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Children's Rights in Israel: An End to Corporal Punishment?

By Tamar Ezer*

I. Introduction: The *Plonit* Decision

On January 25, 2000, the Supreme Court of Israel issued the landmark *Plonit*¹ decision, which prohibited the use of corporal punishment as an educational tool by parents. In this case, the Court rejected an appeal by a mother, convicted of assault and abuse for slapping and striking her two minor children with shoes and a vacuum cleaner. The mother denied that her actions constituted abuse and further excused them as "disciplinary measures" imposed on her children "in order to educate and improve them."² The Court both declared the mother's actions abusive and rejected the parental defense for corporal punishment. Maintaining that "corporal punishment as an educational method not only fails to achieve its goals, but also causes physical and psychological damage to the child, that is liable to leave its mark on him even in maturity," the Court proclaimed a strict policy against the physical punishment of children and imposed a duty of protection upon the state.³ While carving out a narrow exception permitting the use of force to prevent injury to children or others,⁴ the Court held that

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¹ *Plonit* is used in Hebrew to keep a female party's name anonymous and safeguard her privacy, similar to Jane Roe in English. Throughout this paper, I will thus refer to the Supreme Court case as the *Plonit* decision. Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145.

² Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145.

³ *Id.* at 170.

⁴ The Court differentiates between the use of force for "educational punishment," which is "void and forbidden" and the "reasonable use of force

"corporal punishment of children, or humiliation and the derogation from their dignity as a method of education by their parents, is entirely impermissible."⁵ This decision caused a splash in the media and sparked debates on proper methods of child-rearing, both amongst secular child specialists and within the religious community. It was highly controversial for three reasons. First, it calls for state intrusion into family privacy. Second, it gives children's right to be free from violence the constitutional status of a basic right. Third, it appears to draw a distinction between the norm-setting role of law and enforcement.

A. State Intrusion

The *Plonit* decision calls for state intrusion into the "sacrosanct" privacy of the family home and close regulation of parent-child relations. In *Plonit*, the Court asserted, "The law imposes an obligation on state authorities to intervene in the family unit and to protect the child when necessary, including from his parents."⁶ This is the case since the state has an "obligation to protect those that cannot defend themselves."⁷ Furthermore, the child is not an incomplete entity to be subsumed by the family. Rather, "in our society the child is an autonomous person, possessing his own independent interests and rights" that the state must safeguard.⁸ The state thus has an independent responsibility to each child. The Court emphasized that "even a little person, has all the rights of a big person,"⁹ upholding the "basic right of the children in our society to dignity, bodily integrity, and health of mind."¹⁰

to prevent injury to the child or to others" or "to preserve order." Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 182. For instance, a parent can use force to prevent a child from running into the street.

⁵ Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 180.

⁶ *Id.* at 176.

⁷ *Id.*

⁸ *Id.* at 178.

⁹ *Id.*

¹⁰ *Id.*

The Court recognized parents' rights, but stated that they are subordinate to the rights of children. As it explained, the "rights of parents to raise and educate their children are not absolute. The relative nature of these rights is expressed in the obligation of parents to care for the child, his best interests, and rights."¹¹ Although the decision calls the right of parents to control their children's upbringing "a natural right,"¹² the Court emphasized that this right can be forfeited. Since the "child is not its parents' property . . . [w]hen a parent does not properly fulfill his obligations, abuses his discretion or parental authority in a manner which endangers or harms the child, the state will intervene and protect the child."¹³ Thus, "parental discretion is limited and always subject to the needs of the child, to his welfare, and to his rights."¹⁴

The Court's approach appears radical since it contradicts the common law individual liberty tradition, where courts attempt to maintain a public/private distinction and are reluctant to allow the state to pierce family privacy. In fact, the Israeli Court has taken the opposite approach from that of England and many states in the United States, which have gone so far as to statutorily protect the parent's right to employ physical punishments that are "reasonable" and for the purpose of either education or discipline. However, even in England and the United States, the public/private divide has begun to weaken with the recognition of women's rights, requiring the state to deal with domestic violence and violations within the family. The recognition of children's rights is perhaps the next stage in this dissolution.

The Israeli Court tied violations of individual human rights caused by corporal punishment to social harms. It cautioned, "We must . . . take into account that we are living in a society where violence is spreading like a plague; a permit for 'minor' violence is likely to deteriorate into very serious

¹¹ *Id.* at 176.

¹² *Id.* at 175.

¹³ *Id.* at 176.

¹⁴ *Id.*

violence.”¹⁵ Thus, not only does “employing punishment that causes pain and humiliation” violate the child’s “rights as a human being,” but “it distances us from our aspiration to be a society free of violence.”¹⁶ In this way, the Court shattered the private/public distinction, revealing a “private” violation within the home and family to be a matter for public concern and government interference.

B. Fundamental Right to Be Free of Violence

The *Plonit* decision was controversial because not only did it recognize children’s right to be free of all violence, even the “educational” kind, but it also endowed this right with a constitutional status. Starting in 1979, various Scandinavian countries had already rejected the use of physical discipline, but this prohibition was legislated, not proclaimed by the court.¹⁷ By contrast, Israel’s prohibition is similar to that of Italy’s – coming from the country’s Supreme Court. Since Israeli legislation does not criminalize physical discipline, the Court supported its decision by referring to both the 1992 Basic Law: Human Dignity and Liberty¹⁸ and the International Convention on the Rights of the Child.¹⁹ Even though Israel does not have an official constitution, its Basic Laws create a constitution by piecemeal, and a Basic Law can trump legislation. Citing the Basic Law and international principles thus elevated the decision to a constitutional level, making the matter one of fundamental rights. As the Court explained, the Basic Law:

¹⁵ *Id.* at 181.

¹⁶ *Id.* at 180.

¹⁷ John E. Durrant, *Evaluating the Success of Sweden's Corporal Punishment Ban*, 23 CHILD ABUSE & NEGLECT 435 (1999).

¹⁸ Basic Law: Human Dignity and Liberty, 1992, S.H. 1391.

¹⁹ U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess. 61st mtg., U.N. Doc. A/Res/44/25 (1989) [hereinafter CRC].

Human Dignity and Liberty "raises the status of human dignity to a super-legal constitutional rank."²⁰

C. Norm-Setting and Enforcement of the Law

The decision seems to differentiate between the norm-setting function and enforcement of law. While it takes a hard line, virtually abolishing the corporal punishment of children, it nevertheless counsels prosecutorial restraint. The Court stressed, "the criminal law includes enough 'filters,' ensuring that petty cases will not be included in its sweep."²¹ First, "the prosecution has discretion not to go to trial in the absence of the public interest."²² Moreover, "the criminal law contains the '*de minimis*' defense, which may also be used to prevent the imposition of criminal liability for the use of mild force."²³ The Court thus reassured that "acts which an ordinarily constituted individual would not complain about" and "routine physical contact between a parent and child" will not serve as a basis for criminal liability.²⁴ This brings up the question of how judgments weeding out the trivial cases will be made. Is this a recipe for discriminatory and arbitrary enforcement? But, perhaps these same concerns are implicated with all laws, as most pertinently, with the prohibition on assaults against adults. Here, however, the Court was explicit about the impossibility and even undesirability of complete enforcement. The Court emphasized its role in shaping citizens' internal concepts of right and wrong and not just the external laws regulating behavior, backed by the might of the state.

As is customary, the *Plonit* case was decided by a panel of three judges. Justice Dorit Beinisch wrote the decision, in which she both defined abuse and declared that "no corporal

²⁰ Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 179.

²¹ *Id.* at 182.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

punishment is permitted.”²⁵ Justice Aharon Barak concurred with Justice Beinisch’s opinion without further comment. Justice Yitzhak Englard wrote a partial dissent in which he took issue with Justice Beinisch’s characterization of abuse, but did not address the Court’s rejection of all corporal punishment. However, he joined the other justices in condemning the mother’s actions as an assault.²⁶ He stated, “[T]he violent manner in which the mother punished her children was neither reasonable nor can be defined as *de minimis*.”²⁷

This paper aims at an exploration of three issues. Part I places the *Plonit* decision within both the Israeli and international context, and it examines the legal, political, and social climate that made this decision possible. Part II focuses on enforcement of the decision. To get a sense of the immediate legal impact of the *Plonit* case, I analyze the legal opinions citing it. Interviews with the various children’s rights organizations in Israel and with the government agencies in charge of law enforcement further provide insight into *Plonit*’s enforcement. Part III looks at the reception of the *Plonit* decision, focusing on the views of experts and concerns it raised amongst the public. This portion of the paper aims to investigate the impact of the *Plonit* decision on the cultural discourse that, in turn, shapes the legal environment.

II. Context

A. The Israeli Legal System

An understanding of the Israeli legal system is necessary in order to place the *Plonit* decision in proper context. What

²⁵ *Id.* at 181.

²⁶ The mother in this case claimed that she acted for the good of her children. She did not express remorse for her behavior and would not commit that she will stop hitting her children if it seems necessary for her to do so. Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 184 (Englard, J., dissenting).

²⁷ Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 184 (Englard, J., dissenting).

was the legal, political, and social climate in Israel that made this decision possible? In this section, I will provide some basic background to the functioning of the Israeli legal system, the role of the court, and the role of government in defining the status of the child and the family. This will enable exploration of questions of democratic legitimacy and relations between the state and its citizens.

1. General Framework

Until the end of World War I, Israel was part of the Ottoman Empire and governed by the *Mejelle*, the Ottoman code influenced by Islam and modeled after Napoleon's *Code Civile*. Most of this Ottoman heritage is of no practical significance today. However, Israel's Admiralty and Civil Procedure contain portions of Ottoman Law, and the Ottomans shaped the current structure of religious courts regulating personal status issues, such as marriage, divorce, custody, and inheritance.²⁸ In 1922, Turkish rule was followed by the British Mandate until establishment of the State of Israel on May 14, 1948.²⁹ British legislation still in effect at this time was incorporated into Israel's law (Section 11 of the Law and Administrative Ordinance), and much of it survives today in revised form.³⁰

The Israeli Supreme Court consists of twelve permanent justices and additional acting ones, who serve until the age of seventy. Currently, there are fourteen justices on the court. Cases are normally presented in front of *ad hoc* panels of three judges, randomly chosen by the President of the Court.³¹ A

²⁸ Yoram Shachar, *History and Sources of Israeli Law*, in INTRODUCTION TO THE LAW OF ISRAEL 1, 3 (Amos Shapira & Karen C. DeWitt-Arar eds. 1995); ARIEL BIN-NUN, THE LAW OF THE STATE OF ISRAEL 4-7 (1992); Stephen Goldstein, *Multiculturalism, Parental Choice and Traditional Values: A Comment on Religious Education in Israel*, in CHILDREN'S RIGHTS AND TRADITIONAL VALUES 118, 119-20 (1998).

²⁹ ARIEL BIN-NUN, THE LAW OF THE STATE OF ISRAEL 4 (1992).

³⁰ Shachar, *supra* note 28, at 8.

³¹ *Id.* at 9.

decision by the three-judge bench may be subject to rehearing by five or more judges of the Supreme Court if the decision deviates from a previous rule or deals with a question of particular importance.³²

The Supreme Court has played a fundamental role in the development of public law, regulating relations between citizens and the state, and in the protection of individual rights. Until 1992, the Supreme Court did not have the power to strike down legislation, but it could subject administrative action to full judicial review under its *Bagatz* function. *Bagatz* procedure allows direct access to the Supreme Court to any individual aggrieved by the State, regardless of the economic weight or legal significance of the infringement. In this capacity, the Supreme Court acts as a high court of justice, reviewing the administrative activities of the other branches of government and protecting individual rights.³³ As Israel has not yet adopted a formal constitution, the development of rights doctrine has been a common law function undertaken by the courts.³⁴

Although Israel does not have an official constitution, the Israeli Knesset is creating a piecemeal constitution through the passage of Basic Laws to be eventually pulled together into an integrated whole.³⁵ Although theoretically a Basic Law has

³² BIN-NUN, *supra* note 28, at 201-02.

³³ Now, in order to lighten the load of the Supreme Court, administrative departments in the district courts take care of simpler legal cases. The Supreme Court has judicial review over the cases decided by these administrative departments. Law for Administrative Courts (2000). At times, this is an appeal as of right and, at times, it requires the granting of Supreme Court permission at <http://www.leetlaw.com/files/int19.htm> (last visited Apr. 25, 2003).

³⁴ David Kretzmer, *Constitutional Law*, in INTRODUCTION TO THE LAW OF ISRAEL 39, 45 (Amos Shapira & Karen C. DeWitt-Arar eds. 1995). "In a long line of decisions, beginning with . . . *Kol Ha'am v. Minister of Interior* [H.C. 73/53, *Kol Ha'am v. Minister of Interior*, 7(2) P.D. 871 (1953)], the Supreme Court has held that because Israel is a democracy, basic civil rights as accepted in other democracies are part and parcel of the Israeli legal system." *Id.*

³⁵ According to the Harrari Resolution, "The first Knesset charges the Constitutional, Legislative, and Judicial Committee with the duty of

no greater permanence than any other law and can be altered by a majority of the Knesset, a Basic Law has the power to trump legislation.³⁶ While the first nine Basic Laws passed by the Knesset are mainly structural, defining the branches of government, the Knesset enacted two Basic Laws in 1992 that deal with human rights. These are the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation.³⁷

The Supreme Court has interpreted these two new Basic Laws as opening the way for judicial review of legislation, and Supreme Court President Aharon Barak heralded their passage as a "constitutional revolution."³⁸ Justice Barak proudly declared, "Similar to the United States, Canada, France, Germany, Italy, Japan, and other western countries, we now have a constitutional defense for Human Rights. We too have the central chapter in any written constitution, the subject-matter of which is Human Rights . . . we too have judicial review of statutes which unlawfully infringe upon constitutionally protected human rights."³⁹

preparing a draft constitution for the State. The constitution shall be composed of individual chapters, in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work, and the chapters together will form the state constitution." *At*

http://www.knesset.gov.il/description/eng/eng-mimshal_hoka.htm#4.

³⁶ BIN-NUN, *supra* note 28, at 38. Thus far, the Supreme Court has twice used the power of a Basic Law to strike down legislation.

³⁷ Gal Dor, *Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective*, 11 IND. INT'L & COMP. L. REV. 1, 3 (2000); Ran Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427, 428 (1998).

³⁸ Aharon Barak, *The Constitutionalism of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law*, 31 ISRAEL L. REV. 3, 3 (1997).

³⁹ Hirschl, *supra* note 37, at 430-31 (quoting Aharon Barak, *The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law*, 31 ISRAEL L. REV. 3-21 (1997)).

Although the rights protected in the two Basic Laws are phrased in absolute terms, they each contain a limitation clause, providing that the right may not be violated "except by a statute that befits the values of the State of Israel, for a worthy goal, and not exceeding what is necessary."⁴⁰ Thus, the Basic Laws themselves recognize the protection of rights as a balancing act that at times calls for their infringement in order to preserve the state and social structure upon which they are premised. The Court thus tests rights violations with a two-tiered analysis, similar to that employed by Canadian courts under the *Canadian Charter of Rights and Freedoms*. First, the court examines whether a statute infringes on a basic right, interpreting both the constitutional text and the statute.⁴¹ Here, the burden of proving all the elements of a breach rests on the person asserting it. If there is an infringement, the court moves on to the second stage and must decide whether it fulfills the requirements of the limitation clause. At this point, the burden of proof shifts to the government seeking to support the challenged law.⁴²

The *Plonit* decision is based largely on the Basic Law: Human Dignity and Liberty. This law states the following:

The fundamental rights of a person in Israel are grounded on the recognition of the value of human beings, on the sanctity of life and of their freedom, and they will be honored in the spirit of the principles set out in the Declaration of the Establishment of the State of Israel. The object of this Basic Law is to protect human dignity and freedom, in order to entrench the values of the State of Israel as a Jewish and democratic State in a Basic

⁴⁰ Basic Law: Human Dignity and Liberty, Provision 8 1992, S.H. 1391; Basic Law: Freedom of Occupation, 1994, S.H. 1454.

⁴¹ "The courts must choose an interpretation of a statutory provision that furthers protection of basic rights." Kretzmer, *supra* note 34, at 51.

⁴² Barak, *supra* note 38, at 9-10.

