Hierarchies of Harm in Canadian Criminal Law: The Marijuana Trilogy and the Forcible “Correction” of Children

Janine Benedet

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/sclr

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Citation Information
http://digitalcommons.osgoode.yorku.ca/sclr/vol24/iss1/9

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.
Hierarchies of Harm in Canadian Criminal Law: The Marijuana Trilogy and the Forcible “Correction” of Children

Janine Benedet*

I. INTRODUCTION

When taken together, it is possible to reduce an analysis of the Supreme Court of Canada’s decision in *R. v. Malmo-Levine*,¹ upholding the prohibition on possession of marijuana, and its decision in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*,² upholding the defence of “reasonable correction” for parents and teachers charged with assaulting a child, as signaling a posture of deference to Parliament in matters of criminal law. It is also possible to explain the decisions as indicating that while abuse of oneself can be considered criminal, at least some abuse of one’s children may not. Viewed more charitably, and probably with more accuracy, the two decisions can be seen as saying something very important about the limits of the criminal law and the role that section 7 of the *Canadian Charter of Rights and Freedoms* plays in setting those limits.³ To that

---

* LL.B. (U.B.C.), LL.M., S.J.D. (Mich.); Assistant Professor, Osgoode Hall Law School, Toronto, Ontario.


³ Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982*, c. 11 [hereinafter “Charter”].
end, it is significant that the majority on the section 7 analysis is composed of substantially the same members of the Court in both cases.\(^4\)

In addition, the decision in *Canadian Foundation*, while reinforcing the ongoing debate at the Supreme Court on the proper understanding of section 15(1) of the Charter, deals a blow to historically subordinated groups seeking to use the right to equality to expose their experiences of state-sanctioned and socially accepted violence. In particular, the apparent revival by the Court of the long-discredited public/private distinction as relevant to the legal understanding of crimes of violence deserves scrutiny.

The attempt by some members of the Court to establish a "*de minimis*" principle in criminal law also links these two decisions. As a matter of the division of powers, the federal criminal law power in section 91(27) of the *Constitution Act, 1867*\(^5\) is very broad and not constrained by a meaningful "harm" requirement. The decisions in *Canadian Foundation* and *Malmo-Levine* make clear that the substantive content of the "principles of fundamental justice" in section 7 of the Charter do not permit the courts to evaluate rigorously under the ambit of the "harm" principle Parliament’s decisions to invoke the criminal law power beyond a *de minimis* threshold. Yet even the invocation of a *de minimis* standard may represent a substantial shift in thinking in light of the historic reluctance of criminal courts to recognize *de minimis* as a common law defence. Thus it is worth considering whether the real impact of these decisions, and in particular of *Malmo-Levine*, will be to revive such a defence.

Taken together, these decisions are especially troubling to this author because I think that the Court got it right in *Malmo-Levine*, and wrong in *Canadian Foundation*. Yet not a single member of the Court

---

\(^4\) In *Malmo-Levine*, majority reasons were written together by Gonthier and Binnie JJ., concurred in by McLachlin C.J. and Iacobucci, Major and Bastarache JJ. Arbour, Deschamps and LeBel JJ. dissented. In *Canadian Foundation*, McLachlin C.J. wrote the majority reasons, with Gonthier, Iacobucci, Major, Bastarache and LeBel JJ. concurring. Justice Binnie dissented in part on the s. 15 ground, but agreed with the majority on its interpretation and application of s. 7. In both cases, Arbour and Deschamps JJ. dissented. Thus the only judge to take a different view of the application of s. 7 in the two cases was LeBel J.

\(^5\) *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3.
shared these views in their entirety. This paper, therefore, argues for a result not supported by any member of the Court: uphold the prohibition on marijuana possession and strike down the “reasonable correction” defence.

II. SECTION 7 AND THE “HARM” PRINCIPLE

The section 7 analysis in Malmo-Levine is premised on the defendant’s assertion that the principles of fundamental justice include a “harm principle”. This principle would prevent recourse to the criminal law where the conduct in question was not harmful at all, or alternatively where it could not be shown to pose a significant risk of harm to others. The Court struggles with this proposition, in part because it must deal with three different harm principles: “harm” as a component of the criminal law power in section 91(27) of the Constitution Act, 1867; “harm” as a principle of fundamental justice under section 7 of the Charter; and “harm” as trigger for a common law defence of de minimis non curat lex. The question is whether the “harm principle” under section 7 is something different than these two other understandings of harm in the criminal law, or whether they should be interpreted as three coterminous manifestations of the same principle. While the court does not quite characterize the issue before it in this way, the interrelationship between these three types of harm is important to understanding the majority’s conclusion in Malmo-Levine.

The first context in which the concept of “harm” is relevant is in the application of the federal criminal law power in section 91(27) of the Constitution Act, 1867. In the companion appeal of R. v. Caine, the appellant argued that the criminalization of marijuana possession fell outside the federal jurisdiction over criminal law. The Supreme Court unanimously rejected this argument. The Court accepted that one major purpose of the prohibition on marijuana possession had always been to protect health and public safety. This brought it within the permissible scope of the criminal law, which required “some evil or injurious or

6 Justice Binnie comes closest in the result. Justice Binnie upheld the prohibition on marijuana possession, but would have found that the s. 43 defence violated the equality rights of children as it applied to teachers.

undesirable effect upon the public against whom the law is directed”.

