

Fundamentally Flawed: The Arbitrariness of the Corporal Punishment Defence

M A R K C A R T E R *

ABSTRACT

In *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, the Supreme Court of Canada upheld the corporal punishment defence contained in s. 43 of the *Criminal Code* in the face of arguments that it is an unreasonable infringement of children's rights under ss. 7, 12, and 15 of the *Canadian Charter of Rights and Freedoms*. In the process of giving precision to the terms of s. 43 as a prelude to its s. 7 vagueness analysis, the majority indicated that the purpose of the section is to allow only the kind of force against children that has "corrective value" as determined primarily by the weight of expert evidence. The author argues that the Supreme Court's subsequent recognition of arbitrariness as a distinct fundamental justice concern under s. 7 in *Bedford v Canada (Attorney General)* meets the "new legal issue" standard for reconsidering previous declarations of validity established in *Bedford*. The author also argues that since 2004, changes in global attitudes and expert opinion in relation to corporal punishment have "fundamentally shift[ed] the parameters of the debate" which is the second *Bedford* test for reconsidering previous declarations of validity. Engaging the new arbitrariness framework and the importance that it places on the purposes of laws, the author argues that s. 43 is unconstitutionally arbitrary. Contemporary expert opinion recognizes no corrective value associated with corporal punishment. Because s. 43's objective is unachievable, there is no rational connection between it and the limit that it imposes on the children's security interests.

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The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed...¹

[T]here can be few things that more effectively designate children as second-class citizens than stripping them of the ordinary protection of the assault provisions of the Criminal Code.²

I. INTRODUCTION

S. 43 of the *Criminal Code* provides that “[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.”³

In *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*,⁴ the Supreme Court of Canada rejected constitutional challenges to the defence found in s. 43 based on several sections of the *Canadian Charter of Rights and Freedoms*.⁵ Many scholars and children’s rights advocates took the *Foundation* decision in stride and have continued to work tirelessly to end the physical punishment of children by seeking the repeal of s. 43.⁶ Recently, the movement has been given added impetus by the findings of the Truth and Reconciliation Commission of Canada (TRC). In its final report, the TRC concluded that “corporal punishment is a relic of a

¹ *Bedford v Canada (AG)*, 2013 SCC 72 at para 105 [*Bedford*].

² *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4 at para 72 [*Foundation*].

³ *Criminal Code*, RSC 1985, c C-46, s 43.

⁴ *Foundation*, *supra* note 2.

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Charter*].

⁶ See e.g. Joan E. Durrant et al, “Defining Reasonable Force: Does It Advance Child Protection?” (2017) 71 *Child Abuse & Neglect* 32; Joan E. Durrant & Ron Ensom, “Twenty-Five Years of Physical Punishment Research: What Have We Learned?” (2017) 28 *J Korean Academy Child & Adolescent Psychiatry* 20; Ailsa M. Watkinson & Letnie Rock, “Child Physical Punishment and International Human Rights: Implications for Social Work Education” (2016) 59 *Intl Social Work* 86; Joan E. Durrant et al, “Predicting Adults’ Approval of Physical Punishment from their Perceptions of their Childhood Experiences” (2017) 8:3/4 *Intl J Child, Youth & Family* 127; Cheryl Milne, “The Limits of Children’s Rights under Section 7 of the *Charter*: Life, No Liberty and Minimal Security of the Person” (2005) 17 *NJCL* 199.

discredited past and has no place in Canadian schools or homes.”⁷ Among the TRC’s calls to action is that “the Government of Canada... repeal Section 43 of the *Criminal Code* of Canada.”⁸ For its part, the first of Justin Trudeau’s federal Liberal Party administrations did not exclude this recommendation from its general commitment to implement all of the TRC’s calls to action.⁹

⁷ *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRCC, 2015) at 144, online: <www.trc.ca/assets/pdf/Executive_Summary_English_Web.pdf> [perma.cc/AFH5-L56D].

⁸ *Ibid* at 145.

⁹ Gloria Galloway, “Liberals agree to revoke spanking law in response to TRC call”, *The Globe and Mail* (20 December 2015), online: <www.theglobeandmail.com/news/politics/liberals-agree-to-revoke-spanking-law-in-response-to-trc-call/article27890875/> [perma.cc/UZT4-7JY9].

While opposed to the physical punishment of children, some currents of editorial and academic opinion nonetheless support s. 43’s retention in order to prevent the prosecution of parents for minor force used against children. See e.g. Margaret Wente, “A ban on spanking: Who’d it hurt the most?”, *The Globe and Mail* (21 December 2015), online: <www.theglobeandmail.com/opinion/a-ban-on-spanking-whod-be-hurt-the-most/article27896251/> [perma.cc/5LSQ-NB4W]; Lisa Kelly & Nicolas Bala, “More Harm than good: Repealing reasonable correction defence could backfire,” *Lawyers Weekly* (19 February 2016). Alternatively, Hamish Stewart recommends a new statutory defence of “deemed consent.” See Hamish Stewart “Parents, Children, and the Law of Assault” (2009) 32:1 Dal LJ 1.

Many opponents of s. 43 would want to distinguish their support for its repeal – a clear human rights objective – from any commitment to having more parents prosecuted for assault. As I have suggested elsewhere, the same objection “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.” See Mark Carter, “Corporal Punishment and Prosecutorial Discretion in Canada” (2004) 12:1 Intl J Children’s Rights 41 at 41. To this end I have, for example, explored the potential for prosecutorial discretion to modify the application of the law of assault in some circumstances that might otherwise have fallen within the scope of s. 43. 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 Rights in Canada* (Waterloo: Wilfred Laurier University Press, 2007) 99 at 99. Relatedly, in her dissenting opinion in *Foundation*, Justice Arbour suggested that in the absence of s. 43, parents could invoke the *de minimis* defence in response to assault charges based on “trivial use[s] of force to restrain children when appropriate” (See *Foundation*, *supra* note 4 at para 132). But see Steve Coughlin, “Why *De Minimis* Should Not Be a Defence” (2019) 44:2 Queen’s LJ 262.

