp had influenced them. Ratushny J. affirms:

> I am unable to assess their personalities. I do not know if, in spite of their camp experiences, they are happy, resilient children who have been able to adapt quite easily to a new life in Canada, but who have chafed at Ms. S.I.'s rules and her anxieties and who could have made up stories against her to try to get away from her rules.[368]

---

[363] *Ibid.*, at para. 9. Ratushny J. states later in the decision that while he understood why the Crown treated the children "with great compassion and spare[d] them from having to testify again," the court was "left with only a written account of the children's evidence." Without ever observing the children as they testified, the court could have no idea "how to weigh the inconsistencies and assess the strength of their evidence." *Ibid.*, at para. 12.
[364] *Ibid.*, at para. 10. No further mention is made of the incidents involving the shoe or the spoon.
[365] *Ibid.*, at para. 22.
[366] *Ibid.*, at para. 17.
[367] A decision the court could "understand." *Ibid.*, at para. 12.
[368] *Ibid.*, at para. 21.

Given the inconsistencies with respect to the bat and knife, the court determined that it is possible the children were simply lying to get away from S.I. and her rules. If, indeed, the children were willing to go to such great lengths to stay away from S.I., one must question what other problems may have existed in this relationship. This becomes particularly important given the testimony of M.A. (who helped S.I. and the children come to Canada), whose testimony included a mention of one of the children having a cut and swollen lip.[369] While finding M.A. a fine person and credible witness,[370] Ratushny J. ruled this testimony inconclusive, with its weight depending on the credibility of the children.[371] Given that there was "nothing in the evidence of the other witnesses that assist[ed]...in assessing the reliability of the children's evidence,"[372] Ratushny J. held that the Crown did not prove the charges beyond a reasonable doubt, and found S.I. not guilty in respect of all charges.[373]

Not all of the cases that have been released after the Supreme Court's decisions suffer from hollow reasoning or lack of evidence. Some recent decisions have resulted in convictions, albeit not based on the rules set out in *Foundation 3*, but rather one the basis of such drastic instances of punishment and abuse that any court, before or after the decision of the Supreme Court, would have found that section 43 did not apply.

---

[369] *Ibid.*, at para. 26.
[370] *Ibid.*, at para. 14.
[371] *Ibid.*, at para. 26.
[372] *Ibid.*, at para. 27.
[373] *Ibid.*, at para. 29.

R. v. *D.P.*:

In *R.* v. *D.P.*,[374] the accused was charged with three counts of assault for kicking his fourteen year old daughter, shoving her sixteen year old friend and then later shoving his daughter. The assaults occurred on August 30, 2003, when the daughter and her friend, B.C., were caught hitchhiking at approximately 1:30 a.m. by the accused.

Upon discovering his child out at such a time, the accused demanded that his daughter get into his car, presumably so he could take her home. When she refused, the accused kicked his daughter, and then shoved B.C., who stumbled and fell to one knee.[375] The accused and his daughter got into the car and drove off, squealing the tires in the process. While en route, the accused shoved his daughter's arm, and when they arrived at their home, shoved his daughter into the house and began breaking his own property. Throughout, the accused amused himself by calling his daughter a "slut," and suggesting to her that she was going to end up pregnant on account of the bad company she kept.[376]

The father confirmed in testimony that he had kicked his daughter, shoved her friend and then shoved his daughter when they arrived home. The daughter received a bruise on the back of her leg from the attack.[377] While counsel for the accused argued that he was simply trying to protect his daughter from being taken advantage of by her older male friends, the court found "no independent, objective evidence that...anybody had or was attempting to give the [daughter] any noxious substance, or to take advantage of her in any way."[378]

---

[374] [2004] N.J. No. 38, (N.F.L Prov. Ct.), online: QL (NJ) [hereinafter "*D.P.*"].
[375] *Ibid.*, at para. 3.
[376] *Ibid.*
[377] *Ibid.*, at paras. 6-7.
[378] *Ibid.*, at para. 16.

After citing the decision of the Supreme Court, Porter J. held that while the "accused's actions in kicking and shoving his daughter are said to have been those of a parent trying to either correct or protect a recalcitrant child," there was "no evidence that any lesser force was attempted by the accused prior to kicking his daughter in order to get her into the car."[379] Accordingly, since the accused did not use a proportionate amount force towards his daughter when he kicked her and shoved her into the house, and was acting out of frustration, there was "no section 43 defence available to the accused for the two assaults on his daughter."[380] As for the accused's daughter's friend, B.C., the court held that no justification was offered for the admitted application of force, and instead, it was "clear from the evidence that the accused took out his frustration by shoving the boy."[381] A finding of guilt was therefore entered for that assault.