According to the Court, so long as some legitimate public purpose underlies the prohibition, and it does not colourably invade an area of provincial competence, the law is *intra vires* Parliament. Control of a psychoactive drug that causes alteration of mental function raised clear issues of public health and safety, bringing it within the ambit of section 91(27). The Court specifically noted that the protection of vulnerable groups from self-inflicted harm, characterized by the appellant as impermissible “legal moralism”, was a legitimate concern of the criminal law.

The division of powers argument did not, in any event, really address the substance of the defendants’ complaint about marijuana prohibition, which was directed at the fact of prohibition itself, rather than at the idea that it should fall within provincial competence. Using the division of powers to strike down laws that trench on civil liberties may have been a necessity in the pre-Charter era, but it makes little sense now in this context, unless the argument is able to distinguish what is distinct about the *criminal* prohibition that limits its use in cases where a provincial offence would be acceptable.

The difference cannot be the use of imprisonment, since provincial offences can carry terms of imprisonment as well, and section 7 turns in any event on the significance of the deprivation of liberty. Nor is it the mere fact of the availability of prosecution by indictment, which tends to give the accused more procedural rights (like a jury trial). The relevant point might be the imposition of a criminal record, particularly since the effect such a record has on the ability to find work or travel abroad can be significant. Most human rights statutes that protect against discrimination on the basis of one’s “record of offences” limit that protection to provincial records, indicating that the criminal record is seen as legitimately carrying significant stigma, at least where no pardon has been granted. While the negative effects of a criminal record were clearly raised in argument before the Court, their connection to the division of powers argument appears to have been unexplored.

---


The question that arises with respect to section 7 of the Charter is whether the principles of fundamental justice include a notion of harm that is more definite than the elastic boundaries of the federal criminal law power. The answer to this question must focus on the fact that the section 7 liberty interest is engaged in situations in which the law is not merely penal in character, but also carries with it the potential for imprisonment. Should the availability of imprisonment change the degree of harm required from the “legitimate public purpose” of the division of powers analysis to a requirement of significant or substantial harm? Or, in the alternative, should it require proof that the risk of harm is to persons other than the accused?

The notion that the principles of fundamental justice demand an examination of the relationship between the state interest and the use of the penalty of imprisonment to further that interest is not without jurisprudential support. In *Rodriguez v. British Columbia (Attorney General)*, the majority held that a breach of section 7 is made out where “the deprivation of the right in question does little or nothing to enhance the state’s interest” since “the individual’s rights will have been deprived for no valid purpose”.11 Yet even these comments, focusing on whether the use of criminal law advances the state interest, assume that such an interest does exist. In *Malmo-Levine*, the defendants primarily argued that there was no valid state interest at all. In the alternative, they asserted that criminalization does more harm than good in achieving any such interest.

The majority of the Court in *Malmo-Levine*, relying on its decision in *Rodriguez*, finds that a principle of fundamental justice must be:

a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of...liberty....12

The majority rejects the argument that a harm principle, defined in these terms, is a principle of fundamental justice. The majority doubts that the “harm principle” is properly characterized as legal principle, but

---

even assuming such a characterization, they find that it is not a requirement for criminal prohibition. There are Code offences that do not cause harm to living persons (like cruelty to animals or interference with a dead body) and those which cause no harm to anyone other than the individuals who consent to them (like dueling or “consensual” incest).\(^\text{13}\) Canadian criminal law has rejected the idea that punishing harm to self is impermissible paternalism, noted the majority, since the costs of self-harm are often borne collectively. What is more, Canadian society is willing to recognize the validity of punishing “moral harm” in the sense of conduct that threatens fundamental or essential social values. This led the majority to conclude that, “Parliament ... is entitled to act under the criminal law power in the protection of legitimate state interests other than the avoidance of harm to others, subject to Charter limits such as the rules against arbitrariness, irrationality and gross disproportionality”\(^\text{14}\).

What sort of limits, if any, are placed by this last condition? “Arbitrariness and irrationality” sound a lot like the kinds of very elastic thresholds constraining the use of the criminal law power in section 91(27). As for “gross disproportionality”, it refers, of course, to the test for “cruel and unusual punishment” under section 12, imported into section 7. On this point, the majority finds that it is the use of imprisonment that is relevant, rather than the availability of imprisonment. Since imprisonment is rarely imposed for simple possession absent aggravating factors, neither section 7 nor section 12 is violated. This approach in general makes sense, as many criminal offences provide a range of sentences whose upper end would be grossly disproportionate if imposed for conduct at the lower end. Manslaughter, where the available sentences range from probation to life imprisonment, is a good example.\(^\text{15}\) The remedy for such excesses, explains the Court, is an ordinary sentence appeal. Thus one can distinguish the prohibition on marijuana

\(^{13}\) Of course, there are reasonable claims of “harm” that can attach to all of these actions. Cruelty to animals does cause unnecessary pain to a living creature. Interference with a dead body presents public health concerns, in addition to causing distress to the bereaved. “Consensual” incest is often anything but mutually beneficial and desired. Citing these examples, then, is not meant to endorse the Court’s invocation of them; one does not have to embrace the value of legal paternalism to find a reason for upholding bestiality laws.

