

CORPORAL PUNISHMENT
IN
LEGAL, HISTORICAL AND SOCIAL CONTEXT
by Frank Bates*

I.

On two consecutive days in February 1982, the European Court of Human Rights made two pronouncements concerning corporal punishment in British schools: in the first,¹ the court upheld the right of parents to keep their children from school in Scotland where corporal punishment was practised and to which they were opposed. The relevant statement in the *European Convention of Human Rights* provides that the particular signatory state, in its educational function, "... shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical beliefs".² It is, thus, clear that, as *The Times* newspaper pointed out in an editorial, the judgment was essentially concerned with the issue of parental right and did not, in any wise, declare corporal punishment in schools to be, "... torture or too inhuman and degrading treatment or punishment",³ which is specifically proscribed in the *Convention*.⁴ Nonetheless, there was a strong dissent from the British member of the court⁵ and, not insignificantly, on the following day,⁶ the same court, awarded significant damages to a 14-year-old schoolgirl who had been caned by her Headmistress. In this case, the girl received £1200 by way of settlement and the evidence showed, in the words of the newspaper report, that the punishment had, "produced weals on the buttocks and the hand. The girl was in discomfort for days and traces of the caning remained for a considerably longer period".⁷ This case is the more significant in that it did seem to infringe the article referring to inhuman and degrading treatment, to which earlier reference has been made,⁸ and, further, it appears from newspaper reports⁹ that the British Government intends sending out a circular to education authorities informing that, in certain circumstances, the use of corporal punishment may infringe the appropriate article of the *European Convention*.

All this has placed the whole matter of corporal punishment — especially when inflicted in connection with formal education — again into the public area of debate. It is the purpose of this paper to examine the place of corporal punishment in its legal, historical and social context; major emphasis will be placed on its use in schools but, inevitably, reference will be made to its use in familial circumstances. This matter may prove to be of continuing interest and importance as there appear to be other complaints filed before the European

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1. See, *The Times*, February 26th, 1982.

2. European Convention On Human Rights, Protocol 1, Art. 2.

3. *The Times*, February 26th, 1982.

4. *Supra* n. 2, Art. 3.

5. Sir Vincent Evans. The court was composed of seven members, and apart from the British member, they were: Mr. R. Rysdal (Norway: President), Mr. J. Cremona (Malta), Mr. T. Wiljamsson (Iceland), Mr. L. Liesch (Luxembourg), Mr. L.E. Petiti (France), Mr. R. Macdonald (Canada) and Mr. A. Eissen (Registrar) and Mr. H. Petzold (Deputy Registrar).

6. *The Times*, February 27th, 1982.

7. *Ibid.*

8. *Supra* n. 2, Art. 3.

9. *Supra* n. 6.

Court of Human Rights in Strasbourg¹⁰ and the Education Secretary of the *Society of Teachers Opposed to Physical Punishment* (STOPP), has commented that, "This is just another case that will surely bring home to the Government that they have got to ban corporal punishment because they will not be able to get out of it so easily on future occasions."¹¹ The damages case is particularly significant because, first, the British Government had also agreed¹² to pay the girl's mother more than £1,000 in legal costs and, second, because of the amount of damages which had been agreed on. The sum can be compared with a successful civil action in the Irish Republic in 1968,¹³ where on shilling by way of nominal damages had been awarded where it was shown that a 9-year-old boy had been struck on the buttocks and hands with a leather strap and on the buttocks with a blackboard pointer. Medical evidence demonstrated damage to the muscle and blood vessels consonant with severe blows to the buttocks.¹⁴

The legal position may be simply — perhaps simplistically — described in the words of the leading text on the law of Torts,¹⁵ "... the schoolmaster is entitled to administer reasonable chastisement to the child"¹⁶ and the same considerations apply as a defence to a prosecution at criminal law¹⁶ as they do to an action in tort. Thus, the general statement of law that, "The application of force to the person of another without lawful justification amounts to the tort of battery"¹⁷ is consequently modified further. However, there is considerable doubt as to the juristic basis of the 'lawful justification' mentioned by *Salmond and Heuston* in the context of corporal punishment in schools. The traditional view is that teachers were empowered to chastise children in their charge because of delegation by parents of their innate authority. In the words of Blackstone:

He [the parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.¹⁸

Wallington,¹⁹ in an important and compendious article, is highly critical of this theory even as it applies specifically to English law, where it enjoys greater currency²⁰ than in other jurisdictions.²¹ He considers²² that Blackstone and those judges and commentators who have followed him have been operating

10. *Supra* n. 6.

11. Mr. Tom Scott, *supra* n. 6.

12. *Supra* n. 6.

13. *Moore v. Ryan and Quinn*, *Irish Times*, June 27th and 28th, 1968 (Dublin Dt. Ct.).

14. *Cf. Ridley v. Little*, [1960] C.L.Y. 1088, a case with very similar facts. *Moore v. Ryan and Quinn*, *supra* n. 13; and *Ridley v. Little* demonstrate how difficult it is to ascertain the degree of punishment regarded, in law, as reasonable. See, *infra*, text at n. 81.

15. *Salmond and Heuston on the Law of Torts* (18th ed. R.F.V. Heuston and R.S. Chambers 1981) at 126.

16. See, generally at common law, J.C. Smith and B. Hogan, *Criminal Law* (4th ed. 1978) at 359.

17. *Supra* n. 15 at 113. See also, the analysis by Ilesley C.J. of the Nova Scotia Supreme Court in *Eisener v. Maxwell*, [1951] 1 D.L.R. 816 at 823 (N.S.S.C.).

18. J.W. Blackstone, *Commentaries*, 452. See also, *Fitzgerald v. Northcote* (1865), 4 F. & F. 656; *Cleary v. Booth*, [1893] 1 Q.B. 465.

19. P.T. Wallington, "Corporal Punishment in Schools" (1972), *J.R.* 124 at 126.

20. *But see, R. v. Newport (Salop) Justices*, [1929] 2 K.B. 416.

21. *Infra* text, at n. 26.

22. *Supra* n. 19, at 128-129 and 140-141.

from the patently false premise that a parent has a right of chastisement which, in turn, is capable of delegation. Wallington suggests that the parental claim is, in fact, merely a privilege and one which is not legally delegable. Although within the context which he has described, Wallington is clearly correct, the decision of the European Court²³ in the Scots case may well lead to some kind of renaissance of the delegation thesis. In English law, the courts have consistently taken the view that parents could not influence the content²⁴ or, indeed, form²⁵ of their children's education. In view of the Scottish case, this entrenched opinion may now be under threat.

The second theory of a teacher's power to inflict corporal punishment relates to the status of the teacher relative to the pupil: as Wallington describes it, "... the teacher has a functional relationship with his pupil qualitatively similar to the parent's relationship with his child, and is therefore entitled to analogous disciplinary privileges . . ." ²⁶ The status theory has found express favour in Scotland; as Lord Guthrie put it in the case of *Gray v. Hawthorn*, "There is no doubt that a school teacher is vested with disciplinary powers to enable him to do his educational work and to maintain proper order in class and in school." ²⁷ The same is true of South Africa, ²⁸ a legal system not dissimilar in many respects to Scotland. ²⁹ However, perhaps not wholly surprisingly in that jurisdiction, there is a *dictum* to the effect that a teacher has not only a privilege or right but a duty to punish difficult pupils. ³⁰ In Australia, as a result of the High Court's decision in *Ramsey v. Larsen* ³¹ it seems that the delegation theory is irrelevant because of the state's coercive power in relation to school attendance and a similar view has been adopted in the United States since the mid-19th century. ³² In Canada, the position is complicated by geographical and cultural considerations. In Quebec, it is provided by article 245 of the *Civil Code* that parents have a right of moderate and reasonable correction over their children, "... which may be delegated to and exercised by those to whom his education has been entrusted." ³³ In common law Canada, the position seems approximate to that in other analogous jurisdictions, though authority in the shape of either judicial or academic comment is notable for its absence. It must also be said that there is evidence that the delegation theory is losing ground in England, its initial home; none of the leading texts on the English law of torts

23. *Supra* text, at n. 1.

