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SPARE THE ROD, EMBRACE OUR HUMANITY: TOWARD A NEW LEGAL REGIME PROHIBITING CORPORAL PUNISHMENT OF CHILDREN

Susan H. Bitensky*

This article proceeds from the simple premise that hitting children hurts them—even when the hitting does not rise to the level of child abuse as traditionally conceived. There is convincing evidence that corporal punishment is a hidden cruelty in child rearing that has serious adverse consequences for its victims and society at large. Yet forty-nine states permit parental corporal punishment of children and approximately half of the states permit such punishment in elementary and secondary schools. The main purpose of this Article is to question the advisability of continuing the legalized status of corporal punishment of children in the United States, especially when the punishment is administered by parents or guardians. The Article presents a new framework for analysis by surveying the laws of those countries and the one state that have prohibited all corporal punishment of children and by examining international human rights instruments that may be interpreted to support such laws. The Article also explores the psychological, sociological, and ethical considerations warranting prohibition and presents a new proposal for law reform on the subject.

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INTRODUCTION

"Childhood"—the word readily conjures up sunlit pictures of little souls boisterously bounding in play or quietly absorbed in whimsical imaginings. But childhood also moves in dark shadows that loom large with fear and pain. These are the shadows cast by an adult world that wields the power and legal prerogative to subject its young to "reasonable" corporal punishment in the name of discipline and guidance. Blows, no matter what their purpose, bring pain and dread of pain even if they are administered with moderation; and these are blows against which there is no recourse, regardless of how often they are repeated. This is the somber side of childhood, overhanging days of play and whimsy with a helpless distress that operates at the level of normalcy.

It may be that the more charming images of childhood come to mind first or exclusively not only because childhood is indeed a time of bustling activity and idle reverie but also because it is too uncomfortable to summon up sensations of pain and attendant feelings of fear, sorrow, and anger. Such summoning can make unbearable demands on us both as present parents and as former children. For, if the reader has spanked his or her own child, the summoning is apt to produce unease at having administered a spanking that may have caused these sensations and feelings in another; and, if the reader was spanked as a child, unpleasant memories of it may require an acknowledgment that a beloved parent had shortcomings and caused one's own suffering.

This reflexive resistance to a critical contemplation of corporal punishment of children is compounded by the fact that spanking is common in the United States. Most American


children have been hit by an adult in one venue or another.\footnote{See STRAUS, supra note 2, at 3 ("[M]ore than 90 percent of American parents hit toddlers and most continue to hit their children for years. In short, almost all American children have been hit by their parents—usually for many years.")}. A 1989 Harris poll showed that 86% of the respondents representing "a random, representative sample of 1,250 Americans" supported parental spanking. See IRWIN A. HYMAN, READING, WRITING, AND THE HICKORY STICK: THE APPALLING STORY OF PHYSICAL AND PSYCHOLOGICAL ABUSE IN AMERICAN SCHOOLS 56 (1990) [hereinafter HYMAN, READING, WRITING, AND THE HICKORY STICK]. An even more recent assessment is that four out of five Americans who were spanked as children approve of spanking. See Interview by Katie Couric with Heidi Murkoff, author of child care books, on Today (NBC television broadcast, Nov. 19, 1996). Indeed, "[e]ven in their late teens (ages 15 to 17), about a quarter of American children still experience some sort of corporal punishment." STRAUS, supra note 2, at 32. But see Larry Reibstein & Susan Miller, The Debate over Discipline, NEWSWEEK Special Edition, Spring/Summer 1997, at 64 (reporting that "[f]or this generation of educated middle-class parents, spanking is as politically incorrect as smoking," and that a Newsweek poll shows that only 31 percent of parents spank their children sometimes or often).

With respect to corporal punishment of children in public elementary and secondary schools, see infra note 13 and accompanying text. "[S]tudies of corporal punishment in schools indicate that it is not used as a 'last resort.' It is too often the first punishment for nonviolent and minor misbehaviors." Irwin A. Hyman, Corporal Punishment, Psychological Maltreatment, Violence, and Punitiveness in America: Research, Advocacy, and Public Policy, 4 APPLIED & PREVENTIVE PSYCHOL. 113, 117 (1995) (citations omitted) [hereinafter Hyman, Corporal Punishment] (summarizing the findings of studies of corporal punishment in schools). In addition, "[m]ost of the corporal punishment in America occurs in states in the South and Southwest—Florida, Texas, Arkansas, and Alabama have consistently been among the leaders in the frequency of hitting school children." Id. at 17 (citations omitted).