\(^{14}\) Supra, note 1, at para. 129.

\(^{15}\) Criminal Code, R.S.C. 1985, c. C-46, s. 236(b).
possession from the prohibition on importing narcotics struck down in

R. v. Smith, where the seven-year sentence of imprisonment was mandatory regardless of the quantity imported, and from the Motor Vehicle Reference, where the Court did say that the potential for imprisonment was enough to violate section 7 where there was no mens rea required for conviction.16

Yet the “gross disproportionality” standard may still operate in an offence with a wide range of possible sentences in a fashion akin to the principle of de minimis non curat lex. The de minimis principle, typically translated as the maxim that “the law does not concern itself with trifling things”, has not found general acceptance in Canadian criminal law despite its longevity.17 If recognized in the criminal law, the de minimis principle would operate as a common law defence in the nature of an excuse that would allow the accused the opportunity to establish that, even though the actus reus and mens rea of the offence are made out, the breach is so trivial that no criminal culpability should be attached.18 This principle might apply to the man charged with theft for sampling a cashew from the “bulk bin” at the supermarket, or the student charged with assault for spraying a classmate with a water pistol.

Such “cases” are typically dealt with through the exercise of social convention. We rely heavily on social understandings about what sort of behaviour is too trivial to merit state involvement to dissuade individuals from complaining to the police about such matters. When that consensus is disrupted, we rely on police and prosecutorial discretion to screen out trivial cases from prosecution. Yet this is not a uniform or reliable result. Most criminal defence lawyers have represented clients charged with theft for stealing items of nominal value, pursuant to a


18 Criminal Code, R.S.C. 1985, c. C-46, s. 8(3).
retailer’s “zero tolerance” anti-shoplifting policies. Moreover, courts have shown considerable reluctance to apply the *de minimis* principle to *Criminal Code* offences, notwithstanding a willingness to recognize it in other settings.

Yet the majority in *Malmo-Levine* appears to accept the relevance of the *de minimis* principle for section 7, noting that “[o]nce it is demonstrated, as it has been here, that the harm is not *de minimis*, or in the words of Braidwood J.A., the harm is ‘not [in]significant or trivial,’ the precise weighing and calculation of the nature and extent of the harm is Parliament’s job”. This seems to indicate an acceptance by the Supreme Court of the *de minimis* defence, at least where there is a liberty interest at stake. *Malmo-Levine* may therefore represent an implicit recognition that the *de minimis* principle is a principle of fundamental justice and thus a valid common law defence.

Justice Arbour, in her dissenting reasons in *Canadian Foundation*, would also be prepared to recognize the *de minimis* principle in the criminal law setting. She argues that the defence could be raised for trivial assaults which, in the parent-child context, might include a “pat on the bum” or the placing of an unwilling child in a car seat. In fact, some trial judges in assault cases have considered the defence; most have declined to conclusively decide its availability, and have proceeded to find the assault not a trivial one in any event. Justice Arbour notes that the principle could also apply where defendants are in possession of very small amounts of marijuana. At least one lower court has reached such a result, in a situation where the accused was in possession of a pipe that tested positive for marijuana residue.

---

19 See, e.g., *R. v. Li*, [1984] O.J. No. 569 (H.C.), where the judge allowed the Crown’s appeal from an acquittal for theft where the value of the stolen screwdriver bit was less than $1.00. The High Court judge found that the trial judge erred in recognizing a *de minimis* principle in theft cases.


21 *Malmo-Levine*, supra, note 1, at para. 133.


There is a clear reluctance on the part of trial courts to recognize the *de minimis* defence. This reluctance stems in part from their obligation to follow the language of the statute. If Parliament wanted to specify a minimum amount of drugs that one might legally possess before the criminal sanction is triggered, it is free to do so. In addition, there is a very real concern about where the triviality ends. Certainly defendants in cases of spousal violence against women have, predictably, attempted to invoke the defence.\(^{24}\)

It is also important to note that those cases which have considered the application of *de minimis* to charges of marijuana possession have focused on the trivial harm based on the *amount* of drugs possessed. The courts have not considered whether the *de minimis* defence should apply on the basis that the harm of possessing marijuana for personal consumption is itself trivial. The connection between the two claims is obvious: how else to explain why the law should not concern itself with possession of marijuana residue in a pipe except by reference to the lack of harm that residue might cause? Of course, implicit in the recognition of the defence is the understanding that there must be some violations of the law that are not trivial. The majority of the Supreme Court found some specific examples of the harm of marijuana consumption, for example, to vulnerable groups such as adolescents. It remains to be seen whether a *de minimis* defence might succeed where it can be shown that a particular defendant does not fall into one of the groups the Court sees the law as validly protecting.\(^{25}\)

The real issue in these cases is one of institutional competence. Given that almost any conduct carries with it some non-trivial risk of harm, who is better placed to determine that harm: Parliament or the courts? The majority of the Supreme Court was correct to leave this


\(^{25}\) Such a result would produce the irony that the most vulnerable accused would be the least able to avoid conviction, since the effects on them of marijuana consumption are not trivial.
job to Parliament and not use the substantive component of “fundamental justice” to sit as an unelected legislature. Leaving this determination to the Parliamentary process makes sense, if only because it allows Parliament to respond to arguments about degrees of harm and about the methods best suited to address them. After all, there are many advocates for the decriminalization of “hard” drugs as well, on the ground that they are a health issue rather than a criminal one; the Charter is not the instrument of choice for advancing such claims.

