Physical Punishment in the Home: A Private Prerogative?

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I: INTRODUCTION

Since the end of the nineteenth century, parents in New Zealand have had statutory authority to use reasonable physical force for the "correction" of children.[1] This statutory licence is currently being questioned. This article examines the various issues that this raises for those faced with designing policy and legislation. The article first summarises the current law on domestic discipline, focusing on two important aspects. The first of these is the operation of police discretion. The police play an important role in this area of the law, and recent research has highlighted the often discriminatory character of prosecutorial discretion. Second, the writer criticises the illusory "reasonable" standard of force permitted by s 59 of the Crimes Act 1961. Then, after summarising the arguments calling for reform to the law, the following questions are addressed. First, how should it be determined whether legislation is necessary or desirable? Second, if legislation is necessary or desirable, what forms are available, and what are the advantages and disadvantages of each? The final section assesses the relative worth of three reform proposals.

The issue of domestic discipline is complex. It exposes many of the difficulties involved when legislating in the "private" world of the family. The writer does not pretend to have discovered the one correct position on this issue, but proposes to

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1 Section 68 of the Criminal Code Act 1893.

clarify some of the questions which require attention, and to highlight the points which have general relevance for legislators.

II: A SUMMARY OF THE BASIC ISSUE

1. The Current Situation

Section 59 of the Crimes Act 1961 ("the Crimes Act") states that parents, and those in the place of parents, may use "reasonable" force to discipline children. Until 1990, this also applied to teachers. The exact wording of the section is:

> **59. Domestic Discipline** – (1) Every parent of a child and, subject to subsection (3) of this section, every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.
>
> (2) The reasonableness of the force used is a question of fact.
>
> (3) Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of section 139A of the Education Act 1989.

Section 139A of the Education Act 1989 forbids the use of corporal punishment by teachers.[2]

Section 59 operates as an exception to s 194 of the Crimes Act which makes it an offence, punishable by two years imprisonment, to assault a child under the age of fourteen years. It is also a defence to the crime of common assault,[3] and to civil liability for the torts of assault and battery.[4] Thus parents and substitute parents are given a statutory privilege to commit acts which would otherwise be unlawful. At common law parents have a similar privilege,[5] hence s 59 merely reinforces this position.

(a) Justifications for section 59

The right of parents to discipline their children physically has existed in

2 This was inserted by s 28(1) of the Education Amendment Act 1990.

3 Section 196 of the Crimes Act 1961.

4 Section 59 says that parents are "justified" in using force on their children. The s 2 definition of "justified" includes "not liable to any civil proceeding".

5 Blackstone noted that parents "may lawfully correct [the] child, being under age, in a reasonable manner", 1 Bl Comm 452. This was interpreted to include physical discipline in *R v Hopley* 2 F and F 202; 175 ER 1024.

Western cultures for centuries.[6] Today, the privilege is justified by supporters on several grounds. These may include religious or cultural convictions, a belief in the practical effectiveness of physical punishment, and a belief in parents' right to raise children as they see fit. Others view physical discipline as not needing any justification at all – as simply being the way "normal" people raise their children. The effect of these different approaches is considered below.

(b) Prosecutorial discretion

Section 59 is an example of open-textured drafting. Instead of specifying exactly what parents can and cannot do to children, the Crimes Act simply says that parents may use "reasonable force". The advantage of this is that the law remains flexible and can respond to changing attitudes. It can also deal with novel forms of behaviour not envisaged at the time of drafting.

The disadvantage of the open-textured approach is that parents are left without clear guidance as to what is, or is not, reasonable. Further, this approach leaves the courts and the police with significant discretion.

The effect of this discretion is that the law is in fact made largely by police and social welfare officials. While conventional wisdom holds that the police simply apply the law, or occasionally interpret it, the writer subscribes to the views of legal realists such as Llewellyn:[7]

> [J]udges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*

Llewellyn points out that the theoretical state of the law – as could be discovered by reading statutes and law reports – is irrelevant when it comes to individuals making decisions daily about how to act. Instead, those actions are determined by the prevailing "social atmosphere".[8]

The social atmosphere in the context of physical punishment is largely determined by the action or inaction of the police and other officials.[9] The police and social welfare departments each have a policy defining their view of "reasonable".[10] These policies may not exist in written form, but may be simply a type of organisational habit. In this instance, as very few cases have come to court under s 59, such policies are, at least in a *de facto* sense, the law. The delegation of

6 Under classical Roman law, the father literally possessed the power of life and death over his children. See Caldwell, "Physical Punishment and the Law" (1989) 13 NZULR 370, 371.

7 Llewellyn, *The Bramble Bush* (1960) 12. Original emphasis.

8 Ibid, 22-23.

9 Although, the role of the media cannot be ignored.

10 In fact, police officers the writer has spoken to consider that police policy has been largely to ignore domestic discipline.

decision-making power to the police means that reasonableness is viewed first through the prism of police discretion. The police often "both define the problems and construct the solutions, using considerable discretion in the process".[11]

Professor Davis claims that the government has implicitly delegated part of its function to the police by failing to provide them with adequate funding, and by retaining laws which are unable to be enforced.[12] He contends that the reality of police rule-making should be recognised, and made subject to procedural constraints:[13]

> [S]elective enforcement [of the criminal law] should be open and aboveboard .... Enforcement policy should be made through the kind of rulemaking procedure that has been highly successful in federal administrative agencies.

This would force the police to develop a clear policy on domestic discipline. This process could then be controlled, and the policy subject to scrutiny. Davis argues that this process would make the existing situation more responsible and responsive.

Davis' position has been criticised because allowing police to have legislative power does not sit easily with traditional constitutional theories. In particular, Professor Allen has stated:[14]

> [I] unequivocally reject the suggestion that the police should engage in rulemaking that directly affects the scope of the substantive criminal law. I do not think that the structure of our law permits the police to exercise this kind of authority. Perhaps more importantly, I am convinced that it would not be wise to accord the police this power, even if it were permissible to do so.

This position, based on a principled application of the doctrines of separation of powers and delegation, in turn has been criticised as being overly theoretical.[15]

It is the writer's view that police rulemaking is an inevitable part of our system.[16] It is hard to imagine a system of law advanced enough that it could be applied mechanically without any form of discretion. Thus the current laws on domestic discipline will always be subject to the institutional bias and discrimination of the police force. For this reason, the writer supports Davis' call for the processes to become more transparent.

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11 McLaren and Lowman, "Enforcing Canada's Prostitution Laws 1892-1920: Rhetoric and Practice" in Friedland (ed) *Securing Compliance* (1990) 21, 72.

12 Davis, *Police Discretion* (1975) 80-81; cited in Allen, "The Police and Substantive Rulemaking: Reconciling Principle and Expediency" (1976) 125 U Pa LR 62, 73-74.

13 Davis, ibid, 168; cited in Williams, "Police Rulemaking Revisited: Some New Thoughts on an Old Problem" 47 L & Contemp Prob 123, 123.