This was not the accused's first assault conviction.[382] Porter J. found that the most "appropriate disposition for these offences [was] for the Court to suspend the passing of sentence and place the accused on probation for twelve months."[383] Three counts of violent assault, twelve months of participation in anger management.

While the conviction of the accused in *D.P.* is proper given the decision of the Supreme Court in *Foundation 3*,[384] it is likely that even without this new Supreme Court pronouncement the father would have been found guilty for at least two of the assaults. First, prior to the decision in *Foundation 3*, when determining whether the force used was "reasonable under the circumstances," the court was required to examine such things as

---

[379] *Ibid.*, at para. 18.
[380] *Ibid.*, at paras. 20-21.
[381] *Ibid.*, at para. 22.
[382] *Ibid.*, at para. 24.
[383] *Ibid.*, at para. 25.
[384] The accused assaulted (1) teenagers, (2) in anger, in a way that (3) causes harm or raises a reasonable prospect of harm.

the nature of the offence calling for correction, the age of the child victim, the gravity of the punishment, and the injuries, if any, inflicted.[385] The accused kicked his daughter in the back of the leg hard enough to leave a bruise, and he did this, presumably, when she had her back turned to him. Even though in this case it did not seem to result in prolonged pain or suffering, it was held in *Dupperon* that if the child "suffers injuries which *may* endanger life, limbs or health or is disfigured that alone would be sufficient to find that the punishment administered was unreasonable under the circumstances."[386] Clearly a grown man's kick to the back of a fourteen year old girl's leg when she is unprepared for it may lead to injuries of this sort. This alone should be sufficient for the court to find that section 43 did not apply, and that the assault was unreasonable.

Second, with respect to B.C., section 43 only allows for the use of force "by way of correction toward a pupil or child, as the case may be, who is under his care."[387] The accused's daughter's sixteen year old companion was not 'under the care' of the accused, nor was the assault on B.C. for the purpose of correction. The accused struck out in anger at a teenage boy whom the accused viewed as "mouthing off" to him.[388] Section 43, prior to the ruling of the Supreme Court in *Foundation 3*, would not have covered this assault.

The Supreme Court's decision is mentioned only once in this judgement, and this is in relation to the Supreme Court's finding of section 43 as constitutionally sound.[389]

---

[385] *Dupperon*, *supra* note 136.
[386] *Ibid.*, at para. 28 [emphasis added].
[387] *Criminal Code*, *supra* note 1 at section 43.
[388] *D.P.*, *supra* note 374 at para. 22.
[389] *Ibid.*, at para. 11.

There is no mention of the majority's checklist, and instead, Porter J. cites the 2000 Ontario Court of Appeal decision in *Emans*[390] to convict the accused.

R. v. *Galliani*:

R. v. *Galliani*[391] concerned an appeal by the Crown of the acquittal of Galliani, a special education teacher who was charged with the assault of his thirteen year old student. The Crown's appeal contended, among other things, that the trial judge erred in finding that section 43 of the *Criminal Code* provided a defence to the assault.[392] The victim suffered from a developmental disability, and operated at a level approximating that of a three to five year old child. Often unable to speak, the victim would make noises.[393] In April of 2002, just prior to the students leaving school for home, the victim was communicating through sounds, and was told by the accused to be quiet. The victim made more of the same sounds, and the accused again told the victim to quiet down. Following this, the victim made one louder noise, to which the accused responded by punching the student in the stomach. The victim clutched his stomach, his eyes open wide.[394]

Durno J. points out that the trial judge made no analysis of section 43 or findings of fact as to what happened or motivated the accused. While the court was appreciative of the "desire to resolve the issues in this case on appeal," Durno J. was "unable to determine on this record whether section 43 is applicable."[395] The court notes that while

---

[390] [2000] O.J. No. 2984.
[391] [2004] O.J. No. 2978 (Ont. Sup. Ct.), online: QL (OJ).
[392] *Ibid.*, at para. 1. The Crown also argued that the trial judge misapprehended the evidence, ignored relevant evidence and erred in finding the Respondent's action was reflexive and therefore not an assault.
[393] *Ibid.*, at para. 2.
[394] *Ibid.*, at para. 4.
[395] *Ibid.*, at para. 42.

the arguments of the accused that the victim was being corrected may have been relevant relying on case law prior to *Foundation 3*, this is no longer a consideration, as the Supreme Court has altered the application of section 43.[396] Durno J. allowed the Crown's appeal and ordered a new trial.

