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Parents, Children, and the Law of Assault

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The debate concerning the constitutionality and the possible repeal of s. 43 of the Criminal Code, the so-called "spanking" provision, has raised an important issue: when a parent touches a child without the child's consent, under what conditions is the parent's conduct an assault? Supporters of the repeal of s. 43 have suggested that parents are protected from inappropriate prosecutions by the exercise of prosecutorial discretion and by the common law defences of de minimis non curat lex and necessity. But prosecutorial discretion is not a suitable substitute for a proper definition of the scope of criminal liability, and the defences of de minimis and necessity do not cover many typical situations in which parents apply non-consensual force to children for proper purposes. Further development of the common law defence of "deemed consent" would be more promising. This defence is available as a defence when a parent, a teacher, or another caregiver uses proportionate force in touching a child for a proper purpose. Because of certain problems in the common law definition and application of this defence, Parliament should enact a defence of "parental care," clearly restating the legal standard governing the touching of a child for a proper purpose.

Le débat sur la constitutionnalité et l'abrogation possible de l'article 43 du Code criminel, disposition que certains appellent « article sur la fessée » soulève une importante question : quand un parent touche un enfant sans le consentement de ce dernier, dans quelles conditions la conduite du parent constitue-t-elle des voies de fait? Les partisans de l'abrogation de l'article 43 avancent que les parents sont protégés contre des poursuites injustifiées par l'exercice du pouvoir discrétionnaire de poursuivre ainsi que par les moyens de défense de minimis non curat lex (la loi ne se soucie pas des petites choses) et de nécessité de la common law. Par contre, le pouvoir discrétionnaire de poursuivre n'est pas un substitut acceptable à la définition adéquate de la portée de la responsabilité criminelle, et les moyens de défense de minimis et de nécessité ne sauraient s'appliquer à beaucoup de situations usuelles où les parents appliquent une force non consensuelle à leurs enfants à des fins adéquates. Approfondir la défense de common law invoquant la présomption de consentement serait une avenue plus prometteuse. Ce moyen de défense peut être invoqué lorsqu'un parent, un enseignant ou toute autre personne responsable utilise une force adéquate pour toucher un enfant à une fin légitime. Parce que la définition de ce moyen de défense dans la common law et son application présentent certains problèmes, le Parlement devrait adopter une défense d'« assistance parentale », énonçant clairement la norme légale qui régit le fait de toucher un enfant à une fin légitime.

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Introduction

When a parent touches a child without the child's consent, under what conditions is the parent's conduct a criminal offence? This question may seem to be of purely theoretical interest at best: it is usually easy to recognize the difference between the kind of routine physical contact that is necessary to care for children, which is evidently not criminal, and the physical or sexual abuse of children, which is a very serious offence indeed. But under Canadian law as it now stands, the answer to the question is far from obvious. There are at least two reasons for this state of affairs. First, the offence of assault in Canada is defined very broadly; though the scope of the law is not entirely certain, it is quite arguable that any intentional and non-consensual touching, even if fleeting and entirely harmless, is an assault as defined by s. 265 of the *Criminal Code*. Second, there is very little case law which might provide guidance on this question; because it is usually easy to recognize the difference between routine care-giving and assault or abuse, there are, except in the context of corporal punishment, very few cases that consider the boundary between them.

But the question of the legal status of the non-consensual touching of a child is not just of theoretical interest. It is central to the debate surrounding the proposed repeal of s. 43 of the *Criminal Code*, the so-called "spanking" provision that permits teachers, parents, and persons standing in the place of parents to use reasonable force "by way of correction toward a pupil or child, as the case may be, who is under [their] care, if the force was

reasonable under the circumstances.”¹ In that context, the question was considered not only by the Supreme Court of Canada in its well-known decision upholding s. 43,² but also by members of the Senate in its debates over a bill that would have repealed s. 43. The senators recognized that if s. 43 were repealed, it would be arguable that not just corporal punishment but any non-consensual touching of a child by a parent or teacher would be a criminal offence. No-one thought that would be a desirable outcome, and the bill that ultimately passed the Senate would therefore have replaced s. 43 with a tightly defined defence of “parental control.”³ But s. 43 speaks only to a very specific purpose for use of force against a child; it does not deal with the myriad circumstances in which parents, teachers, and other caregivers may touch children without their consent for purposes other than correction. So the question posed in this paper remains important whether or not s. 43 is ever repealed.

But the debate around s. 43 is highly relevant to the question because the position taken by many participants in that debate implied that the question need not be answered. Some commentators and senators argued that the repeal of s. 43 would be unproblematic, for several reasons. Some pointed to the existence of prosecutorial discretion; it was said that the police would not lay, and the Crown would not prosecute, a charge in the vast majority of uses of force against a child. Others pointed to the common law defences of necessity and *de minimis non curat lex* (the law does not care about trifles). It was said that if a parent or teacher were inappropriately charged, he or she would be able to defend himself or herself on the ground that the touching was either necessary or so trifling that it should be beneath the law’s notice.⁴ Implicit in this position is the view that the interesting question is not whether non-consensual touching of a child is a criminal offence but whether a parent or teacher will ever be unjustly convicted in such a case; and the answer to that question is, given our existing laws and institutional practices, a clear “no.”

This position, though plausible at first sight, does not stand up to sustained scrutiny. There is little doubt that a parent, teacher, or other

1. *Criminal Code*, R.S.C. 1985, c. C-46, s. 43.

2. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 [*Canadian Foundation*].

3. Bill S-209, which would have repealed and replaced s. 43, passed the Senate on 17 June 2008 and, if not for the dissolution of Parliament in the fall of 2008, would have been debated in the House of Commons.

4. For some of these themes, see Don Stuart, *Canadian Criminal Law: A Treatise*, 5th ed. (Scarborough: Thomson Carswell, 2007) at 530 [Stuart]; *Canadian Foundation*, *supra* note 2 at paras. 196-208 *per* Arbour J. dissenting; *Debates of the Senate*, No. 144 (14 November 2007) at 214 (Hon. Céline Hervieux-Payette).

caregiver should be permitted to touch a child, with or without the child's consent, for what I will call a proper purpose; that is, for purposes related to the discharge of that adult's duties in respect of the child. These purposes would include caring for the child, protecting the child, and preventing the child from misbehaving. Neither the exercise of prosecutorial discretion nor the common law defences of necessity and *de minimis* would be adequate to protect parents who were carrying out their duties. In Part II.1 below, I argue that prosecutorial discretion, though central to the effective functioning of the criminal justice system, is not a suitable substitute for a criminal law that properly defines the scope of criminal liability. And, as I show in Parts II.3.a and II.3.b below, the common law defences of necessity and *de minimis* are also inadequate. The common law defence of necessity would be available to a parent or teacher in only a very small number of the cases where the touching is for a proper purpose. As for the maxim *de minimis non curat lex*, it is not clear whether there is such a common law defence in Canadian criminal law; if there is, it is not clear whether it applies to the offence of assault; and if it does, it would be available in only a very small number of the cases where a parent or teacher touches a child for a proper purpose. Moreover, in addition to these considerations, the requirement of the rule of law suggests that the criminal liability of a parent who touches a child for a proper purpose should not depend on the vagaries of prosecutorial discretion or on criminal law excuses. It may be unlikely that a parent is inappropriately charged, but if such a charge were laid, the parent should be able to rely on a legal regime that properly defines his or her right to touch a child for a proper purpose.

The common law is not entirely without resources to protect the parent, teacher, or other caregiver who properly applies force to a child. The common law defence of "deemed consent," which has received little attention in the debate around s. 43, is available as a defence when a parent, a teacher, or another caregiver uses proportionate force in touching a child for a proper purpose. But because of certain problems with the defence of deemed consent, it would be helpful to accompany any repeal of s. 43 with a statutory defence that restated the common law defence of deemed consent. In Part II.3.c below, I discuss the common law defence and consider the versions of this defence, under the name "parental control," that have been recently enacted in New Zealand and proposed by the Senate of Canada. I argue that these restatements attempt to draw the boundaries of permissible uses of force too narrowly. I propose that parents, teachers, caregivers, and children themselves would be better served by a clear statutory restatement of the legal standard governing the

touching of a child for a proper purpose, under the rubric of a defence of “parental care.”

I. *The law of assault: an overview*

1. *The definition of assault*

Section 265(1)(a) of the *Criminal Code* defines the offence of assault in very broad terms:

A person commits an assault when ... without the consent of another person, he applies force intentionally to that other person, directly or indirectly ...

It is well-established in the case law interpreting s. 265 that the elements of this offence (that is, those facts that the Crown must prove beyond a reasonable doubt to get a conviction) are as follows:⁵

- the accused touched the complainant;
- the touching was intentional (*i.e.*, not negligent, accidental, inadvertent);
- the complainant did not consent;
- and the accused was aware of, reckless as to, or wilfully blind to the complainant’s lack of consent.

If all of these elements are proved, the accused is guilty of the basic offence of assault, which is sometimes referred to as common assault, simple assault, or assault *simpliciter*.⁶

Two elements of simple assault are particularly important here: the element of touching and the element of non-consent. It is the broad definition of these two elements that creates the problem addressed in this paper.