14 Allen, supra at note 12, at 67.

15 See Williams, supra at note 13, at 124.

16 Williams traces the institutional evolution of the police force, and concludes that the police do have the power to develop guidelines, if not rules. He agrees with Professor Davis that this power should be recognised and controlled: ibid, 181.

The traditional view of discretion is that "street-level bureaucrats",[17] such as the police, consider the facts of each individual case and form a judgment which is responsive to those facts.[18] This view of discretionary decision-making emphasises the inconsistency that results from individualised decisions. However, Baumgartner provides an interesting insight into the use of discretion. She argues that:[19]

> [T]he exercise of discretion by legal officials .... follows clear and specifiable principles and is remarkably patterned and consistent. The decisions officials make ... can be anticipated with considerable accuracy from general formulations.

According to Baumgartner, discretion is commonly exercised in accordance with "social laws". This means that although factually similar cases may appear to be treated differently, socially similar cases are treated alike across all stages of the legal process.[20] The social factors which Baumgartner claims affect discretionary decisions include age, sex, wealth, education, group memberships, personal networks, ethnicity, religion, and respectability.[21] These factors influence actors at all stages of the process. Thus police officers, prosecutors, judges, and juries are all similarly affected by social laws. Feldman points out that "police officers are influenced by the categories they learn from their fellow officers to classify types of people".[22]

Significantly, the degree of relationship between the parties is one of the strongest factors influencing official reaction to crime. Various studies have shown that rape, murder, and other violent crime within the family, are treated with much less seriousness by officials.[23] Police are less likely to arrest for offences committed against family members. Prosecutors are less likely to proceed with such cases, and judges and juries are less likely to convict.

The offender's "respectability", including general reputation and prior contact with officials, will also affect the exercise of discretion. Baumgartner notes that "[o]ffenders whose clothing, hair-style, and posture strike officials as unsavoury ... are more often subjected to aggressive legal action".[24] Social status is also indicative. Police, judges, and juries all "proceed more aggressively against defendants of lower status".[25]

Applying Baumgartner's thesis to the area of domestic discipline, one can see that the effect of discrimination is twofold. First, cases of unreasonable physical

17 Feldman, "Social Limits to Discretion: An Organizational Perspective" in Hawkins (ed), *The Uses of Discretion* (1992) 163, 165.

18 Ibid, 167-8.

19 Baumgartner, "The Myth of Discretion" in Hawkins, ibid, 129, 129-130.

20 Ibid, 130.

21 Ibid, 131.

22 Ibid, 182. For a discussion of the institutional influences on discretion, see Reiss, infra at note 95.

23 Ibid, 131-136.

24 Ibid, 137.

25 Ibid, 144.

punishment are less likely to be brought since, of course, the parties are known to each other. Second, those cases which are brought are likely to be against poor and "undesirable" parents. Baumgartner is not optimistic about overcoming discrimination such as this. She concludes that discretion is a necessary element in our legal system, and that "as long as citizens and officials are socially diverse, then ... a degree of systematic discrimination in law-enforcement seems inevitable".[26]

(c) What is reasonable force?

Given the paucity of reported cases, it is not surprising to find that the law as to what constitutes "reasonable force" is unclear. This may be a reflection of the number of irreconcilably divergent views held in society on the issue. Some people regard physical punishment as beneficial and necessary, others see *all* physical punishment as harmful.[27] In *Kendall v Director-General of Social Welfare*, Judge Inglis QC said:[28]

> What is "reasonable" must be a matter of degree and will depend in large measure on what can be perceived to be the current social view at any given time.

This appeal to a discernible "current social view" is illusory. No such homogenous view exists.

Failure to define what constitutes "reasonable force" means that the "objective" standard is meaningless, and has no effect on individuals' attitudes or behaviour. For example, in 1902, a mother argued that she was simply using reasonable force by way of correction when she killed her eight year old daughter.[29] In that case it was held that motive is relevant to the question of reasonableness. Thus, "[i]f the mother was animated by dislike of the child, and took the occasion of a slight offence to cruelly beat it, then the force would not have been honestly used for the purpose of correction".[30] In 1987, "a father was held to have gone beyond reasonable discipline where he lost his temper, beat his children and left visible injuries".[31]

A recent paper describes the often severe effects of domestic violence on children.[32] The author, Dr Gabrielle Maxwell, concludes that there is currently

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26 Ibid, 161.

27 For results of a recent survey on attitudes to parental discipline, see Maxwell, *Physical Punishment in the Home in New Zealand* (1993) 9-11.

28 (1986) 3 FRNZ 1, 12.

29 *R v Drake* (1903) 22 NZLR 478.

30 Ibid, 485.

31 *P v P and W* 3/12/87, Judge Inglis QC, FC Levin FP 031/07485; cited in *Trapski's Family Law* (1991) I.4.06.

32 Maxwell, *Children and Family Violence: The Unnoticed Victims* (1994) 13.

insufficient recognition of the need to call the police when children are the victims of violence. She states:[33]

> To beat or belt a child, or even to punch them, is still seen by many as a legitimate part of parenting. A recent study ... showed that 2% of a random sample of over 300 current parents said that they had given their child "a really severe thrashing" and 11% reported that they had "hit with a strap, stick or something similar". *Such behaviour is likely to continue to be seen as acceptable parenting rather than violence towards children so long as it is supported by the fact that Section 59 of the Crimes Act 1961 exempts from a charge of assault parents who use "reasonable force" towards their children.*

This reinforces the point that the standard of "reasonable" force is problematic. No parent is ever likely to consider his or her actions to be unreasonable.

(d) Cultural concerns

Different cultures have differing views of physical punishment.[34] In *Erick v Police*,[35] a Niuean father used "a lot of force" to cause "extensive injuries" to his six year old son. The son was being punished for disobedience, and failed to cry after his father hit him the first time. The father felt that his son should be made to cry and therefore delivered a further ten or more blows with a belt. The purported cultural defence was summarised thus:[36]

> At the trial, evidence had been given by certain other Niue witnesses claiming conversance with the Niue practices of domestic discipline. In sum, it appeared that what might be judged by the broader "New Zealand standard" as excessive force, by the more robust Niue yardstick might well represent correction that is not unreasonable in the (different cultural) circumstances. Such discipline might commence in very early life (as early as 1-2 years) and might still be deemed appropriate, in extreme cases, up to the age of 21. Indeed, according to one witness, "it does not matter how old you are, parents use sticks, belts, anything that is handy".

Justice Heron accepted that the cultural characteristics of the family were relevant to the legal test of reasonableness. In the particular case however, notwithstanding the cultural practices of the Niuean people, he held that the force used was unreasonable. In England, it has been held that cultural background is irrelevant to the question of reasonableness. Lord Justice Widgery made this plain in *R v Derriviere*:[37]

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33 Ibid, 14. Emphasis added.

34 Although interestingly, a recent survey in New Zealand has found that the difference between Pakeha, Maori, and Pacific Island attitudes "was not significant": Maxwell, supra at note 27, at 11.