4. Some statutes, either expressly or by inference, prohibit the use of corporal punishment on students in elementary and secondary schools. Some of these statutes also contain language stating that force may be used for other specified purposes besides punishment. See, e.g., ALASKA ADMIN. CODE tit. 4, § 07.010(c) (1996) (stating an express prohibition); CAL. EDUC. CODE § 49001 (West 1993) (stating an express prohibition with the caveat that force may be used for the specified purpose other than punishment); CONN. GEN. STAT. ANN. § 53a-18(6) (West 1994) (implying a prohibition by permitting the use of force for specified purposes other than punitive ones); HAW. REV. STAT. § 298-16 (1993) and HAW. REV. STAT. ANN. § 703-309(2) (Michie 1994) (expressly prohibiting the use of force for punishment, but allowing its use for other specified purposes such as the maintenance of school discipline); 105 ILL. COMP. STAT. 5/24-24 (West 1996) (stating an express prohibition with the caveat that force may be used for specified purposes other than punishment); IOWA CODE ANN. § 280.21 (West 1996) (stating an express prohibition with the caveat that force may be used for specified purposes other than punishment); MD. CODE ANN., EDUC. § 7-306 (1996) (stating an express prohibition); MASS. ANN. LAWS ch. 71, § 37G (Law. Co-op. 1991) (stating an express prohibition with the caveat that force may be used for specified purposes other than punishment); MICH. COMP. LAWS ANN. § 380.1312 (West 1997) (stating an express prohibition with the caveat that force may be used for specified purposes other than punishment); MINN. STAT. ANN. § 127.45 (West 1996) (stating an express prohibition); MONT. CODE ANN. § 20-4-302 (1997) (stating an express prohibition with the caveat that force may be used for specified purposes such as "maintain[ing] the orderly conduct of a pupil"); NEB. REV. STAT. § 79-295 (1996)
corporal punishment of children by their parents or guardians is legal in every state except Minnesota;\(^5\) even so, recently

(stating an express prohibition); NEV. REV. STAT. § 392.465 (1995) (stating an express prohibition with the caveat that force may be used for specified purposes other than punishment); N.J. STAT. ANN. § 18A:6-1 (West 1989) (stating an express prohibition with the caveat that force may be used for specified purposes other than punishment); N.Y. COMP. CODES R. & REGS. tit. 8, § 19.5 (1995) (stating an express prohibition with the caveat that force may be used for specified purposes other than punishment); N.D. CENT. CODE § 15-47-47 (1993) (stating an express prohibition with the caveat that force may be used for specified purposes such as "quell[ing] a verbal disturbance" or "preserv[ing] order"); OR. REV. STAT. § 339.250(2),(11) (1995) (stating an express prohibition with the caveat that force may be used for the specified purpose of maintaining order); UTAH CODE ANN. § 53A-11-802 (1997) (stating an express prohibition unless the child's parent or guardian has given written permission for corporal punishment to be administered and otherwise allowing use of force for specified purposes besides punishment); VT. STAT. ANN. tit. 16, § 1161a (1989) (stating an express prohibition with the caveat that force may be used for specified purposes other than punishment); VA. CODE ANN. § 22.1-279.1 (Michie 1997) (stating an express prohibition with the caveat that force may be used for specified purposes such as "maintaining[ ] order and control"); WASH. REV. CODE ANN. § 28.150.300 (West 1997) (stating an express prohibition); W. VA. CODE § 18A-5-1 (Supp. 1997) (stating an express prohibition); WIS. STAT. ANN. § 118.31 (West 1991 & Supp. 1997) (stating an express prohibition with the caveat that force may be used for specified purposes such as maintaining order and control). Rhode Island does not expressly forbid corporal punishment in its schools, but all school districts are directed to devise a discipline policy and no districts have permitted the use of corporal punishment on students. See Jerry R. Parkinson, Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence that is Literally Shocking to the Conscience, 39 S.D. L. REV. 276, 279 n.30 (1994) (citing Telephone Interview with Mr. Vila, Legal Office, Rhode Island Department of Education (Mar. 23, 1994)). According to the Legal Counsel for the Commissioner of Rhode Island's Department of Education,

There's no policy manual provision in the State of Rhode Island which authorizes the use of corporal punishment in the schools. School districts can only do what is authorized in the state policy manual. Corporal punishment is looked down upon and a law authorizing its use would never pass the state legislature.

