Who's Afraid of Banning Corporal Punishment - A Comparative View on Current and Desirable Models

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Abstract

Who’s afraid of banning corporal punishment of children? The use of corporal punishment for the education of a child is one of the most loaded and disputed questions among jurists, psychologists, sociologists, educators, and the general public. Modern approaches hold that the use of corporal punishment should be prohibited because of the physical and emotional damage it causes and its inefficiency. According to other approaches, if corporal punishment is administered moderately and with due composure, it is not harmful and could even be useful in setting boundaries for children.

How does the law in different countries treat corporal punishment? In most countries of the world, corporal punishment is permitted so long as it is moderate and reasonable. Sixteen countries, mostly in Europe, have in one form or another, prohibited the use of corporal punishment by law. In most countries, the prohibition was enacted into legislation, while a few prohibited corporal punishment through a court ruling. In a small number of countries, the prohibition was enacted into criminal law. Most countries, however, enacted the prohibition as a human right of children not to be exposed to physical punishment as a matter of civil law (family acts and human rights statutes).

Has the time not come in common law countries, too, to introduce a ban on corporal punishment, deriving from principles of human rights, the children’s dignity, and their rights over their body? Maybe corporal punishment is a fundamental part of a child’s right to get a proper education and of the parents’ duty to educate and correct the children, as long as the spanking is not harsh. This Article discusses four existing models of legal regulation of corporal punishment drawn from Roman law and the law in England, the United States, Canada, Israel, Cyprus, Sweden, Finland, Denmark, Norway, Austria, and Germany. The models differ in the level of legal intervention in the parent/child relationship as expressed with the issue of corporal punishment. The Article concludes by proposing a desirable model that reflects the most appropriate way to ban corporal punishment.
The desirable model moves cautiously between two poles. One rejecting intervention and proposing leaving the family dynamic as is. The second pole supports massive intervention because of the damage to the rights of the child. It does not take an exaggerated view of the rights of the individual on account of the rights of the family and vice versa. The proposal relies, inter alia, on educative measures, not only legal measures, and emphasizes the fact that a dispute in the family cannot be treated as a dispute between strangers.

The importance will be particularly for countries, mostly in North America, Africa, Asia, and some European countries, which have not yet by law prohibited corporal punishment in the family unit. However, this article has ramifications also for those legal systems which have already taken such a step and prohibited the use of corporal punishment one way or another. The desirable model to be proposed at the end of the essay will be adaptable, mutatis mutandis (among others), for further parental behaviors and not only corporal punishment.

In addition to family and comparative law, the Article will draw on and contribute to the literature in a number of fields, including law and social change, multiculturalism and the law, the intersection between domestic relations and criminal law, and international human rights.

I. Foreword

Who's afraid of banning corporal punishment of children?

The use of corporal punishment for the education of a child is one of the most loaded, difficult, and disputed questions among jurists, psychologists, sociologists and educators and, indeed, the general public. Modern approaches hold that the use of corporal punishment should be prohibited because of the physical and emotional damage it causes, its inefficiency, and because if the conduct reaches the point of an assault, the parent is not to be granted protection. Other approaches provide otherwise, namely, that if corporal punishment is administered moderately and with due composure, it is not harmful and could even be useful in setting boundaries for children.

What is, actually, corporal punishment? Sociologist Murray Straus defines corporal punishment as "[t]he use of physical force with intention of causing a child to experience pain, but not injury, for the correction or control of the child's behavior." Straus differentiates between mild and moderate corporal punishment designed to accord the child a painful experience for the purpose of correcting their conduct or

controlling their behavior, and an injury inflicted on the child through use of this measure. Seemingly, causing the child an injury does not fall within “corporal punishment” but is recognized as violence in all respects. The American Academy of Pediatrics defines corporal punishment as, “[t]he application of some form of physical pain in response to undesirable behavior.” Whereas, behavioral science experts define corporal punishment, quoted in one of the Canadian court rulings to be discussed below, as, “[t]he administrating of one or two mild to moderate ‘smacks’ with an open hand, on the buttocks or extremities which does not cause physical harm.”

Corporal punishment, therefore, is the hitting of a child by their parents or educators for the sake of their education, usually with a light blow on the buttocks or hand because the child has misbehaved, deviated from the good path, or not complied with their wishes and their instructions and did not accept their authority. It is usual to say that reasonable and mild corporal punishment is a deterrent. In other words, corporal punishment accustoms children not to repeat acts, shapes their character, cultivates fitting qualities, and trains and directs their path through life for good, at least until they can stand on their own two feet as independent persons, in terms of the steps they take, their discretion and ability to make correct decisions. The traditional premise is that moderate, reasonable, and infrequent corporal punishment can be used, if at all and only when necessary, as an essential means once in a while to draw clear boundaries of conduct for the child in order to bring them up and forge and guide them on the correct and sure path through life.

How does the law in different countries treat corporal punishment? In most countries of the world, corporal punishment is permitted so long as it is moderate and reasonable. Some sixteen countries, mostly in Europe, have prohibited by law, in one form or another, the use of corporal punishment for the education of children. In about ten of these countries, the prohibition was passed between 1998 and 2006. In most countries, the prohibition was enacted into legislation, while a few countries prohibited corporal punishment through a ruling of the Supreme Court. A small number of countries, enacted the prohibition into criminal law. Most countries, however, enacted the prohibition as a human right of children not to be exposed to physical punishment specifically as a matter of civil law through Family Acts and the like.

Has the time not come in common law countries, to introduce a ban on corporal punishment, deriving from principles of human rights, children's dignity, and children's rights over their body? Perhaps corporal punishment is a fundamental part of children's rights to get a proper education and of the parents' duty to educate and correct the children, as long as the spanking is not harsh.

In this article, five models will be discussed. Four existing models and an integrated model, which is being proposed as a satisfactory solution for the issue, through which it will be possible to discern the difference between the various perceptions. The models differ in the level of legal intervention in the parent/child relationship as expressed with the issue of corporal punishment.

First, two general approaches characterizing the legal attitude and that of the social sciences to parent/child relationships will be reviewed, in an attempt to review the current models and arrive at a more desirable model. The Article will next examine the legal models. The importance will be particularly for countries, mostly in North America, Africa, Asia, and some of the European countries, which have not yet prohibited corporal punishment in the family unit in their laws. However, this Article provides some ramifications also for those legal systems that have already taken such a step and prohibited the use of corporal punishment one way or another. The desirable model proposed at the end of the essay will be adaptable, mutatis mutandis, for further parental behaviors and not only corporal punishment.

The Article is a reflection of an important dilemma regarding several issues, including: law and social changes, legal intervention in parent/child relations, multiculturalism and the law, and the intersection between domestic relations and criminal law. This dilemma and a possible solution will be presented via comparative law.

II. Two Dominant Approaches in Parent/Child Relationships and their Impact on Shaping Legal Models

In modern society, unequivocal attitudes are being heard more and more against the use of parental behaviors that harm children, even if allegedly undertaken for the interest of children, but inflict damage on them in different plains and different ranges, harm their self-respect, and are contrary to justice and equality. The behaviors are also ineffective and the harm they cause can exceed their benefit. Unlike the traditional
view of society, the individualistic approach views the individual in the family unit per se and not solely the family as a whole. The individualistic approach aspires to seeing the child as an independent entity for almost all purposes, even at the expense of gnawing at the parents' authority, despite the natural inequality inherent in the structure of the classic family unit, at the center of which are "strong" parents and "weak" children. This approach follows from the human rights approach. If the actions of the parents hurt the child, the individualistic approach holds that the parents should be restricted, even when acting for the benefit of the child and out of a positive educational motive. In other words, there is an attempt to shake free from traditional paternalistic approaches, which leave to the parents the decision as to what is in the interest of their child, even if such is done apparently in the name of a positive goal of forging children as independent entities who know boundaries and learn to accept discipline and values, and also if the injury is mild, not serious.

Promoting the independence of children and the fear of causing them injury as a result of certain parental behaviors are central parameters and of particular importance in a multi-cultural society because they lead to the viewpoint that, even if the educational path with which the parents are familiar and know or are in accordance with their religious, community or ethnic ascription, but differ from what is acceptable in that society, the law must decry it. In its stead, desirable norms should be formulated, which are consistent with human rights and enforce them in an egalitarian manner on the whole population.

An opposite approach, which is a kind of collectivist approach, espouses giving a dynamic to the family unit to behave more naturally and freely. The point of view of the family approach is paternalistic and is expressed in the granting of legitimacy to moderate parental behaviors that are in the interest of the child, even if the child does not at any given moment understand that to be the case, because it is assumed that parents know what is best for their child. That being so, the family approach holds that the parents' steps are not to be restricted, nor their authority prejudiced or their discretion limited. Thus, the benefit of parental behavior must exceed the damage inflicted, not seriously harm the child, and the motive


for those actions must be positive and educational. This approach does not focus only on the child but also on the authority of parents to educate their children within the family unit as a whole with its special status in society and on the children themselves and their greater good in the long term. This approach understands that the family is not a collection of individuals and that parents have a function to educate their children, to raise and set boundaries for them, and, to this end, unpleasant and mildly hurtful sanctions are sometimes necessary. The child is indeed an independent personality, but they are not always capable of differentiating between good and bad, and the hand of the parents has to direct and guide them. Children cannot be granted absolute autonomy in the making of decisions which concern them.

Thus, corporal punishment and other behaviors, such as confinement of the child to their room or grounding the child, serve only as a means rather than a goal in itself. This approach favors increased parental authority, expressed in a more forgiving and understanding attitude towards the use of educational methods such as corporal punishment, which are sometimes inevitable, so long as practiced in a measured and moderate manner. This is not tantamount to encouraging blows for the sake of education. The assumption is that no parent wants to harm their child, even to a small extent. It cannot, however, be deduced from this that corporal punishment is not legitimate. Indeed, this approach attempts to reach a balance between the status of children and the authority of parents, *inter alia*, by attempting to prove that this method of education can be effective if it abides by reservations designed to limit, as far as possible, the harm to the child. An educational means which harms a child excessively or is proven to be ineffective, should, in any event, not be used.

This same space for parental discretion will allow any society, sector, community, and family to bring children up according to the traditional methods of education acceptable to them, so long as they do not cross red lines. In other words, so long as the relative freedom of action does not inflict damage on the child, or, alternatively, so long as the benefit in the inculcation of boundaries and frameworks, expressed in reasonable, measured, and moderate methods of education and punishment, the physical punishment will exceed any immediate and minuscule damage that might be inflicted on the child. This approach is certainly paternalistic for it calculates what is in the interest of the child from the point of view of his education and normal development both in the short term and in the long term.7

Can a middle approach be adopted in parent/child relationships? This Article will attempt to point to a model that finds the correct balance between the individualistic approach and the family approach, under the influence of the Relational Worldview of Bush and Folger. Their approach is an interesting middle ground, holding that the individualistic approach is incorrect because it focuses only on the individual and separateness. According to Bush and Folger, the collectivist approach, which abolishes the rights of the individual through exaggerating the importance of the collective, is also incorrect. Bush and Folger favor adoption of a relational worldview, which although does not rule out the individualistic perception but, rather views it as just one dimension in the complex totality, they understand that human nature does not focus only on separate self-interests, but also on responses and relationships to the society in which it belongs. Nor does the relational worldview rule out the collectivist perception and it certainly takes the interest of the collective into account. In other words, the collectivist approach recognizes that a person is contemporaneously both separate and connected, and one should lead to an integration of a compound type rather than of a mixture type, i.e., a full chemical reaction between the two perceptions, between separateness and belonging, and the finding of connecting points between the approaches out of an understanding that each approach is, on its own, lacking and unbalanced. With all due respect, this is a correct and balanced approach that has a place in western society and relies on increasing recognition of human rights and the rights of children while the law does not always succeed in making such a fine balance. The collectivist approach needs to be dressed up to have a legal meaning in this discussion.

The current legal interventions in parent/child relationships can be assigned to four main molds: minimal intervention, moderate intervention, strict-penal intervention and civil-human rights intervention. Finally, I shall present a fifth, and desirable, model. These models are in fact legal expressions of the individualistic or family approaches or a combination of the two of them to some extent or another.

The prevailing models will be presented in the fourth section. First, the minimal legal intervention model, which accords autonomy to the family and to those heading it to treat it virtually as they wish, will be presented. The minimal legal intervention model upholds, to an extreme extent, the idea that each approach is, on its own, lacking and unbalanced.

(2002) (discussing the matter of relationships between spouses, the presentation of approaches of the individual as against the family unit).


9. Family, for this Article's purposes, but also tribal, communal, sectarian and so on.
extent and almost without balances, a rationale that underlies the family approach and supports the integrity of the family as evidenced by the non-intervention of government in these relationships. In fact, a principle is created here of the family autonomy that prevails over the rights of the child and over any consideration for their well-being and best interest. This model is extreme and hardly exists today in any modern western society.

The model of moderate legal intervention that exists in most common law countries maintains a balance between the two former legal models and, in fact, between the family approach and the individualistic approach, since it constitutes a sort of bridge between them. The model tries to strike a balance between the principles of the rights of the child, the best interest of the family, and the best interest of the child. The model of moderate legal intervention leaves sufficient authority in the hands of the parents, so long as their actions are in the best interest of their child, and are moderate and reasonable. Thus, the balance of the moderate legal intervention model is closer to the family approach. The model agrees in principle that corporal punishment could sometimes cause harm and be ineffective, but it does not deny its legitimacy where its effectiveness is large and its damage minuscule, as reflected in a series of restrictions and reservations presented in the moderate legal intervention model. The central question the moderate legal intervention model poses is the extent of its success in implementing the delicate balances between the different approaches.

Subsequently, two models that ban corporal punishment, each in a different way, will be presented. The strict-penal model of legal intervention is the opposite of the minimal intervention model. The strict-penal model is a reflection of the individualistic approach. In seeking to forbid corporal punishment sweepingly, almost absolutely and through criminal law, the implications of which are very serious, this model emphasizes the damage that could be inflicted on children even by moderate and light corporal punishment, the lack of its effectiveness as a way of education, the harm to the body and self-respect of children inasmuch as it humiliates and belittles, and the "slippery slope" that could easily bring it to the point of abuse. This model is strict and has hardly any balances with the family approach and is, therefore, excessively sweeping and can hurt the family even though it is based on good intentions.

The model of civil-rights legal intervention is built from a sweeping declaration, that follows the individualistic approach, as against moderate enforcement, which follows the family approach, and it attempts to find gentle solutions, some of which are not "purely" legal. The rationale of the model of civil rights legal intervention is a sweeping declaration alongside moderate enforcement, that will have to be examined in light
of its having to be adjusted for modern, western legal systems.

After reviewing the existing models and presenting them in a critical light, each from a different direction, a proposed solution which is actually a fifth model will be presented. The reference is to an intermediate model, which combines advantages from some of the existing models and adopts patterns from the two general approaches, the individualistic approach and the family approach. The model will attempt to reinforce the structure of the modern family as an autonomous unit and will suggest building a system of arrangements, interwoven within the existing law, but that has their own uniqueness and is compatible with the nature of the family territory and the essence of the relationships between parents and children.

III. The Prevailing Legal Models: Description and Critiques

A. The Minimal Legal Intervention Model: Roman Law

The first model presented is one of minimal legal intervention in parent/child relationships that will be illustrated by Roman law. This system of law espoused a minimal to zero legal intervention in the acts of parents vis-à-vis their children, even if the acts were very grave. Roman rule invested most of its efforts in public management, including international and inter-religious relations, paving roads, and constructing bath-houses and houses of pleasure, but did not view itself as able and willing to handle and arrange the small daily issues of every family unit throughout the empire. Roman rule left the internal management of each family in the hands of the father of the family, virtually undisturbed: “The Rule of the Father” (Patria Potestas).

Because of its weakness and limitations, which did not permit it to deal with family affairs, the Roman government decided to leave extensive powers to the father of the family. Fathers had almost total control over their children, which continued beyond their reaching maturity and even after their marriage. Except in rare cases, fathers enjoyed both extensive ownership over their children and non-intervention of the government in

their deeds vis-à-vis members of their families. Injuries to children through violence (or neglect) were not amongst those rare cases and so did not merit legal recognition, leaving fathers unexposed to sanctions. Furthermore, the Patria Potestas contained judicial authority for fathers over members of their families who followed their orders. This authority was termed the “Rule over Life and Death” (Just Vitae Necisque Potestas), because in certain periods Roman law permitted fathers, in the opinion of most researchers, to punish their children even with death (“Rule over Death”). Roman law also accorded fathers, in certain opinions, the power of clemency in cases where the punishment for the deeds of the child within the family or outside it justified, in the opinion of the government, capital punishment (“Rule over Life”). This power was later taken from fathers and they were left only with “Rule over Death.” In certain periods there was some governmental intervention, but it was toothless because it merely condemned the father for exceeding his powers and exercised no real sanctions. Later, certain sanctions were legislated for the father and jurisdiction was determined in a special “family court” (Domesticum Judicium), although in the first stage only extreme cases (mainly for capital punishment of children) were heard in these courts.

This arrangement of Roman law delegated certain powers of the state onto the shoulders of the father for the purpose of running the family unit almost as he saw fit, without any rights for the children, except for extreme cases where the state intervened as a sort of appeals court in the father’s decision regarding a death penalty for a child. Accordingly, as the agent of the government and a clerk executing its word, the father was given the obligatory authority to punish members of the family at the public level (for example, for offenses committed against others, such as theft) as well as extensive authority at the level of the internal family relationships. The father, as an agent of the government, was in effect given a free hand to run the affairs of the family, including the education and punishment of the children. He was not indicted if he injured the child by his deeds or omissions, and was thus able to control his children as he saw fit. The Patria Potestas expressed, therefore, an intentional government disregard of, and even explicit permission for, corporal punishment for the education and “training” of children, for chaining and imprisoning them, for abuse, utilization, maltreatment, various tortures, and even abandonment and serious neglect.

11. Meyer v. Nebraska 262 US 390 (1923); Rabello, supra note 10 (explaining that the ownership and possession of children in ancient systems of law differed from their sense in modern law. In ancient systems, they were very close to the concept of guardianship rather than the children being by way of property).
12. Mason P. Thomas, Jr., Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspectives, 50 N.C. L. REV. 293, 294-295 (1972); TONY
“The Rule of the Father” expresses, in fact, the development of a separate law for the family within the general Roman legal system in which, in connection with the issues discussed here, fathers were also judges and executioners, almost without any right to the child of appeal to an instance of the state. Over the years, Roman law underwent changes but, even at the end of the rule of the Roman Empire, legal and governmental intervention in the life of the family and in the “Rule of the Father” was too little.

Thus, the Minimal Legal Intervention Model is incompatible with the family in modern society. Roman law adopted an extreme and inappropriate interpretation of the famous saying, “a man’s home is his castle,” by granting almost complete immunity for the father.

Despite the focus on Roman law, minimal state intervention expressed in the issue of corporal punishment was also accepted and extensively rooted without any reservations in various other cultures, whether for reasons of exorcising an evil spirit in the child by beating him or for reasons of inferior status, which children, servants, or women had. This approach was similar to the rationale underlying the Roman Patria Potestas. The basis for the existence of that rationale for a separate law for the family unit, albeit in a less sharp form, exists even in the models to be presented below, even if the grounds for those modern approaches differ from what was at the basis of the Patria Potestas.

From Roman law, which stood for the convenience and interest of the government, not even a hint of a solution can be extracted regarding the question of the desirable model. The separateness of the family has to appear at a much lower level and from the starting point of family sanctity rather than government convenience. One can perhaps progress from such a principle and arrive at less extreme models that create a certain space for family autonomy and retain family harmony, dignity, and privacy, but also

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leave sufficient space for legal intervention. The kernel of special family laws should, indeed, express a unique arrangement for the family unit, but also an arrangement which will integrate into the general law in effect and not one that creates a totally separate realm, blocking almost every form of legal-governmental intervention. The arrangement has to find the balance between the degree of privacy required for the family unit and the rights of the individuals in it, including the rights of the children, the weak organ in the family. Such a balance is not achieved by the minimal intervention model. Patria Potestas does not pass the test of reality since it easily, almost necessarily, gives birth to exploitation of the weak by the strong and to a breach of order in the family. The autonomy of the family unit has to be restrained, clear boundaries have to be set for it, and it has to be subject to the supervision of authorities.

At the same time, one should not necessarily go to the other extreme and rely only on the individualistic approach. A fitting balance between the different considerations will obviate not only the damage to the family unit and to society as a whole which could result from application of the minimal intervention model, but also damage resulting from an opposite legal situation in which the government is too active and interferes in the family unit in general and in parent/child relationships in particular in an excessively sweeping fashion.

**B. The Moderate Legal Intervention Model: Reservations for License—English, American, and Canadian Law**

According to this intermediate model, the moderate legal intervention model, the state does indeed have to intervene in parent/child relationships and not leave it to Patria Potestas and the like. However, such intervention must not be absolute. The law has to provide balances between the individual approach and the family approach and permit corporal punishment with certain reservations, but not in any instance and at any price. The law has to understand that parental activity to educate children is important and its wings should not be clipped. At the same time, the law must not ignore children’s rights, lest the parents misuse their dominant status. The rule underlying this model, therefore, is the dynamism of the family unit, but is restricted (unlike the minimum intervention model) by the rights of the child.