Law. No injury may be caused to the life, person or dignity of a human being as a human being. Every person has the right to protection of his life, his person and his dignity.⁴³

The Basic Law: Human Dignity and Liberty has been interpreted to protect a number of fundamental rights: the right to life, bodily integrity, privacy and personal confidentiality, property, liberty against arrest and imprisonment, and liberty to enter and leave the country.⁴⁴ According to Justice Barak, the Basic Law: Human Dignity and Liberty contains both a prohibition on violation and an obligation of protection to ensure the “minimal promise of a humane material and spiritual existence.”⁴⁵ However, Justice Barak explicitly noted that “social human rights such as the right to education, to health care, and to social welfare are, of course, very important rights, but they are not, so it seems, part of ‘human dignity.’”⁴⁶ Although the Basic Law: Human Dignity and Liberty is subject to the limitation clause, the Supreme Court has interpreted dignity as a top value that cannot be sacrificed for other values and its limitations themselves must be based on human dignity.⁴⁷

2. Status of the Child

a. Statistics

⁴³ Basic Law: Human Dignity and Liberty, 1992, S.H. 1391.

⁴⁴ Kretzmer, *supra* note 34, at 53.

⁴⁵ Aharon Barak, *Human Dignity as a Constitutional Right*, 41 HA'PRAKLIT 271, 273, 280 (1994).

⁴⁶ Hirschl, *supra* note 39, at 444 (quoting AHARON BARAK, LEGAL INTERPRETATION (1994), Part III, 419 [Hebrew, Hirschl's translation]).

⁴⁷ Barak, *supra* note 45, at 275, 278.

At the close of 1999, Israel's children numbered 2,108,100, comprising 34% of the general population.⁴⁸ As of 1996, Jewish children accounted for 74% of the population of children in Israel.⁴⁹ Between 1998 and 1999, the number of violent crimes committed in Israel against minors within families rose by nearly 300 to total of 1,817 per year.⁵⁰ In 2000, WIZO shelters for battered women registered a 50% increase in the number of abused children in their care during the past year.⁵¹

b. Legal Status

Despite the rise in violence against children, Israel is generally known as a child-centered country.⁵² In 1991, Israel ratified the Convention on the Rights of the Child, and in 1996, it ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁵³ Israeli law adheres to the child's best interests as the governing principle with regard to the child's care, supervision, and education.⁵⁴

Although Israeli law holds that the child's best interests will normally be met under the parents' care, parental authority

⁴⁸ ISRAEL NATIONAL COUNCIL FOR THE CHILD IN COLLABORATION WITH ASHALIM, *THE STATE OF THE CHILD IN ISRAEL: A STATISTICAL ABSTRACT* 5 (2000). At <http://www.iyfnet.org/document.cfm/70/section/337> (last visited Apr. 25, 2003).

⁴⁹ GALIA EFRAT ET AL., BERNARD VAN LEER FOUND., *YOUNG CHILDREN IN ISRAEL: A COUNTRY STUDY* 69 in *THE STATE OF THE CHILD IN ISRAEL* (National Council for the Child 1998).

⁵⁰ Frimet Roth, *The Nightmare Season*, *THE JERUSALEM POST*, July 3, 2000, available at <http://www.nospank.net/israel2.htm> (last visited Apr. 25, 2003).

⁵¹ *Id.*

⁵² EFRAT ET AL., *supra* note 49.

⁵³ Leslie Sebba & Varda Shiffer, *Tradition and the Right to Education: The Case of the Ultra-Orthodox Community in Israel*, in *CHILDREN'S RIGHTS AND TRADITIONAL VALUES* 177-78 (Gillian Douglas & Leslie Sebba eds., 1998).

⁵⁴ Ariel Rosen-Zvi, *Family and Inheritance Law*, in *INTRODUCTION TO THE LAW OF ISRAEL* 99 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).

is not absolute. As far back as the 1950s, the Israeli Supreme Court acknowledged limits to parental authority and recognized the child as a separate entity with independent interests. As Justice Zilberg wrote in *Shtiner v. The State*, "The child is not an 'object' . . . , but rather a 'subject,' a litigant in his own right It is not possible to ignore his own interests under any circumstances, and it is not possible for us to reject them in favor of the 'right' of someone else, be it his father or mother."⁵⁵ Under the best interests principle, every child is entitled to a relationship with both parents, regardless of relations between them.⁵⁶ Furthermore, children can collect damages from parents for harms suffered as a result of psychological neglect and abandonment.⁵⁷ Thus, not only do parents have rights with respect to their children, but children have rights with respect to their parents.

Besides obligating parents to care for children's physical and psychological needs, Israeli law also imposes specific requirements on parental authority. First, parents must adhere to government regulations, such as the Compulsory Education Law.⁵⁸ Second, sections 323-327 of the Penal Law impose a duty on parents to protect the child from abuse.⁵⁹ Failure to fulfill this duty is a crime punishable by up to three years imprisonment.⁶⁰

Social service agencies, moreover, have the authority to intervene in family matters. In less severe cases, the assistance is geared toward improving the functioning of parents, while in more serious ones, the state intervenes to protect children from their parents. When a court declares a minor to be "a minor in need" under the Youth (Care and Supervision) Law, a welfare officer may take over the care and supervision of the minor,

⁵⁵ C.A. 209/54, *Shtiner v. State*, 9 P.D. 241, 251.

⁵⁶ Rosen-Zvi, *supra* note 54, at 92.

⁵⁷ C.A. 2034/98, *Yitzhak Amin v. David Amin*, 53(5) P.D. 69.

⁵⁸ Compulsory Education Law, 5709-1949, 3 L.S.I. 125, (1948-49).

⁵⁹ Penal Law, 5737-1977, Sections 323-27, Special Volume L.S.I. 54, (1976-77).

⁶⁰ Rosen-Zvi, *supra* note 54, at 94.

including revoking parental authority to make certain decisions.⁶¹ In extreme cases, the declaration also allows for transferal of the minor to a foster family and restriction of the parents' visitation rights. Under the Capacity and Guardianship Law of 1962, a court has jurisdiction to completely or partially cancel the guardianship of one or both parents and to appoint additional guardians.⁶² Under the Adoption of Children Law of 1981, a court can declare children adoptable and separate them from their natural parents.⁶³

Not only state authorities can interfere in families, but every citizen has a duty to report behavior within the family in certain cases. Sections 368D(a)-(h) of the Penal Law of 1977 prescribes, "There is a general duty to report that is imposed upon anyone who has reasonable grounds to believe that an offense has been committed by a person who has charge of a minor . . . against said minor."⁶⁴ Failure to report is punishable by up to three months in prison.⁶⁵

3. Corporal Punishment of Children

Looking at Israeli law, it is possible to see a development in legal approach leading up to the *Plonit* decision.

a. Legislation

Unlike in the United States, there is no parent-child tort immunity in Israel.⁶⁶ Provision 23 of the Law of Torts (New Version) prohibits an assault of every type against another.⁶⁷ However, Provision 24(7) initially provided a reasonable

⁶¹ Youth (Care and Supervision) Law, 5720-1960, 2 L.S.I. 44 (1960-1961).

⁶² Capacity and Guardianship Law, 1962, 16 L.S.I. 106 (1962-63).

⁶³ Rosen-Zvi, *supra* note 54, at 93.

⁶⁴ Penal Law, 5737-1977, § 368D(a-h), Special Volume L.S.I. 54, (1976-77).

⁶⁵ *Id.*

⁶⁶ Dana Cohen, Legal Standing of Corporal Punishment for Educational Purposes by Parents and Teachers in the Age of New Basic Laws 5 (2000) (unpublished thesis) (on file with author).

⁶⁷ *Id.*

corporal punishment defense for the defendant if "the defendant is the parent or custodian or teacher of the plaintiff . . . and he harms the plaintiff to a necessary and reasonable extent for the improvement of the plaintiff's ways."⁶⁸ On June 13, 2000, the Knesset passed into law Anat Maor's bill to rescind 24(7)'s special defense for the corporal punishment of children.⁶⁹

Similarly, criminal law in Israel, Provision 379 of the Penal Code of 1977, considers every physical assault against another to be a criminal violation, even if the person suffers no physical harm.⁷⁰ However, it also recognizes the general defense of "justification." This has been interpreted as permitting acts falling within "limited social norms," including the use of "reasonable" corporal punishment for educational purposes by the custodian of a minor.⁷¹

Eight years ago, the Knesset considered a proposed penal law that would explicitly protect custodian authority to hit children for educational purposes not to exceed the bounds of reasonableness. This proposal passed the first stage of Knesset review. It was then vigorously fought by children's rights organizations and soundly defeated.⁷²

b. Court Decisions

In 1953, in *Dalal Rasi v. The State of Israel*, the Supreme Court recognized as legitimate custodial use of corporal punishment, as long as it is reasonable.⁷³ It maintained that "there is no serious disagreement in the law that parents or educators are entitled to punish children under their care or supervision, and even through the use of corporal punishment,

⁶⁸ Orit Shtiver, *Spare the Rod, Loving the Child*, TO BE A FAMILY: THE PERIODICAL ACCOMPANYING THE FAMILY 2000, at 71.

⁶⁹ Roth, *supra* note 50.

⁷⁰ Penal Law, 5737-1977, § 379, Special Volume L.S.I. 54, (1976-77).

⁷¹ Shtiver, *supra* note 68.

⁷² Galit Levi-Samorai, *Spare the Rod*, 46 PARENTS AND CHILDREN, March 2000, at 12; Yafa HaOzer, *Without Hands*, 79 PARENTS AND CHILDREN, 1994, at 20.

⁷³ Cr.A. 7/53, *Rasi v. State of Israel*, 7(2) P.D. 790, 793.

and it is just a question of the severity of the punishment.”⁷⁴ Thus, parents and educators could use “moderate and acceptable” punishment in order “to uproot the bad from the soul of the child.”⁷⁵ In this case, however, the Court held that use of force in pushing a child’s head against a wall, in pricking a child’s lip with a needle, and in kicking a child’s back was not reasonable.⁷⁶

On January 12, 1992, Judge Strashnov of the Tel Aviv District Court similarly defended parental authority to use corporal punishment on children. He held that “[c]orporal punishment by a parent towards his child with the goal of educating him, disciplining him and curbing his behavior, as long as it is accomplished to a reasonable extent, with careful consideration and humane wisdom – it is not disqualified from an educational respect and it is not legally prohibited.”⁷⁷ A father was accused of kicking his son in the stomach, causing his daughter a bloody nose, heavily whipping his son with a belt, and pulling the son’s hair until he fell to the ground. Judge Strashnov dismissed all these accusations, except for the kick to the stomach, based on the unreliability of the witnesses: the grandmother as “unstable and hysterical,” the daughter as mentally “limited,” and the son as “completely unrestrained,” lacking “inner peace and quiet,” and subject to “wild outbursts.”⁷⁸ As for the kick to the stomach, Judge Strashnov concluded that it was not “exceptional and unreasonable . . . to the point of becoming a criminal offense.”⁷⁹ He was able to consider it “reasonable” because the father did not aim to hit the boy’s stomach, but his backside, and the stomach received the blow only as a result of the boy’s movement to escape from the kick.⁸⁰ As Orit Shriver points out, this reasoning, of course,

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Cr.C. (T.A.) 570/91, *State of Israel v. Ploni*, 52(1) P.M. 431, at 436-37.

⁷⁸ *Id.*

⁷⁹ *Id.* at 436.

⁸⁰ *Id.*

does not take into consideration that it is foreseeable for a child to "try and escape from a physical attack."⁸¹ Judge Strashnov supported his decision by referring to the parental obligation to educate children and teach them "moral principles and values" and to *Torat Moshe* and the Hebrew proverb, "He who spares the rod hates his child."⁸²

Judge Strashnov's decision, however, caused a storm of protest amongst educators, psychologists, and social workers.⁸³ Children's rights organizations urgently turned to the Minister of Justice, requesting an appeal of the decision.⁸⁴ Judge Strashnov ended up writing a book, *Children and Youth in the Mirror of Law*, to justify his opinion.⁸⁵ In this book, he points to the widespread violence among the young and the rise in crimes committed by juveniles in 1995,⁸⁶ arguing that "the education of the child necessitates the setting of frameworks and clear rules . . . the child must not be allowed to do as he wishes and to live his life without an educational and limiting framework."⁸⁷ He finds absurd the consideration of "all moderate physical punishment for educational purposes" as a criminal offense, and writes of the need to clearly differentiate between appropriately used corporal punishment and systematic hitting or abuse.⁸⁸ Although Judge Strashnov does not renounce the use of corporal punishment for educational purposes, he differentiates between a hit or two and "systematic" hitting or the use corporal punishment as an educational method.

⁸¹ Shtiver, *supra* note 68, at 72.

⁸² Cr.C. (T.A.) 570/91, State of Israel v. Ploni, 52(1) P.M. 431, at 435.

⁸³ Levi Eden, *Corporal Punishment or Physical Abuse?*, THE ACADEMIC: JOURNAL OF THE ACADEMIA ON THE SOCIAL SCIENCES AND HUMANITIES, Feb. 1994, at 7.

⁸⁴ Yosi Miller, *Corporal Punishment in Israel*, 3 ISRAELI JOURNAL FOR CHILDREN'S RIGHTS, 1993, at 69.

⁸⁵ AMNON STRASHNOV, CHILDREN AND YOUTH IN THE MIRROR OF LAW (2000).

⁸⁶ *Id.* at 9-11.

⁸⁷ *Id.* at 187.

⁸⁸ *Id.* at 87-188.

After 1993, there was a shift in courts' positions on the issue of corporal punishment, and a number of decisions clearly rejected corporal punishment as an educational means. Judge Astrovski Cohen, for instance, determined that corporal punishment is a criminal violation.⁸⁹ Another turning point was the 1996 ruling in which Judge Pilpel of the Beersheva District Court uncompromisingly determined that "violence towards children cannot be used as an educational means in any case."⁹⁰ Citing the Basic Law: Human Dignity and Liberty, he explained, "A minor is considered 'human,' accordingly his beating negates his basic human rights, and the parent has no right to do this."⁹¹ Thus, although *Plonit* marked the first time the Supreme Court decisively rejected the corporal punishment of children, previous lower court opinions had already come to this conclusion.

The *Plonit* decision was also preceded by *Sde-Or* in 1998, where the Supreme Court held that "the use of violence by an educator towards his students conflicts with Israeli society's views on education, its goals, and its realization, and thus cannot be viewed as reasonable."⁹² In this case, a kindergarten teacher, who would hit, pull, push, and throw the children under her care was brought to trial. The teacher justified her use of force "as an educational means that was supposed to bring children back to order, and principally the 'young children that do not yet understand that there is discipline, a framework and rules in kindergarten, and this is a way to clarify to them that there are such laws.'"⁹³ The Court, however, rejected this logic, fearing that "violence is liable to serve as a model for the students to copy and also to harm their

⁸⁹ Yafa HaOzer, *Without Hands*, 79 PARENTS AND CHILDREN, 1994, at 20.

⁹⁰ Tova Tzimuki, *No Hands*, YEDI'OT AHARONOT, Oct. 30, 1996, at 1.

⁹¹ ACRI (Association for Civil Rights in Israel), COMMENTS ON THE COMBINED INITIAL AND FIRST PERIODIC REPORTS CONCERNING THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS [hereinafter ICCPR], Submitted to the United Nations Human Rights Committee (July 1998) (quoting Cr.A. (B.S.) 1059/96).

⁹² Cr.A. 5224/97, State of Israel v. Sde-Or, 54(3) P.D. 572, 579.

⁹³ *Id.* at 575.

development.”⁹⁴ Not only did the Court perceive the corporal punishment of children as endangering their own “well-being,” but also as socially harmful and “liable to harm the basic values of our society – human dignity and physical integrity.”⁹⁵ Thus, corporal punishment for educational purposes is a logical impossibility and can never be “reasonable.” In strong language, the Court explained, “Physical violence towards the student is prohibited. Flogging, hitting, and pulling ears have no place in school. The classroom is a place of instruction and not an arena of violence. The body and soul of the student are not to be treated as worthless.”⁹⁶

In support of its decision, the Court cited the Convention on the Rights of the Child, provision 19(1); lower court decisions; and Jewish law. It pointed to the fact that “the cases decided in the past few years have held that the penal code prohibits the use of corporal punishment as an educational means.”⁹⁷ Anchoring its approach in Jewish authority, it also quoted Rabbi Yitzchak Levi, the Minister of Culture and Education, who stated, “It is clear beyond any doubt that Judaism does not recommend the use of hitting as an educational method, and I would even go further and say that in the era we now live, it completely prohibits ‘education’ through hitting – seeing it as a contradiction in terms.”⁹⁸ Thus, the Court concluded, “The view expressing permission to use violent means for educational purposes no longer reflects the social norms acceptable to us.”⁹⁹

c. Post-*Plonit* Developments

Soon after the *Plonit* decision came out, perhaps in a show of solidarity with the Court, the Knesset passed the Pupils

⁹⁴ *Id.* at 578.