Telephone Interview by Christine Greig with Thomas Vila, Legal Counsel for the Commissioner of Rhode Island's Department of Education (Jan. 6, 1997).


5. For commentators referring to the fact that all states permit parents or guardians to administer "reasonable" corporal punishment upon children, see Leonard P. Edwards, Corporal Punishment and the Legal System, 36 SANTA CLARA L. REV. 983, 984–85 (1996); Mary Kate Kearney, Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child, 32 SAN DIEGO L. REV. 1, 22 & n.125, 29 (1996). Cf. Franklin E. Zimring, Legal Perspectives on Family Violence, 75 CAL. L. REV. 521, 526 (1987) (stating that "the physical discipline of children is typically insulated from legal review if it does not represent a gross threat to the child").

Some states have enacted statutory language specifically authorizing corporal punishment of children by their parents or guardians. See, e.g., ALA. CODE § 13A-3-24(1) (1993); ALASKA STAT. § 11.81.430(a)(1) (Michie 1996); ARIZ. REV. STAT. ANN. § 13-403(1) (West 1989); ARK. CODE ANN. § 5-2-605(1) (Michie 1993); COLO. REV. STAT. § 18-1-703(1)(a) (1996); CONN. GEN. STAT. ANN. § 53a-18 (West 1994); DEL. CODE ANN. tit.
there was an unsuccessful attempt in Congress to enact legislation that would have given parents an express federal right to mete out such punishment. 6


Some states have also indicated acceptance of "reasonable" parental corporal punishment by judicial decision. See, e.g., State v. Arnold, 543 N.W.2d 600, 602-03 (Iowa 1996) ("[P]arents have a right to inflict corporal punishment on their child, but that right is restricted by moderation and reasonableness."); Carpenter v. Commonwealth, 44 S.E.2d 419, 423 (Va. 1947) ("Courts are agreed that a parent has the right to administer such reasonable and timely punishment as may be necessary to correct faults in his growing children.").

Minnesota also appears to have a statute allowing parental corporal punishment of children. See MINN. STAT. ANN. § 609.06, subd. 1(6) (West Supp. 1998) (allowing reasonable force "when used by a parent, guardian, teacher or other lawful custodian of a child or pupil, in the exercise of lawful authority, to restrain or correct such child or pupil"); see also MINN. STAT. ANN. § 609.379 (West 1987) (same). For this reason, commentators often incorrectly include Minnesota among the states authorizing such punishment. See Letter from Victor I. Vieth, Senior Attorney, National Center for Prosecution of Child Abuse, to Nadine Block, Director, Center for Effective Discipline (Oct. 29, 1997) (on file with the University of Michigan Journal of Law Reform). However, Minnesota precludes the use of reasonable force, including corporal punishment, as a defense to assault charges. See MINN. STAT. ANN. § 609.379 (West 1987 & Supp. 1998) (allowing for the use of reasonable force as a defense for certain criminal offenses, not including assault); see also Victor I. Vieth, Corporal Punishment in the United States: A Call for a New Approach to the Prosecution of Disciplinarians, 15 J. JUV. L. 22, 41-45 (1994) (hereinafter Vieth, Corporal Punishment) (detailing Minnesota's statutory scheme vis-à-vis corporal punishment of children); infra Part I.H. The result is that "it is a crime to employ physical discipline in Minnesota." Vieth, Corporal Punishment, supra, at 42 n.160.

It is interesting to note that in 1991, a bill was introduced in the Wisconsin legislature which, had it been enacted, would have prohibited any person responsible for a child's welfare from subjecting the child to corporal punishment. See H.R. 799, 1991–92 Leg. (Wis. 1991).

6. See Parental Rights and Responsibilities Act of 1995, S. 984, 104th Cong. § 3 (1995) (providing for parents' right to direct the upbringing of their children and subsuming therein a parental right of "disciplining the child, including reasonable corporal discipline"). The bill died in the Senate Judiciary Committee. See Telephone Interview with Bryce Sandler, Finance Director for Congressman Joseph Knollenberg (Sept. 18, 1997).

