CONTINUING LEGAL EDUCATION MATERIALS

PANEL I:

THE SHARED INTERESTS IN SOCIETY IN
HORTON HEARS A WHO

PANELISTS:

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On the 15th of May in the Jungle of Nool, an elephant named Horton was splashing in a pool when he heard a cry for help from a tiny speck of dust. The speck of dust was actually home to a community called WhoVille, where the Whos lived. The Mayor of WhoVille asked Horton to protect them from harm, which Horton wholeheartedly agreed to do because “a person’s a person no matter how small.” Sure enough, Horton stood true to his promise, even in the face of extreme tormenting from others who did not believe him about the existence of WhoVille. The story climaxes when one of Horton’s chief tormentors, the Sour Kangaroo, threatens to boil the invisible Whos in Beezlenut juice. Horton encourages the Whos to raise their collective voices and scream loudly so that others will be able to hear them and know of their existence. A Who named JoJo living in apartment 12J, apathetic and reluctant, refused to believe that his voice would make a difference. Yet once he joined in, the Sour Kangaroo and the other characters were finally able to hear the Whos. WhoVille was spared being boiled in Beezlenut Juice. Written after World War II and often thought of as a parable about the post-war American occupation of Japan.

Themes:
- Tolerance
- “Standing up for what’s right”
- Distribution of power
- Helping the powerless
- Respect for life
- Other-ness, segmentation, and marginalization
- Collective action efforts
Dr. Seuss’s *Horton Hears a Who!* (1954) is, just beneath its characteristically childlike façade, a parable of human equality. Written in 1954, the year of *Brown v. Board of Education*, Horton’s famous refrain, “A person’s a person, no matter how small” elegantly reflects the egalitarian principles espoused by the emerging U.S. Civil Rights movement. *Horton’s* message of nondiscrimination is hard to miss, and even its juvenile readers have, for generations, emerged with a greater empathy for those who may be different than themselves. But unlike later Seuss classics that convey a similar message of racial tolerance (e.g., *Green Eggs and Ham* (1960) and *The Sneetches and Other Stories* (1961)), *Horton* raises a cascade of complex issues that challenge conventional notions of property, control and autonomy.

For example, the simple question “Who owns Who-ville?” has no simple answer. Within their microscopic world, the Whos dwell in houses and apartments and possess a great number of outlandish noise-making devices. One might conclude that the Whos, in some form or another, own Who-ville and its multitudinous contents. But in Horton’s world, Who-ville exists only as a speck of dust. Horton finds it, thanks to his sensitive elephantine ears, and, consistent with ancient common law principles of “found” property, takes possession of the speck and all that it contains. Horton exercises the classical rights of ownership in this new property by defending it against those who would take it from him and seeking to recover it when it is lost. But what does it mean to own not only a speck of dust, but also its inhabitants? Are Horton’s rights akin to those of common law landowners who were deemed to have title to all wild creatures (*ferae naturae*) occupying their land? These questions are far from theoretical today, as the ownership of native plants, insects, microorganisms and endangered species existing on indigenous lands and in developing countries has significant economic and cultural implications.

But are such claims salient with respect to the Whos themselves, sentient beings occupying Horton’s physical property (the owner of an apartment building by no means owns its inhabitants)? If so, does Horton’s claim take on a more sinister character, one that is uneasily at odds with the message of racial equality expressed by the story? Well-meaning Horton, of course, may be characterized more as a protector than a subjugator of the Who-ville population. But this is certainly not the case with kangaroo and her henchmen.

These characters, both in their language and their visual depiction, adopt the persona of an authoritarian state. As such, they physically wrest control of the speck from unsuspecting Horton. Is this seizure a justifiable “taking” of property, effected for Horton’s own good, or at least for the preservation of social order? Or is it more akin to the acquisition of title by conquest, a practice deeply rooted in the European colonization of the New World? That is, does kangaroo’s superior force justify the seizure, and near destruction, of Who-ville? Are the conqueror’s rights over a subjugated population absolute? Of course not. But what if the population is unknown, or invisible, or believed to be a figment of an elephant’s over-heated
imagination? Kangaroo’s attempt to boil Horton’s speck in a kettle of Beezle-Nut oil is likely to have disastrous consequences for Who-ville. But while kangaroo’s plan may have a tragic outcome, it is not evil in its conception, as she calls off the boiling once she hears tiny Who voices. Then she relents and vows to extend the state’s protection to Who-ville and its now-recognized inhabitants. A happy ending? Perhaps, though the conclusion of Horton does not establish the equality of the Whos with their macroscopic counterparts, but simply substitutes the paternalistic protection offered by Horton with that afforded by the state. Is the outcome, then, more akin to Johnson v. M’Intosh (recognizing the European powers’ claim to the New World as superior to the native inhabitants’) than Brown v. Board?

From another angle, Horton makes us consider the nature of ownership and property itself. What does it mean to “own” a clover field, a clover, or a speck of dust? Does ownership of a thing extend to its most basic, atomistic level? Does ownership of a plot of land, or a field of clover, impart to the owner an absolute right to every molecule of every speck of dust on every clover in the field? And if so, how enduring is that ownership? When dust is carried from one field to another, does the first owner’s right float along with it? Can the speck be recovered from its new resting place, or does it become the neighbor’s property, for so long as it rests in his field? Most fundamentally, Horton raises the question whether there is any lower threshold below with traditional notions of ownership disintegrate. And the question is far from hypothetical, for today we recognize the ownership of rights in single-celled organisms, segments of human DNA and nanoparticles that are 100,000 times smaller than the diameter of a human hair. By these standards, even Who-ville begins to loom large.