Of course, the adoption of the trivial harm standard is not unproblematic. It seems to suggest that Parliament could criminalize any activity that met the legitimate interest threshold. Since it is almost always possible to identify some harmful consequence of an activity to the actor or to others, this gives the criminal law power an almost unlimited scope. For example, could Parliament criminalize golf because of the environmental damage required to produce the courses, or the risk to others from errant flying balls? Even if the criminal law power is limited to those subjects that have traditionally been the subject of the criminal law, combined with the more than trivial harm requirement, this may not be enough to protect golf from prohibition. After all, the Criminal Code does impose penalties in the context of a number of other sports, such as waterskiing at night. There appears to be no constitutional impediment to the creation of a criminal offence of “golfing at night” on the same reasoning. Perhaps these examples suggest that the correct debate is not one of the relative significance of harm to others, versus harm to community values, versus harm to self, but rather the level and certainty of harm of any of these kinds that flows from the potentially criminal act. Or perhaps we are content to let golfers, water skiers and consumers of marijuana use the democratic process to resist

---


27 After all, the Court has already confirmed in its freedom of association cases that golf is not a constitutionally protected activity: Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 408, [1987] S.C.J. No. 10.

overcriminalization as they see it, and leave the courts, and section 7 of the Charter, out of such debates.  

### III. SECTION 15 AND THE PUBLIC-PRIVATE REVIVAL

While the guarantee of equality in section 15(1) of the Charter was raised in both *Malmo-Levine* and *Canadian Foundation*, it was given serious consideration only in the latter decision. In *Malmo-Levine*, the appellant argued that the offence of possession of marijuana for the purpose of trafficking discriminated on the basis of “substance orientation” or “occupational orientation” as analogous grounds under section 15(1). The Supreme Court unanimously rejected the argument that these were cognizable grounds of discrimination under section 15:

> The true focus of s. 15 is to “remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society”; *Swain*, supra at p. 992, *per* Lamer C.J.; and *Rodriguez*, supra, at p. 616. To uphold *Malmo-Levine*’s argument for recreational choice (or lifestyle protection) on the basis of s. 15 of the *Charter* would simply be to create a parody of a noble purpose.  

This conclusion is hardly surprising; the Court has been justifiably reluctant to recognize new analogous grounds of discrimination solely on the basis that individuals have been criminally prosecuted on the

---

29 I have not considered in this article the s. 7 claim advanced in *Canadian Foundation*, despite the concern it has caused to others: see Paul Burstein and Roslyn Levine, Q.C. in this volume. In particular, they are concerned that Canadian Foundation’s argument that s. 43 of the Criminal Code violates s. 7 of the Charter was an attempt to use s. 7 as a “sword” that would require the government to criminalize certain behaviour that harms others, rather than as a “shield” to limit the ability of government to create crimes. I do not think that the s. 7 challenge in *Canadian Foundation* should be viewed in this manner. The Foundation was challenging something that Parliament had affirmatively done, namely enacting the s. 43 defence. It was not seeking an order that Parliament do anything; it was asking the Court to strike down an existing section of the Code. I have not dealt with that argument at length here, since I am of the view that *Canadian Foundation* is a case about children’s equality rights, and since in the s. 15(1) context the distinction between positive and negative rights has been undermined, thankfully, by the decision in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29.


basis of those characteristics. The mere fact that criminalization is tied to a particular behaviour or personal characteristic that a group of individuals share — a sexual interest in children or the enjoyment of animal abuse — does not tell us very much about whether the criminalization is discriminatory or implicates an equality interest, as socially defined.

In order to sustain his argument, the appellant in this case attempted to argue that criminalization for “harmless hedonism” demonstrated the nexus to the discriminatory action on the part of the state. This characterization, of course, brings us right back to the harm principle considered under section 7. For the section 15(1) argument to be a distinct constitutional claim, the appellant would need to argue that even if it is not a principle of fundamental justice that there must be a significant risk of harm to others before an activity can be subject to a penalty of imprisonment, the use of the criminal law for only some activities that fail to meet this standard is discriminatory, a point already rejected by the Court under the “arbitrary or irrational” test. Alternatively, the claimants might have tried to show some discriminatory pattern in the enforcement of the law, a point apparently not developed in argument, notwithstanding disproportionate numbers of young adults prosecuted under the statute.

An important section 15(1) argument was made in Canadian Foundation, in which the Foundation argued that the reasonable correction defence in section 43 of the Criminal Code discriminated against children on the basis of their age, by providing accused persons with a defence to the assault of children in some circumstances that would not apply to assault of an adult victim. The majority of the Court, in reasons written by McLachlin C.J., found no infringement of section 15(1). The Court’s rather cursory conclusion on this point is not encouraging for those who despair at the ongoing inability of the Supreme Court to grasp the concept of substantive equality.