35 High Court, Auckland, 26 February 1985 M1734/84 Heron J; noted [1985] NZ Recent Law 227.

36 Ibid.

37 (1969) 53 Cr App R 637, 638-639.

> It was said below, and no doubt with truth, that standards of parental correction are different in the West Indies from those which are acceptable in this country; and the Court fully accepts that immigrants coming to this country may find initially that our ideas are different from those upon which they have been brought up in regard to the methods and manner in which children are to be disciplined. There can be no doubt that once in this country, this country's laws must apply; and there can be no doubt that, according to the law of this country, the chastisement given to this boy was excessive and the assault complained of was proved.

(e) Summary of the current position

While it is generally known in society that parents are entitled to discipline their children physically, the limits are not well known and parents have little guidance as to what is reasonable. As Dr Maxwell points out, even severe violence towards children continues to be seen as acceptable.[38] Those rules which do exist appear to have been developed informally by officials in the police and social welfare departments.[39] The discretion given to police officers and social workers has resulted in the potential for discrimination.

Nevertheless, public opinion appears to favour the status quo. Recent surveys indicate that most New Zealanders believe a degree of physical punishment is necessary as part of normal childrearing.[40]

2. The Call for Change

(a) Four different perspectives

The case against physical punishment has four primary aspects.[41] First, there is a "human rights" argument which emphasises that children have rights as citizens, and should be treated no differently to others. Second, it is argued that physical punishment is ineffective in achieving the goals it purports to attain. Third, it is claimed that critics argue that physical punishment is, at least indirectly, linked to child abuse. Finally, physical punishment leads to a number of undesirable consequences, from an increase in general aggression and violence, to more

38 See supra at note 32.

39 The writer's understanding from discussions with police officers is that domestic discipline is not seen as a priority. Severe violence or death would be required before an arrest would be made. This is not surprising considering the Police response to domestic violence generally. A memorandum issued by Police National Headquarters in 1987 required that all perpetrators of domestic violence be arrested as a matter of course. This memorandum was not complied with, and had to be re-issued in 1992, 1993, and 1994.

40 Supra at note 27.

41 These arguments are summarised in Urlich, "Physical Discipline in the Home" (1994) 7 AULR 851, 853-855.

juvenile offending. The detail of these arguments is outside the scope of this article. It is enough to note that these four arguments exist, and that their different perspectives have the potential to influence the debate in different ways.

(b) The Campaign by the Office of the Commissioner for Children

There have been a number of calls for a change to the law.[42] Most notably, the Office of the Commissioner for Children is currently campaigning for the repeal of s 59 of the Crimes Act. An information leaflet issued by the Office states:[43]

> It is not legal to beat or hit men, women, prisoners or service personnel but children don't have the same right to protection from the use of physical force as adults do. It is legal to hit them at present. Reasonable force is not defined in law. *This is unjust.*

(c) Overseas experience

Five European countries[44] have legislation which prevents the use of physical punishment. The right of parents to discipline their children physically was gradually removed. These legislative changes were accompanied by imaginative and extensive public education campaigns promoting the legal reforms and alternative methods of child management.

Parents who use physical force in the home face the possibility of criminal sanctions. However, these sanctions are used infrequently, and even then, not punitively. There has been only one prosecution in Sweden in fourteen years,[45] and the real emphasis of governmental action has been on changing attitudes through education. The change in attitudes has been manifest. In 1993, eighty-seven percent of New Zealanders thought that physical punishment was justifiable sometimes, compared to only twenty-six percent of Swedes in 1981.[46]

(d) What changes have been suggested?

Unfortunately, it is common for public campaigns to focus simply on the need for change to the law, without addressing the kind of change required. This issue is no exception. The Office of the Commissioner for Children's campaign simply states that s 59 should be repealed. The campaign suggests that the Scandinavian

42 See Caldwell, supra at note 6, at 370.

43 Office of the Commissioner for Children, *Hitting Children is Unjust* (pamphlet).

44 Sweden (1979), Finland (1984), Denmark (1986), Norway (1987), Austria (1989).

45 Welch, "Force of Habit" *Listener*, 13 November 1993, 16, 18.

46 Supra at note 27, at 16.

model is appropriate for New Zealand to follow, however this is not made explicit. Since competing proposals are not provided, the onus falls on the legislature to come up with a range of options. The next section of this article examines how the legislature may respond most appropriately to this task.

III: HOW SHOULD THE LEGISLATURE RESPOND?

1. The Development of a Response

(a) What is the real issue for the legislature?

In the writer's view, focusing only on s 59 would deflect attention from more important issues, and could lead to a preoccupation with "legal" questions, such as, the legal effect of a change.[47] Clearly, the immediate aim of repealing s 59 would be to stop parents from hitting their children. However other issues that need to be considered include claims that ending physical punishment will:

(i) provide official recognition of children's rights;
(ii) improve the well-being of children generally;
(iii) reduce violence in society; and
(iv) acknowledge that hitting children is not an effective form of education.

Since the validity of these claims will influence the type of legislation favoured, the first issue is whether stopping physical punishment will achieve the results claimed.[48]

If, for example, the link between physical punishment and general violence were accepted, the ultimate focus of any legislation would be the future behaviour of children. Compliance measures might be directed to long-term goals rather than

47 For example, in the debate on mandatory reporting of child abuse, the Crown Law Office seemed to suggest that any policy initiative lacking "clear evidence" that it will meet all its desired objectives will fail the s 5 reasonableness test in the New Zealand Bill of Rights Act 1990. The Crown Law Office's opinion claimed that mandatory reporting breached the New Zealand Bill of Rights Act because it was not the least intrusive means of achieving the Crown's objective: Crown Law Office opinion to the Attorney-General, 4 August 1993, 7. Note however, that Canadian courts have been prepared to defer to Parliament's assessment of conflicting social science evidence. Thus, courts will not strike down legislation simply because some social scientists consider the particular means to be ineffective. See *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927.

48 The legislature would need to ensure that it was fully informed as to the effects of physical punishment, both long-term and short-term, and the reasons motivating parents to punish children.

short-term punishment, and there would need to be greater use of education programmes for both children and parents. In contrast, legislation based on "children's rights" would have a different focus. That approach might require a more traditional criminal law solution based on a desire to protect rights. Alternatively, if the only difficulty with physical discipline were its ineffectiveness, this might suggest that the law should not be involved at all, much less the criminal law.

(b) Conflicting positions

It is clear that even among supporters and opponents of physical discipline there are a range of opinions as to what the content of any legislation should be.[49] However, two further views also have the potential to influence the debate concerning the form and content of legislation in this area. First, that government should resist legislating in the domestic realm. Liberal theory claims that the private realm should be free from state intervention. Second, that it would be cultural imperialism to impose the views of one culture upon another. Several ethnic groups claim a cultural right, or at least an established custom, to discipline their children physically.

(i) Is this a "private" issue?

The division of life into public and private spheres has been central to Western political thought since at least the seventeenth century.[50] The effect of this division is set out by Mill:[51]

> The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.

