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CORPORAL PUNISHMENT AND PENAL POLICY: NOTES ON THE CONTINUED USE OF CORPORAL PUNISHMENT WITH REFERENCE TO SOUTH AFRICA

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Before the invention of the prison in Europe and North America, the whip had been a ubiquitous instrument of penal practice. Together with other physical punishment and tortures, it gave formal expression to the punitive obsessions of medieval criminal justice. Although these punishments have fallen into disuse in most of the modern world, the philosophy of retribution continues to have popular appeal. Politicians and editors of popular newspapers, who are aware of the intensity of public feeling on law and order issues, frequently capitalize on these feelings by calling for more severe penal measures such as the death penalty, mandatory prison sentences and corporal punishment. For example, in Britain, before winning the 1979 general election the Conservative Party was reported to have been planning a referendum on the reintroduction of corporal punishment for young offenders.[1] But in Britain, as in other liberal democracies, election promises to introduce tougher penal measures are not always fulfilled. Law and order issues were featured prominently in the Conservative Party's election campaign, but were abandoned after the party assumed office. Instead of reintroducing corporal punishment, the Conservative Party established two military style centers where young offenders can be committed for what is described as a "short, sharp, shock" period of detention.[2]

As there appears to be little likelihood of the resurrection of corpo-

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1 The Guardian, June 5, 1978, at 3.

2 These proposals were explained to the Conservative Party conference on October 10, 1979, by the Home Secretary who indicated that two existing detention centers for young offenders had been selected for the "experiment;" stricter discipline and greater regimentation would be introduced. *See* The Guardian, Oct. 11, 1979, at 4.

ral punishment in the industrial countries or in other nations which have abolished it, criminological interest in the subject has waned. Similarly, because few criminologists believe that its use can be defended, little has been written about it in recent years. This wane is due more to the insularity of Western criminology than anything else, for the whip has not been abolished universally. Surprisingly, journalists have documented its continued use far more extensively than have criminologists.

I. SOME CONTEMPORARY EVIDENCE

Recently, journalistic attention has been focused on the use of corporal punishment in Iran, Pakistan, Saudi Arabia and other Islamic countries. In Pakistan in 1977, shortly after the military seized power, General Zia, the military head of state, told foreign journalists that he intended to introduce corporal punishment to curb the country's high crime rate and he indicated that this measure was compatible with his efforts to return Pakistan to Islamic orthodoxy. He pointed out that it was not intended that those subjected to corporal punishment should suffer much physical pain; instead, a public whipping would inflict shame and degradation. Corporal punishment would be administered with a soft cane over the offender's clothing and it was unlikely that the prisoner's skin would be lacerated.[3] The first public whipping was carried out in March 1978 before a crowd of some 10,000 people in Rawalpindi's race course. The offender, a twenty-seven year old man who had been convicted of rape and sentenced to fifteen lashes as well as fifteen years imprisonment, was whipped on his naked back with a cane which had been soaked in mustard oil. At the end of the whipping, the prisoner was bleeding profusely and had to be carried away.[4] After this first beating, few reports of public whippings were received and it appeared that this punishment was not being widely used. However, in October 1979, shortly after the General had announced a further postponement of the long awaited national elections, military courts began to impose sentences of corporal punishment more frequently. In a press release on October 18, 1979, the Pakistan government announced that five offenders had been whipped for a variety of unspecified offenses; sentences of between thirteen and fifteen lashes had been imposed.[5]

Corporal punishment as well as other forms of physical injury such as amputations are prescribed penalties in traditional Islamic law.[6] However, in those Islamic countries that were subjected to European

[3] The Guardian, Sept. 2, 1977, at 6.

[4] The Guardian, Mar. 2, 1978, at 5.

[5] The Guardian, Oct. 19, 1979, at 6.

[6] *See* N. ANDERSON, LAW REFORM IN THE MUSLIM WORLD, ch. 1 (1976); J. SCHACHT, AN INTRODUCTION TO ISLAMIC LAW, ch. 24 (1964).

colonial rule and in other Islamic countries where Western legal codes were adopted, these punishments have fallen into disuse. On the other hand, in countries such as Saudi Arabia, where Western influence has been minimal, public whippings, amputations and executions are still held. Expatriates are not immune from these sentences, although such sentences are seldom carried out. Still, it was reported in June 1978 that two British engineers had been whipped for distributing homemade beer.[7]

There are indications that those Islamic countries that have penal codes based on Western precepts are considering reinstituting traditional Islamic sanctions such as corporal punishment. In the United Arab Emirates, religious courts assumed jurisdiction over criminal cases in 1977. Shortly afterwards the first sentence of a public whipping was imposed on a man convicted of rape.[8] The sentence of one hundred lashes was carried out in the central market of Abhu Dabhi before 3,000 people. It was reported that although the man had withstood the first ten lashes, he subsequently had collapsed.[9]