2. *The element of touching*

The word “assault” and the phrase “application of force” may suggest that the Crown needs to prove some degree of violence or hostility on the part of the accused, or some degree of injury or alarm to the complainant. But

5. *R. v. Palombi*, 2007 ONCA 486, 222 C.C.C. (3d) 528 *sub nom. R. v. P.(K.)*, at paras. 28, 34, 35 [*Palombi*]; Alan W. Mewett & Morris Manning, *Mewett and Manning on Criminal Law*, 3d ed. (Markham: Butterworths, 1994) at 749-55 [Mewett & Manning]; Hamish Stewart, “When Does Fraud Vitiolate Consent? A Comment on *R. v. Williams*” (2004) 49 C.L.Q. 144 at 145.

6. *Criminal Code*, *supra* note 1 at s. 265(1)(b)-(c) defines two other kinds of assault, ss. 267-268 define various aggravated forms of assault, and ss. 271-273.2 define several forms of sexual assault. For the purposes of this paper, it will not be necessary to discuss these other forms of assault.

it is well-established that a simple assault can be committed without any particular degree of violence, much less any injury, to the complainant, and without any motive of hostility on the part of the accused. So it is often said that *any* non-consensual touching, no matter how minor, satisfies the touching element of the offence of assault.⁷ For this reason, throughout this paper, I use the word “touching” and the phrase “application of force” to mean exactly the same thing: the degree of physical interaction that would satisfy the statutory requirement that the accused “applies force ... directly or indirectly” under s. 265(1)(a), regardless of the accused’s motivation for the touching and regardless of the degree of harm, if any, caused by the touching. This interpretation of the touching element of assault has important implications for the possible application of the *de minimis* maxim, as discussed further below.

3. *The element of non-consent*

To prove assault, the prosecution must prove beyond a reasonable doubt that the complainant did not consent to the touching. Consent to intentional touching (intentional application of force) can be either actual or implied. The complainant actually consents if he or she is willing to be touched. So, to establish actual non-consent, the Crown has to prove that the complainant was not willing to be touched. Because the element of actual non-consent is rarely in issue in cases of simple assault, it is not entirely clear from the case law whether a willingness to be touched is determined with reference to the complainant’s subjective state of mind, or whether it is better understood as the complainant’s manifestation, by words or gesture, of a willingness to be touched. For the purposes of this paper, I will assume that the concept of actual consent in simple assault, as in sexual assault, depends on the complainant’s state of mind: his or her subjective willingness to be touched.⁸ So to prove actual non-consent, the Crown must prove that the complainant was subjectively unwilling to be touched.

Implied (or deemed) consent, in contrast to actual consent, is a consent that is deemed to have been given to a particular application of force that

7. The most recent authority on point is *Palombi*, *supra* note 5 at para. 28. See also *R. v. Burden* (1981), 64 C.C.C. (2d) 68 (B.C.C.A.) (a case of indecent assault); *R. v. Bernier* (1997), 119 C.C.C. (3d) 467 (Que.C.A.) at 475-6, *aff’d* [1998] 1 S.C.R. 975 (a case of sexual assault); Mewett & Manning, *supra* note 5 at 757.

8. There is extensive statutory and case law on the meaning of consent and non-consent in the law of sexual assault. See in particular ss. 273.1 and 273.2 of the *Criminal Code*, as interpreted in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 [*Ewanchuk*]; see also the discussion in Hamish Stewart, *Sexual Offences in Canadian Law*, looseleaf (Aurora: Canada Law Book, 2004) at §3:300 [Stewart]. But the law on the meaning of actual consent in cases of non-sexual assault is much less developed.

occurs in the course of an activity that the complainant has agreed to participate in.⁹ The leading Canadian cases on implied consent involve hockey games. A hockey player does not actually (*i.e.*, subjectively) consent to each specific physical contact with members of the other team. Quite the contrary: he or she subjectively does not want to be checked, hooked, or tripped precisely because these actions impede his or her effectiveness as a member of the team. But by willingly participating in the game itself, each player has agreed to accept the physical contacts that typically occur in the course of a hockey game, and therefore is deemed to consent to those contacts. The agreement to participate gives rise to the player's implied consent to those physical contacts, whether or not he subjectively agrees to any one of them in particular. In *Cey*, the leading case on point, the Saskatchewan Court of Appeal stated that "in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom [including those] forms sanctioned by the rules [and those] forms, denounced by the rules but falling within the accepted standards by which the game is played."¹⁰ Moreover, there are many activities besides hockey that occur with the deemed consent of the participants. L'Heureux-Dubé J. has recognized, in *obiter dicta*, that there may be implied consent to a degree of touching on social occasions and in "many aspects of day to day life."¹¹ L'Heureux-Dubé J.'s point might be illustrated by the social conventions applicable to social gatherings (shaking hands, patting someone on the back or arm) or by the inevitable pushing, bumping, and jostling that occurs on a crowded bus or subway car. In each case, the participants may not actually consent to each physical contact, but they are deemed to consent to it by their participation in the activity in question.

To negate implied or deemed consent, the Crown has to show that the touching in question was not within the norms of the activity in question. For example, to prove that a hockey player had assaulted another player during a game, the Crown has to show that the degree of violence the player used was outside the norms applicable to hockey¹²; to prove that a person's conduct on a social occasion was an assault, the Crown would

9. This is another issue on which there is an important difference between simple assault and sexual assault. The defence of implied consent is undoubtedly available on a charge of simple assault, but the Supreme Court has unequivocally stated that there is no defence of implied consent to a charge of sexual assault: *Ewanchuk*, *supra* note 8 at para. 31.

10. *R. v. Cey* (1989), 48 C.C.C. (3d) 480 at 488 (Sask.C.A.); see also *R. v. Leclerc* (1991), 67 C.C.C. (3d) 563 at 568-72 (Ont.C.A.).

11. *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at para. 21 [*Cuerrier*].

12. See e.g. *R. v. Watson* (1975), 26 C.C.C. (2d) 150 (Ont.Prov.Ct.); *R. v. Ciccarelli* (1989), 54 C.C.C. (3d) 121 (Ont.Dist.Ct.).

have to show that the conduct was outside the norms applicable to that type of social occasion.¹³

The Crown will also be able to prove an assault even where the complainant consented (or where the Crown cannot disprove consent) where the law, for policy reasons, does not recognize the complainant's consent as a defence. The Supreme Court recognized this possibility in *Jobidon*,¹⁴ holding that the accused had committed an assault when he caused and intended to cause serious bodily harm in the course of a consensual fist fight.¹⁵ More generally, *Jobidon* should be understood as refusing to recognize consent to bodily harm that is intentionally inflicted in the context of a socially valueless activity.¹⁶ In a sense, the *Jobidon* doctrine is the mirror image of the doctrine of deemed consent: in the former, an actual consent is disregarded because of the social uselessness and harmfulness of the activity in which it occurs, while in the latter, an actual non-consent to a particular application of force is disregarded because of the complainant's willing participation in an activity that is socially valued.

4. *Defences to assault*

In this paper I use the word "defence" in its broad sense to refer to any set of facts that will result in an acquittal. Defences in this sense include facts that negate an element of the offence (e.g., the Crown's failure to prove the fault element), facts that justify conduct that would otherwise be criminal (e.g., self-defence), and facts that excuse criminal conduct (e.g., duress).¹⁷ So if the Crown cannot prove one of the elements of assault, then the accused has a defence in this broad sense; for example, if the Crown fails to prove the element of non-consent, the accused is entitled to the benefit of the "defence" of consent. But the offence of assault, like all other offences in the *Criminal Code*, is also subject to the defences of general application, that is, those offences that are available even where

13. See e.g. *R. v. Bennett*, [2006] N.J. No. 244 at para. 47 (Prov.Ct.).

14. *R. v. Jobidon* (1991), 66 C.C.C. (3d) 454 (S.C.C.) [*Jobidon*].

15. The accused was charged with unlawful act manslaughter. The victim had died from the injuries he suffered during the consensual fistfight. The theory of the defence, accepted by the trial judge, was that because of the victim's consent, the accused had committed no unlawful act and was thus not criminally responsible for the death. The Court of Appeal and the Supreme Court of Canada both held that the victim's consent to the fistfight would not be recognized by the law of assault; thus, the accused had assaulted the victim and was guilty as charged.

16. This interpretation is based on the reasons offered by the majority for refusing to recognize the consent in *Jobidon* itself, *supra* note 14 at 491-5. For further discussion of the interpretation and application of *Jobidon*, see Stewart, *supra* note 8 at 3:300.40.

17. Compare the discussion of excuses and justifications in *R. v. Perka*, [1984] 2 S.C.R. 232 [*Perka*].

the Crown has proved all the elements of the offence: self-defence, duress, necessity, and so forth.

If the word “defence” is used in this broad sense, the question posed at the outset of the paper can be restated as follows: what defences, if any, are available to a parent, teacher, or other caregiver who touches a child, without the child’s consent, and under what circumstances? This question is addressed in the next part of the paper.

II. *Applications of force to children*

1. *Some hypothetical cases*

It is difficult to find reported cases of non-sexual assaults on children that test the border-line between consent and non-consent, or (except for cases involving s. 43) the border-line between proper and improper touching of a child by a parent or teacher. Many prosecutions for assaults on children involve physical injuries that are obviously outside the scope of any consent, actual or implied, that a child might be able to give; indeed, some of them involve injuries to which even an adult might not be able to consent, because of their seriousness.¹⁸ So, to test our intuitions about the application of the possible defences to assault, courts and commentators have used a number of reasonable hypotheticals in which it is plausibly asserted that (i) a parent or teacher has intentionally and non-consensually touched a child, and so has apparently assaulted the child, but (ii) the parent or teacher should not be found guilty of a criminal offence because the touching was for a proper purpose and was proportionate to that purpose. The following five hypothetical cases are meant to fall into this category.