The ground of discrimination, age, is an enumerated ground, so there can be no dispute that section 15(1) is engaged. There is also no question that the Code provision imposes a disadvantage on children not imposed on adults, namely the disadvantage of being hit or slapped or restrained by a parent or a teacher in circumstances where that adult is shielded from criminal prosecution by operation of the defence. The majority rejects the
assertion that this fact alone is not enough to make the provision discriminatory because it would “... equate[e] equal treatment with identical treatment, a proposition which our jurisprudence has consistently rejected”.\textsuperscript{32} This is quite true as an abstract principle, but it does not automatically explain why facially disadvantageous treatment can be justified in this case. To answer that question, the Court reformulates the applicable standard for a section 15(1) violation multiple times, until it eventually produces a test that allows it to find that there is no age discrimination in the operation of section 43 of the \textit{Code}.\textsuperscript{36}

The majority begins by invoking the general principles set out in the \textit{Law}\textsuperscript{33} decision, namely “whether a reasonable person possessing the claimant’s attributes and in the claimant’s circumstances would conclude that the law marginalizes the claimant or treats her as less worthy on the basis of irrelevant characteristics”.\textsuperscript{34} However, the majority continues, since this would raise the fiction of the “reasonable, fully-apprised, preschool-aged child”, the correct relevant perspective is that of the “reasonable person acting on behalf of a child, who seriously values the child’s views and developmental needs”.\textsuperscript{35} The majority fails to notice that this person sounds a lot like the accused, or at least like the accused as characterized by defence counsel, creating an odd vantage point from which to judge the interests of victims of what would otherwise be assaults. The majority then proceeds to combine these standards, asking whether “... viewed from the perspective of the reasonable person identified above, does Parliament’s choice not to criminalize reasonable use of corrective force against children offend their human dignity and freedom, by marginalizing them or treating them as less worthy without regard to their actual circumstances?”\textsuperscript{36}

This assessment, in turn, is to be determined by regard to the four factors first identified in \textit{Law}: “(1) pre-existing disadvantage; (2) correspondence between the distinction and the claimant’s characteristics or circumstances; (3) the existence of ameliorative purposes or effects; and

(4) the nature of the interest affected”. The majority finds that the first, third and fourth of these factors are met: children are members of a vulnerable group; the defence is not designed to ameliorate the condition of persons belonging to another more disadvantaged group, and the interest affected — bodily integrity — is profound.

However, the Court finds no discrimination because the second factor, “correspondence with actual circumstances”, shows that the law is not discriminatory. Chief Justice McLachlin argues that children need not only protection from physical harm, but also guidance and discipline from parents and teachers. This, in turn, requires a “stable and secure family and school setting”. She argues that section 43 accommodates these needs of children by resorting to the criminal law only when force is used not as part of a genuine effort at correction and poses no reasonable risk of harm that is more than transitory or trifling. To do otherwise “risks ruining lives and breaking up families”. This leads her to conclude:

I am satisfied that a reasonable person acting on behalf of a child, apprised of the harms of criminalization that section 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful conduct is still prohibited by the criminal law, would not conclude that the child’s dignity has been offended in a manner contemplated by section 15(1). Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of section 43 on a child’s sense of dignity.

Without section 43, the majority reasons, parents and teachers would risk criminal punishment for placing a child in a chair for a five-minute “time out”. The fact that the reasonable person here is supposed to take into account the “views of the child” seems to have fallen out of the analysis, except insofar as children are assumed not to want their families torn apart. Whether children have views on whether being hit teaches them anything, and if so, what those lessons are, is not considered.

37 Id., at para. 55.
38 Id., at para. 68.
39 Id., at para. 62.
The section 15(1) analysis employed by the majority in this case makes abundantly clear the shortcomings of the Law test for discrimination, as refined and reinterpreted in subsequent cases. The first and most obvious problem with the Law test is the focus on “dignity” as a proxy for equality. In Law, the Court found that the purpose of equality rights was to recognize the fundamental human dignity of each individual, in the sense of their inherent self-worth. This statement is hard to criticize; the Universal Declaration of Human Rights begins with the assertion that “all human beings are born free and equal in dignity and rights”. But this does not mean that dignity is the same thing as equality. That the two are distinct concepts is made clear in the constitutions of countries such as Germany and South Africa, which provide specific rights to dignity quite apart from their constitutional equality rights.

In particular, the dignity principle should not mean that the claimant in an equality rights case should have to prove that the discrimination in question was not only discriminatory but also demeaning to the claimant’s dignity. As applied by the Court, this requirement has the odd effect of penalizing individuals who are able to maintain their dignity in the face of oppression. It makes it much more difficult to challenge differential allocations of benefits, since the government’s inevitably benign purpose can be pointed to as meaning that there is no assault on dignity. This tends to ignore the fact that it is both the purpose and the effect of government action that must be scrutinized when a Charter claim is made and threatens to return us to an intent-based definition of discrimination. The Court’s reasoning seems to be that since inequality is a repudiation of essential human dignity, and since discrimination produces inequality, the way to discover if there has been discrimination is to look for proof of indignity. Why the Court cannot just consider discrimination and inequality directly is unclear.

In *Canadian Foundation*, one might have thought that use of the dignity analysis would have benefitted the claimants, since being hit or slapped without the legal recourse available to other human beings is certainly demeaning. The majority is able to avoid confronting this problem directly by resorting to the four factors identified in *Law*. Despite the fact that these factors were never intended to be exhaustive or rigidly applied, the majority treats them as a four-part test and applies them mechanically to exclude the claim. In particular, there is little analysis of the way in which the factors relate to one another. The importance of the interest in physical integrity, the vulnerability of children, and the absence of ameliorative purposes for other disadvantaged groups are not enough to dislodge the conclusion that there is no discrimination, since the “lack of correspondence” test is not met.