Thus, while Horton appears to espouse a simple message of equality and nondiscrimination, the text gives rise to far more complex and nettlesome questions involving the nature of property, ownership and autonomy. In this essay, I explore these questions, which are as relevant to our world as they are to the tiny denizens of Who-ville.
CHAPTER 3

Nowhere to Stand: Correction by Force in the Supreme Court of Canada

ANNE MCGILLIVRAY

Chasten thy son while there is hope, and let not thy soul spare for his crying.
— Proverbs 19:18

Every school teacher, 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 in the circumstances.

— Criminal Code

... it’s just
A family tradition
The strength of this land
Where what’s right and wrong
Is the back of a hand
Turns girls into women
A boy to a man
But the rights of the children
Have nowhere to stand.

— k.d. lang, 1989

1 The verse “has probably been responsible for more physical pain than any other sentence ever written.” Northrop Frye, The Great Code: The Bible and Literature (Toronto: Harcourt Brace Jovanovich, 1986) at 21. Twelve verses exhort corporal punishment but “spare the rod” is not among them. It comes from Samuel Butler’s sexual satire Hudibras (1660): “Love is a boy by poets stil’d; Then spare the rod, and spoil the child.”

2 Criminal Code, RSC 1953–54, c. 51, s. 43.

The 1989 United Nations Convention on the Rights of the Child requires that the child be protected from “all forms of physical or mental violence” and from “cruel, inhuman or degrading treatment or punishment.” The Charter guarantees equal protection and equal benefit of the law to everyone, children included. Consistent and cumulative research shows the inutility of corporal punishment. Canada’s constitutionally frail “spanking law,” section 43 of the Criminal Code, was ripe for challenge. The Canadian Foundation for Children, Youth and the Law challenged the law by way of stated case in the Ontario courts and the Supreme Court of Canada, arguing that section 43 breaches children’s rights to security of the person, freedom from cruel or unusual punishment, and freedom from age-based discrimination. In 2004, McLachlin CJ found that section 43 violates no right of the child. The decision in Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) was vigorously denounced in dissenting judgments by Binnie, Arbour, and Deschamps JJ and in numerous academic articles.

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5 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 15(1) [Charter]: “Every 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 race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Section 15(2) makes an exception for programs whose object is to ameliorate conditions of inequality arising from disadvantages such as age.
6 RSC 1985, c. C-46.
The weird constitutional interpretation and flawed empiricism of *Foundation* have been widely reviewed. This essay examines other assertions for which the Supreme Court offers little or no support. In what sense was it “Parliament’s decision” to give parents and teachers special protection from the law of assault? What does Canadian jurisprudence disclose about section 43? Without section 43, will parents go to jail? As this book honours the work of Professor Nicholas Bala, his comments on the defence are discussed in the concluding remarks.

A. PARLIAMENT’S DECISION

“The issue in this case is the constitutionality of Parliament’s decision to carve out a sphere within which children’s parents and teachers may use minor corrective force in some circumstances without facing criminal sanction,” McLachlin CJ writes for the majority of the Supreme Court. Did Parliament “decide”? That children cannot learn without being beaten, broken

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Note 9: *Foundation*, above note 7 at para. 1. Also see among others, paras. 45, 51, 54, 59, and 65.
to obedience like horses or hawks, was a strongly held belief for some 3,500 years. *Ius corrigendi*, or the right of chastisement — corporal punishment, correction by force, the infliction of pain for the purpose of correction — is a magisterial power valued for its degrading effect and used to reinforce hierarchy and compel obedience. Its use with children was considered both necessary and virtuous.10 It once belonged to masters of households, schools, pupils, ships, courts, prisons, apprentices, slaves, servants, and colonies as well as to fathers.11 Only children remain legally subject to it in Canada today.12 Parliament’s “decision” begins with Roman law.

The Roman *pater familias* held an “absolutely despotic personal authority” over wives, children, relatives, servants, and slaves, “often exercised with merciless cruelty.”13 *Pater potestas*, the power of the father, included infanticide, the sale and surrender of children, banishment, execution, emancipation of sons and slaves, and corporal punishment.14 *Potestas* was reduced by

10 Corporal punishment was used “not only a means of inducing [children] to conduct themselves well and tell the truth, but also as an aid to education itself.” George Ryley Scott, *The History of Corporal Punishment: A Survey of Flagellation in Its Historical, Anthropological and Sociological Aspects* (London: T. Werner Laurie, 1938) at 16.

11 The legal chastisement of slaves ended with the *Slavery Abolition Act* (1833); of wives with the English Court of Appeal decision in *R. v. Jackson*, [1891] 1 QB 671 (the court claimed this never was legal); of apprentices with the renovated 1955 Canadian *Criminal Code*, SC 1953–54, c. 51; of offenders and prisoners with the *Criminal Law Amendment Act*, 1972, SC 1972, c. 13, s. 59, repealing s. 668 of the *Criminal Code*; of persons aboard ships with the *Canada Shipping Act*, 2001, SC 2001, c. 26, s. 294, repealing s. 44 of the *Criminal Code*; and of schoolchildren in 2004 with *Foundation*, above note 7 at paras. 38 and 40.