Moderate and reasonable corporal punishment in the family framework is permitted in most countries of the world. Such is the situation in the countries of North America, South America, Africa, New Zealand, and most of Europe. In some of these countries, a general section has been enacted permitting light corporal punishment. In other countries, mainly the common law states, the permit for parents to use corporal
punishment on their children is slightly more detailed (in court rulings or legislation) and contains the foundations of being moderate and reasonable in the use of force.\textsuperscript{14} In other countries, however, this is even more detailed or explicit in judicial decisions which have delineated it and specified what the actual parameters are that comprise these foundations.\textsuperscript{15}

This model leads to creating a special orientation for the family, which while not being as extreme as the Patria Potestas, nevertheless takes into account the importance of not putting the brakes on the dynamic of the family unit in consequence of exaggerated legal intervention. The understanding that a massive reduction of parental authority would hurt the family, and that this authority is not to be sacrificed on the altar of children's rights, is a proper understanding. The application of this model, however, is problematic. The focus will be on a number of legal systems that have adopted moderate intervention in the matter: English law, American law, and Canadian law.

English law adopted the path of moderate legal intervention and permits parents to use corporal punishment on their children, allowing a criminal and civil defense.\textsuperscript{16} Section 7 of The Children and Young Person's Act creates an exception to the prohibition on battery in Section 1 of this act, in stating that "[n]othing in this section shall be construed as affecting the right of any parent... or any other person having lawful control or charge of a child or young person to administer punishment to him."\textsuperscript{17} The courts have laid down a permit for corporal punishment so long as it is moderate and reasonable.\textsuperscript{18} However, reservations were set to this license. The list contains: (1) examination of the circumstances of the case; (2) examination of the age and strength of the child; (3) the length of the beating; and (4) the gravity of the beating.\textsuperscript{19} These

\textsuperscript{14} In Spain, Section 154 of the Spanish Civil Code determines that "[Parents] may administer punishment to their children reasonably and in moderation." 154 C.C.
\textsuperscript{15} See infra pp. 13-19.
\textsuperscript{17} Children and Young Persons Act, 1933, c 12, § 7 (Eng.), amended by Children Act 1989.
\textsuperscript{19} R. v. Woods, (1921) 85 J.P. 272; see also Gillick v. West Norfolk and Wisbech
reservations are inadequate, and the use of instruments such as a belt or shoe is not explicitly prohibited.

The rationale behind this arrangement is the understanding that, in the framework of parental obligations vis-à-vis their children, parents may adopt disciplinary measures, even those that contain the use of force. If the parent acted out of a proper motive and the force he used was not exaggerated, then there should be no intervention in his discretion. The reasonableness test has an advantage, according to this approach, in that it allows flexibility to look at the circumstances of each and every case.20

Some changes have been made in the last few years; however, the UK has not prohibited parental corporal punishment. There is more emphasis on the need to differentiate between mild corporal punishment and abuse and serious violence, especially if it causes physical or emotional harm or is done with the use of implements. There is now a real effort to ban corporal punishment in schools.21

In addition, a bill of the Liberal-Democratic Party was passed in the 2003-2004 parliamentary session, in which the reasonable chastisement defense will not apply at all, even with respect to parents, if the corporal punishment resulted in "[g]rievous or actual bodily harm, wounding, or unnecessary suffering or injury to health."22 It will be interesting to see how the courts interpret the new legislation. For example, will hitting with an instrument now be forbidden? Will permissible corporal punishment be hedged in a better way with additional reservations?

In American law, the situation is similar from certain points of view. The Supreme Court of the United States has ruled that the various states do not have a constitutional obligation, under the Due Process Clause of the Fourteenth Amendment to the Constitution, to protect individuals from violence exercised against them by other individuals and that this also applies to incidents of violence of parents vis-à-vis their children.23 This finding could impact the path of American law on the issue of corporal punishment.

The American Model Penal Code, which serves as a basis for penal legislation in many United States jurisdictions, permits parents to use

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Area Health Authority (1986) A.C. 112 (providing that the ruling that hitting a child above the age of sixteen years is forbidden in any situation).
20. See Orentlicher, supra note 16; Davidson, supra note 16.
23. DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989) (discussing a father's abuse of his child who was in his care. The child and mother filed a claim against the welfare services and some of its workers); see BITENSKY, supra note 13, at 262-64 (providing a discussion and critiques of the DeShaney judgment).
corporal punishment vis-à-vis children so long as the force is applied for the purpose of "promoting the welfare of the minor" and the force is not exaggerated.\textsuperscript{24} Sixteen states in the United States have legislation explicitly permitting corporal punishment in the family unit, while judgments of the courts in other states permit corporal punishment. Corporal punishment is not prohibited in any United States jurisdiction.\textsuperscript{25}

The law permitting corporal punishment also revolves around reasonableness, moderation, and necessity, which are all requirements specifically for an educational purpose in a form that recalls the path of English law. Among the restraints enumerated in the different states, one can find the preparedness of the child to accept the punishment, the age of the child, the physical and mental state of the child, and the force and necessity of its use. In some of those states, it is emphasized that the purpose of the restraints is to differentiate between corporal punishment and child abuse or any other cruel or inhumane conduct.\textsuperscript{26} In foster families, however, corporal punishment has been prohibited in the majority of United States jurisdictions.\textsuperscript{27}

The confusion and uncertainty in many of the states are great. For example, a court in Florida noted that it is very difficult to draw the line between light corporal punishment which is permitted and child abuse which is, of course, prohibited.\textsuperscript{28} Bitensky justifiably criticizes the existing law because in various United States jurisdictions, if a child is beaten and the beating leaves no marks on their body, it can be assumed that the parent will be acquitted.\textsuperscript{29} It is no wonder that the vast majority of the American public still supports educational spanking in the family unit and very high percentages of those asked in surveys point to support for this method and actual use of it. For example, research has indicated that ninety percent of parents in the United States justify the use of corporal punishment for the sake of educating their children, while eighty-five percent of them would prefer not to utilize this method if they had some other reliable and effective method.\textsuperscript{30} At the same time, other

\begin{thebibliography}{99}
\bibitem{24} Model Penal Code, § 3.08 (2001).
\bibitem{26} BITENSKY, supra note 13 at 266.
\bibitem{28} State v. McDonald, 785 So. 2d 640, 647 (Fla. Dist. Ct. App. 2001).
\bibitem{29} BITENSKY, supra note 13, at 268.
\end{thebibliography}
research indicates a decrease in support for this phenomenon in recent years.\textsuperscript{31}

The main problem with American law is that those restraints on corporal punishment in the penal law, which were created in legislation and/or court rulings, are not arranged and summarized as in Canadian law, as will be shown below. Most of the reservations noted above in the presentation of these systems of law can be collected from within American law.\textsuperscript{32} It is, however, difficult to find states that unite all these reservations together in their law.\textsuperscript{33} Each state views matters slightly differently and emphasize various components or other restraints on the use of corporal punishment. Even the definition of reasonableness varies from state to state, because some states emphasize the subjective facet and others the objective facet.

There is also a difference in the perception of the parental mens rea, which requires that the parent act intentionally, consciously, negligently, or recklessly for a conviction and examines whether the parent acted with the intent to educate their child. Some states examine the acts of the child that resulted in corporal punishment, while others concentrate only on the acts of the perpetrating parent.\textsuperscript{34} This situation means that many forms of conduct that are forbidden in other common law countries, such as Canada, are permitted in some United States jurisdictions. The very fact that these states are independent and lack any direction from the federal courts means that this outcome is quite expected mainly in everything to do with various interpretations of courts in the different states.

Canadian law permits a parent to hit a child for educational purposes, if they meet the restraints of moderation and reasonableness. The source for these requirements is found in Section 43 of the Canadian Criminal Code of 1985. Court judgments hedged it around and construed it by reduction. Section 43 provides that "[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what

\begin{itemize}
  \item \textsuperscript{31} Bitensky, supra note 13, at 24 n.24, 270.
  \item \textsuperscript{32} The reservations include the motive for the beating, the age of the child, the size of the child, the physical and mental condition of the child prior to the beating, the frequency of the acts, the type of injury actually inflicted or which could have been inflicted and so on.
  \item \textsuperscript{33} Thus, for example, a section of the law in the State of Alabama is detailed, but would appear to grant wider discretion to parents. A section of the statute in Utah is broad and specifies much detail in comparison with similar sections of statutes in other states. In Ohio, there was some difficulty in reaching a decision in various courts, for example, does a bite, even if one-time, or a beating with a belt, constitute abuse or corporal punishment. See Bitensky, supra note 13, at 265-67.
  \item \textsuperscript{34} Id. at 266.
\end{itemize}
is reasonable under the circumstances.\(^3\)\(^5\)

The purpose of the permissible educational beating is to correct the behavior of the child prospectively, rather than some reckoning and vengefulness over his acts in the past. Section 43 actually leaves parents and even teachers and those standing in for them (in loco parentis) some discretion.\(^3\)\(^6\) Court rulings hedged the license in principle in the section with reservations. Courts determined that there is to be no hitting out of anger, in an inconsiderate way and out of a loss of control,\(^3\)\(^7\) and the child is not to be threatened or frightened.\(^3\)\(^8\) According to court ruling, factors are to be checked in the basis of reasonableness in the section.\(^3\)\(^9\) In practice, "reasonableness" means the circumstances of the case, the age of the child,\(^3\)\(^0\) the extent of the child’s understanding and his acceptance of the punishment, their readiness to learn from the beating, the force and seriousness of the beating,\(^3\)\(^1\) the injury inflicted on the child in practice, if any, or the concern for such injury, and the beating is not to be administered with a tool or instrument, but with the hands only.\(^3\)\(^2\)

Courts and scholars have criticized the fuzziness of the reasonableness basis in Section 43\(^3\)\(^3\) which resulted in a lack of uniformity in implementing judgments. For example, some parents who used slight force were convicted, while other parents who used exaggerated force and painful measures were acquitted. Thus, it is not clear to parents whether their actions are permissible. Further, the section does not adequately protect children’s rights.\(^3\)\(^4\)

The issue was presented before the Supreme Court of Canada in 2004 in an appeal against a judgment of the Court of Appeals of the Province of Ontario.\(^3\)\(^5\) This was the high point of a process in which various social


\(^4\) A child above the age of fifteen years is not to be hit. The age range, however, has changed over time.

\(^4\) Sensitive body parts, such as the head, are not to be hit and there is to be no kicking or strangling.

\(^4\) Ontario Judgment, supra note 3 (holding that a child under the age of two years is not to be beaten).

\(^4\) As this basis has been construed, as stated in Dupperon case, supra note 39. See also R. v. J.O.W. [1996] O.J. 4601; SC Judgment, supra note 3. For the criticism in the literature, see Ezer, supra note 16, at 165.

\(^4\) R. v. J.O.W. [1996] O.J. 4601. For an extensive review of Canadian judgments that acquitted parents who hit their children in cases which prima facie are hard. See the SC Judgment, supra note 3, paras. 153-70.

\(^4\) Ontario Judgment, supra note 3.
organizations, mainly the Canadian Foundation for Youth, argued that
corporal punishment is inconsistent with the Canadian Charter.\footnote{46} The
respondents to the pleas were the Attorney-General, parent and teacher
organizations, and a Canadian organization called “Coalition for Family
Autonomy.”\footnote{47} In a majority opinion, the Supreme Court affirmed the
Court of Appeals’ judgment.\footnote{48} The Court also approved the rulings with
respect to the eight reservations of beating, as laid down in various
judgments and mentioned in the Ontario Judgment (although here it was
ruled that a child under the age of two years and over the age of twelve
should not be hit, and also that a handicapped child should not be hit); the
lack of practical difference between corporal punishment administered by
parents and that administered by teachers; the successful balance that
Section 43 of the Criminal Code draws between the interest of the child
and the state, and the desire of parents and teachers to permit a certain
space for the education of children and school pupils without their conduct
being stigmatized as criminal, following which balance the section is not
contrary to the Charter.

Two of the justices were of the opinion that Section 43 runs counter
to the Charter\footnote{49} and to the basic rights of children, and should, therefore,
be repealed. One justice opined that Section 43 should accord immunity
to parents but not to teachers.

The majority acknowledged that, without Section 43, the said cor-
duct

\footnote{46. Canadian Charter of Rights and Freedoms, \textit{in IV CONSTITUTIONS OF THE}
\footnote{47. It should be noted that matters may not be disconnected from the fact that Canada
is a blatantly multi-cultural society. The ethnic breakdown in Canada is as follows: 28\% of
the citizens are of British origin, 23\% of French, 15\% other European countries,
26\% mixed, 2\% natives and 6\% various foreigners and immigrants. The religious
breakdown is 98\% Christian (of whom 42\% Catholic, 40\% Protestant and 16\% other
Christians), 1\% Moslems and 1\% Jews. Throughout the country, there are two large
cultural communities: the natives, the aborigines (who are also termed “Indians”), who are
English-speaking, and the French-Canadians, mainly residents of the Province of Quebec,
who are French-speaking and seek isolationism for example in language, customs, and trade
marks. There have been attempts in Canada on this backdrop to resolve the problem of the
multi-culturalism and bridge the gaps with the residents of the Province of Quebec who are
demanding independence. \textit{See} Taylor, \textit{supra} note 4. The subject could certainly be of
relevance for this paper. A possible repeal of Section 43, as abolishing other cultural
characteristics, could constitute a true multi-cultural problem in Canada. One of the ways,
therefore, to maintain “industrial quiet” is to adopt a path of moderate legal intervention
which has place for the behaviors of sub-cultures so long as they do not overstep the
reservations laid down in the judgment. Durrant indeed notes that the repeal of the section
would not be welcomed by the public in Canada and proposes that such be done only at the
same time as, or following, an extensive educational and promotional public campaign. \textit{See}
\footnote{48. SC Judgment, \textit{supra} note 3, para. 60, (citing the Report of the Canadian
Committee on Corrections, Toward Unity: Criminal Justice and Corrections 12-3 (1969)).
\footnote{49. The Charter, \textit{supra} note 46.}
would fall into the offense of battery in the Criminal Code,\textsuperscript{50} but reasoned that its conclusion was based on the fact that Section 43 provides sufficient filters to protect the interest, dignity and security of the child, which are represented by the State. The section lays down limits and is not breached. It prevents arbitrary enforcement and its goals are educating children and correcting their ways, rather than punishing them for their past acts. Parents and teachers must know that they have a certain area in which they can and should comply with the obligation of education without fear of penal sanctions. The majority recognized that the statement, "reasonable under the circumstances," indeed seems overly general, but argued that the section does not defend any action which is tantamount to causing injury to a child. The majority provided that Section 43 should not be disconnected from various factors, including the circumstances in which there is a need for the imposition of discipline, the social consensus at a given time, the opinions of experts, and legal commentary. When all these factors are taken into account, the general basis of reasonableness assumes a clear meaning, which allows penal sanctions to be imposed in a case of parental behavior that deviates from what is permitted. Hence, the section does not permit harsh and cruel behavior and is, therefore, not contrary to the Charter.

The majority opinion actually adopted a family-paternalistic approach in noting that children need an atmosphere of great security, but depend on their parents and teachers for instruction and discipline. This dependence is needed for the purpose of their natural development and protection from injury they could inflict upon themselves. Section 43 is perceived by the majority as a successful integration by the Canadian legislature of these two important interests. Its repeal might cause a situation where "[m]en and women may have their lives, public and private, destroyed; families may be broken up."	extsuperscript{51}

The minority opined that use of any force against children not only hurts their dignity but turns them into real "second class" citizens and creates age discrimination (between children and adults) that runs counter to the principle of equality, the Charter and the rules of natural justice. The role of the Court is to limit the widening of criminal liability which the legislature made, apart from which the section contains a wide opening for the use of great force and its ambiguity harms children. The authorities should be protecting children, as a vulnerable and weak group in society, rather than contributing to the perception of children as the property of adults. The status of children should be compared to that of other groups.


\textsuperscript{51} SC Judgment, supra note 3, para. 60 (citing the Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections 12-3 (1969)).
in the population whom it was customary to punish physically, such as women, servants, slaves, and prisoners, and for whom the custom has changed in recent generations. It is not possible, says Justice Deschamps, that children need corporal punishment for the purpose of their correct upbringing. Children are not the property of their parents. The idea that the body and dignity of children can be given up to the wishes of their parents, even if they are mistaken, is unacceptable in his opinion. The purpose of the section in its present form is actual defense of the rights of parents and teachers, and not of children. Furthermore, the minority opinion emphasized that the Canadian courts consistently failed to give a uniform construction to the basis of reasonableness and were embarrassed on the question of its interpretation, since this basis is associated with public policy and individual parental sense and is always touched with subjectivity and dependent on so many variables, particularly on the background of cultural and religious beliefs. In the minority’s opinion, the majority’s attempt to construe the basis of reasonableness by imposition of various reservations is in effect a rewriting of the law (this being, presumably, a criticism of non-separation of the legislative and judicial authorities).

The minority opinion was not concerned with exposing parents and teachers to lawsuits that would follow a possible repeal of Section 43, because the Criminal Code contains sufficient general defenses. The necessity defense applies to cases such as preventing a child from running into the street or applying force to him. For example, if a child refuses to receive an injection from a doctor; in any other instance, only minuscule corporal punishment will earn a defense. Justice Binne, however, was in the middle and concurred in part and dissented in part. He agreed with the majority opinion with regard to parents and the minority opinion with regard to teachers. Although Canada has not repealed the license in principle for corporal punishment, it did conduct an informational campaign with the goal of teaching parents of small children how to exercise discipline without corporal punishment.

There is room to critique the moderate legal intervention model, although in principal it constitutes an appropriate legal balance between the family and individualistic approaches. American, English, and Canadian law represent legal systems that provide a certain defense to parents who have adopted physical punishment for the education of children. Canadian law chose to set an explicit permit for corporal punishment, as an exception to the general prohibition of hitting, but this permit is qualified with various reservations. The reservations mirror the restraints pointed out by scholars in social science literature supporting the family approach.52

52. Among these scholars is Prof. Diana Baumrind, a psychologist specializing in the
American law in most United States jurisdictions, much like English law, set overly fuzzy restraints. English law is a bit more specific, but is still not sufficient. In American law, one can find more detailed reservations, but this is mainly if one brings together the systems in the various states. It is difficult to find states that have an orderly list of reservations as in Canadian law, which leads to a lack of certainty and confusion, often even within a particular state, and certainly in any attempt to look at American law as a whole.

In none of the instances was there full satisfaction at the path followed by these legal systems. In England, the subject of corporal punishment merits an alert and occasionally penetrating public debate. It is unclear whether the recent developments in legislation will satisfy the public and end the dispute over the issue, so long as corporal punishment in the family unit is not totally forbidden or at least more closely

development of children, from the Institute of Human Development at Berkeley University, California (Diana Baumrind, *Response: A Blanket Injunction Against Disciplinary Use of Spanking Is Not Warranted by the Data*, 98 PEDIATRICS 830 (1996); Diana Baumrind, *Parenting: The Discipline Controversy Revisited*, 45 FAM. REL. 405 (1996); Diana Baumrind, Robert E. Larzelere & Philip A. Cowan, *Ordinary Physical Punishment: Is It Harmful? Comment on Gershoff (2002)*, 128 PSYCHOL. BULL. 580 (2002)). In Baumrind’s opinion, corporal punishment for purposes of inculcating discipline in a child, administered sensibly, can actually establish correct social behavior and better prepare the child for life and protect him/her from sudden exposure to negative and painful features and behaviors occurring outside the family unit. According to Baumrind, if a child grows up in a “hothouse” in which the parents fail to react in the face of bad behavior or use “soft” and insufficiently effective alternatives to counter it, the child is, in the final resort, hurt by the reaction. If the child behaves in such a way outside the family framework, he will be exposed to very harsh negative reactions without any prior preparation. From Baumrind’s research, it also follows that there is no substance to the argument of an inter-generational cycle of violence with regard to light corporal punishment and that children’s violence stems, *inter alia*, not only from exaggerated corporal punishment but also from the failure to use it at all, whether by parental choice or because of state law. Baumrind also presents findings according to which children whose parents used moderate corporal punishment on them were less violent vis-à-vis others. Baumrind sets clear limits and restraints on the use of this method of education. Although Baumrind argues she personally opposes the hitting of children as an educational method, her research shows that occasional use of a smack on the backside of a young child in a family where the children are growing up in a loving atmosphere, does not cause any long-term damage to the mental state of the child. On the contrary, a rational smack on the buttocks is perhaps a necessary tool in the attempt to educate a small child, particularly between the ages of eighteen months to six years. Baumrind also argues that many researches carried out so far and showing the opposite were not conducted scientifically and ignored additional possible influences on the child, parent and family. Baumrind enumerates the following criteria making light corporal punishment legitimate. The punishment should be an occasional smack, not frequent beatings; a light and controlled blow, not a serious beating; a smack on the child’s backside, not on more sensitive organs; a blow administered for educational purposes and the imposition of discipline and not one without reason; smacking is effective for forming the conduct of children aged eighteen months to six years; the smacking takes place in a family where the child is growing up in a loving atmosphere and a warm and supporting set of relationships and not out of anger or rejection.
restrained. In American law, criticism has been expressed in judgments and in the literature in some states on the lack of uniformity amongst the states in construing the term “reasonableness.”