Family life has been classified by liberals as the clearest example of the private zone. Thus, they claim that individuals within the family have the right to absolute independence and freedom from state "intrusion". For example, the threat of marital rape law reform led legislators in the United States to cry that the "state shouldn't be going behind the bedroom doors".[52] Spousal rape laws were labelled

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49 The arguments supporting and opposing physical punishment have been noted earlier. See text, supra at Part II, 1(a) and 2(a) respectively.

50 Okin, "Gender, the Public and the Private" in Held (ed), *Political Theory Today* (1991) 67, 67.

51 Mill, *On Liberty* (1985) 68-69.

52 Newspaper report quoted in Olsen, "The Myth of State Intervention in the Family" (1985) 18 U Mich JL 835, 840 n9.

"an absolute intrusion into family life".[53] One Senator commented, "I don't know how you can have a sexual act and call it forcible rape in a marriage situation".[54]

This liberal conception of public and private, and its effect, has been criticised from a number of perspectives. Most notably, feminist theorists have attacked the public/private dichotomy, and its effect on women. Okin, while agreeing with the basic human need for privacy, claims that the traditional public/private split has been "based in the culture and social practices of patriarchy".[55] MacKinnon argues that privacy law serves simply to "keep some men out of the bedrooms of other men".[56]

Olsen attacks the very idea that the state is, or has ever been, capable of "non-intervention" in the family.[57] She argues that it is meaningless to speak of the state "not intervening", when it is the state which has constructed the family in the first place. She points out that "the state constantly defines and redefines the family and adjusts and readjusts family roles".[58] Olsen argues that non-intervention may affect individuals' relationships within the family just as much as intervention. They are both examples of political choices and state intervention in a broader sense. Indeed, the decision of the New Zealand legislature *not* to give the benefit of the Matrimonial Property Act 1976 to unmarried couples is as much "intervention" as is the Marriage Act 1955 which specifies the requirements for a formal marriage.

Natural law theorists may respond that the family is a "natural human formation, not created but merely recognised (or not recognised) by the state".[59] Olsen states that:[60]

> The content of family roles has changed over the years and there has never been complete agreement about the authority husbands and parents have over wives and children or about the responsibilities that go along with the authority.

Thus, state officials such as the police must continually make decisions about the nature and extent of family hierarchy. These decisions are undoubtedly political, and result in a degree of construction, not merely recognition.

Olsen observes that "[t]he simple claim that the state should not intervene in the family tends to obscure the genuine problems of ethics and policy that continually arise".[61] Clearly, the public/private debate has the potential to influence thinking on domestic discipline. The writer agrees with Olsen that this would be

53 Ibid.
54 Ibid.
55 Okin, supra at note 50, at 90.
56 MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1982) 8 Signs: Journal of Women in Culture and Society 637, 657.
57 Olsen, supra at note 52, at 836.
58 Ibid, 842.
59 Ibid, 846.
60 Ibid, 849.
61 Ibid, 855.

an unfortunate diversion away from the real issue. However, despite compelling arguments attacking the public/private concept, the idea that the family is private is a view still held by many in New Zealand.

(ii) Is intervention culturally appropriate?

As noted above, Heron J has accepted that cultural practices are relevant to the assessment of "reasonable" force under s 59 in New Zealand.[62] The argument of cultural relativists, that the law should never impose the morality of one culture upon another, raises a potential barrier to legislation banning physical punishment. According to these theorists, there is no such thing as "objective" morality. Each culture has its own internal standards, which cannot be applied to any other culture. This view developed from a realisation that different cultures may see the same act in entirely different ways. What is considered legal in New Zealand may be criminal in Iran, and vice versa.

However, cultural relativism has been largely discredited among philosophers.[63] It is inconsistent with the notion of the "rule of law", and has a number of practically undesirable consequences. For example, international human rights treaties and conventions could not exist meaningfully alongside cultural relativism. International condemnation of apartheid would have been rendered groundless on this theory. The theory has been rejected in England, where it has been held that laws on domestic discipline cannot be influenced by culture.[64]

In the writer's view, cultural relativism provides an important insight into the need to recognise other perspectives and ways of living. Traditional Western criminal law operates in a simple "binary" fashion – defendants are either guilty or not guilty. Scope for flexibility arises only at sentencing. Cultural relativism challenges this black and white approach to culpability. In many cases, cultural factors make the law appear clumsy and unrealistic.[65] For example, refugees in America have put themselves at risk of bribery charges by paying police officers for taking a crime report. However in the refugee's culture, "[t]hey just expect to pay to get the officer on their side".[66] Few would dispute that cultural background and experience are relevant to culpability in these cases.

However, there must come a point at which actions are deemed wrong regardless of culture, tradition, or motive. It is the writer's opinion that measures directed at preventing violence in society are sufficiently fundamental to oust the possibility of cultural defences. In the area of physical punishment, to allow a defence based on custom would seriously undermine the effect of a law designed to change inveterate behaviour.

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62 Supra at note 35.

63 See Rachels, *The Elements of Moral Philosophy* (2nd ed 1993) 15-29.

64 *R v Derriviere*, supra at note 37.

65 See Sherman, "When Cultures Collide" (January 1986) Cal Law 33.

66 Sergeant Marvin Reyes, Fresno City Police Department, cited in Sherman, ibid, 35.

Section 20 of the New Zealand Bill of Rights Act 1990 ("NZBORA") gives minorities the prima facie right to "enjoy the culture" of their race or group "in community with others of that minority":

> **20. Rights of minorities** – A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

An argument could be mounted that repealing s 59 would breach the NZBORA. Even the possibility of a breach may be strong enough to attract an Attorney-General's certificate under s 7 of the NZBORA.[67]

First, a litigant would have to establish the denial of the right to enjoy his or her culture. Certainly, the criminalisation of an entrenched cultural practice would amount to such a denial. However, there would be difficulty in establishing that physical punishment is a recognised cultural practice. Second, the litigant must show that physical punishment is a communal practice, as s 20 only protects rights exercised "in community with other members of [the culture]". This would be a difficult argument to maintain. Nevertheless, it must be acknowledged that many people continue to believe that legislating against physical discipline would be culturally inappropriate.

(c) The effect of these different positions

The effect of the public/private dichotomy and arguments of cultural relativity is to cloud the debate. Arguments may be presented as objective fact when in reality they are statements of political position. Frequently arguments are made combining aspects of the different positions. For example, a recent letter to the *New Zealand Herald* stated:[68]

> Attempting to legislate against parents smacking their children is truly alarming. This law must never be implemented for two reasons, the first of justice; the second of common sense. The state exists to implement justice and to protect its citizens from harmful and unlawful behaviour. By legislating against smacking it is overstepping its prescribed domain and encroaching on what is properly the realm of the family. This legislation seems to be presented in reaction to the tragic increase in child abuse. But assaulting and killing children is already illegal. Disciplined smacking is as little related to a violent assault on a child as is kissing the child. The solution to the tragic violence done to children must be sought elsewhere. Prohibiting smacking is not the answer.

