Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

assault

Working Paper 38

Canada

ASSAULT

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Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada
K1A 0L6

or

Suite 310
Place du Canada
Montréal, Québec
H3B 2N2

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Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Ontario
K1A 0L6

Commission

Mr. Justice Allen M. Linden, President
Professor Jacques Fortin, Vice-President
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Mr. Alan D. Reid, Q.C., Commissioner
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Secretary

Jean Côté, B.A., B.Ph., LL.B.

Co-ordinator, Substantive Criminal Law

François Handfield, B.A., LL.L.

Special Adviser

Patrick Fitzgerald, M.A. (Oxon.)

Consultant

John Barnes, B.A. (Oxon.), B.C.L. (Oxon.)

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Introduction

Once homicide is left behind, the rest of the law relating to offences of violence seems comparatively straightforward and easy to deal with. There seem to be no great dramatic conflicts: the struggle between necessity, duress and self-defence and the sanctity of human life — how far can one legitimately preserve one's own life at the expense of another's? — this has all been explored in the context of the flagship offence of murder. Nor do there seem to be any major conceptual problems: those concerning omission and causation — when can one be said to kill by not doing anything or by simply providing a necessary condition for the death? — these too have been examined in that same context. What remains apparently is merely a need to tidy up the drafting in the *Criminal Code*.

Appearances, however, are deceptive. There are, for example, in the context of assault some very significant, although not necessarily dramatic conflicts such as that between the right to bodily freedom and the right to bodily integrity — where does my right to move my fist end and where does your right to personal space begin? There are also certain major problems relating to consent — what is consent, when is consent real consent, and how far does the victim's consent negate criminal liability? Such problems assume special importance in the context of the law regarding medical treatment, contact and combat sports, and possibly corporal punishment, where, as in other contexts, this area of law serves to chart the limits to the lawful use of force. Accordingly, if not exactly a flagship offence, assault is nonetheless what could be called a foundation offence — a crime on which much law on other offences is constructed.

The reason for this, of course, lies largely in history. Our law, contained in sections 244 and 245 and numerous other sections of the *Code*, derives from earlier English law. That law in turn was built on two foundation stones — the common law crimes of assault and battery. In consequence our present law is likewise built on these foundations, although both crimes are lumped together under the same name, "assault."

I.

Present Law in Canada

Our present law on non-fatal crimes of violence is contained in sections 244, 245, 245.3 and numerous other sections in Part VI of the *Criminal Code*. Sections 244 and 245 create basic offences of assault (including what common law termed both assault and battery). Section 245.3 creates a parallel basic offence of unlawfully causing bodily harm.[1] The remaining sections build on those basic offences to create a number of specific or aggravated offences. They may be aggravated by being committed with some special intent, for example, with intent to wound, maim or disfigure (section 228) or they may be aggravated by being committed on some special type of victim, for example, on a peace officer (section 246). In addition, there are certain related offences such as administering a noxious thing (section 229) and sending threats by letter and so forth (section 331) which serve to plug certain gaps left by the law relating strictly to assault and causing bodily harm.

Related to the above-mentioned offences are certain other crimes such as kidnapping (section 247) and abduction (sections 249 and 250), and offences comprising acts endangering life (sections 79, 176, 204, 231, 232 and 241 to 243). Kidnapping and abduction raise specific problems over and above those raised by the offences mentioned in our introduction. "Endangering life" offences also involve special considerations other than those relating to assault and so forth. Kidnapping, abduction and "endangering life" offences then, are not dealt with here, but will be considered separately in later Working Papers.

1. Under the *Offences against the Person Act 1861* (U.K. (1861), 24-25 Vict., c. 100) it was an offence to commit an assault causing bodily harm. Under our *Criminal Code* it became an offence unlawfully to cause bodily harm or commit an assault that causes bodily harm (subsection 245(2)). These two different offences are now by reason of a 1982 amendment (S.C. 1980-81-82-83, c. 125, s. 19) contained in separate sections: assault causing bodily harm is dealt with by paragraph 245.1(1)(*b*), while the offence of unlawfully causing bodily harm is dealt with by section 245.3. Clearly — and especially so since the 1982 amendment — our *Code* has added a new basic offence to complement assault.

A. The Concept of Assault

As mentioned earlier, the *Code* merges assault and battery into one offence. Section 244 defines the offence in detail and section 245 prescribes the penalty for its commission.

Subsection 244(1) defines assault as follows:

> A person commits an assault when
>
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (*b*) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
>
> (*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

(1) *Actus Reus*

(a) Mode of Commission

Assault can be committed in three different ways. It can be committed by non-consensual application of force. It can be committed by threatening or attempting to apply such force when having present ability to do so. And it can be committed by accosting, impeding or begging while carrying a real or imitational weapon.

The first mode of committing assault, then, is by application of force. "Force" itself is left undefined by the *Criminal Code*. Case-law, however, has recognized various kinds of conduct as constituting application of force, for example, touching or spitting. Indeed a brief touching, without exerting any strength or power, suffices to qualify as an assault.[2] Clearly, "force" here is not used as normally to connote violence, but rather with a technical and limited meaning to connote contact without consent.

Such force may be applied not only directly but also indirectly through some deliberate act causing an impact. It is probably an assault under the *Criminal Code* deliberately to cause falls or collisions by digging pitfalls or by playing tricks or practical jokes. Of course where certain indirect means, for example, explosives, are used with intent to cause injury, a specific offence under section 79 of the *Criminal Code* may be committed.

Generally, force can only be applied by a positive act and not by a mere omission. According to English authority, however, deliberate refusal to rectify a continuing act

2. In *R.* v. *Burden* (1982), 64 C.C.C. (2d) 68, p. 70, it is the judge's opinion that when the accused places his hand on a woman's thigh for five to ten seconds without her consent he intentionally applies force to her person and therefore commits an assault.

which involves the infliction of unlawful force is an assault.[3] This principle has recently been summarized as follows: "an unintentional act followed by an intentional omission to rectify that act or its consequences can be regarded *in toto* as an intentional act."[4] Apart from this narrow qualification (which is not necessarily the law in Canada) a mere omission cannot constitute assault.

The second mode of assault is by threat of immediate application of force. This must be done by act or gesture, for example, by pointing a gun at the victim. Mere words, though indicating an intention to use force, are according to conventional wisdom not sufficient, although such wisdom seems based on little by way of real authority. And the threat must be one which the defendant can, or which the victim reasonably believes the defendant can, carry out forthwith.

The third mode is by accosting and so forth, when armed. Such accosting could of course involve unlawful application of force or else threat of such application, but this would have to be determined on the evidence. To obviate the need for such determination, the *Code* provides that this type of conduct shall automatically count as an assault. In short, it deals with this kind of antisocial and possibly frightening behaviour by an extension of the law on violent offences.

(b) Consent

The essence of assault is that it takes place against the victim's will. In general, no assault can be committed on a victim who consents. Apparent consent, however, obtained by force, threats, fraud or exercise of authority will not qualify for this purpose as true consent. Following previous case-law, which was to some extent already incorporated in the *Code*, the present subsection 244(3) provides as follows:

> For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (*a*) the application of force to the complainant or to a person other than the complainant;
>
> (*b*) threats or fear of the application of force to the complainant or to a person other than the complainant;

---

3. *Fagan* v. *Commissioner of Metropolitan Police*, [1969] 1 Q.B. 439, p. 445. In this case the action of the accused in mounting the policeman's foot with his car may have been initially unintentional but the time came when, being aware of this situation, he remained seated in the car, switched off the ignition, maintained the wheel on the foot and used words showing his intention of keeping the wheel in that position. The judge affirmed that such conduct cannot be regarded as mere omission or inactivity.

4. *R.* v. *Miller*, [1982] 2 All E.R. 386, p. 392 *per* May L.J. In a criticism concerning the reasoning of the majority of the court in the *Fagan* case, it was held that in reality the driver's failure to drive the car off the policeman's foot was an omission. But in the driver's failure to release the officer's foot, knowing that he had just driven on to it, the court thinks:

> [T]here was clearly a substantial element of adoption by the driver, at a later stage, of what he had done earlier ... the conduct of the driver in that case can and should have been looked at as a whole and as the whole contained both the *actus reus* and the *mens rea* they were sufficiently coincident to render the driver guilty of an assault....

(*c*) fraud; or

(*d*) the exercise of authority.

Usually the victim's consent will be obvious. In some cases it may be given expressly. In others it may be implied. It may be implied in three kinds of situations: (1) in the case of harmless non-hostile contacts in the course of ordinary social life, for example, accidental jostling in the street, tapping a person's shoulder to attract his attention; (2) in the case of non-hostile contact in the course and for the purpose of medical treatment; and (3) in the case of blows reasonably incidental to the playing of a lawful game or sport.

In some cases however, the victim's consent or non-consent is quite irrelevant. On the one hand his consent is irrelevant where the application of force is intended to cause death or serious bodily harm, or where the blow is struck in the course of an illegal combat like a duel or prize-fight. On the other hand the victim's non-consent will be irrelevant where force is applied by lawful authority for the purposes of law enforcement or by way of lawful punishment by a parent or teacher.

(2) *Mens Rea*

Assault is basically a crime of intent. Paragraph 244(1)(*a*) of the *Criminal Code*, explicitly requires the force to be applied intentionally. Paragraph 244(1)(*b*), while making no explicit reference to it, by using the words "attempts or threatens" implies a measure of intentionality — how could one be said to attempt or threaten accidentally? Likewise, paragraph 244(1)(*c*), by using the words "accosts," "impedes" and "begs" impliedly incorporates a reference to intentionality.

The exact meaning of intentionality in this context is less than wholly clear. On the one hand the requirement of "intentional" rules out acts done by accident and, in some cases, by mistake as to the circumstances. On the other hand assault is a crime of general intent — the defendant need not intend specifically to assault this person rather than that.

Whether such general intent would cover recklessness is open to question. Traditionally, assault was generally viewed as a crime that could only be committed with intent, a view apparently accepted in *R.* v. *George*,[5] and *Leary* v. *The Queen*.[6] But in

5. [1960] S.C.R. 871, pp. 877 and 891. A general intent attending the commission of the act is the only intent required to constitute common assault. No specific intent must be proved by the Crown as one of the constituent elements of this offence. It was held that evidence that the accused was in a state of voluntary drunkenness cannot be accepted as a defence because under the circumstances of the case there was no suggestion that the drink had produced permanent or temporary insanity and the respondent knew that he was applying force to the person of another.

6. (1977) 33 C.C.C. (2d) 473, pp. 476, 481 and 495. In this case, a distinction is drawn between offences of general or basic intent and offences which, in addition to general intent, also require a specific intention attending the purpose for the commission of the act. Rape being an offence involving only a general intention, the court reached the conclusion that the defence of drunkenness could have no application. Dickson J., speaking in dissent, concluded that it is no longer necessary to maintain such a distinction. The accused must be found guilty if he intended to force intercourse, notwithstanding absence of consent or that he was reckless as to whether the woman consented or not. Intoxication is one factor which should be taken into account in determining the presence or absence of the necessary mental element.

the English cases of *R.* v. *Venna*,[7] and *Director of Public Prosecution* v. *Morgan*,[8] it was held that assault could be committed not only with intent but also recklessly. As to the position in Canada, the textbooks are at present in conflict, Stuart[9] taking the view that the law here is the same as in England, and Mewett and Manning[10] considering that in Canada recklessness is not sufficient for assault.

B. Causing Bodily Harm

As mentioned above, the offence of causing bodily harm has now been put in a separate section of the *Criminal Code*, namely, section 245.3. For this offence the *actus reus* consists in unlawfully causing bodily harm. Such harm presumably can be caused either directly or indirectly, and either by act or by omission. And the offence is committed whether the victim consents or not, for causing bodily harm is not a non-consensual offence.

The *mens rea* of the offence is not defined explicitly. On general principles it should consist at most of intent and recklessness. There is, however, no case-law on the subject.

Finally, the meaning of "unlawfully" is uncertain. In his textbook on the General Part, Glanville Williams[11] suggests four possible meanings for "unlawfully" in criminal statutes. It may be used merely to affix a penalty or sanction for some unlawful behaviour defined elsewhere. It may be used to proscribe unlawful as opposed to lawful categories of some type of behaviour, leaving it perhaps to the courts to draw the distinction between the two in any given case. It may be used, as contrasted with the term "illegal" and as employed in contract law, to denote behaviour conventionally regarded as immoral. Or it may be used simply to exclude from criminal liability, acts committed with legally

7. [1976] 1 Q.B. 421, p. 429. In the judge's opinion, the mental element of recklessness when coupled with the *actus reus* of physical contact is sufficient to form the battery involved in assault causing bodily harm.

   We see no reason in logic or in law why a person who recklessly applies physical force to the person of another should be outside the criminal law of assault. In many cases the dividing line between intention and recklessness is barely distinguishable.

8. [1976] A.C. 182, p. 217:

   The prosecution must prove that the accused foresaw that his act would probably cause another person to have apprehension of immediate and unlawful violence or would possibly have that consequence such being the purpose of the act or that he was reckless as to whether or not his act caused such apprehension.

   It was held that this intention or recklessness is the *mens rea* in assault.

9. Donald R. Stuart, *Canadian Criminal Law: A Treatise* (Toronto: Carswell, 1982), p. 130.

10. Alan W. Mewett and Morris Manning, *Criminal Law* [Canadian Criminal Law Series] (Toronto: Butterworths, 1978), p. 474.

11. Glanville Williams, *Criminal Law — The General Part* (London: Stevens and Sons, 1953), p. 25. In 2nd ed. (1961), p. 27.

recognized justification or excuse, in which case the term "unlawfully" is strictly surplusage. This fourth meaning is probably the meaning to be given the word in section 245.3 of the *Criminal Code*.

C. Specific Assaults

Building on the simple general concept of assault, the *Code* then proceeds to define a number of specific aggravated assaults. Some of these are aggravated by virtue of the special intent with which they are committed. Others are aggravated by reference to the kind of victim involved. Yet others are aggravated by the harm actually caused.

(1) Assaults with Specific Intent

Here the intent may be to cause severe injury or to commit a further offence. An intent to cause severe injury forms an ingredient in two offences. First, the offence of causing bodily harm with intent is defined by section 228 of the *Code* as requiring one of three possible intents. Paragraph 228(*a*) refers to an intent to wound, maim or disfigure. Paragraph 228(*b*) refers to an intent to endanger the life of any person. Paragraph 228(*c*) refers to an intent to prevent the arrest or detention of any person. Second, the offence of administering a noxious thing is defined by section 229 as requiring either an intent to endanger the life of, or to cause bodily harm to, the victim or an intent to aggrieve or annoy the victim.

With these offences, the prosecution must prove that the accused acted with the necessary intent. There will be no conviction if, for example, the accused is unable to form an intent to cause bodily harm,[12] or did not in fact intend to wound,[13] or to cause bodily harm.[14] The intents specified in the statute must be proved.[15] However, in cases of savage attacks, there may be an inescapable inference that the accused had the necessary intent.[16] Where the specific intent cannot be proved and where the action charged neces-

12. In *R.* v. *Martin* (1947), 88 C.C.C. 314, p. 317, the judge reached the conclusion that the accused was in such a state of intoxication that he did not have the power to form the specific intent to do grievous bodily harm on a charge of shooting at another with intent to cause bodily harm. See also *R.* v. *Penney* (1959), 125 C.C.C. 341.

13. *R.* v. *Patrygura* (1960), 129 C.C.C. 333, p. 333. In this case, the accused admitted having fired the shot but he stated that he acted that way for the purpose of frightening the victim, and that he never intended to shoot him or cause him any harm or injury.

14. *R.* v. *MacDonald*, [1944] 2 W.W.R. 458, p. 462. On a charge of unlawfully shooting a loaded rifle with intent to cause grievous bodily harm, it was inferred from the accused's testimony that he fired not at the complainant but into the ground or wide of him in an effort to scare him away.

15. *R.* v. *Robertson* (1940), 86 C.C.C. 353.

16. In *R.* v. *Innes and Brotchie* (1972), 7 C.C.C. (2d) 544, p. 547, it was decided that the bodily harm caused was of such a degree (joint venture involving punching and kicking — victim's throat cut) as to

sarily involves an assault,[17] it will usually be possible to convict of common assault as an included offence.[18]

The offence in section 228 may be committed by discharging "a firearm, air gun or air pistol." The section refers to the intent to wound, to maim, to disfigure and to endanger life. To "wound" is to break the skin.[19] To "maim" a person is to render him less able to defend himself.[20] To "disfigure" denotes something more than a temporary marring of the figure or appearance of a person.[21] It includes injuries such as "the cutting off of an ear or nose, the slitting of a nose or the causing of a permanent scar on the face by throwing acid."[22] The intent to endanger life is different from, and less serious than, the intent to kill.[23]

By section 229, it is an offence to administer a poison or noxious thing to the victim with intent to endanger life, to cause bodily harm or to annoy. A "substance is a noxious thing if, in the light of all the circumstances attendant upon its administration, it is capable of effecting, or in the normal course of events will effect, a consequence defined in section 229."[24] In determining whether a substance is noxious, a court may consider "its inherent characteristics, the quantity administered, and the manner in which it is administered."[25] The *mens rea* required under section 229 is proof that the act of admin-

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justify the conclusion that there was an intent at least to disfigure the victim. In *R.* v. *Patrygura*, *supra*, note 13, pp. 334-335, it is mentioned that if the Crown proves an act committed by the accused whose natural consequence would be an injury to the victim, the guilty intent required may be found and the accused convicted accordingly in the absence of any explanation on his part.