In Canadian law, there has been no upheaval but there are trends that cannot be ignored. Canadian courts had some difficulty with the reasonableness principle in Section 43 of the Criminal Code, which grants partial immunity to parents, although “reasonableness” is a basic principle in many legal systems and the courts always have to fill it with content. It is true that Canadian law did set criteria for reasonableness, but they did not always make it possible to reach uniformity in court rulings and there were cases of beatings that were not slight where the parents were acquitted. Maybe other criteria, in addition to those that already exist, might succeed in dispersing the fog, accord a better sense for the Canadian courts with interpretation of the law, and reach greater uniformity in the outcome of the cases in question. One cannot ignore the dissenting opinion in the 2004 judgment of the Canadian Supreme Court. It is possible that this minority opinion will, as time passes, become the majority opinion. It is very possible that this minority opinion is paving the way for gradual legal, social, and public recognition of the need for the prohibition of corporal punishment.

The moderate legal intervention model presents a correct balance of interests, albeit theoretically. It attempts, and in some of the systems presented here, even succeeds in retaining the principles of the integrity and dignity of the family unit as an outcome of the family approach, but does not neglect children’s rights as an outcome of the individualistic approach. There is some sort of considered balance between family interests, public interests (lack of desire to intervene excessively in the family unit and the desire to prevent the courts from being flooded with claims), and private interests (the rights of the child as an individual in society).

All of those legal systems also permit a certain freedom of action in a multi-cultural society, such as American and Canadian societies. When the deed of corporal punishment is not totally forbidden but only hedged, it does not constitute a “declaration of war” on groups and sectors in which it is common. It permits a respectable living space for those groups so that they will not feel threatened and will not be forced to abandon their traditional customs, but will only have to adjust to the rules of reasonableness and moderation, an edict with which the public is able to comply. This balance does not opt for the simple solution of a prohibition on those parental conducts; it chooses to confront the daily dilemmas in family life.

The situation can also be seen from another angle. One of the explanations proposed for the legal situation in the United States is the lack
of preparedness of society as a whole to accept a change in the form of a prohibition on corporal punishment and lack of desire of the law to go against these trends when it is not backed up by public support, while emphasizing that this situation is changeable, should there be a change in public opinion on the subject? This point will be of great significance in the review of some of the following models and of the desirable model. In the next part, a legal system will be presented in which the law wanted to make a pioneering breakthrough and uproot common norms that it viewed as improper. In this, it did not allow for the perception of the approaching upheaval by the public and its abilities to take on board the change of the norm without legal and social factors cooperating and launching a propaganda campaign to this end. In the United States and other countries, the law did not want to wrestle with society and chose to wait and flow with the social change. This is a serious difference in the legal-social world outlook and in the attitude of the law to social changes. This theoretical difference also resulted in a difference in the outcome of the intervention.

Unlike the minimal intervention model, children are not the property of their parents under the moderate legal intervention model. The legal systems comprising the moderate intervention model try to find a bridge between an individualistic approach and a family approach. The declarative starting point of the model is, however, somewhat problematic for our times because its point of view is overly paternalistic and focuses on the obligations of the parent and the interest of the family as a whole, while the rights of the child are expressed only in restriction to those obligations. The moderate legal intervention model opts for the proper balance but does not succeed in putting it into the correct marketing package. Perhaps, with respect to the Canadian experience, it can also be said that there is a gap between a theoretically successful balance and its practical implementation. The implementation difficulties mainly stem from fuzziness in interpretation of the foundation of reasonableness in different circumstances.

This being the case, that basis of the balance set by the moderate intervention model is a proper basis, but not in its original form. Changes have to be made in it and, in particular, it has to be more attentive to children’s rights and to the damage that could be caused by corporal punishment. In my opinion, one can reach a similar result through a clearer declaration regarding children’s rights and their ramifications, such as emphasizing the damages that could be inflicted on a child through corporal punishment. There is also room to determine more criteria and parameters that will guide and instruct parents when and how they can

53. Warburg, supra note 25, at 57-60, 66.
administer corporal punishment for their children's education and when they would be exposed to an indictment.

General parameters of reasonableness, proportionality, and moderation do not suffice because the public does not know what is contained in those bases and the courts cannot reach uniformity in their judgments on the subject. Canadian law, to a certain extent, took an important step in setting criteria, but further criteria should be added. The criteria have to ensure that those parental behaviors will be permitted only in relatively rare instances and only when parents and educators meet an arc of difficult restrictions and reservations.

Perhaps the solution is to ban, in one way or another, the use of corporal punishment, leaving room for very narrow defenses. There are several ways to enact such a ban. The next part of this Article presents a strict model that banned corporal punishment in penal law. A unique model that tries to create a civil human right for the child not to be subjected to corporal punishment will be presented. After close summary of those models, I will identify the most appropriate way to ban corporal punishment, and conclude whether it is through penal or civil human rights laws or if there is a need to create a new model.

C. The Strict-Penal Legal Intervention Model: Criminal Ban—Israeli and Cypriot Law

The strict-penal legal intervention model intensively intrudes in parent/child relationships, which is to a large extent an outcome of the individualistic approach that makes allowances mainly for the rights of the child. The intervention also occurs when the rights of the child are applied at the expense of the whole family unit, which may, in the long term be detrimental to the child. In practice, this model usually also applies to the family unit the general law in effect between strangers, often without allowance for the fact that the family territory is a special unit in society that requires a different and more gentle attitude. In this respect, the strict-penal model constitutes a second extreme to the minimal legal intervention model.

The strict-penal legal intervention model will be demonstrated by way of two legal systems that have adopted penal intervention, the most sweeping form of legal intervention. Israeli law, which is relatively young, has clearly switched to the model of strict-penal intervention. The criminal prohibition imposed on corporal punishment by the Israeli Supreme Court, as it will be seen below, also has ramifications for the interpretation of earlier legislative measures on different judicial levels. Details of the various implications for existing legislation will point to the impact, which is often most problematic. Cypriot law has also
prohibited corporal punishment through criminal law. Unlike Israel, this prohibition was made in orderly legislation accompanied by a public campaign to inculcate the norm. The importance of these differences will be examined below.

Strict-penal intervention appears to resolve the problem of legal intervention in parent/child relationships in that it deals with the issue from the root. The model intervenes full force and realizes the rights of the child, the weak organ in family and society, which is to a great extent at the expense of the rights of the parent, the strong one. This intervention, however, if made through a criminal judgment rather than through legislation, could be destructive particularly for the family unit and even for the child himself. It may also be assumed that those who follow the furrow of strict-penal intervention did not take all the possible ramifications of the outcome of the intervention into account.

Israeli law, which banned corporal punishment in a penal court judgment that constitutes a binding precedent, will be examined first. Israel is a common law country. The Supreme Court, whose rulings are law, and therefore constitute binding precedent, has recently and clearly eaten away at the right and authority of parents in favor of the rights of children because it has almost totally forbidden the use of corporal punishment of children. At first, corporal punishment was forbidden in the educational system and later expanded to the framework of the family unit. Thus, after almost fifty years, the legal situation addressing corporal punishment changed following the 1953 decision of Rassi, a criminal judgment that permitted the use of corporal punishment in the family unit and, with certain reservations, in the educational system. Arguing that it was a matter of lacuna, this ruling relied on English law and was based, inter alia, on agency relationships between parent and teacher, who is in loco parentis, for the purpose of the child’s education. The Supreme Court ruled that parents and educators may impose physical punishments on their children in order to educate them in the right way but such is to be done with great caution, for the sake of education alone, and not for the satisfaction of any lust for revenge, in accordance with the principles of proportionality and reasonableness as distinct from acts of cruelty and abuse.


55. The break from the English umbilical cord occurred with the enactment of the Foundations of Justice Law 1980, S. H. 978, 163. According to this law, any issue for which there is no explicit response in legislation, court rulings or by analogy, is to be based on local, rather than English, sources. Id. Previously, in the case of a lacuna, it had been necessary to turn, according to Section 46 of the King’s Order in Council for the Land of Israel 1922-1947, to English law.
Rassi constitutes an example of moderate legal intervention, with the law leaving parents with discretion whether to adopt corporal punishment so long as it is reasonable and moderate, in a way similar to the English and American law. Rassi constituted binding and guiding penal case law for decades. Section 24(7) of the Torts Civil Wrongs Ordinance in Israel sets forth a defense against a legal action for the civil tort of battery for parents and teachers who used moderate and reasonable force for the education of the child.\textsuperscript{56}

The beginning of the process that resulted in change can be found in the amendments to legislation dealing with domestic violence both in the criminal and civil contexts at the end of the 1980’s and beginning of the 1990’s. These changes directly impacted human rights, the rights of children, and essentially, corporal punishment. Following an eruption of serious cases of domestic violence and an understanding that it was the family, of all places, which constituted a “hothouse” for dangerous exploitation of minors, Amendment 26 of the Israeli Penal Law was enacted in 1989.\textsuperscript{57} This law is also known as the “Prevention of Abuse of Minors and Helpless Persons Law” and deals with the offenses of battery and abuse of minors and helpless persons, particularly by parents or persons in charge of them. The Prevention of Domestic Violence Law was enacted, as part of the civil family laws, in 1991.\textsuperscript{58} Its great importance lay in the determination of a mechanism of restraining orders and protection orders against a violent element in the family even before completion of the legal clarification of the family dispute and irrespective thereof. The new legislation should be taken together with the Legal Capacity and Guardianship Law,\textsuperscript{59} which considers, \textit{inter alia}, parental obligations vis-à-vis children.

The most important document that substantially impacted human rights in general, and amongst them children’s rights in Israel in recent years, is The Basic Law: Human Dignity and Liberty, enacted in 1992.\textsuperscript{60} It is true that Israel has no constitution, but the Basic Law has obtained a supreme status in Israeli law by according constitutional validity to basic

\begin{itemize}
\item \textsuperscript{56} Torts Civil Wrongs Ordinance, 1944, Section 24(7).
\item \textsuperscript{57} The Penal Law (Amendment No. 26) 1989, S. H. 1290, 90.
\item \textsuperscript{58} The Prevention of Domestic Violence Law 1991, S. H. 1352, 138.
\item \textsuperscript{59} The Legal Capacity and Guardianship Law 1962, S. H. 380, 120 [hereinafter Capacity Law].
\end{itemize}
human rights.61 This law constitutes a prime source in the development of the strict-penal intervention model, as reflected in Israeli law in the matter of corporal punishment. The purpose of the Basic Law is to protect not only a person’s body but also his dignity, and to prevent humiliation, which is in accordance with the purpose stated in Section 1a of the Law to prevent harm to the values of the State of Israel as a democratic Jewish state. Section 2 states, “[t]here shall be no violation of the life, body or dignity of any person as such,”62 while Section 4 provides, “[a]ll persons are entitled to protection of their life, body and dignity.”63

Actually, human rights were not strangers to Israeli law prior to the Basic Law;64 however, the legislation made dignity of man and protection of his body a protected basic right with a higher normative level than that of a “regular” law or court judgment.65 The dignity the child obtains, in this context, is a special status since the law’s litmus test could be the degree to which it extends its protection over the weak in society. Professor Aharon Barak, then a Justice of the Supreme Court, noted in an article that, at the center of the Basic Law, stands each person, adult and minor.66 Supreme Court Justice Mishael Cheshin notes, “someone who is small is a person, albeit a person small in dimensions but a small person is also entitled to all the rights of a large person.”67 These and similar statements have been oft-quoted in court judgments and in Israeli literature on the matter of corporal punishment.

In the years following the enactment of the Basic Law, murmurings began to be expressed in the legal literature over the legitimacy of corporal punishment, even if it is moderate and reasonable.68 At the

61. Together with the other Basic Laws, the common Israeli law in effect has established a sort of constitution.
63. Id., § 4.
64. Meir Shamgar, Human Dignity and Violence, 3 MISHAPT UMIMSHAL 33, 39 (1995-6). The Declaration of Independence is based on freedom, justice and peace as envisaged by the prophets of Israel and it calls for equality of social and political rights. The Supreme Court formulated the various basic rights over the years. The Basic Laws did not create them ex nihilo but brought them together in statutory provisions while determining arrangements for their incidence and protection.
67. CA 6106/92 Anon. v. the Attorney-General, Tak-EI 94(2) 1166 (1994).
same time, there were expressions in court judgments regarding the importance of parental rights to educate their children as a basic constitutional right, which is also and primarily the right of children to be educated by their parents. In this context, the President of the Supreme Court, Meir Shamgar, stated in a case about an argument between parents as to how to educate children, but did not involve the use of violence, there is a need for limited state intervention while retaining familial family privacy and an autonomous upbringing and education of the children. The state intervention should be by way of an exception with a reason to justify it, such as cases where there is a need to protect the child when the parents are not fulfilling their role properly. Simply stated “the right of the parents (to educate the child) is relative and is limited by the rights and interest of the child.”69 These words have also been quoted repeatedly. Is the right to educate to be restricted in cases of reasonable and moderate corporal punishment?

The process started with a ban on corporal punishment in the educational system in a number of judgments by the Supreme Court, relying, *inter alia*, on The Basic Law: Human Dignity and Liberty. 70 Most of these judgments were made at the height of a bitter dispute in the

70. CrimA 4405/94 State of Israel v. Elgani, 48(5) IsrSC 191 (1994) (stating that physical violence vis-à-vis a pupil is forbidden. The body and spirit of a pupil are not ownerless and the child’s human dignity is hurt if the teachers use physical violence against him/her. Ear-pulling is not a permissible means for encouraging a pupil’s memory and hitting the hand with a ruler is not a permissible cautionary measure. The judgment did not revoke the *Rassi* ruling and did not determine that it was obsolete even with respect to the educational system. The court also rejected an argument that was raised during the case, according to which these disciplinary measures are acceptable in the Arab sector); CrimA 5224/97, State of Israel v. Sde-Or, 54(3) IsrSC 572 (3) 374 (1998) (stating that all forms of corporal punishment by teachers, kindergarten teachers and educators are forbidden. The Court ruled the *Rassi* judgment was no longer befitting for the currently accepted norms, and in our times any use of force by educators, even for educational purposes, is forbidden, particularly vis-à-vis younger children. Corporal punishment could achieve the opposite of what was hoped for when the educating figure, serving as a model for emulation, itself adopts violent measures. In this respect, no importance is attributed to the gravity of the corporal punishment used against a child. An erroneous outlook in this context jeopardizes the welfare of the children and could prejudice the basic values of Israeli society, human dignity, and bodily integrity. The *Rassi* judgment has, therefore, now been revoked regarding the educational system). The Supreme Court has also ruled, in a number of judgments in appeals on decisions of the Civil Service Disciplinary Court in the matter of teachers who hit students between the years 2000 and 2002, that it is seriously prohibited to hit pupils for the purposes of education and in any sector. In one of the decisions there was an argument that corporal punishment was acceptable in the Arab sector in Israel. It was ruled that such a teacher should be seriously punished by disciplinary law in accordance with the sanctions featured in the relevant legislation: reprimand, a fine and even dismissal. CA 1730/00 Anon. v. Israel 54(5) IsrSC 433, 437-8 (2000); CA 4503/00 Amin v. Israel, IsrSC 2000(3). 1296 (2000); CA 1682/02 Abed Al-Wahab v. Israel, Tak-El 2002(2) 1300 (2002); Civil Service Appeal 3362/02 State of Israel v. Abu Asbah, 56(5) P.D. 6 (2002)).
lower courts over the validity of the Rassi judgment and the question of the legitimacy of corporal punishment in the family unit. However, this legal situation did not stay in place for long once the Supreme Court spoke.

In January 2000, a judgment was given in Plonit. This case involved a mother accused of frequently hitting her two small children on various occasions and on different parts of their bodies with various objects and, in effect, turning them into her servants or slaves. The children were harshly beaten by her when they did not do her bidding. The mother admitted some of the acts, did not express regret over them, and claimed that although she adopted an educational path which differed from what was usual, this was done for the sake of educating the children to be obedient and disciplined. In the appeal, written by Justice Dorit Beinish with which the President, Aharon Barak, concurred, the majority opined that the acts fell into the category of battery and physical abuse. The court sentenced the mother to a period of probation and a suspended prison sentence, but not actual imprisonment.

In the opinion, Justice Beinish went into greater detail and

71. The Rassi judgment has remained since the beginning of the 1950's, and for decades was the binding judgment in anything dealing with corporal punishment by parents on the penal level (there was a similar defense, as noted, in torts). See Cr.F. (Dct Ct. T.A.) 570/91, State of Israel v. Asulin, 52(1) P.M. 431 (During the 1990's, two seemingly quite contrary approaches developed in the District Courts and Magistrate Courts in Israel: one supporting moderate and reasonable corporal punishment, and the other prohibiting corporal punishment totally and uncompromisingly, even if moderate and reasonable represents a model of the strict-penal intervention which is currently discussed.); see Cr. F. (TA) 511/95 State of Israel v. Anon., Tak-Meh 97(3) 1898 (1997). State of Isreal v. Asulin relied on the Rassi judgment as binding case law of the Supreme Court as an expression of the family approach, while State of Israel v. Anon relied on a number of theories. One being, a declaration of the non-validity of the Rassi judgment since it does not fit the prevailing social and legal situation following the passing of the UN Convention on the Rights of the Child, the Basic Law and the changes in children's rights generally, as an expression for the individualistic approach. Both these contrary approaches in the lower courts led to an interesting legal situation, which the verdict in a case where a parent hit his child moderately and reasonably for his/her education would be decided according to the judge sitting on the case and his/her adoption of one or other of the approaches.


73. Id., para. 18 (Beinish, J).

74. Id., para. 4 (Beinish, J).

75. Id., para. 18-9 (Beinish, J).

76. Plonit v. Israel, [2000] IsrSC 54(1) P.D. 145, para. 32 (Beinish, J), para. 25 (Englard, J).

77. In Justice Yizhak Englard's opinion agreeing with the punishment, the same outcome could also have been reached following a conviction for the offense of battery alone since the deeds described do not constitute an offense of abuse. Id.
considered the mother’s argument that, her deeds were not to the point of a criminal offense since they were, by way of corporal punishment, a means of discipline for the education of the children and improvement of their ways. After taking the changes in children’s rights into consideration and making an extensive comparison with various legal systems such as Canada, England and some of the United States jurisdictions that support reasonable and moderate corporal punishment, Justice Beinish concluded that corporal punishment of children as a method of education is unacceptable on all counts and is remnant of a socio-educational perception that is obsolete and “forbidden in our society today.” In making this conclusion, Justice Beinish, also relied on legal sources such as the UN Convention on the Rights of the Child and The Basic Law: Human Dignity and Liberty, as well as additional legal systems, such as Scandinavia, that prohibit the use of corporal punishment. This reliance on Scandinavian law is by no means accurate, since the law in these countries developed a substantially different arrangement than that arrived at by Justice Beinish.

At the end of the opinion, Justice Beinish to a certain extent restricted the sweeping judgment she passed not long before expressing limitations recognized in criminal liability such as the de minimis defense and prosecutorial discretion. This expresses a fitting distinction between the use of force by parents for purposes of educational punishment, which is unacceptable and forbidden, and “reasonable use of force to prevent injury to the child or to others,” or light, if firm, contact with the body of the child in order “to preserve order.”

What is “light, if firm, contact?” It is not stated in the judgment and so it is difficult to differentiate between light, reasonable and moderate corporal punishment, which is currently forbidden by a strict-penal prohibition, and light, if firm, contact which is permissible. It may be assumed that the intention of this statement, for example, is a license to address a child with force when he objects, to hold him firmly so that he will clean up a mess he has made, prevent him from wandering off to a dangerous place, or to forcibly take from him a dangerous appliance or toy he took from his sibling. Perhaps it is a sort of restraining “hold” for a child who misbehaves and is unruly, which allows his whole body to be embraced or his hand or foot be firmly held, forcibly but without causing pain. This method allows for a sort of bear hug that is intended to be warm and loving, if firm, restraining his unruliness and stopping him from doing whatever he was doing, even for a long time.

79. Ezer views this as, for example, preventing the child from running into the street. Ezer, supra note 16, at 139, note 4.
Others view this, in effect, as an incidence of the defense of necessity; although, as I see it, this is a difficult interpretation because the judge could have referred explicitly to this defense when she mentioned the *de minimis* defense.