Case #1. A mother is walking along the sidewalk with her two-year-old son. The child tries to step into the street, where he would be struck by an oncoming vehicle. The mother physically restrains the child from stepping into the street.¹⁹

Case #2. A father has taken his five-year-old daughter to see a physician for a routine immunization. The child is very reluctant to receive the needle. The father physically restrains his daughter while the physician injects the vaccine into the child’s arm.²⁰

18. Compare the discussion of *Jobidon*, *supra* notes 14-16 and accompanying text.

19. Compare *Canadian Foundation*, *supra* note 2 at para. 199 *per* Arbour J. dissenting.

20. Compare *ibid.*

Case #3. A grandmother is shopping with her four-year-old grandson in a toy store. The child asks her to buy him a particular videogame. The grandmother, knowing that the child's parents have made a considered decision that the child should not play that game, refuses. The child then embarks on a full-blown temper tantrum: screaming, shouting, crying, and rolling on the floor. The grandmother picks up the child and carries him out of the store.²¹

Case #4. A secondary school has a rule prohibiting students from using cell phones. Students are permitted to have cell phones in their possession, but the phones must be turned off during school hours. If a cell phone rings or if a student uses a cell phone to make a call, the principal has authorized teachers to confiscate the cell phone until the end of the school day. During her first class of the day, a fourteen-year-old student takes out her cell phone and begins to make a phone call. Her teacher asks her to turn the phone off and hand it over. The student refuses and holds the phone held tightly in her hand. The teacher wrests the phone from the student's hand.²²

Case #5. The parents of a six-year-old boy have decided to use "time-outs" as a form of discipline. If the child misbehaves, he will be required to go to his room for a set period of time. One afternoon, on arriving home from school, the child hits his four-year-old brother and takes a toy away from him. His parents decide to send him to his room for a fifteen-minute time out. The child refuses to go. The father picks up the child and carries him to his room.²³

Before I consider the possible defences available to the parent or other caregiver in these hypothetical cases, three preliminary points are in order.

First, in all five of these cases, the use of force by the parent or other caregiver is applied for a proper purpose and is not excessive, and should therefore not be subject to criminal sanction. In all cases, the force is for the purpose of care, protection, or the enforcement of rules. In none of the cases does the parent or other caregiver intend to injure the child, nor is any injury caused. Most Canadian legislators, judges, lawyers, and police officers, not to mention parents and teachers, would regard these uses of force as appropriate and proportionate methods of carrying out the adult's

21. Compare *Debates of the Senate*, No. 144 (4 March 2008) at 899 (Hon. Ethel Cochrane).

22. Compare *Canadian Foundation*, *supra* note 2 at para. 40 *per* McLachlin C.J.C.

23. Compare *ibid.* at para. 62 *per* McLachlin C.J.C.

duties in respect of the child in these situations, and therefore as justifiable. In some of these cases, it may be possible to imagine more effective ways of dealing with the child's behaviour, but the means actually chosen in each of these cases should not be criminally punishable.

Second, in at least four of these cases (#2, #3, #4, and #5), if the complainant was an adult, the use of force would amount to an assault.²⁴ So if the parents and teachers in these examples are entitled to a defence, it must derive in some way from their status as the child's caregiver.

Third, it has been suggested that the exercise of prosecutorial discretion will protect parents and teachers from prosecution in these hypothetical cases.²⁵ This view has usually been expressed in support of the contention that s. 43 of the *Code* should be repealed outright, without being replaced by a new statutory defence. There is no question that the proper exercise of prosecutorial discretion is essential to the operation of our criminal justice system, and few Canadian police officers or prosecutors would think it was appropriate to lay or to proceed with a charge in any of the hypothetical cases I have outlined. But prosecutorial discretion, like any other discretion exercised by a public official, needs to be structured by principle, and as the law stands, it is not clear what the relevant principles are in these situations. So, in the interest of certainty and the rule of law, it would be better to express the principles that structure the exercise of prosecutorial discretion as elements of a defence. Otherwise, the law of assault as it pertains to children would be grossly over-broad. Over-broad laws invite selective enforcement and overcharging, which creates uncertainty and shifts decision-making about criminal liability from courts to police officers and prosecutors.²⁶ Moreover, if prosecutorial discretion is for some reason improperly exercised, an accused person has very few remedies because it is very doubtful whether a trial judge has any jurisdiction to interfere with the prosecutor's decisions about which cases

24. One could imagine additional facts that would give someone the authority to use the force applied even to an adult. In case #4, for example, a security guard might well have the authority to remove an adult shopper who is throwing a temper tantrum from a store. But the adult's grandmother would not. Case #1 might be an instance of necessity whether the complainant was an adult or a child.

25. This possibility is most extensively explored by Mark Carter, "Corporal Punishment and Prosecutorial Discretion in Canada" (2004) 12 *Int'l J. Children's Rights* 41. See also Joan E. Durrant, "Corporal Punishment: A Violation of the Rights of the Child" in R. Brian Howe & Katherine Covell, eds., *A Question of Commitment: Children's Rights in Canada* (Waterloo: Wilfrid Laurier University Press, 2007) 99 at 112; Sharon D. Greene, "The Unconstitutionality of Section 43 of the Criminal Code: Children's Right to be Protected from Physical Assault, Part 2" (1999) 41 *C.L.Q.* 462 at 482; Sheila Noonan, "Annotation" (1984) 41 *C.R.* (3d) 297 at 299; Stuart, *supra* note 4 at 530.

26. Compare Douglas Husak, *Overcriminalization* (New York: Oxford University Press, 2008) at c. 1.

to pursue.²⁷ For this reason, the Supreme Court of Canada has often held that the existence of prosecutorial discretion is not a reason to uphold a law that is constitutionally defective;²⁸ even where the constitutionality of a law is not in issue, a clear delineation of the scope of criminal liability is preferable to reliance on prosecutorial discretion.²⁹

2. Section 43 of the Criminal Code

The defence of “reasonable force by way of correction” codified in s. 43 of the *Criminal Code* may appear, on the face of the law, to be the only defence currently available for the non-consensual application of force to a child; it is certainly the only section of the *Code* that speaks explicitly to this situation. If a parent, teacher, or person standing in the place of a parent uses reasonable force “by way of correction toward a pupil or child ... who is under his care,” s. 43 states that the use of force is “justified” and so not an offence. As noted above, the availability of this defence remains controversial, and there is little doubt that it will be the subject of future Parliamentary debate.

In *Canadian Foundation*, the Supreme Court of Canada considered several Charter challenges to s. 43. The majority, *per* McLachlin C.J.C., interpreted the phrase “force [that] does not exceed what is reasonable under the circumstances” quite narrowly and specifically:

Generally, s. 43 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 s. 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.³⁰

27. On the limits of judicial review of prosecutorial decisions, see Kent Roach, “The Attorney General and the Charter of Rights Revisited” (2000) 50 U.T.L.J. 1. For a corporal punishment case where a court stayed proceedings for what it saw as a misuse of prosecutorial discretion, see *R. v. K. (M.)* (1992), 74 C.C.C. (3d) 108 (Man.C.A.). In this case, the influence of the judge’s personal views about corporal punishment was so substantial that few advocates of repealing s. 43 would agree with the decision to stay the proceedings.

28. See, e.g., *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 906 at 924 *per* Wilson J.

29. Compare *Canadian Foundation*, *supra* note 2 at para. 63 *per* McLachlin C.J.C.

30. *Canadian Foundation*, *supra* note 2 at para. 40.

With this narrow interpretation in hand, the majority held that s. 43 was not unconstitutionally vague, was not overbroad, did not offend a child's right against cruel and unusual punishment under s. 12 of the Charter, and did not offend children's equality rights under s. 15 of the Charter. The majority also rejected the argument that the "best interests of the child" was a principle of fundamental justice under s. 7 of the Charter, at least in the criminal law context, and therefore did not have to decide whether retaining the s. 43 defence was in the best interests of children.³¹

The decision in *Canadian Foundation* has been severely criticized on numerous grounds, in particular, the quality of the constitutional analysis, the court's quasi-legislative reinterpretation of s. 43, and the court's failure to accept the claim that corporal punishment is never good for children.³² Moreover, it has been argued that the retention of s. 43 is inconsistent with Canada's international obligations.³³ While I am sympathetic to these criticisms, the object of this paper is not to analyze *Canadian Foundation* any further, but to consider the more general problem of non-consensual touching of children. Indeed, the hypothetical cases presented above show that the retention or repeal of s. 43 does not answer the question posed in this paper either way. In cases #1 and #2, s. 43 would not be applicable, as

31. Binnie J., dissenting in part, would have held that s. 43 offended s. 15, but would have upheld the s. 15 violation in the case of parents; Deschamps J. would have struck the section down on s. 15 grounds; and Arbour J. would have struck the section down on s. 7 grounds.