14 “Subject to paternal ownership, children in the early days of Rome were treated with no more consideration than domestic animals. It was entirely optional with the father whether his offspring should be spared and brought up, or abandoned . . . [I]nfanticide was frequently practised to avoid expense . . . A child, like a slave or an ox, could be surrendered by its father by way of reparation for any damage it had caused . . . [N]either marriage nor the attainment of majority, had any effect, so far as the release of paternal authority was concerned.” Scott, *Justinian’s Code*, ibid.
imperial edict in the latter days of the empire.15 The emperor Severus prohibited corporal punishment exceeding moderate flogging and ordered that fathers who killed sons be subject to the penalty for sons who killed fathers—"sewed up in a sack with a dog, a cock, a viper, and a monkey, and, enclosed with these wild animals and associated with serpents, thrown into the sea."16 In AD 365, co-emperors Valentinian and Valens issued an edict on "domestic correction" to prohibit "extremely severe castigation," limit the use of castigation to "minors" and remove paternal jurisdiction over "atrocious crime" to the courts of justice." An early annotation to the AD 365 edict states: "The motive: for example, flogging, which goes unpunished if administered by a magistrate or parent, because it is inflicted for the purpose of correction not for the sake of insult; but it is punished when someone has been beaten up in anger by an outsider." Canon law and the rediscovery of Justinian's works strongly influenced the development of common law doctrine. Bracton on the Laws and Customs of England (c. 1230) restates the Roman annotation as the law of England: "Motive, as in whippings, which are not punishable if imposed by a master or parent (unless they are immoderate) since they are taken to be inflicted to correct not injure."18

The pater familias was resurrected in the Protestant Reformation, a nucleated father-headed family being both metaphor for the king as pater patriae and more amenable to state control than the feudal open-kinship family with its complex political allegiances. Manuals and broadsheets equated obedience to the father with obedience to god and king.19 Filial, state, and religious obedience was inculcated through obligatory beating. "More children were being beaten in the sixteenth and early seventeenth centuries, over a longer age span, than ever before."20 Apprentices sued their masters "for almost


16 Justinian’s Code, ibid., 8.46 at 227.

17 Ibid., Book IX.


19 Lawrence Stone, The Family, Sex and Marriage in England 1500–1800 (Harmondsworth, UK: Penguin, 1979) at 27. See also c. 5 and pp. 408–11.

20 Ibid. at 117.
limitless sadism” and children hated parents for their harsh discipline. The ecclesiastical courts held jurisdiction over family matters. As judges were concerned with enforcing filial piety rather than protecting children from parents, no child assault case is found in court records from 1400 to 1600. The magistrates’ handbook *Eirenarcha* (1581) explains that “some are allowed to have privately, a natural, and some a civile power (or authoritie) over others, so that they may be excused themselves if but (in reasonable manner) they correct and chastise them for their offenses.” Fathers had a “natural” authority and masters a “civil” authority to chastise children under their charge.

By the close of the 1700s, a handful of criminal prosecutions for extreme cruelty had been brought against parents. As Blackstone explains, the father’s power is absolute (“a mother, as such, is entitled to no power, but only to reverence and respect”) and his power of correction, while “much more moderate” than in ancient Rome, is “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.” The power of teachers was tested in 1860 in *R. v. Hopley*. Thomas Hopley, master of an Eastbourne private school, wrote to the father of thirteen-year-old Reginald Chancellor, “a dull boy,” for permission to “chastise him severely” to cure his obstinacy and “that if necessary he should do it again and again” and “continue it at intervals even if he held out for hours.” The father agreed. Hopley beat his pupil for two and a half hours with an inch-thick, brass-tipped stick.

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24 This resulted from the rise of the public prosecutor and changing ideas of childhood. From 1785 to 1860, *The Times* reported 385 physical and sexual assault cases in which children were victims, nine in ten of whom were children of the accused. Linda A. Pollock, *Forgotten Children: Parcel Child Relation from 1500 to 1900* (Cambridge and New York: Cambridge University Press, 1983).
25 William Blackstone, *Commentaries on the Law of England* (1769) Book I, c. 16, online: www.lonang.com/exlibris/blackstone/bla-000.htm. See also *R. v. Greenhill* (1836), 4 Ad & E 624, 111 ER 922, asserting that “when a father has the custody of his children, he is not to be deprived of it except under particular circumstances . . . any doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age.” Only in proven cases of extreme cruelty would paternal rights be severed.
26 (1860) 2 F&F 202 [Hopley].
The boy died. In convicting Hopley of manslaughter for “excessive chastisement,” Cockburn CJ writes: “By the law of England, a parent or a schoolmaster . . . may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable.” Punishment in “passion” or “rage” or “immoderate or excessive in its nature or degree” or “protracted beyond the child’s powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb” exceeds the limits of the defence.

The question for nineteenth-century jurists and educators was not the legality or desirability of chastising children, but its severity. Quebec judge Henri Elzéar Taschereau’s annotation to the Criminal Law Consolidation and Amendments Acts of 1869 reflects Hopley. Under “Killing by correction,” he writes: “Moderate and reasonable correction may properly be given by parents, masters and other persons, having authority in foro domestico, to those who are under their care, but if the correction be immoderate or unreasonable, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case.” The English judge James Fitzjames Stephen cites Hopley in his 1887 formulation of a general defence of chastisement which would, like Taschereau’s defence, apply to all under the control of a master: “It is not a crime to inflict bodily harm by way of lawful correction . . . to the person of another; but if the harm inflicted on such an occasion is excessive the act,

27 Although debate was beginning to shift from how severe school corporal punishment should be to whether it should be used at all, Canadian education reformer Egerton Ryerson defends use of the rod: “The regulations established by law provide that each master (or mistress) of a school is ‘to practise such discipline as would be exercised by a judicious parent in his family.’” That a judicious parent uses corporal punishment is supported by “scripture and common sense.” Department of Public Instructors for Upper Canada, Reports of the Local Superintendents of Common Schools, and of the Inspector of Grammar Schools (Toronto, July 1865) 24–26 [emphasis in original]. This fits with the decision in Hopley, above note 26.