24. *Watt v. Kesteven County Council*, [1955] 1 Q.B. 408; *Cummings et al. v. Birkenhead Corporation*, [1971] 2 All E.R. 881 (C.A.). These cases are discussed in detail in Wallington, *supra* n. 19, at 135.

25. *Re D.J.M.S. (A Minor)*, [1977] 3 All E.R. 582 (C.A.). For comment, see F. Bates, (1978) 56 *Can. B.R.* 516.

26. *Supra* n. 19, at 143.

27. [1964] J.C. 69 at 75. See also, *Muckarsie v. Dickson* (1948), 11 D. 4 at 5 (per Lord President Boyle); *McShane v. Paton*, [1922] J.C. 26 at 31 (per Lord Salveson); *Brown v. Hilson*, [1924] J.C. 1 at 5 (per Lord Cullen).

28. *Hiltonian Society v. Crofton* (1952), 3 S.A. 130.

29. See, T.B. Smith, "Scots Law and Roman-Dutch Law: A Shared Tradition", *Studies Critical and Comparative* (1962) at 46.

30. *R. v. Muller* (1948), 4 S.A. 848, (per de Beer J.P.).

31. (1964), 111 C.L.R. 16 at 37, per Taylor J.: "The authority of the master must . . . be regarded as having been acquired from the Crown . . ."; per McTiernan J. at 25, " . . . in my view a teacher employed by the Department of Education in a State school is *in loco parentis* only in virtue of his appointment by the Crown as a teacher".

32. See, *Stevens v. Fassett* (1947), 27 Me. 266; *Lander v. Seaver* (1859), 32 Vx. 114. See generally, W.L. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) at 135; M.R. Sumpson, "The Control Pupil Conduct by the School" (1955), 20 *Law and Contemporary Problems* 80; P.O. Proehl, "The Liability of Teachers" (1959), 12 *Vand. L.R.* 723 at 726-727; R.W. Miller, "Resort to Corporal Punishment in Enforcing School Discipline" (1950), 1 *Syr. L.R.* 247.

33. "[Q]ui peut être délégué et qui peuvent exercer ceux à qui l'éducation de cet enfant a été confiée". See, *Filistrato v. Boyle* (1938), 45 R.N.L.S. 29.

today espouse it³⁴ and Street,³⁵ indeed, has never done so. The editors of *Salmond and Heuston* rely³⁶ on the Australian authority, earlier noted,³⁷ and that of *Winfield and Jolowicz*³⁸ on Street's earlier rejection of it. Wallington comments³⁹ that the status theory is much easier to defend jurisprudentially and can only be overturned if it is denied that teachers have quasi-parental status.

Nevertheless, as has earlier been briefly noted,⁴⁰ if the status thesis is to be accepted, which it is suggested that it must be, at least until the Scots case, two important considerations flow directly and indirectly from it. Firstly, as the editor of *Winfield and Jolowicz* points out,⁴¹ if one accepts the status theory, then it clearly follows that a parental veto upon corporal punishment would not thereby render its use unlawful. Secondly, the authorities which have been hitherto discussed have involved practices in schools directly controlled by state agencies.⁴² Different considerations may apply in relation to non-government schools. This is important because, first, parent and non-government school may stand in a different relationship to one another than parent and government school. Second, the position and practice of corporal punishment in private schools is, as will be later observed,⁴³ from a historical point of view, a matter of great importance. As regards the relationship between parent and private school, where the school permits corporal punishment, Boer and Gleeson say⁴⁴ that parental consent may arise from the contractual relationship between the parties if the conditions of enrolment require that the child comply with school rules. "However", they continue, "it can be argued that parents should not be in a position to contract in such a manner as to impinge on the "rights" of their children." This view, it is suggested, is in accord with the general decline⁴⁵ in notions of parental right. Although, in abstract terms, Boer and Gleeson ought to be correct, it is suggested that, in reality, their comments may be far from accurate. Many private schools, rightly or wrongly, are jealous of their practices and traditions and many parents seek to have their children educated at such schools because of them. Thus, in a report of the Australian Schools Commission, factors such as, "... discipline, uniforms, ... moral or value-centred education ..."⁴⁶ and some, less tangible, feeling that a non-government school is more accountable to them were cited. At least one of the issues which will be canvassed in this paper⁴⁷ relates to the nature of discipline *per se*, and some of the other

34. See *supra* n. 15, at 127; *Winfield and Jolowicz on Tort* (11th ed. W.V.H. Rogers 1971) at 654; H. Street, *Law of Torts* (6th ed. 1976) at 87.

35. H. Street, *Law of Torts* (1955) at 90.

36. *Supra* n. 15, at 127.

37. *Supra* text, at n. 31.

38. *Supra* n. 34.

39. *Supra* n. 19, at 143.

40. *Supra* text, at n. 23.

41. *Supra* n. 34.

42. See particularly, *Ramsay v. Larsen*, *supra* n. 31.

43. *Infra* text, at n. 184.

44. B. Boer and V. Gleeson, *The Law of Education* (1982) at 157.

45. *Id.*, at 87 and 157. For general comment see J.C. Hall, "The Waning of Parental Rights" (1972), 311 *Camb. L.J.* 248; F. Bates, "Redefining the Parent/Child Relationship: A Blueprint" (1977), 12 *U.W.A.L.R.* 518.

46. Quoted in G. Sheridan, "Education Today: How Parents are Grading Schools" *The Bulletin*, Jan. 26th, 1972, at 42.

47. *Infra* text, at n. 166.

considerations to which reference is made in the report are solely a matter of personal opinion.⁴⁸

At the same time, it is hard to imagine, in a situation where some parents at any rate⁴⁹ regard private education as being of such value, schools would be prepared to bend their usual practice and organization to accommodate the wishes of individual parents on particular matters relating to their children's education. In other words, a parent, sending his child to a private school where corporal punishment was generally used, and who required that the child not be beaten would, in today's middle-class education climate, receive scant support from the school.⁵⁰ Parents send their children to private schools for various reasons,⁵¹ but, it must be emphasized, do not generally do so on their own terms.

Teachers' powers to punish corporally may, sometimes, be confirmed (and the Quebec provision has already been noted)⁵² or restricted by statute or regulation. In Tasmania,⁵³ for example, it is provided by s.50 of the *Criminal Code Act 1924* that it is lawful for, "... a parent or a person in the place of a parent, or for a schoolmaster, to use, by way of correction, towards a child or pupil respectively under his care, such force as is reasonable under the circumstances." The structure of the Tasmanian provision is interesting in that, by placing the "schoolmaster" in a separate category, the legislature in that jurisdiction seems to accept the status theory in respect of teachers. On the other hand, the states of New South Wales and South Australia, for instance, in their regulations, recognize the right of parents of pupils in state schools to prevent the corporal punishment of their children.⁵⁴ In addition, regulations prescribe the manner of corporal punishment and under what circumstances it may be inflicted.⁵⁵

Throughout the foregoing discussion the idea of "reasonable" corporal punishment has continually arisen. The common law uses the word "reasonable" in a wide variety of contexts particularly to denote that an objective test is to be applied to the conduct under question. It not infrequently has caused various difficulties beyond the scope of the present discussion.⁵⁶ If corporal punishment is adjudged not to be "reasonable", then the inflictor may be liable in both tort and criminal law. Inevitably, it is easier to say what, at any given time, has been held to be unreasonable rather than to state what, at the

48. The urge of parents to put their children into ridiculous and degrading clothes, referred to as 'uniforms', seems to this writer, at least, especially perverse.