The correspondent begins by appealing to family privacy. The claim that parents' methods of discipline are "properly the realm of the family" is a classic exposition of the liberal position. This is a statement of political belief, properly

67 Section 7 of the NZBORA imposes an obligation on the Attorney-General to bring to the attention of Parliament any provision in a Bill before the House that is inconsistent with any of the rights and freedoms contained in the NZBORA.

68 *New Zealand Herald*, 6 September 1994, section 1, 8.

the subject of debate and argument. Resolution of this issue will depend largely on the ideological position of the legislature. Further, the correspondent disputes the claim that physical punishment is linked to child abuse. This he does by appealing to "common sense", and an assertion that disciplined smacking is no more harmful than a kiss. This argument is a claim about the effects of physical discipline – a claim about human behaviour. Evaluating the claims about physical punishment requires specialist knowledge, research, and consideration. Accurate empirical evidence about the causes and effects of physical discipline is vital. Government policy should be based on an assessment of the scientific evidence, rather than political ideology, and legislators need to differentiate between the two.

An example of the way in which various perspectives approach issues differently, and the way this affects legislation, can be seen in the debate surrounding prostitution in Canada between 1892 and 1920. In considering the various approaches, McLaren and Lowman detail:[69]

> [A]n intriguing range of often-conflicting ideologies relating to prostitution and the application of social and legal controls to it. Each of these ideologies has been supported by and in turn been affected by a particular mode of discourse, a means of characterizing the issue in terms of the scientific, social, moral, or psychological significance attached to it.

They identify six main approaches. First, a "moral discourse" perceived prostitution as a dangerous practice, primarily the result of "individual female pathology and immorality".[70] Second, a discourse of tolerance viewed prostitution as an inevitable fact of life – "a necessary outlet for male sexual aggression".[71] A third discourse was concerned primarily with the maintenance of public order. Enforcing anti-prostitution laws was seen as a means of controlling generally undesirable behaviour.[72] Fourth, many viewed prostitution as a public health matter. Therefore, controlling or repressing prostitution was necessary to minimise the public health risks created by the sex trade.[73] Fifth, an emerging group of radical feminists argued that prostitution was "a reflection not of moral or mental delinquency but of a fundamental and discriminatory power structure".[74] Sixth, some were concerned for the legal rights of prostitutes. This was in contrast to general "indifference [to the fact] that prostitutes in particular could be picked up virtually at will, entrapped, and generally harassed by the forces of law and order".[75]

These various discourses produced different conceptions of the appropriate legal response to prostitution. Those concerned with moral purity supported the

69 McLaren and Lowman, "Enforcing Canada's Prostitution Laws, 1892 - 1920: Rhetoric and Practice" in Friedland (ed), *Securing Compliance: Seven Case Studies* (1990) 21, 22.

70 Backhouse, "Nineteenth Century Canadian Prostitution Law: Reflection of a Discriminatory Society" (1985) 18 Social History 387, 388-90; cited in McLaren and Lowman, ibid, 26.

71 McLaren and Lowman, ibid.

72 Ibid, 24.

73 Ibid, 57-58.

74 Ibid, 36.

75 Ibid, 55.

use of criminal sanctions to control prostitution. This was in line with their view that prostitution, should and could, be stopped. It demonstrated an "ultimate faith in the instrumental ability of criminal law sanctions to effect durable social change".[76] In contrast, feminists saw the use of the criminal law to repress prostitution as unjust and unlikely to succeed. Given that prostitution was a product of the power imbalance existing in patriarchal society, the task of legislators was to address that fundamental imbalance.[77] The public health lobby supported measures "empowering public health authorities to control and move against sources of infection".[78] Thus, health authorities were able to enter any house to seek out those who might have venereal disease. Infected persons were compulsorily removed for treatment.[79] Those advocating pragmatic tolerance of prostitution favoured allowing prostitutes to conduct their affairs without, or with minimal, state intervention.[80] The public order discourse was concerned "to demonstrate to the practitioners of prostitution that they were at the mercy of the police, who could as easily prosecute them as turn a blind eye".[81]

This survey demonstrates the way in which different perceptions of social "problems" affect the development of "solutions". It highlights the need to acknowledge the differing perspectives brought to the issue of domestic discipline. Conclusions about physical punishment are clearly affected by both starting points and presumptions.

(d) What place is there for legislation?

For the purposes of this article, the writer assumes that ending physical punishment would be likely to achieve the results claimed. That is, it would be a step towards reducing violence in society, and improving the well-being of children. In reality such conclusions could only be reached after careful assessment of the scientific evidence, and a considered policy decision as to the extent to which family privacy should be recognised. The question for the legislature would therefore be largely one of policy. The writer proceeds on the assumption that the legislature finds reform of the law to be desirable.

Given the existence of the statutory privilege, this issue is not one which could be dealt with through the common law. Reform would require legislation. Such legislation would be a form of social control, designed to change the behaviour of parents. The question which remains is how could this change in behaviour be achieved?

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76 Ibid, 63.
77 Ibid, 36-37.
78 Ibid, 61.
79 Ibid.
80 Ibid, 63.
81 Ibid, 64.

2. The Content of Possible Legislation

It is widely recognised that legislation is limited in its ability to deal with many types of problems. This is particularly true of so-called "social problems". The authors of the review of the Children, Young Persons And Their Families Act ("the CYPF Act"), known as the "Mason Report", point out that "child abuse cannot be legislated against", and that it is "impossible to create laws which will create loving families who care for their children".[82]

Twining and Miers note that whenever a new problem is perceived in society, an instinctive response is to call for a law imposing sanctions or creating new offences.[83] Thus the natural consequence of perceiving physical punishment to be undesirable is to call for it to be made criminal, or at least illegal. It is not always recognised that the law operates in many ways other than by simply imposing sanctions.

(a) What measures are available to effect change?

Summers discusses five basic techniques of law which give effect to policy.[84] These are summarised by Twining and Miers as follows:[85]

> (i) law as a grievance-remedial instrument (recognition of claims to enforceable remedies for grievances, actual or threatened);
>
> (ii) law as a penal instrument (prohibition, prosecution and punishment of bad conduct);
>
> (iii) law as an administrative-regulatory instrument (regulation of generally wholesome activity, business or otherwise);
>
> (iv) law as an instrument for ordering governmental (or other authoritative) conferral of public benefits (... such as education, welfare and highways);
>
> (v) law as an instrument for facilitating and effectuating private arrangements (... economic and otherwise).

This analysis of the functions of law makes it clear that prosecution and punishment are only part of a range of measures available to legislators. For example, the law has a significant role in the creation, definition, and facilitation of relationships among people.[86] In addition, it should be recognised that law has latent as well as manifest effects.[87] One of the most important latent effects of law is the public

82 Mason, *Review of the Children, Young Persons, and Their Families Act 1989* (1992) 14.
83 Twining and Miers, *How To Do Things With Rules* (1976) 68.
84 Summers "The Technique Element in Law" (1971) 59 Cal LR 733, 736-745.
85 Supra at note 83, at 66.
86 Twining and Miers, *How To Do Things With Rules* (3rd ed 1991) 165.
87 Ibid, 163.

affirmation of the legislature's position. Thus, law can be said to have an expressive or educative role. This section of the article considers the effect of legal sanctions, and contrasts this with the "law as educator" model.