Finally, while the Canadian social, economic, and legal context is unique, Joan Durrant’s research indicates that in countries that have removed their corporal

In the absence of s. 43's repeal, doctrinal developments since the *Foundation* decision in 2004 provide a new basis for questioning the constitutionality of the section. This article concentrates on developments in relation to the "principles of fundamental justice" in s. 7 of the *Charter* which, along with ss. 12 and 15, occupied a significant part of the Court's analysis in *Foundation*.¹⁰ S. 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In *Bedford v Canada (AG)*,¹¹ the Supreme Court consolidated and rationalized its jurisprudence relating to those principles of fundamental justice that are concerned with flaws or failures in the "instrumental rationality" of laws.¹² These are the rules against arbitrariness, overbreadth, and gross disproportionality. In *Bedford* the Court also established tests for situations when Supreme Court precedents – and, in particular, earlier findings of constitutionality – can be revisited by lower courts and the Supreme Court itself. I argue that in light of the Court's guidance in relation to these principles of instrumental rationality, the question as to whether s. 43 of the *Criminal Code* infringes s. 7 of the *Charter* meets the "new legal issues" threshold for reconsidering precedents.¹³ I also argue that there has been "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate"¹⁴ since 2004, which meets the Supreme Court's other test for reconsidering past precedents.

Of the three flaws in instrumental rationality, this article focuses, in particular, on the arbitrariness of s. 43 as that concept has been understood since *Bedford*. In the *Foundation* decision, concerns about the arbitrariness

punishment defences, and where adequate longitudinal data exists (e.g., Sweden and Germany), "[c]oncerns about the criminalization of parents and the intrusion of child welfare authorities into families' lives have not been borne out." See Joan E. Durrant, "Corporal Punishment and the Law in Global Perspective" in James G. Dwyer, ed, *The Oxford Handbook of Children and the Law* (Oxford: Oxford University Press, 2020) at 18, online: <www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190694395.001.0001/oxfordhb> [perma.cc/3X94-8N24] [Durrant, "Corporal Punishment"].

¹⁰ *Foundation*, *supra* note 2.

¹¹ *Bedford*, *supra* note 1.

¹² *Ibid* at para 107. The Supreme Court adopted this way of characterizing arbitrariness, overbreadth, and gross disproportionality from Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 136.

¹³ *Bedford*, *supra* note 1 at para 42.

¹⁴ *Ibid* at para 42.

and overbreadth of the corporal punishment defence were melded into the Court's primary focus on the section's potential vagueness. Vagueness is now better understood as a distinct challenge to fundamental justice. In *Bedford* itself, in which the prostitution-related offences in the *Criminal Code* were declared unconstitutional, the Court specifically recognized that arbitrariness, overbreadth, and gross disproportionality "have, to a large extent, developed only in the last 20 years" and in a manner that now more clearly distinguishes them from the rule against vagueness.¹⁵

As will be discussed, since *Bedford*, the instrumental rationality analysis places a premium on the purposes of laws in the determination of their constitutionality. Laws that infringe s. 7's threshold rights to life, liberty, and security of the person will avoid characterization as arbitrary, overbroad, or grossly disproportionate only if those infringements are connected, in particular ways, to the purposes of the challenged laws. To avoid characterization as arbitrary, there must be some connection between the infringement of a threshold right and the purpose or object of the law. As an initial matter, this process requires the identification of the purposes of the laws in question. Furthermore, the *Bedford* decision demonstrates that if the Court has identified the purposes of laws in previous decisions (even ones that concerned different constitutional issues), then those statements of purpose will be significant for future instrumental rationality analyses. In the words of the Court, "[t]he doctrine against shifting objectives does not permit a new object to be introduced at this point."¹⁶

In *Foundation*, the Court accepted that the corporal punishment defence adversely affects children's right to security of the person.¹⁷ However, in its perfunctory arbitrariness and overbreadth analysis – connected as these concepts were at the time with vagueness considerations – the majority did not seriously consider the connection between the infringement of this threshold right and the purpose of s. 43 of the *Criminal Code*, as the instrumental rationality analysis now requires.

¹⁵ *Ibid* at para 45.

¹⁶ *Ibid* at para 132. In this regard, the Court in *Bedford* established a new outpost for the rejection of "shifting purposes" which was otherwise a concern in the context of considering whether laws that infringe *Charter* guarantees are reasonably justified under s. 1 of the *Charter*. See Mark Carter, "Sections 7 and 1 of the *Charter* after *Bedford*, *Carter*, and *Smith*: Different Questions, Same Answers?" (2017) 64:1/2 *Crim LQ* 108 [Carter, "Same Answers"].

¹⁷ This point was conceded by the Crown. See *Foundation*, *supra* note 2 at para 3.

Nevertheless, the Court in *Foundation* did contribute to our understanding of the purpose of s. 43 in a manner that can assist in the application of the current framework for assessing the section's arbitrariness. As it operated in *Foundation*, the vagueness doctrine analysis focused, unfortunately, on protecting the interests of adults using force against children rather than on the interests of children themselves.¹⁸ Notwithstanding this, in the process of providing precision to otherwise unclear (i.e. vague) terms in the text of s. 43, the Court engaged in the kind of analysis of the "text, context, and scheme of the legislation" that the Court has subsequently identified as an important method of determining a law's purpose.¹⁹

In summing up its single paragraph on the overbreadth analysis, which follows and relies upon the vagueness inquiry, the Court in *Foundation* stated that "[s]ection 43 does not permit force that cannot correct."²⁰ The corollary of this assertion, therefore, which must be accepted as an important aspect of the purpose of the section, is that s. 43 only allows force that can correct. Furthermore, the Court was clear that the "corrective value" of force is to be established, not by the subjective beliefs of people engaging in this conduct,²¹ but primarily by "expert evidence"²² – as leavened occasionally in the decision by the more amorphous concept of "social consensus."²³ Indeed, "expert consensus" was critical to, and the explanation for, the Court's exclusion from the scope of the defence of any force used against children younger than three or older than 12 years. If there was any doubt in 2004, then the overwhelming weight of expert evidence is now clear that force is no more corrective within the age window established by the Court than outside of it. There is, therefore, no connection between the limitation that s. 43 places on children's right to

¹⁸ 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) 12:2 Intl Rev of Victimology 189 [Carter, "Critical Analysis"].

¹⁹ *R v Moriarity*, 2015 SCC 55 at para 31[Moriarity].

²⁰ *Foundation*, *supra* note 2 at para 46.