The question of whether moderate and reasonable corporal punishment needs to be discussed at length, where the case in hand concerns serious violence and cruelty that (in the majority opinion in this case) reached the proportions of abuse was already raised above. One possible response could be the very reference to the mother’s defense argument, stating that her punishment was the way she educated her children, even if it was different from what is accepted. Justice Beinish also attempted to justify her discussion of light corporal punishment on the slippery slope principle, by virtue of which a certain deed is forbidden, restricted or related to with severity that, objectively, is not prohibited per se. Meaning that the law forbids an act, only out of concern that it overflows to the point of becoming a more severe and serious action. The judge argued that the damage that corporal punishment causes, even if slight, could be great and there is a fear that it could deteriorate with time into serious violence and even abuse. Since a light blow often does not help, the temptation to increase the punitive dosage is great, and the parent feels that in order to convey the educational message, the force of the punishment has to be increased. According to this argument, when the barrier is removed and the restraint is released, it is very difficult to return later to a moderate level and the road to systematic abuse could be short. Accordingly, one may not rely on the discretion of the parent, and the integrity of the body and soul of the minor should not be prejudiced by any corporal punishment whatsoever. In Justice Beinish’s opinion, this principle prevails even over the concern that such a ruling will be an edict with which the public is unable to comply.

Through her comments, Justice Beinish also supports the requirement of examining the legitimacy of the methods of education in accordance with changes in societal values. In her opinion, attitudes that were correct at the time of the *Rassi* judgment have changed and are no longer relevant. Nowadays, the use of corporal punishment as a way of education is outdated. The source of this argument is not clear. Are the Israeli and

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82. Guidance for Effective Discipline, *supra* note 2; *Beating the Devil*, *supra* note 1, at 85.
non-Israeli public, its judges and scholars, really of the opinion that there is no longer a place for such a method of education and that it should be thoroughly condemned? That this was the situation is most doubtful, mainly in view of some schools that continued to make their presence felt into the end of the 1990's, and in light of the legal systems in many countries where moderate and reasonable corporal punishment is still permissible. Also representing the ongoing life of corporal punishment is the view in social science disciplines of the familial approach, which still exists. Thus, Justice Beinish, in effect, revokes the Rassi judgment in all matters dealing with the family. The Plonit decision is the binding ruling in Israel today on the issue of corporal punishment in the family unit. The lower courts are bound by this judgment of the Supreme Court, which is binding on every court except the Supreme Court itself.\(^83\)

Israel is a multi-cultural country, with various ethnic communities, religions and nationalities, and also many immigrants coming from different countries over the years. A frequent argument in such a society is that the method of education with which the parent is familiar and which he knows, in accordance with his religious, communal or ethnic ascription, or which he has chosen from an ideological point of view, is different from that which is generally accepted in society. Therefore, the argument provides that, society and the law must allow the parent space to keep those norms to which he is accustomed, even if the educational method includes the use of force toward children. The strict-penal legal intervention model, following the individualistic approach, would appear to see itself as having a clear function to set norms that are consistent with the rights of the child and try to impose them within those sectors, with a clear statement that the norm has to be egalitarian within all groups of the population and has to be enforced equally on these groups. The guideline judgment, Plonit, on the issue was not given on a specifically multi-cultural background, but the judgment combines with a general determination in which the act is not subjective and is not looked at from the point of view of the victim, the attacker, or from the aspect of the sector to which they belong or their country of origin, but is gauged objectively as seen by an observer on the side.

No prohibition of corporal punishment has been enacted into Israeli legislation in the meantime. However, this process has continued. In 2000, the legislature canceled the defense against the civil tort of battery in the Tort Ordinance, which was used by parents and teachers who inflicted reasonable and moderate corporal punishment on children.\(^84\)

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83. Basic Law, supra note 60, § 20.
84. Section 24(7) of the Civil Wrongs Ordinance was revoked in Amendment Number 9 of the Tort Ordinance. Tort Ordinance, 2000, S.H. 1742, 213.
Toward the latter part of 2000, the Pupils’ Rights Law was passed in the Knesset. Section 10 of the Pupils’ Rights Law, determined that the rights of the pupil were not to be punished corporally or in a humiliating way inasmuch as it is inconsistent with human dignity. This situation results in almost complete harmony between criminal and tort law.

The prohibition on corporal punishment in the judgment also has extensive ramifications for the law that existed prior to the prohibition ruling and its interpretation. As noted, at the end of the 1980’s and beginning of the 1990’s, a string of laws and amendments to laws passed with the purpose of strengthening the defense of the rights of the weak members in a family and in society, who are first and foremost, children. The importance of these laws is very great but their main purpose is to deal with serious violence and abuse. This creates a danger if they are also to be applied to light corporal punishment. The result could be an excessively sweeping result causing serious harm to the whole family, including the child himself. There is no avoiding the thought that the sweeping judgment in Plonit did not take into account all the possible ramifications of the results of the prohibition at all these levels. Following are a number of examples.

There is a view that, since corporal punishment necessarily causes a psychological injury, it is considered to be injury causing battery. This serious offense made by a parent or caretaker brings extended liability, i.e. the punishment of seven years’ imprisonment, as opposed to four years for regular battery. In addition, this offense imposes a mandated reporting on every citizen alongside an increased duty on a person in charge of a minor and on various professionals who come into contact with the child to report to the authorities, a welfare official or the police, a list of offenses perpetrated on a minor. This interpretation seems far-reaching, tendentious, and forced, particularly in view of the dispute in the professional literature regarding the damages, if any, that corporal punishment causes to a child. Indeed, there are those who hold that any corporal punishment, even slight and one-time, could cause various physical and psychological-behavioral damage to a child. Others;

86. The Report of the Committee for Examination of Basic Principles in the field of Children and Legislation, § 5.3.2, p. 100, available at http://www.justice.gov.il/MOJ/Heb/HavaadLeZhuyot/. An injury is defined as being either psychological or physical, in accordance with Section 368b(c) of the Penal Law, 1977, S. H. 864, 226.
87. Penal Law, supra note 86, at Section 368b(a).
88. Id. at §§ 379, 383(b).
89. Id. at Section 368d (providing that mandated reporting applies to a string of offenses, among them: abandonment or neglect; battery causing real injury; battery causing serious injury; and, abuse).
90. See Newell, supra note 16, at 224-25; Orentlicher, supra note 16, at 155-60; ALICE
however, point to the fact that light and moderate corporal punishment used intelligently and not systematically does not always harm the body and soul of a child and, even if minor damage is caused, it is voided and rejected because of the efficacy of the punishment for the education of the child in the short and long term.  

Such an interpretation removes all content from the offense of non-injurious battery of a child by a parent since, according to this interpretation, any battery of a child is one that causes injury. Hence, according to this interpretation, any corporal punishment exposes the parent to a punishment of up to seven years' imprisonment and binds the general public as well as those caring for the child and in charge of him (for example, the other parent who did not hit the child) to report every instance of corporal punishment, however minor, to the authorities. To this must be added temporary remedies such as detention of the punitive parent at the criminal level, and his removal from the home by a restraining order, which is possible at both criminal and civil levels and can be applied now also vis-à-vis light corporal punishment.

How enticing it can be to report to the police violence of a spouse

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MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD REARING AND THE ROOTS OF VIOLENCE 7, 61, 65-6, 115-16, 232 (Hildegarde Hannum & Hunter Hannum trans., 1990); Warburg, supra note 25, at 58.


92. A string of research on this issue was published in the journal of Pediatrics, one of whose 1996 issues was devoted entirely to the subject, Issue 98(4) of October 1996, following a conference of the Health Academy in February 1996, which corporal punishment does not fall into the category of abuse was examined. From the research, it follows that there is equality between the rival approaches on the efficacy of corporal punishment and there are those who claim that one can even point to greater efficacy of this method as against its alternatives. See Baumrind's articles, supra note 52; Marjorie Lindner Gunnoe & Carrie Lea Mariner, Toward a Developmental-Contextual Model of the Effects of Parental Spanking on Children's Aggression, 151 ARCHIVE OF PEDIATRICS AND ADOLESCENT MEDICINE 768 (1997). Larzelere's conclusion, which he filtered out from much such scientific research not differentiating between mild and severe corporal punishment analyzing thirty-five studies on the issue, was that light corporal punishment is not harmful and can even be of benefit. Robert E. Larzelere, Presentation: A Review of the Outcomes of Parental Use of Non abusive or Customary Physical Punishment, 98 PEDIATRICS 824 (1996). See also Orentlicher, supra note 16, at 159.

93. The distancing of a violent parent from the home is possible in Israel in a number of ways: as part of an alternative detention in criminal law and condition for release on bail, in the framework of the power of the Court for Family Affairs in the context of a claim for alimony, for quiet accommodations, and by virtue of civil law. Prevention of Violence in the Family Law, supra note 58, which accords the Magistrate Courts and the Courts for Family Affairs as well as the religious court extensive (parallel) powers to adopt a restraining order.
against a child, apparently in the name of good citizenship, when underlying it is an exaggeration or fabrication of a story out of a wish to achieve an advantage in divorce and custody disputes. How tempting can it be to file a petition *ex parte* for restraining a violent spouse out of concern, as it were, for the interests of the children? Are these outcomes not overly difficult as forms of legal intervention when it is a matter of light corporal punishment intended for educational purposes, and not violence for its own sake? The whole legitimacy underlying corporal punishment as a method of education, for those opinions that view legitimacy in it, rests on its being light, moderate and reasonable, measured and calculated, not frequent and not recurrent. A light slap broadcasts to the child in a symbolic way that he behaved improperly and it is not intended for relief of the anger and frustration of the parent that their child is disobedient. Even for those approaches that are not satisfied by the use of corporal punishment and are interested in seeing a legal prohibition on this conduct, particularly on the criminal level, these ramifications could be most difficult. Indeed, a number of Israeli judges in the District Courts have criticized the functioning of the enforcement authorities, mainly the police and prosecutors, for applying the law in an overly pedantic way, which seriously harmed the family unit in those cases.⁹⁴

What about the proceedings after the indictment? Here, too, there is no small problem. Can the defenses and barriers existing in the law prevent the mass filing of charges against parents who physically punished their children in a light, reasonable and moderate way after the *Plonit* case? As noted by Justice Beinish, there is no fear of this because of the existence of general defenses in the Penal law, such as *de minimis*,⁹⁵ and vis-à-vis a relatively new defense that the judge creates only for a situation involving parents and children—"light but firm contact to maintain order."⁹⁶

Justice Beinish also calls for reliance on the discretion of the prosecution not to press charges in the absence of any public interest.⁹⁷ In her opinion, these reservations on criminal liability express a fitting distinction between the use of force by parents for unacceptable and prohibited purposes and the reasonable use of force intended to prevent

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⁹⁷. *Id.*
harm to the child himself or to others, or to maintain order.\textsuperscript{98} According to Justice Beinish, there are sufficient and proper filters through which no criminal liability will be imposed on a parent in instances of little value that do not justify enforcement in the framework of the penal laws. This, however, is surprising in view of her extensive explanation about corporal punishment being harmful to the child and the importance of prohibiting it, even where it is a matter of a light punishment.

Can the \textit{de minimis} defense be used in a case of light corporal punishment? In my opinion, it is difficult to see such a result after the unequivocal judgment in the \textit{Plonit} case and the statement that no corporal punishment is permissible. If light, moderate and reasonable corporal punishment nevertheless fits into the \textit{de minimis} defense, then there is an internal contradiction in the \textit{Plonit} judgment, because all corporal punishment is forbidden. Hence, the only way that this defense could be upheld would be in those cases of light but firm contact with the body of the child for the sake of retaining order, although Justice Beinish certainly referred to two different defenses. Moreover, as noted above, the boundaries of those cases of "light but firm contact" are altogether unclear from what she says. The defense is fuzzy and its application, therefore, problematic. Apparently, there is no alternative but to construe the two defenses that have arisen here as a matter of the amount of the force used and its proportionality, reasonableness, and nothing more than that, although such was not Justice Beinish's purpose.\textsuperscript{99} Such an interpretation will, of course, remove the ground from under the sweeping renewal of the \textit{Plonit} judgment.

Justice Beinish also recognized prosecutorial discretion as a defense. Such defense places the onus on the prosecutorial authorities not to take to trial cases of light corporal punishment. With all due respect, this is not a defense because it refers to a process preceding the pressing of charges. In view of the forceful determinations in the \textit{Plonit} case, it is not clear to what extent the prosecutorial authorities will decide not to press charges in cases of light corporal punishment. That is to say, in a situation in which case law explicitly determines that light corporal punishment is an outmoded educational method and is nowadays prohibited, with a clear statement that this also includes light corporal punishment, one should not be surprised if the main points of the \textit{Plonit} judgment are literally internalized by the prosecutorial authorities. This possibility, together with the element of an edict with which the public is unable to comply, will result in a change of the \textit{status quo} and a mass pressing of charges with respect to corporal punishment. It may be noted

\textsuperscript{98} Id.
\textsuperscript{99} Cf. SEBBA, supra note 80, at 452-53.
that some criticize the very granting of such extensive discretion to the prosecutorial authorities.\textsuperscript{100}

The true test of the \textit{Plonit} judgment could actually be whether the prosecution and enforcement authorities and the Courts relate, in light of the new situation, to a parent who inflicted light, moderate and reasonable corporal punishment on their child. Pressing charges, particularly after use of temporary remedies, could destroy the family. It would not be justified to do so following light and infrequent corporal punishment and we have seen that in this respect one cannot always rely on the prosecution and enforcement authorities. For example, police officers are beginning to internalize the prohibition, and the question is what will this internalization lead to,\textsuperscript{101} because, with all due respect, it will not always be possible to rely on the courts to stop the snowball effect. It is true that then Attorney-General, Edna Arbel, currently a Justice in the Israeli Supreme Court, stated in a press interview that the prosecution should examine each case on its merits according to its circumstances and that steps should not be taken in every case against a parent who used corporal punishment on their child for educational purposes.\textsuperscript{102} Nonetheless, as far as is known, there is no such thing as a written directive for prosecutors and, as mentioned, the Attorney-General has since been replaced. It should be admitted that, to the drawing of these lines, it is difficult to see in practice that many charges are meanwhile being pressed in Israel against parents in cases that are not abusive and where no injury is inflicted.\textsuperscript{103} But this should be looked at over a broader perspective of time. In any event, it might be problematic and change from time to time, and I think it is not proper for this sensitive matter to be dependent on each prosecutor’s discretion.

The deterrent is, of course, important, but sometimes the courts have to intervene in a non-sweeping manner, specifically because of the delicate and frail fabric of intra-familial relationships. A punishment for one member of the family, however justified, could also hurt the other members of the family and cast a question mark over its continued survival. The integrity of the family unit has to be a common interest of all parties—the hitting parent, the parent who did not hit, the child-victim, the prosecuting authorities, the therapeutic bodies, and the legal system. \textit{Plonit} could have ramifications in directions other than that desired in this context. The desire to protect minors and the helpless is also very much

\begin{itemize}
\item \textsuperscript{100} Rhona Schuz, \textit{Three Years On: An Analysis of the Delegalisation of Physical Punishment of Children by the Israeli Courts}, 11 \textit{Int. J. Of Children’s Rights} 235, 244-5 (2003) [hereinafter Schuz 2003].
\item \textsuperscript{101} Ezer, supra note 16, at 187.
\item \textsuperscript{102} Tova Tzimuki, \textit{No Hands}, \textit{YEDI’OT AHARONOT}, October 30, 1996, p.1.
\item \textsuperscript{103} See Schuz 2003, supra note 100, at 246, 248; SEBBA, supra note 80, at 453-54.
\end{itemize}
understood and is at the basis of court judgments. The question, therefore, is not whether corporal punishment should be prohibited but, namely, what would be the most effective way from all points of view?

Let it be well noted that I do not want to say that the legislation is not good or that the judgment in Plonit was unbecoming. The law often constitutes the only channel for children who are exposed to violence, in many cases within the four walls of their home, where there is no one to hear and rescue them. But I do want to say that an overly literal application of these implications on cases of light, moderate and reasonable corporal punishment could bring about the extermination of the family unit. It should be understood that the Plonit judgment does not stand in a vacuum, but that it also has direct ramifications for the legislation which was enacted before it. This does not seem to have been the intention of those who drafted that legislation or of the public and society in general. The strict criminal handling should be left for the hard cases.

Apparently, a good solution would be to qualify the sweeping judgment so that, in instances of light corporal punishment, the family will not be exposed to such sweeping intervention on those aspects that were discussed. But that would not suffice. As noted, the prohibition was obtained in a court judgment. It is true that the transition, as we have seen, was not sudden and its roots were in previous case law with respect to the educational system. These judgments, however, found no public echo, as did the Plonit judgment, and so the judgment in this case was perceived as rapid and too sudden a transition from a "license" to a prohibition. It would be an understatement to say that I am not convinced that the Israeli courts have succeeded in readying the people for a transition to an almost absolute prohibition on corporal punishment in the family unit, and the issue is still far from being the subject of a social and legal consensus. The prohibition was received as a "bolt of lightning" and led to a most alert legal and social debate. The discussion of this case did not take sufficiently into account, in my opinion, the question of preparing the public mind to accept the prohibition of corporal punishment as an educational method. It remains to be seen whether such a judgment is a result of social policy and reflects public opinion pressing to find a solution, or a solution differing from what exists, or whether the judgment is a pioneering vanguard formulating social policy and influencing public opinion in order to prepare minds for the anticipated change, and so creating a new norm? I believe that there is no unequivocal answer to this weighty question.

In Plonit, it is clear that, despite the statements that corporal punishment as a means of education is outdated, the objective of the Court was to be a vanguard and to set norms. These norms might have
been before their time and the public might not have been ready for the change. It is possible that a different path could have been taken and the norms changed gradually and not in one fast stage, through statements such as "by the way" in judgments and perhaps in external ways, such as statements in the literature or in lectures, etc.\textsuperscript{104} The Court also could have tried to influence the legislature to change the legal situation, as it has done and is doing in many other cases, rather than do so itself. A change made in legislation is the subject of a wider consensus and can better prepare the public.\textsuperscript{105} The processes of legislation are lengthy and an opportunity is given during them for various social and political factors to express their opinion and have some influence, which is unlike a sudden judicial decision. The extensive public controversy over the question of the legitimacy of corporal punishment that arose following \textit{Plonit} proves matters did not penetrate the public consciousness and perhaps not even that of jurists. In spite of the public controversy, the judgment was received in wide public circles with surprise and even anger.\textsuperscript{106}

It is to be noted that, after the judgment, no educational publicity campaign was conducted to inculcate the norm as was done in other countries and such will be presented below. The body that undertook the informational function was the Israel National Council for the Child (NCC) which conducted an extensive campaign against corporal punishment even before the judgment\textsuperscript{107} and published a special explanatory booklet for the general public about the significance and importance of the new situation and the alternatives to beatings.\textsuperscript{108} The NCC tried to promote the enactment of a law on the subject, since it was not satisfied with only a court ruling.\textsuperscript{109} However, the NCC is not a governmental body and its budget is limited. Its influence is relatively great, but perhaps less than that of a government ministry, which can and

\textsuperscript{104} Cf. Sebba, supra note 80.
\textsuperscript{106} See Ezer, supra note 16, at 184-211 (describing some of the opinions within the public and of experts following the judgment).
should have done this in its stead.\textsuperscript{110} The Committee for the Promotion of Children’s Rights in Legislation recommended, \textit{inter alia}, holding such a campaign under governmental sponsorship.\textsuperscript{111} This recommendation has yet to be implemented.

A ruling that is not the subject of consensus and is before its time, could cause a number of interrelated problems. Advocate Yehudit Karp, the former Deputy Attorney General in Israel,\textsuperscript{112} defended the results of the judgment in \textit{Plonit} although, some years earlier she pointed to problems with the case. According to Karp, before the imposition of a penal prohibition on corporal punishment at the hands of parents and educators, it was apt to find a balance between the harm that could be done to the child and society by light corporal punishment and the social damage that could result from such a prohibition turning most parents into a population of offenders. Karp was troubled by the possibility of increasing intervention of enforcement authorities in family autonomy, a larger intervention than society could abide by. Advocate Karp was also concerned that, should a social position be declared, determining a prohibition without any serious intention of enforcing it, in the final resort the law would be disrespected and ineffective.\textsuperscript{113} Even the Director-General of the Israel National Council for the Child, Dr. Yitzchak Kadman, expressed a position a very short time before the judgment, according to which there is no place for a legal prohibition on corporal punishment as the public in Israel is not yet ready for such prohibition.\textsuperscript{114} Similarly, Advocate Tamar Morag, then the legal advisor and the Director of The Child and the Law Center of the NCC (and now a Professor of Law) held, only about a year before the judgment in \textit{Plonit}, that the debate in Israel on the matter of corporal punishment was still at its beginning and the path to legislation that would prohibit corporal punishment was “still long.”\textsuperscript{115} According to Tamar, an extensive information campaign was necessary to describe the damages inherent in corporal punishment and it could be hoped that such information would result in a social change in


\textsuperscript{111} Report of the Committee for Examination of Basic Principles in the field of Children and Legislation, supra note 86.

\textsuperscript{112} Karp was also a member of the UN Committee for the Rights of the Child which was appointed by virtue of Article 43 of the Convention.