⁹⁵ *Id.* at 579.

⁹⁶ *Id.*

⁹⁷ *Id.* at 578.

⁹⁸ *Id.*

⁹⁹ *Id.*

Rights Law, which explicitly established, "Every student is entitled to a disciplinary system in educational institutions conducted in a way respecting human dignity and is specifically entitled not to have corporal or humiliating disciplinary means . . . used against him."¹⁰⁰

Then, in May 2002, the Supreme Court approved the removal of a teacher who systematically used violence against his students, after he injured a student by hitting her face with a plastic cone so that she required medical attention. The Court declared, "There can be no acceptance for an educational approach based on the taking of violent measures against minors."¹⁰¹ The Court further rejected as irrelevant the claim that corporal punishment was acceptable in the homes of the school's Arab students. It explained, "The laws of the State apply to all segments of the population even if past traditions make it difficult to uproot this once accepted phenomenon. Today, we cannot endorse norms that violate a child physically or psychologically."¹⁰²

B. International Treatment of the Corporal Punishment of Children

1. International Law

Under international law, two main documents protect children: The United Nations Declaration of the Rights of the Child and the United Nations Convention on the Rights of the Child.¹⁰³ Although these two documents do not specifically address corporal punishment, they establish children's right to physical integrity, and the Committee on the Rights of the Child has interpreted the Convention to prohibit corporal punishment.

¹⁰⁰ Pupils Rights Law, 2000, S.H. 42, Provision 10.

¹⁰¹ D.A. 1682/02, Wahab v. State of Israel (not yet published).

¹⁰² D.A. 1682/02, Wahab v. State of Israel (not yet published).

¹⁰³ Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959); CRC, *supra* note 19.

The United Nations Declaration of the Rights of the Child, approved by the United Nations General Assembly in 1959, is the first expression of international human rights law concerning children. This Declaration does not impose binding obligations on states and aims for the progressive realization of children's rights. The Declaration sets out a positive right to protection for children. Thus, in the Preamble, it explains that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection," linking needs and rights.¹⁰⁴ Principle 2 goes on to assert, "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity."¹⁰⁵ Principle 9 refers specifically to abuse, stating that "[t]he child shall be protected against all forms of neglect, cruelty and exploitation."¹⁰⁶ In the Declaration, children's rights are rooted in the inherent "dignity and worth of the human person."¹⁰⁷ By virtue of their humanity, children are entitled to the protections necessary for them to live with dignity.

The United Nations Convention on the Rights of the Child, approved unanimously by the United Nations General Assembly in 1989, presents the first comprehensive international articulation of children's rights.¹⁰⁸ It went into force in 1990 and was ratified by more nations in a shorter period of time than any other international convention before or since.¹⁰⁹

¹⁰⁴ Declaration of the Rights of the Child, *supra* note 103, at Preamble.

¹⁰⁵ Declaration of the Rights of the Child, *supra* note 103, at Principle 2.

¹⁰⁶ *Id.* at Principle 9.

¹⁰⁷ *Id.* at Preamble.

¹⁰⁸ Gerald Abraham, *Giannella Lecture: The Cry of the Children*, 41 VILL. L. REV. 1345, 1361 (1996).

¹⁰⁹ *Id.* By its tenth anniversary, the Convention was adopted by 191 states -- every nation except two: Somalia and the United States. Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L.

Unlike the 1959 Declaration, the 1989 Convention imposes binding obligations on all the nations that have ratified it.¹¹⁰ The Convention created the Committee on the Rights of the Child to monitor the compliance of the treaty's parties, but the Committee has no enforcement power.¹¹¹ Since the Convention has no direct method of formal enforcement and no court to assess claims, it thus places great weight on reporting. "Two years after ratification, each government is expected to send the United Nations Committee a report detailing progress made in fulfilling obligations under the Convention."¹¹²

The Convention includes a multitude of provisions affirming children's positive right to protection. Article 19 instructs:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.¹¹³

Thus, in cases of abuse, the child explicitly "has the right to the protection of the law against such interference or attacks."¹¹⁴

1, 41 (Dec. 1999). Timor-Leste, which became independent in 2002, also has not ratified the Convention; Susan H. Bitensky, *Spare the Rod, Embrace our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM. 353, 390 (1998).

¹¹⁰ Abraham, *supra* note 108, at 1363.

¹¹¹ *Id.* at 1366.

¹¹² JANE FORTIN, *CHILDREN'S RIGHTS AND THE DEVELOPING LAW* 44-45 (London, 1998).

¹¹³ U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess. 61st mtg., U.N. Doc. A/Res/44/25 (1989).

¹¹⁴ *Id.* at art. 16.

Article 20 further specifies cases where a child "shall be entitled to special protection and assistance provided by the State."¹¹⁵

The Committee on the Rights of the Child has paid particular attention to a child's right to physical integrity and protection from corporal punishment in monitoring implementation of the Convention.¹¹⁶ The Committee has repeatedly stressed that the corporal punishment of Children is incompatible with the Convention and it is necessary to ban it in families in order for reporting countries to achieve treaty compliance.¹¹⁷ Guidelines for country reports require that they indicate "whether legislation (criminal and/or family law) includes a prohibition of all forms of physical and mental violence, including corporal punishment, deliberate humiliation, injury, abuse, neglect or exploitation, inter alia within the family."¹¹⁸ As the basis for this policy, the Committee has interpreted Article 19 as an absolute prohibition of corporal punishment of children. The Committee further points to Article 24, paragraph 3 and Article 37 to support its interpretation. Article 24, paragraph 3 states, "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children," and the Committee perceives the use of physical force to educate children as such a practice.¹¹⁹ The Committee further perceives corporal punishment to fall within Article 37's prohibition of "torture or other cruel, inhuman or degrading treatment or punishment."¹²⁰

Marta Santos Pais, the Committee's rapporteur, links the prohibition on the corporal punishment of children to their fundamental human dignity. In 1996, she explained that "[t]he right not to be subject to any form of physical punishment . . . flows as a consequence of the consideration [in the Convention

¹¹⁵ *Id.* at art. 20.

¹¹⁶ Bitensky, *supra* note 109, at 392.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 395.

¹¹⁹ CRC, *supra* note 19, at art. 24, ¶3.

¹²⁰ *Id.* at art. 37.

of the Child] of the child as a person whose human dignity should be respected.”¹²¹ The High Commissioner for Human Rights, Mary Robinson, echoed this notion. She stated,

The recourse to physical punishment by adults reflects a denial of the recognition, by the Convention on the Rights of the Child, of the child as a subject of human rights. If we want to remain faithful to the spirit of the Convention, based strongly on the dignity of the child as a full-fledged bearer of rights, then any act of violence against him or her must be banned.¹²²

2. Common Law Countries

a. United Kingdom

English law contains statutory acknowledgement of the right of any parent to administer corporal punishment to a child.¹²³ The Children and Young Person’s Act, § 1, Part 1¹²⁴ prohibits assaults against minors, but provision 7 is quick to reassure 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.”¹²⁵ Paragraph 24(7) of the Civil Wrongs Ordinance establishes that in a suit for the tort of assault, the defendant will have a defense if he or she “is the

¹²¹ Bitensky, *supra* note 109, at 398 (quoting Marta Santos Pais, Address at the International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (Dublin, Ireland, Aug. 22, 1996).

¹²² Peter Newell, *Key United Nations Human Rights Body Urges UK to Ban All Physical Punishment*, CHILDREN ARE UNBEATABLE!, at <http://www.nospank.net/n-j07.htm> (last visited Apr. 25, 2003).

¹²³ CHRIS BARTON & GILLIAN DOUGLAS, *LAW AND PARENTHOOD* 150-151 (1995).

¹²⁴ Amended in the framework of the Children Act, 1989, c. 41, sched. 12-13 (Eng.).

¹²⁵ Children and Young Persons Act, 1933, c 12, § 1 (Eng.).

parent or guardian or teacher of the plaintiff, or his or her status in regard to the plaintiff is similar to that of a parent or guardian or teacher, and he or she punished the plaintiff in an amount reasonably necessary in order that the plaintiff correct his or her behavior."¹²⁶

Case law also establishes the parental right to administer corporal punishment. According to *R. v. Hopley*, a parent may inflict moderate and reasonable corporal punishment for the purpose of correcting a child or punishing an offense.¹²⁷ In this case, it was held reasonable for a father to grant a teacher permission to chastise his son severely and "that if necessary he should do it again and again" and "continue it at intervals even if he held out for hours." The thirteen year-old boy eventually died from this flogging.¹²⁸ *R. v. Woods* explained that whether or not a punishment is reasonable must depend on all the facts of a case and, in particular, the age and strength of a child and nature and degree of a punishment.¹²⁹ Reasonable punishments have been found to include beatings with sticks, belts, and slippers.¹³⁰ Since *Gillick v. West Norfolk and Wisbech Area Health Authority*, it seems unlikely that corporal punishment can be justified at all in the case of a child over sixteen.¹³¹

There has been international pressure on the United Kingdom to change its policies. In 1995, after examining the United Kingdom's first report under the Convention on the Rights of the Child, the UN Committee on the Rights of the Child recommended that corporal punishment be prohibited and criticized the defense of "reasonable chastisement." In May

¹²⁶ A similar defense to the tort of imprisonment is found in Paragraph 27(6) of the Civil Wrongs Ordinance. Neither of these provisions exempt a parent from liability imposed by the criminal law.

¹²⁷ *R. v. Hopley* (1860) 175 Eng. Rep. 1204.

¹²⁸ BARTON & DOUGLAS, *supra* note 123, at 151.

¹²⁹ (1921) 85 JP 272; P. M. BROMLEY & N. V. LOWE, *BROMLEY'S FAMILY LAW* 274 (7th ed. 1987).

¹³⁰ PETER NEWELL, *Respecting Children's Right to Physical Integrity*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE* 219 (Bob Franklin ed., 1995).

¹³¹ (1986) AC 112; BARTON & DOUGLAS, *supra* note 123, at 152.

2002, the UN Committee on Economic, Social and Cultural rights echoed this recommendation.¹³² In *A. v. United Kingdom*, decided in 1998, the European Court of Human Rights found that English law did not adequately protect a child repeatedly flogged with a garden cane by his stepfather, who was subsequently acquitted under the defense of "reasonable chastisement." The Court held that English law violated Article 3 of the European Convention for Human Rights, requiring "States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture . . . or degrading treatment or punishment," and thus legal reform was necessary.¹³³ In their 1985 Paper, Recommendation No. 85(4), para. 12, the Committee Ministers of the Council of Europe expressed their hope that member states would "review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment."¹³⁴

In addition to this pressure from international law, there have also been movements towards reform within England itself. During the passage of the Children's Bill through the House of Lords, there was an unsuccessful attempt to render physical punishment by parents unlawful.¹³⁵ In 1986, Section 47 of the Education Act abolished corporal punishment in all schools supported by public funding.¹³⁶ The United Kingdom thus became the last country in Europe to end corporal punishment in state-supported education.¹³⁷

b. Canada

Under the current Canadian Criminal Code, the offense of assault is drafted in a wide and inclusive manner. However, since 1892, Section 43 of the Code has provided a defense for

¹³² Newell, *supra* note 122.

¹³³ *A. v. United Kingdom*, [1999] 27 Eur. H.R. Rep. 611.

¹³⁴ BARTON & DOUGLAS, *supra* note 123, at 151.

¹³⁵ *Id.* at 152.

¹³⁶ CHRISTINA LYON & PETER DE CRUZ, *CHILD ABUSE* 242 (2nd ed. 1993).

¹³⁷ NEWELL, *supra* note 130, at 217.

parents and other persons in positions of authority where the assault occurs in the context of correcting a child, as long as "reasonable" force is used. It states as follows: "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."¹³⁸

Interestingly, while conferring a right to correct with reasonable force, Section 43 does not define the circumstances under which correction can ensue, in marked contrast with other justifications in the Code.

The Canadian Supreme Court has sought to limit the availability of the Section 43 defense by strictly construing who may invoke it and the circumstances surrounding when it may be invoked. In its leading ruling on Section 43, the Court explained that the section should be read restrictively, precisely because it "exculpates the use of what would otherwise be criminal force by one group of persons against another. It *protects* the first group of persons, but, it should be noted, at the same time it *removes* the protection of the criminal law from the second."¹³⁹ In defining reasonable force, the Canadian Supreme Court stated:

The court will consider, both from an objective and subjective standpoint, such matters as the nature of the offense calling for correction, the age and character of the child and the likely effect of the punishment of this particular child, the degree of gravity of the punishment, the circumstances under which it was inflicted, and the injuries, if any, suffered. If the child suffers injuries which may endanger life, limbs . . . or is disfigured that alone would be sufficient to find

¹³⁸ Criminal Code of Canada, R.S.C., ch. C-46, § 43 (1985) (Can.).

¹³⁹ *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173.

that the punishment administered was unreasonable under the circumstances.¹⁴⁰

The Supreme Court has refused to accept justifications for excessive force based on localized standards, requiring instead a "Canadian community" standard.¹⁴¹ Courts have also been hesitant to apply Section 43 as children approach the age of maturity. For instance, in *R. v. J.O.W.*, the judge stated, "In light of the age of I.L., she was almost an adult, such punishment in my opinion would be counter-productive."¹⁴²

Canadian judges have further heavily criticized Section 43 for its lack of clarity and for conflicting with the Convention on the Rights of the Child. In *R. v. J.O.W.*, the judge expressed his:

[h]ope that the law makers will see to establish clearer rules, so that parents will know with some degree of certainty when they are permitted to physically discipline their children; or alternatively, if Parliament determines that corporal punishment is no longer tolerable in our society, to then repeal Section 43 of the Code. The current state of uncertainty is inadequate to protect children, while simultaneously, potentially placing otherwise law abiding parents at risk of obtaining a criminal record.¹⁴³

Then, in *R. v. James*, the Court exclaimed the following:

[T]he Convention stands in direct conflict with the state of the law. One wonders how section 43 can remain in the Criminal Code in the face

¹⁴⁰ *R. v. Dupperon*, [1984] 16 C.C.C. (3d) 453, 460.

¹⁴¹ *R. v. O.J.* [1996] O.J. 647.

¹⁴² *R. v. J.O.W.* [1996] O.J. 4601, at para. 35.

¹⁴³ *Id.* at para. 4-5.

of Canada's international commitment. To the extent this paradox might inform any discussion of the constitutionality of the defence, it is not a question likely to be tested by a court, because the party who would have to raise the question would be the crown itself . . . The only personal view I will express is that I think this is an area that begs for legislative reform.¹⁴⁴

c. United States

Historically, in the United States, children could not bring tort suits against their parents and others standing in *loco parentis*,¹⁴⁵ including suits for harm caused by corporal punishment.¹⁴⁶ However, the modern trend has been for courts to restrict the application of parental immunity and to permit civil lawsuits by children against parents.¹⁴⁷ As of 1988, seventeen states still retained this immunity.¹⁴⁸

The Model Penal Code typifies the American attitude, explicitly protecting parents' right to use physical force on children as long as two conditions are met: the force is used for the purpose of "promoting the welfare of the minor" and the force is not excessive.¹⁴⁹ While approximately half of the states have statutes establishing a parental defense for the corporal punishment of children, the remaining states rely on case-law

¹⁴⁴ R. v. James [1998] O.J. 1438, at para. 9.

¹⁴⁵ Refers to parent figures.

¹⁴⁶ Judge Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 1007-1008 (1996).

¹⁴⁷ Sandra L. Haley, *The Parental Tort Immunity Doctrine: Is it a Defensible Defense?*, 30 U. RICH. L. REV. 575, 603 (1996) ("The doctrine of parental tort immunity was created by 1891 case law and has been substantially abrogated in most of the states which had adopted it."); See, eg., *Gillet v. Gillett*, 335 P.2d 736 (Cal. Ct. App. 1959).

¹⁴⁸ Karen A. Bussel, Note, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability*, 41 DUKE L.J. 661, 676 n.91 (1991).