While *Galliani* may be applauded for returning to trial an obviously unreasonable assault, more important may be the court's acknowledgement that the former rules surrounding section 43 no longer apply in the wake of the ruling of the Supreme Court.[397] In order for the restrictions placed on section 43 to be functional, courts must be willing to accept that the decision of the Supreme Court has altered the rules of application. As evidenced by the above, very few cases have done so.

Conclusion

The Supreme Court's ruling in *Foundation 3* is neither progressive nor protective. The right of children to be free from unwanted invasions of their bodily integrity has not been protected. Children have been, and remain to be, one of the most vulnerable groups in Canadian society. Their interests are trampled, their rights are run over.

Any limited protections for children set out by the Supreme Court are being negated by the refusal of courts to apply the new framework enunciated by the Chief Justice. The above cases evidence this. Through spurious logic or selective admission of evidence, courts are twisting the Supreme Court's pronouncement in ways which ensure acquittals for child assault. Those cases which do result in convictions ignore the ruling of

---

[396] *Ibid.*, at para. 44.
[397] *Ibid.*

McLachlin C.J., and convict on grounds analogous to those that were being used prior to *Foundation 3*.

Instead of a checklist, the Supreme Court should have struck down section 43 in its entirety. Its maintenance cannot be justified. The rewriting of legislation against its original meaning and purpose is not the job of the Supreme Court, and needs to be discouraged. As noted by Professor McGillivray:

> This is the 'shifting purposes' problem of putting new wine into 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.[398]

Protection of the law denotes citizenship, and the lack of protections provided to children intrudes on their already regretful position within society. Instead of section 43, educational programs for parents and teachers should be implemented, along with the development of balanced prosecution policies to ensure the weight of the criminal law is not needlessly crushing those who care for children.

Either way, the ruling of the Supreme Court is not being heeded by the lower courts, and this state of affairs continues to subject children to unfair and humiliating treatment. To be hit is to be abused. This is not to diminish the problems associated with child abuse in Canadian society, however, how can judges and legislators preserve what is, when viewed objectively, state sanctioned violence against children? How can Canadian society ignore the fact that no sentient beings (not prisoners, animals or other adults) except children can legally be beaten?

The above cases show the lengths the courts will travel to avoid convicting parents of assaulting their children. This may not be as surprising as it initially seems, as the courts

---

[398] *McGillivray*, *supra* note 2 at 155. Professor McGillivray cites *Big M*, *supra* note 222 and *R.* v. *Zundel*, [1992] 248 R.C.S. 731.

have simply taken a page from the Supreme Court's decision: logical acrobatics and legislative revision. Perhaps the courts are following part of the decision in *Foundation 3*. Unfortunately, however, that part seems to be the willingness of the court to go to great lengths to protect parents, not children.

Part V

The corporal punishment of children has been a part of the Canadaian/European landscape for centuries. Even prior to the enactment of the first *Criminal Code* in 1892, Canadian children were subject to legally justified violence at the hands of parents and masters. Historically vindicated by the "desired outcome of degradation,"[1] this archaic Roman ideology, now legislated as section 43 of the *Criminal Code*,[2] still plagues the lives of Canadian children, and in many ways, governs the relationship between parent and child, and parents and the state.

The foregoing has been an attempt to show the unfairness of such a provision, particularly given the unevenness of its application. Law makers and judges have been given virtually no guidance on how to administrate this defence, and when direction is given in the form of a Supreme Court checklist, lower courts ignore it.

It may be argued that there exist strong arguments for retaining section 43, such as the notion that corporal punishment is an important tool for maintaining the structure of the family,[3] or that marginalized segments of society will be targeted and marred by an imbalanced use of state power.[4] The Supreme Court justifies section 43 as a method of keeping parents out of jail. Arguments such as this beg the question: whom is section 43 intended to benefit? Is it a tool for allowing parents to beat their children in order to teach them what is or is not proper societal behaviour? If so, this seems a weak

---

[1] Anne McGillivray, "'He'll Learn it On His Body': Disciplining Childhood in Canadian Law" 5 International Journal of Children's Rights 193 at 199 [hereinafter "*He'll Learn*"].
[2] *Criminal Code*, R.S.C. 1985, c. C-46, s. 43 [hereinafter "*Criminal Code*"].
[3] Laura M. Purdy, *In Their Best Interests: The Case Against Equal Rights for Children* (Ithaca: Cornell University Press, 1992) [hereinafter "*Purdy*"]; Onora O'Neill, "Children's Rights and Children's Lives" in Michael D.A. Freeman, ed., *Children's Rights*, vol. 1 (Burlington: Ashgate Publishing Company, 2004) 291; Canadian Council on Children and Youth, *Admittance Restricted: The Child as Citizen in Canada* (Ottawa: Canadian Council on Children and Youth, 1978).
[4] *He'll Learn*, *supra* note 1 at 229.

justification, as teaching children how to operate within society by beating sense into them is counterintuitive. Or is section 43 a method of educating children? If so, again problems arise. One need only to look at the Swedish example, discussed *supra*, to discover that children can be educated and raised without resorting to violence.