17. See *R.* v. *Walton* (1974), 14 C.C.C. (2d) 523, p. 526, where the charge of causing bodily harm with intent to endanger life did not specify the means by which harm was inflicted, nor did it use any other words from which it could be inferred that the harm alleged was necessarily caused by assault. Therefore assault, not being included in the charge as formulated nor in the offence as described in the enactment, was not necessarily involved.

18. *R.* v. *Martin*, *supra*, note 12, pp. 319-320. A person is charged with shooting at another with intent to cause grievous bodily harm. It was held that shooting at a person was an assault and that even though the accused is found not guilty of the intent, he may be convicted of common assault as being a lesser offence. In *R.* v. *Christmas* (1975), 12 N.S.R. (2d) 489, p. 491, the judge reached the conclusion that even if the test of what is an included offence is as narrow as suggested in the *Walton* case, the charge in this case by indicating that bodily harm was caused "with intent to maim" implies that the harm was caused by an assault. Maiming necessarily involves an assault.

19. In *R.* v. *MacPhee* (1979), 45 C.C.C. (2d) 89, p. 91-92, the judge refers to the case of *R.* v. *Taylor and Young* (1923), 40 C.C.C. 307, in which it is affirmed that "any and every 'wounding' ... must cause 'actual bodily harm' ...."

20. In *R.* v. *Schultz* (1962), 133 C.C.C. 174, pp. 178 and 180, the court considered that to break a man's leg was a sufficiently serious injury to amount to maiming. An injury to any part of a man's body which may render him, in fighting, less able to defend himself or to annoy his adversary shall be esteemed a maim.

21. *R.* v. *Innes and Brotchie*, *supra*, note 16, p. 550, *per* Robertson J. A.

22. *Ibid.*, p. 551.

23. Keeping this principle in mind, it was held in *R.* v. *Boomhower* (1974), 20 C.C.C. (2d) 89, p. 91, that the acquittal of the appellant on two counts for attempted murder was not inconsistent with his conviction on the count of discharging a firearm with intent to endanger life under section 228 of the *Criminal Code*; see also, *R.* v. *Ross*, [1975] 5 W.W.R. 712.

24. *R.* v. *Burkholder* (1977), 34 C.C.C. (2d) 214, p. 219, *per* Prowse J. A.

25. *Ibid.*

istering the substance was accompanied by an intention to cause the particular harm defined in the section.[26]

The basic offence in section 228 is the causing of bodily harm with the necessary intent. The aggravating factors are, therefore, the outcome and accompanying intent. But the section also criminalizes acts which are simply dangerous to the person. The offence may also be committed if certain weapons are employed with the necessary intent.

An intent to resist arrest or to commit some further offence forms an ingredient of several *Code* offences. An intent to prevent arrest or detention is the third possible element required for the offence of causing bodily harm (paragraph 228(*c*)). An intent to enable oneself or to assist another to commit an indictable offence is the intent required for the offence of overcoming resistance to the commission of an offence (section 230). An intent to prevent lawful arrest is one specified for the commission of an offence under subsection 246(1). And of course, assault with intent to steal is robbery as defined by section 302.

With these offences, the prosecution must again prove that the accused had the defined intent. There must be "a specific intent attending the purpose for the commission of the act."[27] Such intents are "deliberate steps taken towards an illegal goal."[28] There will be no conviction if there is reasonable doubt that the accused had or was capable of forming the intent, although there may be a conviction for the included offence of common assault.[29]

(2) Assaults on Specific Victims

The *Code* also contains several offences consisting of assaults on specific victims. Section 172 of the *Criminal Code* prohibits assaults on clergymen carrying out their duties. Section 201 forbids a master unlawfully to cause bodily harm to his servant or

26. *Ibid.*, pp. 220-221:

> The section does not provide that it is an offence to administer a noxious thing to another person. The offence is constituted by the mental element that accompanies the act of administering a substance that is in fact noxious. The Crown need not prove that the accused knew the substance was noxious (although that may be relevant in establishing intent). The Crown need only prove that the substance administered was noxious. Thereafter it must establish the necessary intent.

27. *R.* v. *George*, *supra*, note 5, p. 877, *per* Fauteux J.

28. *Supra*, note 5, p. 890, *per* Ritchie J. The following comment is made:

> In considering the question of *mens rea* a distinction is to be drawn between intention as applied to acts done to achieve an immediate end on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand.

29. *Supra*, note 5. The accused was acquitted of the offence of robbery because he did not have the capacity to form the specific intent required as a constituent element for the offence of theft. He was nevertheless found guilty of common assault. In *Luckett* v. *The Queen*, [1980] 1 S.C.R. 1140, pp. 1141 and 1147, it was held that there are two circumstances under which an offence is included in another: it can be included in the offence as described in the enactment creating it or as charged in the count. The judge concludes that the lesser offence must not be included in all the subsections of the offence charged as described in the enactment.

apprentice. Subsection 246(1) proscribes assaults on peace officers and others executing lawful process.

There is extensive case-law dealing with the offence in paragraph 246(1)(*a*) of assaulting a peace officer in the execution of his duty. The *mens rea* of the offence requires that there be knowledge that the person assaulted is an officer. The accused must, therefore, have the mental ability to recognize the officer,[30] and must be aware of the identity of the victim.[31] The intent must be to assault an officer. The prosecution need not, however, prove that the accused knew that the officer was executing his duty; the person who assaults a victim whom he knows to be an officer does so at his peril.

However, the offence requires the officer to be executing his duty at the time of the assault.

> [T]the duty of an officer extends beyond simply the apprehension of criminals, the detection and prevention of crime and the preservation of the peace ... it extends to the situation ... where a peace officer, while on duty as such, comes upon a person showing every indication of committing suicide. He is under a duty to take reasonable steps to save his life.[32]

Difficult questions frequently arise whether the officer (who must in fact be a peace officer) was exercising lawful powers.[33] There can be no conviction if, for example, a policeman is making an unlawful arrest,[34] or is exceeding his powers so as to interfere

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30. In *R.* v. *Connolly*, [1967] 1 C.C.C. 101, pp. 104 and 105, the question was whether or not the accused at the time he struck the policeman had the necessary criminal intent to commit the act of violence. Because of the severity of the injuries to his forehead and to the vortex of the skull, it was held that he was not able to form a rational intent unlawfully to assault a peace officer in the course of his duty. He had temporarily lost the power of co-ordination. In *R.* v. *Vicko* (1973), 10 C.C.C. (2d) 139, p. 140, it was held that when the accused because of his having ingested LSD is not in a mental condition to know that the victim is a peace officer, a conviction cannot stand.

31. In *R.* v. *McLeod* (1954), 111 C.C.C. 106, pp. 118-119, the following comment is made:

> Where knowledge of a constituent of the crime is an essential ingredient the prisoner is entitled to be acquitted when the evidence fails to establish or negatives the specific knowledge required regardless of any other offence the accused may have been committing because the crime charged has not been proven.
>
> Therefore the fact that the accused in any event was guilty of a common assault does not render him liable for the offence of assaulting a police officer in the absence of the necessary *mens rea*.

32. *R.* v. *Dietrich* (1978), 39 C.C.C. (2d) 361, p. 364 *per* Rae J. At pp. 363 and 365 it is said that the duty of a peace officer goes beyond intervening only when someone is doing anything illegal. It should be noted that he has a general duty to protect the life and property of the inhabitants but it is not every act of his in purporting to carry out this duty that is justified.

33. See, for example, *R.* v. *Dean*, [1966] 3 C.C.C. 228, p. 228, in which the assault occurred when the police officer was seeking to arrest the accused at which time he was acting within his powers to arrest without warrant. It was decided that the arrest being lawful, the officer was in execution of his duty at the time of the assault upon him. See also *R.* v. *Todd* (1978), 6 B.C.L.R. 66.

34. See *R.* v. *Kelly*, [1970] 4 C.C.C. 191; *R.* v. *Allen* (1971), 4 C.C.C. (2d) 194, pp. 195-196, where the officer gave evidence that he had not intended to arrest the young woman for what had already taken place but that something more occurred (he was slapped by her) and he wanted to prevent further trouble. His authority had been flaunted and it was decided that he was not acting in the course of his duties; *R.* v. *Lascelles* (1971), 2 C.C.C. (2d) 134; *Gamracy* v. *R.* (1973), 12 C.C.C. (2d) 209, p. 211. When an arrest is made without possession of a warrant but pursuant thereto, it was held that the duty of the officer is entirely discharged by telling the arrested individual that the reason for his arrest was the existence of the outstanding warrant. It was not part of the officer's duty to obtain the warrant or to ascertain its contents in order to inform the accused.

with personal freedoms.[35] An officer may be in execution of his duty even though technically a trespasser.[36]

(3) Assaults with a Weapon or Causing Bodily Harm

Assault can also be aggravated by virtue of being committed with a weapon or causing bodily harm. Whereas the penalty for assault is five years, the penalty for an assault with a weapon or causing bodily harm is ten years (subsection 245.1(1)). And the penalty for aggravated assault, defined by section 245.2 of the *Criminal Code* as one which wounds, maims, disfigures or endangers the life of the victim, is fourteen years.

D. Related Offences — Threatening

The *Criminal Code* includes a further group of offences involving non-fatal interferences with the person. The *actus reus* in these offences does not necessarily require any direct application of force to the victim. They are concerned with other forms of interference with the freedom and safety of individuals or of the public. Some offences seek to protect the freedom of movement or action by prohibiting unlawful intimidation, confinement or abduction. Others are directed against the creation of general hazards or the neglect of dependants in need of care. Here we consider only offences involving threatening.

Unlawful threats may be made for various reasons. Sometimes the object will be economic advantage, as in threats of violence used in robbery or blackmail. Threats may also be used to extort sexual relations or to obstruct justice. Such threats may properly be dealt with as offences against property, sexual offences or offences against the administration of justice.

Other threats may be made simply to annoy. They may also be made to intimidate someone not to do something they have every right to do. Such a threat may be designed

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35. In *R.* v. *Tunbridge* (1971), 3 C.C.C. (2d) 303, p. 305, the constables exceeded their duty when they purported to decide that in the best interest of the child it should go with the mother, and then proceeded with their attempt physically to take it from the father. There was no reasonable apprehension of injury to the child or of some breach of the peace. In *R.* v. *Corrier* (1972), 4 N.B.R. (2d) 775, pp. 781-782, the police officer was investigating an alleged theft and he was acting within the scope of his duties by questioning the appellant and searching his car. But when he sought to seize the car in order to obtain evidence of the commission of the offence, his conduct was *prima facie* an unlawful interference with the appellant's right to possession of the car. He was not performing a duty imposed upon him either by common law or by statute.

36. In *R.* v. *Stenning*, [1970] S.C.R. 631, pp. 636-637, the question was to determine whether the constable was engaged in the execution of his duties at the time he broke into the building. On the facts of this case, whether he was technically a trespasser or not he was in the course of his duty at the time he was assaulted, and at that time there had been no unlawful interference with either the liberty or the property of the respondent. The constable was there to investigate; he was on duty.

to stop a person from going to his workplace; or, the threat may be made to interfere with a personal relationship. These sorts of threats may properly be classified as offences against the person, that is, threats of injury or harm which interfere with the victim's personal freedoms of choice and action but which do not constitute sexual or other offences. These threats will be referred to as "pure personal threats."

Threatening offences seek to protect against fear and intimidation. They also serve a preventative function, criminalizing conduct before tangible harm is done. The value protected by threatening offences is the liberty of action: the freedom of choice and of action should not be curtailed by unlawful intimidation.

Under existing law, pure personal threats are dealt with in four sections of the *Criminal Code*:

> By paragraph 244(1)(*b*), assault is committed if a person "... threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose."
>
> By subsection 305(1), extortion is committed if threats are used "to induce any person, whether or not he is the person threatened ... to do anything or cause anything to be done ...." The threats must lack reasonable justification and must be made "with intent to extort or gain anything."
>
> By section 331, it is an offence to communicate threats by mail or telephone.
>
> By section 381, it is an offence to use threats, intimidation, watching, besetting or following to compel "another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing."

These provisions dealing with pure personal threats draw various distinctions. The assault offence in section 244 envisages a "face-to-face" threat by act or gesture and requires that there be present ability to carry it out. The ability to carry out the threat is not required in the "long distance" verbal threat in section 331, the general intimidation offence in section 381 or in extortion (section 305). The threat of force in assault must be directed against the other person. With the other offences, the threat may be a threat of harm to a third party or to property.

The word "anything" in section 305 is wide enough to include extorting sexual acts.[37] The threat involved must be such as to intimidate, alarm or unsettle a person of ordinary firmness.[38] A threat to do something which the complainant knows is supposed

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37. In *R.* v. *Bird*, [1970] 3 C.C.C. 340, p. 354, it was held that the word "anything" should be construed widely enough to include obtaining from the complainant the use of her body. It should not be narrowly restricted to mean only tangible material things, and sexual intercourse can be the subject-matter of a charge under this section. See also *R.* v. *Bloch-Hansen* (1978), 38 C.C.C. (2d) 143, p. 146.

38. *R.* v. *Bloch-Hansen*, *ibid.*, pp. 146-147. The test is not whether the threat alarmed the particular person to whom it was destined. The threat is expected to "overcome the will of an ordinary person," to "raise sufficient fear to unsettle the mind and take away the voluntary action of a reasonably sound individual."

to happen anyway, is insufficient.[39] The evil need not be one to be inflicted personally by the threatener; advising a victim that he may be dealt with by a violent third party is sufficient.[40] To constitute a defence to the charge in section 305 "there must be reasonable justification or excuse not only for the demand but for the making of the threats or menaces by which the accused sought to compel compliance with the demand."[41] A threat to cause death or bodily harm cannot be justified.

> When it is proved that threats have been made for the making of which there could be no justification or excuse, that the threats were made with intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime ... is established, and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be reasonable justification or excuse for making them.[42]

The accused's intention must be to "extort or gain" something but it is not necessary to consider what the accused intended to do with the item once it was obtained.[43]

The offence in section 331 "consists in the simple expression of a thought,"[44] but it can be committed only through the types of means or methods mentioned in the section.[45] An oral, face-to-face threat is not included; it was not Parliament's intention to make such a threat a more serious offence than assault.[46] The Crown need only prove that the

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39. *Ibid.*, p. 147. In the present case, the complainant knew she was supposed to be sent to jail on a warrant. The court was satisfied that an ordinary person being held on a warrant under similar conditions would not be threatened by the suggestion that she would be taken to jail.

40. *R.* v. *Swartz* (1977), 37 C.C.C. (2d) 409, p. 412. In this situation Swartz did not threaten personally, but on behalf of criminals of known violent propensities. In the judge's opinion such a representation which was false to his knowledge may well be a greater threat than if the threatener said he would himself do violence to the person threatened.

41. *R.* v. *Natarelli and Volpe*, [1968] 1 C.C.C. 154, p. 160 *per* Cartwright J.

42. *Ibid.*, pp. 160-161.

43. In *R.* v. *McClure* (1957), 26 C.R. 230, p. 236, it was said that what the accused intended to do with the money after he had obtained it was irrelevant even though he intended the two hundred dollars eventually to find its way back to the owner.

44. In *R.* v. *Nabis* (1975), 18 C.C.C. (2d) 144, p. 154 *per* Beetz J., aff'g. (1973), 12 C.C.C. (2d) 268, it should be noted that the following comment is made:

> That the expression of a thought should of itself constitute a serious crime regardless of the form it takes, the motives of its author and its present or probable effects on the victim or on any other individual seems to me to be contrary to the general economy of our criminal law and also likely to lead to many difficulties, for countless are those who do not weigh their words.

45. In *R.* v. *Basaraba* (1976), 24 C.C.C. (2d) 296, p. 297, it is held that "[t]he essence of an offence under s. 331 Cr. C. is the means of expressing a threat." That essential element was absent from the charge which alleged that the accused did, by word of mouth, utter a threat to one person, to cause death to another person, but it did not allege that the accused used one person as a means of causing another person to receive a threat. It is interesting to note that the court found it unnecessary to decide whether the use of an intermediary as a means of communicating a threat fell within the scope of the section.