32. See Stuart, *supra* note 4 at 529-30; Katie Sykes, "Bambi Meets Godzilla: Children's and Parents' Rights in *Canadian Foundation for Children, Youth and the Law v. Canada*" (2006) 51 McGill L.J. 131; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee" in S. Rodgers & S. McIntyre, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2006) 71 at 84-8; Anne McGillivray & Joan E. Durrant, "Child Corporal Punishment: Violence, Law, and Rights" in Ramona Maggia & Cathy Vine, eds., *Cruel but not unusual: Violence in Canadian families* (Waterloo: Wilfrid Laurier University Press, 2006) 117 [McGillivray & Durrant]; Marianne Hardy-Dussault, "Un facteur contextuel sous influence ou les pièges de la pertinence : *Canadian Foundation for Children, Youth and the Law*" (2005-06) 36 R.D.U.S. 327; Judith Mossoff & Isabel Grant, "Upholding Corporal Punishment: For Whose Benefit?" (2005) 31 Man.L.J. 177; Sanjeev Anand, "Reasonable Chastisement: A Critique of the Supreme Court's Decision in the 'Spanking' Case" (2004) 41 Alta.L.Rev. 871 [Anand]; Mark Carter, "The Constitutional Validity of the Corporal Punishment Defence in Canada: A Critical Analysis of *Canadian Foundation for Children, Youth and the Law versus Canada (Attorney General)*" (2005) 12 Int'l Rev. of Victimology 189; Janine Benedet, "Hierarchies of Harm in Canadian Criminal Law: The Marijuana Trilogy and the Forcible 'Correction' of Children" (2004) 24 S.C.L.R. (2d) 217; Cheryl Milne, "The Limits of Children's Rights under Section 7 of the Charter: Life, No Liberty and Minimal Security of the Person" (2004) 17 N.J.C.L. 199.

33. Canada, Senate, Standing Committee on Human Rights, "Children: The Silenced Citizens: Effective Implementation of Canada's International Obligations with Respect to the Rights of Children" in *Sessional Papers*, No. 1/39-7805 (2007); McGillivray & Durrant, *ibid.*

the force applied to the child in these cases is not “by way of correction”³⁴ but for the child’s health or protection. Section 43 might apply to justify the grandmother, teacher, or parents in the remaining cases, but they are far from the sort of corporal punishment that is usually associated with s. 43. So the question posed in this paper will remain whether or not s. 43 is repealed: what doctrine of Canadian law gives parents (and other caregivers) the right to touch children without the children’s consent?

3. Common law defences

Section 8(3) of the *Criminal Code* provides that every common law defence “continues in force and applies ... except in so far as [it is] altered by or [is] inconsistent with” the *Code* or other federal statutes. Moreover, while all criminal offences (except contempt of court) are now codified in the *Criminal Code* and other federal statutes, the interpretation of the offence definitions are often influenced by the common law background. By both of these routes, criminal law defences continue to exist at common law and to be developed by Canadian courts. Defences that have been recognized under s. 8(3) include necessity, duress,³⁵ entrapment,³⁶ and officially induced error.³⁷ These defences are excuses; but a new common law justification might also be recognized under s. 8(3). A defence that operates by negating an element of the offence can also be recognized, either by interpreting the elements of the offence in light of the common law or through s. 8(3).³⁸

The three common law defences that I consider here are the defence of necessity, the defence of *de minimis non curat lex*, and the defence of deemed consent.

34. This point has often been made; see, for example, *Canadian Foundation*, *supra* note 2 at para. 199 *per* Arbour J. dissenting; *Debates of the Senate*, No. 144 (14 November 2007) at 213 (Hon. Céline Hervieux-Payette) (noting that forcing an unwilling child into a seatbelt is not a form of punishment but compliance with a legal obligation). To be “by way of correction,” the force must be applied “for educative or corrective purposes,” that is, be “designed to restrain, control or express some symbolic disapproval of [the child’s] behaviour”: *Canadian Foundation*, *supra* note 2 at para. 24. The use of force motivated by anger or frustration with a child’s behaviour is not justified by s. 43: *R. v. Sinclair* (2008), 229 C.C.C. (3d) 485 (Man.C.A.).

35. *Criminal Code*, *supra* note 1 at s. 17, provides a limited defence of duress, but the common law defence is available to certain parties to offences (*Paquette v. The Queen*, [1977] 2 S.C.R. 189) and where the application of s. 17 would be unconstitutional (*R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687).

36. *R. v. Mack*, [1988] 2 S.C.R. 903.

37. *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, 2006 SCC 12, [2006] 1 S.C.R. 420.

38. See, for instance, *Jobidon*, *supra* note 14, where Gonthier J. used both of these strategies to incorporate common law policy limits on consent that would otherwise negate an assault.

a. *The defence of necessity*

The Supreme Court has recognized, at common law, an excuse of necessity in cases where the accused commits an offence in response to an extremely urgent situation. Most recently, in *Latimer*, the court restated the defence as follows:

... three elements ... must be present for the defence of necessity. First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided.³⁹

The first requirement is very stringent. A situation of imminent peril or danger means that “disaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur.”⁴⁰ Or, as stated in *Perka*:

At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable ...⁴¹

The second requirement is that there was no reasonable alternative to breaking the law. “If an alternative to breaking the law exists, the defence of necessity on this aspect fails.”⁴² The third requirement is that “[t]he harm inflicted must not be disproportionate to the harm the accused sought to avoid.”⁴³ All three requirements must be present for the defence to succeed.⁴⁴

The defence of necessity is so stringent that it would fail in the vast majority of cases where touching a child was a justifiable response to the situation facing the parent or other caregiver. The first element of the defence would normally be lacking because most uses of force against

39. *R. v. Latimer*, [2001] 1 S.C.R. 3, at para. 28. The defence was held to have no air of reality on the facts of the case. The court had previously recognized the defence, in principle, in *R. v. Morgentaler*, [1976] 1 S.C.R. 616, and in *Perka*, *supra* note 17, though in neither case was it decided whether the accused was entitled to the defence on the facts.

40. *Ibid.* at para. 29.

41. *Perka*, *supra* note 17 at 251.

42. *Latimer*, *supra* note 39 at para. 30.

43. *Ibid.* at para. 31.

44. As with any other defence, the accused must show that the defence has an “air of reality”; if this evidentiary burden is satisfied, to obtain a conviction, the Crown must disprove the defence. But where the defence has several elements, the defence will fail if the Crown disproves at least one of the elements beyond a reasonable doubt.

a child are not responses to emergency situations.⁴⁵ Indeed, the defence of necessity would be available in only the first of the five hypothetical situations outlined above. In Case #1, the parent's use of force to prevent the child from stepping into traffic would be a response to an imminent peril; there would be no legal alternative; and the minor force used would obviously be proportional to the harm avoided. But the remaining cases would all fail to satisfy the first requirement: none of them exhibits the imminent disaster or unavoidable harm that must be present for the defence of necessity to apply. Consider Case #2. It is undoubtedly important for the child to receive the immunization, both for her own sake and for the sake of public health in general. But if she does not, neither she nor anyone else will be in imminent peril; disaster will not strike if she is not vaccinated that day. Or consider Case #4. It is very important for a teacher to have the power to enforce the school's rules in her classroom. But a student's threatened use of a cell phone, even in blatant defiance of the school's rules, hardly amounts to imminent disaster. To put the point another way, the fact that a person is trying to achieve something important is insufficient to trigger the application of the defence of necessity.

So the defence of necessity would provide no protection to parents and other caregivers in the vast majority of situations where, for a proper purpose (as defined above), they need to touch or otherwise apply force to children under their care.

b. *The defence of de minimis*

The common law defence of *de minimis non curat lex* is meant to excuse trivial infractions of the law. The defence is often traced to *The "Reward."*⁴⁶ After commenting that it was not the court's function to correct "unwise" legislation but to "administer the law as it stands," the court continued:

The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*.—Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the

45. *Palombi*, *supra* note 5 at para. 29. Compare *R. v. B.W.S.*, [2006] S.J. No. 532 (Prov.Ct.). The accused was charged with assault with a weapon after he struck his thirteen-year-old autistic step-son with a belt; this conduct was a reaction to the complainant's repeated efforts to run away from home. The trial judge rejected the defence of necessity because "the use of the belt on the complainant ... was excessive and unnecessary" (para. 44). But the defence could also have been rejected on the ground that the first element was lacking: while preventing the complainant from running away might have been a response to an imminent emergency, punishing him after his return was not.

46. *The "Reward"* (1818), 2 Dods. 265, 165 E.R. 1482 (Eng. Adm. Ct.).

public interest, it might properly be overlooked.⁴⁷

The defence was, however, rejected on the facts of the case.⁴⁸

The *de minimis* defence does not negate an element of the offence or justify the conduct; rather, it is applied where the prosecution can prove all the elements of the offence but the offence is, in the circumstances, so trifling that in the court's judgment criminal liability should not be imposed. "The defence of *de minimis* does not mean that the act is justified; it remains unlawful, but on account of its triviality it goes unpunished."⁴⁹ It may serve as a check on a failure of prosecutorial discretion and as a way of avoiding the trivialization of the criminal sanction.

There are three problems with reliance on the *de minimis* defence as a solution to the problem of a parent or caregiver's touching of a child. First, it is not clear whether Canadian criminal law recognizes the defence of *de minimis* at all. Second, even if it is a defence in general, it may not be available on a charge of assault. Third, and most significantly, even if the *de minimis* defence is available on a charge of assault, it would not apply to many cases of the use of force towards a child for a proper purpose. I outline each of these problems in turn.

The *Criminal Code* does not provide a defence of *de minimis*, and the case law presents a mixed picture as to whether the defence exists at common law. There is indeed some support for the existence of the *de minimis* defence in certain alcohol, drug, and theft cases,⁵⁰ as well as in academic commentary.⁵¹ But some of the cases cited in support of the

47. *Ibid.* at 1484. This passage is frequently quoted; see, e.g., *Canadian Foundation*, *supra* note 2 at para. 202.