¹⁴⁹ MODEL PENAL CODE, § 3.08 (2001).

precedent to define the scope of the privilege.¹⁵⁰ The majority rule is that a parent is not criminally liable for an assault on a child if the blow to the child's body constitutes "reasonable force" and is administered for a disciplinary purpose.¹⁵¹

The policies of the state of Minnesota stand in interesting contrast to the rest of the United States. Reading Minnesota's various relevant statutory provisions together, it becomes apparent that what would be "reasonable" corporal punishment of children in any other state is an assault under Minnesota law.¹⁵² Since corporally punishing children is "an attempt to inflict pain, or place a child in fear of pain in an effort to reform behavior" even mild forms, such as spanking, would constitute a fifth degree assault under Minnesota law.¹⁵³ Minnesota has lived under this prohibition on the corporal punishment for many years. However, Minnesota has exercised prosecutorial restraint in enforcement, and there are no reported cases of parents prosecuted for administering mild punishment to children.¹⁵⁴ Furthermore, although no corporal punishment is legal, mandated reports are only necessary when a physical assault actually produces injury.¹⁵⁵ The main result of Minnesota eliminating the right of parents to hit children has been the avoidance of the often endless litigation endured in other states,¹⁵⁶ over what constitutes a reasonable blow to a child.¹⁵⁷

¹⁵⁰ Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense- Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 436.

¹⁵¹ Victor I. Vieth, *When Parental Discipline is a Crime: Overcoming the Defense of Reasonable Force*, 32 AUG PROSECUTOR 29 (1998).

¹⁵² Bitensky, *supra* note 109, at 386-387. It is necessary to read Minn. Stat. § 609.379, which appears to permit "reasonable" corporal punishment of children in conjunction with §§ 609.224 and 609.02.

¹⁵³ Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131, 143 (1998).

¹⁵⁴ Bitensky, *supra* note 109, at 388.

¹⁵⁵ Vieth, *supra* note 153, at 144.

¹⁵⁶ *State v. Crouser*, 911 P.2d 725 (Haw. 1996).

¹⁵⁷ Vieth, *supra* note 153, at 143, n.78.

Despite the wide existence of statutes protecting corporal punishment of children, there has also been some movement towards its restriction. Certain adults who stand in *loco parentis* to a child are prohibited from utilizing any type of corporal punishment. For instance, certain state regulations prohibit foster parents from using corporal punishment. The California Foster Family Home Regulations declare that "[e]ach child shall have personal rights which include, but are not limited to, the following: . . . To be free from corporal punishment or unusual punishment, infliction of pain, humiliation, intimidation, ridicule, coercion, threat, mental abuse, or other actions of a punitive nature"¹⁵⁸ Other states have adopted similar restrictions for foster parents.¹⁵⁹ In California, the prohibition against corporal punishment has been extended by statute to private day nurseries, even if parents agree that caretakers may use such punishment when their child is disobedient. The statute has been upheld by the court of appeals.¹⁶⁰ Although the Supreme Court found the corporal punishment of students constitutional,¹⁶¹ over half of the states now prohibit its use by teachers. In 1974, only two states banned corporal punishment in schools. By 1994, twenty-seven states had outright prohibitions and an additional eleven states, by local rules, banned the corporal punishment of children in public schools.¹⁶² The American Bar Association rejects the use of corporal punishment, declaring, "BE IT RESOLVED, that the American Bar Association opposes the use of corporal punishment in institutions where children are cared for or educated and urges that state laws which permit such corporal punishment be amended accordingly."¹⁶³

¹⁵⁸ Cal. Code Regs. Tit. 22, § 87072 (repealed).

¹⁵⁹ Edwards, *supra* note 146, at 1017-1020.

¹⁶⁰ *Id.* at 1017.

¹⁶¹ *Ingraham v. Wright*, 430 U.S. 651 (1977).

¹⁶² Edwards, *supra* note 146, at 1014, n.230.

¹⁶³ *Id.* at n. 231. "The professional organizations that formally oppose [the] corporal punishment of children include the American Academy of Pediatrics, the American Medical Association, the American Bar Association, the American Public Health Association, the American

3. Countries Rejecting Corporal Punishment

a. Statutory Protection of Children

1) Scandinavian Countries

a) Sweden

In 1979, the International Year of the Child, Sweden became the first country to enact a statute, banning the corporal punishment of children.¹⁶⁴ As amended in 1983, the statute states, "Children are entitled to care, security and a good upbringing. They shall be treated with respect for their person and their distinctive character and may not be subject to corporal punishment or any other humiliating treatment."¹⁶⁵ The use of the phrase "respect for their person" evokes the concept of dignity.

Prior to the 1979 legislation, Sweden had a long tradition of corporal punishment in the family context.¹⁶⁶ Sweden's Penal Code allowed parents to avoid criminal liability for corporally punishing their children, and in 1920, when Swedish family law was codified, parents were expressly granted the right to punish their children by using physical force.¹⁶⁷ Both religious and legal codes reiterated the proverb

Psychological Association, the National Parent-Teacher Association, the National Association of School Psychologists, the National Education Association, the National Association of Social Workers, and the National Association of Pediatric Nurse Associates and Practitioners . . . and the American Humane Society." *Id.* at 1020-1022, n.263.

¹⁶⁴ Geraldine Van Buren, *The Family and the Rights of the Child in International Law*, in *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 88 (1995).

¹⁶⁵ Bitensky, *supra* note 109, at 362 (quoting Swedish Children and Parents Code, ch. 6, § 1 para. 2 (Swedish Ministry of Justice trans.)).

¹⁶⁶ *Id.*

¹⁶⁷ Edwards, *supra* note 146, at 1018.

that sparing the rod spoils the child.¹⁶⁸ As long as injuries were not permanent, parents could engage in "regular – often weekly – harsh beatings to drive out the devil and make [children] firm for God's will."¹⁶⁹

However, as corporal punishment was increasingly accompanied by widespread child abuse, the Swedish legislature decided to intervene. It established a Commission on Children's Rights, which prepared a report revealing that "[c]hild psychiatrists and psychologists have long been in agreement that physical punishment of children is inappropriate."¹⁷⁰ Between 1965 and 1979, the Swedish government progressively restricted parents' right to use corporal punishment to discipline children. Efforts culminated in 1979 with the ban on all corporal punishment.¹⁷¹ The legislature adopted this measure by a nearly unanimous vote, emphasizing the role of law in changing the attitudes of parents.¹⁷²

Sweden has exercised a policy of prosecutorial restraint in enforcing this ban on corporal punishment, preferring instead to pour its energies into educating the public. The law itself appears in the civil, not criminal code, and it does not provide specific sanctions for violators.¹⁷³ The government's stated intent in passing the law was two-fold: primarily "to stop beatings," but also "to create a basis for general information and education for parents as to the importance of giving children good care and as to one of the prime requirements of their care."¹⁷⁴

The government thus supplemented the law with a massive education campaign and by providing extensive

¹⁶⁸ Dennis A. Olson, *The Swedish Ban of Corporal Punishment*, 1984 BYU L. REV. 447, 447.

¹⁶⁹ Edwards, *supra* note 146, at 1018 (quoting Peggy O'Mara, *MOTHERING* 42 (1994)).

¹⁷⁰ Olson, *supra* note 168, at 457.

¹⁷¹ Johnson, *supra* note 150, at 477.

¹⁷² Olson, *supra* note 168, at 453.

¹⁷³ Edwards, *supra* note 146, at 1019.

¹⁷⁴ *Id.* at 1018 (citing Peggy O'Mara, *MOTHERING* 42 (1994)).

support services to families.¹⁷⁵ The public school system served as an important vehicle to reach children. Children were taught what parents could and could not do and how they should respond when punished corporally. Parental education programs instructed parents on alternate discipline methods that did not make use of physical punishment.¹⁷⁶ The government also distributed mailings to every family with a young child and to daycare facilities. The Ministry of Justice circulated 600,000 copies of a pamphlet entitled, "Can you bring up children successfully without smacking and spanking?"¹⁷⁷ This pamphlet explains:

Should physical chastisement meted out to a child cause bodily injury or pain which is more than of very temporary duration, it is classified as an assault and is an offense punishable under the Criminal Code . . . [T]rivial offenses will remain unpunished, either because they cannot be classified as assault or because an action is not brought."¹⁷⁸

Finally, the media aggressively informed the public about the new law.¹⁷⁹ Milk cartons in Sweden carried a cartoon of a girl saying, "I'll never ever hit my own children," and an explanation of the law.¹⁸⁰

Since the 1960s when legal reforms against physical punishment in Sweden began, there has been evidence of dramatic changes in the attitudes of Swedish parents. Although

¹⁷⁵ Bitensky, *supra* note 116, at 362.

¹⁷⁶ Johnson, *supra* note 150, at 477-78 (quoting Dennis Olson); Edwards, *supra* note 146, at 1019.

¹⁷⁷ NEWELL, *supra* note 130, at 219.

¹⁷⁸ *Id.* at 219 (quoting Ministry of Justice, *Can you bring up children successfully without smacking and spanking?* (1979)).

¹⁷⁹ Edwards, *supra* note 146, at 1019.

¹⁸⁰ NEWELL, *supra* note 130, at 219 (quoting Ministry of Justice, *Can you bring up children successfully without smacking and spanking?* (1979)).

a majority of Swedes opposed the law when it was passed fifteen years ago, it is now overwhelmingly supported.¹⁸¹ Public opinion polls carried out between 1965 and 1981 showed a doubling of the proportion of parents who believed that children should be raised without corporal punishment (from 35% to 71%, 74% of women and 68% of men).¹⁸² Over the same period, the proportion of people who believed corporal punishment was "sometimes necessary" halved from 53% to 26% and "don't knows" came down from 12% to 3%.¹⁸³ A 1995 report indicated that only 11% of the Swedish population supports the use of corporal punishment. As societal tolerance for corporal punishment steadily declined, so has the rate of fatal child abuse.¹⁸⁴ After examining the effects of the Swedish law, Professor Adrienne Hauser concluded, "The law has dramatically reduced physical punishment and commitment to it. It has broken the inter-generational transmission of the practice. It has helped to reduce serious child-battering . . . Professionals in particular have welcomed having a 'clear line' to transmit to parents."¹⁸⁵

b) Finland

In Finland, a prohibition on the corporal punishment of children in the family was enacted in 1983 as part of a general overhaul of Finnish law governing children.¹⁸⁶ The ban was adopted unanimously, without debate, and went into effect on January 1, 1984.¹⁸⁷ The Prohibition states, "A child shall be brought up with understanding, security and gentleness. He shall not be subdued, corporally punished or otherwise humiliated. The growth of a child towards independence,

¹⁸¹ Edwards, *supra* note 146, at 1018.

¹⁸² NEWELL, *supra* note 130, at 220 (citing SIFO- Swedish polling agency (1981)).

¹⁸³ *Id.*

¹⁸⁴ Johnson, *supra* note 150, at 478.

¹⁸⁵ NEWELL, *supra* note 130, at 220.

¹⁸⁶ Bitensky, *supra* note 109, at 368.

¹⁸⁷ *Id.*

responsibility and adulthood shall be supported and encouraged.”¹⁸⁸ Here the word “humiliated” seems to refer to the concept of dignity. Parents who violate the prohibition may be prosecuted for assault or sued for damages.¹⁸⁹ The Finnish government also conducted a nationwide campaign to educate adults about alternative ways to teach their children.¹⁹⁰

In Finland, as in Sweden, opinion polls have shown a significant drop in support for corporal punishment. In 1989, Central Union for Child Welfare carried out a major survey of the experiences and views of fifteen and sixteen year-old teenagers, who were already ten years old when the law came into effect. The survey found that 19% of the teenagers had experienced mild violence from parents, and 5% severe violence. When asked whether they believed they would use physical punishment in the upbringing of their own children, only 5% said yes.¹⁹¹

c) Denmark

In 1985, Denmark became the third Scandinavian country to enact a law directed against the corporal punishment of children in the family context.¹⁹² As amended in May 1997, the law asserts, “The child has the right to care and security. It shall be treated with respect for its personality and may not be subjected to corporal punishment or any other offensive treatment.”¹⁹³ The statute explicitly endows children with positive rights to care and security and emphasizes “respect.” Unlike its Swedish and Finnish counterparts, the original Danish statute was understood to be entirely precatory, and it did not abolish parents’ right to inflict corporal punishment as a

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 370.

¹⁹⁰ *Id.*

¹⁹¹ NEWELL, *supra* note 130, at 221 (citing Sariola 28-9 (1992)).

¹⁹² Bitensky, *supra* note 109, at 371.

¹⁹³ *Id.* (quoting Danish Act to Amend the Act on Parental Custody and Conviviality no. 416 I).

child rearing technique.¹⁹⁴ The law was then amended in 1997 to prohibit all corporal punishment of children, making perpetrators subject to prosecution under the Danish Criminal Code.¹⁹⁵ However, it was generally understood that there would "be no intensified or excessive action taken by law enforcement social welfare authorities to monitor ordinary families['] private lives."¹⁹⁶ Again, the prohibition was supposed to have primarily an educational impact, gradually persuading parents to relinquish corporal punishment as a disciplinary technique.¹⁹⁷

d) Norway

In 1987, Norway passed a statute providing that "[t]he child shall not be exposed to physical violence or to treatment which can threaten his physical or mental health."¹⁹⁸ Similar to the other Scandinavian statutes, this prohibition is primarily pedagogical, achieving its aims by shaping Norwegian norms. Its language does not prescribe any penalties or liability.¹⁹⁹

2) Austria

In 1989, the Austrian Parliament by unanimous vote enacted a law which provides that "[t]he minor child must follow the parents' orders. In their orders and in the implementation thereof, the parents must consider the age, development and personality of the child; the use of force and of infliction of physical or psychological harm are not permitted."²⁰⁰ This law bars the corporal punishment of children by parents, but it also imposes on children the duty to

¹⁹⁴ *Id.* at 371-72.

¹⁹⁵ *Id.* at 372.

¹⁹⁶ *Id.* at 372-73 (quoting Letter from Vestergaard, Assoc. Professor, Inst. Of Criminology and Criminal Law, University of Copenhagen (July 3, 1997)).

¹⁹⁷ *Id.* at 373.

¹⁹⁸ *Id.* (quoting Norwegian Parent and Child Act, art. 30, 3, as amended by the Amending Act no. 11, Feb. 6 1987 (Finn Erik Engzelius trans.).

¹⁹⁹ *Id.* at 374.

²⁰⁰ *Id.* at 375.

obey their parents. However, the duties of parents and children are two separate duties and not contingent on each other. The 1989 law represents a logical progression, rather than a sudden departure from statutory precedents. In 1977, Austria had repealed an explicit authorization for parents to corporally punish their children.²⁰¹

Like many Scandinavian countries, Austria enacted the prohibition mainly for its educational effect, and there are not many reported cases.²⁰² In addition to passing the law, the government instituted a social service program with an emphasis on the prevention of violence against children.²⁰³ Even without prosecutorial intervention, the 1989 ban seems to have had an effect on social norms in Austria. A study commissioned by the Austrian Federal Ministry of the Environment, Youth and Family indicates that as of the early 1990s, "67.5% of mothers and 68.8% of fathers categorically reject serious corporal punishment (beatings) as a means of education."²⁰⁴

3) Cyprus

In June 1994, Cyprus became the sixth nation to have outlawed the corporal punishment of children in the home.²⁰⁵ "The Cypriots passed a law that not only prohibits parental use of any force against children but also makes it an offense for violent behavior to take place in the presence of minor[s]."²⁰⁶ Parents who engage in violence can be prosecuted by government, fined, and incarcerated.²⁰⁷

²⁰¹ *Id.* at 376.

²⁰² *Id.* at 377.

²⁰³ *Id.* at 378.

²⁰⁴ Division for Children's Rights, Austrian Fed. Ministry for Youth and Family Affairs, Initial Report of Austria in Accordance with Article 44 of the United Nations Convention on the Rights of the Child 66, 67 (1996), *quoted in* Bitensky, *supra* note 109, at 378.