49. See, *supra* n. 46.

50. In even more basic terms, "This school can be filled several times over — If you don't like the system, many others do, and you are at liberty to remove your child." Anecdotally and experientially, this writer has ample evidence to suggest that this dialogue between private school Principal and parent occurs many times annually in the English-speaking world.

51. *Supra* n. 46, at 43-44.

52. *Supra* text, at n. 33.

53. See also, Queensland *Criminal Code Act 1899*, s.280 and Western Australia, *Criminal Code Act Compilation Act 1913*, s.257. In addition to the categories of 'child or pupil' specified in the Tasmanian legislation, these enactments include apprentices! In New Zealand, see *Crimes Act 1961*, s. 43 and in Canada *Criminal Code*, R.S.C. 1970, c.C-34, s.59 where the provision is substantially the same as that in Tasmania.

54. See, *supra* n. 44, at 152.

55. For an outline of the position in the Australian jurisdictions, see, I.K.F. Birch, *The School and the Law* (1976), at 49.

56. See, for example, the notion of the "reasonable man", for comment see, O.M. Reynolds, "Reasonable Man of Negligence Law: A Health Report on the 'Odious Creature'" (1970), 23 *Okl. L.R.* 410. Reasonable belief and conduct are likewise in prominent view.

present time, will be regarded as being reasonable. Standards of behaviour observably change and much will depend upon the particular facts of each individual case. For example, this means that a case like *Byrne v. Hebden, Ex parte Hebden*,⁵⁷ which was decided in 1913 might well not be decided in the same way today. In that case, the conviction of a teacher for assault was quashed where it had been shown that he had caned an eight-year-old girl on the hands and back, the latter leaving perceptible marks. Although there was some procedural irregularity, it is clear from the judgment of Cooper C.J.⁵⁸ that that was not the reason why the conviction was quashed. "The mere existence of marks", said the Chief Justice, "does not prove unreasonable chastisement"

The case which appears generally to be regarded as the leading authority on the matter is *Ryan v. Fildes*,⁵⁹ where the defendant schoolmistress had struck a disruptive pupil, a ten-year-old boy, on the side of the head with her hand. The blow ruptured his eardrum and, thus, rendered him partly deaf. In holding the defendant liable, Tucker J. stated that he considered:

. . . [T]his was not punishment which could be described as moderate or such as is usual in a school, and such as the parent of the child might expect that the child could receive if it did wrong. The blow struck was moderate in the sense that it was not a very violent blow, but as punishment, it was not moderate punishment, because I do not think that the proper way of punishing a child is to strike it on the head or ear.⁶⁰

Given the facts of, say, the *Hebden* case, one might be forgiven for thinking that Miss Fildes was not a little unfortunate, particularly as she had, in Tucker J.'s words,⁶¹ ". . . borne a very good character and reputation as a schoolmistress" and her Headmaster had spoken of her, ". . . as a mistress in whom he put implicit trust and confidence". Wallington has analysed⁶² most of the relevant case law, so that reiteration is unnecessary and selected examples are sufficient in the context of the paper as a whole. It is worth noting, at this juncture, that a clear picture is not easy to obtain because of the particularity of the subject and the wide differences in social and judicial attitudes which are apparent, not merely historically, but at any given time. Thus, *Ryan v. Fildes* may be compared with the decision of the Full Court of the Supreme Court of Queensland⁶³ in *White v. Weller, Ex parte White*.⁶⁴ There, a decision at first instance by a magistrate dismissing a complaint was upheld where it was shown that the defendant teacher had punished a fifteen-year-old boy by slapping him twice on the face with his open hand and on the left shoulder several times with sufficient force to cause bruises and abrasions. In reaching the conclusion that it could not, in all the circumstances, be said that the punishment was unreasonable, Stanley J. said that it was not to be understood that, ". . . punishment inflicted by blows on the head is to be encouraged or is always reasonable Indeed, I think that *prima facie* such a

57. [1913] St. R. Qd. 233.

58. *Id.*, at 235.

59. [1938] 3 All E.R. 517 (K.B.).

60. *Id.*, at 520.

61. *Id.*, at 519.

62. *Supra* n. 19, at 146.

63. The issue seems to have been of particular significance in that jurisdiction. *See, supra* n. 55, at 64.

64. [1959] Qd. R. 192.

form of punishment is unreasonable if only because it is liable to produce unexpectedly serious results on a child."⁶⁵ He, accordingly, rejected a contention to the effect that striking a child on the face or shoulder was, by reason of its inherent danger, so irregular and unusual as to be unreasonable.⁶⁶

The matter of unexpectedly serious results occurring from corporal punishment is graphically illustrated by the Canadian case of *Andrews v. Hopkins*⁶⁷ where the plaintiff, an eleven-year-old girl, had received five strokes on each hand with a strap. The evidence showed that, when the child returned home for lunch, "... she was in nervous condition, and could not eat and her arms were bruised from her hand nearly to her elbow and there was a blood blister on her right had."⁶⁸ However, the ultimately more serious consequence of the punishment was that the child developed chronic mastitis, which necessitated regular subsequent medical treatment. The trial judge, Paton J., had no doubt⁶⁹ that the child's injuries had been caused by the negligent infliction of the punishment and his decision was upheld by the Court of Appeal.⁷⁰ *Andrews v. Hopkins* is interesting because it involved negligence, rather than trespass, as the grounds for liability and it involved the corporal punishment of a girl. The courts seem, although a stronger word is not merited, to have been less sympathetic to the physical punishment of girls. The *locus classicus* is the decision of Lord Young in the Scots case of *Scorgie v. Lowrie*⁷¹, a case decided as early as 1883, where a girl aged twelve developed paralysis of the thumb as the result of a caning on the hand. Lord Young commented: "My abhorrence of the use of the cane for the punishment of young girls is so strong that I have seriously considered whether it is not in itself an assault; its application to boys is quite another thing."⁷² Nonetheless, the injury was held to be the product of accident⁷³ and the teacher was, hence, held not to be liable. The analogous English case is *Mansell v. Griffin*,⁷⁴ where a ten-year-old girl had been struck on the arm with a ruler. Unknown to the teacher, the child had a tumour on that part of her arm and, thus, suffered greater injury than would have been expected. Again, the teacher was held not to be liable.⁷⁵

The mode of punishment which is of greatest psycho-sociological significance in the English-speaking world is beating on the buttocks.⁷⁶ Wallington comments⁷⁷ that this method has always been assumed to be "reasonable", although there have been particular instances where it has not been so held.

65. *Id.*, at 196.

66. *Supra* n. 64, at 199.

67. [1932] 3 D.L.R. 459 (N.S.S.C.).

68. *Id.*, at 460 (*per* Paton J.).

69. *Supra* n. 67, at 461.

70. Although the major issue before that court related to the question of the admissibility of evidence given by child witnesses.

71. (1883). 10 R. 610.

72. *Id.*, at 613.

73. Other children had been caned on the same occasion, with the same severity, but had not suffered lasting injury in the same way as the plaintiff.

74. [1908] 1 K.B. 160.

75. Additionally, *supra* the mode of punishment was contrary to the relevant regulation. For comment on the United Kingdom scene in this regard, see, *supra* n. 19 at 155.

76. *Infra* text, at n. 6.

77. *Supra* n. 19, at 152.