In Egypt, there has been pressure on the government to revise the country's penal code to bring it into greater conformity with traditional Islamic law. In March 1976, a new draft penal code, prepared by a professor at Cairo University, was approved by the People's Assembly.[10] The draft code proposes that sentences of amputation of one hand for theft, and both hands and feet for attempted rape be imposed; rape resulting in the death of the victim should be punished by crucifixion followed by hanging. It recommended that whippings of varying severity should be imposed for different offenses: 100 lashes for fornication, 80 lashes for drinking, and 50 lashes for selling alcohol. The Assembly's approval of these proposals was described as a "conservative gesture" to proponents of Islamic traditionalism. Although the government cannot ignore the demands of orthodox pressure groups, there is little indication that these proposals have the support of the influential, educated middle class and, therefore, it is unlikely that the executive branch will sanction the enactment of the draft penal code.[11]

The Malaysian government has also been under pressure to govern the country according to strict Islamic principles. The zealous *dakhwah* missionaries, who now exert great influence in urban areas and among young people, have gained greater support for Islamic traditionalism in recent years. There have been calls for the introduction of public whip-

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[7] The Guardian, June 15, 1978, at 1.
[8] The Guardian, Sept. 27, 1977, at 6.
[9] *Id.*
[10] The Guardian, Mar. 9, 1976, at 4.
[11] *Id.*

pings, stonings and executions and these calls have been echoed by some politicians.[12] In 1977, the government agreed to consider drafting a Muslim Family Law Act, which would only apply to Muslims. Also, there have been demands that Islamic criminal courts be created to try all offenders, irrespective of their religion.[13]

The use of corporal punishment is not limited to Islamic societies; a recent judgment by the European Court of Human Rights gave embarrassing publicity to the fact that, until recently, whippings were still being imposed on young offenders in parts of the United Kingdom.[14] Although legislation enacted in 1948 abolished judicial corporal punishment in the country,[15] the Act did not apply to those parts of the United Kingdom which are self-governing in terms of special constitutional provisions; in the Channel Islands and the Isle of Man, corporal punishment was retained. It is reported that in the Channel Islands corporal punishment has been used sparingly; in Jersey, a whipping was last carried out some fifteen years ago.[16] On the other hand, in the Isle of Man, some twenty-five young offenders have been "birched" since 1966.[17] The use of corporal punishment in the Island's juvenile court is governed by legislation originally enacted in 1927 and amended in 1960,[18] which prescribes that whippings be administered in the presence of a medical doctor who may order that the punishment be stopped if he is of the opinion that its effects are too traumatic. The offender is undressed, held down by two police officers and is whipped on the naked buttocks. Also, the legislation limits the number of strokes which may be imposed and allows the child's parents to be present. In 1969, some of the Island's residents began to campaign for the abolition of corporal punishment after a whipping had been imposed on a teenage boy who, only two days earlier, had attempted to commit suicide.[19] Through their efforts, the continued use of corporal punishment on the Isle of Man has been given much publicity.[20]

A great deal of publicity also attended the case of Anthony Tyrer, who was the original applicant in the case heard by the European Court

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12 The Guardian, Mar. 21, 1978, at 6.

13 The Times, Sept. 1, 1977, at 5.

14 Tyrer Case, [1978] Y.B. EUR. CT. OF HUMAN RIGHTS Series A No. 26, at 4 (Eur. Comm. on Human Rights).

15 U.K. Criminal Justice Act, 1948, § 2.

16 The Guardian, Apr. 26, 1978, at 1.

17 *Id.*

18 Acts of Tynwald, Summary Jurisdiction Act, 1927, § 56(1), *as amended by* Summary Jurisdiction Act, 1960, §§ 8, 10.

19 The activities of this pressure group were reported in The Times, June 20, 1972, at 3.

20 The Guardian, reported that the activities of these abolitionists were being fiercely resisted by the Island's politicians and police. The Guardian, Feb. 1, 1974, at 2.

of Human Rights referred to previously.[21] Tyrer was convicted, along with three other boys, of assaulting their school prefect after the prefect had reported them for bringing beer onto the school premises. Then aged fifteen, Tyrer was caned by the school's headmaster and was sentenced subsequently to be given a whipping of three strokes by the Castletown Juvenile Court.[22] An appeal against the sentence was dismissed in April 1972,[23] and the punishment was administered on the same day in the presence of the boy's father. The father was so incensed that he attempted to intervene and had to be restrained. In September 1972, a complaint was lodged with the European Commission on Human Rights.[24]

In 1976 the Commission ruled that the whipping imposed on Tyrer was a degrading treatment and, therefore, punishment contrary to Article 3 of the European Convention. The Commission took the matter to the European Court of Human Rights.[25] Previously, Tyrer had withdrawn his complaint but the Commission held that the case should proceed as it raised an issue of general principle beyond the question of the actual injury suffered by the complainant.