48. The court upheld the forfeiture of several tons of wood that had been illegally exported from Jamaica to the United States.

49. *Canadian Foundation*, *supra* note 2 at para. 203; compare *R. v. Daniels*, [2001] S.J. No. 503 at para. 21 (Prov.Ct.), where the defence was rejected on the facts of the case.

50. *R. v. Overvold* (1972), 9 C.C.C. (2d) 517 at 419-21 (N.W.T. Mag. Ct.) (*de minimis* defence applied to trace amount of hashish not shown to be remnant of a larger amount previously in accused's possession) [*Overvold*]; *R. v. S.* (1974), 17 C.C.C. (2d) 181 at 186 (Man. Prov. Ct.) (*de minimis* maxim applied where amount of marijuana in question was too small to use); *R. v. Marusiak*, [2002] A.J. No. 1048 (Q.B.) (QL) (accused acquitted of possession of trace amount of crack cocaine on basis of *de minimis* doctrine) [*Marusiak*]; *R. v. Appleby* (1990), 78 C.R. (3d) 282 (Ont.Prov.Ct.) (high-profile theft charges stayed on basis of *de minimis* maxim).

51. See e.g. Stuart, *supra* note 4 at 624-29; Jean Hétu, "Droit judiciaire: De minimis non curat praetor: une maxime qui a toute son importance!" (1990) 50 R. du B. 1065.

defence in fact reach an acquittal by other routes.⁵² And some courts have held that the defence does not apply to certain offences,⁵³ or does not exist at all.⁵⁴

If there is a *de minimis* defence to some offences, there is further doubt as to whether it applies to the offence of assault. As noted in Part I.2 above, there is no threshold level of force required to constitute an assault: the slightest intentional, non-consensual touching is an assault. The rationale for this broad definition of assault is that even the slightest non-consensual touching interferes with the personal dignity and autonomy of the complainant:

Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no

52. See *R. v. McBurney* (1975), 24 C.C.C. (2d) 44 (B.C.C.A.), aff'd 15 C.C.C. (2d) 361 (B.C.S.C.). The accused was acquitted of possession of a "minute trace" of cannabis resin on ground that a "minute trace is evidence of earlier possession [but] does not establish present possession"; the court found that it was "not necessary to invoke the maxim *de minimis non curat lex*"; *ibid.* at 46. Note also the same court's subsequent decision in *R. v. Brett* (1986), 41 C.C.C. (3d) 190 (B.C.C.A.) (see note 53 *infra*) [Brett]. Some cases cited on point are probably *obiter dicta*: *R. v. Peleshaty* (1949), 96 C.C.C. 147 (Man.C.A.) (accused acquitted of unlawful possession of 10 drops of liquor because the Crown had not proved *mens rea*; in the alternative, *de minimis* maxim applicable); *Overold*, *supra* note 50 (even if *de minimis* maxim not applicable, Crown had failed to prove *mens rea*); *Marusiak*, *supra* note 50 (trial judge erred in convicting accused after accepting his testimony that he was not aware of the trace amount of cocaine).

53. In *R. v. Battie* (1985), 26 C.C.C. (3d) 49 (B.C.Co. Ct.) and *R. v. Keizer* (1990), 59 C.C.C. (3d) 440 (N.S.S.C.) it was held that the defence of *de minimis* was inapplicable to offence of possession of narcotics. This result is consistent with *Brett*, *supra* note 52, where it was held that to prove possession of a narcotic, the Crown was not required to prove that the amount possessed was usable. These holdings are in various respects contrary to the cases cited in note 50 above. In *R. v. Carson* (2004), 185 C.C.C. (3d) 541 at para. 25 (Ont.C.A.), the court implied that the *de minimis* defence was not applicable to allegations of domestic violence. See also *R. v. A.S.B.*, [2006] B.C.J. No. 3447 at para. 18 (Prov.Ct.); *R. v. Downey*, [2002] N.S.J. No. 442 at paras. 35-38 (S.C.); *R. v. Stewart*, [1996] O.J. No. 2704 (Prov.Div.). But other courts have refused to exclude the *de minimis* defence in cases of alleged domestic assault: see *R. v. McLeod*, [2006] A.J. No. 644 (Prov.Ct.) (*de minimis* defence applied in the alternative, to an allegation of domestic assault); *R. v. Peniston*, [2003] N.S.J. No. 29 at para. 31 (Prov. Ct.) (touching was consensual or, in the alternative, *de minimis*).

54. *R. v. Li* (1984), 16 C.C.C. (3d) 382 at 384 (Ont. H.C.); *R. v. Juliano*, [2002] O.J. No. 699 at para. 24 (S.C.); *R. v. D.K.*, [2004] O.J. No. 4676 at para. 14 (C.J. *R. v. Hinchey*, [1996] 3 S.C.R. 1128 at para. 69 [Hinchey]. Here, L'Heureux-Dubé J. briefly considered the defence, but limited herself to noting that "this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below." Since the principle would not be applicable to the facts of the case, she preferred "to leave the issue for another day."

other having a right to meddle with it, in any the slightest manner”: see Blackstone’s *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.⁵⁵

Recognizing a defence of *de minimis* would arguably be inconsistent with this rationale for the offence of assault. If the purpose of the law of assault is to protect “human dignity and autonomy” by deterring and punishing non-consensual applications of force, then the degree of force applied should be irrelevant.

Notwithstanding this line of reasoning, some courts have recognized a *de minimis* defence to assault. These cases tend to involve angry, sometimes politicized, confrontations between adult men;⁵⁶ underlying the reasoning in these cases there may be an unspoken assumption that grown men should be able to tolerate a degree of minor pushing and shoving. More importantly, while a majority of the Supreme Court has never recognized the *de minimis* defence,⁵⁷ two judges of that court have recognized it as a possible defence to assault. In *Cuerrier*,⁵⁸ the Supreme Court considered a case of aggravated assault based on the allegation that the accused had had unprotected sex with two women without disclosing that he was HIV-positive. The theory of the Crown was that his failure

55. *Ewanchuk*, *supra* note 8 at para. 28 *per* Iacobucci J. *Ewanchuk* was a case of sexual assault, but these comments are applicable to all forms of assault.

56. See, for instance, *R. v. Kormos* (1998), 14 C.R. (5th) 312 (Ont.Prov.Div.) [*Kormos*]. The accused was a member of the provincial legislature who was involved in a confrontation with a security guard at a government office and was charged with assault. The trial judge, after a careful review of the evidence, found that that “[t]he evidence, at its highest, shows an insignificant amount of physical contact by Mr. Kormos”, and that if it was criminal conduct, was excused as *de minimis*. See also *R. v. LePage* (1989), 74 C.R. (3d) 368 at 375 (Sask.Q.B.): during a dispute about the storage of Christmas trees, the accused brushed or pushed past a fire inspector. He was convicted at trial, but the summary conviction appeal judge allowed the accused’s appeal, holding that the intention to apply force had not been proved and that the force applied was “trifling”. See also *R. v. Freedman*, [2006] Q.J. No. 1248 (C.Q.) at para. 36, *aff’d* [2006] J.Q. No. 12166 (C.S.), where the accused was charged with two offences arising out of a confrontation between the accused and a police officer who ticketed the accused’s vehicle. The trial judge rejected the officer’s evidence in respect of one charge; with respect to the other, the trial judge found a minor, non-consensual touching, but applied the *de minimis* maxim and acquitted the accused. The Crown’s appeal was dismissed. But see *R. v. Kubassek* (2004), 188 C.C.C. (3d) 307 (Ont.C.A.). The accused assaulted a minister during a protest against a same-sex marriage. The trial judge acquitted on the ground that the assault was *de minimis*. The Crown’s appeal was dismissed, but a further appeal to the Court of Appeal was allowed. The court found it unnecessary to decide whether the *de minimis* principle was a defence because the court held that the assault, on the facts found by the trial judge, was not *de minimis*.

57. Compare *R. v. Persaud*, [2007] O.J. No. 1752 at para. 48 (S.C.J.), Anand, *supra* note 32. Since the court has probably never had a set of facts that would call for the application of the defence, it would be a mistake to read too much into the court’s failure to identify it as a defence that is preserved under s. 8(3).

58. *Cuerrier*, *supra* note 11.

to disclose his HIV status amounted to fraud negating consent under s. 265(3)(c) of the *Criminal Code*. While the entire court agreed that the facts alleged by the Crown in that case would, if proved, establish the accused's guilt,⁵⁹ there was sharp disagreement about the proper test for fraud in this context. L'Heureux-Dubé J., speaking for herself, proposed a very broad test, according to which any dishonesty that induced any touching would undermine consent. Her colleagues objected that this test would criminalize innumerable minor social interactions. She replied to this objection in a number of ways, one of which was to invoke the *de minimis* maxim: she argued that if the Crown were "foolish enough to prosecute a case of assault by handshake or social buss," the *de minimis* maxim might well be applicable.⁶⁰ In *Canadian Foundation*, Arbour J. responded in a somewhat similar way to those who suggested that the invalidation of s. 43 would lead to a flood of absurd charges against parents. She commented that in the absence of s. 43, the *de minimis* principle "will suffice to ensure that parents and teachers are not branded as criminals for their trivial use of force to restrain children when appropriate."⁶¹ After reviewing the Canadian case law concerning the defence, she said:

I am of the view 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 *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 s. 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.⁶²

These statements by L'Heureux-Dubé J. and Arbour J. represent the strongest endorsement, so far, of the defence of *de minimis non curat lex* in Canadian criminal law.