²¹ *Ibid* at para 36: "It is wrong for caregivers... to apply their own subjective notions of what is reasonable; s. 43 demands an objective appraisal based on current learning and consensus."

²² *Ibid* at paras 36–41, 46.

²³ *Ibid* at paras 36, 38.

security of the person and the purpose of the law. S. 43 is arbitrary, *tout court*.

The next part of this article briefly reviews the *Foundation* decision, paying particular attention to the s. 7 analysis in the case and the majority's consideration of the vagueness issue. Part III of the article discusses the significance of the *Bedford* decision for a reconsideration of s. 43's constitutionality, beginning with the standards established by the Court for revisiting past precedents. I then review the Supreme Court's recognition in *Bedford* of arbitrariness, overbreadth, and gross disproportionality as three principles of fundamental justice that are distinct as between themselves and from the concept of vagueness. In Part IV, I return to the *Foundation* decision, first applying the tests from *Bedford* for reconsidering past precedents to the s. 7 issues raised in that case. I then reconsider the object or purpose of s. 43 as it must be understood based on the majority's analysis of the terms of the section and the majority's exclusion from the ambit of the section all force used against very young children and teenagers, which experts agreed has no corrective value. The last part of the article emphasizes the lack of connection between the purpose of the corporal punishment defence as identified by the majority – to allow the application of force that has corrective value – and the limitation that it places on the security of children within the age window of vulnerability established by the Court.

II. *CANADIAN FOUNDATION FOR CHILDREN YOUTH AND THE LAW V CANADA (ATTORNEY GENERAL)*

A. *The Foundation Case*

The Supreme Court of Canada's *Foundation* case was the culmination of an attempt by a number of individuals and child advocacy groups to have the corporal punishment defence, as contained in s. 43 of the *Criminal Code*, declared unconstitutional. The action was brought pursuant to Ontario's *Rules of Civil Procedure* that provide for public interest litigation in certain circumstances.²⁴ As indicated by the trial judge, Justice McCombs of the Ontario Superior Court:

This case is unusual because it does not come before the court with a factual underpinning, where one of the parties has raised a constitutional issue that

²⁴ Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 14.05(3)(gl).

impacts upon a case already before the court. Instead, this case was heard with special permission of the court, because it raises a serious legal question, and there is no other reasonable and effective way for the issue to be raised.²⁵

The Foundation sought a declaration that the corporal punishment defence is unconstitutional and of no force and effect because it unreasonably infringes several sections of the *Charter*. Along with s. 7, which is the focus of this article, the Foundation argued that the defence justifies conduct that offends the protection against cruel and unusual treatment or punishment under s. 12 of the *Charter* and that the defence constitutes age discrimination, which offends the equality guarantees under s. 15 of the *Charter*. The Foundation was unsuccessful at trial, and the Ontario Court of Appeal dismissed the Foundation's appeal.²⁶ At the Supreme Court of Canada, Chief Justice McLachlin, writing for the majority,²⁷ also rejected all of the Foundation's arguments.²⁸ In dissent, Justice Arbour held that s. 43 is unconstitutionally vague under s. 7 of the *Charter*. Such vagueness meant that s. 43 is not a limit "prescribed by law" which is the threshold requirement for reasonable limitations of *Charter* rights under s. 1. In separated reasons, Justice Binnie and Justice Deschamps found infringements of s. 15. For his part, Justice Binnie found this limitation to be a reasonable infringement under s. 1 of the *Charter*, except insofar as the defence applied to teachers. Justice Deschamps would have declared the entire section to be of no force and effect.

B. The Section 7 Analysis in *Foundation*

1. The Structure of Section 7 Arguments

Parties challenging a law under s. 7 of the *Charter* have to establish first that the law "deprives" anyone of their right to life, liberty, or security of the person. The onus then remains on the challenger to establish that this limitation is not in accordance with the principles of fundamental justice.²⁹ If a challenger convinces the court that a law infringes s. 7 then, as with all

²⁵ *Canadian Foundation for Children, Youth and the Law v Canada (AG)* (2000), 188 DLR (4th) 718 at para 8, [2000] OJ No 2535 (Ont Sup Ct) [*Foundation* 2000].

²⁶ *Canadian Foundation for Children, Youth and the Law v Canada (AG)* (2002), 207 DLR (4th) 632, 52 WCB (2d) 277 (Ont CA).

²⁷ *Foundation*, *supra* note 2.

²⁸ For an extended review and critical analysis of the Supreme Court's decision see Carter, "Critical Analysis", *supra* note 18.

²⁹ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 [BCMVA].

Charter guarantees, the government can argue that the law represents a reasonable limit under s. 1 of the *Charter*, pursuant to the framework established by the Supreme Court of Canada in *R v Oakes*.³⁰ The chances of s. 7 infringements being upheld under s. 1 of the *Charter* are very slim and, to date, no Supreme Court majority has supported such an outcome.³¹

2. Separate Representation for Children

Because the Crown conceded that s. 43 infringes children’s right to security of the person, the Foundation’s three s. 7 arguments concerned the principles of fundamental justice. One of these was a procedural argument. Since its earliest consideration of the nature of the term “principles of fundamental justice” in s. 7, the Supreme Court has recognized that they include, at least, procedural protections.³² In *Foundation*, the challengers argued for recognition that in criminal proceedings that involve the invocation of s. 43, adequate procedural protection for the young complainants requires that they have independent legal counsel. The Supreme Court rejected this submission on the basis that the right to counsel for victims of alleged criminal activity has not been recognized by Canadian courts and, in any event, in criminal proceedings the Crown represents victims’ interests.³³

3. Best Interests of the Child Principle as a Principle of Fundamental Justice

The Foundation also argued that the concept of fundamental justice should be understood to include the “best interests of the child” (“best interests”) principle and that sanctioning assaultive conduct toward children is not in accordance with that principle. In rejecting the best interests principle’s inclusion within the concept of fundamental justice, the Court employed a three-part analytical framework that it established in *R v Malmo-Levine; R v Caine*,³⁴ a decision that had not been delivered when

³⁰ *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

³¹ Accordingly, while I will argue that s. 43 is arbitrary under s. 7, I will not engage in s. 1 analysis, which, I assume, would not be successful for reasons that I discuss in Carter, “Same Answers”, *supra* note 16.