46. *R.* v. *Nabis*, *supra*, note 44, pp. 153 and 155. Why would Parliament take the trouble to enumerate, even in a non-exhaustive manner, various means of expressing threats if its purpose was to prohibit threats by whatever means they are uttered? Parliament has delimited the boundaries of the offence and a line must therefore be drawn with respect to the means by which the threats can be uttered. "... I would at least stop at the simplest, most direct and most frequently used mode of expression, the oral proffering

threats were uttered through the required means; it is not necessary to show that the recipient appreciated that he was being threatened,[47] or that the accused intended to carry out the threat.[48] The intended victim does not have to be the direct recipient of the threat.[49]

The offence in section 381 may be committed through the intimidation in various ways of specific persons,[50] or by the general obstruction of the highway.[51] Prosecutions usually involve industrial disputes but the offence is not limited to that context.[52] The accused's purpose is an essential ingredient of the offence which the Crown must prove.[53] The offence may be constituted where the accused makes a veiled or indirect threat without physical violence[54]; pressure in the nature of nuisance or trespass is sufficient.

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of a threat face to face, especially as it appears never to have amounted to a criminal offence." In *Henry* v. *R.* (1982), 24 C.R. (3d) 261, p. 263, it was held that assuming, as suggested by a passage in *Nabis*, that a threat may be made by means of an intermediary, in this case there was no evidence that the appellant intended that the named persons should act as intermediaries to express the threats to kill a police officer. Therefore paragraph 331(1)(*a*) of the *Criminal Code* did not find application.

47. *R.* v. *Carons* (1978), 42 C.C.C. (2d) 19, p. 21. The victim in this case failed to appreciate that the respondent threatened to kill her. In the judge's opinion it was irrelevant whether such failure arose from the threatener's state of intoxication, from her own mental or physical condition or from her failure to hear the message correctly.

48. *R.* v. *Johnson* (1913), 9 Cr. App. 57, p. 59. The question was whether, to constitute an offence under the section, it was necessary that there should have been an intention to carry out the threat to kill contained in the letter. The judge concludes that: "... the gravamen of the charge is not in sending the letter or in meaning to carry out the threat; the offence is in maliciously sending and uttering the letter."

49. *R.* v. *Thompson* (1981), 59 C.C.C. (2d) 514, p. 516. Under that section, the threat must be communicated either directly or through an intermediary to the person who is the intended victim. Following the judge's opinion, such an interpretation is in accordance with the intention of the legislation. There is no identification of recipient and intended victim and Parliament would have expressed its intention by using a different language if its intention was to the contrary.

50. In *R.* v. *Rowley* (1972), 6 C.C.C. (2d) 388, p. 390, it was held that from the use of the words "that person" in paragraphs 381(1)(*a*) to (*f*) of the *Criminal Code*, it was apparent that the offences created by each of them were concerned specifically with the intimidation of an identifiable person.

51. *Ibid.* By contrast, paragraph 381(1)(*g*) does not contain such words. The offence created by that paragraph is concerned with the interference with any person identifiable or otherwise by the obstructing of a public highway. See also, *R.* v. *Stockley* (1977), 36 C.C.C. (2d) 387.

52. In *R.* v. *LeBlanc*, [1964] 3 C.C.C. 40, pp. 44-45, the accused was held guilty of wrongfully and without lawful authority threatening violence to Jehovah's Witnesses for the purpose of compelling them to leave the locality and to abstain from calling on other people. In the judge's opinion they were entitled to propagate their faith in a lawful manner; they had a right to be in the locality and to call on others. In *R.* v. *Basaraba*, *supra*, note 45, p. 298, the judge, in considering whether section 381 of the *Criminal Code* was confined to the context of industrial disputes, noticed that the language of the section itself does not so limit its application. The heading applicable to the section is "Intimidation" and one can envisage many instances of offences which would fall outside trade union activity.

53. In *R.* v. *Branscombe* (1957), 25 C.R. 88, p. 89, it was held that it would be impossible for the Crown to prove by direct evidence the purpose the accused had in his mind. Such a purpose must necessarily be found "by reference to the circumstances and by inference from the evidence showing the circumstances in each particular case."

54. In *R.* v. *Bonhomme* (1947), 88 C.C.C. 100, pp. 102-103, it seemed evident that the mention made by the accused of an incident involving a colleague of the complainant was for the purpose of strongly impressing her in order to prevent her from continuing to work freely. The judge mentioned that the right to strike exists in certain conditions but it does not confer the right to prevent others who so wish from working.

The accused's actions must be performed "wrongfully and without lawful authority" as where picketing "is carried on in a manner which creates an obstruction, unlawful assembly, violence, trespass or otherwise in an unlawful manner."[55]

55. *R.* v. *Doherty and Stewart* (1946), 86 C.C.C. 286, p. 294. At page 291, it was held that employees and officials of the company were deliberately prevented from entering the plant by the accused. It was done intentionally "with a view to compel" them to abstain from work. The decision was to the effect that it is sufficient if it be shown that they were constrained by any means from pursuing their normal course of employment.

II.

Origins — English Law

Our present law, on this as on so many other matters, derives from English law. In 1892[56] the authors of the *Criminal Code*, like those of the English *Draft Code* on which it was modelled, built substantially on previous legislation. This consisted basically of the English *Offences against the Person Act 1861*,[57] which the new Dominion of Canada enacted by a statute in 1869[58] and adopted with minor changes by another statute in 1886.[59] Apart from the merging in the *Code* of assault and battery into one offence and the creation of the new offence of unlawfully causing bodily harm, the 1861 *Act* is the basis of our present law.

The *Offences against the Person Act 1861* provided a virtual code of crimes of violence. Of its seventy-nine sections, ten dealt with (without defining) murder and manslaughter, five with different attempts to commit murder and the rest with other violent offences. Section 18 concerns serious wounds inflicted with intent to maim, disfigure, disable or do grievous bodily harm. According to Stephen,[60] this section creates twenty-four separate offences and forbids any and every combination of four acts (wounding, causing grievous bodily harm, shooting at any person and trying to fire loaded arms at any person) with any one of six intentions (intent to maim, disfigure, disable, do some other grievous bodily harm, resist lawful apprehension and resist lawful detainer). Meanwhile the basic crimes of assault and battery themselves were left to be defined by common law.

For, prior to the 1861 *Act*, two basic non-fatal crimes of violence had emerged in common law, namely, assault and battery. An assault was any intentional act, for example, raising one's fist at a person, thereby causing another to apprehend immediate and unlawful violence. A battery was any intentional act, for example, striking or hitting another, inflicting violence on another.

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56. S.C. 1892, 55-56 Vict., c. 29.
57. U.K. (1861), 24-25 Vict., c. 100.
58. S.C. 1869, 32-33 Vict., c. 20.
59. S.C. 1886, 49 Vict., c. 51.
60. Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883, reprinted New York: Franklin, 1964), vol. 3, p. 117.

In addition, certain other more serious crimes of violence were created. Some were creatures of common law, like the felony of mayhem and the lesser offence of wounding, which were noted by Blackstone[61] when discussing offences against the personal security of the subject. Others were created by a succession of statutes culminating in the *Offences against the Person Act 1861*.

61. Sir William Blackstone, *Commentaries on the Laws of England* (1769, reprinted London: Dawson of Pall Mall, 1966), vol. 3, p. 121.

III.

Shape and Characteristics of English Law

A brief glance at this area of English law reveals three salient features. First, there was a general progression from comparative leniency to considerable strictness regarding violence. Hand in hand with this went a gradual "trivializing" or "technicalizing" of the concept of assault. Thirdly, there was the eventual emergence of the present arrangement of two basic crimes and a superstructure of specific offences.

Homicide apart, offences against the person were treated by English law with surprising lenience, especially when compared to property offences. Fine was the punishment for maiming another "of any member whereby he is less able to fight, as by putting out his eye ...." Fine too was the punishment for committing "unlawful assault, beating, wounding, or such like trespasses against the body of any man." This situation continued until 1803[62] when an Act was passed converting several such offences, particularly attempts to commit murder, into capital crimes.

Next, the "trivializing" of assault. In Bracton's time, when every felony was a trespass and every civil wrong a punishable offence, mere bruises which didn't break bone or draw blood were insufficient to ground a charge of felony. Later, by the end of the seventeenth century, such assaults were being taken notice of by the law, provided they were done wilfully, in anger or in a hostile manner, such as violently jostling someone out of the way, snatching something from his hand or spitting in his face. Eventually even this requirement disappeared: the slightest "force" came to constitute a battery if exercised intentionally, and without the victim's consent — mere touching is enough.[63] In the event, assault, force and violence have acquired in English and hence in Canadian law mere technical connotations, namely, intentional contact *in invitum*.

Finally, the gradual trivialization of assault produced a division of non-fatal crimes of violence into two categories: mere assaults and assaults causing bodily harm. There is no concept of anything between the two.

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62. U.K. 1803, 43 Geo. III, c. 58 (*Malicious shooting or stabbing*). See also Stephen, *supra*, note 60, p. 114.

63. Stephen, *supra*, note 60, p. 108.

Meanwhile the words "bodily harm" were at first left undefined. In course of time they were interpreted by the courts as meaning "any hurt or injury that interferes with the health or comfort of a person ... and is more than merely transient and trifling."[64] Finally this definition was statutorily adopted by subsection 245.1(2) of the *Code*.

64. *R.* v. *Maloney* (1976), 28 C.C.C. (2d) 323, p. 326, *per* Lesage Co. Ct. J.

IV.

Shortcomings and Problems with Present Law

Looking back at our present law in the light of its historical origins we can see various shortcomings and several problems. First, there are shortcomings of a formal nature that have to do with poor arrangement generally and lack of clarity specifically over basic offences. Next, there are shortcomings of a more substantive kind that concern definition of *mens rea* and *actus reus* in the basic offences. Third, there are problems that relate to policy issues like the role of consent, the question of medical treatment, the matter of sports and the business of corporal punishment.

A. Formal Shortcomings

(1) General Arrangement

Clearly the chapter of the *Criminal Code* on non-fatal crimes of violence is in disarray. Far from being organized in a coherent, systematic manner, the offences are scattered haphazardly throughout the *Code*. The basic offences of assault and causing bodily harm are defined in sections 244 to 245.3. But apart from assaults on peace officers, which are dealt with in section 246, and sexual assaults, which are dealt with in sections 246.1 to 246.8, the other specific types of assault and related offences are defined in sections preceding sections 244 to 245.3 or in much later sections quite remote from them.

Many types of assault are provided for in sections appearing much earlier in the *Code* (in one case even in Part I — General) than that dealing with the basic offence on which they are built or of which they form specific instances. So, for example, sections 38, 41 and 42 of the *Criminal Code*, which concern defence of property, provide that resistance by trespassers in certain circumstances shall be deemed to be assaults. Section 172 covers assaults upon officiating clergymen. Section 201 deals with masters causing bodily harm to servants and apprentices. Section 228 defines the offence of causing bodily harm with intent, an aggravated variant on causing bodily harm defined in section 245.3.

Similarly, many other offences which are not assaults but rather related offences are defined in *Code* sections appearing much earlier than the basic offences to which they are related. Section 81 deals with prize-fighting. Section 84 creates the offence of pointing a firearm. Section 171 prohibits causing a disturbance in a public place by a variety of acts including fighting, molesting and discharging firearms. Section 174 proscribes the throwing of offensive volatile substances. Section 229 deals with administering a noxious thing, and section 231 concerns traps likely to cause bodily harm.

At the same time, some specific types of assault or related offences appear much later in the *Code* than do the sections on basic offences. Section 253, for instance, deals with the communication of venereal disease. Section 331, which appears in Part VII on offences against rights of property, concerns uttering threats by letter, telegram, telephone, and so forth. Section 381.1, which is located in Part VIII on fraudulent transactions relating to contracts and trade, makes it an offence to threaten to assault an internationally protected person.

From this short examination, it can readily be seen that the overall structure, arrangement and organization of the laws relating to assault and similar offences are seriously unsystematic. Different offence-creating sections appear scattered at random throughout the *Code*, not even being restricted to the Part dealing with offences against the person. Needless to say, this puts a burden on the user of the *Code*, who has to retain in his mind the various offences, see how they differ and note where they overlap.

(2) Definitions of Basic Offences

Several problems, already hinted at, arise regarding the two basic offences of assault and unlawfully causing bodily harm. These relate to the concept of assault itself and to the relationship between assault and causing bodily harm.

Under present law contained in sections 244 and 245.3, the basic offences are only two in number: assault and unlawfully causing bodily harm. Assault, however, covers both common law battery (direct application of force) and common law assault (threat of immediate application of force). But these are surely two radically different offences, one involving frightening without touching and the other touching without necessarily frightening.

Now under present law assault can be committed in four different ways. It can be committed by direct application of force (paragraph 244(1)(*a*)), by attempting to apply force (paragraph 244(1)(*b*)), by threatening to apply force (paragraph 244(1)(*b*)) and by accosting or begging while wearing a weapon (paragraph 244(1)(*c*)). Direct application of force is the statutory version of common law battery. Threat of force is the statutory counterpart to common law assault. Attempt to apply force is merely an attempt to assault and is therefore surplusage because an attempt to commit a crime is itself a crime by virtue of section 24 of the *Criminal Code*. Armed begging, an act remote from both the

actual application of force and the threat of immediate violence, is a comparative newcomer under the rubric of assault. In short, "assault" in the *Code* confuses several quite different types of behaviour which, as we explore later, infringe different values.

Confusion also arises from the overlap of assault and causing bodily harm. Assault is defined in the manner outlined above by section 244 of the *Criminal Code*. Section 245 then sets out the penalty for this offence. Then section 245.3 deals with the offence of unlawfully causing bodily harm, an offence formerly provided for by subsection 245(2). This latter offence, though nowhere defined, clearly by virtue of the definition of "bodily harm" in subsection 245.1(2), includes all assaults other than those of a trifling nature. This can cause confusion.

Such confusion relates particularly to the question of consent. By definition, assault in terms of battery requires the victim's non-consent — it is an *in invitum* crime. By contrast, unlawfully causing bodily harm has no such requirement — the victim's consent or lack of it appears irrelevant. This being so, a person inflicting bodily harm on a consenting victim might have to be acquitted of assault causing bodily harm under paragraph 245.1(1)(*a*), but convicted of unlawfully causing bodily harm under section 245.3.

B. Substantial Shortcomings

(1) *Mens Rea*

As we have already seen, the exact nature of the *mens rea* for assault in Canada is less than fully certain. Case-law in England extends it to include not only intent but also recklessness, whereas case-law in Canada has not yet gone this far. Meanwhile, textbook writers are divided, Stuart[65] considering Canadian law to be the same as that of England, and Mewett and Manning[66] considering the *mens rea* of assault in Canada to exclude recklessness.

(2) *Actus Reus*

As we have also seen already, there is considerable lack of clarity as to the exact nature of the *actus reus* of the basic offences. This relates partly to the question of

65. Stuart, *supra*, note 9.

66. Mewett and Manning, *supra*, note 10.

omission since, notwithstanding certain developments in England, it is unclear how far in Canada assault can be committed by failure to act as opposed to positive action. It relates partly to the question (not entirely settled) as to how far it can be committed by mere words alone. It relates partly to the meaning of "bodily harm," which as we saw, can cover almost anything. Finally, it relates to the matter as to how far in present law the victim's consent is of any relevance.

As regards the present law, it is clear that sometimes, as in the case of mere touching, consent is a defence, and that in general, where the contact is intended to cause death or serious harm, consent is no defence. It is also clear that even in circumstances going beyond mere touching (for example, in surgical operations and in lawful sports) consent can prevent the force from being unlawful. What is unclear is the extent to which the same rule applies or does not apply in Canada outside the operating theatre and the sports arena, for example, in sado-masochistic circumstances.

C. Policy Issues

(1) General

For law reform, consent raises by contrast a policy question. Given that consent can legitimize touching, how far should it be able to legitimize more than this? If it can legitimize harm (in the sense defined in subsection 245.1(2)), for the purpose of medical treatment or competitive sports, why should it not also be able to legitimize it for other purposes? On what principle should consent be relevant in the one case but not in the other?

The issue of consent, then, is intimately bound up with the whole question of medical and similar treatment, with contact and combat sports, and possibly with domestic violence and corporal punishment. Of course, whatever provisions the law were to contain, these issues would still be problems. In our view, however, the problems are bedevilled and accentuated by special factors related to the three characteristics already noted as pertaining to the law we have inherited.

(2) Special Factors

As we saw earlier, the development of this area of law was characterized by a move from leniency to strictness concerning violence, by a gradual trivializing of assault and by construction of two tiers of offences, namely, mere assault and aggravated assault,

the latter usually involving actual bodily harm. Each of these three characteristics has had unfortunate results.