59. The accused was alleged to have had unprotected sex with two women without disclosing that he was HIV-positive. He was charged with aggravated assault, on the theory that his failure to disclose was fraud vitiating consent within the meaning of s. 265(3)(c), and that the unprotected sex endangered the complainants' lives.

60. *Cuerrier*, *supra* note 11 at para. 21. L'Heureux-Dubé J.'s reliance on the *de minimis* defence is especially striking because of her previously expressed hesitation to endorse it: *Hinchey*, *supra* note 54 at para. 69.

61. *Canadian Foundation*, *supra* note 2 at para. 132.

62. *Ibid.* at para. 207.

But even if the defence is eventually recognized by a majority of the court and is applied to assaults, it would not apply to most of the hypothetical cases given above because the degree of force used in each is well beyond the trifling. In cases where the *de minimis* defence has been applied to what would otherwise be an assault, the accused's contact with the complainant was quite trivial: a minor push or touching in the context of an argument,⁶³ light touches on the arm and chest of the complainant.⁶⁴ Contrast these minor touchings with the degree of force used in the hypotheticals. In Case #2, the father restrains the child while a physician injects her with a vaccine. Neither the restraint nor the injection could plausibly be described as *de minimis*. In Cases #3 through #5, a significant degree of force might well be required to remove the child from the store, to take the cell phone from the student's hand, or to keep the child in his room. To see that these uses of force are not *de minimis*, imagine that in these cases that the person restrained is an adult. It would be quite implausible to describe the degree of force required to make an adult submit to a nonconsensual injection or to restrain an adult in a room as trifling.

Moreover, the *de minimis* defence is an excuse; that is, the accused's act remains wrongful but is not punished. In all of the hypothetical cases above, the parent or caregiver's conduct is, in the circumstances, the right thing to do. So even if the conduct could somehow be characterized as trifling, excusing it through the defence of *de minimis* would send the wrong message: it would say that the parent or other caregiver had done something wrong, not that he or she had used force that was permissible and proportionate. Indeed, in some cases, the force used would be required by other legal rules; for example, in Case #1, the mother's duty to care for her child would demand, rather than prohibit, her use of force to prevent the child from running into traffic.

The defence *de minimis non curat lex*, assuming it exists in Canadian law and applies to the offence of assault, would provide insufficient protection to parents, teachers, and other caregivers in many situations where they need to touch or otherwise apply force to the children under their care.

c. *The defence of deemed consent*

The nature of the defence

A child is a person, but he or she is a person who is in the course of physical and psychological development and so is dependent on adults for

63. See the cases cited in note 56 *supra*.

64. *Kormos*, *supra* note 56.

food, shelter, protection, and education (among other goods and services). The child's parents are primarily responsible for providing the child with these goods and, more generally, for preparing them to become adults. Consequently, parents have quite stringent legal obligations to care for their children. These obligations existed at common law and today are imposed by statute.⁶⁵ The rights that parents have over their children, vis-à-vis other adults, the state, and the children themselves, flow only partly from the parents' interest in having a relationship from their children; much more importantly, they flow from the parents' need to have these rights to carry out their duties to the children. As Kant put it, parents "have brought a person into the world without his consent and on [their] own initiative, for which deed the parents incur an obligation to make the child content with his condition so far as they can."⁶⁶ The "right of parents to manage and develop the child, as long as he has not yet mastered the use of his members or of his understanding" derives from this duty; it is a right of the parents against other adults, but it is at the same time the parents' duty towards the child.⁶⁷ The right that parents have to raise and to care for their children is of a fiduciary nature: it is to be exercised primarily in the children's interest, not the parents'.⁶⁸

One of the necessary incidents of the parent's duty to the child is that the parent must be able to touch the child (apply force to the child) for the purposes of caring for the child, providing him or her with the necessities of life (including food, shelter, clothing, and medical care), and educating him or her. The parent must be able to touch the child for these purposes whether or not the child consents; that is, these touchings seem to meet the definition of assault. Yet it is quite implausible to argue that there is something wrong with these touchings or that they are all assaults that are

65. See, for example, *Criminal Code*, *supra* note 1 at s. 215; *Family Law Act*, R.S.O. 1990, c. F.3, s. 2.31; Art. 32 C.c.Q.

66. Immanuel Kant, *The Metaphysics of Morals*, trans. by Mary Gregor (Cambridge: Cambridge University Press, 1996) at 64.

67. *Ibid.* at 65, original emphasis.

68. The derivation of parental rights from the parent's duty to the child is at least as old as William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford: Clarendon Press, 1765) at 434, 440, though some of Blackstone's views about specific parental rights are archaic and unacceptable (as indeed were some of Kant's). For more modern discussions of the relationship between parental rights and parental duties, see Bernard Dickens, "The Modern Function and Limits of Parental Rights" (1981) 97 Law Q. Rev. 462 at 464, 471; Andrew Bainham, *Children: The Modern Law*, 2d ed. (Bristol: Family Law, 1998) at 78-104; David Archard, *Children: Rights and the Law*, 2d ed. (London: Routledge, 2004) at 149-52; *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at paras. 85-86 *per* La Forest J.; *Winnipeg Child and Family Services v. W.(K.L.)*, [2000] 2 S.C.R. 519 at paras. 72-3 *per* L'Heureux-Dubé J. For statutory statements of the "best interests of the child" principle, see, among others, *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 20(2); Art. 33 C.c.Q.

not prosecuted because of prosecutorial discretion. Thus, to recognize the parent's need to touch a child in carrying out his or her parental duties, the common law recognizes a defence of deemed (or implied) consent to parental applications of force that are done for a proper purpose.

The common law defence of deemed consent

The common law defence of deemed consent is rarely seen in the case law because parents are, in practice, rarely if ever prosecuted in situations where the defence would apply. Nonetheless, the defence has been raised and recognized in a number of recent cases, although there do not appear to be any cases where the defence has, on the facts, exonerated a parent or other caregiver.

The leading Canadian case concerning the defence of deemed consent is *E.(A.)*.⁶⁹ The accused father had injured his two-month-old daughter and was charged with assault causing bodily harm. The accused testified that he caused the injuries inadvertently while caring for his child. The trial judge rejected his evidence, found that the accused had assaulted the child without any justification or excuse whatsoever, and convicted him. In light of the trial judge's factual findings, the Ontario Court of Appeal dismissed the accused's appeal from conviction.⁷⁰ But the court, *per* Weiler J.A., also commented as follows on the defence of deemed or implied consent:

[T]he common law recognizes the right of a parent to apply force in a reasonable manner for the benefit of the child ...⁷¹

* * *

On the one hand, the law must protect children and those who are defenceless from unwarranted bodily interference; on the other hand, persons engaged in looking after a child must be protected from state interference when acting in the best interests of the child. Accordingly ... it 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' ...⁷²

* * *

The deemed consent of a child to the intentional application of force by a parent is limited at common law to the customary norms of parenting or what a reasonable parent would do in similar circumstances. This is

69. *R. v. E.(A.)* (2000), 146 C.C.C. (3d) 449 (Ont.C.A.) [*E.(A.)*].

70. The decisions at trial and on appeal are quite unsurprising in light of the serious injuries, including multiple fractures of the leg bones and ribs, suffered by the child.

71. *E.(A.)*, *supra* note 69 at para. 26.

72. *Ibid.*

an objective standard. ... There appears to be general agreement that a parent has the right to apply force to a child when it is necessary to protect the child, to protect others (such as a younger sibling), and to teach a child social values and behavioural limits.⁷³

The court added that where the force used by a parent does not respect these limits, then “the deemed consent of the child is vitiated”⁷⁴ and the parent is guilty of assault.

Similarly, in *Palombi*,⁷⁵ the Ontario Court of Appeal explained the defence of deemed consent as arising from the parents’ duties towards their children:

Infants ... require care that will call for the intentional, although usually minor, application of force. In addition, parents have a statutory and common law duty to provide the necessities of life to children under their care. ... Again, the performance of this type of duty will require the use of force. It is awkward to attempt to excuse the use of force through the application of the rigorous standards of the necessity defence. The courts have instead developed the concept of deemed consent.

* * *

[D]eemed or implied consent in the case of infants must be strictly limited to conduct that is “consistent with the purpose and rationale underlying the policy basis for the consent.” That policy basis is the child’s incapacity to care for him or herself. It follows that only force necessary to care for the child can be justified.⁷⁶

The court added that “the force used must have been for the purpose of caring for the child”⁷⁷ and that “the force used must not be excessive.”⁷⁸ These limits are wholly consistent with the rationale of the defence, in that the defence provides a right to use force to be exercised in the discharge of a duty towards the child.⁷⁹

In light of *E.(A.)* and *Palombi*, the common law defence of a child’s deemed consent to the application of force by a parent or other caregiver

73. *Ibid.* at para. 40.

74. *Ibid.* at para. 41.

75. *Supra* note 5. The accused mother was convicted of aggravated assault and failing to provide the necessities of life to her son, who was about six weeks old at the time of the alleged offences. The Court of Appeal ordered a new trial on a ground that is not directly relevant here.

76. *Ibid.* at paras. 29-30.

77. *Ibid.* at paras. 30, 32.

78. *Ibid.* at para. 32.