The most spectacular case is that of *R. v. Hopley*,⁷⁸ where a schoolmaster beat a fourteen-year-old boy⁷⁹ with such severity over a period of about two hours and a half that the boy died of exhaustion caused by loss of blood. The schoolmaster was convicted of manslaughter and sentenced to four years' penal servitude. In his address to the jury Cockburn C.J. invited the jury to find the beating to be excessive when he said that "... had the correction been moderate it is contrary to common experience that it should have resulted in death. One can scarce conceive of moderate chastisement resulting in death, except under circumstances of a very peculiar character, or in the case of a child with an unusual organisation".⁸⁰ At the same time, some lesser degree of injury seem to appear conscionable: in *Ridley v. Little*⁸¹ the beating, "... did not hurt [the child] more than corporal punishment reasonably should ... that there was bruising but that it did not incommode him." The difficulty of finding a pattern may further be demonstrated by comparing *Ridley v. Little* with *Moore v. Ryan and Quinn*,⁸² an unreported Irish case noted earlier, where the facts showed scarcely more injury than in the earlier case, but where the defendant was held liable. In view of the legal issues which are to be canvassed later in the paper, it is, finally, worth citing a comment by Cockburn C.J. in his charge in *Hopley*⁸³ where he stated that if corporal punishment, "... be administered for the gratification of passion or rage ... the violence is unlawful and if evil consequences to life and limb ensue, then the person inflicting it is answerable to law."

What general conclusions may be reached regarding the state of the law? Birch, after commenting on the Queensland case law, concludes by saying, *inter alia*, that the courts will have regard to the manner, mode and severity of the punishment in determining whether it is reasonable; that some punishment, for example, to the face, is *prima facie* unreasonable and that appellate courts will be reluctant to reverse decision at first instance, even though the individual judges might have found differently on the evidence.⁸⁴ In addition, Wallington has concluded, and the case law earlier discussed appears to bear out this contention, that the courts, perhaps because most judges come from a generation in which corporal punishment was accepted as a normal feature of school (and, probably, domestic) life, are unwilling to involve themselves in the policy considerations inherent in the issue. In turn, this has led to too broad an interpretation of the formula of "reasonableness" in relation to lawfully administered corporal punishment.⁸⁵

It now falls to examine the social and historical factors which have contributed to the place of corporal punishment in Anglophone society and to relate it to the legal situation already discussed and to the broader issues of law and policy.

78. 175 E.R. 1024; (1860), 2 F. & F. 202 (Q.B.).

79. In fact, the teacher had written to the boy's father proposing to, "... subdue his obstinacy by chastising him severely; that if necessary, he should do it again and again, and continue it at intervals even if he held out for hours". The boy's father had replied that he did not wish to interfere with the schoolmaster's plan.

80. *Supra* n. 78, at 206.

81. [1960] C.L.Y. 1088.

82. *Supra* n. 13.

83. *Supra* n. 78, at 206.

84. *Supra* n. 55, at 68.

85. *Supra* n. 19, at 160.

II.

Just as the starting point for research into the legal position of corporal punishment must be Wallington's article,⁸⁶ the starting point for research into the appreciation of the social and historical context of corporal punishment must be Gibson's quite remarkable book on the subject and its related social manifestations.⁸⁷ Although one may sometimes question certain of his assertions,⁸⁸ the breadth and depth of his researches into this part of the subculture of violence is awesome.

Throughout the literature one primal argument is continually raised: that is, the notion that corporal punishment is beneficial, in some sense, to the recipient or, at least, does no harm. In the case law, in *Gardner v. Bygrave*,⁸⁹ Mathew J. remarked that caning might be justified, "... with a view to intellectual stimulation."⁹⁰ Judges have not been reticent, on occasion, in expressing their support for corporal punishment, both judicial and otherwise. Thus, Lord Goddard, excoriating two young offenders, stated⁹¹ that,

[N]owadays, the cane is never used at school. It would have done them good if they had had a good larruping. What they want is to have someone who would give them a thundering good beating, and then, perhaps, they would not do it again. I suppose they were brought up to be treated like little darlings, and tucked up in bed at night.

It is, of course, now well known that the delinquents in question came from a broken home and were, at one stage, beaten severely almost every day.⁹² Very much earlier in the history of the human race a noted King and Judge, King Solomon of Israel,⁹³ had expressed himself strongly on the matter. Indeed, it is fair to say that the book of *Proverbs* positively bristles with injunctions such as: "He that spareth the rod hateth his son: but he that loveth him chastiseth him betimes"⁹⁴ or "Withold not correction from thy child; for if thou beatest him with the rod, he shall not die".⁹⁵ Although the adage most cited by supporters of corporal punishment — "Spare the rod and spoil the child" — is not, as is generally thought, of Biblical origin. It comes from a somewhat salacious passage in a satirical poem *Hudibras* by the Seventeenth Century poet Samuel Butler.⁹⁶

On the other hand, the deleterious effects of flagellation, thinly described as correction or punishment, have long been noted as well. A particularly

86. *Supra* n. 19.

87. I. Gibson. *The English Vice: Beating, Sex and Shame in Victorian England and After* (1978).

88. For example, it is, at least, it is suggested, open to question as to whether the reissue of the *Greyfriars* stories by Frank Richards amounts to a resurgence of flagellant pomography; *id.*, at 83.

89. (1889), 6 T.L.R. 23 at 24 (Q.B.).

90. The direct relevance of this remark may be less than it was when uttered originally, as many education authorities now restrict the use of corporal punishment in connection with failure at school work. *See supra* n. 55 and *supra* n. 75.

91. On December 3rd 1952, quoted in G. Jones and E. Grimshaw. *Lord Goddard: His Career and Cases* (1958) at 124.

92. *Id.*, at 124-125. *See also*, the same judge's comments in a debate on the issue on July 5th 1952, quoted in Jones and Grimshaw. *id.*, 119-120.

93. For a well known example of Solomon's judicial abilities. *see* I Kings 3.

94. *XIII Proverbs* 24.

95. *XIII Proverbs* 13. *See also*, *III Proverbs* 12; *XIX Proverbs* 18; *XIX Proverbs* 18; *XIII Proverbs* 14; *XXII Proverbs* 15.

96. (1664) Part II, Canto I, 1 and 884. For comment *see*, H.S. Salt. *The Flogging Craze: A Statement of the Case Against Corporal Punishment* (1916) at 28 and Gibson, *supra* n. 87, at 49.

surprising source is William Acton, whose contribution to sexual and social history has been the subject of much comment⁹⁷ and has caused immeasurable misery to generations of adolescents.⁹⁸ However, in his most notorious work, he wrote that:

Before quitting the subject, I cannot help alluding to the ill consequences of whipping children on the nates. Of late years this form of punishment has gone out of vogue but some recent newspaper correspondence it is urged that flogging cannot be dispensed with. The objections on medical grounds have not, probably, been stated; and, I think, its ill effects are not sufficiently known.⁹⁹

Although writers, contemporaneously with Acton¹⁰⁰ and still earlier¹⁰¹ have referred to the psycho-sexual dangers attendant on flagellation, Acton is, it is suggested, of particular importance because of his central position in the development of British attitudes towards sexual behaviour in the Nineteenth Century and later. Those writers and others who seek to justify corporal punishment by recourse to Biblical precept might well share, it seems safe to say, Acton's extreme views on masturbation and indiscriminate sexuality whilst rejecting the more thoughtful analysis, say, of Rousseau.

Indeed, there is little doubt that corporal punishment can have apparent and deleterious effects on victim, inflictor and observer.¹⁰² Indeed, publicity does seem to be an innate part of corporal punishment: from the case law, in *R. v. Newport (Salop) Justices*,¹⁰³ two fifteen-year-old boys had broken a school rule by smoking in the street and, as a result, were caned¹⁰⁴ in the presence of 70 other boys and were forced to apologise for their act. The Divisional Court held that the punishment was reasonable, although it is, it is submitted, not without significance that neither Hewart C.J. nor Avery J. referred to the public and intentionally humiliating character of the punishment. In Wallington's words: "The pupil has a right not to be assaulted, but no such right not to be humiliated; however deplorable such public beatings may be, they are no more unlawful than private beatings".¹⁰⁶ The effect of public beatings must, inevitably, vary with the character of the observer. Hence, in one case, observation may instill feelings of horror and revulsion as in the description of a flogging at Eton by James Brinsley Richards¹⁰⁷ around 1860 who writes that, "... when

97. For comment on Acton's work. see. S. Marcus. *The Other Victorians: A Study of Sexuality and Pornography in Nineteenth Century England* (1966); and A. Comfort. *The Anxiety Makers: Some Curious Preoccupations of the Medical Profession* (1967).