28 32–33 Victoria for the Dominion of Canada (1874), vol. 1: “In Grey’s case . . . says the report, if a father, master, or school-master will correct his child, servant or scholar, he must do it with such things as are fit for correction, and not with such instruments as may probably kill them” (177). “If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder, but if with a cudgel or other thing not likely to kill, although unsuitable for the purpose of correction, it will be manslaughter” (403).
which inflicts it is unlawful.” Somewhat grudgingly, Stephen’s fourth edition references “the correction of children and servants” to section 66 of the Draft Code, appended to the report of the Royal Commission on the Law Relating to Indictable Offences. It was not Stephen, a member of the Commission and considered the architect of the Draft Code, but Lord Blackburn, Commission chair, who drafted the defences. Blackburn’s draft of section 66, “Correction and Preservation of Discipline,” does not include servants. By comparison to his ornate defences of person and property which set out detailed circumstances and limits, the simplicity of section 66 is remarkable: “It is lawful 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.” A similar defence for assault by masters of ships “for the purpose of maintaining good order and discipline” was included in the section.

The Draft Code was rejected in England but purchased for Canada, where Blackburn’s section 66 was adopted verbatim and without debate. It was renumbered section 55 in the 1892 Canadian Criminal Code and retitled “Discipline of Minors and on Ships.” The haste to promulgate a federal code in the wake of Confederation resulted in “serious defects” due to “too much reliance on Sir James Stephen’s draft” and “too light an estimate of the difficulties that lie in the drafting of a code,” Taschereau, now on the Supreme Court, noted.

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29 James Fitzjames Stephen, A Digest of the Criminal Law (Crimes and Punishments), 4th ed. (London: Macmillan, 1887) at 138 and 183. This is repeated verbatim in George Wheelock Burbidge, A Digest of the Criminal Law of Canada (Crimes and Punishments) founded by permission on James Fitzjames Stephen’s Digest of the Criminal Law (Toronto: Carswell, 1890) s.257.


31 See above note 11.

32 Henri Elzéar Taschereau, The Criminal Code of the Dominion of Canada as amended in 1893, 3d ed. (Toronto, Carswell, 1893) at vi, noting that ss. 16–60 (the defences) were “Drawn by Lord Blackburn for Imperial draft.”
Court of Canada, told Justice Minister Sir John Thompson in 1893. Deputy Justice Minister Robert Sedgewick, drafter of the Criminal Code’s Canadian content, prepared a memorandum for his minister in which he reminds him, “One of the principal objects of the Code was to place in short and sustainable compass the existing law . . . . We are not law reformers, and therefore the Bill as submitted contained as far as possible the existing law.” There was no parliamentary consideration of the discipline of minors. Taschereau’s annotation of section 55 of the new 1892 Criminal Code states: “A parent may in a reasonable manner chastise his child, or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, and a captain of a ship any of the crew . . . . As to homicide by correction : see R. v. Hopley.” In 1906, the title became “Correction of child by force.” In the 1953–54 renovations of the Code, the section was renumbered 43, “justified” replaced “it is lawful,” “teachers” replaced “schoolmasters” and were placed before parents, “masters and apprentices” disappeared, and ship masters were given their own section, section 44, since repealed.

The history of section 43 discloses no substantive change to the AD 365 Roman edict on domestic correction in over 1,600 years. Contra McLachlin CJ, no “decision” worthy of the name was made by Parliament other than adopting existing common law defences as drafted by Lord Blackburn and, over fifty years ago, modernizing the language. Nor can its purpose fairly be stated as “to carve out a sphere within which children’s parents and teachers may use minor corrective force.” Its purpose is to recognize and preserve a status quo in which assaulting children was a necessary and virtuous tutorial duty. For most of its history, criminal sanctions were irrelevant.

B. A CANADIAN JURISPRUDENCE?

In a central area, Foundation is curiously silent. This is the analysis of the pre-existing caselaw. Chief Justice McLachlin explains that “judicial inter-

33 Letter by Judge Taschereau to the Attorney General of Canada with Comments and Suggestions (20 January 1893), online: www.lareau-law.ca/TaschereauLetter1893.pdf. Taschereau proposed no change to s. 55.
35 Taschereau, above note 32.
36 RSC 1906, c. 146.
interpretation may assist in defining ‘reasonable under the circumstances’” but “judicial decisions on s. 43 in the past have sometimes been unclear and inconsistent, sending a muddled message as to what is and is not permitted.”

Judges “failed to acknowledge the evolutive nature of the standard of reasonableness,” “gave undue authority to outdated conceptions of reasonable correction,” and “erroneously applied their own subjective views on what constitutes reasonable discipline — views as varied as different judges’ backgrounds.”