*Canadian Foundation* shows once again the danger of the “correspondence” factor, which, as Binnie J. notes in his partial dissent, threatens to reincarnate the discredited “relevance” test from the *Miron v. Trudel* trilogy. This concern is heightened where, as in this case, the Court uses the phrases “less worthy on the basis of irrelevant characteristics” and “less worthy without regard to their actual circumstances” interchangeably. Inviting judges to determine whether the legislative distinction at issue “corresponds” to the claimant’s needs and circumstances allows them to use the same kind of circular reasoning that poisoned section 15(1) analysis under the “relevance” test. It invites judges to speculate on what the claimant’s “circumstances” are, and then make conclusions as to whether the purpose of the legislative distinction is related to them. The potential for stereotyping that uses the impact of pre-existing discrimination to justify further related discrimination is clear. Applied mechanically, this factor permits the Court to ignore the nature of the historic disadvantage and the way in which the distinction in question might contribute to that disadvantage, which is the essence of a substantive equality analysis.

---

44 *Id.*, at paras. 53 and 54.
Such an analysis, alive to the social and historical context in which the impugned practice and the ground of discrimination co-exist, would not end the vulnerability analysis by simply concluding, as the majority does here, that children are a vulnerable group and that the extent of their powerlessness is somehow mitigated by the fact that children “often feel a sense of disempowerment and vulnerability” at the hands of adults. On a substantive equality analysis, the fact that the vulnerability is chronic should heighten, rather than diminish, the scrutiny that is brought to bear on the legislative distinction, given that so many laws affect children in a differential and disempowering fashion. More importantly, a substantive equality analysis should consider the historic vulnerability of children in the context of the practice at issue, namely the use of force against them by parents and teachers. On this point, there is ample evidence that children have been and continue to be the recipients of widespread physical and sexual violence at the hands of those persons who are entrusted with their care, and that this violence is age-based as a social practice. In 1998, there were an estimated 61,000 substantiated reports of child maltreatment (physical, sexual and emotional) investigated by police and children’s aid societies in Canada. Sixty-nine per cent of substantiated cases of physical abuse of children, or about 9,700 cases, involved inappropriate punishment, that is abuse administered under the guise of “correction”. Another 5,300 cases involved suspected physical abuse in the guise of punishment.

It might also have been useful to consider the history in this country of physical abuse by teachers in residential schools, directed disproportionately at First Nations and disabled children, and whether giving teachers some licence to use physical correction contributed to that abuse or the difficulty of exposing it. It is this context which explains why any lack of convincing proof that the use of mild force is harmful is not especially relevant to a discrimination analysis. The point is that there is ample proof that parents and teachers meting out discipline are often unable or unwilling to limit themselves to mild force.

---

Another part of the social context unmentioned by the Court is that there is another age-based group whose members are subject to violence at the hands of their family members and caregivers, namely the elderly, and that this group is not excluded from the protection of the criminal offence of assault on the basis that it risks breaking up their families to include them.47

“Age-based” in this context does not refer to the formal distinction that children are younger than adults. It is not the youth of children per se that is the source of their social inequality. Children are not a historically disadvantaged group because they are young. This reasoning has led courts to conclude that some kinds of disadvantageous treatment of children or young people are not discriminatory because they will not be young forever.48 But the permanence of the ground is not crucial to the experience of discrimination, except perhaps to its severity. After all, pregnancy is also a temporary condition, but pregnancy discrimination is still recognized as sex discrimination. Societal discrimination against children is a product of the state-sanctioned exploitation by adults of the inherent power imbalance between adults and children. That exploitation includes, for example, the practices identified in the international conventions designed to safeguard children’s rights, such as physical and sexual violence, child labour and lack of access to education, child marriage and other practices that stunt the ability of children to realize their full potential to exercise fully the rights and privileges of adulthood.49

Regardless of the legal regime in place for responding to the violence against them, children are not able to prevent or defend against this violence because of their size, intellectual development and dependence on adults. This is the (in)capacity that is “relevant” to the section 15(1) analysis. The question, then, should be whether section 43 of the

---

47 L. McDonald and A. Collins, Abuse and Neglect of Older Adults: A Discussion Paper (Health Canada, Family Violence Prevention Unit, 2000), at 13-15. The authors note that while telephone surveys of older adults living at home indicate rates of physical and verbal abuse of 2-7 per cent, these numbers are probably low because of reluctance to disclose and the omission of cognitively impaired older adults from such surveys.


Criminal Code, in its purpose or effect, augments that vulnerability and that history of violence. If this question is answered in the affirmative, then absent some overriding ameliorative purpose for another disadvantaged group, the provision is discriminatory and violates section 15(1). Questions of justification (the purported need for some discipline that takes a physical form, the preference of Parliament to use education rather than criminalization to reduce the use of physical discipline) should be left for the section 1 analysis.