³² BCMVA, *supra* note 29. Also, see Mark Carter, “Fundamental Justice” in Mathew P. Harrington, ed, *The Court and the Constitution: A 150-Year Retrospective* (Toronto: LexisNexis, 2017) at 259 [Carter, “Fundamental Justice”].

³³ *Foundation*, *supra* note 2 at para 6.

³⁴ *R v Malmo-Levine; R v Caine*, 2003 SCC 74 [*Malmo-Lavine*].

Foundation was argued.³⁵ The Court held that the best interests of the child principle met the first requirement of being a “legal principle.”³⁶ Bizarrely, however, the Court held that there is no societal consensus that the best interests of children is “vital or fundamental to our societal notion of justice”³⁷ or that it is a “foundational requirement for the dispensation of justice.”³⁸ Accordingly, the best interests of the child principle did not meet the second, “societal consensus” requirement of the *Malmo-Levine* framework. Neither did the best interests of the child principle satisfy the Court’s third requirement that principles of fundamental justice be “capable of being identified with some precision.” In the Court’s estimation, the best interests principle is “inevitably highly contextual and subject to dispute”³⁹ – something which might be said about many if not most legal principles, even those that have been recognized as part of the fundamental justice concept.

4. *Vagueness*

i. Protecting “Risk Takers”

As a principle of fundamental justice, the requirement that laws be adequately precise – not vague – serves important aspects of the rule of law concept. Laws that limit life, liberty, or security of the person have to be sufficiently precise that they provide an adequate basis for legal debate and “delineate... area[s] of risk, and thus can provide... fair notice to the citizen” as to the conduct that is prohibited. Laws also have to be precise enough to

³⁵ As I argue in Carter, “Critical Analysis”, *supra* note 17 at 204, a number of principles of fundamental justice that the Supreme Court had already recognized at this point in its s. 7 jurisprudence would not satisfy the *Malmo-Levine* framework.

³⁶ *Foundation*, *supra* note 2 at para 9.

³⁷ In a number of articles, I have criticized the circularity of the Court’s reasoning in this regard. The majority suggests that since we have long-standing laws that are inconsistent with the best interests of the child (See *Malmo-Lavine*, *supra* note 34 at para 10: “[f]or example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child’s best interests”), we must therefore conclude that there is no societal consensus as to the principle’s fundamental character. See, for example, Carter, “Critical Analysis”, *supra* note 18 at 203; Mark Carter, “Blackstoned’ Again: Common Law Liberties: The Canadian Constitution, and the Principles of Fundamental Justice” (2007) 13:2 *Tex Wesleyan L Rev* 343.

³⁸ *Foundation*, *supra* note 2 at para 10.

³⁹ *Ibid* at para 11.

provide “a limitation of enforcement discretion.”⁴⁰ A law that fails to meet these standards of precision would be unconstitutionally vague.⁴¹

It will be noted that the focus of concern in this framing of the vagueness doctrine is the interests of the people engaging in potentially unlawful conduct. They are “risk takers” who will be interested in knowing what the law allows them to do or not to do, and they are the parties who will want to avoid arbitrary enforcement of the law. For these reasons, our understanding of the vagueness doctrine under s. 7 has been forged in the context of offences. S. 43, however, presents an entirely different situation. The reason that the matter was before the Court for s. 7 consideration had nothing to do with the rights of adults who may want to take the risk of engaging in assaultive conduct against children. These adults would, of course, not want to challenge the constitutionality of the defence except insofar as they are prevented from taking advantage of it. Rather, the s. 7 challenge in *Foundation* turned on the extent to which the corporal punishment defence limits the security interests of innocent third parties – children who may be subject to assaultive conduct. Accordingly, while the standard “frame” for the vagueness doctrine, with its primary concern for the interests of risk takers, may have been the only one that was available to the Foundation in making its arguments, that frame was entirely incapable of protecting the true interests that were at stake in the case. As I have argued elsewhere,⁴² the vagueness analysis in *Foundation* has a surreal quality. It proceeded as if the parties who are most worthy of constitutional concern are the adults engaging in forceful conduct against children, rather than the children who are subject to that conduct.⁴³

ii. Giving Precision to the Corporal Punishment Defence

Leaving these concerns aside, in *Foundation*, the Chief Justice characterized the applicant’s vagueness argument in the following terms:

[Section] 43 is unconstitutional because first, it does not give sufficient notice as to what conduct is prohibited; and second, it fails to constrain discretion in

⁴⁰ *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36 at 626–27.

⁴¹ As noted above, Justice Arbour’s dissenting opinion held s. 43 to be unconstitutionally vague.

⁴² See Carter, “Critical Analysis,” *supra* note 18 at 200–02.

⁴³ I thank Professor Anne McGillivray, Canada’s leading legal scholar in this area, for bringing to my attention this strange inversion of the interests in the majority’s decision. See also Judith Mosoff & Isabel Grant, “Upholding Corporal Punishment: for Whose Benefit” (2005) 31:1 Man LJ 177.

enforcement. The concept of what is “reasonable under the circumstances” is simply too vague, it is argued, to pass muster as a criminal provision.⁴⁴

The concept of force that is “reasonable under the circumstances,” along with s. 43’s reference to “force by way of correction,” occupied the majority’s attention as it concerned the vagueness doctrine. According to the Court, other relevant terms in s. 43 were unproblematic. In relation to who could take advantage of the defence, the section’s references to parent and teacher were understood to speak for themselves. Chief Justice McLachlin also found that a “person standing in the place of a parent” had been adequately defined by the courts as “an individual who has assumed ‘all the obligations of parenthood.’”⁴⁵

Having identified the nature of the “conduct [that] falls within the sphere” of the section⁴⁶ as the only aspect of the defence that lacks precision, the Chief Justice proceeded to provide it. From her reading of precedents and expert evidence, Chief Justice McLachlin divined a “solid core of meaning”⁴⁷ for s. 43’s terms. This core of meaning is reflected in requirements that, in the majority’s estimation, rescue the section from characterization as being unconstitutionally vague. Two of these requirements relate, respectively, to the ages of the young people against whom force may be applied and the necessary “corrective” character of that force. As I argue below, these requirements are particularly significant for our understanding of the purpose of s. 43. This, in turn, will be essential to my assessment of the arbitrariness of the corporal punishment defence.