At the hearing before the court in January 1978, the government of the United Kingdom, which is responsible for the Island's external affairs, defended the action and its legal representative pointed out that although the British government did not condone the use of corporal punishment, it believed that the Island had a right to determine its own domestic policies. The Island's Attorney General defended corporal punishment vigorously, arguing that the great majority of Manxmen favored the practice. He maintained that the low rate of violent crime on the Island could be attributed to the deterrent effect of corporal punishment, and he expressed the fear that violence would increase if it were abolished. He reported that the Manx government intended to enact legislation restricting the use of corporal punishment and ensuring that it would be administered more humanely; for example, the offender would not be required to undress in the future.

These arguments and assurances did not satisfy the court, which ruled by a majority of six to one in April 1978 that corporal punishment was a degrading punishment in contravention of Article 3.[26] The British judge dissented, believing that the imposition of corporal punish-

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21 Tyrer Case, [1978] Y.B. EUR. CT. OF HUMAN RIGHTS at 6.

22 *Id.*

23 *Id.*

24 *Id.* at 11.

25 Article 3 states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

26 European Convention on Human Rights, Nov. 4, 1950, Council of Europe, Europ. T.S. No. 5, art. 3. Tyrer Case, [1978] Y.B. EUR. CT. OF HUMAN RIGHTS at 17.

ment on juveniles was of such little consequence that it could not be regarded as degrading; to argue that it was, exaggerated the issue all out of proportion. Nonetheless, the court's decision is binding and it requires the British government to ensure that the Island's authorities discontinue the practice.[27]

II. CORPORAL PUNISHMENT AND PENAL POLICY IN SOUTH AFRICA

Generally, journalistic inquiry into corporal punishment in the modern world has not been accompanied by rigorous criminological documentation or research. One exception is South Africa where a considerable amount of information about the widespread use of corporal punishment has been collected and where, on several occasions, legal scholars and criminologists have commented on its use.[28] However, the available information has not been collated adequately, therefore, it may be of interest to review briefly this material.

In the early days of Cape Colony, the death penalty was imposed for a great variety of offenses and corporal punishment was usually reserved for those convicted of petty misdemeanors. It was not uncommon for whippings of more than one hundred lashes to be administered, frequently resulting in serious injury or in death.[29] In the first half of the nineteenth century, after the imposition of British colonial rule, many descendants of the original Dutch and Huguenot settlers emigrated to the hinterland where they established two independent republics, the Orange Free State and the South African Republic; British rule, however, still extended over the Cape and Natal.

Originally in the South African Republic, corporal punishment could be imposed only on black offenders.[30] Then, in 1880, legislation was introduced to permit white escaped prisoners to be whipped. By 1892, this legislation had been amended to allow the courts to impose

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27 The *Tyrer Case* was widely reported in the British press. See in particular an editorial in The Guardian, Feb. 18, 1978, at 12, and a lead article by Professor Zander of the London School of Economics in the same newspaper on April 26, 1978, at 4.

28 *See, e.g.*, Kahn, *Crime and Punishment 1910-1960*, ACTA JURIDICA 191, 212 (1960); Midgley, *Sentencing in the Juvenile Court*, 91 S. AFR. L.J. 451, 459 (1974); Nicholas, *Consistency and Discretion in Sentencing in the Courts*, in CRIME AND PUNISHMENT IN SOUTH AFRICA 153 (J. Midgley, *et al.* eds. 1975); Steyn, *The Punishment Scene in South Africa: Developments over the Past Decade and the Prospect for Reform*, in CRIME, CRIMINOLOGY AND PUBLIC POLICY 553 (R. Hood ed. 1974).

29 H. VENTER, DIE GESKIEDENIS VAN DIE SUID AFRIKAANSE GEVANGENISSTELSEL: 1652-1958 3 (1959).

30 In terms of the nomenclature of apartheid, the people of South Africa are classified into four racial categories: these are (a) the Africans or "Bantu" who are further divided into several tribal categories, (b) the whites, descendants of European settlers, (c) the Asians, chiefly of Indian origin and (d) the Coloureds, a mulatto people. The term, "blacks," refers to the Africans or Bantu and the Coloureds.

corporal punishment on white offenders for a variety of crimes.[31] In 1860, legislation was enacted in the Cape Colony to restrict the number of lashes that could be imposed: magistrates' courts were limited to sentences of thirty lashes while the superior courts were allowed to impose a maximum of fifty lashes.[32] Special legislation governed the use of corporal punishment in juvenile cases; in 1869, the Cape Colony courts were restricted to using sentences of no more than fifteen lashes for children under the age of fifteen.[33]