\textsuperscript{114} It was said during at a meeting of the sub-committee of the Constitution, Law and Justice Committee of the Knesset, May 23, 1999, p. 17 of the protocol.

\textsuperscript{115} Id.
attitudes enabling re-examination of the law.116

Three main problems can be pointed out in this regard: (1) a
dispute could be generated in the public as to the legitimacy of the
decision and the authority of the Court to intervene and rule as it did, and
the judge could be perceived as involving personal attitudes, such as
social, value, religious, and even political attitudes in his judgment;
(2) judicial legislation is problematic, particularly when it is expected,
with a high degree of probability, that the judgment will be considered
law, but one does not teach so publicly, which could result in a
cheapening of the judgment and an undermining of the status of the
Court; (3) the need to take into account social value outlooks in the
public and the concern lest such a judgment be an edict with which the
public is unable to comply at a given time when it was issued.

John Rawls and Lon Fuller also recognized that the law does not
require one to perform impossible deeds as one of the minimum
conditions for the existence of justice.117 Justice Beinish refers to this
point in her judgment and firmly determines that "[i]n the legal, social
and educational situation in which we find ourselves, there is to be no
compromise on account of jeopardizing the welfare and integrity of
minors . . . [t]he integrity of the body and soul of a minor is not to be
endangered by any corporal punishment whatsoever; the fitting criteria
have to be clear and unequivocal and the message is that no corporal
punishment is permissible."118 Justice Beinish even notes that parents
have certain defenses in the matter, although it must be stated that
implementation of these defenses is most problematic. Also in this
connection, the attempt of the Court to rely on the laws of other people to
show that the judgment is not exceptional, is a problem. As noted above,
many countries in Europe have prohibited corporal punishment in their
laws. A considerable proportion of the world’s population, including
western countries, view it as an effective and legitimate means of
education and differentiates between corporal punishment and abuse.
They do not view the use of corporal punishment as being contrary to the
law or ethical standards. Reliance on the Scandinavian law is also most
problematic because of the unique way that it integrated an extensive
public educational campaign together with civil, not penal, legislation.

At the same time, one cannot ignore the fact that the new
prohibition, which was accompanied, as noted, by an alert public debate,

116. TAMAR MORAG, Children’s Rights and the Law, in CHILDREN’S RIGHTS IN
ISRAEL: A COLLECTION OF ARTICLES AND SOURCES 17, 21 (Yitzchak Kadman and Galia
Efrat eds. 1999).
117. JOHN RAWLS, A THEORY OF JUSTICE (1971); LON FULLER, THE MORALITY OF
is slowly penetrating and being absorbed, even if at least partially, by the Israeli public, in accordance with surveys on the subject. In my opinion, however, the test is not only of the outcome. One must also look at the stages of the process compared to the public's feelings and confusion in the interim period pending the acceptance, if at all, of the prohibition. Such a look can help to improve the situation in countries where a prohibition has been accepted without preparation of the public mind by an understanding that some importance is to be attached to upholding it even post factum, and as a warning signal for countries interested in prohibiting corporal punishment in the future.

Cypriot Law took a different path of penal prohibition in legislation. This is neither a prohibition through court ruling nor civil legislation, as will be seen below in the law of some other European countries. Section 7(1) of the Cypriot Constitution grants every child a right to life and dignity, and this section also impacted the situation regarding

119. Tzimuki, supra note 102 (A survey of the National Council for the Child, taken in 1996, according to which three out of four parents punish their children through hitting, at least occasionally); Question: Is a parent allowed to give a light slap to a child for the sake of his/her education?, YEDI'OT AHARONOT, February 21, 2000, (A survey conducted a few days before the judgment was given in the Ploni case showed that 47% of the public was of the opinion that a parent should be allowed to give a light slap to a child for the sake of its education and only some 40% of the public was of the opinion that one should not do so.); Beruriah Atar, Light Punishment, Heavy Price, HAARETZ, February 2, 2001, (A survey conducted by Dr. Yitzchak Levav of the Mental Health Services of the Ministry of Health and Dr. Roza Goffin of the Department for Social Health at Hadassah Hospital in Jerusalem among a thousand people from the Jewish sector found that a quarter of those asked viewed corporal punishment as "a good way to inculcate good behavior" and not just as a permissible method of education. Levav and Goffin emphasized that, in their opinion, the true rate is higher since some of those asked had reservations about stating their real opinion.); data very similar was measured some two years after the judgment and similar data was also measured (with a slight drop in the percentage of supporters) in a survey conducted some three years after the judgment from a survey conducted by the Geocartography Institute on "Violence towards Children," for the National Council for the Child in 2003, it followed that some 37% of those asked were of the opinion that it was permissible to hit children for the sake of their education in one form or another. A change was recorded some six years after the judgment was given, at the end of 2005. From a survey conducted by the Geocartography Institute especially for a conference on the subject of "Five Years since the Prohibition on Corporal Punishment" at the Sha'arei Mishpat College on November 14, 2005, it followed that 79% of those asked held the opinion that children should not be hit for the sake of their education while just 17% supported doing so. Yuval Lidor and Assaf Zelinger, A New Survey: 50% of the Parents Hit their Children, MA'ARIV, June 7, 2007, (noting that from another survey conducted by Shiluv Institute for the Israeli TV, channel 2, in the beginning of June 2007, it followed that although 50% of the parents use corporal punishment for the correction of their children, only 10% think that it is a legitimate and efficient way of education).

120. The review of Cypriot law was made on the basis of BITENSKY, supra note 13, at 174-80.

corporal punishment in Cyprus as it did in Israel.

In 1994, the Cypriot legislature enacted the Prevention of Violence in the Family and Protection of Victims Law.\textsuperscript{122} This law prohibited any form of corporal punishment by a parent or other caretaker and the punishment for it was an increased fine or imprisonment. In 2000, this law was replaced with a new law, Law 119(I), the Law which Provides for the Prevention of Violence in the Family and Protection of Victims.\textsuperscript{123} This law is part of the Cyprus Criminal Code. The innovations it contains against its predecessor mainly concern victims' testimonial matters of domestic violence. The law determines that, "[f]or purposes of this Law, violence means any unlawful act, omission or behavior which results in the direct infliction of physical, sexual or mental injury to any member of the family by another member of the family."\textsuperscript{124} According to the new law, and like the situation in Israel, battery in the familial context is more grievous than battery between strangers and the punishment for it is, therefore, increased to two years or an increased fine, as against one year imprisonment when the offense is not committed in the familial context. The law also determines a handling mechanism enabling and obliging the welfare services intervention in giving advice and mediation to members of the family for resolution of the problems that led to the violence or which, it is suspected, will lead to it. This is an important part of the law that also focuses on treatment of the victims of the violence and not only on the punishment of the perpetrators thereof.

It is true that corporal punishment is not explicitly mentioned in the law but scholars explain that the law applies to every form of violence vis-à-vis children.\textsuperscript{125} In one of the recent decisions of the Cypriot Supreme Court regarding this law, it was determined that violence vis-à-vis a child hurts one's dignity and domestic violence in general is wrong and unjust because a man's home should be his castle and a source of affection, not of violence.\textsuperscript{126} At the same time, it may be noted that, as in Israel, the Supreme Court in Cyprus also related to this section of the law through incidents of serious violence that approached the level of abuse. In one of the cases, a mother abused her daughter systematically and intentionally, both physically and mentally, with slaps, beatings with her open hand and

\begin{itemize}
  \item \textsuperscript{122} The Prevention of Violence in the Family and Protection of Victims Law, Act of June 17, 1994, Law 147(I), OFFICIAL GAZETTE OF THE REPUBLIC OF CYPRUS No. 2886.
  \item \textsuperscript{123} The Law that Provides for the Prevention of Violence in the Family and Protection of Victims is, Annex (I), Laws of Cyprus 2000/I, Law No. 119(I) of 2000, Criminal Code, Ch. 154.
  \item \textsuperscript{124} \textit{Id.} at § 3-(1).
  \item \textsuperscript{125} BITENSKY, supra note 13, at 175.
  \item \textsuperscript{126} Attorney General of the Republic v. Eleni Ioannou (CA 7403, Nov. 27, 2003).
\end{itemize}
objects such as a broom or wooden spatula as well as biting,\textsuperscript{127} while in another case a father sexually assaulted his daughter.\textsuperscript{128} Another case involved a father beating his son’s entire body with a belt.\textsuperscript{129}

The change in Cyprus was thus through legislation rather than case law, in contradistinction to Israel. A further significant change concerns the education and instruction of the public. Unlike in Israel, the legislative change in Cyprus occurred hand-in-hand with an attempt to educate the public regarding the new legal status. The prohibition on corporal punishment and its significance was published in leaflets, and on posters, and stickers. This educational campaign was run by the welfare services and non-governmental organizations.\textsuperscript{130} A survey conducted in October 2000, the same year in which the prohibition was passed in the new law and six years after enactment of the initial law on the matter, points to the fact that only 15% of those asked were of the opinion that beating children is socially acceptable in practice as a method for bringing up children.\textsuperscript{131}

A critique on the exaggerated strength of the model should be expressed, mainly with regard to Israeli law but also with regard to Cypriot law, because it seems that not all the implications were taken into account. Israel has forbidden corporal punishment in the family with a clear penal prohibition through a judgment of the Supreme Court, which has the authority of a statute, as such judgments constitute a binding precedent. Cyprus prohibited it in legislation in the Criminal Code.

In Israel meanwhile, no statute has been enacted on the subject with respect to the family unit. There is a significant difference between these two paths. The process of enacting legislation is lengthier, gives expression to trends and desires of various public representatives, and permits better inculcation following publication of the legislative process and public knowledge that there is a statute on the subject. A court judgment, on the other hand, is sudden, more subject to dispute as it is given in a limited composition of justices (three in the Israeli case, with one of the justices not having considered the issue of corporal punishment at all) and could, therefore, create antagonism vis-à-vis the decision, primarily on the part of sectors of the population in which corporal punishment has been accepted since olden times. In many cases, such decisions are opposed because they do not sit well with the public in a multi-cultural society. Moreover, when there is no statute on the matter, but

\begin{itemize}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Attorney General of the Republic v. A. B. (CA 7329, Aug. 6, 2002).
\item \textsuperscript{129} BITENSKY, supra note 13, at 176.
\item \textsuperscript{130} Id., at 179.
\item \textsuperscript{131} ROWAN BOYSON, EQUAL PROTECTION FOR CHILDREN: AN OVERVIEW OF THE EXPERIENCE OF COUNTRIES THAT ACCORD CHILDREN FULL LEGAL PROTECTION FROM PHYSICAL PUNISHMENT 33-4 (Lucy Thorpe ed., 2002).
\end{itemize}
only a judicial decision, albeit binding, the norm is easily forgotten and accepted by the public.\textsuperscript{132}

Another significant difference arises from the fact that, in Israel, no government information campaign was held to inculcate the new norm but only a campaign of very limited scope financed by the NCC, which is a private association. In Cyprus, there was such a campaign. The importance of such can be great, even critical. The extensive public debate following the passing of the prohibition in Israel proves this.

A third difference lies in the existence of mandated reporting which applies to everyone in Israel. It requires everyone to report the battery of a minor by his/her parents or caretakers and this obligation has been construed by some scholars as applying to corporal punishment of any level. If activated with respect to every instance of light corporal punishment, this obligation could intensify the problem of the intrusion of the law into the family unit by requiring everyone to intervene in other families' matters.

However, it would not be correct to say the problem is latent only in the Israeli solution and not in the Cypriot. The problem of the strict-penal legal intervention model does not end only with legislation and a campaign to inculcate the norms although they can certainly help blur over difficulties.

The legal sources, legislation and court ruling, mentioned do indeed depict a real and honest desire to protect children from injury at the hands of their parents. This objective is basically positive and there is no doubt it indeed results in children being protected and serves as a tool for saving them from harsh acts by those who are supposed to be guarding them, their parents. Some hold that a prohibition on corporal punishment, and in legislation, will strengthen the principles of democracy and respect for human rights.\textsuperscript{133} If, however, the ramifications of these sources are examined, particularly in Israel, then a very problematic picture emerges concerning serious injuries in the whole family unit if these sources are to be used in cases of light corporal punishment.

There are two main problems with the application of the strict-penal intervention model. One is the negative incentive for a parent not to educate and discipline his children\textsuperscript{134} if he knows that using light corporal punishment could result in charges against him and possibly destroy his family. The other problem is the intrusion of the law into the family by way, specifically of the penal law, with all its ramifications,

\begin{itemize}
  \item \textsuperscript{132} Ezer, \textit{supra} note 16, at 189.
  \item \textsuperscript{133} BITENSKY, \textit{supra} note 13, at 357.
  \item \textsuperscript{134} Schuz 2001, \textit{supra} note 105, at 173.
\end{itemize}
particularly in the pointed fashion made in Israel. The judgment in *Plonit* has overly sweeping repercussions on all subsequent judgments, but the danger is also and mainly in extreme and unbalanced interpretations of the previous legislation. The judgment unequivocally decided in fact that the right of parents to educate their children as they see fit, recognized more than once in case law, takes a back seat, according to the new interpretation, to any injury, even the slightest and even for educational purposes, to the body of a child. Interpretation in accordance with that sweeping prohibition results in parents who punish their children with light corporal punishment being exposed to the operation of temporary criminal and other (such as detention or restraint) remedies against them which exist in each country and could be used against parents. As noted, mandated reporting exists with respect to everyone in Israel like in many United States jurisdictions. The detention could be either an investigative detention or detention until completion of proceedings. In addition, a restraining order against approaching the home could be imposed. The incidence of these remedies could be in certain cases for days, weeks, or even months.

The opening up of all these processes could derive from an overly literal use of mandated reporting on offenses of domestic violence, both by professionals that treat the family and by the general public. Thus, not only the basic rights of the parent might be prejudiced, to which thought should also be given, but first and foremost, the damage is to the whole family. The arrest and restraint of a parent might constitute painful, but necessary “root treatment” in cases of serious violence, but other balances can be thought of when the acts of the parent are light and intended for educational purposes. The situation could still be reparable in Israel, if the legislation is construed such that it does not apply to light corporal punishment; however it is most doubtful whether this will be done in view of the *Plonit* judgment. The situation described has not lead to any decrease in the level of violence of parents or of children. On the contrary; there is a constant rise in grievous instances of abuse and violence of parents against their children and of children against each other, despite the legal developments.135

If it is decided to press charges against a parent who used light educational corporal punishment on his child, then according to the *Plonit* judgment, the parent has a few defenses that are not applicable in most cases, in practice and in fact. The Court also did not provide tools in the form of educational alternatives that it views as legitimate instead of the

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135. As noted, the latest research points to 50% of Israeli parents that corporally punish their children, even though 90% think it is not an efficient and legitimate way of education. See supra note 119 and accompanying text.
use of corporal punishment. Also there is considerable concern that such a decisive judgment, combined with the implications of the legislation on the different levels could upset the delicate balance between deterrence and rehabilitation considerations. The victim who was attacked could also suffer. When all of this could happen following light corporal punishment and not only following serious corporal punishment and abuse, this is an overly sweeping intervention.

These results are difficult, mainly on the background of a judgment that could become "an edict with which the public is unable to comply" and "this is the law but one does not teach so publicly," and it is dubious whether the Israeli Supreme Court gave thought to all the ramifications of its judgment. It has to be understood that not everything that is not desirable in terms of conduct can be legally prohibited.

The attempt to fight previous norms and change them specifically through the penal law could seriously harm family and society. And, as noted, this could be even more problematic when such a substantive change is made through court rulings, without preliminary preparation or readying the public mind through legislative measures spread over time and giving different groups in the population a possibility for expressing themselves.

Professor Leslie Sebba determines that it may reasonably be assumed that the norm set in the Plonit judgment reflected mainly a position of a "socio-legal elite" rather than a broad socio-cultural consensus.\textsuperscript{136} If Plonit is examined in accordance with the conditions enumerated by William Evan for an effective absorption of a new legal norm, as against the need to recognize the limits of the law's power, then a large problem arises.\textsuperscript{137} Evan determined that: (1) such a norm has to be expressed by the legislature; (2) it has to rely on previous cultural traditions; (3) other models for emulation have to be shown, i.e., other countries which adopt the same norm; (4) the commitment on the part of the law enforcement system to enforce the prohibition has to be unequivocal; (5) the existence of accessible remedies for those hurt in cases where the norm is breached; and (6) it is necessary for the new norm to come into immediate effect to prevent objections.\textsuperscript{138}

It is easy to see that the first five conditions are not met by Israeli law. The norm was expressed by the Court. There was no previous cultural tradition on the matter in Israel (on the contrary, tradition

\textsuperscript{136} Sebba, supra note 80, at 458-59.


\textsuperscript{138} Id.; see also Sebba, supra note 80, at 458-59.
supported corporal punishment in almost all sectors of the Israeli population); other models for emulation were not listed, and those which were mentioned in the judgment from Scandinavian countries, do not match the prohibition laid down in Israel. The norm was not set there in the penal law, as will be seen below, on dealing with them and those similar to them. The Israeli public was not exposed to other models in practice. The extent of the commitment of the law enforcement system to enforce the prohibition does not appear unequivocal, and there are no clearly accessible remedies for those hurt (the children) in cases of breaching the norm. The only condition with which there is clear compliance here is that of the immediate coming into effect of the new norm, but in Sebba’s opinion, this condition seems problematic. One has to agree, at least for the purpose of this research, when Sebba says it is difficult to expect a large part of the public to change its way of life overnight without an adjustment period to allow a gradual absorption of the new norm.

These problems are more serious in a multi-cultural society. The legal reference to the issue of corporal punishment in a multi-cultural society clarifies even more sharply the approach of the Court as it sees itself as intervening and determining educational norms, while emphasizing that such norms are to be imposed on the entire population, even though its components differ from each other culturally. Various sectors in Israeli society did not come to terms with the outcome of the judgment. Some, such as religious circles, were even angry that the judgment, which covered scores of pages, did not mention the attitude of Jewish law on the subject, with the well-known verse, "[h]e who spares the rod hates his son; but he who loves him is careful to discipline him." It is true that it is possible to identify different schools of thought in Jewish law, some of which are strictest with parents who punish their children corporally. However, it can be assumed that any reference to this law, in a country twenty-percent of whose population defines themselves as religious, while many others define themselves as traditional, would have helped introduce the norm or at least softened part of the antagonism towards it.

In other groups corporal punishment is more acceptable, for example, in the Arab sector and among immigrants, the judgment was

139. SEBBA, supra note 80, at 459.
not seen as being common to all groups. The strict-penal intervention model is insufficiently tolerant with respect to religious, traditional, or ideological opinions and beliefs coming from special sectors of the population and new immigrants, and does not always look for a suitable way to handle the problem when the danger of destruction of the family among those groups could be much greater. Nor does it try sufficiently to speak to those groups in their language. Such being so, these groups accept the changes either with indifference or antagonism. This critique is not tantamount to suggesting that any conduct of a certain group should be allowed even if it grievously prejudices children's rights. Some thought should, nevertheless, be given as to whether, in the mild cases, an interim path could not be found that would, on the one hand, retain children's rights and enable value-oriented norms to be introduced to that sector while being careful not to cause harm as far as possible to sectarian beliefs and opinions. The goal of bringing population groups closer to each other, rather than sowing antagonism amongst them against the governmental authorities in general and the courts in particular, is also important and has to be balanced with children's rights, although it is clear that the children's rights must prevail in principle.

One of the possibilities, if the whole issue has already been discussed in the penal context, is to "utilize" both parts of the criminal judgment, the verdict and the sentence, in such a way that, if parents are convicted, it will be possible to be lenient with their punishment. This is particularly the case for new immigrant parents and more so for those who came from countries in which corporal punishment was permissible. As noted, legislative measures that were taken in other countries can blur the problem, not resolve it.

With innovative judgments in various areas, there is a tendency of the courts to restrict the ruling and to hedge it with reservations so that it will not break through any barriers. With the judgment in the Plonit case, the Court also tried to do so but, seemingly, without much success leaving the legal situation vague and uncertain. The prohibition on corporal punishment is sweeping and almost absolute and, even if one step back is taken in an attempt to apply general and specific defenses, in practice it is very difficult to see how they could exist in view of the legal situation and the social atmosphere reigning after the judgment. If there is any understanding that parents should be allowed to exercise reasonable force in order to maintain order, not by way of the de minimis defense, as these are two separate defenses, then the Plonit judgment should be hedged explicitly and not in some fuzzy manner.

It is true scholars point out that several years is too short a time to examine the extent of the prohibition's acceptance and assimilation among
the public, since this has to be examined over many years.\textsuperscript{142} Already now, as noted, one can point to a great problem, at least theoretically, particularly for the Israeli method.