In *Foundation*, the Chief Justice alludes to the “agreement among experts” that force used against children younger than three or “teenagers”⁴⁸ has no “corrective value” and would be harmful to those infants and young people. By excluding from the concept of “reasonable force” under s. 43 force that is used against the very young and teenagers, the Court effectively established a ten-year window of vulnerability to corporal punishment for children aged three to 12 years. The implication is that the use of force

⁴⁴ *Foundation*, *supra* note 2 at para 13.

⁴⁵ *Ibid* at para 21, citing *Ogg-Moss v The Queen*, [1984] 2 SCR 173 at 190, [1984] 2 RCS 173 [*Ogg-Moss*].

⁴⁶ *Foundation*, *supra* note 2 at para 22 [emphasis in original].

⁴⁷ *Ibid* at para 40.

⁴⁸ *Ibid* at para 37: “Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour.”

against children within this window of vulnerability may have “corrective value” and is not harmful in the way that it is to those who are younger or older. In fact, the majority’s decision is stunningly silent about the lack of any evidence of this. The most that can be drawn from the majority’s engagement with expert evidence on this point is not that the use of force against children in this age group has corrective value, but only that it might not always be as harmful as it always is for those who are younger or older. This, then, undermines another requirement that the majority establishes for the kind of force that is justified under s. 43: that it be corrective in accordance with objective standards.⁴⁹

The majority otherwise identified the conduct that is exempt from criminal sanctions under s. 43 as force that is of a minor “transitory and trifling nature,”⁵⁰ administered only by hand,⁵¹ and below children’s heads. Teachers may no longer use force “merely as corporal punishment.” S. 43 now only protects force used by teachers that is intended to “remove... children from... classroom[s] or secure compliance with instructions.” The necessary “corrective” character of the conduct that falls under s. 43 also excludes force that stems from “frustration, loss of temper or abusive personality.”⁵²

Quite apart from the specifics of the *Foundation* case itself, the majority’s efforts to bring precision to s. 43 continue to raise challenging questions about the limits of the judicial role. For his part, Professor Hogg uses the *Foundation* example to discuss the general question: “[t]o what extent is it possible for a court to repair potentially unconstitutional vagueness by interpreting a challenged law to supply more precision?... [W]here does interpretation end and redrafting begin?”⁵³ This part of the majority’s decision drew strong responses from the dissenting judges. Justice Arbour charged the Chief Justice with drafting “an entirely new provision.”⁵⁴ Justice

⁴⁹ *Ibid* at para 40.

⁵⁰ Although the Court did not indicate the source of this language, it seems significant that it is part of the definition of “bodily harm” under s. 2 of the *Criminal Code*: “bodily harm means any hurt or injury to a person that... is more than merely transient or trifling in nature.”

⁵¹ This is the effect of the majority’s prohibition on the use of “objects.” See *Foundation*, *supra* note 2 at para 40.

⁵² *Foundation*, *supra* note 2 at para 40.

⁵³ Peter Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough, Ontario: Carswell, 2007) at 47-64.8, 47-64.9.

⁵⁴ *Foundation*, *supra* note 2 at para 190.

Binnie and Justice Deschamps expressed their respective concerns about “judicial amendment”⁵⁵ and crossing the line from “statutory interpretation into... legislative drafting.”⁵⁶

5. Arbitrariness and Overbreadth

In *Bedford*,⁵⁷ the Supreme Court recognized that arbitrariness and overbreadth had only recently developed their status as independent concerns of fundamental justice that are distinct from the vagueness doctrine.⁵⁸ The treatment of arbitrariness and overbreadth in *Foundation* reflects the older approach. Thus, in considering the potential arbitrariness of the section, the majority relates this to concerns about zones of risk and arbitrary enforcement of imprecise laws, which the vagueness doctrine guards against.⁵⁹ Similarly, concerns about the overbreadth of the section are addressed to the majority’s satisfaction with “Parliament’s decision to confine the exemption to reasonable correction.” As indicated above, in the course of giving precision to the terms “force by way of correction” and force that is “reasonable under the circumstances” before engaging in the vagueness analysis, the majority restricted the breadth of the section by excluding as recipients of this conduct, children under two or older than 12 years.⁶⁰ None of this reflects the post-*Bedford* approach to the arbitrariness and overbreadth analysis that is primarily concerned with the connection between rights infringements and the purposes of laws.

III. *BEDFORD V CANADA (AG)*

A. Revisiting Past Precedents

In its unanimous decision in *Bedford v Canada (AG)*, the Supreme Court of Canada held three prostitution-related *Criminal Code* offences to be unreasonable infringements of s. 7 of the *Charter*. The offences of keeping or being in a bawdy-house⁶¹ and communicating for the purposes prostitution⁶² were held to be grossly disproportionate. The offence of living

⁵⁵ *Ibid* at para 81.

⁵⁶ *Ibid* at para 216.

⁵⁷ *Bedford*, *supra* note 1.

⁵⁸ *Ibid* at para 45.

⁵⁹ *Foundation*, *supra* note 2 at para 26.

⁶⁰ *Ibid* at para 46.

⁶¹ *Criminal Code*, *supra* note 3, s 210.

⁶² *Ibid*, s 213(1)(c).

off the avails of prostitution⁶³ was held to be overbroad. In doing so, the Court was reconsidering the constitutionality of two offences – the bawdy-house and communicating provisions – that were upheld in the *Prostitution Reference*⁶⁴ in 1990. The unsuccessful s. 7 arguments in the *Prostitution Reference* case were based on the vagueness doctrine.

In *Bedford*, the Court considered the “vertical” *stare decisis* issue of lower courts’ jurisdiction to depart from higher court precedents as had occurred in *Prostitution Reference*. The Court held that trial judges could do so if new legal issues were raised. These new issues included arguments based on provisions of the *Charter* that were not raised in earlier cases. The Court also accepted lower courts’ jurisdiction to depart from otherwise binding precedent “if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.”⁶⁵ As it concerned the “new legal issues” standard in *Bedford*, of particular significance to this discussion is the Court’s finding that “the *Prostitution Reference* dealt with vagueness... [t]he principles raised in this case – arbitrariness, overbreadth, and gross disproportionality – have, to a large extent, developed only in the last 20 years.”⁶⁶

B. The *Bedford* Framework for Arbitrariness, Overbreadth, and Gross Disproportionality

The Supreme Court in *Bedford* confirmed the emergence of arbitrariness, overbreadth, and gross disproportionality in the jurisprudence as “three distinct principles” of fundamental justice.⁶⁷ This was the case notwithstanding courts’ previous inconsistent application of the principles and a tendency to “commingle” them.⁶⁸ All three principles concern the relationship between limitations that laws impose on s. 7 rights to life, liberty, and security of the person and the laws’ purposes. Laws are unconstitutionally arbitrary when there is no connection between the s. 7

⁶³ *Ibid*, s 212(1)(j).