Of additional importance is the negative repercussions corporal punishment has on a child's physical and intellectual development. Corporal punishment is associated with future incidents of violence and anti-social behaviour, as well as higher levels of aggression. When parents corporally punish their children, children become violent, when parents cease to corporally punish their children, levels of violence decline.[5] It seems only natural that if parents are truly concerned about the future of their children, they would stop conducting themselves in ways that damage their children's future potential and self worth. However, more public education with respect to the results of corporal punishment is needed, as this will lead to both decreased use of corporal punishment, and increased support for a ban on all violence toward children.[6]

The movement to ban violence against children took root in Canada following the Second World War and the social movements of the 1960s, when, following the birth of the 'new liberalism' and a changing of the guard in Canadian social policy, Canadian children began to be viewed more as citizens of the state, with dignity and basic rights, and less as the property of the father, subject to paternalistic control.[7] Such a shift in

---

[5] Stats-Can – *National Longitudinal Survey of Children and Youth: Home Environment, Income and Child Behaviour* (2005), online: <http://www.statcan.ca/Daily/English/050221/d050221b.htm> (date accessed: 2 March 2005).

[6] Joan E. Durrant, "The Abolition of Corporal Punishment in Canada: Parents' Versus Children's Rights" (1994) 2 The International Journal of Children's Rights 129 at 131. Professor Durrant notes that Sweden has been successful in gaining public support for the abolition of child corporal punishment largely because public education was "comprehensive and extensive."

[7] Anne McGillivray, "Reconstructing Child Abuse: Western Definition and Non-Western Experience" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer

Canadian notions of right helped alert much of society to the veiled forms oppression can take, and allowed Canadian society to see children as they actually existed: "powerless, dominated, ignored, invisible."[8] Emphasis began to shift, as noted by Michael Freeman, "from protection to autonomy, from nurturance to self-determination, from welfare to justice,"[9] culminating in the 1989 United Nations *Convention on the Rights of the Child,* to which Canada is a signatory.

Part II of this paper examined this shift, and concluded that any cogent theory of children's rights must attempt to take into account the needs and constraints of childhood, while at the same time recognizing children's inherent status as citizens and their ability and intelligence as human beings. To adequately protect the rights of children, care must be taken to apply a theory that avoids the pitfalls of radical Protectionism or Liberationism. Parents must refrain from automatic dismissal of the wishes and desires of children, and so of primary importance is a greater understanding of ourselves, through which the creation of conditions to improve the lives of children can be attained. There still exists in Canada and internationally a great confusion with respect to the topic of the rights of children. Hopefully, the theory enunciated in Part II will improve our understanding of the needs and contributions of children, and help explain and justify a more egalitarian and level society. Children already have rights, both legal and moral. What now needs to be done is ensure they are respected and protected.

Academic Publishers, 1992) 213 at 218; Katherine Covell and R. Brian Howe, *The Challenge of Children's Rights for Canada* (Waterloo, Wilfred Laurier University Press, 2001) at 19 [hereinafter "*Covell*"]. Professor Jane Fortin also credits the American Civil Rights Movement which "encouraged, in the 1960s and early 1970s, a far more sympathetic attitude to the treatment of all minority groups, including children." See Jane Fortin, *Children's Rights and the Developing Law*, 2nd ed. (London: Reed Elsevier, 2003) at 4 [hereinafter "*Fortin*"].

[8] Richard Farson, *Birthrights* (New York: Macmillan Publishing Co., Inc., 1974) at 2 [hereinafter "*Birthrights*"].

[9] Michael Freeman, "Rights, Ideology and Children" in Michael Freeman and Philip Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Kluwer Academic Publishers, 1992) 3 at 3.

The *Convention* was an attempt to recognize these rights. What has the signing and ratification of this document accomplished? As pointed out in Part III, most courts are loath to apply or even acknowledge the existence of such an agreement. Courts apply inconsistent reasoning, and fail to follow precedent. Even lists of things to consider, as provided by the courts in *Dupperon* and *Ogg-Moss*, make little difference, as they are rarely considered and offer little direction. The standard of harm allowed by the judiciary varies immensely.

