Corporal punishment and prosecutorial discretion in Canada

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I. Introduction: A Middle Ground?

Opponents of Canada’s corporal punishment defence, as provided for in section 43 of the Criminal Code, do not necessarily wish to achieve greater respect and protection for children by threatening parents and teachers with jail. For many, the distaste for punitive measures that inspires opposition to the corporal punishment defence extends to a lack of enthusiasm for, and a lack of faith in the positive results of, sterner criminal justice responses to social problems. It is important therefore to explore the possibility that there may exist some middle ground between a formal defence to criminal liability for violent disciplinary conduct towards children, and a situation where the law of assault is applied without sensitivity to some of the unique demands that may attend adult supervision of children. Greater awareness of such a middle ground might facilitate acceptance of the proposal to repeal, or seek the constitutional invalidation of Criminal Code section 43, on the part of those who feel that our law should retain some ability to distinguish the use of force by parents, teachers, and people acting as parents, from other forms of assaultive conduct.

Section 43 of the Criminal Code compromises the physical and psychological security of children and gives on-going legal effect to archaic assumptions about how children are less worthy of respect – indeed, less human – than other people in society. That being said, leaving aside the question as to whether slaps and spankings are ever too trivial to concern the courts, the offence of assault as defined by s. 265 of the Criminal Code may be satisfied by a range conduct which, at its least violent end, includes gestures. Accordingly, quite apart from the intentional infliction of pain that defines many forms of corporal punishment, an assault may be performed by less offensive kinds of “corrective” conduct that may be incidents of the stewardship of children. Such conduct includes, for example, pulling a recalcitrant child by the hand, carrying an equally recalcitrant, screaming child from a theatre or church, or gesturing sternly at a child. As unfortunate as any of these examples may be, it is
not clear that criminal prosecution for assault would represent the best response to them.

Whatever substance there may be to the argument that the law of assault needs to be applied in a manner that is occasionally sensitive to the unique situation of parents, people acting as parents, and teachers – the three categories of people who are covered by the defence – section 43 is nevertheless too symbolically objectionable and demonstrably offensive in practice to be sustained. Therefore, the necessary line drawing between situations where the law will and will not show this sensitivity must be done in the absence of a statutory corporal punishment defence. Furthermore, judges should be discouraged from developing a common law replacement for the section 43 defence, as this would reproduce its objectionable symbolism.

An alternative, proposed by at least one advocate of Criminal Code section 43’s repeal, is that prosecutorial discretion may be part of the middle ground. In her case comment on the Supreme Court of Canada’s leading decision in Ogg-Moss v. R., Sheila Noonan wrote:

This is not to suggest that every exercise of physical force against a child should result in a criminal charge. . . . [T]here might be instances . . . where adults might be guilty of an offence under circumstances in which punishment would seem unjust. Nonetheless, this recognition is insufficient reason for abrogation of the child’s right to dignity and bodily security. One would hope that such occurrences would be properly handled through the exercise of prosecutorial and police discretion.²

This article explores Noonan’s suggestion in relation to discretion exercised by prosecutors or Crown counsel in particular.

Looking to the exercise of discretion by legal officers to facilitate a law reform initiative engages interesting and challenging issues of general legal theory and policy. I will take advantage of the opportunity offered by the section 43 example to discuss and analyse some of these more general issues. These issues include the most basic question which is whether it is appropriate or legitimate to rely on the exercise of discretion in this way: to do informally and in a limited manner, what it is objectionable for our law to do formally and more generally. Furthermore, if a proposed course of legislative reform such as the repeal of section 43 is premised upon the expectation that certain kinds of decisions will be made, the issue arises as to whether the decision-making activity in question is truly discretionary in nature. This is because, to some considerable extent, the products of discretionary decision-making are uncertain by definition.

This article first outlines the Canadian corporal punishment defence and discusses the need for law reform in this area. This is followed by a review of the academic debate over the nature and legitimacy of discretion. The particular