98. For an especially spectacular example of the direct effect of Acton's writings. see. T. Blackburn. *A Clip of Steel: A Picaresque Autobiography* (1969).

99. W. Acton. *The Functions and Disorders of the Reproductive Organs in Youth, in Adult Age, and in Advanced Life: Considered in their Physiological, Social and Psychological Relations* (1857) at 59.

100. See. e.g., *R. v. Krafft-Ebing. Psychopathia Sexualis* (1886).

101. See, e.g., J-J. Rousseau. *Confessions* (1782).

102. The matter of effect on observers has long been noted in relation to capital punishment. Thus, A.H. Manchester. *Modern Legal History of England and Wales 1750-1950* (1980) at 247 quotes a clergyman, speaking in 1840, who had attended 167 persons condemned to death, stating that 164 of them had attended public executions.

103. [1929] 2 K.B. 416.

104. The words of the report, *id.*, at 417. make the proceedings sound distinctly unpleasant: "[T]he headmaster, with the help of Mr. Harman and Mr. Lowe, two assistant masters, caused each of the boys to bend over and administered to each of them five strokes of the cane. The headmaster then made the two boys apologise to the other boys for what they had done".

105. *Supra* n. 19, at 153.

106. Although Wallington, *supra* n. 19, at 153, goes on to say that: "The fact of an attempt to humiliate the pupil may however be evidence of malice or improper motive such as would initiate the teacher's legal protection, and might increase damages where the beating was otherwise unlawful".

107. J.B. Richards. *Seven Years at Eton* (1883) at 72.

the Low Master inflicted upon his person six cuts that sounded like the splashing of so many buckets of water, I turned almost faint. I felt as I have never felt but once since, and that was when seeing a man hanged". The role of Eton school figures large in the story of the place of violence in English speaking society and education.

Conversely, it is clear that many observers did not share Richards's shocked attitude. John Delaware Lewis, writing of the 1840's, and again of Eton, states that floggings were, "... entirely public; anyone who chose might drop in. I have sometimes been one of three spectators, and sometimes one of a hundred."¹⁰⁸ In other words, many pupils became hardened towards the ritualistic beatings practised at Eton and other schools. Furthermore, there were yet others who became, not only hardened to them, but positively and viciously obsessed by them. A famous Old Etonian, still a household name, provides a clinical example tending to the disproof of the notion that corporal punishment does no harm. He was the poet Algernon Charles Swinburne.

Swinburne is a strange and complex personality:¹⁰⁹ *inter alia*, he almost certainly provided the model for Reginald Bunthorne, the "fleshy poet" in Gilbert's operetta *Patience*,¹¹⁰ and even his best known work is shot through with masochistic reference.¹¹¹ Swinburne attended Eton from 1849 to 1853 and his biographer Henderson writes that, "It would seem fairly obvious that Swinburne's lifelong obsession with flagellation had its origin in the beatings he both witnessed and received at the notorious Eton flogging block"¹¹² and "... Eton evidently had a good deal to answer for in the development of Swinburne's character".¹¹³ It must be said that floggings at Nineteenth Century Eton were indeed quite horrible affairs; inflicted, as we have seen, in public,¹¹⁴ on the bare buttocks with a birch rod which, in Richards's words, was "... nearly five feet long, having three feet of handle and two of bush".¹¹⁵ At the same time, the extent of Swinburne's flagellomania was quite extraordinary; as George MacBeth describes it when referring to Swinburne's creative output, "... the energy was whipped out (quite literally) in the 1860s."¹¹⁶ In the early part of that decade, Swinburne had begun work on, in Henderson's words, "... his epic of flagellation, *The Flogging Block*, in which his imagination played delightedly round the whipping of small boys at Eton, and which was to engage him at intervals for the rest of his life".¹¹⁷ A short

108. J.D. Lewis. "Eton Thirty Years Since" (1875), (May) *MacMillans Magazine* 42 at 46.

109. For a general commentary. see. P. Henderson, *Swinburne: The Portrait of a Poet* (1974).

110. Probably the key passage occurs towards the end of Act I, when all the principal characters sing: "And the pain that's all but a pleasure, will change For the pleasure that's all but pain" W.S. Gilbert. *Original Plays* (3d series, 1928) Act I at 112. For comment, see. W.D. Jenkins. "Swinburne, Robert Buchanan and W.S. Gilbert: The Pain that Was All But a Pleasure" (1972), 69 *Studies in Philology* 369.

111. Even, for instance, what Henderson, *supra* n. 109, at 76, describes as, "... the first great chorus" from *Atalanta in Claydon* (1865), with its reference to, "The tongueless vigil and all the pain". See generally, *supra* n. 87, at 119 and for a particularly graphic example. see. *Sattia te Sanguine* (1866). He was also one of the few poets to write parodies of their own work: see e.g., *The Ghost of It* (1880).

112. *Supra* n. 109, at 17.

113. *Supra* n. 109, at 18.

114. *Supra* text, at n. 107.

115. *Supra* n. 107.

116. G. MacBeth (ed.), *The Penguin Book of Victorian Verse* (1969) at 281.

117. *Supra* n. 109, at 54.

quotation is sufficient to give the flavour of this work which, quite apart from its pornographic nature, is characterised by an appalling standard of verse:

How those great big ridges must smart as they swell!
 How the Master does like to flog Algernon well!
 How each cut makes the blood come in thin little streaks
 From that broad blushing round pain of naked red cheeks.¹¹⁸

Swinburne also contributed to *The Pearl*, the notorious Victorian pornographic magazine,¹¹⁹ and to the anonymous collection, *The Whippingham Papers*.¹²⁰ His novel *Lesbia Brandon*¹²¹ also contains copious flagellant references. Apart from writing the kind of nauseating rubbish quoted earlier,¹²² Swinburne certainly visited flagellant brothels,¹²³ which figured large in the sexual activity of public school educated Victorians.¹²⁴ *In toto* Swinburne's private life does not present an especially edifying prospect, particularly as its origins can be so clearly traced to his school experiences.

It must not be thought that the case history of Swinburne is both too particular and unrelated to our own time. In the anonymous *Autobiography of an Englishman*,¹²⁵ which appeared as recently as 1975, the author details his progress through preparatory school to public school, and then, into the world at large burdened by an accumulation of sexual problems caused by flagellant experiences at school. In his *ipsissima verba*, he stated: "I feel certain that an obsession with flagellation, practical or theoretical, never leaves anyone once he has acquired it at school".¹²⁶ Or, as Gibson puts it, at the conclusion of his treatise, "We shall never know how many people have been crushed and rendered impotent by the flogging system of which the British preparatory and public school Establishment has been so proud, for the victims have not gone round proclaiming themselves in public. But we can be certain that their name is legion."¹²⁷ Swinburne's history is also important because of claims which are made for the Victorian way of life, notably as pertaining to the family, which are made from time to time. For instance, comments relating to the decline of the family today are widespread,¹²⁸ particularly as they refer to the decline of the father figure.

118. *Algernon's Flogging*, quoted in Gibson, *supra* n. 87, at 121.

119. For comment on the position of this magazine in Victorian society, see: Marcus, *supra* n. 97 *passim*.

120. (1888), for comment, see, *supra* n. 87, at 121.

121. Written between 1864 and 1877, but not published until 1952. It seems probable that *Lesbia* is modelled on Swinburne's cousin, Mary Gordon, who shared his flagellant interest. For comment, see, *supra* n. 109, at 95.

122. *Supra* text, at n. 118.