In the two republics and the Colony of Natal, similar restrictions were applied in the late nineteenth century but the number of lashes which the courts in these territories could impose varied considerably.[34] Consequently, at the time of Union in 1910, the four provinces, as they became known, were subject to different restrictions and it was not until 1917, when their criminal codes were repealed, that uniformity in the use of corporal punishment was achieved. This legislation permitted the magistrates' courts to impose sentences of no more than fifteen lashes and provided also for the automatic review of sentences of corporal punishment by the Supreme Court, except in the case of juveniles.[35]

Previously, rulings by the superior courts had tempered the magistrates' use of corporal punishment. In the late nineteenth century, the Cape Supreme Court criticized the practice of deferring whippings until the completion of prison sentences and condemned the administration of corporal punishment in installments.[36] In 1911, the Transvaal Supreme Court ruled that a sentence of ten lashes was a very serious punishment which should be imposed only in exceptional circumstances.[37] It was common in the nineteenth century to whip adults with the cat-o'-nine-tails and to use the cane on juveniles. Although magistrates were empowered to impose the "cat" until 1944, its use declined in the early twentieth century as various Supreme Court rulings encouraged the use of the cane instead.[38] In 1944, legislation was passed which restricted the use of the "cat" to the Supreme Court[39] and, except for the period 1948 to 1950, when 281 offenders were whipped with the "cat", Kahn reported that its use by the superior courts had been "insig-

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31 SOUTH AFRICA, REPORT OF THE COMMISSION OF ENQUIRY INTO THE PENAL SYSTEM OF THE REPUBLIC OF SOUTH AFRICA 129 (RP 78/1976 (1976)).

32 Kahn, *supra* note 28, at 207.

33 *Id.*

34 Nicholas, *supra* note 28, at 154.

35 S.A. Criminal Procedure and Evidence Act, 31 of 1917.

36 Kahn, *supra* note 28, at 208.

37 R v. Kambula, 1911 T.P.D. 239.

38 Kahn, *supra* note 28, at 209.

39 S.A. Magistrates Court Act, 32 of 1944.

nificant."[40] Also, this legislation reduced the number of lashes that could be imposed by magistrates from fifteen to ten.

A. THE LANSDOWN COMMISSION AND THE WHIPPING ORGY

In 1945, the Smuts government appointed a commission to inquire into penal matters in South Africa. Known as the Lansdown Commission, it was the first comprehensive attempt to review the country's penal policies. As part of the examination of the sentences available to the courts, it inquired into the use of corporal punishment. It reported that although corporal punishment had been abolished by most Western countries, "in South Africa, it finds a large place in the penal system."[41] In the case of juvenile offenders and especially black children, this was due primarily to the lack of alternative sentences available to magistrates; there was no probation service for Africans and institutional facilities were limited. Because of these limitations the Commission regarded the continued use of corporal punishment as legitimate. However, its main reason for recommending that corporal punishment be retained was the belief that such punishment was a deterrent of "special efficacy" for Africans, who the Commission noted, had not yet emerged from an "uncivilized state."[42]

On the other hand, the Commission was concerned about the frequent imposition of sentences of corporal punishment by the courts and about the psychological damage a whipping could cause children who came from an unhappy home. The Commission believed that these children were likely to become even more maladjusted after a whipping, and felt that corporal punishment would serve a more constructive purpose if it were imposed only where the home circumstances of juvenile offenders were stable. The Commission was persuaded by psychiatric evidence that corporal punishment should not be imposed on those who might suffer mental ill-health as a consequence of being whipped and it accepted that whipping would have no effect on those who suffered from psychopathy.[43]

Although the Commission's recommendations on corporal punishment and its retention were disappointing, the Commission did attempt to subject the imposition of such punishment to more rigorous conditions. The Commission specifically recommended that juvenile offenders should not be whipped where a more constructive method of dealing

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[40] Kahn, *supra* note 28, at 209.

[41] SOUTH AFRICA, REPORT OF THE PENAL AND REFORM COMMISSION (UG 47/1947 (1947)). The Commission noted the major exceptions were some member states of the British Commonwealth and parts of the United States of America. *Id.* at 69.

[42] *Id.* at 69.