²⁰⁵ Bitensky, *supra* note 109, at 379.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

b. Court Decisions Protecting Children

1) Italy

On May 16, 1996, Italy's highest court decided the *Cambria* case and declared that "the use of violence for educational purposes can no longer be considered lawful," thus prohibiting the parental use of corporal punishment.²⁰⁸ The *Cambria* case was not decided only on the basis of the specific legislation. Like the *Plonit* case, *Cambria* was decided on the basis of human rights treaties, especially the U.N. Convention on the Rights of the Child.²⁰⁹ Although enforcement of this principle would be difficult, Judge Ippolito, who wrote the opinion, predicted that it would "filter into society" as a new norm.²¹⁰ This case is part of a process of legal and cultural reforms in Italy since 1945.²¹¹ "[A]s Italy moved away from fascism, it also moved away from the concept of the authoritarian father."²¹² For instance, in the 1950s, Italy's Supreme Court held that the Constitution barred husbands from using any means of correction, physical or otherwise, against their wives.²¹³ Various provisions protecting the dignity of the individual as an inalienable right were also included in Italy's Constitution.²¹⁴

c. Other Steps Taken by Countries

Other countries also appear to be taking steps towards the abolition of corporal punishment of children. Interestingly,

²⁰⁸ *Cambria*, cass., sez VI, 18 marzo 1996, *Foro It.* II 1996, 407, at 411 (Italy), quoted in Bitensky, *supra* note 109, at 380.

²⁰⁹ Bitensky, *supra* note 109, at 384.

²¹⁰ *Id.* at 386.

²¹¹ *Id.* at 382.

²¹² *Id.* at 383.

²¹³ *Id.*

²¹⁴ *Id.*

where formal structures have been established to represent children's interests at the government level, advocacy to end the social and legal acceptance of corporal punishment has been followed. In Switzerland, the Working Group on Child Abuse, set up by the Federal Department of Internal Affairs, recommended that the Constitution be revised to prohibit corporal punishment and degrading treatment both within and outside the family.²¹⁵ In 1992, the Minister of Justice in Germany announced that a prohibition of physical punishment would soon be introduced.²¹⁶ In Poland, a governmental commission recommended a ban in the context of constitutional reform.²¹⁷ The Scottish Law Commission presented a report on family law to Parliament in 1992, in which they recommended that it be a criminal offense to hit a child with an implement or in any way that caused or could cause injury, significant pain, or discomfort.²¹⁸ In September 1993, more than 600 participants from fifteen African countries assembled in Capetown for a Second African Congress on Child Abuse. They unanimously adopted a resolution supporting moves to eliminate all physical punishment of children through legal reform and education.²¹⁹

III. Enforcement

A. Legal Impact

The legal impact of the *Plonit* decision is as yet undetermined since the case was decided so recently. Furthermore, the Supreme Court itself seems to indicate that the role of this decision is not solely legal, but also socially important. While legal "filters" will "prevent the imposition of criminal liability for the use of mild force by a parent,"²²⁰ the

²¹⁵ NEWELL, *supra* note 130, at 223-24.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 182.

"yardstick must be clear and unequivocal, and the message" to society is that "no corporal punishment is permitted."²²¹ Thus, even if legal enforcement will not and should not be absolute, the *Plonit* case sends an important message that shapes social norms. In the few cases decided in the wake of this decision, reactions vary from support for the norm-setting function of the Supreme Court and realization of the gravity of violence towards children, to confusion and discomfort with the decision. In the twelve decisions citing the *Plonit* decision, only three even mention *Plonit's* prohibition on corporal punishment of children by parents as an educational tool.²²²

The Supreme Court itself did not deal with the issue of corporal punishment by parents again, but in a case where a teacher hit, kicked, and sprayed glue on a student, it refers back to the standards set in *Plonit*. Perceiving the prohibition on corporal punishment in schools as fundamentally intertwined with the prohibition of corporal punishment in families, the Supreme Court linked its treatment of the teacher case with that of *Plonit*. It stated, "This approach [taken by the Court in the present case] also recently finds expression in the treatment of corporal punishment of children by their parents."²²³ Approvingly citing the reasoning of *Plonit*, the Court explained:

The use of punishment that causes pain and humiliation does not contribute to the child's personality or education, but instead violates his rights as a human being. It harms his body, feelings, dignity, and proper development. It distances us from our aspiration to be a society free of violence. Therefore, the use by parents of corporal punishment or means that humiliate and debase the child as an educational method is now prohibited in our society.²²⁴

²²¹ *Id.* at 181.

²²² Four decisions in the Supreme Court and seven decisions in lower courts.

²²³ D.A. 1730/00, *Roe v. State of Israel*, 54(5) P.D. 433, 435.

²²⁴ Cr.A. 4596/98, *Jane Roe v. The State of Israel*, 54(1) P.D. 145, 180.

This case also sheds light on the judicial approach to sentencing. The Supreme Court wrote:

In an extreme case, when the teacher adopts measures of severe violence or when he conducts himself according to a type of violence, it is possible that the answer is that the teacher can no longer serve as an educator. In such a case, distancing the teacher from the school is not intended to add to the punishment already imposed on the teacher by the court, but rather to defend the welfare of the students and the proper functioning of the educational system. In a lighter case, it is possible to be satisfied with moderate disciplinary measures, directed principally to clarify to teachers in general that a teacher that cannot refrain from employing violence can expect severe measures to be taken against him, even if he is a senior and devoted teacher. In this way, it is possible to deter teachers from violent behavior.²²⁵

This can be analogized to cases of parental violence. Thus, only in extreme cases will a child have to be separated from the parent. Lighter cases are primarily concerned with deterrence and setting a standard of appropriate behavior.

In *The State of Israel v. Rachamim*, where a father beat his son with a shoe and mop, the Jerusalem Magistrate Court accepted the role of law and judicial interpretation in changing and advancing society.²²⁶ Law is not just supposed to follow social norms, but rather to help forge them. As the judge declared, "The claim that time is needed in order to internalize the values of a society is unacceptable to me."²²⁷ This is

²²⁵ D.A. 1730/00, *Jane Roe v. The State of Israel*, 54(5) P.D. 433, 435.

²²⁶ Cr.C. (Jm.) 1423/99, *State of Israel v. Rachamim*, 17 P.M. 737, 738.

²²⁷ *Id.*

especially the case when a "moral fault" threatens the fabric of society. The judge explained, "The moral fault of hitting children with a mop, or belt, or by throwing objects indicates a social flaw. And well-known are the studies according to which those who grow up in a home where communication is through blows, internalize these ways, and pass them on to the next generations."²²⁸ Thus, law has a normative function. It is not just concerned with reflecting the acceptable or "reasonable" practices of a society. Rather legal standards can make use of social values and social science research in order to critically examine social practices.

However, *The State of Israel v. Rachamim*, nonetheless, indicates a discomfort with the *Plonit* decision. Although lower courts are bound by the decisions of the Supreme Court, the judge presented the legal status of corporal punishment of children by parents as an unsettled area of law. He stated that "there is a disagreement of opinion in the case law regarding the phenomenon of corporal punishment for children. On one hand, according to the decision of Judge Strashnov, corporal punishment with an educational goal, when it is committed to an extent acceptable by human understanding and wisdom, is not to be treated as criminal. However, according to the Supreme Court's [*Plonit*] Case, there is no possibility for permitting corporal punishment."²²⁹ The judge thus puts the Supreme Court's *Plonit* decision on the same standing as a lower court opinion, contrary to the rules of precedent in Israel. Although at the end he agrees that the father committed a criminal act in this case, he shies away from whole-heartedly endorsing the *Plonit* decision.

In *The State of Israel v. Yerushalmi*, the Court sidesteps the issue of the legitimacy of corporal punishment. In this case, a father accused of child abuse claimed in his defense that he "perceived his actions as an educational method, and not as violence."²³⁰ The Court avoided disabusing him of his legal

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Cr.C. (Hi.) 430/00, *State of Israel v. Yerushalmi*, 32(9) P.M. 713, 715.

error and pointing out that corporal punishment can never serve as a legitimate educational tool. Instead, the Court addressed only the question of whether his actions constituted child abuse. Even on this question, the Court refused to completely align itself with the *Plonit* decision. Although lower courts are bound by the Supreme Court's majority opinion, the judge in the Yerushalmi case referred to Justice England's partial dissent as "an approach that is less broad."²³¹ Nevertheless, it does not totally abandon *Plonit*, citing it to explain the justification for severe treatment of violations against minors. The Court quotes, "The heightening social awareness of the gravity and pervasiveness of the violations of minors and incompetents moved the Israeli legislature to treat these offenders more severely. This awareness led to an intensification of the fight against the said negative phenomenon not only in Israel, but also in other countries."²³²

A recent July 8, 2002 case decided by the Tel Aviv Magistrate Court, espouses the principles of the *Plonit* decision, while refusing to give it retroactive application. In this case, a 24 year-old man sued his parents for regularly employing severe corporal punishment towards him from the age of three to nineteen. The judge found the son's version of events unbelievable, but conceded that once in a while the parents hit him in times of anger. Although the judge acquitted the parents since their actions took place before *Plonit* was decided, he declared, "However difficult a child's behavior, it cannot provide a permissible justification for hitting him."²³³ Echoing *Plonit*, he maintained that "the child is not the parents' property," and corporal punishment conflicts with the principles

²³¹ *Id.* at 6.

²³² Cr.A. 4596/98, *Jane Roe v. The State of Israel*, 54(1) P.D. 145, 158.

²³³ Assaf Bergerfreund, *The Court Acquitted Parents Whose Son Accused Them of Abuse*, HA'ARETZ, Jul. 9, 2002, at 7(a).

of a democratic society.²³⁴ He further stressed the law's role as a tool for the achievement of social goals.²³⁵

B. Governmental Response

The *Plonit* decision has not yet elicited much response from government agencies. This is perhaps to be expected since the Supreme Court itself deemphasized the direct enforcement potential of the decision.

It is enlightening to look at the government reaction in 1996, following Judge Pilpel's district court ruling, rejecting the corporal punishment of children as an educational tool. When asked how this decision will affect legal enforcement, State Attorney Edna Arbel explained, "We will decide every case according to its individual facts. Only in the cases where the hitting strays from the educational framework will we take fitting action."²³⁶ Thus, the concept of "educational hits" was not abandoned. However, now that the Supreme Court of Israel has ruled against the validity of this concept, it will be harder to rely on it – or at least it will not so easily be taken for granted. Rut Matot, the director of the Children in Danger branch of Jerusalem's Welfare Services, stated, "From my point of view, if we are talking about a light hit on the bottom, we will not intervene. We, of course, recommend that parents not use corporal punishment, but rather learn how to become good parents without raising a hand."²³⁷ This reasoning is in line with the *Plonit* opinion and will probably reflect the current government attitude towards the Supreme Court decision.

C. Children's Rights Organizations

²³⁴ *Id.*

²³⁵ Asaf Burgerfreund, *The Court Acquitted Parents Whose Son Accused Them of Abuse*, HA'ARETZ, Jul. 9, 2002, at 7(a).

²³⁶ Tzimuki, *supra* note 90, at 2.

²³⁷ *Id.*

People dealing with children's rights in the field are generally in favor of the *Plonit* decision and praise it for its normative value. However, despite the splash this decision has made in the news, it has not yet fully penetrated to smaller organizations working directly with families on parenting techniques.

1. The National Council for the Child

The National Council for the Child (NCC),²³⁸ established in 1979, is widely known as the principal children's rights organization in Israel.²³⁹ NCC was created by the President of Israel in 1980 to mark the International Year of the Child, and in 1986 it began working as an independent non-governmental agency.²⁴⁰ It is the sole agency representing the entire spectrum of issues concerning the rights of all Israeli children, ages 0-18.²⁴¹ NCC fulfills a number of functions: it seeks change in legislation, policy, and practice; gathers data and monitors the extent and quality of services for children; raises public awareness and seeks to promote the concepts of children's rights and child protection; advocates on behalf of children; and serves as a nation-wide address for anyone wishing to report violations of children's rights.²⁴²

Established in 1998, NCC's Children's Rights Mobile Unit visits children in schools and youth groups and teaches them about their rights. It visits both Jewish and Arab schools

²³⁸ Known as *HaMoatzta HaLeumit LeShalom HaYeled* in Hebrew.

²³⁹ The National Council for the Child represents itself as "Israel's foremost advocate for the rights and well-being of children in Israel," and this recognition was confirmed in my research and talks with child care experts. EFRAT ET AL., *supra* note 49.

²⁴⁰ National Council for the Child webpage, at <http://www.crin.org/organisations/viewOrg.asp?ID=691> (last visited Apr. 25, 2003).

²⁴¹ EFRAT ET AL., *supra* note 49.

²⁴² *Id.*

all over Israel, and on average, it meets with 2500 children per month. To date, it has seen over 200,000 children.²⁴³

As perhaps to be expected, NCC strongly approves of the Supreme Court's *Plonit* decision. Yitzhak Kadman, the head of NCC, praised the decision for "finally" recognizing "the right of children not to be exposed to violence of any kind, even when those who use violence makes excuses for it, saying it is 'educational' or 'punitive.'"²⁴⁴ He stressed the norm-setting function of the of the decision, explaining that "the ruling is significant for its declarative value, for setting norms, for saying that hitting or spanking one's child is wrong, period."²⁴⁵ According to Yitzhak Kadman, "the role of the Court and the legislature is to set public norms of authorized and prohibited on central issues."²⁴⁶ Tali Gal, NCC's legal director, echoed these sentiments. She stated that in *Plonit*, the Supreme Court took an important step, for the first time "clearly and decisively" affirming that corporal punishment is forbidden and creating a norm that "can penetrate to the public."²⁴⁷

Thus, NCC's leaders see the decision as not just directed to law enforcers, but to the public at large. Acknowledging that the public is still not fully aware of the decision, NCC is working on informing them. Yitzhak Kadman explains, "The Supreme Court set up a big and important signpost, but the way still needs to be paved. NCC has for years led a campaign for education without violence."²⁴⁸ NCC thus sees educating the public as vital to "completing the work" of the Supreme Court decision. To this end, it produced a pamphlet, *With Children –*

²⁴³ Interview with Tali Gal, Legal Director of the National Council for the Child, in Israel (Feb. 5, 2002); THE NATIONAL COUNCIL FOR THE CHILD YEARLY REPORT: THE COUNCIL'S ACTIVITIES IN 1999.

²⁴⁴ Dan Izenberg, *Supreme Court: Corporal Punishment of Children is Indefensible*, THE JERUSALEM POST, at 4, Jan. 26, 2000.

²⁴⁵ Herb Keinon et al., *Spank No More*, THE JERUSALEM POST, at 3B, Feb. 4, 2000.

²⁴⁶ Levi-Samorai, *supra* note 72.

²⁴⁷ Tali Gal Interview, *supra* note 243.

²⁴⁸ Levi-Samorai *supra* note 72.

Without Hitting: Saying No to Corporal Punishment,²⁴⁹ explaining the Supreme Court decision to lay terms and addressing objections to a ban on corporal punishment. NCC is also gearing up for a public education campaign, making active use of the Children's Rights Mobile Unit. Not only does the public need to understand the decision, but it is important for parents to be aware of alternate methods of teaching and disciplining children.²⁵⁰

However, the issue must be approached with care since over 50% of families use corporal punishment, and the parents of most of today's parents used corporal punishment. People further cite Jewish law in support of corporal punishment. Although certain groups engage in more corporal punishment, branding them as such would only cause resentment. Tali Gal explains that "all children have the same rights," and it is unproductive to "point fingers." It is thus best to treat all groups equally and expect high standards from all.²⁵¹

In this way, NCC perceives both a role for courts and a role for NGOs in safeguarding the rights of children. As Tali Gal states, "Law is not the only tool, but it is a central tool in the protection of children. A court can either reflect an existing norm or lead with a norm that is supposed to exist and thereby educate the public."²⁵² It is important to remember, however, that educating the citizenry is not only a public function. "It would be wonderful if there were more education and personal examples of good behavior from the government, but unfortunately, this is not the case. Private non-profit organizations need to take up this task."²⁵³

Although the *Plonit* decision will not automatically affect child rearing techniques, Tali Gal believes that it will probably directly influence child care and social workers.

²⁴⁹ TAMAR PELEG-AMIR & YITZHAK KADMAN, *WITH CHILDREN- WITHOUT HITTING: SAYING NO TO CORPORAL PUNISHMENT* (2001).