Let us examine first the move from leniency to strictness. This has done much to rob the terms "force" and "violence" of any real meaning within the language of the law. In earlier times the application of force or violence would have meant much the same as it still means in ordinary non-legal discourse and would have involved at least some measure of undue pressure. Today in law it means any mere intentional touching of an unconsenting victim and connotes force or violence in a wholly artificial and technical sense.

This development, going hand in hand with the trivialization of assault, has in our view confused the matter of consent and the question of the value infringed by technical assault. The value in question is that of privacy and bodily inviolability — the notion that everyone has a right that others not touch him against his will nor invade his personal space. But such is the nature of life in society that there are many contacts which no one ordinarily objects to or would be taken to object to — contacts involved in handshakes, kissing, sexual intimacy, grooming, medical treatment, contact sports, accidental jostling, and so forth. In such cases, the contact occurs without objection and is no assault.

Now the conventional legal account of all this involves the notion of consent. Assault (in the earlier sense of battery) is said to be touching a person without his consent. Conversely it is no assault when he consents. And he may consent explicitly (for example, the victim of a break-in may expressly consent to be fingerprinted) or impliedly (for example, to the ordinary contacts encountered in normal social intercourse).

The problem with this account is that it puts things upside-down. It suggests — and there is merit in this — that touching others is forbidden, but it also suggests that this rule is negated if the person touched expressly or impliedly consents. Express consent, however, is comparatively rare, and mostly the consent in question is, in fact, fictitious. In the case of the ordinary contacts mentioned above, people are *taken* to consent unless they make it clear that they do not, that is, unless they positively object.

The nub of the matter, then, in the context of technical assaults, is not whether the victim consented but rather, whether he objected. Assault is essentially a touching *in invitum* — taking liberties with another's person. So, in the case of ordinary social contacts, the law should surely be that no offence is committed except on a clearly unwilling and objecting victim. In the case of contacts outside the ordinary run of things, the law should leave it to be inferred that the victim would in all probability have objected, had he been given a chance to — few people would not object to being spat on.

More serious, however, is the way the law erected serious assaults on the back of technical assaults. To a large extent many of the specific aggravated offences of violence are viewed as differing from the basic offences only in degree. Ordinary assault is applying technical force to a non-consenting victim, and aggravated assault is applying more force, that is, more than technical force, to a non-consenting victim. And force that is more than technical is force that causes bodily harm.

This view obscures at least three things. It blurs the fact that the difference between simple and aggravated assault is not so much a difference in degree as a difference in kind — touching that causes harm involves an additional dimension quite absent from mere touching. It confuses the two different values at stake: the law against simple assault protects one's right to bodily *inviolability* and to security against having liberties taken with one's person, whereas the law against assaults causing bodily harm protects one's right to bodily *integrity* and to security against bodily injury — the former looks to a kind of right to privacy and the latter to a right to be left whole. Finally it muddies the waters as concerns consent, because true consent is always a defence to simple assault but not necessarily always to assault causing bodily harm. Simple assault is essentially an act *in invitum* and assault causing bodily harm is not. However, offences which are not *in invitum* cannot really be built on the backs of those which are.

Most noteworthy of all, however, is the failure of English and hence Canadian law to recognize the existence of anything between simple assaults and those involving bodily harm. All that the law has provided for is simple assault (in the sense of battery) and a variety of more serious assaults causing harm. And, as we saw, the latter are seen simply as aggravated forms of the former.

Yet if we step back from the law, we cannot help seeing that in this context there are not two but three possibilities. At one end of the spectrum is *touching*, which only becomes objectionable when the victim objects or where it is clear that anybody in his shoes would object. At the other end is *harming*, which produces some permanent or long-lasting impairment of the victim's body or its functions and which may be objectionable whether or not the actual victim objects. There is a value set on physical wholeness and a general objection made to its impairment. Midway between touching and harming comes *hurting* (in the sense of inflicting pain without causing injury or damage) which is objectionable but only *prima facie* because there is no objection where the actual victim consents.

In our view, the failure to recognize a place for hurting has contributed to confusion. It has led the courts to stretch the meaning of "bodily harm" to cover "hurt ... that interferes with *comfort*" so long as it is more than transient or trifling — presumably it would cover what is done to patients sometimes by dentists and doctors. It has helped to misconceive the role of consent, because it may be argued that consent can legitimize hurt but cannot in general legitimize harm. It also obscures the existence of another value — the value set on the right to be free from pain and suffering, as opposed to the right to be free from having liberties taken with oneself and the right to be secure from harm and injury. Finally, it prevents a truly principled approach to the issues of medical treatment and physical sports.

V.

A New Approach

In our view, a more logical approach and one more in line with ordinary common sense would be to divide assaults into three as follows:

(1) assault by touching an unwilling victim — here the unwillingness would be of the essence and would have to be proved by the prosecution either from evidence of express objection or from circumstances from which objection could be inferred;

(2) assault by hurting, that is, inflicting pain — here again unwillingness on the victim's part would be of the essence but could be presumed unless the defendant raises evidence of consent; and

(3) assault by causing harm or injury — here the victim's willingness or unwillingness would be irrelevant, but there would be a special rule for medical treatment. Note that the term "assault" is used here in an extended meaning, for the suggestion is that, unlike the first two kinds of assault which could only be committed by positive acts and with intent, this third type of assault could be committed (like all causation crimes) by omission and with recklessness.

Each offence could be aggravated by various factors. These would include the identity of the victim, the intent of the defendant and the mode of commission. Touching, hurting or harming could be aggravated, for instance, if the victim was a peace officer, if the defendant's intent was to escape justice or if the mode of commission involved firearms.

In our view, such a classification would bring many improvements. First, it would help simplify the law relating to this area by bringing it more in line with common sense and ordinary morality which recognize these distinctions. Second, it would allow the law to give to consent its proper role, permitting it to operate in law, just as in common sense, as a defence to touching and hurting, but not to harming. Third, it would deal more logically and realistically with medical treatment, would help clarify the problem of contact and combat sports and might also throw light on the problem of domestic violence and corporal punishment.

A. Medical Treatment

Medical treatment is clearly the most important issue in this entire area. As such it forms the subject of special examination by our Protection of Life Project.[67] For that reason this Paper will not deal with the matter in any detail, but will merely outline a general approach, indicating in principle how we think the question could most suitably be dealt with in a new *Code*, leaving it to a later Paper to ink in the detailed rules.

Discussion can start by laying down two truisms. One is that touching people against their will, inflicting pain on them without their consent and causing them harm merit inclusion as crimes in any decent code of criminal law. The other is that medical treatment accorded to a fully consenting patient should obviously not attract criminal liability for assault.

A simple, not to say simplistic, approach would be to build the whole area around consent. The law could provide that all touching, hurting and harming without consent is criminal. Conversely it could provide that no touching, hurting or harming with consent — whether by doctors, dentists, barbers, beauticians, tatooists, or even sadists — is criminal. On this view, medical treatment would neither be, nor need to be, put in a special case.

Clearly, this approach is too simplistic. For one thing, it is not clear that harming people should necessarily escape being criminal merely because the people in question consent. Just as the sanctity of life seems to militate against allowing consent to operate across the board as a defence to homicide, so the sanctity of the body may work against allowing consent to count as a defence to serious harm and injury. In cases where consent is so allowed to operate, we find that the acts in question are always regarded as performed for socially accepted purposes — to save life, to restore health and so forth.

For another thing, and perhaps more importantly, this is not how we ordinarily view medical treatment. It is not that we look on the surgeon as inflicting bodily harm (stabbing us and so forth), although having a good justification for doing so. It's rather that we do not regard his acts as constituting harm at all — they do not even call for a justification.

Accordingly, medical treatment would best, we think, be dealt with as follows. First, we will discuss the question of touching. Here, as in the case of the barber or beautician, a doctor or a dentist commits no offence, provided he only touches the patient with his actual or apparent consent. No special problem arises at this stage for medical treatment.

67. On the subject of medical treatment the reader can consult the Law Reform Commission of Canada's Working Paper: *Medical Treatment and Criminal Law*, [Working Paper 26] (Ottawa: Supply and Services, 1980). The Commission is also at the present time preparing a Report on this matter.

Second, is the question of hurting. Doctors sometimes and dentists often hurt. Here once again there is no problem, because the patient consents. Clearly we recognize that consent can license infliction of pain, for example, the pain inflicted by a beautician, a tatooist, an arm-wrestler, a boxer, a scientific experimenter, and so forth. And while we don't usually consent to pain, we do so often enough to make it impossible to exclude consent as a defence to hurting. Here too, there is no special problem for medical treatment.

Where problems do arise, they concern pain inflicted for sexual gratification. If D pays V to let D flagellate her, should V's consent be a defence? If X agrees to let Y, her immediate superior, cane her for some wrongdoing rather than report her to a higher authority with risk of dismissal, should X's consent be a defence for Y? If A pays B to inflict pain on him, should it make any difference to B's criminality whether A wants to conduct a scientific experiment, wants to be punished for his sins or is just indulging his masochism? Our own tentative view is this: since hurting causes no permanent or lasting damage, since it would be difficult for courts to inquire into motives and reasons in such cases and since it is hard to articulate a principle which would criminalize, say, the beating with his own consent of T. E. Lawrence but legitimize, say, the scourging of Henry II at Canterbury, the law should operate on the principle that consent is always a defence to hurting.[68]

Finally, there is the question of harming. On what principle are we to distinguish between the sadist who cuts off a consenting victim's ear and a surgeon who cuts off a consenting patient's leg? One thing we do not say is that both cause harm but the surgeon does so justifiably. On the contrary, what we say is this: the sadist causes harm for which consent is no defence, for a person's body is not to be impaired for any reason with or without consent, and this must be publicly condemned by society through its criminal law; but the surgeon doesn't cause harm at all — he hurts perhaps but doesn't harm, for whereas "hurt" simply describes inflicting pain, "harm" has a partly normative connotation and means to make something less able to fulfil its function. Thus a surgeon removing a diseased kidney or leg does not inflict harm as commonly understood, but rather enables the patient to function *better* without it.

In our view, the law should deal with this particular problem by way of definition and exception. First it should define an offence of causing bodily harm; then it should provide a general definition of bodily harm; and finally, it should add an exception to the effect that "bodily harm" does not cover surgical operations on consenting patients for socially accepted goals. Clearly the most obvious such goal will be the patient's own cure and benefit, but recently, we have come to accept the practice of donating organs and of undergoing scientific experiments, and these can be covered by the term "socially accepted goals." Note that the patient would still have to consent — no one should have

68. This question was resolved in quite an unsatisfactory manner in *R.* v. *Donovan*, [1934] 2 K.B. 498. This case involved flagellation of a consenting female without permanent or lasting damage being inflicted upon her. On the basis of the approach we recommend and of the facts in that case, the accused should have been acquitted, consent being a defence to hurting. If, however, the Crown had established harm, then consent of the victim would have been irrelevant. Still it would have been possible for defence counsel to plead the accused's good faith and that consent was given for a socially acceptable purpose.

treatment forced upon him. Note too that this approach would take medical treatment with consent right out of the criminal law as is surely only right.

B. Sports

Contact and combat sports present a problem with two aspects. One is a legal aspect having to do with legal definitions and concepts. The other is a social aspect relating to unnecessary violence practiced and indeed encouraged in some sports, such as hockey.

(1) Legal Aspect

The legal problem is the following: On what basis and to what extent can the use of force in contact sports constitute a lawful exception to the laws prohibiting violence? In principle of course all violence, even violence of a mere technical nature, is against the law. By way of exception, however, it has always been allowed in contact sports. This makes good sense, for otherwise no contact sports could ever lawfully be played.

The legal basis for this exception is the victim's consent. In principle, a participant in a game or sport can be regarded as consenting to:

(a) contact (and sometimes pain) in accordance with the rules of the game;

(b) contact (and sometimes pain) of an accidental nature arising incidentally in the course of it; and

(c) the risk of injury from such contact.

So, a football player impliedly consents to being tackled, to being kicked accidentally and to the risk of being injured thereby. By contrast, the participant is not taken to consent to any other contact — to contact not licensed by the rules of the game, to injuries arising therefrom or to injuries deliberately inflicted. Thus, a football player is not taken to consent to being deliberately punched in the face, or kicked in the groin or hit on the head.

Consent, however, is not the only relevant factor in the eyes of the law. Also relevant are two other matters:

(a) the nature and extent of the resulting harm, and

(b) the nature of the activity in the course of which the violence occurs.

The relevance of the nature of the harm is the following. While most sports, games and activities rule out deliberate injury, some do not. In these activities the consent of

the victim will not necessarily be a defence. If the sport is illegal, as is prize-fighting, the victim's consent becomes clearly irrelevant. If the sport is lawful, as in the case of boxing, his consent is relevant insofar as the defendant's conduct falls within the rules which are designed to minimize the risk of serious injury. Furthermore, if the activity is neither explicitly prohibited nor explicitly allowed by law, it may be said in principle that consent is only a defence, provided the harm caused is not serious, that is, it does not interfere with health or comfort, and is trifling and transient in nature. For, as was observed in *R.* v. *Bradshaw*,[69] "no rules or practice of any game whatever can make that lawful which is unlawful by the law of the land." In other words, private law cannot supersede or prevail over public law.

The relevance of the other factor, the nature of the activity itself, while clearly based on common sense, is harder to articulate. In common law tradition, some measure of violence has always been tolerated in the course of lawful sports, especially if these are carried on according to careful rules and safeguards, whereas the same amount of violence is not tolerated in the course of other activities not qualifying as such sports. The distinction which can be grasped intuitively is that the former are seen to have such social utility as to justify being carried on despite the violence involved, whereas the latter are not seen to have any such redeeming value. So, in *R.* v. *Donovan*,[70] where flagellation of a consenting female for sexual gratification was not regarded as being on the same footing

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69. (1878), 14 Cox C.C. 83, p. 84. In the course of a football game the accused caused the death of a player, and his act was considered unlawful because in committing it he intended to produce serious injury to another, or was reckless as to its consequences. At page 85 the judge affirmed that it was immaterial whether the act was in accordance with the rules and practice of the game.

70. *Supra*, note 68. This case has been discussed by many authors. They seem to experience great difficulty in concluding that *Donovan* is law in Canada. The decision states that the blows which the accused struck were likely or intended to cause bodily harm and therefore the court was of the opinion that he had committed an unlawful act to which consent was no defence. Authors insist on the fact that this decision leaves the law in an uncertain state. In their view, according to *Donovan*, it seems almost a necessary inference that boxing and similar activities are illegal, because to suggest that in boxing the motive is not to injure is to ignore realities. They also believe that *Donovan* omitted to mention the case of medical treatment as an exception to the rule concerning bodily harm. The main problem raised by many authors lies in the ambiguity of the definition of a criterion of "bodily harm" and in the inability to distinguish more minor from more serious assaults. In Hughes Graham's opinion ("Consent in Sexual Offences" (1962), 25 *Modern Law Review* 682):

> ... the bodily harm test is reasonable in its essentials but might be interpreted somewhat more liberally than the judgment would seem to indicate .... Where no likelihood of permanent harm is present it would not seem to be good policy to declare such acts [sado-masochistic] criminal where consent is free and full.

It is submitted that it is necessary to assess degrees of harm permissible or otherwise depending upon the social interest or value involved.

The reader can refer to: J. C. Smith and Brian Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983), p. 358; Mewett and Manning, *supra*, note 10, p. 472; Stuart, *supra*, note 9, p. 458; Jacques Fortin and Louise Viau, *Traité de droit pénal général* (Montréal: Thémis, 1982), p. 299; Peter Brett and Peter L. Waller, *Cases and Materials in Criminal Law*, 2nd ed. (Chatswood, Australia: Butterworths, 1965), p. 278; Glanville Williams, "Consent and Public Policy," [1962] *Crim. L.R.* 74; L. H. Leigh, "Sado-Masochism, Consent and the Reform of the Criminal Law" (1976), 39 *Modern Law Review* 130.

In *R.* v. *Abraham* (1974), 30 C.C.C. (2d) 332 and *R.* v. *Setrum* (1976), 32 C.C.C.(2d) 109, two decisions rendered respectively by the Québec Court of Appeal and the Saskatchewan Court of Appeal, *Donovan* was not considered to be authoritative in Canada. It is however interesting to note that the Supreme Court of Canada in *R.* v. *Cullen*, [1949] S.C.R. 658, referred to the case of *Donovan*, implicitly accepting its rationale. So whether or not *Donovan* is law in Canada is at best uncertain.

as what the court termed "manly" sports, the victim's consent was no defence to a charge of causing bodily harm qualifying as serious.

Whether the issue turns on the rules of the game or the value of the activity, there are problems. As to the former, principle and practice may be in conflict. In principle, intentional injury falls outside the rules, and negatives consent, but unintended injury resulting from actions incidental to the sport is taken as impliedly consented to. In practice, so swift is the pace of many a game or sport that the distinction between intentional and unintentional contact may prove impossible to draw.