Cases were “seldom viewed as sufficiently serious to merit in-depth research and expert evidence or the appeals which might have permitted a unified national standard to emerge.” That legislation may be “open to varying interpretations,” she concludes, “is not fatal.”

The failure of Canadian courts to establish a coherent and defensible standard in well over a century suggests otherwise. An abortive attempt was made in 1903, when the Nova Scotia Supreme Court ordered the retrial of a teacher who had bloodied, bruised, and lamed a truant student. In acquitting the teacher, the magistrate had “applied a [permanent injury] test taken from an American decision . . . for which . . . there is no warrant in our Code.”

The Canadian standard is: “If . . . he went beyond the limit of moderate castigation, and, either in the mode or degree of correction, was guilty of any unreasonable and disproportionate violence of force, he was clearly liable for such excess.” But the “permanent injury” test was resurrected in a 1927 Saskatchewan District Court decision which wrongly cites R. v. Gaul in support.

“Permanent injury is out, pain and bruising are to be expected. ‘That the punishment naturally may cause pain hardly needs to be stated,’” the Quebec Court of King’s Bench observed in 1951. “Bruises or contusions alone will not be unreasonable” but one who “so far forgets himself as to strike

38 Foundation, above note 7 at para. 39.
39 On the “judicial childhood test,” see McGillivray, above note 15.
40 R. v. Gaul, [1904] 8 CCC 178. The precedent applied in magistrate’s court is State v. Pendergrass (1837), 19 NC 365 (SC), which states that parental duty “cannot be effectually performed without the ability to command obedience [and] to enable him to exercise this salutary sway he is armed with the power to administer moderate correction.” Punishment “which may seriously endanger life, limbs, or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself improper.” The Nova Scotia appeal court followed Commonwealth v. Randall, 4 Gray 36, “which is practically the same as our Code.”
41 R. v. Metcalfe, [1927] 49 CCC 260 (Sask Dist Ct).
42 Campeau v. R. (1951), 103 CCC 355 (Qc KB). The force used must be “proportioned to the offenses committed” and “any punishment exceeding this limit, or motivated by arbitrariness, caprice, anger or bad humour constitutes an offence.”
a child in any part of the body where permanent damage may be caused must
take the consequences.” The Saskatchewan Court of Appeal ruled in 1985
that a “severe” belt-lashing to prevent a learning-impaired boy from growing
up to be “a bum on 20th Street” was corrective and that the deep bruising
caused, while excessive, was not bodily harm.43 The Saskatchewan court’s list
of factors to be considered was rarely considered in subsequent cases. Courts
have excused assaults of children incapable of correction, stemming from an-
ger and malice, resulting in broken teeth and eardrums, and committed with
belts, straps, sticks, hairbrushes, and harnesses.44 Community standards are
referenced by some courts, rejected by others. Precedent is rarely cited. Stan-
dards are seldom articulated.

Judicial maps of the punishable body are an indecipherable maze of lines
drawn around injury, gender, age, correctability, weapons, and body parts.45
That the deciding factor is the judge’s personal opinion of corporal punish-
ment may be explicit, as in a 1992 Manitoba Court of Appeal decision: “The
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.”46 Chief Justice McLachlin sought
to clean up the judicial mess by articulating yet another standard. The result
is worthy of Dr. Seuss:

When you’re under twelve and over two
It doesn’t matter what you do,

43 R. v. Dupperon (1985), 16 CCC (3d) 453 at 86 (Sask CA). Chief Justice McLachlin rejects
“the nature of the offence calling for correction” as a factor (Foundation, above note 7
at para. 35): “[I]t is improper to retrospectively focus on the gravity of a child’s wrong-
doing, which invites a punitive rather than corrective focus” (Foundation, ibid.). Surely
the sole vestige of fairness in corporal punishment is the relationship between the
seriousness of the conduct and the severity of punishment.

44 On pre-Foundation law, McGillivray, above note 15, and Foundation, above note 7,
Arbour J dissenting at paras. 15ff.

45 Sexual assault further confuses the body map. Children who breach sexual boundaries
are punished by sexual assault or in sexually suggestive ways. Assaults that are ob-
jectively sexual have been justified under s. 43 of the Criminal Code, above note 6. See
McGillivray, above note 15; Mark Carter, “The Corrective Force Defence (section 43)
and Sexual Assault” (2000) 6 Can Crim L Rev 53; and Nigel King et al., “Spanking and

The judge says they can beat on you.
But not on the head or if they’re mad
And not with a stick and not too bad
And just if they’re your mom and dad.47

Children over twelve and under two years of age cannot be hit and, although the punishment must be corrective, the child’s conduct is irrelevant. The head cannot be hit, punishment cannot be in anger, no implement can be used, injury must be transitory and trifling, and only parents and those in loco parentis can use corporal punishment. Teachers are restricted to restraint. Punishment cannot be “degrading, inhuman or harmful.” But these criteria are not defined. The Court cites no judicial or empirical evidence for these criteria.48 Will this cure the vagueness of section 43?