⁶⁴ *Reference Re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, [1990] 1 RCS 1123 [*Prostitution Reference*].

⁶⁵ *Bedford*, *supra* note 1 at para 42.

⁶⁶ *Ibid* at para 45.

⁶⁷ *Ibid* at para 107.

⁶⁸ *Ibid* at para 106.

infringement and the purposes of laws.⁶⁹ Laws that are overbroad are “arbitrary in part”: they are “so broad in scope that [they] includes some conduct that bears no relation to [their] purpose[s].”⁷⁰ Findings of gross disproportionality occur when laws’ “effects on life, liberty or security of the person are so grossly disproportionate to [their] purposes that they cannot rationally be supported.”⁷¹ All of these defects represent critical failures in the “instrumental rationality” of laws.⁷²

IV. THE CORPORAL PUNISHMENT DEFENCE AND INSTRUMENTAL RATIONALITY

A. Revisiting the *Foundation* Decision

1. *Significant Developments in the Law*

Since the *Foundation* decision, the law concerning s. 7 of the *Charter* has developed in a manner that meets the standard for revisiting otherwise binding precedents established by the Court in *Bedford*. Indeed, the arbitrariness, overbreadth, and gross disproportionality principles that have “emerged as central in the recent s. 7 jurisprudence,”⁷³ and which have significance for s. 43, are the same ones that led the Court in *Bedford* to revisit the *Prostitution Reference*. In *Carter v Canada (Attorney General)*,⁷⁴ the emergence of these principles also supported the Supreme Court’s decision to revisit and reverse its decision in *Rodriguez v British Columbia (Attorney General)*⁷⁵ concerning the constitutionality of the assisted suicide offence. It is also significant that the Court’s s. 7 analysis in *Bedford* was concerned with disentangling the principles of arbitrariness, overbreadth, and gross disproportionality from their connection to the vagueness doctrine in *Prostitution Reference*. As discussed above, in *Foundation*, arbitrariness and overbreadth were similarly melded into the vagueness analysis in a manner that is inconsistent with the contemporary approach to these principles as outlined in *Bedford*.

⁶⁹ *Ibid* at para 111.

⁷⁰ *Ibid* at para 112.

⁷¹ *Ibid* at para 120.

⁷² *Ibid* at para 107.

⁷³ *Carter v Canada (AG)*, 2015 SCC 5 at para 72 [*Carter*].

⁷⁴ *Ibid*.

⁷⁵ *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, [1993] 3 RCS 519 [*Rodriguez*].

2. *Change in the Circumstances or Evidence*

Another exception to the vertical *stare decisis* rule that the Court recognized in *Bedford* arises when there has been “a change in circumstances or evidence that that fundamentally shifts the parameters of the debate.”⁷⁶ For example, in the *Carter* decision, along with the significant developments in the law concerning s. 7 of the *Charter*, the Court also found that the *Rodriguez* decision could be revisited based on changes in “the matrix of legislative and social facts” since *Rodriguez*.⁷⁷ Significantly, for this discussion, there existed at the time of *Rodriguez* evidence of “substantial consensus” in Western countries that a blanket prohibition [on assisted suicide] is necessary to protect” vulnerable people.⁷⁸ The Supreme Court in *Carter* was satisfied that there was evidence before the trial judge that could undermine the conclusions in *Rodriguez* about this substantial consensus.⁷⁹ This evidence included changes that had occurred since *Rodriguez* in relation to other jurisdictions that now allowed physician-assisted death.⁸⁰

Comparable changes have occurred in relation to the banning of corporal punishment in other jurisdictions, which should be recognized as changes in circumstances or evidence since *Foundation*. At the time of the *Foundation* case, only eight countries explicitly banned physical punishment.⁸¹ In June 2021, the Global Initiative to End All Corporal Punishment of Children reported that this group of countries had grown to 61 with 27 others committed to doing so.⁸² Also, if in 2004 there was any degree of expert opinion that physical punishment of children could have “corrective value” – something which even the majority did not explicitly accept in *Foundation* – then that acceptance is gone. Writing in 2019, Dr. Joan Durrant of the University of Manitoba, a leading international expert on the subject, put it succinctly: “[d]ebates over corporal punishment’s effectiveness have come to an end. No study has shown it to have long-term

⁷⁶ *Bedford*, *supra* note 1 at para 42.

⁷⁷ *Carter*, *supra* note 73 at para 47.

⁷⁸ *Ibid* at para 47.

⁷⁹ *Ibid*.

⁸⁰ *Carter v Canada (AG)*, 2012 BCSC 886 para 944.

⁸¹ *Foundation 2000*, *supra* note 25 at para 100. Those eight countries are Sweden, Finland, Denmark, Norway, Austria, Cyprus, Croatia, and Latvia.

⁸² “Global Initiative to end all Corporal Punishment of Children” (2018), online: *End Corporal Punishment* <endcorporalpunishment.org/countdown> [perma.cc/KK7M-V8V T].

benefits, while many have demonstrated its substantial and wide-ranging risks.”⁸³

B. Reconsidering the Object or Purpose of Section 43 of the *Criminal Code*

In its instrumental rationality analysis in *Bedford*, the Supreme Court demonstrated that after having established that a law limits the right to life, liberty, or security of the person, courts will next identify the object or purpose of the law,⁸⁴ before going on to consider the connection that exists between the rights limitation and that purpose or objective. *Bedford* also illustrates the Court’s commitment to the idea that there exists a single “true” objective for every law.⁸⁵ In the instrumental rationality context, the Court indicated that it would not engage in any substantive analysis of the appropriateness of the legislative objectives or purposes in question, determining instead to take them “at face value.”⁸⁶ Neither, however, will the Court accept any purpose that the Crown may proffer. In *Bedford*, the Supreme Court rejected the objectives for all three offences that the federal and provincial Attorneys General proposed, employing instead ones that were better supported by the “legislative record”⁸⁷ or precedent.⁸⁸ In *Carter*, the Court similarly rejected the purpose of the assisted suicide offence as proposed by the Attorney General for Canada, preferring instead a

⁸³ Durrant, “Corporal Punishment”, *supra* note 9. The literature in support of this point is overwhelming. For a small sample, see the literature cited in fn 6.