As to the nature of the activity, the question is: How are we to decide which sports are lawful and which unlawful? A principled answer would be to count as unlawful all sports involving intentional injury. Accordingly, in lawful sports, participants should, by simple inference from the circumstances — as under present law — be taken to consent, so far as the rules specify, to:

(1) being touched;

(2) being hurt;

(3) being accidentally touched, hurt or harmed.

No special express rule is necessary. What may require an express rule however is the sport of boxing. This sport, unlike all other lawful sports, allows intentional inflicting of harm and injury — in no way can a knock-out blow be reckoned as not inflicting harm. Preservation of the present lawful status of boxing then would require a special *ad hoc* provision based on no underlying principle but solely catering to expediency.

(2) Social Problem

While blows struck in the course of games present technical difficulties for the criminal law, there is far wider concern over the unnecessary violence practised in many sports. Professional hockey, for example, has been widely condemned for tolerating a brutal style of play which is dangerous for the participants and morally degenerate for the spectators. This violent style is also seen as offering an unhealthy and harmful model to young players. To cure the perceived malaise in modern sports, various solutions or means of control have been recommended.[71] Some commentators call for a general re-evaluation of the objectives of sport, a re-education of participants and a search for a more humane and less destructive model. Some suggest new rules and stricter disciplinary controls by leagues; some would favour establishing public statutory commissions to regulate standards in sport; and, some recommend more effective and vigorous sanctioning of violent acts by players through the criminal law. Often, it is recognized, the appropriate measure must vary with the age and level of the players.

71. For further information on the subject of sports, the reader can refer to John Barnes, *Sports and the Law in Canada* (Toronto: Butterworths, 1983).

Normally Canadian society condemns deliberate acts of violence and accepts criminal prosecution as the appropriate remedy. But when the criminal law invades the Canadian ice rink, it treads on unusual and maybe even sacred ground. Hockey, which holds a revered place in Canadian culture, is by definition, a fast, vigorous, aggressive and traditionally masculine game which has never in its history been gentle and which has always seen winning as important.

> Hockey is rooted, nurtured, and triumphant in violence. Its inevitability is compounded: not only is the stick a weapon, but the skates are sidearms; not only is body checking necessary but the use of stick and shoulder and elbow and head and hand and even skate to facilitate checking is artfully developed. Enclosing the playing surface adds a new dimension of boards and glass to the physical rigidity of the frozen surface. Further enclosure with the noise and increasingly rabid presence of fans does the rest .... Ironically, what is best in hockey — team play — has contributed to what is worst — deliberate violence. The brutality has become calculated as an instrument of winning. Putting out for team means defending teammates, retaliating for teammates, and even exercising aggression as a deterrent to opponents. Contemporary coaches speak openly of physical intimidation as a strategy for winning hockey.[72]

Many perhaps would not want things otherwise. Perhaps the popularity of hockey depends upon its brutal character. Meanwhile the criminal law has to be wary of tampering with traditional symbols. Where hockey is concerned, the law skates on thin ice.

The criminal law does sometimes take a stand, however, against deliberate infliction of injury. In recent years, players have been prosecuted for assaults during play and for homicidal attacks.[73] And while fighting or causing injury in athletic competition may give rise to a variety of charges — for example, for wounding under *Criminal Code* subsection 245.2 (1), causing bodily harm by criminal negligence under section 204, causing a disturbance under section 171 or possession of a dangerous weapon under section 83 — the charge most often brought is assault, which may be laid even though the league has taken internal disciplinary action of its own.[74]

There is now a substantial body of reported cases dealing with alleged criminal

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72. Neil D. Isaacs, *Checking Back — A History of the National Hockey League*, 1st ed. (New York: Norton, 1977), pp. 19-20.

73. *R.* v. *Smithers*, [1978] 1 S.C.R. 506, p. 521. Smithers was found guilty of involuntary homicide. It was proved that he had illegally assaulted the victim, which had at least contributed to his death. The judge stated the principle that a person who assaults another person must accept his victim as is. In *Re Duchesneau* (1979), 7 C.R. (3d) 70, p. 84, the court, unable to find the accused guilty of involuntary homicide, condemned him for common assault. According to the judge, as the assault was committed while the game was temporarily stopped, we cannot presume an implied consent because this consent could not exist except as a body check which happens during a game according to the rules.

74. *R.* v. *Prénoveau*, [1971] R.L. 21, p. 25. According to the judge, the rules of the hockey leagues are necessary for the proper running of hockey. Nevertheless, the civil and criminal courts should not ignore their own jurisdiction because a player has already been penalized through the application of league rules. Any items of a contract or ruling which would contradict this principle should be considered illegal and contrary to public order.

assaults during contact sports.[75] Two leading civil judgments are: *Gagné* v. *Hébert*[76] and *Agar* v. *Canning*.[77] The sport invariably involved is hockey. These cases seek to define the limits of players' implied consent to blows. As observed earlier, if the contact is unintentional, instinctive or reasonably incidental to the game, then it will be held to fall within the bounds of consent, but if it is found to be calculated, overly violent or unrelated to the immediate course of ongoing play, then it will constitute an assault. Even if an action is found to be unrelated to play and unnecessarily violent, an accused may be able to plead self-defence.[78] Canadian courts have viewed violent attacks during professional

75. *R.* v. *Maki* (1971), 1 C.C.C. (2d) 333, p. 336. In the opinion of the court, consent to bodily injury as a defence to criminal prosecution has its limitations. *In obiter* it was held that no sport league, no matter how well organized, should render the players immune from criminal prosecution. "There is a question of degree involved and no athlete should be presumed to accept malicious, unprovoked or overly violent attack." In *R.* v. *Green* (1971), 2 C.C.C. (2d) 442, pp. 447-448, on facts produced from incidents occurring in the course of a hockey game played at the national level, the judge found it difficult to imagine a circumstance where an offence of common assault as opposed to assault causing bodily harm could stand, considering the permissiveness of the game and the risks that the players willingly undertake. Where a player reacts instinctively and does so to protect himself, he should not be found guilty of common assault. The situation would be different in cases of unprovoked savage attacks in which serious injury results. In *R.* v. *Leyte* (1973), 13 C.C.C. (2d) 458, p. 459, it was held that players in competitive sports such as handball must be deemed to enter into such sport being aware of the possibility of being hit and must be deemed to consent thereto so long as the reactions of the players are instinctive and closely related to the play. In *R.* v. *Watson* (1976), 26 C.C.C. (2d) 150, pp. 156-157, counsel for the accused held that the rules of the game tolerate or encourage fighting. In the judge's opinion the rules recognize that such misconduct will, during such events, occasionally occur, but in fact they are designed to discourage it. "[T]o engage in a game of hockey is not to enter a forum to which the criminal law does not extend." (p. 156) In *R.* v. *Maloney*, *supra*, note 64, pp. 326-327, regardless of implied or expressed consent to the application of force the judge insisted on the legal limitations to the consent that a person can give: "Implied consent would be when a player agrees to those assaults which are inherent in and reasonably incidental to the normal playing of the game of hockey." In *R.* v. *Henderson*, [1976] 5 W.W.R. 119, pp. 123, 124 and 127, the court attempted to establish guidelines as to the types of risks which the players assume by participating in a sport. They assume those which flow naturally from the activity involved, which activity falls within the bounds of fair play. The court recognized the fact that imposition of criminal sanctions in activities such as sports is a serious step. In *R.* v. *Langton*, Sask. C.A., 2 October, 1974 (unreported) (see "Hockey Violence — *R.* v. *Langton* — a Case Note" (1976), 32 C.N.R.S. 121), any notion that sport players consent to all assaults is dispelled. There exists a principle that has been reinforced: "No organized sport no matter how popular can legalize conduct that Parliament in its infinite wisdom has deemed fit to prohibit." (p. 125) See also *R.* v. *Lecuyer* (1978), 11 A.R. 239; *R.* v. *Williams* (1977), 35 C.C.C. (2d) 103. In *R.* v. *St. Croix* (1979), 47 C.C.C. (2d) 122, p. 124, it was held that "professionally trained and professionally employed hockey players in the National Hockey League consent to more assaultive type behaviour than in a purely amateur friendly neighbourhood hockey game." In *R.* v. *Côté* (1981), 22 C.R. (3d) 97, pp. 100-101, according to the judge, the theory that an athlete be subjected only to the disciplinary rules of sport and that the abuse of these rules not be subjected to the law is unacceptable because it would put sports above the law. Would not more frequent intervention reduce the violence in sports which has already reached epidemic proportions? In *R.* v. *Gray*, [1981] 6 W.W.R. 654, pp. 661-662, the play was not in progress and it was easier to determine that the accused acted deliberately and intentionally. His action was not incidental to the normal playing of the game.

76. (1932), 70 C.S. 454, pp. 457-458. It is not because it is the practice not to have recourse to the courts that those who have deliberately caused damage (assault) can ignore their responsibility under section 1053 of the Civil Code. According to the court, it is about time that the courts intervene.

77. (1966), 54 W.W.R. 302, p. 304; aff'd (1966), 55 W.W.R. 384. In this case the following comment was made: "Injuries inflicted in circumstances which show a definite resolve to cause serious injury to another even when there is provocation and in the heat of the game should not fall within the scope of the implied consent." A blow struck in anger even though provoked during the course of play in a hockey game was held to be actionable in a civil action for damages.

78. *R.* v. *Maki*, *supra*, note 75, p. 335, reveals to what extent the courts will go to allow this defence in a hockey game. The rule is to the effect that where the means of defence used is not disproportionate to the severity of the assault, a plea of self-defence is valid. Although the defendant failed to measure the

hockey games with some tolerance and leniency but expect greater restraint and "fair play" from local or amateur participants. Many convictions have been recorded against amateur players.

In this connection — apart from the legalistic problem discussed earlier — the "limited implied consent" doctrine can work reasonably well. It has given Canadian criminal courts the flexibility to distinguish ordinary physical contact in sport from unnecessary brutality. While some might advocate special measures — in 1980 a Sport Violence Bill[79] was introduced into the United States Congress to deal specifically with the use of excessive physical force during professional sports — we consider the solution to this social problem of sports violence to lie in essence outside the redrafting of our present assault provisions. It lies rather in a greater police and prosecutorial vigilance, in stricter enforcement of existing law and in less judicial tolerance and leniency for "sports assaults."

As pointed out above, the present rule found in *Criminal Code* subsection 245.1(2) creates some difficulty in that there is no clearly defined limit to the measure of bodily harm to which a victim may consent. The Néron Report[80] on hockey violence addressed this issue as follows:

> [TRANSLATION]
> It is evident that there must be limits to consent to violence. The *Criminal Code* clearly imposes such a limit when it provides in section 14 that no one may consent to have death inflicted upon him. In the case of acts causing injuries that do not result in death, the question of consent continues to raise problems, however, since section 244 [now redrafted and supplemented with a statutory definition of 'bodily harm' in subsection 245.1(2)] of the *Code* allows a person to consent to force or violence being intentionally applied to him. There is no limit set in this section on the degree of violence that may be used or on the gravity of the injuries that may result therefrom... It must be admitted that the current state of the law on this question of consent does nothing to make the task of the police and the courts in eliminating violence in sports any easier.[81]

In dealing with sports violence, the criminal law can serve as an "enforcer" or "policeman" of last resort. But occasional sanctioning under criminal law will not solve the wider problem. A careful combination of social and educational measures is needed involving governments, leagues and associations, parents, sports officials and the press. We agree with G. Létourneau and A. Manganas when they say:

> [TRANSLATION]
> It is obvious that a series of measures such as education of the public and of sports officials, government intervention and other social measures must be used if we are to curb violence

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degree of force necessary to prevent the attack and inflicted serious injury, the charge was dismissed. It seems that "stick-swinging duels" are legal, although other forms of duelling are not. One must conclude that as long as it is a hockey game, there are almost no limitations on the degree of force used to repel force.

79. *Sports Violence Act, 1980*, H.R. 7903, 96th Cong. 2nd sess., 96th Cong. Rec. 6946 (1980). See also *Sport Violence Act. 1981*, H.R. 2263, 97th Cong. 1st sess., 127 Cong. Rec. H760 (1981).

80. Gilles E. Néron, *Rapport final du Comité d'étude sur la violence au hockey amateur au Québec* (Québec: Gouvernement du Québec, Haut-Commissariat à la jeunesse, aux loisirs et aux sports, 1977).

81. *Ibid.*, pp. 129-130.

in sports. All these factors have a long-term effect, however, and some are still in the experimental stage. The great advantage of the criminal law lies in the fact that it can be used in the short term if not to resolve the problem, then at least to put a stop to the marked increase in violence.[82]

The criminal law therefore has a limited place at the sports arena. In the case of some professional leagues, it may be the only tool available. When it is used, perhaps the offending player should not be the only individual to be charged. Means could be found to bring to account the coaches, managers, team owners and league officials who indirectly encourage and contribute to brutal exhibitions.

C. Domestic Violence and Corporal Punishment of Children

(1) Domestic Violence

Clearly, domestic violence is a serious social problem. It is indeed as great a problem here in Canada as it is in most other similar countries. Like most Western nations we have our measure of wife battering, husband battering and child abuse. As to wife battering, the Canadian Advisory Council on the Status of Women[83] estimated that, of all women married or living "common law," one in ten is battered by the man she lives with — in 1978 no fewer than 500,000 female Canadians suffered such treatment and these were by no means all members of the poorer or less educated classes. As to child abuse, the Department of National Health and Welfare[84] estimated, on the basis of reports, that in 1978 no fewer than 213,535 Canadian children were in need of protection or were at risk of being in such need, and that the number of children actually abused totalled 5,789 in 1977, and 7,329 in 1978.

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82. G. Létourneau and A. Manganas, "La tolérance des droits pénal et sportif, source de violence dans les sports" (1976), 17 *C. de D.* 741, p. 775.

83. Linda MacLeod, *Wife Battering in Canada: The Vicious Circle*, prepared for the Canadian Advisory Council on the Status of Women (Ottawa: Supply and Services Canada, 1980), pp. 20-21. Michael D. Freeman, "The Phenomenon of Marital Violence and the Legal and Social Response in England," in J. M. Eekelaar, ed., *Family Violence, An International and Interdisciplinary Study* (Toronto: Butterworth, 1978) writes at page 74, with respect to the problem in England: "Ashley M. P., a champion of the cause of battered women, has suggested that between 20,000 and 50,000 women a year may be involved."

84. Corinne Robertshaw, *Child Protection in Canada*, a Discussion Paper prepared for the Social Services Division, Department of National Health and Welfare (February, 1981), pp. 20-24. In the Ontario Ministry of Community and Social Services, *Child Abuse Prevention*, Information Pamphlet (1983), p. 8, it is stated that "it has been conservatively estimated that between 2,000 and 3,000 children are seriously abused in Ontario every year."

In America, child abuse accounts for more childhood deaths than any other single factor, according to Hyman and Shreiber in "Selected Concepts and Practices of Child Advocacy in School Psychology" (1975), 2:1 *Psychology in the Schools* 50.

Domestic violence is also a legal problem. On the one hand, the laws relating to assault and similar offences prohibit all forms of violence — necessity and *Criminal Code* section 43 apart, there is no exception just because such violence takes place in the family — and in theory the offences in our *Code* are adequate to deal with it. On the other hand most wife battering, husband battering and child abuse still goes unpunished by the law — in this context practice falls sadly short of theory.

The reasons for such shortfall, though, have nothing to do with definitions of offences. Domestic violence goes unpunished not by reason of inadequacy of definition, but by reason of problems of detection, proof and general attitude.

First, we will discuss problems of detection.[85] Domestic violence typically occurs not in full public view, but rather in secret, behind closed doors, within the confines of the family. Meanwhile, the only witnesses may be the victims themselves — witnesses in a peculiarly vulnerable position. Few people, for example, can be more powerless, isolated and helpless than the battered wife. Emotionally and economically dependent on her spouse, she finds herself locked into a dangerous and destructive relationship, fears for her own safety and that of her children, is ashamed of her treatment, does not know how to escape and risks further abuse if she seeks help.

Next, we have the question of proof.[86] In these cases, as in most criminal cases, the burden of proof is rightly on the prosecution. But also in these cases, unlike the position in most other criminal cases, the burden may be particularly hard to satisfy. The chief witness — the wife or child — may withdraw the complaint, refuse to testify or otherwise turn out to be an unsatisfactory witness. She may have no real interest in seeing the offender punished, may prefer dropping the matter to exacerbating an already difficult relationship, or may even rather continue in the present unsatisfactory relationship than opt for a life without it.

Finally, there is the matter of attitude.[87] Law and law enforcers have been reluctant to interfere in cases of domestic violence. This reluctance stems not only from difficulties

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85. MacLeod, *supra*, note 83; Debra J. Lewis, *A Brief on Wife Battering with Proposals for Federal Action*, prepared for the Canadian Advisory Council on the Status of Women (January, 1982).