A review of post-Foundation cases shows the futility of redefining the indefinable.49 A father who shoved his son in the face, causing him to stumble and bruise his head, was acquitted, as “minor corrective force of a transitory and trifling nature” is not corporal punishment and anger is “part and parcel of correcting a child.”50 A bus driver who tied a six-year-old learning-impaired boy to his seat with surgical tape and taped a sock in his mouth was given the

47 With apologies to the spirit of Theodor Geisel.
49 Adapted from summaries of forty-seven cases; see Repeal 43, online: www.repeal43.org/the-law.html; and Anne McGillivray & Cheryl Milne, “Canada: Two Steps Forward, One Step Back” in Anne Smith & Joan Durrant, eds., Realizing the Rights of Children: Global Progress towards Ending Physical Punishment (London: Routledge, 2010).
50 R. v. Demelo, [2009] OJ No 2387 (Ct J) at paras. 44 and 66. Foundation, above note 7, bars anger and blows to the head.
benefit of section 43.\footnote{\textit{R. v. Morrow}, [2009] ABPC 114. \textit{Foundation}, \textit{ibid.}, bars objects and uncorrectable children. Also see \textit{R. v. T.M.D.}, [2008] AJ No 900 (Prov Ct), extending the defence to an institutional care worker deemed \textit{in loco parentis} for the purpose; and \textit{R. v. D.L.M.}, [2009] BCJ No 1288 (Prov Ct), denying the defence to a biological father with joint custody: he had not assumed all the obligations of parenthood and there was no evidence that the mother had delegated her authority to use corporal punishment. \textit{Foundation} restricts corrective assault to parents.} For good measure, the court considered the hostility requirement of the English law of assault, citing this to Arbour J’s comments on the common law.\footnote{\textit{Foundation}, above note 7, Arbour J dissenting at para. 136.} A father who threw his fifteen-year-old daughter into his truck was acquitted on appeal.\footnote{\textit{R. v. Swan} (13 March 2008) Picton, (ON Sup Ct J). If the force used is corrective, it falls under s. 43 of the \textit{Criminal Code}, above note 6. \textit{Foundation}, above note 7, bars children over twelve.} The force was for restraint, not correction, the court found; paradoxically, it was reasonable “in light of the offence calling for correction.” A teacher charged with fourteen counts of common assault and four of assault with a weapon for hitting learning-impaired first and second graders with books and rulers, pushing their faces into desks, and shoving them to the floor was acquitted.\footnote{\textit{R. v. Persaud}, [2007] OJ No 1752 (Sup Ct J) \textit{[Persaud]}. \textit{Foundation}, above note 7, bars objects, uncorrectable children, and teachers.} While the force was “beyond the absolute minimum required,” the court states, \textit{Foundation} permits touching and the children were not hurt. A father who burned his seven-year-old son with a cigarette lighter to teach him not to set fires was acquitted at trial, the court finding the assault to be both unintentional and educational in intent.\footnote{\textit{R. v. D.K.}, [2004] OJ No 4676 (Ct J). \textit{Foundation}, \textit{ibid.}, bars children over twelve.} The father was convicted of assault with a weapon on appeal. A mother who hit her thirteen-year-old daughter on the face for refusing to turn off the television was acquitted. The court noted that \textit{Foundation} permits “minor corrective force of a transitory and trifling nature” and only slaps to the head that can be characterized as corporal punishment are unreasonable; as this slap was not corporal punishment, it was not unreasonable.\footnote{\textit{Foundation}, above note 7 at para. 42.} The only \textit{Foundation} factor consistently applied by the courts is the ban on using objects, but this was already an established judicial trend.

The claim that the renovated section 43 “sets real boundaries and delineates a risk zone for criminal sanction”\footnote{\textit{Foundation}, above note 7 at para. 42.} does not hold. Judges use ever-stran-
ger twists of logic to seek what is, in their view, a just result. The failure lies not with the courts but with the defence. There are too many circumstances, too many ideas about what is reasonable, too many forms of punishment, too many “subjective views” too deeply rooted in childhood experience, for legislative capture or an “evolutive” impact on standards. The defence is a lightning rod for values associated with authority and religion, values that in a pluralistic society are far too diverse, vague, and idiosyncratic to control the application of the criminal law.58

C. WILL PARENTS GO TO JAIL?

“The reality is that without s. 43, Canada’s broad assault law would criminalize force falling far short of what we think of as corporal punishment, like placing an unwilling child in a chair for a five-minute ‘time-out.’”59 Will parents be jailed for time-outs or, for that matter, for wrapping a child in Jobidon’s ugly scarf?60 “That absurd consequence could not have been intended by Parliament,” the Supreme Court states in Jobidon. “Rather its intention must have been for the courts to explain the content of the offence, incrementally and over the course of time.”61 To claim that section 43 protects parental acts of care and nurture or anything other than physical punishment is, in the Jobidon sense, absurd.62 Nurture, which requires touching and restraint, is

59 Foundation, above note 7 at para. 62. See also paras. 19, 51, and 60–61.

Assault has been given a very encompassing definition in s. 265 . . . [which] says nothing about the degree of harm which must be sustained. Nor does it refer to the motives for the touching. If taken at face value, this formulation would mean that the most trivial intended touching would constitute assault. As just one of many possible examples, a father would assault his daughter if he attempted to place a scarf around her neck to protect her from the cold but she did not consent to that touching, thinking the scarf ugly or undesirable. (Even an argument for implied consent would not seem to apply in a case like this.)