(i) Legal sanctions

It has been noted that in the area of family violence "[t]he primary emphasis has been on crisis intervention rather than prevention".[88] Hence sanctions remain the most common method of social control. They operate negatively, as a means by which one person or group of persons seeks to change the behaviour of another individual or group.[89] Forms of sanction include criminal penalties, civil liability, publicity, and shame.

The most common justification for criminal sanctions is that they deter people from committing crimes. In other words, sanctions motivate people to change their future behaviour to avoid being subject to sanction. Bentham considered people to be "rational maximisers of satisfaction".[90] People, in Bentham's view, avoid acts which are likely to yield more pain than pleasure.[91]

More recently, Bentham's ideas have been adopted by "law and economics" theorists. Posner presents Bentham's theory in economic terms:[92]

> People engage in the acts that yield them the most value net of cost and can be deterred from criminal activity by a punishment system that makes the cost of criminal activity greater than the value of that activity to them.

This forms part of Posner's overall theory of the purpose of legal remedies. According to Posner, the law's task is to "impose costs on people who violate legal rules".[93] Therefore, an effective measure to combat physical discipline would need to impose enough cost on parents to discourage them from using such methods, since offences are only committed after a calculation of the positive and negative consequences. In addition, the law would need to ensure the efficient detection and public punishment of offenders. These two elements, sufficient "cost" and likelihood of detection, would ensure an efficient deterrent.

Within the domestic context, the use of sanctions encounters particular difficulties. Family members are often reluctant to report fellow members' behaviour to officials. Young children may simply be unable to do so.[94] In the recent debate

88 Hagan, Rogerson and McCarthy, "Family Violence: A Study in Social and Legal Sanctions" in Friedland (ed), supra at note 69, at 392, 426.

89 Ibid, 393.

90 Posner, *Economic Analysis of Law* (1975) 357.

91 Bentham, *Theory of Legislation* (1896) 325-326.

92 Supra at note 90.

93 Ibid.

94 Supra at note 88.

on mandatory reporting of suspected child abuse in New Zealand, it was argued that requiring officials to report their suspicions of child abuse would simply discourage victims from seeking help. Sanctions also often involve severe disruption to family relationships, which can adversely affect other family members. As noted above, there continues to be a strong belief that the family is private, and that activity within the family should not be subject to state intervention. These notions may lead to under-enforcement of sanctions.

Reiss argues that there is a fundamental difficulty with deterrence or sanction based models of law.[95] He contends that police practices are commonly focused on a deterrence model of controlling behaviour, and that the criminal justice system's concern for punishment and justice leads the police to emphasise the "clearance of crimes".[96] However, this ignores the value of compliance models which control behaviour. These models stress the importance of achieving compliance with the law without the intervention of arrest and punishment. The effect of the current situation is that police are mainly concerned with controlling violent crimes against the person and high value property offences. In contrast, "[l]esser crimes that may be quite serious in their consequences for individual and collective life ... are given less attention".[97]

Ironically, the debate about criminal sanctions mirrors the domestic discipline debate itself. Just as the state may be concerned to alter the behaviour of parents, parents are concerned to alter the behaviour of children.[98] In light of this, perhaps the legislature should take note of Leach's comments regarding domestic discipline:[99]

> [N]o kind of punishment is an effective way of changing behaviour at any age because to change behaviour we have to do several things that punishment cannot do: we have to motivate people to do something different from what impulse or inclination suggests; we have to ensure that they understand what that different and desirable behaviour is, and that it is available to them; and we have to make them feel good about choosing to behave that way.

If this argument were accepted, the state's responsibility would be to present parents with alternative modes of behaviour, and to encourage them to follow that behaviour by demonstrating its benefits. This view of the state's role is radically different to those of Posner or Bentham.

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95 Reiss, "Consequences of Compliance and Deterrence Models of Law Enforcement for the Exercise of Police Discretion" (1984) 47 L & Contemp Prob 83.

96 Ibid, 121.

97 Ibid.

98 See Hagan, Rogerson and McCarthy, supra at note 88, at 402-403.

99 Leach, "What's wrong with hitting children?" EPOCH (1992) Ending Physical Punishment of European Children, Final Report from Two-day Seminar, March 1992, London 90, 92.

(ii) The law as educator

Law does not always function as a direct regulator of behaviour. Legislation may be introduced as a symbolic gesture or affirmation of principle. This is particularly so in relation to "moral" issues. Twining and Miers cite the American prohibition laws as one example of this. It can be claimed that despite the fact that the laws were manifestly ineffective in stopping the consumption of alcohol, they served a valuable function by displaying the state's disapproval of drinking.[100] The fact that total or even substantial compliance was unlikely did not mean that the law was not useful. Likewise, a primary purpose of race relations legislation is said to be its "unequivocal declaration of public policy".[101] In many ways, school rules operate largely to inculcate particular values and attitudes.[102] In this respect laws can be extremely effective despite widespread non-compliance.

A 1983 New Zealand study on rape concluded that reform to rape laws would have both instrumental and symbolic objectives.[103] Reform undertaken with a symbolic objective would aim to "express a particular attitude towards the offence, the victim and the offender, and thus ... effect some change in social attitudes".[104] Forty percent of those at a symposium on rape thought that the most important objective of rape legislation should be to change people's beliefs about the offence of rape.[105] However, the authors of the report noted that it was:[106]

> [P]erhaps unduly optimistic to believe that new laws alone [could] effect any real change in deep-seated social attitudes about sex roles and sexual behaviour, at least in the short term.

In the debate concerning mandatory reporting of suspected child abuse, supporters argued that, no matter how effective or ineffective the law would be in stopping individual cases of child abuse, it would serve a valuable symbolic function by displaying the community's abhorrence of child abuse.[107] Gibbons describes the argument in favour of "symbolic" mandatory reporting laws in this way:[108]

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100 See Sinclair, *Prohibition: The Era of Excess* (1962); cited in Twining and Miers, supra at note 83, at 64 n26.

101 Race Relations Board, First Annual Report (1967) para 65, cited in Twining and Miers, supra at note 86, at 162.

102 Twining and Miers, ibid.

103 Smith and Young, *Rape Study* (1983) Volume 1, 21.

104 Ibid.

105 Ibid.

106 Ibid, 23.

107 Supra at note 82, at 13-17.

108 Gibbons, "Mandatory Reporting of Child Abuse. Is it a better option than Voluntary Reporting, and if so, what form should it take?" in Mason, ibid, 205, 212.