⁸⁴ In *Bedford*, in relation to each of the offences under review, and after having established that each of the three offences limit the right to security of the person of sex trade workers, the Court began its “fundamental justice analysis” with subsections titled “The Object of the Provision”. See *Bedford*, *supra* note 1 at paras 130, 137, 146.

⁸⁵ I consider this development at length in *Carter*, “Same Answers”, *supra* note 16.

⁸⁶ *Bedford*, *supra* note 1 at para 125.

⁸⁷ In relation to the bawdy house offence, the objective proposed by the Attorneys General was the deterrence of prostitution. The Court accepted instead the “prevent[ion] [of] community harms in the nature of nuisance.” See *Bedford*, *supra* note 1 at para 131.

⁸⁸ In relation to the offence of living off the avails of prostitution, the Court rejected the Attorneys General’s proposed objective “to target the commercialization of prostitution, and to promote the values of dignity and equality” accepting instead the Court’s own finding in *R v Downey*, [1992] 2 SCR 10, the offence was targeted at “pimps and the parasitic, exploitative conduct in which they engage.” See *Bedford*, *supra* note 1 at paras 137–38.

narrower version that, in the Court's determination, better accorded with the ruling in *Rodriguez*.⁸⁹

Since the *Bedford* and *Carter* decisions, the Supreme Court has provided more guidance concerning the identification of legislative purposes for the instrumental rationality analysis. In *R v Safarzadeh-Markhali*,⁹⁰ the Court expanded upon the approach that it had recently laid out in *R v Moriarity*.⁹¹ *Markhali* and *Moriarity* both concerned overbreadth challenges, but the approach should apply equally to the arbitrariness analysis. In *Markhali*, the Court stated:

To determine a law's purpose for a s. 7 overbreadth analysis, courts look to (1) statements of purpose in the legislation, if any; (2) the text, context, and scheme of the legislation; and (3) extrinsic evidence such as legislative history and evolution.⁹²

In this process, the Court cautions us to distinguish between legislative objectives and the means used to achieve the objectives. While the latter may assist in identifying the former, the concepts are distinct.⁹³ We are also directed to consider the "appropriate level of generality" with which to characterize a law's purpose: less general than an "animating social value" but not so narrow as to be a "virtual repetition of the challenged provision, divorced of context."⁹⁴ A statement of legislative purpose should be precise and succinct.⁹⁵ The Court also reiterated its position that the appropriateness of the purpose is not a concern. At this stage of the analysis, the objective will be taken "at face value" and it is assumed to be "appropriate and lawful."⁹⁶

While a version of the corporal punishment defence has always been in the *Criminal Code*, there has been remarkably little consideration of its purpose. Prior to the *Foundation* decision, the leading authority on the meaning and scope of the corporal punishment defence was *Ogg-Moss v R*.⁹⁷ *Ogg-Moss* did not involve a constitutional challenge but, rather, a consideration of the scope of the terms "child" and "pupil" for the purposes

⁸⁹ *Carter*, *supra* note 73 paras 74–75.

⁹⁰ 2016 SCC 14 [*Markhali*].

⁹¹ *Moriarity*, *supra* note 19.

⁹² *Markhali*, *supra* note 90 at para 31.

⁹³ *Moriarity*, *supra* note 19 at para 26.

⁹⁴ *Ibid* para 28.

⁹⁵ *Ibid* para 29.

⁹⁶ *Ibid* para 30.

⁹⁷ *Supra* note 45.

of a party wishing to take advantage of the defence. In *Ogg-Moss*, Justice Dickson stated that “a confident conclusion as to the purpose of s. 43 must await an accurate assessment of the meaning of its terms.”⁹⁸ Justice Dickson did not provide that conclusion – confident or otherwise – but he did emphasize the connection between the meaning of the terms of the section and its purpose, a task that was undertaken by the Supreme Court in *Foundation*.

Among the sources to which we are directed in *Moriarity* and *Markhali* in order to determine legislative purposes, as suggested by Justice Dickson in *Ogg-Moss*, we are left primarily with “the text, context, and scheme of the legislation.” Except insofar as it may be reflected by those terms, there is no separate statement of purpose for s. 43. In relation to “extrinsic evidence such as legislative history and evolution,” the majority decision in *Foundation* commented on the rewording of the section as part of the 1953–54 revisions to the *Criminal Code*.⁹⁹ Before the revisions, the section indicated that the use of force by way of correction may be “lawful” in certain circumstances. “Lawful” was changed to the section’s current indication that the use of corrective force may be “justified.” As an aspect of its arguments as to the discriminatory nature of s. 43, the Foundation contended that the language of justification implies that the purpose of the section is to promote the idea that corporal punishment is “good for children.”¹⁰⁰ The Court rejected this argument in a manner that suggests how limited the evidence of legislative history may be for s. 43: “[w]e do not know why [‘lawful’ was changed to ‘justified’]. We do know that the change was not discussed in Parliament, and that there is no indication that Parliament suddenly felt that the reasonable force in the correction of children now demanded the state’s explicit moral approval.”¹⁰¹

The most direct evidence of what must be taken to be the purpose of s. 43, therefore, arises out of the majority’s “consider[ation of] its words and court decisions interpreting those words... [which] must be considered in

⁹⁸ *Ibid* at 183.

⁹⁹ Also excluded from the section at this time was the relationship between masters and apprentices.

¹⁰⁰ *Foundation*, *supra* note 2 at para 64.