As Part III explains, numerous cases have either neglected to take into account, or purposely ignored Canada's commitment to children, making the *Convention* a gesture of minimal importance and strength; a hat-tip to children and child rights advocates who are either beaten, or admonishing parents to refrain from beating. This is not the essence of such an international agreement. When a country such as Canada signs such an agreement, it makes a commitment to all of its citizens, and to the international community that "children have fundamental rights as individual persons and that parents, adults, and state authorities have responsibilities for providing for those rights."[10] As noted earlier, the value of preserving such an ideal is clear:

> Children who are not protected, whose welfare is not advanced, will not be able to exercise self-determination: on the other hand, a failure to recognize the personality of children is likely to result in an undermining of their protection with children reduced to objects of intervention.[11]

---

[10] *Covell*, *supra* note 2 at 22.
[11] Michael Freeman, "Laws, Conventions and Rights" in *The Moral Status of Children: Essay on the Rights of the Child* (Cambridge: Kluwer Law International, 1997) 47 at 53.

Children, still the most vulnerable members of Canadian society, need the protection of written law, and this law must be applied equally and effectively. If not, children revert to their status as objects of paternalistic care and control.

The ratification of the *Convention* should have brought forth a new era of rights for Canadian children, and in particular the right to (at least) equal protection under the law of assault. Part III demonstrates that this is not the case. Whether through indolence, ignorance, or apathy, the Canadian judiciary have failed in their task of ensuring that rights agreements are respected and implemented.

Part IV examines the Supreme Court of Canada's recent rule on the constitutionality of section 43, and questiones whether or not this ruling has had an effect on the rights of children. McLachlin C.J., writing for the majority, found this controversial provision did not violate sections 7, 12 or 15 of the *Charter*. In reaching this conclusion, the majority rewrote the rules of application for section 43, reading-in significant limitations as to who and when this section can be invoked as a defence. Accordingly, those who fall under the ambit of section 43: (1) must not use corrective force against children under the age of two, children in their teens,[12] or at any age if the child suffers from a disability or other contextual factor which would render the child incapable of learning from the correction;[13] (2) must not use corrective force that "causes harm or raises a reasonable prospect of harm," as the operation of section 43 is limited to "the mildest forms of assault";[14] (3) must not use "[d]egrading, inhuman or harmful conduct," and this includes

---

[12] The Court prohibits teachers from corporally punishing their students of any age. However, teachers still "may reasonably apply force to remove a child from a classroom or secure compliance with instructions." *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)*, [2004] S.C.J. No. 6, online: QL (SCC) at para. 40.
[13] *Ibid.*, at para. 25.
[14] *Ibid.*, at para. 30.

discipline "by the use of objects or blows or slaps to the head";[15] and (4) must not strike out in anger, as "conduct stemming from the caregiver's frustration, loss of temper or abusive personality" are not covered under this provision.[16] While this decision would upset many child and rights advocates, some solace can be taken in the fact that the Supreme Court limited the availability of this defence.[17]

The Supreme Court of Canada missed an historic opportunity to do some good.[18] It seems only natural in a progressive Canadian society that the removal of state sanctioned violence against children would be viewed by the keepers of the Constitution as a positive and meaningful step. Nevertheless, the Supreme Court carved down the defence with the assumption that future cases of corporal punishment will be examined within this new framework. Part IV demonstrates that this is mistaken.

What then is the future of children's rights in Canada and section 43? Senator Hervieux-Payette's Bill to remove the justification available to schoolteachers, parents and those standing in the place of a parent for using force as a means of correction toward a pupil or child section 43 of the *Criminal Code* received its second reading in March of 2005, still leaving its future uncertain. The removal of such a provision would not only place children on an equal footing before and under the law, but also signal to the Canadian public that violence, in any form, is unacceptable. Such a removal should be applauded and staunchly advocated.

---

[15] *Ibid.*, at para. 40.
[16] *Ibid.*
[17] Sanjeev Anand, "Reasonable Chastisement: A Critique of the Supreme Court's Decision in the "Spanking" Case" (2004) 41 Alta. L. Rev. 871, online: QL (JOUR).
[18] I thank Madame Justice Clair L'Heureux-Dubé, who suggested this wording to me in a conversation at the University of Manitoba Faculty of Law during a visit on October 19, 2004.

Section 43 of the *Criminal Code* reduces the status of children to mere objects, and subjects them to violence at the hands of those charged with their protection. By maintaining such a section the state and judiciary sends the appalling message that children, already the most vulnerable members of Canadian society, can be further subjugated and violently suppressed. It is time for Canada, as a country grounded in the notion of equality for all of its citizens, to repeal section 43 and send the correct message to children and adults: children are human beings, complete with rights and privileges. The law should reflect this fact. Repeal section 43.