Thus, strict-penal intervention, mainly through a judgment without any preparatory educational campaign readying the soil, is unsuitable for the unique nature of the family unit and the desire to give it some autonomy, albeit delineated and limited, and to permit it a certain internal dynamic without outside interference. The model relates to the rights of the individual, i.e. the child, as to those of any other individuals, and this, in principle, is only right. However, it does so often, without a necessary sideways glance to the child's place in a family unit. The intention of this model is certainly desirable, but its actions are problematic because it goes much too far and does not foresee the possible damage to the family unit and the various ramifications in the spheres of law and society. One cannot view parent/child relationships only through an individualistic approach at the center of which is an individual versus an individual. Family considerations also have to be taken into account. If the case is serious, there is no question of the need for criminal law to be invoked. But when it comes to light corporal punishment, things are more complicated. Denying parental authority and parental discretion in too many instances, particularly by using the most heavy-duty legal tool, the penal law, could harm not only the parents causing the injury but also the injured children. This is particularly so when the intervention is made through a court judgment and not by preparation of the public mind, as happened in Israel, but it is problematic even when the intervention is through legislation, as in Cyprus.

Truth be told, the nature of the intervention in the opinion of this model is preferable tenfold to the nature of the intervention or non-intervention according to the minimal legal intervention model, which sacrifices on the altar of the dynamic of the family unit, the rights of the weak members of the unit, primarily the children. Both models lack balance with their emphasis on one important aspect, their neglect of another important aspect, and by approaching the issue one-sidedly with over-simplification.

If so, from the strict-penal legal intervention model, the need should be adopted for extensive defense of the rights of children, the weaker ones, first and foremost, their right not to have painful corporal punishment inflicted on them; although, a smarter interim method should be found for the application of matters currently in practice. This interim model has to, on the one hand, fight for the rights of children in accordance with the new changes, but, on the other hand, it must strike a balance between these

\textsuperscript{142} BITENSKY, \textit{supra} note 13, at 209; Ezer \textit{supra} note 16, at 212-13.
rights and the rights and duties of parents, while being on guard lest the family be harmed. The moderate legal intervention model that was presented in the former part of this Article lacks the uncompromising will to fight for children’s rights, although its balance is proper in principal. The model that will be presented in the next part provides a preferable balance between both family and individual approaches and also between different considerations.

D. The Civil-Rights Legal Intervention Model: Gap Between Sweeping Declaration and Moderate Enforcement—Several European Countries

In order to create an opening for a principled legal attitude with the purpose of educating the public in stages and in a way that will create empathy for a judgment or legislation forbidding corporal punishment and lead towards an edict with which the public is able to comply and to fill it with content, there is possibly room to adopt a rationale of a structured gap between a sweeping declaration and moderate enforcement. This approach will be able to create a gap between a clear declaration, consistent with the individualistic approach and with strict-penal legal intervention, and moderate enforcement. The latter means light punishment for the parent or even his non-conviction in mild cases, as follows from the family approach and from moderate legal intervention. Such a “bridge” between the approaches and the models would constitute a wise step that could convey a firm message as to the importance of protecting children’s rights without irreparably harming the family unit in mild cases. This is the substance of the civil-rights legal intervention model that will be presented in this section through creative legal attitudes to corporal punishment. These will be shown via balances adopted by the law in the countries of Scandinavia and, in their wake, by other countries in Europe.

I will try to show how this model attempts to constitute a connecting thread, bridging between rival models, particularly between intervention, which is strict-penal sweeping ex ante but moderate ex post. This is done by finding points of balance and compromise that will match the nature of the modern family. I shall not evade the difficult question whether the nature of the legal intervention that this model presents can be suitable for every modern legal system. One should consider that a declarative statement, the purpose of which is a legal declaration which it is not intended to enforce in practice, does not contribute to the important facet of deterrence. Obedience to the law out of a fear of sanctions constitutes an important, and for some parts of society, prime motive for implementation of the legal norm. Some have viewed enforcement almost as a sine qua non for the validity of the legal norm itself while others have
seen it as the initial legal norm and so differentiated, \textit{inter alia}, between a legal and a moral norm. However, one has to be exact in that it is not a matter merely of recommendations but of legal rulings for all purposes which the law chooses of its own initiative not to enforce fully despite its ability to do so. Enforcement of heavy duty legal norms, mainly in the criminal sphere, does not always constitute the king's highway for true internalization by the public. The law is certainly a tool for internalization of norms, but not always the central tool. It, too, is often limited in terms of its effectiveness. That being so, the civil-rights legal intervention model is not just a reality sketch of desirable law nor is it disconnected from "the ground" and daily life. Problems with the possible adjustment of the model exactly the way it is written to a modern, western legal system will be indicated. Large parts of it, however, can possibly help with the construction of a practical proposal for an integrated model for resolution of the basic dilemma.

Sweden was the first Scandinavian country and apparently of the World to prohibit corporal punishment in legislation. Corporal punishment had been accepted as a way of education in Sweden, as in most countries of the world mainly in order to drive or beat the devil out of the child. This resulted in many cases of child abuse. However, in 1949, Sweden enacted the New Parental and Guardianship Code. This code limited parental rights to administer physical punishment and determined that such was reprehensible. Even if it was not a matter of an effective remedy, it can be assumed that, for that period, this was a revolutionary law. In 1958, Sweden prohibited corporal punishment in schools and in 1969, repealed the penal defense against the battery offense for parents who hit their children for their education and caused light injuries. In 1979, the 1949 law, a civil rather than penal law, was amended in the

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143. \textbf{YIZHAK ENGLARD, AN INTRODUCTION TO JURISPRUDENCE} 25-30, 83-84 (1991). Hans Kelsen holds in modern law the power to apply the sanction is the initial norm while the substantive behavior with respect to which the sanction was determined is only a secondary norm.

144. \textit{See} \textbf{BOYSON}, \textit{supra} note 131, at 24-25, 38; \textbf{BITENSKY, supra} note 13, at 154-70, 180-84; \textbf{Newell, supra} note 16, at 219; \textbf{Joan Senzek Solheim, A Cross-Cultural Examination of Use of Corporal Punishment on Children: A Focus on Sweden and the United States}, \textit{6 CHILD ABUSE \& NEGLECT} 147 (1982); \textbf{Dennis Alan Olson, The Swedish Ban of Corporal Punishment}, \textit{4 BYU L. REV.} 454-55 (1984); \textbf{Michael Freeman, Children are Unbeatable}, \textit{13 CHILD. \& SOCIETY} 130, 139 (1999); \textbf{Durrant, supra} note 25, at 479; \textbf{Edwards, supra} note 27, at 1019; \textbf{Ezer, supra} note 16, at 170-75; \textbf{ADRIANNE HAEUSER, Stopping Corporal Punishment of Children in Order to Prevent Abuse, in CHILDREN IN ISRAEL ON THE TRESHOLD OF A NEW MILLENIUM} 221, 223-31 (Asher Ben Aryeh and Yaffa Zionit eds., 1999); \textit{see also} \textbf{Adrienne A. Haeuser, Banning Punishment of Children: Evaluating Sweden's Success for the U.S.}, \textit{8th National Conference on Child Abuse and Neglect} (Oct. 22-25, 1989). It should be noted that, today, Sweden is a very secular and liberal country.

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parliament by a vast majority of 250 yea with only 6 nays, in the wake of
a public committee on behalf of the parliament. The current formulation,
after a further amendment in 1983, provides that: "[c]hildren... are to be
treated with respect to their person and individuality and may not be
subjected to physical punishment or any other humiliating
treatment."

The Swedish legislation does not differentiate, for this purpose,
between a parent and another person in charge of the child. It establishes a
right for the child and does not spell out to whom the obligation applies.
The right was legislated as part of a specifically civil law (on the same
lines as Section 10 of the Pupils’ Rights Law in Israel) which does not
contain accompanying penalties helping its quick and impressive passage.
Seemingly, one would be accurate in saying from the section that the right
of the child is not to be exposed specifically to demeaning corporal
punishment because corporal punishment was compared to any other
demeaning parental conduct, while corporal punishment intended for an
educational purpose which is not demeaning is not forbidden. The letter of
explanation that the Swedish Ministry of Justice sent to all households
following the last amendment to the law, stated that the purpose of the law
was not to permit any form of hitting children apart from a light smack to
keep a child away, for example, from a burning stove or an open window
where there was a danger that he or she might be injured and hurt. This
letter was just one part of an extensive publicity campaign for that statute.
Leaflets and colored booklets were also distributed, entitled, “Can you
bring up children successfully without smacking (‘Smich och dask’)?”
Advertisements were placed on milk cartons and appeared on television,
specifying the reasons for enactment of the statute and describing how to
bring up a child with discipline without smacking. The Swedish
government also established an ombudsman for children’s complaints. At
the same time, many items were introduced into the school curriculum
about family life and parenting and programs were also initiated for
parents. Over the years, similar additional manifestos were published, on
the background of attempts by various groups, among them Christian
religious groups, to attack the statute in which it was emphasized that
beating a child for any reason is prohibited just as it is for an adult. The
Swedish Ministry of Justice was patient. The publicity campaign, intended
to prepare public minds for the future change, was spread over fifteen
years and it seems that it bore fruit.

Since the enactment of the statute until the end of the Twentieth

146. A translation of the letter into English formerly available at
http://news6.thdo.bbc.co.uk/hi/english/education/newsid%5F609000/609241.st (website
no longer available).
Century, hardly any cases were recorded in Sweden where parents were put on trial because of corporal punishment. This fact may be firmly associated with the results of the surveys conducted during those years that pointed to internalization of the messages of the legislative educational campaign in the Swedish public. This contributed to breaking the traditional inter-generational cycle of corporal punishment as well as a drastic decline in support for this measure and the assimilation of the need for the use of alternative methods of education, such as denying the child benefits or sending him/her for a “time out.” It can be argued that some of the respondents in the surveys were concerned about expressing a position in support of corporal punishment and, that being so, replied as they did; but this datum is taken into account in every survey. Moreover, even if some of the respondents did not answer honestly, the fact that the new legal and social situation resulted in their embarrassment (that they are ashamed of resorting to smacking for education and are not willing to admit it even in an anonymous survey) is some success in itself.

However, this is subject to dispute among scholars. Some argue the campaign succeeded but since it is about a trend, and the prohibition was in fact enacted, as has been seen, in stages and over a period of decades (unlike, for example, in Israel), the process seems natural to the public and one that would have happened even without legal intervention. Parents internalized the prohibition and many of them indeed are adopting alternatives. Others hold that the prohibition acted as a two-edged sword. It hauled in its wake permissiveness in the education of children and, if the tool of corporal punishment is taken from parents, 147. The surveys are mainly mentioned in Haeuser and Newell. See Haeuser, supra note 144; Newell, supra note 16. In 1965, 53% of parents in Sweden supported corporal punishment as a sometimes necessary method of education. In 1971, their number had declined to 35% and, in 1981, to 26%. By 1995, only 11% supported corporal punishment while 78% opposed it in any form, even mild. 56% reported that they use alternative methods of education. 22% admitted that they had, nevertheless, used corporal punishment on their children although they do not support it and excused having done so by saying that they were being harassed by their children in that situation. Towards the end of the Twentieth Century, an increase was recorded in cases of violence in general and child abuse in particular in Sweden but no one specific factor for this was found. Suggestions were raised, such as serious economic problems from which Sweden suffered in 1990 as well as joining the European Union in 1994. This enabled freer entry of merchandise, including drugs, to the country. Either way, no increase was recorded specifically in cases of mild corporal punishment and no connection was made between enactment of the law and that increase. See Haeuser, supra note 144, at 228-29. BITENSKY is of the opinion that research regarding the non-change and growth in youth violence shows the road is still long for change also in Sweden for, if there is less corporal punishment in the home, it would have been expected that the children would be less violent also at school. See BITENSKY, supra note 13, at 160. With all due respect, the reference is to just one indicator. According to her, many cases are not reported such that the phenomenon is much larger. To this, one may answer that there is under-reporting in many other countries.
then when children go too far, parents often use a harsher punishment.\textsuperscript{148}

There is also a dispute among scholars on the issue of penal enforcement of those sections of the civil law that are not accompanied by any sanction whatsoever. Some are of the opinion that these are civil sections of declaratory force only and one cannot in Sweden (and in the other countries of Scandinavia which will be mentioned below) indict a parent for breach of this statute.\textsuperscript{149} Others hold that it is possible and they can be charged for battery, the punishment for which is up to two years imprisonment and, in mild cases, up to six months imprisonment or a fine.\textsuperscript{150} The latter admit; however, that this is a theoretical possibility and is not the purpose of the legislation. The purpose was education of the public and setting a new norm in the hope that it would trickle through and change the current situation without the intervention of the penal law (alongside the desire, of course, to end the phenomenon). In practice, parents who physically punish their children in a mild form are not indicted.\textsuperscript{151} Other Scandinavian countries followed Sweden and under its influence enacted similar sections in their civil law.

In Finland, there was a prohibition on corporal punishment in schools but not in the family from the latter part of the Nineteenth Century. Here too, a process took place. In 1969, a defense for a parent who administered corporal punishment was removed from the Finnish penal code, but no section was legislated explicitly forbidding it. This confused the public as to the legal status of corporal punishment.\textsuperscript{152} In 1981, a public survey was conducted and sixty percent of those surveyed were of the opinion that corporal punishment should be forbidden in Finland, as was the case in Sweden.\textsuperscript{153} In view of these results, a law was enacted in 1983, which was in fact consistent with the desire of the majority of the public and did not give rise to public debates as in Israel. And indeed, the law was passed with genuine naturalness and by unanimous vote in the parliament, as part of the Child Custody and Right of Access Act (and as part of comprehensive reforms in children's laws), a section similar to, and more detailed than its Swedish counterpart.\textsuperscript{154}

\textsuperscript{148} BITENSKY, supra note 13 at 157-58.
\textsuperscript{150} BITENSKY, supra note 13, at 155-57.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 160 (noting that, in 1978, almost a decade after cancellation of the defense, 40% of parents were of the opinion that corporal punishment was permissible and legal and the professionals were also in confusion).
\textsuperscript{153} Id. 161.
\textsuperscript{154} Child Custody and Right of Access Act, Ch. 1, § 1. The objects of custody are
The section came into effect at the beginning of 1984. As expected, there has been a large decrease in the use of corporal punishment since 1983 in Finland. Here, the purpose of the prohibition was an attempt to educate parents to set boundaries for their children using positive measures and without the use of hitting that would not lead to an indictment, and to bring this to the knowledge of the public. Finland did not rest on its laurels. Although the statute was passed with widespread public agreement, an extensive educational campaign was launched to present educational alternatives to corporal punishment, consisting mainly of advertising through the media and family magazines, to the point where it can today be said that the public in Finland is certainly aware of the norm.

In Denmark, there has been an explicit prohibition since 1866 in the penal code against parental violence upon children. In practice, however, it was accepted that a parent and the spouse of a parent can use limited force for the purpose of physically punishing a child for that child's education, although this defense has been gradually whittled away in case law. Some years after the developments in Sweden, similar sections were enacted in some of Denmark's civil family statutes. In 1997, a

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155. Boyson, supra note 131, at 25. A survey conducted among teenagers in 1989 showed that 19% of the youth had been exposed to mild corporal punishment at home and 5% to harsh corporal punishment. Only 5% thought that they would use corporal punishment for the education of their own children. Id.

156. Bitensky, supra note 13, at 25 (arguing that, following a conversation with someone at the Finnish Ministry of Justice, it would theoretically be possible to press criminal charges against a parent who administered corporal punishment on one of the battery offenses according to Finland's Penal Code, the punishment for which varies from a fine to imprisonment actually forbidding corporal punishment is civil. According to scholars, the general defenses in the Penal Code, such as self-defense, do not apply to corporal punishment vis-à-vis a minor).


159. A section was enacted requiring a custodian or caretaker to protect the child from physical violence, mental cruelty and any other form of humiliation, as part of the Minor's Act, § 7(2) and the Act on Custody and Access, § 2. An amendment was also added to the Parental Custody and Care Act in 1985, according to which: "[A child] may
further amendment was introduced and the formulation now provides that "the child has the right to care and security. He/she shall be treated with respect for his/her personality and may not be subjected to corporal punishment or any other offensive treatment."160 Scholars point out that this section does not actually change what was accepted in practice since charges were pressed against parents only in isolated cases and the parents were convicted only when the beating injured the child, leaving marks on him. This policy of restraint in parental prosecution continues to this day.161 The explanatory notes further provide that the legislature did not intend to intervene in the privacy of the family more than it did prior to enactment of the statute.162 Here too, scholars argue that parents and caretakers can face criminal charges with respect to corporal punishment in accordance with the various battery offenses in the Penal Code,163 but it seems merely theoretic, if at all.

In 1972, Norway repealed a provision in the Penal Code that was enacted in 1926 and gave parents a right to use reasonable corporal punishment for the education of a child. Some fifteen years later an amendment that was made in family law came into effect. The amendment gave a child the right not to be exposed to corporal punishment. The law, as formulated, seems to contain only cases in which it can be discerned that the use of violence could cause physical or mental damage, because it provides that, "[t]he child shall not be exposed to physical violence or to treatment which can threaten his physical and mental health."164 With this, Norway permitted a somewhat larger expanse for parents than the other Scandinavian countries.

Some scholars still argue that, following the preparatory works of the law, two parental conducts are still permissible even after enactment of this law.165 First, use of force, such as holding or blocking, especially smaller children, to prevent them from hurting themselves or others or from destroying property. This is actually similar to penal "self-defense" which also applies vis-à-vis others. Second, small smacks on the child's hands or clothed buttocks as a spontaneous reaction may be used as some sort of de minimis defense. Here too, it is a matter of civil law and there are those who argue that parents or others in charge of the child can face criminal charges for corporal punishment through the offense of battery.

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160. BITENSKY, supra note 13, at 180.
161. NIELSEN & FROST, supra note 158.
162. BOYSON, supra note 131, at 38.
163. Id. at 182.
164. Parent and Child Act, art. 30 § 3, amended by the Amending Act No. 11, (Feb. 6, 1987) (Norway).
165. BITENSKY, supra note 13, at 166.
This is a policy of restraint on the part of the prosecution and charges are not pressed against parents for mild corporal punishment.\textsuperscript{166}

Norway also held an educational campaign, to inculcate the norm. Leaflets about the new law were distributed to the public, albeit by non-governmental organizations. The matter of the prohibition was publicized extensively in the press and paid advertisements. The ombudsman gave interviews on television and Norway arranged for parent training programs to discuss methods of child education, on the issue of corporal punishment. The ombudsman published a statement in 2002 to the effect that the prohibition had been taken on board among young and old in Norway and that corporal punishment was no longer acceptable in Norwegian society.\textsuperscript{167} Other countries, including Austria and Germany, followed the path of the Scandinavians.

Austria prohibited corporal punishment in schools in 1975.\textsuperscript{168} With respect to the family unit, as with the Scandinavian countries, Austria began the process in 1977 with the removal of a defense in the Penal Code. Similar to Finland, a counter law was not immediately enacted, leaving the public somewhat confused and perplexed as to the legal situation on the issue. In the 1980's, the Ministry of Justice and the Ministry of the Environment, Youth and Family started on preparatory work for creating a prohibition in law. In 1989, the Austrian parliament voted unanimously for a section of law that prohibits corporal punishment. Prohibitions in the civil code provide that, "[t]he minor child must follow the parent's orders. In their orders and in the implementation thereof, parents must consider the age, development and personality of the child; the use of force and

\textsuperscript{166} Id. at 167. Charges can be pressed for the slightest battery offenses even if no bruises are made on the child's body. In other words, the reference is to a behavioral, not consequential, offense. With more serious offenses, harm has to be proven; it may be noted that there is no division in Norway between penal and civil codes and everything is in one law: Norges Lover. A case that was discussed in Norway illustrates the possibility of pressing criminal charges although it is already here a matter of a beating causing a contusion. A child of less than two years of age hit his father on the hand. The father spontaneously hit the child on the face, his lip swelled up and he bled from the mouth. The court of first instance acquitted the father, ruling that he had a right to put the child in his place after he had hit him. The Supreme Court of Norway determined that it was an offense and sentenced the father to a fine or two days in prison in lieu thereof, while noting that this was not the way to put a child in its place (Rt-1990-1155 (388-90), quoted there, pp. 167-78). According to the standards seen in the moderate intervention model according to Canadian law, hitting in such a fashion would have been prohibited anyway, being directed at a small child and causing a contusion.

\textsuperscript{167} Id. at 170.

\textsuperscript{168} Teaching Act § 473 (Austria). There is no similar legislation with respect to other educational institutions but, here too, scholars argue that a correct analogy leads to a prohibition in all the educational institutions. For the situation in Austria in details see BITENSKY, supra note 13, at 171-74.
infliction of physical or psychological harm are not permitted. There are no defenses. The section does not explicitly mention corporal punishment, but hangs the prohibition on the existence of physical or psychological harm, which is similar to the Norwegian approach. Similar to Scandinavia, Austria enacted the law primarily to influence the simple man, with the intention of a gradual withdrawal from the norm that views corporal punishment as an acceptable method for the education of children.

Here too, there are those who claim that, despite the fact that the legislation is civil, parents, teachers, caretakers or people who are responsible for children can be prosecuted if they used corporal punishment against children. Even the relevant criminal sections are consequential and necessitate being able to point to physical or psychological damage as a consequence of the battery.