²⁵⁰ Tali Gal interview, *supra* note 243.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

Social workers are aware of the decision and the problems with corporal punishment. As for legal enforcement officers, however, the situation is more complicated. Although police officers may be aware of the decision, they are not entirely convinced that the corporal punishment of children is wrong, and their enforcement will reflect this. Nonetheless, police officers are starting to take the hitting of children "more and more seriously."²⁵⁴

Tali Gal readily concedes that not every parent that hits should be criminally punished. She echoes the Supreme Court, placing her faith in legal filters to ensure that *de minimis* cases are not prosecuted. According to Israeli law, if there is no public interest in prosecuting a case, the case is closed. Tali Gal explains that there is a spectrum of corporal punishment, ranging from child abuse to *de minimis* cases. The legal effect of the *Plonit* decision will be felt in cases where corporal punishment is systematically and regularly used to educate children, but does not rise to the level of abuse.²⁵⁵

As for the type of enforcement, Tali Gal maintains that in most cases it is better not to take the parents out of the child's home. Oftentimes, it may be best for criminal law not to interfere, but for a case to be handled by Child Protection Services (*Pkidat Tza-ad*).²⁵⁶

The issue of corporal punishment will probably also come up in custody battles between parents. Tali Gal fears that parents, employing their children as a tool to get back at each other during a divorce, will misuse it.²⁵⁷

2. Defense for Children International

Defense for Children International (DCI)-Israel was founded in 1987 to promote and protect the rights of children, as formulated in the U.N. Convention on the Rights of the

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

Child, and to empower children to recognize and act on their rights. DCI attorneys provide information, legal advice, and representation to children in need at Children's Rights Information Centers throughout Israel.²⁵⁸ DCI outreach workers lead seminars, lectures, and workshops for youth in schools, day care centers, and community centers on a range of children's rights topics.²⁵⁹

Yonatan Vingerten works as a consultant attorney for DCI. He works on both civil and criminal cases. He is also involved with a children's center for kids in danger, helping to prevent problems before they arise.²⁶⁰

Although Mr. Vingerten is morally against the corporal punishment of children, he does not believe that this is something that can be legally prohibited. He thus finds the Supreme Court's *Plonit* decision too extreme. He criticizes the Court for not treating "a delicate issue with sensitivity." Although the corporal punishment of children should be prevented, criminal prosecution should not be invoked so quickly. Vingerten considers the criminal prosecution of parents for light slaps for educational purposes to be a mistake, "even if this corporal punishment takes place out of parental weakness and loss of control." Vingerten explains that "most parents give their children a slap or two every so often," and he fears that if they are brought to trial for this, they will feel as if they have engaged in a criminal act, and this could deter parents from educating their children. The interference of the law would thus have "a negative effect on family relations and on the parental function of raising children."²⁶¹ Therefore, although still morally reprehensible, "in cases where a child is

²⁵⁸ These centers are located in Haifa, Tel Aviv, Be'er Sheva, Ramle, Rahat, and Ashdod.

²⁵⁹ Web page for the Defense for Children International, at <http://www.defence-for-children.org> (last visited Apr. 25, 2003).

²⁶⁰ Interview with Yonatan Vingerten, Attorney, Defense for Children International, in Israel (Feb. 10, 2002).

²⁶¹ *Id.*

only hit once in a very long while," the criminal law should not interfere.²⁶²

Interestingly, although Vingerten's tone and perspective differ, his core ideas actually correspond with those of Tali Gal of NCC and with the *Plonit* decision itself. Mr. Vingerten, Tali Gal, and the Supreme Court all agree that criminal sanctions are inappropriate in cases of light, non-recurring corporal punishment, although Tali Gal and the Supreme Court believe that this minor and sporadic corporal punishment should be legally forbidden. Vingerten, furthermore, declares that no matter how light the corporal punishment, if it is recurring and used as "a method of educating children," then it is problematic and the law should intervene.²⁶³ This coincides with Tali Gal's spectrum of abuse and physical punishment with the *Plonit* decision targeting systematic corporal punishment. The *Plonit* decision itself holds that "parental use of corporal punishment or means that humiliate and debase the child *as an educational method* is now prohibited in our society."²⁶⁴ This wording indicates that the Court is chiefly concerned with the use of corporal punishment specifically as an educational method.

Like Tali Gal, Vingerten points to a gap between the opinions of child care experts and the public with regards to corporal punishment. He remarks that psychologists, social workers, and childcare workers are very much in favor of the decision, but their views do not reflect that of the majority of the Israeli public. He explains that childcare workers are "unusually tolerant and patient people."²⁶⁵

Vingerten does not foresee the decision as having a major effect. He explains that most parents have already forgotten about the decision and that it has wrought "no real change" in the norms of society, and in fact, violence and child abuse have only risen.²⁶⁶

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 180.

²⁶⁵ Yonatan Vingerten interview, *supra* note 260.

²⁶⁶ *Id.*

This is the case because subjecting parents to criminal penalties will not uproot corporal punishment, and dealing with the causes of corporal punishment is more a job for social workers. Vingerten thus suggests the mandatory involvement of social workers, and making the prohibition on corporal punishment a moral imperative for parents and not a legal obligation. The problem is that "the need and demand for social workers in Israel exceeds the supply," and government resources are insufficient.²⁶⁷

Child protection laws themselves are only weakly enforced. Great improvement in the Israeli laws protecting children took place in the last eight years; these advances are reflected both in the law's treatment of children as perpetrators and as victims of crimes. Although there is still room for improvement, the laws are generally good. However, enforcement lacks funding and manpower. Israel's division into various populations also makes enforcement more difficult.²⁶⁸

The economic situation of the country affects not only the government's provision of services, but also the dynamics within families. Poor families that depend on the father's financial support for existence will not rush to file a complaint against him. In these cases, "children's rights are not a priority."²⁶⁹

In terms of preventing abuse, Vingerten advocates a shift in focus from parents to children. Increasing sanctions on abusive parents does not really serve as a deterrent, since a parent who loses control will not be thinking about the law and criminal penalties. In fact, Mr. Vingerten believes that there is no effective deterrence. Thus, energy needs to be invested in the children that were hit since "most parents that engage in corporal punishment were children that were hit themselves."²⁷⁰ Abused children are likely to become abusive parents. Since it is difficult to change parents, the emphasis needs to be on

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

children and on preventing "the spread of violence from one generation to the next."²⁷¹

Despite differences in the use of corporal punishment among the different groups of the Israeli population, Vingerten, like Tali Gal, believes that all groups must be treated equally. The decision has to be "universal." Even if immigrant parents may have come from cultures where severe corporal punishment is accepted and encouraged, they must modify their behavior and adjust to the norms of a new society. The Supreme Court sets the norms for the entire society. Thus, even while disagreeing with the *Plonit* decision, Vingerten accepts the Supreme Court as a moral force – a "moral compass for the society."²⁷² He concedes that perhaps "a measure of forgiveness" can be exercised towards immigrant parents in the type of legal sanctions imposed, but "at least in principle, all groups must be treated equally and held up to the same standards."²⁷³

3. Hirsch Early Childhood Development Center

Established in 1995, the Hirsch Early Childhood Development Center provides medical, psychological, and educational services to Arab and Jewish families and educators in Jaffa. Activities include mother and child care clinical services, family consulting, early childhood enrichment programs, occupational therapy, and parenting programs. Workshops teach parents and educators about the developmental needs of children, positive child-rearing practices, and specific parenting skills. Jewish and Arab professionals facilitate these workshops, and groups meet for one hour per week for six months. Usually, parents come to the center because they do not have the tools to deal with their

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

children, but the center also goes out to kindergartens in Jaffa and recruits parents to join the program.²⁷⁴

Mary Copti is a social worker at the Hirsch Early Childhood Development Center. She manages treatment subjects, serves as a family therapist, and conducts parenting groups. Besides her work with Hirsch, she is a principal of an Arab Orthodox school in Jaffa, currently with students from kindergarten to 4th grade, but with plans to expand to the 12th grade.²⁷⁵

Every year, Ms. Copti leads two groups of about twelve families per group. Usually just mothers participate in the group, but she is now working with couples. Copti used to run separate groups for Arab and Jewish parents, but she is currently running a joint session. Separate and joint groups each have their advantages and disadvantages. In separate sessions, it is possible to work on the problems and difficulties specific to each group. However, working jointly enables holding "enlightening discussions on modernization and democracy."²⁷⁶

Surprisingly, Copti and the Hirsch Center were unaware of the *Plonit* decision, indicating that this decision has not yet penetrated local organizations at the ground level that work directly with families on parenting techniques.²⁷⁷ Copti, however, is fully supportive of the *Plonit* decision. She maintains that a healthy environment will "prevent a situation from arising where there is any need to resort to hitting and corporal punishment."²⁷⁸ She rejects corporal punishment and, in fact, punishment at all *per se*, claiming that punishment will only lead to vengeful feelings and a battle to see who is

²⁷⁴ Interview with Mary Copti, Social Worker with Hirsch Early Childhood Development Center, in Israel (Feb. 5, 2002).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ The second consulting attorney with DCI, besides Yonatan Vingerten, to whom I was referred was also unaware of the *Plonit* decision.

²⁷⁸ Mary Copti interview, *supra* note 274.

stronger.²⁷⁹ It is much better for “the cost for the child to be related to the child’s bad behavior.”²⁸⁰ This way, the children will learn that they are not following arbitrary rules, but rather that the bad behavior itself brings losses. Thus, punishment should never be in isolation, but rather be tied to the behavior.²⁸¹

Copti explains that there are two kinds of parents: initiative and reactive parents. Initiative parents set clear rules and goals for their children. They are assertive, yet comprehending, when setting these rules. They plan their actions and do not need to punish. When children behave wrongly, “they let them correct their mistakes and lead them to do so while maintaining a good atmosphere and warm, friendly relationship.”²⁸² There is a direct connection between the child’s misconduct and the result. On the other hand, reactive parents do not plan their actions and react immediately and spontaneously as soon as a child breaks a rule. They get angry that the child broke a rule and punish the child proportionally to their level of anger. There is usually no connection between the child’s misbehavior and the punishment. If the parents are aggressive, they can even resort to corporal punishment. Thus, Copti states, “I see that punishment shows the power of the punisher, while the alternative way of education – the logical result way – shows the demands of reality.”²⁸³

IV. Reception

This part of the paper examines the reception of the *Plonit* decision. It explores the debates around the corporal punishment of children in Israel and the reaction to the decision amongst both its supporters and detractors. There is a dialectic

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ E-mail from Mary Copti, Social Worker with Hirsch Early Childhood Development Center, to the author (Feb. 16, 2002) (on file with the author).

relationship between law and society. Just as legal developments shape the cultural discourse, the cultural discourse, in turn, helps create the legal environment.

A. Child Specialists and Corporal Punishment

This section explores the attitude towards corporal punishment by people specializing in children. It examines the views of educators, psychologists, and social workers in Israel. A review of the literature concerning children points to the gap frequently cited between the perspective of experts and that of the general public.²⁸⁴

1. Reception of the *Plonit* Decision

For a long time, popular magazines on parenting advocated refraining from corporal punishment, and they embraced the Supreme Court's *Plonit* decision when it came out. As discussed below, these magazines have rejected corporal punishment as ineffective and harmful. Thus, Michael Ben-Yair of *Children: Journal on Education, Health, and Security* declared, "We should be grateful for the approach of the Supreme Court in recent years."²⁸⁵ Galit Levi-Samorai of *Parents and Children* praised the Supreme Court opinion for striking "a clear norm according to which a child is a human

²⁸⁴ Johnson, *supra* note 150, at 429 (stating that although social science research indicates that the use of corporal punishment may not be in best interests of child, it continues to find popular and legal support); Tali Gal interview, *supra* note 243; Yonatan Vingerten interview, *supra* note 260; The *Plonit* decision itself states, "In various articles recently published in the United States, the authors remark on the gap between the legal approach, frequently exhibiting tolerance towards reasonable corporal punishment designated for educational purposes, and the approach of professionals in the arenas of medicine, education and psychology, that do not perceive any utility in it." Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 170-71.

²⁸⁵ Michael Ben-Yair, *Don't Raise your Hands – Corporal Punishment in the Education of Children*, CHILDREN: JOURNAL ON EDUCATION, HEALTH, AND SECURITY, 2000, at 21.

being in every instance; he has rights, and he is not the property of his parents."²⁸⁶ Acknowledging the gap between expert and popular opinion towards corporal punishment, Galit Levi-Samorai sees the Supreme Court as achieving balanced moderation, where light cases remain at home since "the Supreme Court desired to absorb a behavioral norm that unites different strands of the Israeli population, a norm that gives expression to the value of human dignity."²⁸⁷ Judge Strashnov's opinion, on the other hand, is criticized as "liable to have dangerous implications on the growing phenomenon of child abuse – it is liable to become accepted or to be used by parents as an excuse for hitting their children."²⁸⁸

The reaction of child specialists to the *Plonit* decision stems from their concept of the state and its role. Although recognizing that parents are children's primary caretakers, they do not excuse the public from responsibility for children's well-being. Government needs to set rules protecting children and ensuring their human dignity. Thus, Michael Ben-Yair stated, "We have the obligation to care for the well-being and life of those that are not able to take care of themselves and to do everything in order to enable children to grow in an environment of happiness, understanding, and love."²⁸⁹

2. Views on Corporal Punishment

Child specialists commonly deride corporal punishment as ineffective.²⁹⁰ For instance, Tova Nir, an educator at the

²⁸⁶ Levi-Samorai, *supra* note 72.

²⁸⁷ *Id.*

²⁸⁸ Shtiver, *supra* note 68.

²⁸⁹ Ben-Yair, *supra* note 285.

²⁹⁰ The rejection of corporal punishment by children's specialists is most common, but not universal. For example, Naomi Baum, the child psychologist and director of psychological services for the Gush Etzion Regional Council frets, "What the court is doing is undermining to some degree the authority of the parents in the family." Keinon, *supra* note 245. Amos Rolider, the chairman of the Behavioral Sciences Department of Jezreel Valley College admits that "in principle I agree that physical

Adler Institute and Educational Office for Parent Groups declared, "Corporal punishment does not contribute a thing and is not effective."²⁹¹ Yitzhak Kadman²⁹² of NCC explained:

We are in favor of limits, of parents and teachers teaching what is good and bad. But we are saying not to do that with blows because that humiliates and hurts the kid, but does nothing to help him internalize the message. The only thing that you learn from a smack is to be afraid of the person who hit you – you don't internalize anything that person is trying to teach.²⁹³

This is the case since "[a] smack is easy and fast . . . too easy. It is much more difficult to have to sit down with children and explain things to them . . . It is a shortcut, but in education there are no shortcuts."²⁹⁴ "When we react with violence, we actually stop [educating]."²⁹⁵ In the case of babies, where people claim they understand no other language but physical pain, Yitzhak Kadman and Tamar Peleg-Amir respond, "if they do not

punishment is not good, and should be avoided," but he worries that "the trend that the children have all the rights, and the adults are losing theirs, is not necessarily a trend that is for the good of the child. . . We have to look and see what is more dangerous- the fact that there are no parental limits, something which can lead to violent and antisocial behavior on the part of some kids, or the chance that the child will learn aggressive behavior because his parents use physical punishment." *Id.* Thus, it seems that even the experts that oppose the *Plonit* decision do not do so because they believe in the corporal punishment of children as a good thing in itself, but rather because they fear parental loss of control without this tool.

²⁹¹ Adi Yotam, *Without Hitting*, 133 PARENTS AND CHILDREN, 1999, at 48.

²⁹² Besides heading the National Council for the Child, Dr. Yitzhak Kadman has a PhD in Social Policy from Brandeis University, served as a social worker dealing closely with children and families for many years, and was formerly the head of Social Workers Association in Israel.

²⁹³ Keinon, *supra* note 245.

²⁹⁴ *Id.*

²⁹⁵ Levi-Samorai, *supra* note 72.

understand the explanation, they certainly do not understand the hit.”²⁹⁶ Yafa HaOzer refers to many studies that show “that extensive use of corporal punishment causes it to cease working as a deterrence; after the child serves the punishment, he feels free to return to the same behavior.”²⁹⁷ Thus, at best, corporal punishment can prevent negative behavior only when the authority figure is in the environment.²⁹⁸

Not only does corporal punishment fail to achieve its aims, but child specialists find it destructive and “liable to make a negative imprint on the life and behavior of the child, for all his life.”²⁹⁹ As Michael Ben-Yair stated, “The view accepted today by psychologists, educators, and social workers – the view supported by much research is that [corporal] punishment causes pain and humiliation in children; it is an action that is harmful, negative, and unwanted . . . [i]nstead of encouraging self-discipline in the child, the violation humiliates the child and his dignity, and it is liable to lead to the development of a sense of humiliation, low self esteem, and feelings of heightened dread and anger.”³⁰⁰ A *Parents and Children* editorial explains that people who grow up in homes where the use of corporal punishment is frequent for the imposition of discipline will be three times as likely to become alcoholics or develop depression.³⁰¹ Thus, parents who hit or slap their children from time to time are not abusive parents, but they still cause harm.³⁰² Some child specialists go even further and point to the “close connection between corporal punishment and child abuse.”³⁰³

²⁹⁶ PELEG-AMIR & KADMAN, *supra* note 249.