> The obligation to bring to attention episodes of child abuse is an affirmation of the fact that we, as a society, do not accept that the abuse of a child is a private matter for the family. It is an assertion that children are individuals in their own right, they are not the property of their parents. Mandatory Reporting reflects the law's commitment to the protection of children and their right to the preservation of health and life. It is a recognition that the community cares and is serious enough about child abuse to elevate a civic or moral duty of care, that it is a grave matter calling for public scrutiny and perhaps for intervention by agencies of the state. It serves to remind professionals of the seriousness with which our society views abuse of children.

Where the object of the law is symbolic or educative and not supported by criminal sanctions, lack of reporting and enforcement is less important. Such laws may be effective despite non-enforcement. In contrast, if the legislature supports a repeal of s 59 of the Crimes Act with sanctions, reluctance to report could be a potential obstacle to the success of domestic discipline laws.

In the United States, the "New Public Law" scholarship has begun to explore the effect of law on "social understandings, norms, and meanings".[109] This scholarship has flowed from a recognition that "[l]aw is part of a web of sociopolitical structures that are constitutive – and reconstitutive – of our community".[110] In other words, law interacts with people's understandings and expectations in many complex and subtle ways. This interaction is not easily quantifiable, and may or may not show up in traditional measures of legislative success. For example, success of a public distribution structure is measured according to its output capacity; thus the success of a social welfare system is its ability to deliver benefits efficiently.[111] However, while this measure takes account of instrumental effects, it ignores the many cultural effects a structure may have.[112] Walzer points out that the creation of a welfare state was seen as more than merely the enactment of a system to redistribute benefits. It had both an expressive and an economic function, since it expressed "a sense of the nation-state as a community committed to its citizens – or, more accurately, as a community constituted by citizens committed to one another".[113] Thus, social welfare legislation can be viewed as "designed to embody a particular public philosophy and to aspire to the creation of a particular set of social relationships".[114]

This recognition that law is constitutive of social norms makes it clear that legislators should always consider the cultural consequences of new laws. Pildes points out that these cultural consequences are often unintended, and are discovered only after years of experience.[115] This is due in part to the difficulty in

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109 Pildes, "The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium" (1991) 89 Mich LR 936, 938.

110 Eskridge and Peller "The New Public Law Movement: Moderation as a Postmodern Cultural Form" (1991) 89 Mich LR 707, 748.

111 Supra at note 110, at 940.

112 Ibid. Pildes, at 938 n6, discusses the terms "instrumental" and "cultural".

113 Walzer, "Socializing the Welfare State" in *Democracy and the Welfare State* (1988) 13; cited in Pildes, ibid, 952.

114 Pildes, ibid.

115 Ibid, 938-939.

assessing and quantifying them. Standard, and even relatively sophisticated, "cost-benefit" analyses are unable to account for these consequences.[116]

The lesson is similar in the case of domestic discipline. Discussion is likely to focus on the most appropriate form of sanctions or enforcement measures. Couched in traditional terms, this discussion would consider which form of legislation would deliver the most efficient output – probably in terms of the greatest measurable compliance. However, different forms of legislation may have different cultural effects distinct from their "output efficiency". Directly or indirectly they may affect people's conception of the family and relationships among family members. For example, legislation based on recognition of children's rights could contribute to a more individualistic conception of family, placing children and parents in competition and giving children "trump cards" in some situations. This could negate the assumed desired consequence of increasing mutual responsibility and cooperation among family members.

Ultimately, the challenge would be to decide on a desirable model of family relations, and to attempt to ensure that any legislation remained consistent with this model. In the writer's view, legislation would need to encourage a conception of parents as responsible and accountable for the support and education of their children from birth. As well, children should be viewed as subject to parental authority, at least until reaching a "competent" age.[117] Legislation should demonstrate the state's desire to support parents, while recognising that some parental behaviour is ultimately harmful to children. In short, legislation to prevent physical discipline should encourage, not discourage, desirable family structures.

(b) Are there any relevant international obligations?

Increasingly, New Zealand law is being influenced by international instruments. The United Nations Convention on the Rights of the Child states:[118]

> 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 ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

It has been argued that this Convention places an obligation on New Zealand to ban the physical punishment of children.[119] Sir Robin Cooke, President of the Court of Appeal, has recently stated that "[a] failure to give practical effect to international instruments to which New Zealand is a party may attract criti-

116 Ibid, 954-966.

117 A standard similar to that adopted by the House of Lords in *Gillick v West Norfolk AHA* [1986] 1 AC 112 might be appropriate.

118 The United Nations Convention on the Rights of The Child (NZ ed 1992) Article 19.1.

119 See Urlich, supra at note 41.

cism".[120] Thus the legislature may feel some pressure to act in conformity with the Convention.

(c) Coordination with existing legislation

Any law on domestic discipline must acknowledge present legislation in this area, in particular the CYPF Act. The CYPF Act effectively makes any act causing "harm" to a child actionable child abuse. Legislation declaring all physical punishment to be harmful might, therefore, bring the actions of many parents within the CYPF Act definition. This would be inappropriate given the CYPF Act's procedures for prosecution and child removal. In addition, as mentioned above, the NZBORA may be relevant to any claim by a cultural minority.

(d) Options for reform

Three options for reform are discussed briefly below. The first is a simple amendment to the Crimes Act. The second is the enactment of specific legislation to deal with physical punishment in the home. Finally, the possibility of other more comprehensive measures is explored.

(i) Simple amendment to the Crimes Act

Perhaps the simplest option would be to repeal s 59 of the Crimes Act, as suggested by the Office of the Commissioner for Children. This would remove parents' statutory privilege to hit their children, and in the writer's view would be a natural progression from the removal of the privilege given to teachers. Despite the repeal of s 59, parents would retain the common law defence to assault against their children.[121] Nevertheless, the removal of the specific legislative authorisation would be seen as a significant declaration of position by the legislature. In order to be most effective, it would need to be accompanied by a public education campaign similar to that which occurred in Sweden.[122] It is the writer's opinion that the combination of legislative action and educative measures would be an effective way to begin to change attitudes. The continuing existence of the common law protection would allay concerns about the undue criminalisation of common behaviour. At the same time, legislative action would provide firm evidence of the state's commitment to the issue.

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120 *Tavita v Minister of Immigration* [1994] NZLR 257, 266 (CA).

121 See *R v Hopley*, supra at note 5.

122 Of course, the legislation itself would have an educative or expressive function, as described above.

In Leach's opinion, as discussed above, the best way to motivate people to change their behaviour is to present them with viable alternatives, and to explain to them the benefits of those alternatives. Therefore the education programme would need to do at least two things. First, it would need to explain the harmful effects of physical punishment, as determined by the legislature's factual enquiries. This would make the reasons for the law change clear. Such an explanation would help to justify the intrusion into the "private" zone of the family – an intrusion likely to concern many. Second, parents would need to be made aware of other methods of discipline, since it is unreasonable to expect parents to change their behaviour unless they know the alternatives.