86. MacLeod, *supra*, note 83, p. 42.

87. MacLeod, *supra*, note 83; Freeman, *supra*, note 83; Lewis, supra, note 85; Standing Committee on Health, Welfare and Social Affairs, *Wife Battering*, Report on Violence in the Family (First Session of the Thirty-second Parliament, 1980-81-82), p. 11. Scutt, "In Support of Domestic Violence: The Legal Basis" (1980), 3 *Family Law Review* 23, p. 23, states: "An analysis of laws designed to deal with crime in the family clearly illustrates that rather than being concerned to halt domestic violence, laws are framed to preserve the unit despite it." Scutt views the nuclear family as a sexist institution, supported by sexist laws and conducive to family violence. In Robertshaw, *supra*, note 84, pp. 9-19, it is stated that the child welfare statutes of all the provinces and the Yukon Territory contain provisions requiring a report to be made to the child protection authorities where a child appears to be in need of protection. There is no such legislation in the Northwest Territories. Most, but not all of these statutes provide that failure to report is an offence. Child welfare statutes in Alberta, Nova Scotia, Ontario and Québec contain provisions requiring a register to be established for maintaining certain information relating to reports of child abuse received. By regulation made under the Manitoba child welfare legislation, the Director of Child Welfare is to keep a register of cases of child abuse. In British Columbia, Saskatchewan and Newfoundland, such registers are kept as a matter of administrative policy rather than legislative mandate. Robertshaw advocates having central registers of child abuse reports to keep track of child abuse cases when the family moves

of detection and proof but also from the ideological support within our law for a patriarchal social order granting power and dominance to men and leaving the female role as one of long-suffering subserviency and economic dependency.

Clearly, the solution to domestic violence does not lie in the redefinition of existing offences. It lies rather in a change in law enforcement attitudes. New initiatives may be needed in police training. Treatment and counselling services are needed to help the parties deal with the tensions of family life. In the short term, shelters, refuges and places of safety, and in the long run, employment and income security are required for victims. In general, public education is essential to prevent such attacks from being viewed as somehow different from ordinary assaults and more acceptable than ordinary violence. Finally, the special risk to wives (and sometimes husbands) and children suggests the recognition here of a special aggravating factor and also possibly of a new offence consisting of failure to report domestic violence coming to one's notice.

(2) Corporal Punishment of Children[88]

In principle, all use of force is disallowed by law. This is done primarily through the criminal law, which prohibits the use of force as a punishable offence. It is also done secondarily by the civil law, which looks on it as a civil wrong to be redressed by compensation.

To this principle, however, exceptions have always been recognized by law. Use of reasonable force has always been allowed under four different headings.[89] It can be used when necessary for the advancement of justice — those, for example, refusing to submit to lawful arrest can be lawfully seized by force. It can be used in lawful self-defence — those unlawfully attacked are legally entitled to use force in order to protect themselves. It can be used for lawful protection of property — trespassers can be resisted

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from one part of a province to another, and to assist in the compilation of statistics and research. See also Judge Thomson, "Confidentiality and the Compulsory Reporting of Child Abuse" (1981), 2 *Health Law in Canada* 15.

There are no mandatory reporting requirements with respect to suspected cases of wife battering. Lewis, *supra*, note 85, states at page 11:

> Even if the assault is merely the most recent of a long history of beating, the police will often be unaware of previous legal action which would lead them to respond more strongly. There is no central registry at police stations of restraining orders, no contact orders, or previous charges laid in family court.

Lewis recommends that hospitals be required to report any case of wife assault that comes to their attention (p. 14).

88. D. C. Préfontaine and D. Solberg, Department of Justice, "The Use of Force to Correct Children," a Paper presented at the American Society of Criminology, Washington, D.C., November 1981 is an excellent summary of the law on corporal punishment of children. That Paper provided much of the background information for the present Paper, and the authors gratefully acknowledge that assistance.

89. Law Reform Commission of Canada, *The General Part: Liability and Defences*, [Working Paper 29] (Ottawa: Supply and Services Canada, 1982), pp. 91-112.

by the reasonable application of force. And it can also, to some extent, be used in cases of necessity — an assailant of unsound mind or below the age of criminal liability can be resisted, though strictly speaking this would not fall under self-defence because there has been no assault.

To these one more heading must be added: corporal punishment. Formerly such punishment was lawfully permitted at the hands of public and private authority. At the hands of public authority it could be administered, by court order to convicted defendants, by prison officials to offending inmates and under military discipline to soldiers and sailors. At the hands of private authority, corporal punishment would lawfully be inflicted on apprentices by masters, on servants by employers, and on children by parents, teachers and guardians.

Today, however, the rules allowing corporal punishment have been so narrowed as to relate to only two types of person: children, and persons on board ship. *Criminal Code* section 43 enshrines the common law rule concerning lawful correction of children.[90] Section 44 permits the lawful use of force by a master of a ship in order to maintain discipline.[91]

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90. *Criminal Code*, R.S.C. 1970, c. C-34, section 43. The annotation for section 43 in J. C. Martin, *Martin's Criminal Code 1955* (Toronto: Cartwright, 1955) states: "This is the former s. 63, omitting the reference to master and apprentice. It was s. 55 in the Code of 1892 and s. 66 in the E.D.C. [English Draft Code of 1878]." For further discussion of the corporal punishment of children, see the Appendix to this Paper.

91. *Criminal Code*, R.S.C. 1970, c. C-34, section 44 states: "The master or officer in command of a vessel on a voyage is justified in using as much force as he believes, on reasonable and probable grounds, is necessary for the purpose of maintaining good order and discipline on the vessel."

The annotation for section 44 in *Martin's Criminal Code 1955*, *supra*, note 90, states: "This is the former s. 64. It was s. 56 in the Code of 1892, and s. 66 in the E.D.C. [English Draft Code of 1878]." See Appendix for commentary by Sir James Fitzjames Stephen.

"The formerly recognized right to chastise servants, apprentices, mutinous seamen, etc., may be assumed to have fallen into disuetude": 11 Lord Hailsham of St. Marylebone, *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1976), p. 647.

Although the law is "still on the books" in Canada there appear to be no Canadian cases in which section 44 has been considered. Earlier English civil cases dealing with corporal punishment for misconduct on board ship may be relevant to any future invocation of our section 44. In *The "Agincourt"* (1824), 166 E.R. 96, Lord Stowell stated at page 97:

> [I]n a case of gross misbehaviour, the master of a merchant ship has a right to inflict corporal punishment upon the delinquent mariner ... the punishment must be applied with due moderation ... in all cases which will admit of the delay proper for enquiry, due enquiry should precede the act of punishment; and, therefore, that the party charged should have the benefit of that rule of universal justice, of being heard in his own defence.

In *The "Lowther Castle"* (1825), 166 E.R. 137, Lord Stowell stated at page 137:

> It does not appear to me that there is any doubtful question of law, arising upon the illegality of inflicting bodily correction upon offending mariners — such punishment being commensurate to the offence committed, being awarded by due authority, and being administered with due moderation.

See also *Lamb* v. *Burnett* (1831), 148 E.R. 1430 (Exch. of Pleas). In *Hook* v. *Cunard Steamship Co., Ltd.*, [1953] 1 All E.R. 1021, damages for false imprisonment were awarded to a seaman where the captain had arrested and confined him without having reasonable cause to believe or believing that the arrest and confinement were necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property, on board.

In our view, there is no justification now for section 44. No similar *Code* section applies to trains, aircraft or other forms of transport.[92] Insofar as concerns acts protecting the safety of a ship, the doctrine of necessity is wholly adequate and makes the section otiose. Insofar as it concerns enforcing discipline, for example, by flogging, it is anachronistic and should be repealed.

Far less clear is the issue regarding *Criminal Code* section 43. This section states:

> Every 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.[93]

But should children continue to be singled out as lawfully subject to use of force[94] by parents, teachers and others? Should acts which would constitute assaults if inflicted on anyone else remain free from criminal liability when inflicted on those of tender years? Or should our law now go to the logical conclusion of prohibiting corporal punishment completely — not only for prisoners, apprentices and so forth but also for children?

Children, it has to be remembered, form a very special category of persons. On the one hand, they are clearly regarded by the law as full persons, that is, as full subjects

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92. There is no other federal legislation which provides a comparable disciplinary power to the "officer in command" of a train, an aeroplane or a road vehicle.

93. See Préfontaine and Solberg, *supra*, note 88. See also the Appendix following this Paper.

94. The scope of the defence of lawful correction of children is broad, and has been asserted not only in cases of assault, but also in tort actions for false imprisonment and in cases of homicide.

Unlawful detention of a child after school may constitute the tort of false imprisonment.

H. Street, *The Law of Torts*, 4th ed. (London: Butterworth, 1968) suggests that only a very serious breach of discipline would justify any detention or locking up of schoolchildren. In *Fitzgerald* v. *Northcote* (1865), 4 F. &. F. 656, a student was locked in his room for about two hours, until arrangements could be made for him to leave the school, further to his expulsion for conspiring against other students. It was held that as there were no circumstances to justify the expulsion, the headmaster of the school was liable for false imprisonment.

With respect to homicide, J. Stephen, *A Digest of the Criminal Law* (London: MacMillan, 1877), stated at page 131: "It is not a crime to cause death or bodily harm accidentally by an act which is not unlawful." He gave the following illustration suggested in 1 Hale, P.C. 473: "A schoolmaster, corrects a scholar in a manner not intended or likely to injure him, using due care. The scholar dies. Such a death is accidental."

11 Lord Hailsham of St. Marylebone, *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1976) states at pages 624 and 625:

> If a person in the course of inflicting lawful correction unintentionally kills the person who is being corrected, the killing is not manslaughter. The death is regarded as having occurred by misadventure if, having regard to the circumstances, the correction was inflicted moderately and with a proper instrument not likely to cause death or serious injury. If the correction exceeds the bounds of what is proper and reasonable in the circumstances and death is caused, the killing amounts to manslaughter at least.

In *R.* v. *Hopley* (1860), 2 F. & F. 202, a schoolmaster was convicted of manslaughter after a boy died from being beaten for two and one-half hours with a thick stick edged with brass. See also *R.* v. *Pennington*, [1958] Crim. L.R. 690. In this case a child of two years and eleven months died from a brain haemorrhage after having its head struck against a wall by the "common law" husband of the child's mother. The Court of Criminal Appeal (U.K.) held that the blow went beyond proper chastisement and therefore was unlawful. They substituted a verdict of manslaughter for the jury verdict of murder.

of rights and duties. On the other hand they are not yet in complete charge of themselves — they cannot choose their names, their schools, their place of residence and so on, but are instead subject in all such matters to the authority of their parents until their majority. On this question, representations from groups holding different views, and advice by consultants taking different opinions suggest that there is as yet little consensus.

In law, therefore, the parents have the primary authority over their children. They have the right to decide the child's upbringing, education and so forth. And in so doing they have the responsibility, and therefore the authority, to enforce discipline.[95]

It may be argued, then, that parents must in law enjoy the right to use force as a last resort upon their children. Clearly it will be conceded that in any society the state must have the right to use force as the ultimate sanction to enforce its laws. It can also be argued that in any family, parents must be legally entitled to a similar power to buttress their authority, and must be entitled, in addition, to authorize teachers and others to use force for lawful correction.

However, a full examination of this issue must begin by recognizing that there are at least three different kinds of situations where force might be used by parents or others on children. First there are emergency situations where force is used, usually on a very young infant, for his own immediate safety, for the safeguarding of others or for the protection of property — a small child playing with fire may need to be physically prevented from harming himself, injuring others or from setting fire to the home. Second, there is the situation where a parent, teacher or guardian, acting (sometimes understandably) in the heat of the moment resorts to violence — a harassed mother driven to distraction by noisy squabbling children, loses her temper, lets off steam and strikes them. Third, there is the situation where force is used on a child as a method of chastisement — the teacher, often some time after the misbehaviour and often with some measure of ritual, administers a beating.

Obviously the first kind of situation — the emergency — is one where use of reasonable force is justifiable. It is clearly only common sense that the use of reasonable force to prevent greater harm to the child or to others be permissible. While plainly outside the ambit of section 43 which concerns pure chastisement, the use of reasonable force is also permissible at common law under the doctrine of necessity (a doctrine existing in our present law by virtue of *Criminal Code* section 7 and explicitly articulated in draft section 12 of Working Paper 29 on the General Part).[96] In law then, whether under present law or under the proposed recodification, emergency use of force in all such cases remains allowable and presents no problem. Whether necessity would also extend to cover reasonable use of force as a last resort to enforce obedience, for example, physically compelling a disobedient child to go to bed when told, is less certain.

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95. This justification of a parent's right to use reasonable correction force was recognized by the Supreme Court of Canada in *Ogg-Moss* v. *The Queen*, Sept. 17, 1984 (unreported). See Dickson, C. J., for the court, at p. 23.

96. *Supra*, note 89, p. 126.

It is equally obvious that the second kind of situation — the heat-of-the-moment type — is one where use of force is illegitimate. On the one hand, understandable as it may be for a harassed parent, teacher or babysitter to "lose her cool," the use of force is by definition unnecessary — the case is not one of emergency. For this reason such situations fall outside the legal doctrine of necessity. On the other hand, insofar as such cases are not cases of chastisement or correction, strictly speaking, they should also fall outside *Criminal Code* section 43. At best they come within the rule on provocation, which provides no defence to liability but only a mitigating factor going to sentence.[97] In our view those who are provoked into assaulting children should be in no better position than those who are provoked into assaulting anybody else. In practice many such cases are too trivial to form the subject of a prosecution. In principle, however, "heat-of-the-moment" force on children should not be countenanced by law.

Less obvious is the position of the third kind of situation — corporal punishment. This, it must be admitted, is a controversial issue. It has implications for child welfare, child rearing practices in the home, and the maintenance of discipline in schools. It closely affects, therefore, matters of civil rights, family law and education which fall within provincial jurisdiction. Powers and practices in these areas could be materially altered by changes in the *Criminal Code*.

Opponents of corporal punishment attack section 43 on several grounds. They see it as wrongly institutionalizing violence as a means of social control, as an archaic reflection of parental right surviving from a time when servants, apprentices, prisoners and others could be lawfully beaten, as contributing to the serious social problem of child abuse, and as blurring the basic message of the law that violence is off limits. Violence in the home, they argue, begets violence in society — the battered child is likely to become a battering parent. And corporal punishment in school, abolished in most European

97. In *Evans* v. *Bradburn* (1915), 9 W.W.R. 281 (Alta. C.A.), Beck J. stated:

> [T]he law, probably wisely, does not recognize any provocation, short of an assault or threats creating a case for self-defence, as a justification for an assault, but only takes it into account as a circumstance which may reduce culpable homicide from murder to manslaughter, and in all criminal cases involving an assault as a circumstance going in mitigation of punishment and in civil cases in mitigation of damages.

The rule whereby provocation will reduce murder to manslaughter is codified now in the *Criminal Code*, R.S.C. 1970, c. C-34, section 215.

countries[98] and rarely advocated today in Canada,[99] is viewed as ineffective, unnecessary and counter-productive in that it fails to encourage student self-discipline and may conflict with parental views — in an age of compulsory education teachers cannot appropriately be regarded as delegates acting with the consent of the student's parents.

As against this, those in favour of allowing corporal punishment put forward several arguments. They contend that so far as parents are concerned, spanking is a widely accepted and supported form of family discipline. Removing this right would constitute unwarranted interference with family privacy. As to corporal punishment by teachers, they maintain that this is a necessary disciplinary measure of last resort, that many Canadian school boards would be wise not to ban the strap, and that corporal punishment is a traditional and practical system.

In our view the ultimate question is whether corporal punishment is even necessary. Clearly, unnecessary use of force is wrong and cannot be permitted by the law — this is the basic message of this chapter of the criminal law on crimes of violence. Clearly as well, some use of force is sometimes justifiable, as observed earlier, under the doctrine of necessity. How far could corporal punishment be defended under this principle?

Here, we could argue, we must recollect the distinction mentioned earlier in discussing emergency. On the one hand there may be cases where nothing short of physical force may bring a child to heel. For example, nothing less may serve to stop the child from destroying the furniture or to prevent class disruption. But these have nothing to do with punishment or with section 43, and would be unaffected by its abolition. They are emergency situations where the use of force is necessary, can obviously be justified

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98. In I. Hyman, "Corporal Punishment in the Schools: America's Officially Sanctioned Brand of Child Abuse" (1980), 6 *Caring* 2, p. 6, it is stated that:

> Among those countries which have abolished corporal punishment are Poland, Luxembourg, Holland, Austria, France, Finland, Sweden, Denmark, Belgium, Cyprus, Japan, Ecuador, Iceland, Italy, Jordan, Qatar, Mauritius, Norway, Israel, The Philippines, Portugal, and all Communist Bloc countries.