123. One in particular is known by the unlikely name of "The Grave of the Evangelist". See, *supra* n. 109, at 127.

124. See Marcus, *supra* n. 97, at 254.

125. 'Y', *The Autobiography of an Englishman* (1975). For comment, see, *supra* n. 97, at 95-97.

126. *Id.*, at 21.

127. *Id.*, at 314.

128. See the comments quoted in R. Fletcher, *The Family and Marriage in Britain* (Rev. ed. 1966) at 48 and 233. For a general comment, see F. Bates, "The Family and Society: Reality and Myth" (1980), 15 *Irish Jurist* (N.S.) 195.

III.

The position of the father figure takes us to our next area of inquiry — the place of physical punishment in the home. The father figure, the *paterfamilias* of Roman Law¹²⁹ perhaps, loomed large in Victorian family life and law. As Graveson has described the position of, “The English family in the years following Waterloo differed in many ways from the family of today. The husband was in a real sense the authoritarian head of the family, with very extensive powers over both person and property of his wife and children”.¹³⁰ As is well known, the father’s power has declined,¹³¹ but not without something of a struggle. Hence, Mack, an English grammar school headmaster, speaking in 1961, stated that: “It [seemed to him] that the father figure [had] lost much of his awe and all of his majesty” and that there was a “. . . reluctance to accept the father as mentor and guide”.¹³² The resemblance to an Australian judicial pronouncement that, “The law makes the father the absolute lord of both wife and children”¹³³ is manifest.

As to the law, it is clearly established that a parent may inflict moderate and reasonable corporal punishment.¹³⁴ It has been said that a parent has such a “right”,¹³⁵ but Wallington has contended that it is more in the nature of a privilege.¹³⁶ There is, however, no doubt that the use of physical punishment in the home, is, as in the case of school, hedged about with restrictions. Thus, as early as 1869, Martin B. commented that, “The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two and half years old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justified”¹³⁷ The leading practitioners’ work on the law of torts note that, “The right to chastise exists only for the benefit of the child and the maintenance of domestic discipline, so that a parent has no right to punish arbitrarily”¹³⁸ and Bevan, more particularly, writes that there can be no right to punish a mentally disordered child.¹³⁹

Nevertheless, it is clear that corporal punishment played a significant part in many households and, indeed, probably still does.¹⁴⁰ However, the situation has been complicated by the discovery of the phenomenon of child abuse, which was first noted in 1955,¹⁴¹ though not really established until 1962,¹⁴² but

129. For comment, see, J. Thomas, *Textbook of Roman Law* (1976) at 414-416.

130. R. Graveson and F.A.C. Crane “The Background to the Century” in *A Century of Family Law 1857-1957*, (1957) at 2.

131. For an outline, see, J.C. Hall, *supra* n. 45; and F. Bates, *supra* n. 45.

132. Quoted in Fletcher, *supra* n. 128, at 236.

133. *Re Ewing and Ewing* (1881), 1 Q.L.J. 15 (*per* Lillie C.J.).

134. See, *supra* n. 15, at 126.

135. *Supra* n. 19, at 124.

136. *Supra* n. 19, at 140.

137. *R. v. Griffin* (1869), 11 Cox 402 at 403. The father, in that case, was convicted of the child’s manslaughter.

138. *Clerk and Lindsell on Torts* (14th ed. A. Armitage and R. Dias 1975) at para. 742.

139. H. Bevan, *The Law Relating to Children* (1973) at 212.

140. For a general discussion, see J. Gathorne-Hardy, *The Rise and Fall of the British Nanny* (1972).

141. P.B. Wooley and W.A. Evans, “Significance of Skeletal Lesions in Infants Resembling those of Traumatic Origin” (1955), 168 *J. Am. Med. Assoc.* 539.

142. C. Kempe *et al.*, “The Battered Child Syndrome” (1962), 181 *J. Am. Med. Assoc.* 17.

which, today, has produced a vast literature.¹⁴³ Quite obviously, much corporal punishment in the home will not amount to child abuse, in the sense in which that term is ordinarily used,¹⁴⁴ but the line may not be easy to draw. Although its clinical nature is of recent recognition, its fact is not new: thus, the famous diarist Pepys is reported as having beaten his son until he (Pepys) was out of breath¹⁴⁵ and Lady Abergane is said to have thrashed her own child, aged seven, in a fit of rage and, when the father complained, threw the child to the ground so that his skull was fractured and death ensued.¹⁴⁶ There can be no doubt, however, that cases of "over-chastisement", as Hallett and Stevenson refer to it,¹⁴⁷ do occur and these writers have expressed the view that traditional legal sanctions may often be appropriate in such cases.¹⁴⁸ Freeman has more strongly commented that much child abuse is the result of corporal punishment gone wrong, being either the result of deliberate action which causes more harm than was intended or the result of loss of parental self control.¹⁴⁹

The extent of domestic physical punishment, despite Martin B's *dictum* noted earlier,¹⁵⁰ can be pointed out by reference to a study conducted in the English city of Nottingham which found that 62% of babies had been smacked before they were a year old.¹⁵¹ In Australia, Boss writes that:

Altogether, a picture is presented of physical punishment which is general and pervasive. It is probably quite mild in many (most?) families . . . The trouble is, however, that it can increase gradually until it becomes sharp and harsh and approaches a point at which it easily spills into severe violence and ends in injury.¹⁵²

At one time, it was thought that physical punishment was more favoured by the working class than by the middle or upper middle classes. The leading exponent of this view was Bronfenbrenner who stated that, "The most consistent finding documented is the more frequent use of physical punishment by working class parents. The middle class, in contrast, resort to reasoning, isolation and . . . love orientated discipline techniques."¹⁵³ Boss rejects this view and suggests that more recent work (Bronfenbrenner was working in the 1950s) indicates that the use of physical punishment is evenly spread throughout the community, regardless of class, race and age.¹⁵⁴ This view is shared by the Australian *Royal Commission on Human Relationships*¹⁵⁵ and, in the United States, by Stark and McEvoy who found that, at least, 93% of all

143. See, e.g., R. Kempe and C. Kempe, *Child Abuse* (1978); M. Van Stolk, *The Battered Child in Canada* (1972); R. Helfer and C. Kempe (eds.) *The Battered Child* (2nd ed. 1974); J. Renvoize, *Children in Danger* (1974).

144. In the words of C. Kempe et al., *supra* n. 142, "... a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent . . . is a significant cause of childhood disability or death".

145. S.X. Radbill, "A History of Child Abuse and Infanticide" quoted in R. Helfer and C. Kempe, *supra* n. 143, at 4.

146. E. Godfrey, *English Children in Olden Time* (1907) at 239.

147. C. Hallett and O. Stevenson, *Child Abuse: Aspects of Interprofessional Co-operation* (1980) at 18, 41.

148. *Id.*, at 41.

149. M. Freeman, *Violence in the Home* (1979) at 119.

150. *Supra* text, at n. 134.

151. J. Newson and E. Newson, *Infant Care in an Urban Community* (1963).

152. P. Boss, *On the Side of the Child* (1980) at 41.

153. U. Bronfenbrenner, quoted in H.S. Erlanger, "Social Class and Corporal Punishment in Childrearing: A Reassessment" (1974), 39 *Amer. Sociol. R.* 65.

154. *Supra* n. 152.