In answering the question whether section 43 augments the existing vulnerability of children to parental and institutional violence, it is first necessary to confront an important problem of Charter analysis relating to the use that can be made of the existing decisions interpreting and applying section 43 of the Criminal Code. These decisions are, on the whole, remarkable for the frequency with which they interpret section 43 to permit parents and teachers to use a considerable degree of force against a wide age range of children, encompassing weapons, bruising, blows to the head, kicking, and physical restraint. One approach to this body of precedent, favoured by the majority, is to use the existing cases interpreting and applying section 43 of the Criminal Code as merely a context for reinterpreting the provision to minimize the potential for violence against children in the future. In this way the Supreme Court creates a clean slate for the provision’s application, and concludes that under its new interpretation, the defence will not contribute to discrimination against children. The second approach, adopted by Deschamps J. in her dissent, is to use those cases as proof that section 43, as applied, does augment that disadvantage.

The relevance of “past practice” in the application of a challenged provision is accepted in other Charter contexts, such as in freedom of expression challenges under section 2(b). Yet the degree to which this past practice can be obliterated through reinterpretation of the provision

---

50 A summary of these cases is found in the dissenting reasons of Arbour J., dissenting, at paras. 153-70.
51 For example in Little Sisters Book and Art Emporium v. Canada (Minister of Justice) [2000] 2 S.C.R. 1120, [2000] S.C.J. No. 66, the Court considered the past practice of Canada Customs in determining whether the claimant’s rights had been violated and whether Customs could be expected to avoid such violations in the future.
is a matter of continuing debate.\footnote{R. v. Butler, [1992] I S.C.R. 452, [1992] S.C.J. No. 15 is another decision in which the Supreme Court chose to treat prior inconsistent lower court decisions as evidence of the need for clear directions from the Court rather than evidence that the law was unconstitutional.} In this case, it would seem logical to follow the approach of Arbour J. in her dissent on the section 7 claim, and to use the judicial history as evidence of how the provision is likely to be applied, given that the decisions turn on what is “reasonable force”, rather than on any clear split on a question of statutory interpretation. As Arbour J. points out, the majority’s approach confirms the extremely narrow ambit of the vagueness doctrine under section 7, since past practice, however compelling, is always insufficient to prove that the provision is not capable of clear judicial interpretation. Moreover, if lower courts continue to be unable to apply the provision consistently after the Supreme Court decision, it will be almost impossible to renew the vagueness challenge since the Court has declared the provision to be not vague. In any event, whatever the case may be under the section 7 vagueness doctrine, section 15(1) is clearly context-based. The way in which the defence has been applied, and the kind of abuse that has been considered “reasonable force”, are highly relevant considerations in deciding whether the operation of the defence violates children’s equality rights.

Justice Binnie, dissenting in part, recognizes the shortcomings of the majority’s section 15(1) analysis, and finds that the section is violated. As noted above, he criticizes the majority for its reliance on the “correspondence” factor as a litmus test for discrimination. Unfortunately, he imports the same kind of reasoning into the section 1 analysis, which leads him to uphold section 43 as it applies to parents for much the same reasons as the majority relies on in its section 15(1) analysis. In particular, he agrees that the “values of privacy in family life” justify the availability of the section 43 defence to parents as a reasonable limit on children’s equality rights. In so doing, he fails to consider whether the deficits of the “correspondence” test are really eradicated simply by moving them to section 1. In particular, the balancing of means and ends contemplated by section 1 is not the same as correspondence between the needs of the claimant (the child) and the legislative measures at issue.
The reliance of both the majority and Binnie J. on the “privacy of the family” as a justification for upholding the “reasonable correction” defence is acutely disappointing in an equality rights challenge focused on acts of physical violence. Surely this “interest” has now been thoroughly discredited, especially in the context of family violence. Feminist scholars have successfully shifted public opinion away from the myth that battering and rape of women by their boyfriends and husbands are “private” matters. Merely because an assault takes place in the bedrooms, or for that matter the playrooms, of the nation, does not mean that the state has no business intervening in it; most abuse of women and children takes place in the home. The home is a very dangerous place for many women and children and it is perverse to suggest that children benefit from respect for the privacy of family life when that “private life” includes violence against them.

Section 43 of the Criminal Code undeniably “withholds from children protection of their physical integrity in circumstances where the amount of force used would be criminal if used against an adult”. If the concern is that we cannot rely on police and prosecutorial discretion to prevent prosecution for a “pat on the bum”, we need to consider why we are prepared to criminalize such assaults when they occur against adults and rely on that same discretion to screen out such trivial touchings. Children are hardly more likely than adults to phone the police in order to resolve minor disputes. There is little question, of course, that the principle of absolute physical autonomy that is applied to adults is not and cannot be applied to pre-adolescent children, if only for reasons of their safety. But the provision covers correction, not protection. One wonders what degree of associated force is permissible to enforce the Chief Justice’s example of the “five-minute time out”. In R. v. Murphy, it involved the use of electrical tape to restrain a three-year old child to a chair, during which time he urinated on himself. In 1996, this conduct


54 Supra, note 32, at para. 82.

was found to be within the section 43 defence by the British Columbia Court of Appeal.

Another way of looking at this question is to consider whether children have anything in common with the groups of people previously excluded from the full protection of criminal assault provisions through the operation of other categorical defences. These groups would include wives, employees and apprentices, and passengers on ships. There may be something to be learned from the decision to abolish rules sheltering husbands and employers from prosecution for assaults of individuals under their control. These repeals reflected an evolving societal recognition that persons in positions of power should be monitored in the exercise of that power, rather than given free rein to exercise violent “ownership” over individuals who are financially or emotionally dependent on them. This reasoning of course, applies quite directly to the situation of parents or teachers and the children over whom they exercise power and control.