[43] *Id.*

with the child could be found. Also, it proposed that the maximum number of strokes permitted be reduced to five for juveniles and eight for adults, and that no person should be whipped on more than two occasions. No whipping was to be administered unless a psychiatrist or medical officer had certified that the offender was fit for the punishment and that it would not cause serious physical or psychological harm. If there was evidence that the offender had committed a crime because of a psychoneurotic or psychopathic disorder, corporal punishment was not to be imposed.[44]

At the 1948 general election, the Smuts government fell and the new Nationalist government inherited the Commission's report, most of which it ignored. In 1952, the new government enacted legislation that was directly contrary to the Commission's recommendations on corporal punishment; the Criminal Sentences Amendment Act of 1952 directed the courts to impose, without discretion, a sentence of corporal punishment on those convicted of rape (where the death penalty had not been imposed), robbery, housebreaking and culpable homicide involving assault with intent to rape or rob.[45] The courts were compelled to embark on an orgy of whipping and between 1952 and 1954 the number of adult offenders sentenced to corporal punishment increased dramatically from 8,724 to 13,873.[46]

In 1955, additional crimes, including motor car theft and the theft of goods from a motor car, were added to the list.[47] In the same year, the country's criminal code was revised extensively; the new legislation confirmed the mandatory use of corporal punishment and consolidated the offenses for which it had to be imposed. The maximum number of lashes that the courts could impose remained unchanged as did the conditions regulating the use of corporal punishment except that the courts were no longer permitted to sentence an offender to be whipped if there was evidence to show that psychopathy or a psychoneurotic condition was related to the commission of the crime.[48] With this exception, the Lansdown Commission's proposals for the reform of corporal punishment have not been implemented.

Although the government's commitment to mandatory whippings

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[44] *Id.* In support of its recommendation that the maximum number of strokes should be limited to five for juveniles and eight for adults, the Commission pointed out that evidence showed that "continued whipping falls on numbed flesh and is ineffective." *Id.* at 69.

[45] S.A. Criminal Sentences Amendment Act, 33 of 1952. The Act provided for mandatory whippings to be imposed in addition to sentences of imprisonment. Women, men over the age of 50 years, those in ill-health and habitual offenders were exempted. *See also* S.A. Criminal Sentences Amendment Act, 20 of 1953.

[46] Kahn, *supra* note 28, at 211.

[47] S.A. Criminal Procedure and Evidence Amendment Act, 29 of 1955.

[48] S.A. Criminal Procedure Act, 56 of 1955.

was based on the belief that corporal punishment would reduce the incidence of serious crime, there was no evidence to support this view; during the 1950s, the crime rate as well as the number of offenders who were sentenced to be whipped increased steadily.[49] By 1958, when the number who were whipped had increased to 18,542, considerable antipathy to the compulsory use of corporal punishment had been aroused. Magistrates were particularly dissatisfied about their inability to apply discretion, especially where the circumstances of the offender indicated that a sentence of corporal punishment was unsuitable and in 1959, in deference to these criticisms, legislation was enacted that somewhat tempered the use of corporal punishment.[50] Limits were placed on its imposition for a first offense; adults could not be whipped on more than one occasion within a three year period; and those sentenced to a statutory minimum period of imprisonment were exempted. These changes reduced the annual number of whippings imposed by the courts to some extent; in 1963-64, the number who were whipped fell to 16,889.[51]

These changes, however, did not satisfy the judiciary and other informed critics. Eventually, in 1965, the legislature was compelled to bow to the continued criticism of its policy of mandatory corporal punishment and repealed the legislation.[52] The statistics for 1965-66 give some indication of the judiciary's dislike of the limitations placed on their discretion; during that year, the number of offenders sentenced to corporal punishment fell dramatically to 8,888.[53] Shortly afterwards, in a postscript to the preceding thirteen years, a Supreme Court justice remarked: "Within comparatively recent times corporal punishments of quite horrifying severity were inflicted . . . and I for one do not believe that the deterrent effect of such punishments justified the suffering and indignity which were inflicted on those so punished."[54]

B. DEVELOPMENTS SINCE 1965

Since the repeal of the mandatory corporal punishment legislation, the number of adult offenders who have been sentenced to be whipped has declined steadily. In 1968-69, the number had fallen to 5,237 and by 1971-72, it was 4,536. By 1975-76 it had been reduced further to 2,251. It is worth noting, however, that in 1940 the number who were sentenced to corporal punishment was 1,864.

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49 Kahn, *supra* note 28, at 211-12. Kahn notes that the prosecution rate for serious offenses increased by 37% between 1950 and 1958, and a similar increase in the conviction rate.