155. *Royal Commission on Human Relationships* (1977) v. 4, at 133.

parents corporally punished their children.¹⁵⁶ A major thrust of this paper is that there is strong evidence to the effect that, although corporal punishment may be generally used, it is used for different reasons amongst different groups. In poorer groups, violence may well, as the American writer Gil has suggested, be the product of environmental stress.¹⁵⁷ It may be that poorer parents seek to emulate those whom they perceive as their superiors. The wealthier physically punish their children because they believe in the innate merit of that course of action. Why they do so will be the subject of the next section of the paper, but before leaving this area it is worth referring to some of the comments which have been made regarding the personalities of abusive parents. Thus, Wasserman found that abusive parents not only considered physical punishment to be a proper disciplinary measure, but also strongly defended their right [*sic*] to use it.¹⁵⁸ Again, Van Stolk states that almost all abusive parents, "... appear to hold a hard-core belief in authoritarianism. That is, a dominant belief that authority within the home never be challenged".¹⁵⁹ The similarity between the figure criticised by Von Stolk and lauded by Mack¹⁶⁰ must be clearly apparent. The consequences of over-control have also probably not been paid sufficient attention: clinical studies by Radke¹⁶¹ and Newell¹⁶² have, respectively, suggested that children who have been severely punished show little affection, cannot express themselves verbally and are extremely submissive. Still worse, it has been claimed by Johnson that, "The undercontrolled individual may be responsible for numerous acts that are antisocial, but the chronically overcontrolled person is much more dangerous in the long run",¹⁶³ with the result, specified by Garbarino and Gilliam,¹⁶⁴ that many truly violent criminals — murderers, perpetrators of serious assaults — were chronically overcontrolled as children.¹⁶⁵ Hence, the actual results of control through physical punishment may be, in reality, the direct obverse of those sought or, indeed, claimed by its advocates.

IV.

In the editorial in *The Times* newspaper, to which reference was made early in the paper,¹⁶⁶ it is stated that it would be wrong to regard the judgment of the European Court of Human Rights in the Scottish case as, "... representing some special indictment of [Britain] as a haven for child beating. Parts of Germany and Switzerland, Canada, Australia, New Zealand and most of the United States still practise it". That is, indeed, true, but the extract from the editorial raises two issues — the second more important than the first. First, it is interesting that the writer uses the phrase, "... child beating", rather than

156. R. Stark and J. McEvoy. "Middle Class Violence" (1970) 4 *Psychology Today* 52.

157. D. Gil. *Violence Against Children* (1970) at 352-53.

158. S. Wasserman. "The Abused Parent of the Abused Child" (1967) 14 *Children* 175.

159. *Supra* n. 133, at 37.

160. *Supra* text, at n. 132.

161. M.J. Radke. *The Relation of Parental Authority to Children's Behaviour and Attitudes* (1946).

162. H.W. Newell. "The Psycho-dynamics of Maternal Rejection" (1934) 4 *Am. J. Orthopsychiatry* 387.

163. R.N. Johnson. *Aggression in Man and Animals* (1972) at 127.

164. J. Garbarino and G. Gilliam. *Understanding Abusive Families* (1980) at 178.

165. *Ibid.*, in which the authors say: "More than one infamous murderer has been described by his neighbour as. 'Quiet. Kept to himself. mainly. Never heard a peep out of him. He was a good tenant'".

166. *Supra* text, at n. 3.

the usual euphemisms generally employed to justify it and which have been used in this paper in order to keep it as emotionally neutral as possible. The justification seems to be the somewhat pallid one that "If other people do it, why should not we?" The German connection is not unknown historically: hence, the German born Queen Caroline is reported as having complained that the English were not well bred because they were not whipped enough when young¹⁶⁷ and Gibson has sought to relate English and German patterns of early infant training.¹⁶⁸ Nonetheless, it is submitted, not without significance, that the remaining jurisdictions are basically English speaking. Even so, the place of corporal punishment does not seem to have become so entrenched in Canada,¹⁶⁹ even though its Law Reform Commission refused to recommend its abolition in schools¹⁷⁰ and the huge and disparate nature of the United States' legal and social system makes global conclusions difficult to draw. But even there, in *Ingraham v. White*,¹⁷¹ the Supreme Court refused to hold its use unconstitutional, despite the strength of the *Children's Rights* movement.¹⁷² Australia, New Zealand, and the United Kingdom remain. As concerns the last, Freeman, writing in 1979, remarks that its use appears to be gaining ground;¹⁷³ in one local authority physically handicapped or mentally disturbed children in council homes are not exempt from reintroduced beating.¹⁷⁴

In much of the literature relating to physical abuse of children, there is reference to a cycle of abuse. Kempe and Kempe write that "The most consistent feature of the histories of abusive families is the repetition, from one generation to the next, of a pattern of abuse, neglect and parental deprivation".¹⁷⁵ Apart from this documented phenomenon, it seems that there is a more societally based, as opposed to family based, vicious circle. In George Bernard Shaw's words, "... [W]e are tainted with flagellomania from our childhood. When will we realise that the fact that we can become accustomed to anything, however disgusting at first, makes it necessary for us to examine carefully everything we have become accustomed to?"¹⁷⁵ The matter which, I would suggest, we need to examine carefully is the role of private schools in English-speaking society, which, indeed, has been the subject of a number of recent studies.¹⁷⁷

The influence of the public school in England, at least, has been enormous. For instance, 88% of Cabinet Ministers in Conservative Governments from 1918 to 1955 were public school products and half of those were from

167. Radbill. *supra* n. 145, at 4.

168. *Supra* n. 97, at 284.

169. J. Wilson. *Children and the Law* (1978) at 241.

170. *Child Abuse and Neglect* (1976) at 18.

171. (1977), 430 U.S. 651.

172. *Infra* text, at n. 195.

173. *Supra* n. 149, at 118.

174. *Supra* n. 149, at 118. This maybe the case in Nottinghamshire, but in Newcastle-upon-Tyne, the weight of the strap used to punish children in schools has been increased.

175. *Supra* n. 143, at 24.

176. G.B. Shaw. "A Treatise on Parents and Children: Under the Whip." In preface to "Misalliance". *The Bodley Head. Collected Plays With Their Prefaces* (1972) v. 4 at 78.

177. See, particularly, J. Gathorne-Hardy. *The Public School Phenomenon, 1597-1977* (1977); see also, G. MacDonald Fraser (ed.), *The World of the Public School* (1977) and A. Glyn. *The Blood of a Britihsman* (1970), Ch. 10.

Eton or Harrow,¹⁷⁸ the former having conspicuously figured in the earlier discussion.¹⁷⁹ This kind of statistic alone may, in the eyes of some, justify the values which they seek to espouse and those values are still accepted today all but unchanged. Thus, for example, in Australia, a new school is to be opened at Dural in New South Wales in 1983¹⁸⁰ and its prospectus is almost a recitation of the Victorian values which have been encapsulated by Earle as, "God, the Rod and Lines from Virgil".¹⁸¹ The prospectus of the school states that it:

... will be strongly academically orientated ... Examinatin and testing will be a central part of the academic program ... Discipline at the school will be firm and constant ... The school will not be selected on the basis of intellectual ability alone, a proven reward of acceptable behaviour and satisfactory attitude to school work will be important.¹⁸²

These statements of object can, without virtually any distortion, fit into Glyn's description of British attitude:

The school's the thing, particularly if it has a long tradition and is known to produce a good type of boy ... Such schools have always believed that football and Christianity, Latin and the cane provide the finest character training for a British boy, and have applied these principles as single-mindedly and toughly as possible.¹⁸³

Corporal punishment, then, and physcal rigour,¹⁸⁴ is a deeply entrenched part of much private school philosophy; although it must be noted that a New South Wales report shows a strong trend away from the use of corporal punishment in non-government schools.¹⁸⁵ This, however, is explicable in other terms than those with which this paper is concerned directly. The same period which has seen a drift away from state towards non-government education¹⁸⁶ has also seen a rise in radical, private community type schools,¹⁸⁷ often attached to religious groups or sects. These schools do not, usually at any rate, share the traditional values of the private school but, at the same time, it seems not unfair to say that, at present, their influence on the broader fabric of Anglophone society is negligible. The traditional English-type of non-government school is widely assumed to be the best; its values are proselytised directly and indirectly (Gibson has particularly noted the influence of comics)¹⁸⁸ and, indeed, its practices are imitated in state schools.¹⁸⁹ The innate correctness of these values is reinforced by reference to Biblical precept¹⁹⁰ and

178. See, J. Gathorne-Hardy, *id.*, at 451.

179. *Supra* text, at n. 109.