Justice Deschamps does find a violation of section 15(1) that is not saved by section 1. Significantly, she applies the three-step analysis set out in Law and based on the seminal decision in Andrews v. Law Society of British Columbia:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of section 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15(1) of the Charter in

56 In Lord Leigh’s Case (1677), 3 Keb. 433 (H.L.) the House of Lord’s stated that while husbands could not beat their wives, they were entitled to use force for “admonition”. By 1891, the principle was referred to as “quaint and absurd”: R. V. Jackson, [1891] 60 L.J.R. 346 (Q.B.). The right of masters to discipline apprentices was deleted from s. 43 in the 1955 amendments. The right of a captain to discipline a passenger was repealed in 2001: S.C. 2001, c. 26, s. 294.
remedying such ills as prejudice, stereotyping and historical disadvantage?  

On this analysis, the question is whether the differential treatment discriminates against children in a substantive sense. Justice Deschamps correctly notes that the four Law factors relevant to this analysis are not exhaustive or automatically applicable. While she also uses “impairment of dignity” as a proxy for substantive inequality, she correctly focuses on the effect of the differential treatment of children by Parliament rather than whether corporal punishment is itself always demeaning or never carried out for a proper purpose. Unfortunately, she also goes through a rote application of the four factors, but does come to a different conclusion on the “correspondence” factor, based on her view that:

There is a general consensus among experts that the only benefit of mild to moderate uses of force, such as spanking, is short-term compliance. Anything more serious is not conducive to furthering the education of children, but also potentially harmful to their development and health. … It cannot seriously be argued that children need corporal punishment to grow and learn. Indeed, their capacities and circumstances would generally point in the opposite direction...  

Because section 43 had not been applied in such a restrictive fashion, and could not be so restricted without re-writing the statute in complete opposition to its terms, she found that section 15(1) was violated. Justice Deschamps’ reliance on the lack of benefit arising from most corporal punishment echoes her fact-driven conclusions in Malmo-Levine that consumption of marijuana is a largely harmless activity. While this approach makes some sense when she is applying a “harm principle” under section 7 to marijuana possession, it is more dangerous in the section 15(1) context. The Court should leave the balancing of the harms and benefits of corporal punishment to section 1, and focus on the effect of the defence on children in the context of their social experience of violence at the hands of parents and teachers. None of the members of the Court undertaking a section 15(1) analysis in this case considered the physical punishment of children as a social practice in the context of

---

58 Id., at para. 230.
the relatively recent recognition of child abuse by parents as a serious and neglected problem.

The practical danger of the majority’s decision is that parents and teachers will simply consider the decision an endorsement of their power to “spank” children, and fail to understand the Court’s attempt to reinterpret the provision restrictively. One is left to hope that lower courts considering the defence in future will truly limit its application to those uses of force that “restrain, control or express some symbolic disapproval”.

Since the decision in Canadian Foundation, there appears to be only one unreported case that considers section 43 of the Code, and its inattention to the Supreme Court’s restrictions on the defence is hardly encouraging. In R. v. P. (D.), the accused kicked his 14 year-old daughter, bruising her leg. The kick was administered because she refused to get into his car and return home. In convicting the accused of assault, the trial judge referred to the decision in Canadian Foundation as upholding the constitutionality of section 43, but did not make reference to any of the interpretive guidance provided by the Court. Most notably, the trial judge did not refer to the majority’s statement that force used against children over 12 years of age is *per se* unreasonable. Instead, he relies on prior lower court authority and finds the force unreasonable because it was not escalating force.

### IV. CONCLUSION

The majority decisions in Malmo-Levine and Canadian Foundation are, at their core, contradictory. The Court is prepared in Malmo-Levine to permit Parliament to criminalize any conduct that poses a risk of harm that is more than trivial. This rightfully leaves complex debates about risks and benefits of marijuana consumption to the democratic process. The Court is not prepared in Canadian Foundation to limit the ability of Parliament to shield individuals from criminal liability for

---

59 *Id.*, at para. 24.
61 In a case decided one week before the Supreme Court decision, another trial judge applied s. 43 to acquit of assault a teacher who tapped a 16 year-old boy in the face for using a computer without permission: *R. v. Storey*, [2004] O.J. No. 670 (C.J.).
causing harm to children, on the ground that the section can be restrictively interpreted to apply to only “trivial” punishments. Yet if the Court’s reasoning in *Malmo-Levine* is applied in this context, trivial assaults would automatically be excluded from the offence of assault by the operation of section 7 of the Charter anyway.

To date, section 43 of the *Criminal Code* has been a *de maximis* defence that should have been found to violate section 15(1) of the Charter.62 Striking down the defence would have ended the demonstrated practice of using section 43 to shield abusive parents from conviction rather than shielding their children from violence.

---

62 This article does not consider in any depth the s. 1 argument that would flow from such a finding, since even if the government could articulate a pressing and substantial objective where touchings are minor or required for the safety of the child, s. 43 as currently drafted is not rationally connected to those objectives and does not minimally impair children’s equality rights.