61 Ibid.
62 R. v. A.E., [2000] OJ No 2984 at para. 29 (CA) [A.E.]. “[I]t is in the public interest that an infant be deemed to consent to applications of force by a parent done ‘for the good of the child and, indeed, for the survival of the child.’” “Here, as in s. 43, the common law exception that allows a parent to touch a child in order to care for the child both protects the parent and removes a protection from the child” (ibid. at para. 33). The court’s “defence of deemed consent” (para. 53) can be traced to Thomas Hobbes’s dictum that the child’s “absolute subjugation” to the parent “derives from the Childs Consent, either expresse, or by some other sufficient means declared” and extends to the child’s consent
both a right of the child and a parental fiduciary duty. Corporal punishment is neither nurture nor duty. Conflating assault with restraint ignores the necessary, routine, and legal use of restraint by institutional care workers, who are not protected by section 43. Foundation’s portrayal of the defence as a child protection measure — stating that it “does not devalue or discriminate against children, but responds to the reality of their lives by addressing their need for safety and security in an age-appropriate manner” — is misleading.

As fiduciaries of their children, parents enjoy privileges necessary to carrying out their fiduciary duties. These privileges necessarily include touch. A parent who did not touch her child would lose her fiduciary standing to the state’s parens patriae jurisdiction and face criminal charges. Neither section 43 nor its common law “act of nurture” shadow is required to justify parental touch. As fiduciaries, parents can do things for, with, and to their children that others cannot. If touch risks or causes harm to the child, parental privilege is lost. Assault — in its real sense, not its fictive Foundation sense — is such a harm.

Chief Justice McLachlin’s redrawn body map is meant to delineate risk zones to guide both parents and the justice system. “Again, the issue is not whether s. 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

to death; see Leviathan (1651), Part 2, c. 20, and The Elements of Law (1640). The Ontario Court of Appeal heard argument in Foundation the following year. The appeal court does not cite A.E., ibid.


64 Foundation, above note 7 at para. 51. “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” (ibid. at para. 62 and see para. 1).


67 Foundation, above note 7 at paras. 15–19, 22, 26, 27–29, 39–42, and 62.
consensus.” But a 2006 survey shows that most Canadians know nothing of the case or its limiting criteria, and most think that corporal punishment is against the law. Foundation criteria fail to distinguish reasonable force from child abuse. In a 2009 study, the criteria were mapped onto 25,257 cases in which physical abuse was substantiated by Canadian child protection agencies. In over 90 percent of cases, parents were perpetrators. Two-thirds of abused children were between two and twelve, permissible targets of assault according to Foundation. Assault of learning-impaired children is prohibited, and just 12.7 percent of abused children were learning impaired. The force used was minor in almost half the abuse cases, no object was used in over four in five cases, and the intent was corrective in over three in four cases. “Degrading, inhuman or harmful” could not be operationalized for analysis. If the criteria have value as indicators of excessive force and, therefore, as predictors of child abuse, then every case should violate at least one criterion. But almost one in four cases violates none. Only 0.1 percent of cases violate all. The use of non-minor disciplinary force, the study concludes, is the most reliable predictive variable of physical abuse. Spanking is second.

“When these considerations are taken together, a solid core of meaning emerges for ‘reasonable under the circumstances,’ sufficient to establish a zone in which discipline risks criminal sanction,” McLachlan CJ concludes. But no “core of meaning” emerges—not for judges, police, or parents. The risk lies, simply, in the use of corporal punishment.

Is there a legislative solution to the problem? Can a defence for parents also protect the rights and bodies of children? Senate Bill S-209, purportedly a repeal bill, passed second reading in June 2009 but died on prorogation of

68 Ibid. at para. 39.
69 A national telephone survey of 2,451 French- and English-speaking adults conducted January to March 2006, two years after Foundation, showed that the majority (66 percent) had not heard of the Supreme Court decision. A minority (37 percent) knew that parents were allowed to physically punish children. Of these, fewer than one in five knew the limits set on its use; see PR Exchange, National Survey of Canadians’ Knowledge of the Law on Physical Punishment of Children (Toronto: Toronto Public Health, 2007), online: www.toronto.ca/health/pdf/summary_report_200703.pdf.
70 Durrant et al., “Protection of Children,” above note 8. The data are taken from Nico Trocmé et al., Canadian Incidence Study of Reported Child Abuse and Neglect—2003: Major Findings (Ottawa: Minister of Public Works and Government Services Canada, 2005). The study examined cases of reported abuse seen by child protection agencies across the country, excepting Quebec, in the fall of 2003.
Parliament. Under the title “Control of Child,” section 43 would provide that “reasonable force other than corporal punishment” by teachers and parents is justified if the purpose is to prevent injury to the child or others, prevent the child from engaging “in conduct that is of a criminal nature,” or prevent the child “from engaging or continuing to engage in excessively offensive or disruptive behaviour.” As this conduct most frequently triggers corporal punishment and as the Bill fails to specify the kind of force that may be used, it retains the essence of section 43. The problem is not solved.

D. CONCLUDING REMARKS — IN REPLY TO PROFESSOR BALA

No judicial or legislative tinkering can fix section 43. Given its deep violation of the child’s Charter rights and Canada’s treaty obligations under the Convention on the Rights of the Child, and the chaos that lies at its “reasonable” heart, all that is left is unmodified repeal. One who assaults a child should be prepared to defend it on the grounds established by the ordinary defences — although it may be that none apply to after-the-fact assault, as McLachlin CJ observes of the defence of necessity. There are other ways to keep parents out of jail. One, of course, is not to take the risk of assaulting a child. Another is de minimis non curat lex. Although McLachlin CJ rejects this as “equally or more vague and difficult in application than the reason-

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72 In its 2003 Concluding Observations, the UN Committee on the Rights of the Child expressed “deep concern” that Canada has taken “no action to remove section 43 of the Criminal Code.” The Committee called for “legislation to remove the existing authorization of the use of ‘reasonable force’ in disciplining children and explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed” [emphasis added]; see Consideration of Reports Submitted by State Parties under Art. 44 of the Convention, 34th Sess., CRC/C/15/Add. 215 (2003) at paras. 32–33. This is cited by Arbour J in dissent (Foundation, above note 7 at para. 188). Chief Justice McLachlin relies on an earlier UN Committee call for repeal, which she interprets as permitting “mild corporal punishment” (ibid. at para. 33). For UN Committee statements on corporal punishment laws, see online: www.endcorporalpunishment.org/pages/hrlaw/crc_session.html.