79. For recent cases where the defence was rejected on the facts, see *R. v. Tom*, 2007 BCSC 1407, [2007] B.C.J. No. 2064 [*Tom*]; *R. v. D.P.*, [2004] N.J. No. 38 (Prov.Ct.). For an unusual combination of the defence of deemed consent and s. 43 of the *Code*, leading to an acquittal of a father charged with assaulting his teen-aged daughter, see *R. v. B.S.* (2008), 58 C.R. (6th) 126 [*B.S.*].

may be restated as follows. Parents and other caregivers (including teachers) are justified in applying reasonable force to children under their care for the purpose of carrying out their duties to the children, including providing the children with the necessities of life, caring for the children, providing the children with medical treatment and care, protecting the children from danger, enforcing the rules of the home or the school, preventing and responding to inappropriate behaviour by the children, and demonstrating appropriate limits on behaviour. The force used must not be excessive to the purpose; moreover, the defence of deemed consent does not justify the intentional infliction of harm, degrading treatment, or actions taken in anger. The justification for the use of force is assessed from the perspective of the reasonable parent in the circumstances.

The defence of deemed consent would, in my view, justify the parent's or caregiver's conduct in each of the five hypothetical cases provided above. In Case #1, the mother applies force for the purpose of protecting her son. In Case #2, the father applies force for the purpose of having his daughter receive necessary medical care. In Case #3, the grandmother carries her grandson out of the store to demonstrate that his temper tantrum is not an appropriate response to his disappointment. In Case #4, the teacher takes the phone from the student to enforce the reasonable rules of the school. In Case #5, the force is applied as part of a moderate disciplinary response to misbehaviour. In all five cases, the force used is within the norms of reasonable parenting, neither causes nor is intended to cause harm, and does not amount to corporal punishment.

Some problems with the defence of deemed consent

The common law defence of deemed consent does appear to provide a satisfactory defence to parents and other caregivers who touch a child, with or without the child's consent, for appropriate purposes related to their duty to care for and raise the child. If developed along the lines indicated by the Ontario Court of Appeal in *E.(A.)* and *Palombi*, the defence would provide a satisfactory answer to the question posed at the outset of this paper. But there are three potential problems with the defence. First, the Supreme Court has never recognized it under s. 8(3) of the *Code*. Second, in addition to justifiable uses of force, the defence of deemed consent may also be interpreted to include corporal punishment, in a way that would likely be contrary to the intention of the Supreme Court of Canada's reinterpretation of s. 43 and would certainly be contrary to the growing social consensus against corporal punishment. Third, the use of the word "consent" may introduce an element of artificiality into the defence, as the

child has no real choice about participating in the activity which gives rise to the defence. I consider these points in turn.

The Supreme Court of Canada has never had the opportunity to consider the defence of deemed consent. Moreover, none of the judges in *Canadian Foundation* mentions the defence. This omission is odd in light of the court's discussion of other possible defences; the existence of the defence would have been highly relevant on the issue of the effect of striking down s. 43. But the court's failure to mention the defence should not be taken as a holding that it does not exist at common law, particularly since the court was not dealing with a specific set of facts in which the defence might have been pleaded. Indeed, as far as I am aware, the court has never had such a case. Like any other common law defence recognized under s. 8(3), the defence of deemed consent would have to be pleaded at trial by an accused person, and the trial judge's decision to recognize or reject it would have to be appealed to the Supreme Court before that court could definitively recognize it. So the court's failure to recognize it in the past is no obstacle to recognizing it in the future.

As is apparent in hypothetical Case #5, the defence of deemed consent can justify the use of force "by way of correction." But how far can this use of force go? Does it include not just physical restraints for the purposes of imposing a relatively mild punishment such as a "time-out" but also corporal punishment? That was certainly Blackstone's view.⁸⁰ In other words, s. 43 was itself rooted in the common law idea of the child's deemed consent,⁸¹ so that the defence of deemed consent may apply to uses of disciplinary force that s. 43 does not, in light of *Canadian Foundation*, currently justify. Indeed, a superior court judge recently commented that "deemed consent may apply to the application of minor corrective force such as hitting [the complainant child] on the hand,"⁸² even though s. 43 was inapplicable because the complainant was less than two years of age.⁸³ This comment illustrates a danger associated with exclusive reliance on the defence of deemed consent: it may, depending on its judicial development, permit parents and other caregivers who are accused of striking children to successfully argue that corporal punishment is permitted at common law, beyond what is permitted under s. 43.

80. Blackstone, *supra* note 68 at 440-41.

81. Compare *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173 at 188; see also the reasoning in *B.S.*, *supra* note 79.

82. *Tom*, *supra* note 79 at para. 103. However, the accused's conduct went well beyond that, and the defence of deemed consent was rejected on the facts of the case.

83. This limit is a result of the restrictive interpretation of s. 43 adopted in *Canadian Foundation*, *supra* note 2 at para. 37.

Moreover, the word “consent” in the phrase “deemed consent” is somewhat artificial, in that the child does not actually consent to anything at any time in the course of conduct that leads up to the use of force by the parent. Indeed, very young children could not meaningfully be said to consent or to refuse consent to parental touching.⁸⁴ In this respect, the defence of deemed consent differs from the defence of implied consent (though the two phrases are sometimes taken to mean the same thing). The defence of implied consent applies because of the complainant’s willing participation in an activity, such as a hockey game or a social occasion; having decided to participate, he or she is then taken to have agreed to the applications of force that are normally part of that activity. But, by the same token, the complainant can withdraw the implied consent by withdrawing from the activity — he or she can leave the hockey game or exit the social occasion. Although the complainant does not actually consent to each individual application of force, he or she does actually consent to participation in the activity as a whole. The defence of deemed consent does not have this feature because the child has no choice about being a child and cannot withdraw from his or her relationship with the parent or other caregiver. The child did not ask to be born; the relationship itself is not consensual. So “deemed consent” may not be the most suitable phrase to describe the defence.

These considerations suggest that it might be desirable for Parliament to provide a statutory replacement for the defence of deemed consent, drawing on the same underlying idea but avoiding the phrase “deemed consent” itself. In the rest of this paper, I consider possible statutory versions of the defence.

Statutory defences of “parental control”

The idea of providing a statutory version of the defence of deemed consent has recently been taken up by the New Zealand Parliament and by the Senate of Canada. However, the defences enacted in New Zealand and proposed by the Senate are considerably narrower than the common law defence of deemed consent; indeed, they are so narrow that, by themselves, they do not provide satisfactory answers to the question of when a parent, teacher, or other caregiver can touch a child without the child’s consent.

In 2007, the New Zealand Parliament repealed s. 59 of the *Crimes Act 1961* (N.Z.), which was in essence identical to s. 43 of the Canadian

84. At this point, it should be recalled that the “age of consent” defined by s. 150.1 of the *Criminal Code* applies only to sexual offences, not to the offence of common assault.

Criminal Code, and replaced it with the following defence of “parental control”:⁸⁵

59 (1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of —

- (a) preventing or minimising harm to the child or another person;
or
- (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
- (c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
- (d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

(3) Subsection (2) prevails over subsection (1).

This statutory defence avoids reference to the concept of deemed or implied consent; instead, it focuses on the purpose and the degree of force, requiring that both the parent or other caregiver have a proper purpose for the use of force and that the force be “reasonable in the circumstances.” Moreover, s. 59(2) clearly eliminates the use of force by way of correction; even if such force might appear to fall under s. 59(1)(b) or (c), s. 59(3) subordinates s. 59(1) to s 59(2).

Bill S-209, as passed by the Senate of Canada, would have replaced s. 43 with a provision similar to New Zealand’s:

43. (1) Every schoolteacher, parent or person standing in the place of a parent is justified in using reasonable force other than corporal punishment toward a child who is under their care if the force is used only for the purpose of

- (a) preventing or minimizing harm to the child or another person;
- (b) preventing the child from engaging or continuing to engage in conduct that is of a criminal nature; or
- (c) preventing the child from engaging or continuing to engage

85. See *Crimes (Substituted Section 59) Amendment Act 2007*, (N.Z.), 2007/18, s. 5.

in excessively offensive or disruptive behaviour.

(2) In subsection (1), “reasonable force” means an application of force that is transitory and minimal in the circumstances.

The principal differences are the omission of the purpose of “performing ... normal daily tasks” found in para. 1(d) of the New Zealand statute and the specification of “reasonable” as “transitory and minimal in the circumstances.”⁸⁶

New Zealand’s s. 59 and the replacement for s. 43 proposed in Bill S-209 are improvements over s. 43 as it stands and are probably preferable to the combination of repealing s. 43 and relying on over the narrow and uncertain defences of necessity and *de minimis*. But these statutory versions of the defence of deemed consent would still provide insufficient protection to parents and other caregivers. To see this point, consider how the Senate’s version of the defence would play out in the hypothetical cases outlined in Part II.1 above. The defence would apply to hypothetical case #1 and perhaps to cases #3 and #5 as well, as the purposes in paras. 1(a) and (c) would be engaged and the force used would be reasonable. But it is unclear whether the defence would apply to many routine applications of force by parents and other caregivers. Recall hypothetical case #2, where a parent restrains a child so that she may receive a vaccination. While the purpose of this use of force might be covered by para. 1(a) (preventing or minimizing harm to the child or another person), it is not clear that the degree of force used would be covered by the proposed subs. (2): the degree of force might go beyond what a court would consider “transitory and minimal.” Moreover, the list of acceptable purposes in the proposed subs. 43(1) is drawn quite narrowly. It does not include caring for a child as such; while some instances of touching for the purposes of care would fall under the proposed para. 43(1)(a), many would not. Nor does it include the enforcement of rules of the house or the school unless the child’s misbehaviour reaches the high threshold of being “excessively offensive or disruptive” (proposed para. 43(1)(c)). Suppose, for example, a seven-year-old child tries to take one cookie more than he has been permitted. If his mother physically restrains him, for example by preventing him from reaching out to the cookie plate, none of the purposes mentioned in the proposed subs. 43(1) appears to be engaged, so the mother would have no defence. Similarly, the teacher in hypothetical case #4 would not

86. The work done by s. 59(3) of the New Zealand statute is probably accomplished by the wording of proposed s. 43(1).

be protected, as the student's mere possession of a cell phone, though in breach of school rules, is not in itself disruptive.