50 S.A. Criminal Law Amendment Act, 16 of 1959.

51 Steyn, *supra* note 28, at 550.

52 S.A. Criminal Procedure Amendment Act, 96 of 1965.

53 Steyn, *supra* note 28, at 550.

54 S v. Kumalo, 1965 (4) S.A. 566, 574 (Fannin, J., dissenting).

These statistics, taken from the annual reports of the Commissioner of Prisons, refer only to offenders aged eighteen years and older; no detailed information about the number of juveniles who are whipped is available. The statistics for 1974-75[55] and 1975-76[56], which are summarized in Table 1, are the most recent; inexplicably the reports of the Commissioner for 1976-77 and 1977-78 provide no detailed statistics about corporal punishment.[57] The Commissioner's reports reveal that

TABLE 1

DATA RELATING TO CORPORAL PUNISHMENT IMPOSED ON ADULTS IN SOUTH AFRICA: 1974-75 AND 1975-76

	1974-75		1975-76	
	NUMBER	%	NUMBER	%
Age of Offender:				
18 to 20	822	28.2	609	27.1
21 and over	2,088	71.8	1,642	72.9
Total	2,910	100.0	2,251	100.0
Average number of strokes imposed on offenders aged:				
18 to 20	5.0	—	4.9	—
21 and over	5.2	—	5.4	—
Sentence imposed by:				
Supreme Court	176	6.0	137	6.1
Lower Court	2,510	86.3	1,783	79.2
Prison Authorities	224	7.7	331	14.7
Total	2,910	100.0	2,251	100.0
Race of offender:				
White	54	1.8	34	1.5
African	2,403	82.6	1,911	84.9
Coloured	451	15.5	301	13.4
Asian	2	.1	5	.2
Total	2,910	100.0	2,251	100.0

Source: SOUTH AFRICA, ANNUAL REPORT OF THE COMMISSIONER OF PRISONS 1974-75 (RP 47/1976 (1976)); SOUTH AFRICA, ANNUAL REPORT OF THE COMMISSIONER OF PRISONS 1975-76 (RP 46/1977 (1977)).

[55] SOUTH AFRICA, ANNUAL REPORT OF THE COMMISSIONER OF PRISONS 1974-75, at 9 (RP 47/1976 (1976)).

[56] SOUTH AFRICA, ANNUAL REPORT OF THE COMMISSIONER OF PRISONS 1975-76, at 25 (RP 46/1977 (1977)).

[57] The Commissioner's reports for 1976-77 and 1977-78 provide no separate statistical tables on corporal punishment and refer only to a small number of offenders who were sentenced to corporal punishment without a concurrent prison sentence. *See* SOUTH AFRICA,

corporal punishment is most frequently imposed by the lower courts and that it is usually accompanied by a sentence of imprisonment; very few offenders are sentenced only to corporal punishment. As shown in Table 1, the majority of adult offenders sentenced to corporal punishment are over twenty-one years of age and an average of five lashes is imposed. In the African context, issues of race cannot be ignored and it is not surprising that the majority of those who are whipped are black.[58]

After 1965, the decline in the use of corporal punishment was accompanied by an increase in the number of Supreme Court rulings on the subject. One of the most frequently cited rulings is the dissenting judgment delivered by Mr. Justice Fannin of the Natal Provincial Division, who held that corporal punishment is "brutal in its nature and constitutes a severe assault upon [the offender's] dignity as a human being."[59] Consequently, it should be used with great circumspection and only in the case of a persistent offender who has shown "vicious tendencies" and who has committed an offense in circumstances of brutality and cruelty. A Supreme Court judgment in 1968 reiterated that corporal punishment should be used judiciously and limited to violent offenders.[60] Other judgments ruled that corporal punishment was inappropriate for an offender over the age of thirty and that a whipping of more than six lashes should be imposed only in rare circumstances.[61] In 1971, the Supreme Court held that corporal punishment should be imposed only in exceptional circumstances; the use of violence or threatening behavior with a knife did not constitute an exceptional circumstance.[62]

These judgments have contributed to the decline in the imposition of corporal punishment on adult offenders but they were not accompanied by a significant decrease in its use in the juvenile court where, as Steyn noted, "it is still very frequently imposed."[63] Although official statistics were not available, Steyn estimated that during 1970 some

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ANNUAL REPORT OF THE COMMISSIONER OF PRISONS 1976-77 (RP 44/1978 (1978); SOUTH AFRICA, ANNUAL REPORT OF THE COMMISSIONER OF PRISONS 1977-78 (RP 29/1979 (1979)).

58 South African criminologists are inhibited by threat of prosecution from commenting on the issue of racial discrimination in sentencing. *See* A. SACHS, JUSTICE IN SOUTH AFRICA 230-63 (1973); Midgley, *Two Studies of the Politics of Penal Change in South Africa*, 16 HOW. J. PENOLOGY & CRIME PREVENTION 32, 38 (1977).