In Austria, there was also a public campaign to disseminate knowledge about the prohibition to the public and in schools. The policy in Austria is strongly based on the welfare and education services and the children's ombudsman, and less on literal enforcement of the law. A survey conducted in Austria, some three years after imposition of the prohibition, found that sixty-eight percent of parents were opposed to corporal punishment, twenty-five percent smack occasionally and five percent frequently and strongly.

Germany has perhaps the most impressive method, even if theoretically, for handling the issue of corporal punishment. Corporal punishment in the German educational system is subject to resolution in the sixteen federal states that comprise Germany. With respect to the family unit, various attempts to pass legislation that would forbid corporal punishment began in the 1980's. In 1998, however, the legislature prohibited any form of demeaning punishment, including physical and psychological abuse, but no prohibition has yet been legislated against corporal punishment. Scholars have construed the law such that it does not apply to corporal punishment so long as it is administered in response to an act of the child and does not go beyond an

169. Civil Code § 146a (Austria).
172. BOYSON, supra note 131, at 31-32. BITENSKY, supra note 13, at 174. In Bitensky's opinion, however, in the absence of up-to-date research, it is necessary to wait and examine the results after a decade at least. Id.
173. See Durrant, supra note 36, at 166-67; BOYSON, supra note 131, at 52-54; BITENSKY, supra note 13, at 189-97.
174. Thirteen have imposed a ban on corporal punishment in their educational systems. In the remaining three, it is the custom. Even with respect to day care centers, there is no explicit legislation. BITENSKY, supra note 13, at 190.
educational purpose. Here too, the new situation has created confusion for the public and it was not known exactly what was allowed and what was forbidden. The lack of clarity ended in 2000 with the legislation of a civil statute, which declares that, "[c]hildren have the right to be brought up without the use of force. Physical punishment, the causing of psychological harm and other degrading measures are forbidden."\textsuperscript{175} One defense, non-punitive physical contact, exists. An example of non-punitive physical contact is the act of saving a child from some form of danger such as running into the street or possessing matches.

The German government and private bodies also greatly invested in a public education campaign. The campaign included placing large posters on the streets, leaflets for distribution at clinics and other public sites, the distribution of an explanatory booklet about the development of children by social workers, and monthly distributions on the development of children and ways to avoid corporal punishment for parents, from birth until the child reaches the age of five years. Teachers further speak about the prohibition in all classes.

There is also a dispute in Germany between scholars as to whether a parent can be charged with corporal punishment through various penal sections or whether these sections only apply with respect to levels of gravity and intensity that go beyond mild punishment. An argument also exists on the question of whether a criminal defense allowing parents to punish their children in general terms and that applied to corporal punishment prior to the explicit prohibition of 2000, still applies now so long as the punishment is moderate, reasonable, and intended for educational purposes. There are those who argue that the forbidden punishment is specifically punishment that hurts, is dangerous, harmful to health, and immoral because it is destructive for the education of children.

Still, after 2000, light punishment was not criminally forbidden. Others are of the opinion that the 2000 prohibition invites a different interpretation for this criminal defense allowing parents the use of corporal punishment in some terms. Either way, even if criminal liability can be applied, there is a section about the discretion of the prosecuting authorities not to go to court if the offense is light and there is no public interest in pressing charges, a sort of "defense" like that mentioned in the Plonit case in Israel. In some contradistinction to Israel, however, in the more grievous cases, charges are sometimes not pressed against the parents if the prosecutor is convinced that, despite the public interest in doing so, proper therapeutic steps have been taken.\textsuperscript{176}

\textsuperscript{175} German Ostracism of Force in Upbringing Act § 1631(II) (Federal Law Gazette 2000).
\textsuperscript{176} See BITENSKY, supra note 13, at 191-92.
This point raises a more interesting and impressive mechanism, if only theoretically, that was developed in Germany, namely the extensive range of statutes requiring the welfare services to act in virtually every possible way to prevent conflicts in a family and to treat them when they do occur. The emphasis is placed on the obligation of those welfare services to advise and activate programs for a solution of the conflicts in non-violent ways. The emphasis, therefore, is on guidance, direction, and prevention, all by virtue of the law. The obligation is that of the government, but it can send families to private institutions for consultation and treatment. In this, Germany actually presents an impressive balance between an individualistic approach prohibiting corporal punishment of children and a family approach. The latter is illustrated in that there is no clear purpose for enforcement of the prohibition in criminal law and the object is the education of the child. It is also illustrated by the emphasis being placed on the duties of the State, through its various arms, to offer training and directives for resolution of conflicts in the family by peaceful means and to treat families in which such conflicts have appeared in the past with kid gloves.

Scholars, nonetheless, point to only partial absorption of the prohibition within the population of Germany, despite studies and surveys being conducted in too short a time after the prohibition was accepted. The UN Committee, while congratulating Germany on passing the prohibition, called on it to conduct research and provide data. This data pointed to a certain decline in the actual frequency of the phenomenon and in the use of other violent means of education such as hard slaps on the face and blows that cause bruises.

Scholars explain that this derives from the gradualness of the acceptance of the prohibition. In other words, despite the public confusion in the 1990's, the final resort of the preliminary legislation also contributed to a decrease in the level of violence.

That being so, the revolution, led by Sweden, has clearly impacted other European countries. As stated by Bitensky, "[i]t only stands to reason that people need to be aware of a law before they can obey and/or internalize it." This path seems sensible since it understands that judicial force is problematic in the education of the public and it believes in the power of declarative educational legislation through civil family

177. Id. at 190, 193-95 (discussing the particular statutes and their ramifications).
178. "It preserves the family intact and acquainted adults with proper, nonviolent child rearing—something incarceration or a fine is not likely to do." Id. at 193.
179. Id. at 196. Bitensky points to research from 2000, the year the statute was enacted, in which only 30% of those asked, parents and children, knew of the prohibition.
180. BITENSKY, supra note 13, at 196-97.
181. Id. at 189.
laws, integrated fully with education and advertising in order to inculcate the new norm.

However, is the civil rights legal intervention model compatible for every modern society and legal system? The answer to this question is not simple. The civil rights model proves that the existing and the desirable can be drawn together under a single roof in the form of creating a certain gap between declaration and enforcement. This is a smart interim solution between strict-penal intervention focusing on the individual and seemingly not taking the family unit as a whole into account, and moderate intervention which makes the correct balances but "sins" in an overly paternalistic overview which does not explicitly state the importance of children's rights. Unlike the moderate legal intervention model, the civil rights model indeed opts to focus on children's rights, rather than sanctions for parents. The civil-rights legal intervention model contributes to making up the missing parts of the intervention puzzle in parent/child relationships.

Should the Scandinavian model be adopted in every country and is it worth doing so or does this model still require proof as to its suitability? Are we looking at a unique model that is suitable locally for certain countries only, in accordance with the composition of the population, the stability of the government and so on? There are those who support this model as a universal solution and hold that, through a not entirely legal (and certainly not a penal law) method of an educational campaign pointing to alternatives to corporal punishment, parents can be motivated to change their ways, and the law will not be able to influence with the same force.\(^\text{182}\) This approach can be agreed with in principle, but the method of Scandinavian law should be examined in depth, from the decision to introduce reforms to the successful completion of the task.

Sweden, followed by the Scandinavian countries and other countries in Europe, intentionally opted to deal with the phenomenon through civil, not criminal, legislation and to combine it with an intensive publicity campaign with a declared educational goal of uprooting corporal punishment from the ground up and not in one stroke. This is a different path than the one that was taken in the countries of the strict-penal intervention model, in which a criminal prohibition was imposed on corporal punishment out of the blue, without prior and tolerant preparation of the public mind, through legislation and case law. What we actually have here is a prohibition containing an explicit statement against corporal punishment as an educational method, but one that is formulated in terms of the rights of children and not containing any penal

or other sanction.

An inherent problem of declarative sections of law, associated with the legal stability and application of the law, is not to be ignored. In the countries looked at as part of the civil rights legal intervention model, as in most countries of the world, there is an offense and a civil tort of battery, and a parent who punished his or her child physically has no defenses (in some countries, as noted, such defenses were repealed explicitly). The legal situation on the issue of corporal punishment, therefore, is not apparently so clear-cut because it is not certain which of the following situations applies, a situation of no defenses that states a negative arrangement, or a situation where the offense of battery does not, ab initio, apply to corporal punishment, and a criminal sanction cannot be activated with respect to it.

According to the first option, a negative arrangement means that even mild corporal punishment is forbidden as any battery and charges can be pressed with respect thereto (subject to defenses such as de minimis). This model chose to create a gap between declaration and enforcement and, in the relevant countries, charges are not pressed for mild corporal punishment. However, this situation can be reversible, for example, if violence should gain momentum. According to the other option, the prohibition remains on the declarative and educating level and in family laws only, and non-upholding of the defenses and even their effective repeal does still not decree a negative arrangement.

Either way, as stated, the purpose of the prohibition, enacted as a right of children, was not penal enforcement, even if there are those who argue that theoretically, penal enforcement is also possible for the breach of civil sections. There is in effect an understanding between the various enforcement authorities, even if without backing in court rulings or legislation, that in mild cases of corporal punishment parents are not to be indicted. It is possible that this fuzziness is the secret of the success of civil rights model, i.e., the public knowledge that the law has the power to adopt sanctions, even if it does not do so, and the moderate conduct of the enforcement authorities in practice. Sometimes the nature of the force of the authority is not in activation of the force but in its very existence and the public knowledge of it. Yet the interpretation is still not clear-cut, and the situation in which indictments and civil actions are not pressed could change. This is too dependent on the policy of the prosecution authorities and the courts. This problem could reach the proportion of prejudicing the legality principle, because a man in the street does not know with certainty at any given time whether a light smack for educational purpose amounts to a criminal offense or not.

One way or the other, this model is considered to be successful. The Supreme Court in Israel also relied on the legal situation in the countries of
Scandinavia as evidence for the need to lay down a legal prohibition on corporal punishment in Israel.\textsuperscript{183} With all due respect, however, this is inaccurate since it is not a matter of a prohibition on the same level because Israeli law took a significant step up and determined corporal punishment a criminal and sweeping prohibition and not a civil right. Another substantive difference is that in those European countries a legislative action was taken in conjunction with a public campaign, whereas in Israel corporal punishment was prohibited by way of a court judgment, which was not received with broad agreement of the Knesset, and did not follow the path of change and preparation of the public mind. In different countries such as Sweden or Austria, the process lasted decades and the legislation was finally enacted almost unanimously. This datum should not be taken lightly. The Scandinavian school, being a pioneer and precedent maker in banning corporal punishment, did not want to shock the foundations of the legal systems and society by moving from one extreme to the other. It chose, therefore, an integrated path of civil, not penal, legislation and a public campaign. The large opposition to the result of the \textit{Plonit} case in Israel proves that it had also been necessary to take a similar path and turn to the civil-legislative level, rather than the penal-court ruling level and to combine it with an extensive propaganda campaign. These two things were not done in Israel, not even \textit{post factum} after the penal judgment.

One of the doubts regarding ramifications of the Scandinavian solution concerns the multi-cultural matter. Society in Sweden and in the other Scandinavian countries accepted the new norm in stages and with almost total agreement following an intensive educational campaign. However, today in Sweden there is not an inconsiderable minority of immigrants from other countries in which corporal punishment has not been totally prohibited, such as Turkey, the countries of the former Yugoslavia, Portugal, Greece, in which corporal punishment was forbidden only in the latter part of 2006, and also a Moslem minority of three percent.\textsuperscript{184} Denmark, Germany, and other countries that have adopted the model also have minorities, but have not, to this point in time, given rise to any problems in this context. A problem can, nevertheless, arise in these countries with a lack of preparedness to accept a law that runs counter to traditional customs, such as corporal punishment, particularly on the background of the opening of large immigrant quotas between the various European countries following the

\textsuperscript{183} Plonit v. Israel, [2000] IsrSC 54(1) P.D. 145, para. 22.
\textsuperscript{184} In the other countries of Scandinavia, there are fewer minorities (traditionally about one and half percent are minority groups, although the number has been rising in recent years in some of the countries).
unification of Europe process. The declarative legislation might then not meet the test of reality and strict sweeping practical enforcement might become necessary, following education and information campaigns, also and in particular within those sectors. An alternative would be turning a blind eye to the frequent occurrences of corporal punishment within those sectors out of tolerance and understanding that changes slowly occur. Recommendations to adopt the civil rights method should, therefore, be treated with some caution, particularly in countries with relatively large minorities and a relatively conservative population.

In Israel, for example, the population consists of a considerable amount of minorities and many groups that make up a mosaic of a colorful multi-cultural society, on religious, ethnic, and ideological backgrounds and on the background of large waves of immigration. Research in Israel and elsewhere point to a problem at the level of obedience to the law of minority groups and sectors in the population, which perceive the law as an instrument in the hands of power groups and controlling groups. The findings of this research indicates that, when a conflict is created between the laws of a religion that permits corporal punishment, and the state law which forbids it, or when there is a sense of inequality and discrimination on the part of minority groups because of a judicial decision which does not, it is argued, allow for the groups of the multicultural society to take the law into their own hands or distort it. This is also the case whenever an act of the legislature or the court does not sit well with ideological, cultural, and religious views.\textsuperscript{185} The same was determined in the past with respect to Germany,\textsuperscript{186} and also in general terms, with respect to the countries of Europe.\textsuperscript{187}

How would those minority groups have behaved in an encounter with a declarative law only? Would they have obeyed it or would they have been indifferent? Would an educational campaign really have helped inculcate the new norms? To these questions, there is no decisive and clear answer. Some of the societies are fairly conservative which makes it difficult to carry out a revolution.

Another characteristic factor of different countries, such as Israel and Italy, intensifies the problem. At the frequency with which

\textsuperscript{187} See James L. Gibson & Gregory E. Caldiera, \textit{The Legal Culture of Europe}, 30 L. & Soc'y. Rev. 55 (1996) (discussing research that was conducted within societies in the European Common Market that came to a similar conclusion).
governments and ministers change in these countries, it is difficult to see a governmental ministry adopting a long-term policy and launching a budget-hungry campaign. A final factor of weight that also gives rise to doubt as to the applicability of the Scandinavian model is that violence in many countries is a national malaise, that can certainly push the law in the direction specifically of strict-penal intervention.

With all these problems, and as will be seen below, the Scandinavian model can, nevertheless, carry us forward toward an effective solution.

IV. Integrated Model Proposal

A. Why Is there a Need for an Integrated Model?

The various models introduced express different levels of legal intervention for parent/child relationships. The moderate legal intervention model, currently existing in many countries, and the minimal legal intervention model, which has faded from the western legal landscape, both express the need to create a special autonomous status for families. Such a status creates, a sort of intimate intermediate unit in society between the individual and public. They are essentially distinct in the level of legal intervention each imposes. Put another way, one root bifurcated into two distinct modalities. One model views the autonomy of the family unit as a buttressed and sanctified goal decreeing almost total immunity against external legal intervention in the patriarchal rule. Such autonomy is evident, in the father’s independent management of the family and by his ownership of the children, which actually expresses excessive extremism and utilization of the weak by the strong. The other model also emphasizes the autonomy of the unit but strikes a balance between this goal and the rights and interests of the children.

The starting point of the strict-penal model is almost the reverse of the two models mentioned above. According to this model, hardly any distinct arrangements are to be made for the family within the customary law, and family disputes are to be heard with the legal tools for hearing disputes between strangers. This model is decisive because the individualism expressed in the consideration for children’s rights is preferable over the needs of the parent and family unit as a whole. This model does not adequately emphasize the considerations at the core of the family unit as a special part of society. Such considerations often concern the child’s interests. This model aspires to equate children’s rights with those of adults. However, it often fails to realize that equalization is only relative to the nature of relationships between adults.
and minors, one in authority and subordinated by their needs, one required to meet these needs, and one with a right free of obligation. Children's equality to adults derives from human nature, while their functions in society, the community, and family are different. There is no real equality between children and adults, and one can at most only refer to the correct balance between power and rights. One can talk about giving the weak children more power than they have today to protect them from damage to their body, dignity, integrity, and respect, but it is not about making the relationship equal. It is about granting more basic human rights to the children.

On the other hand, the moderate legal intervention model more correctly balances between the independence and dynamic required for a family and the rights of the child as an individual, but it is too paternalistic and lacks a clear normative statement regarding invalidation of parental conducts that are harmful to the child's body, dignity, and spirit. It also lacks clear detailed guiding criteria allowing for indictment and conviction. That being so, this model does not bridge with total success between the minimal intervention model and the strict-penal intervention model.

To a large extent, the conflict between the individualistic approach and the family approach, in the juxtaposition of the models, is a conflict of relational law. This examines the dilemma between the creation of a special law for a special category of relations or arrangement of relations through the previous law. It necessitates, in some opinions, passing unique legislation addressing the special and intimate relationships between the parties. 188

Indeed, from the review of the first three, the minimal, the strict-penal, and the moderate models, for legal intervention in parent/child relationships, there is also a need to create a special system of laws for parent/child relationships. These laws will be suitable for the delicate nature of the relationships in the family where there are power gaps of strong versus weak, and they also characterize a system which is by its very nature long-term. It is true that in certain cases attempts to deal with disputes between parents and children will be possible using regular and general legal tools, both penal and tort. For example, the criminal courts already have the power, in such cases to lean more toward rehabilitation and treatment. But taking special family considerations into account could

be more successful although caution is here indicated. The system must be
careful not to distance itself from the accepted legal norms, and must be
smart enough to create suitable internal arrangements, not unattainable
utopian arrangements. Part of the solution presented below is built on
possible improvements in existing legislation. Case law is also very
important, but the route of judicial legislation cannot create legal certainty
and fitting assimilation of the norm.

The civil-rights model compliments most of the missing parts in the
puzzle theoretically presenting a more balanced approach illuminating
the gap between sweeping declaration and moderate enforcement. It
starts out more from the point of view of the child’s rights, rather than
parental punishment. Important principles can be adopted from the
model to assist in constructing a desirable model, although this model
alone will not suffice. Further, it is unclear whether it is possible to work
in every country.

The existing models, therefore, do not succeed in adequately
balancing between the family approach and the individualistic approach.
Recognizing the problems with the existing models, creative and
refreshing thinking is needed to formulate a new model. Such a model
has to receive inspiration from the civil-rights intervention model,
mutatis mutandis, and the advantages must also be adopted from the two
rival modern models, the strict-penal and the moderate models, with their
disadvantages being remedied. This model, influenced by the interim
approach, must find the correct balance between the individualistic
approach and the family approach. Additionally, the best approach must
incorporate Bush and Folger’s relational worldview, which tries to
connect the different approaches. This model must adopt an active
approach that tries to cope with social change through the law, and also
through propaganda and educational campaigns. Additionally, the
method of law must be gentle, but not sweeping on the penal end of the
spectrum.

Below, I propose an integrated solution for the basic dilemma,
which may be generally suitable for any modern legal system. The integrated model starts with an initial assumption that a dispute between a child and parent must be handled in a more gentle fashion than any other dispute. It tries to balance various considerations. Some of these considerations are interested in having the law wholly intervene convicting the parent following conduct that harms the child. Other considerations want to prevent this in some of the cases, at least out of consideration for the child's interest and that of the family unit.

The solution presented attempts to avoid setting one rigid route that may not address every case it is put in place to solve, and allows for flexibility when necessary. The proposal emphasizes the importance of maintaining harmony and restoring calm to the family unit. This is the ultimate reason for exhausting alternative methods of recognizing criminal action without abandoning the child's or family's interest. Additionally, the method attempts to deter, convict, and punish in appropriate cases that are grievous in nature and where the child/parent relationship is unsalvageable.

B. The Integrated Model—A Collection of Proposals for a Solution

1. An Educational Publicity Campaign

Law is not a magic wand that creates miracles of metamorphosis overnight. When evaluating the effects of the 1979 ban (in Sweden B.S.) in particular, one should be mindful that even its twenty-five-years tenure is not that long a time for profoundly entrenched, nationwide attitudes and practices to undergo extensive modification.191

How true this is, particularly with respect to countries such as Israel and Cyprus where the process did not take decades as in Sweden. Unlike Finland, the Israeli public was not prepared to accept the prohibition. In Finland the parliament set about enacting a law after a survey that showed the majority of the public wished to have such a law. It was also accepted in the penal law and, as noted, in Israeli law by the judiciary and not through legislation.

Psychologist Alice Miller explicitly calls on all countries of the world to prohibit corporal punishment but not for social condemnation of parents, rather for the education of the public and inculcation of the matter into the public awareness through the use of legal tools.192 This

191. BITENSKY, supra note 13, at 160.
192. "It is imperative to launch legislation prohibiting corporal punishment all over the world. It does not set out to incriminate anyone but is designed to have a protective
would seem to be an explicit plea for strict-penal legal intervention, but it is tantamount to a recommendation to the legislature to think in different directions and create a gap between a declaration and enforcement of the law. The purpose of thinking outside the box is, first and foremost, to educate the public and implement actual enforcement on the criminal level.