A defence of "parental care"

This analysis of statutory versions of the defence of "parental control" suggests that although the motive behind New Zealand's s. 59 and Bill S-209 is laudable, the drafting strategy is erroneous. The effort to delineate the precise and narrow circumstances in which a parent or other caregiver may touch a child without the child's consent for the purpose of controlling the child is almost certain to fail because there will inevitably be situations in which a parent is justified in acting but which do not fall within the statute. The surprising failure of the Senate to include in Bill S-209 an analogue to New Zealand's para. (1)(d) illustrates the problem. If Bill S-209 had become law, then in light of its wording and its legislative history, it would have been strongly arguable that a parent is *not* permitted to touch a child for the purpose of "performing normal daily tasks ... incidental to good care and parenting," such as changing diapers, dressing, administering comfort, exercising mild restraint to enforce rules, and so forth. That cannot be the correct result.

Rather than attempting to define the precise circumstances in which a parent may touch a child, it would be better to provide a legal standard governing the use of force by a parent, teacher, or other caregiver towards a child. This legal standard might be called a defence of "parental care," to indicate that the defence flows from the parent's duty to care for the child and, when relied upon by teachers and other caregivers, from the extent to which that duty has been transferred to them. A satisfactory legislative version of the defence of parental care might state that a parent, teacher, or person standing in the place of a parent is justified in using force for the purpose of carrying out their duties in respect of the child, including proper purposes such as caring for and educating the child, and preventing harm, crime and disruptive behaviour; provided that the force used is reasonable in the circumstances, does not amount to degrading or dehumanizing treatment, and does not intentionally injure the child.

In avoiding the phrase "deemed consent," the definition of the defence would avoid the fiction that the parent's right to touch the child flows from the child's actual or implied consent (though where a child was capable of consenting, actual or deemed consent would of course also be a defence). By substituting the word "care" for "control," the definition of the defence would signal that the purposes for which parents may justifiably touch their children are not limited to controlling children but may include any purposes that are connected with the parent's duties in relation to a child.

The limits on the use of force in the proposed defence are typical of the kind of proportionality requirements associated with other defences to the offence of assault, such as self-defence⁸⁷ and s. 43 itself;⁸⁸ they are designed to ensure that the force used, even if motivated by a proper purpose related to the parent's duties, does not undermine that purpose by harming the child. Finally, because the defence would be a justification rather than an excuse, it would send a clear signal that when a parent touches a child in the manner contemplated by the defence, the parent is acting within his or her rights, rather than committing a wrong which the criminal justice system will subsequently excuse.

The advantages of a defence of parental care may also be illustrated by briefly considering possible responses to a constitutional challenge of the kind posed in *Canadian Foundation*. While a full analysis of such a challenge would require an additional paper, the following points may be helpful. It would be easy to say that since s. 43 survived constitutional challenge, *a fortiori* so would the defence of parental care; but the more interesting point is that even if the arguments against s. 43 had succeeded, similar challenges to the defence of parental care would likely fail. The applicants in *Canadian Foundation* argued that s. 43 was unconstitutionally vague, that it unconstitutionally infringed the "best interests of the child" principle, and that it infringed children's equality rights. The claim that the defence of parental care is unconstitutionally vague should fail. By limiting the uses of force to those that are for the purposes of carrying out the parent's duties in respect of the child and are not harmful, the defence would easily meet the standard of creating an intelligible standard for legal debate and a zone of risk for persons who relied on the defence.⁸⁹ A law is not vague "simply because reasonable people might disagree as to its application to particular facts" as long as it "provide[s] a degree of clarity capable of supporting intelligible debate."⁹⁰ The proposed defence of parental care easily meets that standard.

The majority in *Canadian Foundation* held, somewhat surprisingly, that the "best interests of the child" was not a principle of fundamental

87. Compare the limits on defensive force in *Criminal Code*, *supra* note 1 at ss. 34(1) ("no more [force] than is necessary" for self-defence), 37(1) ("no more force than is necessary to prevent ... assault"), and s. 37(2) ("the wilful infliction of any hurt or mischief that is excessive" is not justified under s. 37(1)). There is considerable controversy as to whether these limits should be understood in terms of proportionality or in some other way: in respect of s. 34, contrast *R. v. Hebert*, [1996] 2 S.C.R. 272, with *R. v. Walker* (2007), 217 C.C.C. (3d) 254 (B.C.C.A.).

88. As interpreted in *Canadian Foundation*, *supra* note 2 at paras. 26-42.

89. *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

90. *Cochrane v. Ontario (Attorney General)*, 2008 ONCA 718 at para. 44.

justice under s. 7 of the Charter⁹¹; thus, s. 43 was not required to comply with that principle. But even if the “best interests of the child” were recognized as a constitutionalized principle, the defence of parental care would comply with it. The central purpose of the defence is, precisely, to promote the best interests of children by ensuring that parents and other caregivers are not subject to criminal liability when they carry out routine and necessary tasks related to their duties as parents and caregivers that require them to touch children (with or without the children’s consent); the limits on the defence are intended to ensure that actions justified by the defence are not harmful. So the defence of parental care would be entirely consistent with the best interests of the child.

Finally, the s. 15(1) challenge to the defence of parental care would be much weaker than was the challenge to s. 43. The defence of parental care, like s. 43, would draw a distinction based on the enumerated ground of age. The question of whether this distinction was discriminatory would be addressed by assessing the four contextual factors outlined in *Law*:⁹² (1) whether the distinction affects a group that is vulnerable or suffering from pre-existing disadvantage; (2) whether the distinction corresponds to the group’s circumstances; (3) whether the distinction has an ameliorative purpose or effect; and (4) the nature of the interest affected by the legislation.⁹³ The first, third, and fourth factors would seem to tell against the defence of parental care, for much the same reasons that they counted against s. 43.⁹⁴ But the case for holding that the defence of parental care corresponds with children’s “needs, capacities, and circumstances”⁹⁵ is much stronger than the parallel case for s. 43. The whole point of the defence of parental care is to make the law of assault correspond with the needs and circumstances of children, by providing a justification to parents and other caregivers when they touch children (with or without consent) for the purpose of fulfilling duties such as protecting and caring for children.

91. *Canadian Foundation*, *supra* note 2 at paras. 7-12.

92. *Law v. (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

93. *Ibid.* at paras. 62-75. After *Law*, these contextual factors were understood to be relevant in assessing the ultimate question of whether the distinction undermined the claimant’s human dignity: compare *ibid.* at paras. 59-61. The court has recently suggested that this focus on human dignity is misplaced and that the ultimate question is better characterized as whether the legislative distinction “perpetuat[es] disadvantage and stereotyping”: *R. v. Kapp*, 2008 SCC 41 at para. 24. On either view, consideration of the four contextual factors from *Law* remains an important part of the s. 15(1) analysis.

94. Compare *Canadian Foundation*, *supra* note 2 at para. 56.

95. *Law*, *supra* note 92 at para. 70; compare *Canadian Foundation*, *supra* note 2 at para. 57.

The existence of a defence of parental care would not exclude other devices for avoiding unjust convictions. The common law defence of necessity would, of course, also be available in principle, though I would anticipate that it would be a rare case where a parent's or caregiver's necessitous act would not also fall under the defence of parental care. The *de minimis* defence might also be available, though it would surely be a rare case where the force applied by the parent was *de minimis* but not justified by the defence of parental care. And the judicious exercise of prosecutorial discretion would continue to be an important safeguard against inappropriate charges being laid, but the exercise of that discretion would be structured by a suitable legal standard that flows from the recognition that parents and other caregivers are justified in touching children to discharge their duties in respect of the children.

Conclusion

Countless times every day, parents across Canada touch their children, with or without the children's consent, for the purposes of caring for, protecting, and educating their children. The debate around the proposed repeal of s. 43 of the *Criminal Code* suggested at times that this conduct was, at best, an assault that might be overlooked through an exercise of prosecutorial discretion or excused by the common law defence of necessity or the common law maxim *de minimis non curat lex*. This view of parental care is unsatisfactory because it suggests that parents do not have a legal right to touch their children (though the criminal law regularly excuses them if they do). Fortunately, the common law also recognizes a defence of "deemed consent" to parental touching: this defence recognizes that parents are not merely excused but justified, within limits, in touching their children for proper purposes related to carrying out their duties to the children. Since opportunities for further judicial development of the defence are likely to be rare, and since there is a certain artificiality in the notion of the "deemed consent" of a child, it might be wise for Parliament to enact a statutory version of this justification under the rubric of a defence of "parental care" (possibly in conjunction with a repeal of s. 43 of the *Criminal Code*). But, in either the statutory or the common law version, the defence of parental care recognizes the special nature of the relationship between parents (and teachers and other caregivers) and children: the parent's justification for touching the child without the child's consent flows from the parent's duty to care for, protect, and raise the child.