59 S v. Kumalo, 1965 (4) S.A. at 574.

60 S v. Maisa, 1968 (1) S.A. 271.

61 Steyn, *supra* note 28, at 551.

62 S v. Zimo, 1971 (3) S.A. 371.

63 Steyn, *supra* note 28, at 552.

34,000 young offenders had been whipped.[64] In a study of sentencing in the juvenile court in Cape Town, Midgley found that fifty-seven percent of all convicted young offenders were sentenced to corporal punishment.[65] The study revealed that young children were not exempted; the youngest child who was whipped was only nine years old. However, corporal punishment usually was imposed on children over the age of twelve and most frequently on sixteen and seventeen year old youths. First offenders were whipped as frequently as second offenders and corporal punishment was used indiscriminately for a great variety of misdemeanors including petty offenses. The great majority of children who were sentenced to corporal punishment were Coloured; while sixty percent of all Coloured offenders were whipped, corporal punishment was imposed only on twelve percent of the white offenders. The proportions for the small numbers of African and Asian children who appeared before the Cape Town Juvenile Court were thirty-six percent and fifty percent, respectively.

The legislation which governed the imposition of corporal punishment on young offenders at the time the study was undertaken prescribed that juveniles should receive "a moderate correction of whipping not exceeding ten cuts. . . ."[66] However, the way whippings were administered suggested that the phrase, "moderate correction," was ambiguous. Midgley noted that the term "cuts" mentioned in the statute was "brutally appropriate" for "a whipping will often cause bleeding or scarring being administered on the naked buttocks of the child."[67] Earlier in 1971, a one man Commission of Enquiry appointed to examine criminal procedure and evidence legislation in South Africa expressed surprise that children were whipped in this way. This, the Commissioner, Mr. Justice Botha, observed, "could never have been the intention of the law giver . . . in any event I do not think that it should be allowed."[68] He pointed out that the legislation provided only for a moderate correction and he recommended that the maximum number of strokes permitted be reduced to seven.

In recent years, numerous Supreme Court judgments have condemned the excessive use of corporal punishment in the juvenile court. A judgment of the Cape Provincial Division in 1973 ruled that a sentence of corporal punishment imposed on a youth convicted of driving a

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64 *Id.* at 550. This estimate was based on information provided by the Minister of Justice in reply to a written question in the House of Assembly on Sept. 25, 1970. *Id.*

65 Midgley, *supra* note 28, at 459.

66 S.A. Criminal Procedure Act, 56 of 1955, § 345 (1).

67 J. MIDGLEY, CHILDREN ON TRIAL: A STUDY OF JUVENILE JUSTICE 108 (1975).

68 SOUTH AFRICA, REPORT OF THE COMMISSION OF ENQUIRY INTO CRIMINAL PROCEDURE AND EVIDENCE 19 (RP 78/1971 (1971)).

motor vehicle without a license while under the influence of alcohol was "startlingly inappropriate."[69] In a 1975 judgment, a Supreme Court justice noted that certain juvenile court magistrates were continuing to impose corporal punishment routinely even though the Supreme Court had ruled on several occasions that this was undesirable. He indicated that while the Court could only express its dissatisfaction with the injudicious manner in which whippings were being imposed, he intended to send a copy of his judgment to the Secretary for Justice to draw attention to the way these magistrates were acting.[70] In the same year, several other Supreme Court judgments dealt with the use of corporal punishment in the juvenile court and it appeared that the issue had become, as one writer put it, "a subject for judicial concern."[71]

In 1974, twenty-six years after the publication of the Lansdown Commission's report, the government responded to repeated requests for a thorough review of criminal justice and penal policy in South Africa by appointing a new commission, under the chairmanship of Justice Viljoen, to inquire into "the penal system of the Republic of South Africa and make recommendations for its improvement. . . ."[72] Like its predecessor, the Viljoen Commission came to the conclusion that corporal punishment should be retained. It reported that evidence given by African witnesses was almost unanimous in calling for its retention; these witnesses argued that corporal punishment was respected by Africans and was believed to be an effective deterrent. Some had expressed the view that it should not only be retained but used even more frequently by the courts. However, the Commission recommended that the use of corporal punishment should be curtailed; the maximum number of strokes permissible should be limited to five; no offenders should be whipped on more than two occasions; corporal punishment should be imposed only for offenses involving violence or defiance of lawful authority; adults over the age of thirty years should be exempted; and juveniles should be whipped over their clothing.[73]

Shortly after the Commission's report was tabled in Parliament in January 1977, a new criminal code was enacted. Although this legislation repealed the 1955 Criminal Procedure Act and incorporated some of the Commission's proposals, not all of its recommendations concerning corporal punishment were accepted.[74] The maximum number of

69 S v. C. 1974 (2) S.A. 680.

70 S v. Ruiters, 1975 (3) S.A. 526.

71 Milton, *The Administration of Justice, Law Reform and Jurisprudence*, in ANNUAL SURVEY OF SOUTH AFRICAN LAW 542 (P. Boberg, *et al.* eds. 1976).