73 Canadian Foundation, above note 7 at para. 44.
Ableness defence offered by s. 43, de minimis is alive and well in the courts.74 Police and prosecutorial discretion already operate to shield trivial (and not-so-trivial) assaults from prosecution.75 Child assault cases are routinely rerouted from the justice system to the child protection system in some jurisdictions, not always a good thing.76 Contra Foundation, nurturing touch is neither assault in law nor in the working definition of assault used by police, prosecutors, and judges.

Professor Nicholas Bala, in whose honour this essay is written, supports section 43. His affidavit for Canada in Foundation states: “Children do not have the full range of rights afforded adults.”78 But the Charter says they do. The Charter further demands that limits on rights and freedoms be demonstrably justified, not presumptively asserted on the enumerated basis of age. To say that “these laws are not, in my view, discriminatory” begs the constitutional question. That “it is essential for families to enjoy a ‘zone of privacy’ so that they can make parenting decisions to reflect their personal values, experiences and beliefs” conjures up the sorry history of paternal power and private childhood.79 That “there is no clear agreement on whether a parent’s

74 Ibid. at para. 44, responding to Arbour J’s assertion in dissent that “the defence of necessity and the ‘de minimis’ defence, will suffice to ensure that parents and teachers are not branded as criminals for their trivial use of force to restrain children when appropriate” (para. 132) and would “adequately protect parents and teachers from excusable and/or trivial conduct” (para. 195); see also paras. 200ff.


77 Tammy Landau, “Policing the Punishment: Charging Practices under Canada’s Corporal Punishment Laws” (2005) 12 Int’l Rev Victimology 121. Toronto police laid charges in half of cases in which children were injured, while Winnipeg police laid charges in just 13 percent of injury cases.

78 Ontario Court (General Division), Canadian Foundation for Children, Youth and the Law and the Attorney-General of Canada, Affidavit of Nicholas Bala, sworn 4 May 1999 at para. 72. The affidavit includes a historical review of s. 43. Professor Bala served on the Board of the Canadian Foundation for Children, Youth and the Law at the time the decision to challenge s. 43 was made. He opposed the decision and later resigned.

use of reasonable force for the purpose of correcting a child is harmful or beneficial” is contradicted by a wealth of empirical data, much of it submitted in Foundation. These data show with an exceptionally high degree of reliability that corporal punishment does precisely the opposite of what it is thought to do. It makes children and the adults they become more, not less, violent. It makes them less, not more, functional and contributing members of society. It weakens parents’ relationships with their children. It is not distinguishable from physical abuse. Its severity escalates in imperceptible stages as children and adults become habituated to its use.

“There are lots of things many parents do that are much worse than corporal punishment that are not regulated by criminal law,” Professor Bala asserts elsewhere; nor is the criminal justice system “a particularly good way of educating parents around optimal parenting.” Exposing parents to the justice system is more “traumatizing” for children than abuse, some children are not traumatized by corporal punishment, and “some immigrant communities are more likely to use corporal punishment and would be disproportionately affected by criminalization.” Factually debatable though these propositions are, substituting “husband” for “parent” and “wife” for “child” shows their inherent fallacy. “The evolution of the case law represents the evolution of society’s values” and some day section 43 may be repealed. But where is the tipping point? Now, over six in ten adult Canadians think corporal punishment is illegal, while seven in ten, when told of the law, think it should be repealed if this reduces child abuse. Professor Bala suggests that repeal would undermine parental authority and “a parent’s authority to remove a disruptive child from a situation against a child’s will comes from


81 Margaret Philip, “Spare the Rod — or Face Jail?” The Globe and Mail (7 June 2003), online: www.nospank.net/n-k48.htm.
82 Nicholas Bala, “The Supreme Court: Striking a Balance on Corporal Punishment” Queen’s Gazette (23 February 2004) at 8.
83 PR Exchange, above note 69. Canadians under thirty-five were most strongly in support of repeal.
s. 43.” It does not. It is a form of touch, which is a parental privilege arising from parental fiduciary duty. The issue is not what comes from section 43, but what section 43 comes from: the magisterial power of chastisement, a power now gone from every other arena in which it once ran. “This is the law as we must take it in order to assess its constitutionality,” Arbour J states in her dissenting judgment. “To essentially rewrite it before validating its constitutionality is to hide the constitutional imperative.” By changing in midstream the boundaries and purpose of section 43 and concealing evidence of its history and harm, the Supreme Court hid the constitutional imperative and upheld a dangerous legal anachronism. If a law that allows children to be hit at will offends no right of the child, then it is true that “the rights of the children have nowhere to stand.”


87 Foundation, above note 7, Arbour J dissenting at para. 139.

88 k.d.lang, above note 3.