The United Kingdom is now the only European country which permits the use of corporal punishment in schools according to Pogany, "Education: The Rights of Children and Parents under the European Convention on Human Rights" (1982), 132 *New Law Journal* 344. In the *Case of Campbell & Cosans* (29th January, 1982), the European Court of Human Rights took note of the fact that the Government of the United Kingdom was committed to a policy aimed at abolishing corporal punishment as a disciplinary measure in schools by consensus of all concerned rather than by statute. Nevertheless, the court held that a school's refusal to respect the applicant parents' request that their children not be subject to corporal punishment was a violation of the second sentence of Article 2 of Protocol No. 1 which states:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

It was also held that the suspension of one student, which was motivated by his parent's refusal to submit him to corporal punishment, breached the first sentence of Article 2. The court concluded that Article 3 of the *European Convention on Human Rights* had not been breached in the circumstances. Article 3 states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Pogany, *supra*, Application No. 7907/77 indicates that the use of corporal punishment in schools may in some circumstances amount to a violation of Article 3.

99. *Supra*, notes 88, 90 and 93, and Appendix.

in common sense and plainly has created no problems. On the other hand there are cases where physical force is applied, not in an emergency, but after the event and simply as a punishment. These cases are less easy to justify. First, they lack the urgency aspect found in emergency situations and do not therefore fall under the general doctrine of necessity. Second, common sense is no longer unanimous that corporal punishment is a necessary educational instrument or an obviously appropriate answer to child misbehaviour.

In these circumstances we consider that ideally a clear stand against violence should be taken by the criminal law. Instead of prohibiting violence in general but then allowing it for punishment of children, the law should give a clear and unblurred message to the effect that all unnecessary violence is off limits. Emergency situations in the home or school are covered already by the law of necessity. All other situations should exclude the use of force. The rule in *Criminal Code* section 43 should be abolished.

Would such abolition work in practice? Would it undermine school discipline, teachers' control of pupils, and students' respect for authority? Would it expose parents and families to undue policing and infringement of privacy? To take a Charter analogy, if everyone has a right to freedom from violence, how far can limitation of this right be reasonably justifiable in a free and democratic society?

As regards teachers, the answers to these questions are, in our opinion, somewhat easier. First, as we have suggested earlier, a provision such as section 43 concerning schools and teachers in effect institutionalizes the use of force. Second, apart from necessity situations (where force is used to prevent harm and not to punish), the use of force is never necessary — the ultimate essential sanction is not corporal punishment but removal of the child from school, by force if necessary but by force used to remove a trespasser rather than as a chastisement. Third, the abolition of school corporal punishment in most European countries manifests that in those free and democratic societies, school discipline can survive without it — in short, that corporal punishment is seen as neither necessary nor justifiable. This too was the view taken by most (though not all) of our consultants. In our opinion, therefore, section 43 should be repealed as a defence for teachers.

Less easy is the answer to the question when it comes to parents. Initially, the Commission felt that for the reasons given earlier in discussing corporal punishment, section 43 should be completely repealed and corporal punishment should be ruled out also for parents. But in the light of our consultations on a prior draft of this Working Paper, a majority of Commissioners came round to the view that such repeal, if taken by itself, could have unfortunate consequences, consequences worse than those ensuing from retention of the section. For it would, in principle if not always in practice, expose the family to the incursion of state law enforcement for every trivial slap or spanking. And is this the sort of society in which we would want to live?

One answer given by opponents of corporal punishment and of its enshrinement as legally justifiable in section 43 is that, in practice, fear of such consequences is unrealistic.

In practice, they would argue, good sense and prosecutorial discretion would take care of the problem. Accordingly, although in principle the parent giving his small child a trivial slap might be open to prosecution, in practice he would not be charged.

Others, however, among whom a majority of Commissioners must be included, are not satisfied to rely simply on prosecutorial discretion. In the first place, the rule of law requires the lawmaker to spell out clearly whether a parent in such cases commits a crime, whether he has a defence and whether he is liable to state intervention authorized by law. It cannot be satisfied by provisions that fudge the issue, saying one thing in principle but allowing another in practice. Secondly, and although it has no doubts about the good sense of prosecutors, the majority feel that, when it comes to criminal law and rights such as the right of privacy, we should not have to rely on what people will do but should guard ourselves against what they may do. Such after all is the whole thrust of the call for a "government of laws and not of men."

The dilemma, then, is clear. The Commission would like to remove from the law a provision which enshrines and licenses the use of force on children. But, for the majority, the problem is how to do so without running the risk of wheeling the engines of law enforcement into the privacy of the home for every trivial slap or spanking. A more satisfactory way must be found than by reliance on prosecutorial discretion. Pending this, a majority of Commissioners recommends retaining a special exception for parents (and those acting with their permission) reasonably disciplining their children.

There is, however, a minority view that such an exception cannot be justified by fears of over-zealous state intrusion into family life. The *Criminal Code* contains an important message that force is not to be used as a means of resolving tensions that flow from personal relationships, whether inside or outside the family. It recognizes no exception limiting state reaction to other family assaults (for example, one spouse touching or hurting another against his or her will; or one sibling acting aggressively towards another). It does not limit state reaction to conduct that constitutes other criminal offences, such as theft, mischief and intimidation. Nor does it offer more than a narrow band of protection to parents who act "by way of correction." In practice, family relationships normally do evoke attitudes of tolerance toward offensive conduct, both on the part of those offended against, as well as those whose duty it is to respond officially. As has elsewhere been observed in this Working Paper, experience suggests that there is probably too much, not too little, institutional tolerance toward domestic situations, and it is doubtful that a special exception in the *Criminal Code* is required to protect families against over-zealous enforcement.

To the extent that a call for restraint in the use of the criminal power of the state is appropriate in these situations, the minority feels it should be addressed to enforcement attitudes, not to the letter of the law. Beyond blunting the message of the criminal law, to embrace such a narrow exception calls into question the meaning of our constitutional standards. The singling out of children, whether on the basis of age or a relationship of dependency, raises concerns about how far the state may go to deprive individuals of their "security of the person," and whether those embraced by the exception would enjoy

the "equal protection" of the Canadian criminal law. The language and spirit of the *Canadian Charter of Rights and Freedoms* is not without relevance to this issue, forcing each of us to examine our own view of what can be "demonstrably justified in a free and democratic society."

In the end, this has a great deal to do with moral choices about how children should be treated in our society. For the minority, to have an exception that condones the use of force, even for "reasonably disciplining" a child, sets a national standard that can only heighten the potential for abuse that resides in all of us. One person's discipline is another's abuse, and to perpetuate even this narrow exception to criminal responsibility, operating as it does within a system designed to reject responsibility for conduct whenever there is a "reasonable doubt," can encourage a climate for child abuse, and furnishes a slippery slope down which even the most well-meaning of disciplinarians may unwittingly slide.

VI.

Conclusion and Recommendations

Under present law "assault" covers both assault in its common law sense of threatening immediate force, and battery in the common law sense of unlawful application of force. These are quite different kinds of acts. The former involves frightening without touching, the latter touching without necessarily frightening. Accordingly, the present terminology confuses.

On the other hand the common law labels of "assault and battery" are little better. It was impressed on us by many of our consultants that such terminology is neither in line with French usage nor with the general understanding of the citizen, who uses "assault" to denote direct application of force and does not term the threat of force an assault at all. Moreover, it fails to distinguish between touching and hurting.

For the moment, then, we would use as labels for the central offences of assault, the terms "touching," "hurting" and "harming," and "threatening violence" for the form of assault recommended for retention.

This area of law then contains a whole variety of offences. These include assaults in the "non-battery" sense of the term. They include assaults by way of battery. They include unlawfully causing bodily harm. Finally, they include various types of aggravated assault and aggravated assault causing bodily harm.

In our view, the area could be greatly improved by restructuring as follows. First of all, there is the question of assault in the "non-battery" sense. Under present law this covers threatening force, attempting to apply force and armed begging. We would argue that the only one of these to be retained should be the first, namely: threatening immediate force, which serves to protect one's right to be free from fear and coercion. By contrast, there is no need to retain an offence of attempting to inflict force because such an attempt will already constitute an inchoate offence of attempt; nor is there any need to retain an offence of armed begging. Finally, we suggest that there be no offence of accosting while armed. If armed begging involves threat of violence — a fact to be determined on the evidence — then it constitutes the new assault offence. If not, it need not be an offence at all. Certainly it should not be deemed to be a threat of violence. Criminal law should not talk in terms of fictions.

RECOMMENDATION

1. That the *Criminal Code* include an offence of threatening to apply immediate unlawful force.

Next we would focus on the essential part of this area of law, namely, assault in the sense of battery, causing unlawful bodily harm and aggravated assault and harm. Here we would recommend three levels of assault offences:

(1) touching,

(2) hurting, and

(3) harming.

Assault by touching, which would replace the old common law offence of battery and our present offence of assault as defined in paragraph 244(1)(*a*) of the *Criminal Code*, would be defined in essence as an *in invitum* crime — it would consist in directly or indirectly touching a person against his will. As such, it would also be an offence that could only be committed by a positive act, though this would hardly need to be spelled out within the actual definition. Furthermore, the *mens rea* should be restricted, in line with the more orthodox common law tradition and the view taken by Mewett and Manning,[100] to intention in the form of purpose.

Commenting on these three factors, we would argue as follows. First, as regards consent, for the reasons given earlier in this Paper, it would be more in line with common sense to make it a requirement for the prosecution to prove that the victim objected to the touching or that the touching was clearly of a kind that everyone would object to and that therefore we can assume, in the absence of evidence to the contrary, that this victim would also have objected. Second, the offence of touching would serve to protect against infringements of privacy and bodily inviolability — the right not to have liberties taken intentionally and by some positive action — and this is why the offence should not extend to omissions, recklessness or negligence.[101]

A question arises, however, as to whether the proposed offence of assault by touching would give undue protection to the right of bodily inviolability. Would not the offence as defined cover many touchings which, despite the victim's objection, would be merely trivial? Would not this unduly widen the ambit and compass of the criminal law. And would not this run counter to the principle that criminal law should be used with restraint?

To the extent that these questions must be given an affirmative answer, it is worth reminding ourselves that in this regard, the offence proposed would be no different from the present law. For while subsection 244(1) defines assault as involving the application

100. Mewett and Manning, *supra*, note 10.

101. Committee on Sexual Offences against Children and Youth, Robin F. Badgley, Chairman, *Sexual Offences against Children* (Ottawa: Ministry of Supply and Services, 1984), vol. I, p. 56, Recommendation 7.

of *force*, the term "force" has clearly come to mean, through case-law, any non-consensual touching. As Cross and Jones put it,[102]

> The slightest degree of force, even mere touching, will suffice. Blackstone justified this by saying that the law cannot distinguish between criminal and non-criminal violence and therefore prohibits the lowest degree of it.

The question is, however, whether we can improve on present law in this respect. Should assault by touching be defined as restricted to touching which falls into an "offensive," "serious" or other similar category? The problem with this approach is twofold. First, if the term "offensive" (or some similar term) is used subjectively to mean "offensive to the victim," then it merely repeats the requirement that the touching be against the victim's will. Second, if the term is used objectively to mean "ordinarily reckoned offensive," then the law would be saying that, even in the absence of a legally recognized excuse or justification, it isn't necessarily a crime deliberately to touch another against his will — and this would be to abandon the notion that there is a fundamental value of non-violability of the person. Not everyone would readily accept a criminal law approach that sees people, even in trivial circumstances, as having to submit to physical interference.

Of course the problem of "trivial" wrongdoing is by no means peculiar to the question of assault. It surfaces equally in the case of theft — should stealing a paperclip, for instance, necessarily qualify as theft? It surfaces in the case of damage to property — should penning a word in the margin of a library book inevitably count as vandalism? The need to ensure that criminal law restrict itself to really serious conduct is clearly a general need.

How is this need best satisfied? By relying, as we do at present, on prosecutorial good sense? This we would view as a counsel of last resort, preferring to guard against what people may do, rather than relying on what we hope they will do, as we argued in Working Paper 29 when dealing with the defence of necessity. By defining assault and other offences with words like "serious," "substantial" and "offensive" so as to exclude trivial instances? This would be open to the objections raised above. By following the *Model Penal Code* approach and providing a general *de minimis* rule to the effect that criminal law definitions do not apply to trivial examples? This in its turn raises fundamental problems which we are currently exploring and will be shortly considering in a forthcoming Working Paper.

Meanwhile, as regards assault by touching, the following point deserves note. The proposed definition by no means entails an automatic conviction for each and every case of trivial touching. Even where the prosecution can prove that on the face of it (1) the victim objected to the touching, (2) the defendant knew this, and (3) there was no legal exception, excuse or justification, in trivial cases it would still be open to a court to acquit the accused. It could do this on the ground that the touching was so trivial that

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102. R. Cross and P. Jones, *Introduction to Criminal Law*, 10th ed. (London: Butterworths, 1984), p. 133.

(1) the victim's objection could not have been serious or (2) the defendant could not have realized it was.

Next, let us examine assault by hurting. Since hurting is in general more objectionable that mere touching, people can be more readily taken to object to it than to touching. For this reason, we would suggest that hurting be defined to reflect this distinction, that is, be defined as hurting a person — causing him pain. Moreover, there should be no offence if the victim consents. Like touching, hurting should also be defined as an offence requiring a positive act and an intention, and the same observations as those made regarding touching are in point here.

Only the role of consent calls for separate comment. First, defining it the way suggested above creates an exception rather than an excuse or justification. This seems more consistent with ordinary thinking: we do not regard the person who inflicts pain with consent (for example, in a psychology experiment to see where lies the threshold of pain) to be excused — it is wrong but there are excusing circumstances; nor do we think he should be justified — ordinarily it would be wrong, but here it is right and laudable. Rather we look on him as doing something which, because of the victim's consent, falls outside the ambit of what is forbidden by law.

Second, this way of putting it clearly imposes an evidentiary burden on the defendant. We would not suggest that he should have to prove that the victim consented. But we would argue that he should have to raise evidence of consent before the prosecution is called upon to prove the victim's non-consent.

Finally, there is assault by harming. This offence would replace assault causing bodily harm as defined by paragraph 245.1(1)(*b*) and unlawfully causing bodily harm as defined by section 245.3. In our view it is quite unnecessary to retain both offences.

The new offence, being a causation offence — it consists in the defendant's causing harm to the victim — should be defined as being able to be committed by act or by omission. This would not need to be done explicitly in the definition, but would follow by implication from the new sections on duties to act and on causation.

The *mens rea* for such a causation offence should surely include intention and recklessness. Unlike mere contact or even hurting, injury is serious enough that it should not be caused even by recklessness. In this respect, injury is more akin to death than to pain or contact.

In our view, however, the new offence should be restricted to really harmful conduct. For this purpose "bodily harm" should be redefined much more narrowly than it has been defined up to now. It should be defined to apply only to permanent or extended impairment of the body or its functions, such as a serious stab wound or a broken leg. Such things qualify because they put a person out of commission for quite some while if not, in some cases, forever.

In this new offence, no mention would be made of unwillingness or consent. Hence the prosecution would have no call to prove non-consent. Nor would it serve any purpose for the defendant to prove the victim's consent. This would follow from the absence of "consent" from the definition and would not need to be spelled out expressly.

RECOMMENDATION

2. That there be an offence of assault by touching someone against his will, of which the *actus reus* must consist of a positive act and the *mens rea* of intention in a sense of purpose but for which the victim's unwillingness must generally be proved by the prosecution.

That there be an offence of assault by hurting someone against his will in the sense of inflicting pain, the *actus reus* of which should consist of a positive act and the *mens rea* of which should consist of the intent in the sense of purpose, but for which the victim's unwillingness need not be proved unless the defendant raises sufficient evidence of consent.

That there be an offence of assault by causing harm or injury for which the *actus reus* should consist of acts and omissions and the *mens rea* of intention or recklessness. The victim's consent to this offence should be irrelevant, and "bodily harm" in this offence should be defined to cover permanent or temporary impairment of the body or its functions, for example, by maiming, disabling or disfiguring.

What would need to be spelled out expressly would be a saving clause for medical treatment. This should specify that nothing should qualify as bodily harm if it is done with the victim's consent for medical or analogous purposes. Such a proviso would take surgical operations and similar things right out of the criminal law ambit unless inflicted on unwilling patients or done for bad motive. Moreover, the underlying principle would be that things which may appear as harm, for example, amputations, are not harm when done for the greater good of the amputee — it does not harm, indeed it benefits, a person to have a cancerous limb cut off. The doctor's negligence, however, should make no difference — if he operates negligently and thereby causes damage to the patient, this is a matter best left to civil law.

RECOMMENDATION

3. That nothing should qualify as bodily harm if done with the victim's consent for therapeutic or other socially acceptable purposes.