One advantage of repealing s 59 is that behaviour common to most parents would not be criminalised. This would undoubtedly increase public acceptance of the law, since the undesirable consequences of sanctions would be avoided. The avoidance of sanctions could be viewed as a "soft" option. However, as noted above, an amendment to the Crimes Act would be effective in demonstrating the legislature's seriousness. Accompanying this law change with a suitable education campaign would address public attitudes, making genuine compliance more likely.

One disadvantage of this option is the possibility that the law would be seen as ineffective due to the lack of sanctions and the continuing existence of the common law privilege.

(ii) Specific legislation

A second option would be the enactment of legislation dealing specifically with domestic discipline. Such legislation would be most effective following an education campaign. This would create an environment in which the public were both less tolerant of physical discipline and more informed about methods of non-physical discipline.

This legislation would specifically remove the common law privilege to discipline physically, and make such discipline illegal. Some provision for sanctions would be necessary. However, the sanctions would not need to be employed in the role envisaged by Posner or Bentham. That is, it would not be necessary to make the sanctions cause "pain" greater than the "pleasure" derived from the forbidden action. Sanctions can be effective without strict enforcement, despite the traditional view to the contrary. In this situation, sanctions would be valuable in symbolising the legislature's disapproval of physical punishment. The Swedish experience indicates that a lack of prosecutions does not undermine the effectiveness of the measure.[123]

It can be argued that sanctions which are consistently under-enforced may be counter-productive if they are seen to demonstrate an official lack of commitment

123 See Urlich, supra at note 41.

to an issue. However, in the writer's view, the existence of a legal sanction is nevertheless important. For example, despite the lack of enforcement of anti-cannabis laws, the laws do affect general attitudes.

A further argument which can be raised is that the effect of sanctions would be to undermine the current conception of family relations by altering the parent/child relationship. Some may be concerned at the thought of children holding parents to ransom after minor smacks. However, in order to guard against malicious prosecutions, Caldwell has suggested that the Solicitor General's consent be required before a prosecution be commenced.[124] The writer agrees that this would be an appropriate safeguard.

(iii) More fundamental measures

Physical discipline is linked closely with the issue of family violence in general, including child and spousal abuse. A major justification for ending physical punishment is that this will help reduce child abuse and overall levels of violence. Seen in this light, measures directed at physical discipline would be only one part of a wider initiative to address the problems of violence within the family.[125] Thus, the writer suggests a third option is a transformation of the family structure.

A recent New Zealand report on domestic violence made over 100 recommendations after eighteen months of research.[126] With apparent frustration the authors stated:[127]

> We can only say (somewhat lamentingly) that as soon as we realised that we could not change the world, we became more resigned and somewhat gentler. We had originally felt that if we plumbed deeply enough, the solutions would emerge. We now offer numerous recommendations for change but we see them as ameliorating (in some cases significantly) current problems with policy and practice rather than offering definitive solutions for stopping domestic violence.

The current framework dealing with domestic abuse is limited to "after-the-fact" intervention, and provides for only two possibilities: sanctions or rewards. As described above, Hagan, Rogerson, and McCarthy detail the problems with traditional sanctioning programmes, including the difficulties caused by enforcement and family privacy concepts. Their article concludes that "[s]ocial and legal measures aimed at preventing violence rather than punishing perpetrators or protecting victims afterward are thus desirable".[128] Yet, while some research and

124 Supra at note 6, at 387.

125 Our understanding of family violence is still developing. Various theories exist as to the causes of family violence, but no single model has been able to provide a solution to the problem.

126 Busch, Robertson and Lapsley, *Domestic Violence and the Justice System* (1992).

127 Ibid, vi.

128 Supra at note 88, at 427.

trial work has been done on preventative measures, there continues to be "little evidence documenting their effect in reducing the incidence of child abuse".[129]

Frustrated with the traditional debate about sanctions and rewards, Hagan, Rogerson, and McCarthy have investigated a new "broader conceptual framework for understanding the social structure of the sanctioning process in domestic violence".[130] Their article begins by pointing out that:[131]

> [T]he debate about sanctions and rewards, as is currently being conducted in the public policy arena ... has generated a relatively limited range of options for consideration.

Hagan and his colleagues conclude that further research should focus on the links between family violence and family structure. They postulate that transformation of the family structure may lead to "an effective, long-term solution to family violence".[132] This would involve advancing the economic position of women and their role in the workplace. It would also require a change in society's attitudes. Hagan suggests that "[a] change in legal norms, involving, for example, use of the criminal law to signal the intolerability of physical abuse of wives and children, will in the end contribute to this process of a change in attitudes".[133]

In the writer's view, this focus on family structure is probably the key to the long term reduction of domestic and societal violence. The prevention of physical discipline, and the attitudinal changes implicit in this measure, would make a contribution to the necessary restructuring of family relationships.

If this view were accepted, the challenge for the legislature would be to see the reduction of physical discipline as one step towards re-designing family relationships along more equal and supportive lines. Such reform is ambitious and requires careful consideration and commitment. The results would neither be quick nor easily measurable. However, the complexity of violence as a social problem suggests that solutions will not be simple.

IV: CONCLUSION

This article began by noting that it would not attempt to advance the one objectively correct position on physical punishment in the home. Indeed, it is unlikely that any such position exists. Rather, the article has raised a number of points of general relevance which emerge from the debate over domestic discipline. In the writer's view, there is much to be learned from the domestic discipline debate, both for legislators, and for those seeking to influence legislation.

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129 Ibid, 425.
130 Ibid, 393.
131 Ibid, 426.
132 Ibid, 427.
133 Ibid, 428.

First, the current law on domestic discipline shows that open-textured drafting may lead to meaningless legal standards, and to the potential for discrimination. This is of obvious relevance given the legislature's increasing use of the open-textured approach. It is of particular relevance to those wishing to eliminate discrimination, since open-textured legislation leads to a subtle form of discrimination easily overlooked.

Second, the public debate over physical punishment demonstrates the variety of ideological, moral, and political perspectives that often emerge in the discussion of social issues. Legislators must be careful to recognise these different perspectives in order to separate the arguments, and to deal with them appropriately.

Third, the discussion of the educative role of law is important for those considering possible methods of law reform. While the scholarship on the expressive function of legislation is still new, it can be seen that legislators must look beyond the simple enforcement-driven models which currently dominate law-making. Such new methods and tools of law reform are likely to provide more sophisticated reforms in the future.

Fourth, the discussion of the liberal theory of the public and private is relevant to many social issues. The continuing belief in family privacy stands as an obstacle to legislative intervention of all forms in the family. This has most recently been seen in the debate over mandatory reporting of child abuse.

Finally, the three reform options which have been outlined demonstrate that progressive legislative reform may sometimes be necessary, and that the simple act of repealing a section may not be sufficient to achieve a desired goal. The third option would require research into complex methods of social re-ordering. In the writer's view, such comprehensive research and understanding is the best hope society has of finally addressing violence in all forms within the family. Perhaps the most valuable lesson to be learned is that issues such as domestic discipline require dedicated and considered attention. Currently, it seems, such attention is lacking.