When the Vice-President of the Supreme Court in Israel, Dr. Shlomo Levin, retired from the bench, he stated at the farewell ceremony that in the thirty-six years during which he had sat in judgment, he concluded that:

The law is not the be-all and end-all and it is not capable of correcting all the negative phenomena of society. The law is unable to change improper modes of conduct that have become enrooted. One should not despair of continuing the work but the main burden is on education, from a young age, and on the existence of ground work, and it is a pity that we are so far behind in this matter.\footnote{See http://www.ynet.co.il/articles/0,7340,L-2447934,00.html, February 20, 2003 (last visited July 15, 2007).}

As mentioned, the civil-rights model attributes special importance to ground work in educating the public, but not only through the law. It is recommended to use a publicity campaign while attempting to inculcate the prohibition into law. Such a campaign was undertaken by the Ministry of Justice in Sweden and other countries. This shows that a certain space is possible for mild corporal punishment in terms of not pressing criminal charges against the parent, and at the same time explaining to the public why corporal punishment is unacceptable and should not be used to educate children, what damages it causes and the proposed alternatives. Many parents would be surprised to know there are other systems of education, no less effective than corporal punishment and less harmful. The law can participate in the process with statements in judgments (for example, by pointing out in an \textit{obiter dictum} what is desirable) and by justices giving lectures and writing articles on the subject. The legal norm should be inculcated gradually from an understanding that norms really cannot be changed overnight even with a binding rule from the Supreme Court or legislation.

Some creativity can be shown in solution proposals including

\footnote{See http://www.naturalchild.com/alice_miller/manifesto.html (last visited July 15, 2007).}
lectures, written information material, information material broadcast by radio and television, advertising on consumer products, information material on Internet sites, mailing of information material to homes, free training courses or at a low, subsidized price, advanced study courses and training of new parents as a condition for receipt of the maternity grant.

Special importance is to be attributed to the existence of a campaign specifically in a multi-cultural society. This is the correct way to try and inject norms in which the majority is interested, at least ab initio, into minority groups, not by force and not by using the (primarily penal) law. Each sector has to be addressed in a way that is proper and suitable for it. The training in each sector should be undertaken by appropriate representatives, preferably representatives from that sector (lecturers, doctors, community nurses, educators, psychologists, parent counselors, men of religion and so on, perhaps even with lectures by judges). The adjustment to change takes time particularly within certain sectors. The internalization can be helped if, a person were to look to either side, he would see his peers behaving according to the new norm.

For all this, a government budget has to be set aside rather than rely on limited funding from private organizations. Resources are often non-existent, despite the necessary resources to conduct a criminal process against a parent and the damage to society as a result of criminal processes are quite expensive. An investment has to be made in preventive education. This is a simple cost-benefit analysis.

The strict-penal intervention model would seem to have reversed the order and gone immediately to the stage of sweeping legal prohibition. However, it is still important that information be disseminated even in those countries which have already accepted a legal prohibition on corporal punishment if such prohibition has not yet been assimilated amongst the population and no decline in the phenomenon can be noted.

2. Achievement of Social Consent through Postponing Implementation of the New Norm

Another sophisticated way to inculcate the norms into society, which could be suitable for each society contemporaneously with the educational campaign, is to obtain social consent regarding the undesirability of certain parental conducts by postponing the date for implementation of the new legal norm. It has been suggested that a prohibition on corporal punishment, and other parental conducts, be determined but that the law states that the prohibition will come into
force some time later, say after two years.\textsuperscript{194}

Apart from these suggestions (and not in their stead), it can be said that the law creates a gap not only between legislation of the norm and the date on which it will come into effect, but also between the declarative nature of the norm and its actual enforcement, even if only for the interim period before the new norm becomes operative. More on this will be presented in the next part.

3. Creation of a Reasonable Gap Between Sweeping Declaration and Moderate Enforcement

Finding the right balance between the individualistic approach and the family approach is by no means a simple matter. Bush & Folger premised a theoretical foundation on thinking, which created a relational worldview. This, in effect, constituted a bridge between the different approaches,\textsuperscript{195} but it has yet to be seen whether it is practical. In this part, I shall look at one of the central solutions arising from the existing models, which could lead to an interesting application of the relational worldview.

We have seen the nature of the civil-rights intervention model is the formation of a structured gap between sweeping intervention, expressed in clear declarations regarding the supremacy of children's rights, and moderate enforcement, but only in grievous or rare instances. And indeed, there is no worry about a gap between sweeping declaration and moderate enforcement. As noted, the goal is not always activation of the sanction in practice.

It should be noted that there are other examples in parent/child relationships of declarative sections of law that maintain the rationale of a legal declaration not necessarily backed up by enforcement. For example, Section 16 of the Legal Capacity and Guardianship Law in Israel,\textsuperscript{196} requires children to obey their parents in every matter subject to their guardianship. Each child must maintain respect for their father and mother. This section is derived from the fifth of the Biblical Ten Commandments to "Honor thy father and thy mother." Israel does not, it would seem, enforce this section in practice in tort laws or in any other legal sphere. It is, indeed, difficult to imagine a situation in which this section would be enforced in the gamut of the daily relationships in a family. It cannot be expected that for every refusal of a child to do his/her parents' bidding the child (at least above the age of twelve years, the age of tort liability) would be exposed to a claim in tort against him by the

\textsuperscript{194} SEBBA, supra note 80, at 458-59.
\textsuperscript{195} BUSH & FOLGER, supra note 8, at 238-46.
\textsuperscript{196} Capacity Law, supra note 59.
parents. Hence, Israeli law recognized in theory and practice the existence of a section of law whose purpose is purely declarative, whose importance is on the socio-value plain only, and not enforced by choice (and perhaps even ab initio), in consequence of the daily family reality. The American Restatement also talks about the non-immunity in principle of a child against being sued by the parents, and here too an action by a parent against a child has not been found.

The proposal here is to enforce, in a moderate fashion rather than not at all. The rationale underlying the civil-rights intervention model can be utilized for the purpose of this part of the proposed solution, both with legislative action and with the action of the prosecutorial authorities and judicial action.

"By legislative action” means legislation of a balanced section “prohibiting” corporal punishment specifically in civil legislation, by determining a suitable human right for children. The section could be added, for example, to the Legal Capacity laws or to the children’s rights and family rights laws existing in many countries in the world. Following is a proposed possible formulation, matching the range of parental conducts:

The child shall be entitled to having any discipline vis-à-vis him/her by a parent or other responsible person in loco parentis temporarily or permanently, to whose authority the child is subject, administered in a manner becoming to human dignity, to be exercised reasonably, moderately and proportionately and he shall also be entitled to have no hurtful, humiliating and demeaning physical disciplinary measures activated against him/her.

The section starts with the premise that instilling discipline is a positive action and is actually one of the child’s rights. It is also part of the parent’s obligation to the child. The parent and his proxies must navigate between the need to realize this right while not inflicting any physical or mental injury on the child. The section applies both to parents and anyone filling in for them provisionally or permanently (such as step parents or foster parents), provided there exits an element of authority over the child according the parent and caretaker a legal right to impose discipline on the child. The section leaves no possibility for physically or mentally injurious punitive measures or for demeaning or humiliating measures. It contains foundations of reasonableness, moderation, and proportionality to be filled with content in case law which is handled in the next part.

197. Restatement (Second) of Torts, § 895G(2) (1977) (providing that “A parent or child is not immune from tort liability to the other solely by reason of that relationship. . .”).
The section is effectively restricted to two main situations. The first situation is the possibility of imposing disciplinary measures which cause no physical or mental harm. Corporal punishment is not included. The second situation is the possibility of using force if not for a humiliating or demeaning purpose, for example, to calm down a child having a tantrum or protecting the child's life or that of another person against something the child is doing. In such a case the action of the parent is subject to the principles of reasonableness, moderation, and proportionality.

"By action of the prosecutorial authorities," means the possibility of prosecuting parents, but not in every instance of parental conduct even if considered injurious. In cases of mild, moderate and reasonable corporal punishment a policy of not prosecuting should be adopted. In other more serious instances prosecution is, and should be a matter of routine.

"By judicial action" means implementing the possibility of moderate enforcement alongside a sweeping declaration. There are two different interpretations. First, in mild cases, a policy should be adopted of non-conviction. Secondly, there should be a conviction in cases which are not mild, but with special attention being given to consideration for the rehabilitation of the family unit and restoration of its harmony, all being with minimal harm to the other members of the family unit, including the child who was the victim, particularly if the family has already been hurt as a result of the actual legal process. It is incumbent upon the court to take into account, when passing sentence, the current state of the relationships between the parent and the child at the time of the hearing rather than at the time when the offense was committed. In such a situation, if there is data such as a probation report, reporting that the relationship has improved since the incident and there is a good chance for rehabilitation of the family unit, a therapeutic approach should be tried, particularly if the child asks for this himself. The court can sometimes be forgiving as far as enforcement of the norm is concerned, mainly in mild cases where the motives are positive and educational and meant to assist the family to get over the crisis.\textsuperscript{198}

When a file, which is suitable in principle for treatment and rehabilitation, comes before the court, either because it was not referred to the treatment track from the outset or because the circumstances changed after the indictment was filed, the judge can make numerous decisions. The first is to allow the treatment track even after legal procedures were taken by postponing the judgment date in order to allow time for treatment to run its course. Another possibility is to convict the parent in court but to create a mechanism of punishment that ensures the non-dismemberment of

\textsuperscript{198} Cf. Schuz 2003, \textit{supra} note 100, at 247.
the family unit. A third possibility is a final judgment (for example, a probation order or public service work without a conviction) referring to the treatment and rehabilitation track without a conviction. In many cases, the third option is problematic because it nearly nullifies the deterrent purpose; however, some cases do call for such a judgment. Either way, a balance should be sought between considerations of deterrence and rehabilitation in countries that have imposed a penal prohibition on corporal punishment. A finger should also be kept on the national pulse to sense developments which necessitate greater rigorousness, such as where the conduct becomes a "national malaise" and so on.

If declarative legislation causes parents to fear being indicted the legislation has served its purpose. But one has to be careful and exercise caution not only over excessive enforcement, such as with the strict-penal intervention model, but also over excessive forgiveness in cases where there is no justification for such. When severe punishment has to be administered, such should be done without concern or fear, lest there be no deterrence and matters remain at a declarative level only. How can the prosecutorial authorities and the courts know which cases necessitate enforcement of the sweeping declaration? General sections of law do not suffice. The determination relies on a list of guiding criteria. The next part deals with this.

4. Presentation of Criteria for Criminal Prosecution

One cannot be satisfied with only the civil-rights intervention model, that is, with the very creation of the gap between declaration and enforcement. Because the gap is not at the level of a sweeping declaration versus total non-enforcement, but at that of a sweeping declaration versus moderate enforcement, the latter has to be expressed in a list of criteria for directing conduct and for recognition of a criminal action. General criteria based on reasonableness and moderation are not always adequate. The legislature or the courts should be required to specify more parameters and proper conduct for parents and educators. Canadian law has done this to an extent, but it lacks a sweeping declaration. There is, therefore, a place to present a list of guiding criteria to both judges and parents so that parents will have the tools to know how to act, and to judges so that they will have some guidance as to how to rule, enabling uniformity in their judgments. The greater the number of rules and criteria from the list upheld in a case will make it easier for the court to determine whether the parent should be convicted. The criteria are only guidelines and should, therefore, guide only, leaving all matters to the judge's discretion. As follows, the criteria do not constitute an exhaustive list:
(1) The parental conduct is intentional and voluntary/willful or reckless, with no good faith and not in the best interest of the child. Cases of corporal punishment administered for the purpose of the child’s education are presumed to be such. Nonetheless, use of force against a child, even moderate force, particularly if applied in a humiliating and demeaning form does not stem from a positive and educational motive and is not done in good faith or for the interest of the child.

(2) The extent of the desirability of the action taken. The underlying motive for corporal punishment is affirmative, where as the motive for neglect or abuse is negative. With respect to corporal punishment, the dispute is inherent in the legitimacy of the parental action and in the legal recognition of the remedy relative to the damage resulting from such action. On the other hand, neglect does not prima facie disclose any educational or other positive motive, therefore, a claim should be welcomed, as is a claim with respect to actions that are not associated with the competency of a parent, such as driving or labor relations, and it should be equated with any other action that has no positive facet underlying it, such as sexual abuse. Similarly, some importance should be attributed in the penal aspect to the motive for the conduct. It has to be understood that parents in many instances hit their children lightly out of love and are certain they know how to educate them. The hitting is not done out of a possessive perception. Even if the conduct is perceived as unacceptable they cannot be considered parents who neglected or abused their children.199 This is not to say that the moment an accused parent points to a would-be educational motive, he or she should be acquitted. This is just one of the proposed criteria and the motive has to be examined punctiliously.

(3) Deviation from reasonableness, proportionality and moderation in auctioning the parental conduct. Content has to be poured into these principles by pointing to cases that prominently deviate from them.200 (1) The parental conduct is cruel and humiliating. Cruelty is usually a sign of abuse. It can be expressed in the force of the blow, the use of accessories, the explicit humiliation (for example, when administered in public) and in anger accompanying the action. (2) The parental conduct is ongoing and frequent. A one-time smack is not similar to continuous hitting as part of the family’s daily routine. Hence it is not only the frequency of the act but also its duration at a given time. An act which lasts a long time, even if not repeated with a high

199. Id. at 250-51.
200. This is mainly in accordance with the reservations for corporal punishment as the Canadian law has indicated and in accordance with the analysis of the definition of “abuse” and the distinction between it and offenses of battery in the Israeli judgment in Plonit.
frequency, is more serious and may be assumed not to be proportionate, moderate and reasonable. Frequent blows can turn into psychological abuse. (3) The conduct is directed at a young child (ages zero to six years) or at a child who has reached puberty (above the age of thirteen years). (4) The nature of the child is not suitable for parental conduct, for example, hitting a mentally retarded child or a very difficult child, or where the punishment will only cause him/her to rebel, and so on. (5) The proven injury is serious. The injury actually caused is certainly important and can indicate, for example, the cruelty of the deeds. To this end, the nature of the injury has to be checked in each case. It must also be noted that a good portion of injuries do not come to light immediately, but develop in the child during later stages of his life. (6) The gravity of the deeds accompanying the corporal punishment. If the corporal punishment is accompanied by verbal violence, neglect, degrading confinement and so on, the whole gamut of the parental action should be observed and forbidden.

(4) Safeguarding the integrity of the family unit as far as possible in the circumstances of the case, and looking at the chance to repair the tears and restore harmony to the family So long as there is a possibility of restoring harmony, (the examination will be made by a direct impression of the court in addition to obtaining a probation report or expert opinion) the law should do its part in the attempt to rehabilitate the family unit during sentencing. When the broken unit can no longer be called a family and there is no possibility of rehabilitating it and of restoring the harmony to it even partially, the action is similar to one between two de facto strangers.

5. Examination of the Transfer of the Power to Hear Offenses Within the Family to the Court for Family Affairs or to Specially Trained Judges

In some countries there is no separate court for family affairs, or such court does not have the jurisdiction to hear offenses in the framework of the family but only matters of “pure” family law (adoption, or custody and alimony disputes) and civil claims between members of the family. Having well trained judges in this area of family law who understand how punishment can impact the familial unit coupled with proper approaches to mediation between the victim and the parent will contribute to a more complete solution. Judges who are well aware of the family conflict and do not view the dispute as being between two strangers can create a gap between sweeping declaration and moderate enforcement and if necessary punish severely. They have good tools to refer the parties to rehabilitation and an understanding that the power of
the law can make things worse especially in domestic disputes.

Alternatively, as a matter of routine, some judges in the criminal courts can be referred for special training to specialize in offenses in the family context and relevant files can be directed only to them.

V. Conclusion

Three years of hearings in a criminal case dealing primarily with corporal punishment ended with these words of the Court:

The accused was suspended from his respectable position and resigned from service of many years in the military. The couple, who divorced before the complaint which led to the indictment, found themselves sitting accused together, represented by two attorneys, facing their son, the fruit of their union, who, after the filing of the complaint, left the nuclear family and cut himself off from all contact, direct or indirect, with all members of his family, leaving himself alone in the world. And the son stands facing them on the witness stand; points an accusing finger at them, all the while desisting from calling them mother and father but referring to them by their names; looks them straight in the eyes and describes—in public, and in the presence of representatives of the media—what he claims they did to him from the time he was three years old, as he stood hesitant and introverted, hunched over and holding in his hands a vest or bottle of drink; and later, as his testimony continued—standing erect, confident, exaggerating somewhat, conversing, laughing out loud, smiling, ridiculing, shedding a tear, sinking into memories, and interested in continuation of the testimony and the dialogue with him... a great amount of patience and sensitivity were required in this case; and from the start I knew that no legal result would be "good" but would seriously hurt someone in this disintegrating family, if not all of them... the accused—for their part—fought for their good name, perhaps for their lives; were concerned for their son and fearful for their future and the results of the hearing.201

In such cases there are no victors only vanquished. Legal intervention in the issue of corporal punishment must not be too sweeping or minimal and forgiving. The minimalist intervention is passé and no longer is part of modern society, and that is good. A certain family space has to be created but the family must not be abandoned enabling the strong to exploit the weak. Every person has basic rights, among them equality and safeguarding body and dignity. Strict-penal intervention, on the other hand, which is at the other end of the spectrum, could destroy the nuclear family

including the child.202

Legal intervention in parent/child relationships is itself welcome, and a man's home does not have to remain a castle against the intervention of the law, particularly if the parent in question is taking painful and humiliating actions against his child. However, the State should not always be related to as a "super-parent" while narrowing parental discretion for educating their child, particularly in a multi-cultural society. Legal intervention does not always have a result that sits well with the best interest of the child. Strict-penal intervention should be left for the grave cases and should be applied cautiously. It is possible that in spousal relationships there is more reason to apply an individualistic approach and equality in rights and duties, although even there the family approach and the family as a unit have meaning. In parent/child relationships, the application of such an approach is more problematic since these relationships by their very nature are not relationships of equality but of authority and a true equality between parents and children will result in anarchy. Children will grow up wild without principled frameworks, and parents will fear that any attempt to intervene in the education of their child could put them in court as accused or defendants. The moderate legal intervention model existing in many countries, most notably the common law countries, demonstrates a more considered and correct balance taking into account world outlooks, beliefs and opinions in a multi-cultural society. However, it looks at a situation from an overly paternalistic point of view which does not adequately emphasize the rights of the child.

Corporal punishment is a classic example of the question of the impact of social changes on the law and society. Should the law not take a daring step forward because it does not find support for such a step in public sentiment, for example, in the United States and seemingly also in England, or should the law opt to try and change the reality and go forth as a vanguard before the camp through civil-human rights statutes and with a public-social campaign to introduce the norm, as is done in Scandinavia and other countries in Europe, or in a severe manner as was done in Cyprus through criminal legislation and in Israel through criminal court rulings.203

202. Cf. CA 2266/93, Anon v. Anon, 49(1) P.D. 221, 231, 237-9, at 260-1 (providing a statement by the President of the Supreme Court in Israel, Meir Shamgar, "Greater intervention by the State, through the Courts, in the decisions of parents vis-à-vis their children... grants the child a stronger standing within the family. The end of this process is that it will also hurt the children themselves, for it has to be remembered that the logic of the autonomy approach holds that the parents are the best decision makers for their children. The concern is that undermining [the parents'] status in one context will undermine all the family relationships.").

This Article integrates advantages from existing models with some new concepts. As far as possible the proposal safeguards the rights of the child without seriously harming the nuclear family. The Article moves cautiously between two poles, with one rejecting intervention and proposing leaving the family dynamic as is, and the other supporting massive intervention because of the damage to the rights of the child, all from an understanding that legal intrusion into the family has to be intelligent both in nature and in scope. The Article tries to show that this special unit has to be allowed to retain a certain measure of autonomy in the conduct of its affairs. The proposal expresses a balanced compromise between the models. The proposal does not exaggerate the view of the individual’s rights on account of the family’s rights, even though it does not in practice eat away at the child’s rights. Additionally, the proposal tries to view the picture as a whole and relate to the interest of the child in its broadest sense while being concerned with the situation where legal intervention will destroy the family.

The proposal relies on five central bases, some of them are educational and preventative, in order to teach the parents to adopt alternative paths to corporal punishment. This is for the purpose of changing the norm among the public in a more convenient way allowing for its true adoption.

The conclusion of this research is only the beginning. One could examine other parental actions through the lens of the same models including the proposed integrated model with the same tools, mutatis mutandis. In those issues, one must understand that a dispute in the family context is an expression of a serious ongoing crisis that harms all members of the family. Any non-gentle legal intervention could make the situation worse and the first to be harmed might again be the child. A dispute in the family cannot be treated as a dispute between two strangers.

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a general discussion of the role of the court in the common law countries in deciding between norms, one of which is more acceptable in society and the other less so, and in accepting the first point of view presented above, according to which law is in effect a reflection of social and ethical norms and does not advance alone without examination of the accepted social norms); see Robert Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 93 (1984) (providing a view of the law a unifying glue containing the shared values of the society); Warburg, supra note 25.