72 S.A., Government Notice, 1854 of 18 November 1974.

73 SOUTH AFRICA, REPORT OF THE COMMISSION OF ENQUIRY INTO THE PENAL SYSTEM OF THE REPUBLIC OF SOUTH AFRICA 130 (RP 78/1976 (1976)).

74 S.A. Criminal Procedure Act 51 of 1977.

lashes permitted was reduced to seven instead of five. While the statute stipulates that adult offenders cannot be whipped on more than two occasions, this provision does not apply to juveniles, which is contrary to the Commission's recommendation; the legislation provides, however, that juveniles be whipped over their clothing and that offenders over the age of thirty years be exempted. Also, the Commission urged that the use of corporal punishment should be restricted to serious offenses, but this was not accepted. Defending the government's decision to reject many of the Commission's recommendations, the Minister of Justice said that the Commission's views on corporal punishment were too restrictive especially since black South Africans have great faith in it.[75] It is not known whether this statement was intended to imply that the government believed that corporal punishment should be imposed primarily on black offenders. However, in 1976 and 1977, after widespread civil unrest in the urban African townships of several large South African cities, publicity was given to the fact that many black school children were whipped for participating in politically motivated activities.[76] In September 1977, the South African Bar Council expressed concern about sentences of corporal punishment imposed on a number of African school children under the age of fourteen who had attended an illegal meeting in Port Elizabeth; a special court, which convened at a local police station, sentenced the children to eight lashes each. Yet, political unrest involving young blacks continued in spite of reports of the continued imposition of corporal punishment for activities of this kind.[77]

III. THE NEED FOR CRIMINOLOGICAL INQUIRY

As was argued previously,[78] many criminologists appear to be ignorant of the continued use of corporal punishment, believing that it is of little more than historical interest. Others who are aware that corporal punishment is still being used often regard it as a vestigial practice which survives among primitive societies not yet exposed to modern penal ideas. This article questions both assumptions, attempting to draw attention to the fact that corporal punishment has not been abolished throughout the world; rather, it is institutionalized in some societies and there are strong pressures for its reintroduction in others.

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75 South Africa, 2 DEBATES OF THE HOUSE OF ASSEMBLY 1977 col. 438 (1977).

76 SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, A SURVEY OF RACE RELATIONS IN SOUTH AFRICA 1976 145 (1977).

77 SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, A SURVEY OF RACE RELATIONS IN SOUTH AFRICA 1977 98 (1978). The Guardian reported that the Transkei authorities were proposing to enact legislation that would permit female juveniles who had been involved in political activities to be whipped. The Guardian, June 3, 1978, at 5.

78 *See* text accompanying note 3 *supra*.

Included here are societies of very different cultural, economic, political and social characteristics. Corporal punishment is routinely imposed in several Middle Eastern countries that have strong indigenous cultures and many of the social and economic characteristics of traditional societies. It is also imposed regularly in Westernized, urban, industrial South Africa where it appears to have the support of many well educated Europeans as well as many poorly educated Africans. While there seems to be no demand for corporal punishment in many other countries of similarly disparate characteristics, religious fundamentalists in Malaysia and Egypt and conservative law and order campaigners in Britain appear to be equally convinced of its potential utility. In liberal, cultivated England the recent urban riots were followed by clamors for reintroduction of corporal punishment and, in the Isle of Man, public feeling against the decision of the European Court of Human Rights is reported to be intense. Several members of the Manx Parliament have urged that its ruling be ignored and, recently, the Island's juvenile court sentenced a youth convicted of assault to be whipped; at the time of writing this sentence is under appeal but it is doubtful that it will be carried out.[79]

Reasons for the institutionalization of corporal punishment are complex and, like the death penalty, can be understood only by examining the socio-historical context in which these punishments evolved. But at present, criminologists do not have adequate information to investigate, let alone explain, these phenomena. Although it may be tempting to make generalizations that draw on sociological theories, to do so would be perilous while the comparative documentation of penal practices remains so neglected. Sociological concepts have been employed to examine issues of crime and punishment in South Africa[80] and, although they are useful in understanding the role of corporal punishment in that society, the peculiarities of the South African case make comparisons hazardous. Therefore, this article does not attempt to offer a theoretical framework for the analysis of corporal punishment but seeks, instead, to provide some basic insights into its persistent use, in the hope that more research into this primitive practice will be undertaken.

79 This development was reported in The Guardian, July 22, 1981, at 2.

80 For a review of sociological research into crime in South Africa see Midgley, *The Sociology of Crime in South Africa: Studies in the Cross Cultural Replication of Criminological Models* 5 INT'L J. CRIMINOLOGY & PENOLOGY 245-61 (1977).