²⁹⁷ HaOzer, *supra* note 89, at 18.

²⁹⁸ Yotam, *supra* note 291, at 48 (quoting Dr. Chanita Tzimrin, President of the Organization for the Protection of the Child).

²⁹⁹ Ben-Yair, *supra* note 285, at 20.

³⁰⁰ *Id.* at 21.

³⁰¹ Report on Society, Behavior, Education, and Health in the Family, *Spare the Rod and Hate the Child*, 25 PARENTS AND CHILDREN, 1990, at 12.

³⁰² HaOzer, *supra* note 89, at 18.

³⁰³ Miller, *supra* note 84, at 70.

Another problem with the corporal punishment of children is that children learn by imitating. As Yitzhak Kadman explained,

Most of the learning is done from mimicking the behavior of the significant adults in [the child's] life. . . [j]ust as it is impossible to lecture against smoking while having a cigarette dangling from your mouth, so too it is impossible for a parent to educate against violence when it is used in the home. One thing contradicts the other.³⁰⁴

Dr. Kaisar, the director of child and adolescent psychiatric services at the Tel Aviv Medical Center, echoed that sentiment, saying, "Corporal punishment humiliates the child and causes him to internalize the violence and to make it a permanent behavioral model."³⁰⁵ Corporal punishment shows the child that the world is divided into the strong and the weak, and the strong have the upper hand in the system.³⁰⁶ Absorbing this perspective, children hit by their parents, in turn, hit their younger siblings.³⁰⁷ This also puts in motion a cycle of violence, where using force to impose one's will passes from one generation to the next. As Michael Ben-Yair said, "The

³⁰⁴ Keinon, *supra* note 245.

³⁰⁵ Efrat Milner et al., *For the Decision: The Decision Places Us amongst the Progressive Countries*, YEDI'OT AHARONOT, Jan. 26, 2000, at 11; A longitudinal study, led by Bigelow professor of education Kurt Fischer and founded by the National Institute of Child Health and Human Development, tracked a representative sample of 440 children (aged between 7 and 13 at the start of the study) for eight years to trace the antecedents of aggression. The study found that the strongest predictors of aggression were physical punishment by parents and inhibited temperament – much more so than socioeconomic or demographic factors. *Hair-Trigger Temperaments: Inhibited Killers*, HARVARD MAGAZINE, Sept.- Oct. 2002.

³⁰⁶ HaOzer, *supra* note 89, at 18.

³⁰⁷ Eden, *supra* note 83, at 7.

child seeing in his parents and educators a model for copying is liable to adopt as he matures the same violent behavior from which he suffered as a child."³⁰⁸ Numerous studies have shown that corporal punishment teaches violent behavior across generations,³⁰⁹ and according to a December 1989 study by Hebrew University, 80% of parents that hit were hit themselves as children.³¹⁰

Therefore, according to child specialists, corporal punishment does more to serve the parents, enabling them release tension, than it does to serve the child. Orit Shrig, a clinical psychologist at the Triast-Shrig Institute for Family Treatment explains that "oftentimes, punishment serves the parent's need - an act of vengeance that does not stem from a conscious thought. Punishment only releases the parent from an unpleasant feeling and from frustration, but it is not helpful for the education of the child."³¹¹ Thus, corporal punishment is usually not planned ahead or tied to the child's behavior, but rather linked to the parents' anger, frustration, lack of patience, and helplessness.³¹² However, all agree that a small child is not a suitable object for the release of tension,³¹³ and even if the "educational hits" are accepted, Levi Eden makes the point that it is very hard to differentiate "hits in anger" from "educational hits" - a distinction no longer relevant after the *Plonit* decision.³¹⁴

Child specialists thus perceive corporal punishment not as a sign of parental control, but rather of loss of control. As Tova Nir from the Adler Institute and Educational Office for

³⁰⁸ Ben-Yair, *supra* note 285, at 21.

³⁰⁹ YITZHAK KADMAN & MIRIAM GALIT, WITHOUT VIOLENCE: GUIDE FOR PARENTS I (National Council for the Child); HaOzer, *supra* note 89, at 18; Eden, *supra* note 83, at 8.

³¹⁰ Eden, *supra* note 83, at 7.

³¹¹ Riba Ben-Ner, "Is it Permitted to Spank?" 72 PARENTS AND CHILDREN 29 (1994).

³¹² YITZHAK KADMAN & MIRIAM GALIT, WITHOUT VIOLENCE: GUIDE FOR PARENTS I (National Council for the Child).

³¹³ HaOzer, *supra* note 89, at 18.

³¹⁴ Eden, *supra* note 83, at 7.

Parent Groups explained, "All the experts who write on the subject agree that severe corporal punishment is completely forbidden . . . And, according to their words, hitting is not an educational tool, but rather just the expression of the parent's loss of control and anger."³¹⁵ Yitzhak Kadman agreed that "[i]n most cases, hitting children is a result of loss of control and thought."³¹⁶ As he explained most parents who hit their children occasionally admit it was done when they "lost control" and "not after they sat down and thought out whether it was the best way to get a particular message across"³¹⁷ Likewise, Adi Yotam writes that we punish our children when we lose control – "a different situation, a different mood, and we could resolve every problem with humor, words, and explanation."³¹⁸ Furthermore, not only does corporal punishment stem from weakness, but "the use of physical power does not return control and authority to the parents."³¹⁹

Paradoxically, at the same time that engaging in corporal punishment may help parents release anger and frustration, it also leads to feelings of pain and regret. Yofa HaOzer recounts that most parents who hit from time to time say that giving even the lightest hit causes in them "an oppressive weight and feelings of guilt and frustration."³²⁰ Tova Nir seconds that parents that hit usually feel angry with themselves, but they do

³¹⁵ Yotam, *supra* note 291, at 48.

³¹⁶ Levi-Samorai, *supra* note 72.

³¹⁷ Keinon, *supra* note 245. In Judge Strashnov's case, the father who kicked his son recounted, "He runs wild and shames me. They complain about him at school, the neighbors complain about him . . . I have only trouble from him. I feel I am helpless with this boy." The father's words are more a cry for help, admitting to feelings of powerlessness and a loss of control, than an explanation for his use of violence. Cr.C. (T.A.) 570/91, State of Israel v. Ploni, 52(1) P.M. 431, 434.

³¹⁸ Yotam, *supra* note 291, at 48.

³¹⁹ HaOzer, *supra* note 89, at 18.

³²⁰ *Id.*

not think they have a choice.³²¹ Thus, hitting is painful to both sides - the children and the parents.³²²

Even the staunchest supporters of corporal punishment recognize the need for limitations and do not consider it an absolute good. Parents firmly believing in corporal punishment restrict its use to "reasonable hits" and "educational hits," given not "in time of anger" and "not when children are incapable of differentiating between 'reasonable, educational hits' and ordinary hitting."³²³ Furthermore, as pointed out by Yitzhak Kadman, even while defending their own right to use corporal punishment, most parents would react sharply if a stranger, including a teacher, hits their child or otherwise causes the child physical pain.³²⁴ Additionally, these same people would condemn the corporal punishment of misbehaving or even criminal adults.³²⁵

Child specialists question the logical, moral, and social validity of the corporal punishment of children. They ask, if the education of an older child is more difficult than that of a young child who is helpless and lacking in physical strength – why is there less use of force on adolescents? Is it perhaps because the parents fear the adolescent's reaction?³²⁶ And, why is it that we make an effort to control ourselves and do not hit adults, while this is not the case in our interaction with children?³²⁷ What is "reasonable" punishment anyway when the one that hits is an adult and the one being hit is a small child?³²⁸ How is it possible to give legitimacy at all to a violent connection between parents and children?³²⁹ Yitzhak Kadman maintains that hitting children can only be supported under the approach

³²¹ Yotam, *supra* note 291, at 52.

³²² Tali Ben-Sira, *It Hurts us Too*, 79 PARENTS AND CHILDREN, 1994, at 17.

³²³ Eden, *supra* note 83, at 8.

³²⁴ KADMAN & GALIT, *supra* note 312.

³²⁵ HaOzer, *supra* note 89, at 18.

³²⁶ Eden, *supra* note 83, at 8.

³²⁷ Yotam, *supra* note 291, at 48.

³²⁸ Eden, *supra* note 83, at 7.

³²⁹ Yafa HaOzer, *It is Forbidden to Hit Children. Period.*, 49 PARENTS AND CHILDREN 6 (1992).

that "it is only a child and not a human being yet."³³⁰ Finally, if we believe that violence is "a grave and unwanted phenomenon in our society," how can we "find an objective justification for it"?³³¹

3. Alternate Ways of Educating Children

While rejecting the use of corporal punishment, child specialists promote other ways of disciplining and educating children. Echoing the words of Mary Copti from the Hirsch Early Childhood Development Center, they emphasize the necessity of clarity in rules and relations and of a logical connection between the child's misbehavior and the consequences. Dorit Tamari, a psychologist and educator, speaks of the importance of clearly defining "the unwanted behavior and the punishment it will bring."³³² Yitzhak Kadman and Miriam Galit similarly write of the child's need for a "set framework and clear rules."³³³ Tamari supports the use of negative enforcement, or the prevention of enjoyment, stating that "research shows that negative enforcement is more effective than painful punishment," and that "negative enforcement teaches about the connection between behavior and consequences."³³⁴ Daniella Yeshuron, an educational adviser and manager at the Adler Institute, likewise stresses the importance of "the connection between the action of the child and the reaction."³³⁵ This is the case since "when a child learns that there is a logical consequence to his action, it will be easier for him to do what is asked of him."³³⁶ Kadman and Galit affirm that parents are allowed to discipline and set clear boundaries for their children, and they are allowed to use reward and non-corporal punishment in educating them as long

³³⁰ HaOzer, *supra* note 89, at 20.

³³¹ *Id.*

³³² Ben-Ner, *supra* note 311.

³³³ KADMAN & GALIT, *supra* note 312.

³³⁴ Ben-Ner, *supra* note 311, at 38.

³³⁵ HaOzer, *supra* note 89, at 18.

³³⁶ *Id.* at 20.

as the punishment "is the logical result of the child's behavior."³³⁷ "If the goal of punishment is to teach a child how to behave, punishment needs to relate to the negative behavior of the child and needs to be logical and rational."³³⁸

Child specialists also speak of the need to use positive enforcement. Riba Ben-Ner's article argues that for younger children, who do not understand the meaning of punishment, it is best to set up positive stimulations, along with prohibitions.³³⁹ According to Tova Nir of the Adler Institute, teaching through positive enforcement and kind words is "real learning and for the long run."³⁴⁰

4. Studies Relied On

Studies generally tend to show that the corporal punishment of children is ineffective and even detrimental.³⁴¹ Child specialists discount the studies that hold otherwise as insignificant. NCC's Tali Gal scoffs that they show that corporal punishment is not harmful if it takes place rarely, is not too severe, and meets a host of other conditions – "in short, practically stops being corporal punishment."³⁴²

³³⁷ KADMAN & GALIT, *supra* note 312.

³³⁸ *Id.*

³³⁹ Ben-Ner, *supra* note 311.

³⁴⁰ Yotam, *supra* note 291, at 48.

³⁴¹ See, eg., Murray A. Straus, *Beating the Devil out of Them: Corporal Punishment in American Families and Its Effect on Children* 12 (1994); The submission of the British Psychological Society to the Scottish Law Commission, labeled the corporal punishment of children "an inefficient method of modifying behaviour, being situation-specific and of short-term effect, and with a possibility of undesirable side effects of both fear and learned imitative behavior. More socially desirable attitudes would be encouraged by alternative methods of managing behaviour, such as the withdrawing of privileges and the rewarding of more desirable alternatives." BARTON & DOUGLAS, *supra* note 123, at 153 (citing Scot Law Com., No. 135 *Report on Family Law*, at para. 2.73 (1992)).

³⁴² Tali Gal interview, *supra* note 243.

In rejecting corporal punishment, child specialists in Israel principally rely on American studies.³⁴³ However, as Yonatan Vingerten of Defense for Children International points out, there may be some important differences between American society and Israeli society. According to Vingerten, the Israeli reality is rougher, with daily tension, violence, and terrorism, while the reality in the United States is more "civilized and sterile."³⁴⁴ Israel's Supreme Court itself relies exclusively on American studies. Nevertheless, it recognizes the violence in Israeli society as even more of a reason to prohibit corporal punishment. It quotes Knesset Member Yael Dayan, who describes "our society, where there is violence against children, where there is violence against the weak, where there is violence against incompetents, where there is violence in the power of authority, also within the family, and principally within the family" and declares, "We must also take into account that we are living in a society where violence is spreading like a plague; a permit for 'minor' violence is likely to deteriorate into very serious violence."³⁴⁵

One Israeli study was published by Hebrew University in December 1989. This study, undertaken by a team of researchers from the university and from the Jerusalem Center for the Development of the Child, follows 29 children that were directed to the Center from ages two to four. It shows that the hitting and severe neglect of children at a tender age causes a high risk of gaps in child development and may affect the rest of their lives.³⁴⁶

B. Concerns Raised by the *Plonit* Decision

This section explores some of the public concerns raised by the *Plonit* decision. Material is drawn from both newspaper

³⁴³ Tali Gal interview, *supra* note 243; Yonatan Vingerten interview, *supra* note 260.

³⁴⁴ Yonatan Vingerten interview, *supra* note 260.

³⁴⁵ Cr.A. 4596/98, *Roe v. State of Israel*, 54(1) P.D. 145, 181.

³⁴⁶ Eden, *supra* note 83, at 7.

articles and internet sources. It is important to interpret the reaction to the *Plonit* decision against the background of the incidence of corporal punishment in Israeli homes. NCC published the results of a survey based on a state-wide representative sample of 502 men and women from ages 18 and up. About a quarter of the participants (24.3%) admitted that it was customary in their homes to use corporal punishment against children. About 44% of the participants responded that in their childhood, their parents used to punish them corporally.³⁴⁷ Thus, the use of corporal punishment appears to be declining, but it remains widespread.

The *Plonit* decision was challenged both for systemic reasons and for its wisdom. The Court was first accused of overstepping its bounds and intruding into the family. Some parents saw the decision as a direct threat to their autonomy since "[t]he right to educate one's children according to one's own understanding is among the most precious rights that a free society grants its members."³⁴⁸ Naomi Baum, a child psychologist and the director of psychological services for Gush Etzion Regional Council, complained, "What the court is doing is undermining to some degree the authority of the parents in the family."³⁴⁹ Jonathan Rosenblum took this a step further, expressing the fear that "[s]oon we'll be told that the only protection for our children is that they be raised by the benevolent state" ³⁵⁰ This fear loses credibility, however,

³⁴⁷ HaOzer, *supra* note 89, at 18. According to the NCC survey, 75% of Israeli parents acknowledge using force against their children at least once. Tzimuki, *supra* note 90, at 2. According to a *Yedi'ot Aharonot* survey, 47% of Jewish Israelis believe that it is appropriate for parents to lightly hit their child for educational purposes. The survey interviewed 100 people state-wide over the age of 18. *Yedi'ot Aharonot* survey, YEDIOT AHARONOT, Jan. 2, 2000, at 7.

³⁴⁸ Evelyn Gordon, *The Supreme Court in Loco Parentis*, AZURE, Winter 5761/2000, available at <http://www.shalom.org.il/azure/10-gordon.htm> (last visited Apr. 25, 2003).

³⁴⁹ Keinon, *supra* note 245.

³⁵⁰ Jonathan Rosenblum, *Who Needs Parents, Anyway?*, JERUSALEM POST, Feb. 4, 2000.

when taking into account that the state already actively participates in shaping family relations, and even the most vigorous opponents of the *Plonit* decision do not advocate giving parents absolute control over children.