¹⁰¹ *Ibid* at para 65. Anne McGillivray identifies the roots of s. 43 in Anglo Saxon and Roman sources and with its common law version articulated in William Blackstone’s *Commentaries on the Laws of England*. See Anne McGillivray, “R v K (M): Legitimizing Brutality” (1993) 16 CR (4th) 125 at 127–28.

context, in their grammatical and ordinary sense.”¹⁰² The majority held that the purpose of s. 43 is to “delineate a sphere of non-criminal conduct within the larger realm of common assault in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids ad hoc discretionary decision making by law enforcement officials.”¹⁰³ Based on the discussion above, it will be clear that this statement of purpose is framed in terms that address the specific concerns of the vagueness doctrine: zones of risk and *ad hoc* decision making. However, in the analysis of the section’s terms that precede the consideration of the section’s potential vagueness, Chief Justice McLachlin gave precision to the concepts of “force by way of correction” and “reasonable under the circumstances.” The majority’s conclusions in these respects must be understood to inform our understanding of s. 43’s legislative purpose, even beyond the vagueness context. This would represent the kind of “accurate assessment of the meaning [of the section’s] terms” that Justice Dickson pointed to in *Ogg-Moss* as the key to understanding the purpose of s. 43.¹⁰⁴

In relation to the “force by way of correction” reference, in particular, it is important that the Chief Justice did not allow it to be determined by adults’ subjective beliefs. Rather, the majority decision in this respect responded to expert consensus, at least in relation to uses of force that are never corrective, regardless of subjective belief. On this basis, the majority excluded from s. 43 any force used against children two years of age or younger and teenagers because expert consensus indicates that it has no “corrective value.” This necessarily implies that force applied to children within the age window of vulnerability – three to 12 years old – does or at least may have corrective value according to the same standard used to exclude force used against younger and older people: expert consensus. All of this points to the fullest understanding of the majority’s position as to the objective or purpose of s. 43: to bring precision to the “sphere of non-criminal conduct” that the section allows, and to avoid the *ad hoc* “decision making by officials,” the conduct in question must not only reflect the objective characteristics that the Chief Justice identified – “transitory and trifling nature,” administered only by hand, and below children’s heads. The most precise and succinct statement of the purpose of s. 43 would have

¹⁰² *Foundation*, *supra* note 2 at para 20.

¹⁰³ *Ibid* at para 19.

¹⁰⁴ *Ogg-Moss*, *supra* note 45 at 183.

to recognize that the force that it allows must have corrective value as determined most significantly by expert evidence.

C. The Arbitrariness of Section 43

1. *The Unachievable Objective*

Since the purpose of s. 43 as presented by the majority in *Foundation* is to allow only the kind of force against children that has “corrective value” as recognized by expert evidence, any rational connection dissolves between the rights limitation that the section imposes and its purpose. Although the majority in the *Foundation* decision could not, apparently, bring itself to say so, it may have been willing to concede the possibility of some corrective value in force used against children aged three to 12 years.¹⁰⁵ To repeat Dr. Durant’s concise overview of current expert consensus in this regard, “[d]ebates over corporal punishment’s effectiveness have come to an end. No study has shown it to have long-term benefits, while many have demonstrated its substantial and wide-ranging risks.”¹⁰⁶ Therefore, according to the Court’s own standards for determining what is force “by way of correction,” s. 43 is arbitrary. Not only is there no expert consensus as to the corrective value of force used against children aged three to 12 years, but there is no evidence at all. There is, therefore, no connection between the limit that s. 43 imposes on children’s right to security of the person and the objective of the law. Since the Court has told us that expert evidence must support the corrective potential of the use of force, we now know that s. 43’s objective simply cannot be realized. None of this offends the Court’s insistence in *Bedford* and *Moriarity* that the instrumental rationality analysis involves taking the objective of laws “at face value.” Taking an objective at “face value” does not require accepting that it is realistic or achievable, even if it has traditionally been treated as such. In fact, “correcting” such traditional assumptions which have operated historically to compromise individual rights is precisely the concern of the *Charter* project including the arbitrariness doctrine.

¹⁰⁵ This aspect of the majority’s decision reflects a kind of logical sleight of hand. In fact, expert consensus that there is no corrective value in subjecting children of certain ages to force implies nothing but a lack of consensus – or perhaps no evidence at all – in relation to children who are not of those ages.

¹⁰⁶ Durrant, “Corporal Punishment”, *supra* note 9.

2. *The Arbitrariness of the Decade of Vulnerability*

Because force used against children of any age has no corrective value, it is unnecessary to consider the obvious arbitrariness of the decade of vulnerability established by the majority in *Foundation* for children aged three to 12 years. Were rights denied to children in this age range for more legitimate reasons, important questions would arise about the lack of any objective differences between children on either side of these age lines: children who have just turned three years old, for example, or young people who are almost 13. Furthermore, the extraordinary role of the Court in establishing this age range gives additional currency to the dissenters' concerns about the majority's engagement in judicial legislating. In fact, in *AC v Manitoba (Director of Child and Family Services)*,¹⁰⁷ the majority upheld provisions of child protection legislation that used a specific age to limit young people's s. 7 rights. This legislation, however, did so in the interests of young people's well-being – to ensure that they receive medically necessary treatment – rather than to subject them to force so as to cause pain. Significantly, as well, the age limit in *AC* was saved from characterization as arbitrary and required to be applied flexibly, only because the legislation also recognized the principle that the majority rejected as part of fundamental justice in *Foundation* – the best interests of the child.¹⁰⁸

V. CONCLUSION

Since the Supreme Court of Canada's important reformulation of fundamental justice themes under s. 7 of the *Charter* in the *Bedford* decision, the arbitrariness of the corporal punishment defence in constitutional terms is now clear. The purpose of the section, as established by the Supreme Court in the *Foundation* decision, is to allow caregivers to subject children to force that has "corrective value" as recognized primarily by expert evidence. In 2021, it is clear that the overwhelming weight of expert evidence recognizes no corrective value in corporal punishment. There is, therefore, no rational connection between the way that s. 43 deprives children of their security of the person interests under s. 7 and the purpose

¹⁰⁷ *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

¹⁰⁸ See Mark Carter, "The Children's Trilogy: The Best Interests of the Child Principle and the Principles of Fundamental Justice" in Sanjeev Anand, ed, *Children and the Law: Essays in Honour of Professor Nicholas Bala* (Toronto: Irwin Law, 2011) 1.

of the section. Limits on rights in pursuit of unachievable purposes, are arbitrary limits.