180. *Supra* n. 46, at 45 from where the extract of this new schools prospectus, the Hills Grammar School, is taken.

181. In G. MacDonald Fraser, *supra* n. 177, at 39.

182. By way of *excursus*, the cynical might be forgiven for thinking that the first and last goals may be antithetical. One of the characteristics of the English public school, according to A. Glyn, *supra* n. 177 at 112, is its relentless pursuit of mediocrity: "Brilliance is something [the Englishman] does not much care for. At a Public School the boys will stay more or less together intellectually. They will not be encouraged to streak out far in front, or, to be fair, to lag too far behind. They will be moulded by the ideas of the school, and will form a team, admirable to British ideas".

183. A. Glyn, *supra* n. 177, at 108.

184. In particular, A. Glyn, *supra* n. 177, at 110, stated that "[t]he importance of cold as a discipline is deeply entrenched"

185. *Self-Discipline and Pastoral Care* (1981) at 60-66.

186. See, *supra* n. 46, at 42.

187. *Supra* n. 46, at 43.

188. See, R. Usborne, "The Shadow of Tom Brown" in G. MacDonald Fraser, *supra* n. 177, at 136 for an analysis of public school based literature often overtly extolling these values.

189. *Supra* n. 97, at 82-84.

190. *Supra* text, at n. 94.

Dr. Arnold's "muscular Christianity" is too well known to need analysis.¹⁹¹ Allusions to the physical aspect of public school values occur in the most unlikely places. Lord Goddard, once again, urging the reintroduction of judicial birching in a debate in the House of Lords,¹⁹² expostulated that, "... [he supposed] a chief warder can lay it on as well as Dr. Busby at Westminster and Dr. Keates [*sic*] at Eton".¹⁹³ If the eulogisers of indiscriminate corporal punishment are correct, then the Nineteenth Century public schools should have been orderly, scholarly places — they were not. Riots,¹⁹⁴ which make today's incidents of collective misbehaviour seem trivial, were commonplace. Nevertheless, the wholly false image of the Victorian, and later, public school is still held up as a paradigm.

The vicious circle which I posit involves, in Britain, Australia and New Zealand, an acceptance of the values criticised in this paper amongst those able to send their children to private school and who, in turn, accept their values. They are, then, passed on to their children who have been brought up at home in the same tradition, are sent to the same schools, and bring up their own children in the same way. Even though the social group which acts in this way, and, in all probability, cannot conceive of any other way to act, is relatively small, its imitators, throughout the various social classes, are substantially larger. Hence, the, say, clerical worker who cannot afford to send his children to one of the, so-called, great¹⁹⁵ schools will seek to send them to one which he considers approximates to the values apotheosised therein. The characteristic of the violence practised in homes and schools in this social class is ritualised and may be compared with working-class violence towards children which, from the literature,¹⁹⁶ seems to be more spontaneous and, thereby, perhaps more healthy for all parties. In Canada and the United States, where the hierarchy of private schools seems to play less part in the life of the nation as a whole than in, especially, Britain,¹⁹⁷ the vicious circle has less effect on private and academic life. This vicious circle must, I believe, somehow be broken, but the way in which that can be done is beyond, I fear, both the scope of this paper and the social and political influence of the writer.

As regards the law, with which this paper should end as it began: there is, again, no simple answer. In the United States, the Children's Rights Activist, Holt, has written in strident terms that corporal punishment is "... better called legalised assault by adults against children".¹⁹⁸ Samuels has demanded

191. See, J. Gathorne-Hardy, *supra* n. 177, at 70-79.

192. July 5th, 1952, quoted in Grimshaw and Jones, *supra* n. 91 at 120.

193. In the same speech, Lord Goddard noted that birching, "... gave a certain amount of pain while certainly leaving no marks". This was equally certainly not Swinburne's experience! *Supra* text, at n. 118. Dr. Keate was the Headmaster of Eton (again!) from 1809-1834 who attempted, in J. Gathorne-Hardy's words, *supra* n. 177, at 41, to flog Eton into submission. A detailed comment on this may be found *supra* n. 177, at 40-44.

194. See, J. Gathorne-Hardy, *supra* n. 177, at 56 in particular and throughout the book.

195. According to G. MacDonald Fraser, *supra* n. 177, at 2, these are: Eton, Harrow, Rugby, Charterhouse, Winchester, Westminster, Shrewsbury and one other, depending upon the reader's own education.

196. See *eg.*, A. Glyn, *supra* n. 177, at 136.

197. It must be remembered that the cases before the European Court of Human Rights, mentioned at the beginning of this paper, *supra* text at n. 1, were not the first time Britain had been so involved. Judicial birching in the Isle of Man was considered by the European Commission of Human Rights in 1976; see Gibson, *supra* n. 87, at 191-193.

198. J.C. Holt, *Escape from Childhood* (1974). This movement is, inevitably, not without its critics; see, B.C. Hafen, "Puberty, Privacy and Protection: The Risks of Children's Rights" (1977), (October) 63 A.B.A.J. 1383 and F. Bates, "Children's Rights and the Family Unit" (1978), 1 Family Law Review 242.

that the defence of reasonable chastisement, as applicable to both parents and teachers, should no longer be open.¹⁹⁹ Wallington expresses no direct view of the matter, though the general tenor of his article seems to suggest that corporal punishment in schools be made unlawful.²⁰⁰ Gibson has emphatically stated that an Act of Parliament banning the beating of children in all schools is long overdue.²⁰¹ All of these suggestions have much merit and are supported by the present writer, but we must not be blind to the difficulties involved. In Samuel's solution, the problems of a child suing his parent in tort, particularly those relating to the law of evidence, would substantially outstrip those involved in similar action brought by a wife against a husband;²⁰² the complainant will be bringing his action against the person normally regarded as his *next friend*;²⁰³ he will not normally be as articulate as the defendant; he may not find the judge sympathetic for obvious reasons, and so on. As regards statutory intervention, the unenforceability argument holds good, in probably the worst situation in which it has ever held good. In private schools, particularly, the ethic of silence is strong; as Glyn says, "If a child is unhappy, hurt, overworked, bullied at school or hungry, he must not complain".²⁰⁴ Given the facts and attitudes referred to throughout this paper, it seems highly unlikely that there will be any general and influential support for the radical change advocated and, no doubt as in the past, specious distortions²⁰⁵ of its advocates' attitudes will be advanced. Few, least of all this commentator, would deny teachers the legal or moral right to defend themselves²⁰⁶ or that physical restraint of children in the home or school may sometimes be necessary in the interests of the children themselves.²⁰⁷ Yet, in view of those same facts and arguments, we must also know that, even though the ritualistic horror of floggings at Victorian Eton²⁰⁸ no longer exist to the same extent, the kind of punishment publicly advocated as doing no harm is obviously damaging both sexually and physically. But despite cosmetic changes, recent cases show that the *ethic* remains, and it is far more difficult to destroy an ethic than a mere building.

199. A. Samuels. "Never hit a Child" (1977), 7 Fam. L. 119 at 121. He refers specifically to parents, but, since much of the case law which he cites refers to teachers, it must be taken that he would extend that view to teachers as well.

200. *Supra* text, at n. 19 at 160-161.

201. *Supra* text, at n. 87 at 315.

202. *See, Hoskyn v. Metropolitan Police Commissioner*, [1979] 2 W.L.R. 695 (H.L.).

203. *See*, D.M. Walker, *The Oxford Companion to Law* (1980) at 881 for a description of the role of "next friend".

204. *Supra* n. 177, at 119 and 118-120.

205. *See eg., supra* n. 87 *passim*.

206. *See eg., supra* n. 15, at 120.

207. *See, supra* n. 152, at 39.

208. *Supra* text, at n. 107.