The three central offences of touching, hurting and harming, we suggest, should be aggravated by three different kinds of factors:

(1) the means used — firearms and other dangerous weapons;

(2) the defendant's intent — intent to kill, resist arrest, escape justice; and

(3) the position of the victim involved — that of sovereigns, of persons internationally protected, of persons acting to enforce the law, and of spouses and children of the very person committing the assault.[103]

All three aggravating factors relate essentially to risk, danger and special need for protection. It goes without saying that firearms, explosives and other dangerous weapons put victims at special risk, create extra danger and give rise to a need for particular protection. Likewise, it is obvious that extra danger arises when the assaulter's purpose is to kill, to resist arrest, to escape justice, that is, to pursue some goal which leads him to set the victim's safety at nought. Finally, it is clear that the upholding of the dignity of the state, of the credibility of the legal system and of the peaceful security of the family unit calls for special protection for sovereigns and internationally protected persons, for persons acting to enforce the law, for spouses and children liable to suffer domestic violence from those entrusted with their charge.

RECOMMENDATION

4. That assault by touching, hurting and harming may be aggravated, by any of these factors:

(1) the means used (for example, firearms);

(2) the offender's purpose (for example, intent to resist arrest); and

(3) the position of the victim involved, i.e.

(*a*) a sovereign and/or an internationally protected person,

(*b*) a person acting for the purpose of law enforcement, or

(*c*) a spouse or a child of the very person committing the assault.

In addition to the main three offences described above, we would suggest retaining an offence corresponding to the common law assault as defined in paragraph 244(1)(*b*) without the words "attempts or." In other words, we would recommend that the new offence be restricted to threatening violence. Attempted violence, whether harming, hurting or touching, can be treated simply as attempts to commit the offences of touching, hurting or harming.

We would suggest no special rule as necessary concerning sports, except for the case of boxing. As long as the rules of boxing condone intentional harm — and a knockout blow would surely qualify — then an illogical *ad hoc* rule would be essential. The virtue of this would be to highlight the anomaly. It would be hoped that this might cause a change of attitude about the rules of boxing.

103. *Supra*, note 101.

RECOMMENDATION

5. That there be no special rule for sports in general but that the law provide that bodily harm not cover injuries received in accordance with the rules of boxing.

We would suggest no special rule as necessary for people on ships, or for children in schools. In line with what we said earlier, we would recommend abolishing the defences in sections 43 and 44 for teachers and captains of ships. A majority of Commissioners would, however, suggest a special exception for parental punishment acknowledging that while parents (and those acting with their permission) cannot harm their children, they can nevertheless touch and hurt them for corrective purposes. (Note, however, the minority view mentioned on page 45 of this Paper.)

RECOMMENDATION

6. That these offences of assault by touching and hurting are not committed by parents, and those acting with their permission when reasonably disciplining a child under their custody or protection.

Finally there remain one or two matters of detail. First there is the offence of administering a noxious thing as presently covered in section 229. If the administration causes harm, it will be covered by the offence of harm; if it does not cause harm but is intended to, it will be covered by attempted harming. If it neither causes nor is intended to cause harm but is done through recklessness, it will be covered by an offence of endangering life and bodily integrity, to be considered later.

RECOMMENDATION

7. That there be no separate offence of administering a noxious thing.

There is also the offence of communicating a venereal disease as defined by section 253. Abolition of this offence was recommended by *Bill C-19* and also by the Badgley report on *Sexual Offences against Children*.[104]

In our view, no such offence is necessary because intentionally or recklessly inflicting a person with any serious disease (venereal disease or other) would qualify as harming.

RECOMMENDATION

8. That there be no separate offence of communicating a venereal disease.

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104. *Supra*, note 101, p. 64.

Appendix

A Note on the Current Law of Corporal Punishment of Children (Section 43)

In J. Stephen, *A Digest of the Criminal Law* (London: MacMillan, 1877), the author stated at page 126:

> It is not a crime to inflict bodily harm by way of lawful correction, or by any lawful application of force (other than those hereinbefore mentioned) to the person of another; but if the harm inflicted on such an occasion is excessive, the act which inflicts it is unlawful, and, even if there is no excess, it is the duty of every person applying the force to take reasonable precautions against the infliction of other or greater harm than the occasion requires.

Stephen's first illustration of this principle is: "A, a schoolmaster, beats B, a scholar, for two hours with a thick stick. Such a beating is unlawful." This was the case for *R.* v. *Hopley*, 1 Russ. Cr. 751; 2 F. & F. 202.

The origin of section 43 is, no doubt, the Roman concept of *patria potestas*. See Corinne Robertshaw, *Outline of Key Legislative Issues Relating to Child Abuse*, a Discussion Paper prepared for the Social Services Division, Department of National Health and Welfare (February, 1980).

According to *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing, 1979), p. 1014, *patria potestas* means in Roman law, paternal authority, the paternal power.

> This term denotes the aggregate of those peculiar powers and rights which, by the civil law of Rome, belonged to the head of a family in respect to his wife, children (natural and adopted), and any more remote descendants who sprang from him through males only. Anciently, it was of very extensive reach, embracing even the power of life and death, but was gradually curtailed, until finally it amounted to little more than a right in the *paterfamilias* to hold as his own any property or acquisitions of one under his power.

The power of teachers to use reasonable force by way of correction is said to originate in a delegation of parental authority. In this regard see *Mansell* v. *Griffin*, [1908] 1 K.B. 947. However, with the advent of compulsory education, parental delegation of authority can no longer be the basis for this right. H. Street in *The Law of Torts*, 4th ed. (London: Butterworth, 1968), at page 87, suggests that "the basis of the defence is the need to maintain order in the particular organization responsible for the training of the child." K. Stroud, "The Teacher Privilege to Use Corporal Punishment" (1978), 11 *Ind. L.R.* 349, at page 353 makes the surprising assertion that "public school pupils are subject to corporal punishment under the police power of the states that is delegated to the school officials."

Modern commentators describe the negative effect of corporal punishment by teachers:

> Corporal punishment erodes the youngster's basic trust and stimulates mistrust, anger and resentment and the child learns that the adult will not only not protect him from assault and battery, but also will sometimes be a party to it. Corporal punishment undermines the teacher's ability to interpret a pupil's basic needs and to provide an environment of mutual trust conducive to learning. E. H. Erikson, *Childhood and Society* (1950).

> Not only do children imitate such aggressive behaviour, [corporal punishment by school personnel] they also tend to employ these aggressive behaviours when faced with frustration in their own lives. I. Hyman, "Corporal Punishment in the Schools: America's Officially Sanctioned Brand of Child Abuse" (1980), 6 *Caring* 2.

Franklin C. Wilson, in *A Look at Corporal Punishment and Some Implications of Its Use*, Child Abuse Program, Ontario Ministry of Community and Social Services (August, 1980), provides some interesting statistics on corporal punishment. Wilson writes that many of the educators he interviewed were of the view (at page vii) that "the use of corporal punishment in the classroom by teachers can be a symptom of insufficient or negligible professional training in the areas of discipline behaviour, classroom planning and management." He argues forcefully against the use of corporal punishment in the schools, and suggests that a more appropriate response to school discipline problems is to teach student teachers how to anticipate and solve discipline problems effectively and without resort to violence.

Robertshaw, *supra*, suggests, at page 37, that the parliamentary sanctioning of corporal punishment of children creates a norm of child rearing in our society that is conducive to child abuse. She suggests that removing the present statutory sanction and allowing civil or criminal suits to be decided on an interpretation of the common law might provide a transition period during which other approaches to child rearing might become more widely accepted.

The Standing Committee on Health, Welfare and Science in *Child at Risk*, Report (1980), p. 58, recommended that section 43 of the *Criminal Code* and other provincial or territorial legislation sanctioning corporal punishment "be reconsidered by Federal, Provincial and Territorial Governments in view of the sanction which this type of provision gives to the use of violence against children."

Criticism of the use of force in schools is not only a modern phenomenon. In an American case, *Cooper* v. *McJunkin* (1853), 4 Ind. 290, it was stated:

> The law still tolerates corporal punishment in the schoolroom. The authorities are all that way, and the legislature has not thought proper to interfere. The public seem to cling to a despotism in the government of schools which has been discarded everywhere else .... In one respect the tendency of the rod is so evidently evil, that it might, perhaps, be arrested on the ground of public policy. The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess .... Hence the spirit of the law is, and the leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too cautiously nor guarded too strictly ....

At page 293 of that case Stuart, J. stated:

> The husband can no longer moderately chastise his wife; nor, according to the most recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy, "with his shining morning face," should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained.

Unfortunately the plight of school children in the United States has not been greatly improved over the last 130 years. Boonin, "The Benighted Status of U.S. Corporal Punishment Practice," January 1979, 60:5 *Phi Delta Kappan* 395, pp. 395-96, provides the following statistics: Forty states authorized corporal punishment in their school systems by law; only Massachusetts and New Jersey do not authorize or administer corporal punishment in their school systems; the remaining eight states take intermediate positions.

Opponents of corporal punishment in the United States have attacked the practice as unconstitutional, with only moderate success in the courts. The U.S. Supreme Court, in *Ingraham* v. *Wright*, 621 F. 2d 609 (1977), found that the cruel and unusual punishment clause of the Eighth Amendment does not apply to corporal punishment in public schools, because that Amendment only applies to persons convicted of crimes. They also held that the due process clause of the Fourteenth Amendment does not require notice and a hearing prior to the use of corporal punishment because traditional common law remedies offer sufficient due process protection and the imposition of procedural safeguards would intrude into the educational responsibility of the school authorities. As was pointed out by the dissent in *Ingraham*, the common law remedies only arise after the fact and only protect a student against unreasonable or bad faith error, not against reasonable, good faith mistake. In *Baker* v. *Owen*, 395 F. Supp. 294, (M.D.N.C. 1975), aff'd 423 U.S. 907 (1975) (summary affirmance), the District Court stated that the Fourteenth Amendment concept of liberty embraced the right of parents to determine the mode of discipline for their children, but that right was not fundamental, and because corporal punishment furthered a national and legitimate state interest of maintaining discipline, the state's interest prevailed over parent's rights: 395 F. Supp., pp. 298-300. In *Hall* v. *Tawney*, 621 F. 2d 607 (4th Cir. 1980), the United States Court of Appeals held that a public school student *severely* injured by the use of disciplinary corporal punishment can press substantive due process claims under 42 U.S.C. section 1983, for deprivation of the Fourteenth Amendment right to bodily security. By recognizing this right, school children were provided with the constitutional protection that has been provided in the criminal context by virtue of the Eighth Amendment.

It is conceivable that arguments based on the *Canadian Charter of Rights and Freedoms*, would meet with greater success than similar arguments under the United States *Constitution*. There is no history of judicial interpretation that would limit the application of section 12 (the right not to be subjected to cruel and unusual treatment or punishment) to the criminal context. Section 7 (the right to security of the person) should protect children against violent assault. Similarly subsection 15(1) (the right to equal protection and benefit of the law) should provide persons of all ages, including children, with the same protection from assault that adults enjoy by virtue of section 245 of the

Criminal Code. Subsection 15(2) only permits discriminatory laws when their object is amelioration of the condition of disadvantaged groups or individuals, such as young children, and certainly could not be used to justify the type of discrimination in section 43 of the *Criminal Code*, which has as its apparent object tyranny over children. It is also arguable that the rights recognized in sections 7, 12 and 15 may not be abrogated by section 1, because corporal punishment of children is *not* demonstrably justified in a free and democratic society.

Schoolteacher, parent or person standing in the place of a parent

"The authority of a school teacher to chastise a pupil *is* to be regarded as a delegation of parental authority, and any punishment inflicted is presumed to be reasonable and for sufficient cause until the contrary is shown": *Rex* v. *Corkum*, [1937] 1 D.L.R. 79 (N.S. Co. Ct.), Roberts, Co. Ct. J., p. 80. The parental authority forcefully to discipline their child, delegated to the educational authorities for educating, teaching and disciplining and returning the child home safely, extended to the defendant school bus driver, who was charged by the educational authorities with the responsibility of transporting the children safely to and from school: *Regina* v. *Trynchy* (1970), 73 W.W.R. 165 (Yukon Terr. Mag. Ct.). In *Regina* v. *Phyllis Jean Nixon* (October 17th, 1980, Ont. Dist. Ct., Shea D.C.J.), the accused was a residential counsellor at a psychiatric hospital and the victim was a moderately retarded adult who was at the centre to develop her communication skills. It was held that section 43 protected the accused from criminal liability: the accused stood in the place of "parent" and the victim was a "pupil"; the accused's actions in getting the victim to go to bed were "correction" within the meaning of section 43; she was justified in using reasonable force. But in *R.* v. *Ogg-Moss* (1981), 24 C.R. (3d) 264 (Ont. C.A.), it was held that section 43 could not be invoked because the accused, who was a residential counsellor at a hospital for mentally retarded persons, was not a "schoolteacher" or "person standing in the place of a parent" and the complainant, who was twenty-two years old and a voluntary resident at the hospital, was neither a "pupil" nor a "child" within the meaning of that section.

Force employed by schoolteacher must not exceed what is reasonable under the circumstances

A schoolmaster has the right, under section 63 (now section 43) of the *Criminal Code* as well as at common law, to inflict corporal punishment on a pupil for violating the rules of the school, provided the punishment is not excessive, the instrument with which it is inflicted is a proper one for the purpose and there is no malice or ill will on the part of the teacher. Punishment so inflicted which caused temporary pain and discolouration of the flesh for a few days was held not excessive according to *Rex* v. *Metcalfe*, [1927] 3 W.W.R. 194 (Sask. District Court). In *Campeau* v. *The King* (1951), 14 C.R. 202 (Québec C.A.), McDougall J. stated, at page 212:

> If in the course of the punishment the pupil should suffer bruises or contusions it does not necessarily follow that the punishment is unreasonable. However, if the master is careless in

> the manner of punishment he may by that fact alone be held responsible. There will be no disagreement that if a master strikes a pupil on the head by way [of] discipline his act is completely unjustified; the reason of course being that there is a danger of doing permanent harm by striking a delicate part of the body such as the head.

See also *Regina* v. *Joseph Herbert Dawson Bick* (April 11th, 1979, Ont. Co. Ct., O'Flynn, Co. Ct. J., unreported). Where there were reasonable and probable grounds upon which the accused could have concluded that a boy had engaged in conduct deserving of punishment, and, in punishing him, the accused did so in the honest belief that he had participated in the name calling, the accused was entitled to use force by way of correction. The force was reasonable under the circumstances and took place at the first reasonable opportunity: *Regina* v. *Haberstock* (1970), 1 C.C.C. (2d) 433 (Sask. C.A.). No force at all towards the victim is justified where there are no reasonable grounds for believing a breach of discipline requiring correction has occurred: *Regina* v. *Kanhai* (1981), 124 D.L.R. (3d) 85 (Sask. Dist. Ct.). See also *Regina* v. *Hugh Edward Jenney* (August 28th, 1981, B.C. Co. Ct., Carley Co. Ct. J., unreported). In *R.* v. *Imbeault* (1977), 17 N.B.R. (2d) 234 (N.B. Co. Ct.), a teacher was acquitted of a charge of assault because he was not required to foresee that the student might resist the teacher's acts of lawful correction, thus resulting in a scuffle. A teacher is not charged with the absolute duty to measure neatly the amount of force used by way of correction. See also *Regina* v. *Dimmell* (1980), 55 C.C.C. (2d) 239 (Ont. Dist. Ct.). The court may criticize a teacher for resorting to violence in the classroom: *R.* v. *Wheaton* (1982), 35 Nfld. & P.E.I.R. 520 (Nfld. Prov. Ct.).

Parents

The defence in section 43 was not available where the accused had the victim's older brother daily prod the victim's feet with a paperclip to "discipline" him, resulting in puncturing of the skin and infection, because the force used was not "reasonable under the circumstances" applying community standards: *Regina* v. *Michael David Sarwer-Foner* (January 12th, 1979, Ont. Prov. Ct. (Fam. Div.), unreported). In determining whether the force used in administering the punishment was reasonable or excessive, the court must consider the customs of the contemporary Canadian community. The customs practised in the accused's former country were not, therefore, the appropriate test. The means of correction must be adapted to the age and sex of the child and to the effects that may result from it. The use of force by way of correction of a fifteen-year-old girl can seldom be justified. Punishment which caused injury to the girl's buttocks and breasts went far beyond what was reasonable under the circumstances. The accused are not entitled to the protection of section 43 when the force used by them is not by way of correction: *Regina* v. *Baptiste and Baptiste* (1980), 61 C.C.C. (2d) 438 (Ont. Prov. Ct.). Corporal punishment must be "objectively reasonable" and not only reasonable in the parent's opinion. A parent who chooses to use corporal punishment has a heavy responsibility to ensure against excesses in respect to motive, duration, force or choice of instrument. Slapping with the hand on the buttocks but not on the face or head is likely considered reasonable, but the use of an instrument such as a strap was perilous: *In Re James F.* (June 13th, 1983, Alta. Prov. Ct. Juv. Div., Bowker P.C.J.).