The Israeli Supreme Court has also been accused of usurping legislative functions and of dangerous counter-majoritarianism in the *Plonit* decision. Knesset Member Rabbi Gafni, who submitted a bill to counter the Court's ruling which was subsequently defeated, perceived the decision as "opening the door to judicial dictatorship," criticizing the Court for its "dangerous arrogance."³⁵¹ Jonathan Rosenblum mocked, "Our Supreme Court has once again experienced an infusion of the god-like wisdom to which it is periodically subject."³⁵² This conveys a notion of the Supreme Court as a dictatorial voice determining policies from above. He then went on to ask "[w]hy the court – and not the Knesset, which has the ability to conduct extensive hearings and which more closely reflects the values of Israel's citizens – should be the body to establish these norms."³⁵³ He concluded that "[c]hild raising is too important a subject to be confined to the pronouncements of three justices with no self-evident qualifications in the area."³⁵⁴ Evelyn Gordon is indignant that "[w]ith supreme arrogance, a panel of three people . . . decided that it knows better than the majority what 'is forbidden today in our society.'"³⁵⁵ She made this criticism part of a general critique of the Supreme Court, protesting that "this is hardly the first time the court has ruthlessly rewritten Israel's legal system to suit its own 'enlightened' values," and "the fact that a majority of the country might disagree has never stopped the court from

³⁵¹ Rabbi Moshe Gafni, *Is it Reasonable or Desirable to Outlaw the Use of Corporal Punishment by Parents?* THE JERUSALEM POST, May 8, 2000.

³⁵² Rosenblum, *supra* note 350.

³⁵³ *Id.*

³⁵⁴ Jonathan Rosenblum, *Child Rearing is Too Important for the Courts*, JERUSALEM POST, Feb. 10, 2000.

³⁵⁵ Evelyn Gordon, *Supreme Arrogance*, JERUSALEM POST, Feb. 1, 2000.

declaring itself the sole arbiter of society's values."³⁵⁶ However, Gordon herself conceded that "[t]he ruling did produce a . . . debate on the pros and cons of spanking one's child, but there was virtually no discussion of the court's right to issue such a verdict."³⁵⁷ Thus, while Israelis hotly debated the decision's implications for child raising, they generally accepted the Supreme Court's norm-setting role for society.

The third systemic issue raised with regards to the *Plonit* decision centers on its enforceability. As Barak Barfi said, "It will be very difficult to enforce the ruling."³⁵⁸ Even worse is the fear that *Plonit*'s unenforceable standard will open "the way for arbitrary and unequal applications of the law. Social workers, for instance, will now have a tool with which they can institute proceedings to remove virtually any child they want from his home."³⁵⁹ The Court took pains to assure that *de minimis* cases will not be pursued, but its critics find this far from reassuring. As Motti Scherzer, the chairman of Education Counselors explained, "When even the court's supporters claim that a ruling it has issued is not meant to be implemented, its status as a legal authority is in trouble."³⁶⁰ Thus, paradoxically, according to *Plonit*'s opponents, while the Court is aggrandizing its power, it is at the same time threatening the very basis of its authority. Evelyn Gordon warned, "[I]ssuing a decree 'that the public will not be able to abide by' is a sure way to breed disrespect for the law and most especially for the court itself."³⁶¹ But, does this logic also apply to *de minimis* assaults against adults, which are also legally prohibited?

Some parents took the decision as a personal attack against their policies and status as parents. Evelyn Gordon sharply criticized the Court for issuing a "ruling, based on the

³⁵⁶ *Id.*

³⁵⁷ Gordon, *supra* note 348.

³⁵⁸ Barak Barfi, *Israeli Supreme Court Bans Parental Force*, ASSOCIATED PRESS, Jan. 27, 2000.

³⁵⁹ Rosenblum, *supra* note 350.

³⁶⁰ Gordon, *supra* note 348.

³⁶¹ Gordon, *supra* note 348.

flimsiest legal premises, which declared the overwhelming majority of Israeli adults to be criminals.”³⁶² She lamented, “A large number of Israelis are probably criminals now – even though they weren’t a few weeks ago.”³⁶³ And, she warned parents dramatically, “you’ll never know when the knife might descend.”³⁶⁴ To claims that corporal punishment is harmful to children, parents defensively point to their own upbringing, asserting that corporal punishment did not hurt them. Yafa Ha’Ozer quoted this common refrain: “I was also slapped, and nothing happened to me. I didn’t feel a miserable and beaten child. On the contrary, I learned that if I do something bad, I deserve a punishment.”³⁶⁵

These parents are most uncomfortable by the connection drawn by corporal punishment and abuse in the decision. Jonathan Rosenblum maintains that “Beinisch’s entire argument against any physical punishment was that anyone who spansks their child even once may become a child abuser She assumes, without support, that every parental spanking is a microcosm of what child abusers do on a continuous basis.”³⁶⁶ He is quick to reassure that “[t]he means, intent, and psychological makeup of the child-abuser bear no relation to those of a normal parent who occasionally spansks a child.”³⁶⁷

Parents also oppose the decision out of the fear that without corporal punishment they are liable to lose control over their children. Knesset Member Rabbi Gafni fears that the Court’s “intervention could twist the personalities of the children, causing them to rebel against their parents and cast off the yoke of education,” leading to “educational anarchy.”³⁶⁸

³⁶² Gordon, *supra* note 348.

³⁶³ Evelyn Gordon, *Court Shows Supreme Arrogance in Ban on Spanking*, JEWISH BULLETIN OF NORTHERN CALIFORNIA: EDITORIAL & OPINION, February 25, 2000, at <http://www.jewishsf.com/bk000225/commi.shtml> (last visited Apr. 25, 2003).

³⁶⁴ Gordon, *supra* note 355.

³⁶⁵ HaOzer, *supra* note 89, at 18.

³⁶⁶ Rosenblum, *supra* note 354.

³⁶⁷ *Id.*

³⁶⁸ Gafni, *supra* note 351.

Amos Rolider, the chairman of the Behavioral Sciences Department of Jezreel Valley College worries that:

[t]he trend that the children have all the rights, and the adults are losing theirs, is not necessarily a trend that is for the good of the child We have to look and see what is more dangerous - the fact that there are no parental limits, something which can lead to violent and antisocial behavior on the part of some kids, or the chance that the child will learn aggressive behavior because his parents use physical punishment.³⁶⁹

However, he goes on to say, "In principle I agree that physical punishment is not good, and should be avoided. That is good common sense But at the same time, we need punishments for educational purposes."³⁷⁰ He thus concedes that corporal punishment is not ideal, but fears that there is no alternative. Shimon Kahn, who teaches 22 three-year-olds in a Jerusalem preschool, addresses this point. "If we are taking this right away, maybe we need to provide workshops for parents on how to discipline. Maybe every parent who registers their child in an Education Ministry preschool should, once or twice, be required to come to an hour-long workshop on discipline."³⁷¹

Not all of the decision's critics even accept the Court's fundamental assumption that violence is an absolute evil that needs to be eradicated from society. One of the decision's antagonists argued that violence – used in proportion and in proper circumstances – is good and necessary.³⁷² Going back to the Holocaust, he queried, "[D]on't we all cringe because several million Jews went to the gas chambers without putting

³⁶⁹ Keinon, *supra* note 245.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² Macabee Dean of Ramat Gan, *Some Supreme Court Justices Should be Spanked*, Letter to JERUSALEM POST, Feb. 3, 2000.

up a struggle? Maybe their violent resistance might not have changed their fate, but it would have made us feel a bit prouder. Violence has its uses."³⁷³ He praised the virtues of spanking, claiming with tongue and cheek that it could even benefit some adults. He wrote, "The problem is that parents often need the spanking more than their child. And this goes for all too many of our politicians, our policemen, our teachers, our doctors, our bus drivers, our rabbis . . . and yes, with all due respect, Their Honors, our Supreme Court Justices."³⁷⁴

Reaction to the decision is further complicated by religious considerations. Judge Strashnov of the Tel Aviv District Court based his support of corporal punishment on Biblical and rabbinical citations.³⁷⁵ Proponents of corporal punishment commonly cite the proverb, "He who spares the rod, hates his child."³⁷⁶ The Talmud and later commentaries also seem to justify corporal punishment.³⁷⁷ Chaim Budnick explained that "in the correct circumstances and within the correct boundaries, corporal punishment is not only condoned but rather prescribed."³⁷⁸ Thus, Jonathan Rosenblum wrote, "Most religious Jews would likely be numbered among the skeptics when it comes to the absolutist position against any physical punishment."³⁷⁹ However, even among the religious, views are not unanimous. Rabbi Israel Meir Lau points out that the Hebrew word for rod, *shevet*, not only means rod, but it is

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ Miller, *supra* note 84, at 70.

³⁷⁶ *Proverbs* 13:24 (Hebrew Bible).

³⁷⁷ It is interesting to note that Rabbinic sources seem to support not just the hitting of children by parents, but also the hitting of wives by husbands. Avirma Golan, *To Hit in an Educational Way*, MUSAF L.A., Feb. 22, 2002, at 24 (discussing the doctoral dissertation of Michal Wolf).

³⁷⁸ Chaim Budnick, *The Fifth Shulchan Aruch*, Letter to JERUSALEM POST, Feb. 3, 2000.

³⁷⁹ Rosenblum, *supra* note 350. According to the Yedi'ot Aharonot survey, amongst the religious, there exists a broader consensus that it is appropriate to use light corporal punishment on a child. *Yedi'ot Aharonot survey*, YEDIOT AHARONOT, Jan. 2, 2000, at 7; Tzimuki, *supra* note 90, at 2.

also used in the Bible to denote authority and fear.³⁸⁰ Frimet Roth argues that since the second half of the quoted proverb is "But he who loves him reproves him early" with no mention of a rod or hitting, this supports the view that King Solomon was merely exhorting parents to teach and discipline their children.³⁸¹

V. Conclusion

Placing the *Plonit* decision in proper context de-radicalizes it and makes it more understandable. Although the decision represents a break with common law tradition, it is possible to see how it follows from legal developments internationally and in Israel. In January 2000, Israel became the tenth in a string of countries rejecting the corporal punishment of children.³⁸² Soon after Israel's *Plonit* decision, Germany passed an amendment to the Civil Code, stating, "Children have the right to a non-violent upbringing. Corporal punishment, psychological injuries and other humiliating measures are prohibited."³⁸³ Even the common law countries have taken steps towards the elimination of corporal punishment. In 1986, the United Kingdom became the last country in Europe to abolish corporal punishment in state-supported schools.³⁸⁴ Over half of the American states prohibit the use of corporal punishment in public schools,³⁸⁵ and certain state regulations prohibit foster parents from using corporal punishment.³⁸⁶ In Israel, starting in 1993, lower court opinions had already

³⁸⁰ Keinon, *supra* note 245.

³⁸¹ Roth, *supra* note 50.

³⁸² EPOCH-WORLDWIDE, LEGAL REFORMS: CORPORAL PUNISHMENT OF CHILDREN IN THE FAMILY.

³⁸³ EPOCH-WORLDWIDE, LEGAL REFORMS: CORPORAL PUNISHMENT OF CHILDREN IN THE FAMILY 4.

³⁸⁴ BARTON & DOUGLAS, *supra* note 123, at 151; LYON & DE CRUZ, *supra* note 136.

³⁸⁵ Edwards, *supra* note 146, at 1014, n.230.

³⁸⁶ *Id.* at 1017-1020.

rejected corporal punishment.³⁸⁷ In 1998, in *Sde-Or*, the Supreme Court of Israel held that "the use of violence by an educator towards his students . . . cannot be viewed as reasonable."³⁸⁸

It is still premature to properly evaluate enforcement of the *Plonit* decision. The decision is starting to shape legal doctrine and has been cited as precedent. However, lower court reactions vary from support for the norm-setting function of the Supreme Court and realization of the gravity of violence towards children to confusion and discomfort with the decision.

³⁸⁹ Some judges have avoided decisively stating that corporal punishment is impermissible and have chosen to decide cases on narrower grounds.³⁹⁰ As perhaps to be expected, in terms of government enforcement agencies, there has as yet not been much of a response to the decision. The National Council for the Child, Israel's major children's rights organization, seems to be making the dissemination of information on the *Plonit* decision one of its priorities. It produced a pamphlet explaining the decision to the public and responding to commonly raised concerns. It is also gearing up for a public education campaign, including visits to schools all over Israel.³⁹¹ Events in the Scandinavian countries, such as Sweden and Finland, demonstrate that a legal prohibition can affect the norms and behavior of the citizens even with light enforcement.³⁹² However, in these countries, the legal change was backed by the pouring of government energy and money into educating the public through mailings, public school programs, parental education seminars, and a massive media campaign.³⁹³ The question is whether this can happen in Israel. Causing an initial

³⁸⁷ HaOzer, *supra* note 89, at 20; Cr.A. (B.S.) 1059/96.

³⁸⁸ Cr.A. 5224/97, State of Israel v. Sde-Or, 54(3) P.D. 572, 579.

³⁸⁹ Cr.C. (Jm.) 1423/99, State of Israel v. Rachamim, 17 P.M. 737.

³⁹⁰ Cr.C. (Hi.) 430/00, State of Israel v. Yerushalmi, 32(9) P.M. 713.

³⁹¹ Tali Gal interview, *supra* note 243.

³⁹² Johnson, *supra* note 150, at 478; NEWELL, *supra* note 130, at 220-21.

³⁹³ Edwards, *supra* note 146, at 1019; Bitensky, *supra* note 109, at 366; Johnson, *supra* note 150, at 477-478; NEWELL, *supra* note 130, at 219.

splash in the media, the decision has already contributed to the consciousness-raising of Israelis. Nonetheless, memories are short, and the decision has still not penetrated to smaller organizations on the ground, working directly with families on parenting techniques.³⁹⁴

The decision's reception has been mixed. Children's specialists overwhelmingly welcomed it,³⁹⁵ though some stressed that parents need to be taught alternative tools for dealing with children.³⁹⁶ Children's specialists in Israel have been agitating for a prohibition on corporal punishment for a long time, advocating for it in parenting magazines and lobbying the Knesset.³⁹⁷

Public concerns raised by the decision range from the systemic to challenges to the decision's wisdom. Religious issues also factored into this explosive mix with frequent reference to the proverb, "He who spares the rod, hates his child," and the Talmud and later commentaries seeming to justify corporal punishment. The decision raised important questions about the democratic legitimacy of the Court's decisions, the norm-setting function of law, and the role of government in regulating family relations. People used the decision as a means to criticize the Supreme Court's policies and role in government in general. However, as even some of the decision's detractors concede,³⁹⁸ the Israeli public generally accepts the norm-setting function of the Court and perceives the Court as a "moral compass for the society."³⁹⁹ Debate thus centered mainly on the practicability and intelligence of the decision. Even amongst those who feel the decision went too far, however, there is widespread agreement that corporal

³⁹⁴ Mary Copti interview, *supra* note 274.

³⁹⁵ Ben-Yair, *supra* note 285, at 21; Izenberg, *supra* note 244; Levi-Samurai, *supra* note 72.

³⁹⁶ Keinon, *supra* note 245.

³⁹⁷ Ben-Yair, *supra* note 285, at 20; HaOzer, *supra* note 89, at 18, 20; Levi-Samurai, *supra* note 72; Miller, *supra* note 84, at 69; Yotam, *supra* note 291, at 48.

³⁹⁸ Gordon, *supra* note 348.

³⁹⁹ Yonatan Vingerten interview, *supra* note 260.

punishment – no matter how light – used systematically and as a regular educational method by parents is problematic.⁴⁰⁰

Thus, only time will tell what impact the decision will have on the behavior of Israeli parents. Much of this will depend on efforts at education and the dissemination of information. Parents need to be given alternative disciplinary tools, and emphasis needs to be placed on reaching the next generation. But, significantly, the decision is part of a movement away from corporal punishment in Israel, and there is a certain public consensus on which to build. I would like to close with the words of Alice Miller: “We are still barely conscious of how harmful it is to treat children in a degrading manner We don’t yet know, above all, what the world might be like if children were to grow up without being subjected to humiliation, if parents would respect them and take them seriously as persons.”⁴⁰¹

⁴⁰⁰ Keinon, *supra* note 245; STRASHNOV, *supra* note 85; Yonatan Vingerten interview, *supra* note 260.

⁴⁰¹ NEWELL, *supra* note 130, at 215 (quoting Alice Miller 65 (1987)).