Over the past two and one-half years, a movement has also been under way to persuade 28 state legislatures to adopt a parental rights amendment that would give
Because parentally administered corporal punishment is a long-standing and pervasive practice, it, in particular, is assumed to be sacrosanct. Until recently, it did not even occur to many Americans that a practice so ingrained and commonplace could be misguided.\(^7\) Indeed, while most psychologists, pediatricians, social workers, and other experts in child development have questioned the wisdom of corporal punishment of children,\(^8\) the legal community has tended to string with the lay mainstream and has remained virtually impervious to the debate insofar as it involves punishment in the family. Legal scholarship in particular has been, with a few exceptions, remarkably silent.\(^9\) This Article is intended to throw down the intellectual gauntlet, not just to recruit converts to this author’s point of view, but also, more humbly, to nudge the academy into giving the subject fuller and more objective scrutiny.

Reassessment of corporal punishment of children is politically sensitive and evocative of related controversial issues, circumstances which make it easy to ascribe an unintended breadth to the topic undertaken here. Before proceeding further, parents a seemingly absolute right to raise and educate their children without state governmental interference. See Mark Frankel & Larry Reibstein, Family: Who’s Hands-On, Who’s Hands-Off? The Parental Rights Amendment, NEWSWEEK, July 8, 1996, at 58. Adding such a right to state constitutions would, no doubt, further strengthen parents’ prerogative to physically punish their offspring. However, as of July, 1996, the parental rights amendments had not yet been adopted in any state and had been defeated in Kansas, North Dakota, and Virginia. See id. It was also more recently defeated in Colorado. See Robert Kowalski, Voters Reject Parental-Rights Measure, DENV. POST, Nov. 6, 1996, at A1.

7. See STRAUS, supra note 2, at 11 (“Corporal punishment is so commonly accepted that it is taken for granted, an unremarkable and almost imperceptible part of the lives of parents and children.”); see also Herman, supra note 2, at 2 (describing Americans as desensitized to the use of corporal punishment on children). But see STRAUS, supra note 2, at 33 (discussing surveys showing some decline in the frequency and severity of such punishment from 1975 to 1985).

8. See infra notes 347–48 and accompanying text.

9. Credit is due to Dean M. Herman who wrote a ground breaking law review article in 1985 critiquing the legality of parental corporal punishment of children. Herman, supra note 2. The Herman piece was ahead of its time and represents a major contribution. There are very few other American law review articles dealing primarily with the legal status of parental corporal punishment of children from the perspective of law professionals. See Edwards, supra note 5; Kearney, supra note 5; Vieth, Corporal Punishment, supra note 5; Scott A. Davidson, Note, When Is Parental Discipline Child Abuse?—The Vagueness of Child Abuse Laws, 34 U. LOUISVILLE J. FAM. L. 403, 405–19 (1996); Dennis Alan Olson, Comment, The Swedish Ban of Corporal Punishment, 1984 BYU L. REV. 447 passim (1984); cf Murray A. Straus & Carrie L. Yodanis, Corporal Punishment by Parents: Implications for Primary Prevention of Assaults on Spouses and Children, 2 U. CHI. L. SCH. ROUNDTABLE 35 (1995) (discussing parental corporal punishment from the sociologist’s point of view).
therefore, it is essential to avoid any misunderstanding by distinguishing what this Article does and does not profess to do. First, this Article does not presume to attribute all of the ills of childhood or of society at large to corporal punishment of children. The world is too complex to assign any one cause as the sole source of adversity. Instead, the approach here is to treat such punishment as a highly significant and frequently unacknowledged factor contributing to humanity's more destructive characteristics and tendencies.10

Second, this is not an article advocating permissiveness in raising or educating children. Like many experts on child psychology, this author accepts the notion that adults must set limits for children and that children should be taught to adhere to those limits.11 The intent here is to examine policy and law reform with respect to only one form of discipline—physical chastisement.

Third, this is not an article about child abuse as that term is traditionally conceived. My concern instead is with subabuse corporal punishment. "Subabuse," as used here, is not meant to imply that there is nothing abusive about "reasonable" spanks or smacks; Part III of this Article, in fact, demonstrates the contrary. Rather, "subabuse corporal punishment" is used to signify attacks on the body of the child, in the name of discipline or guidance, that are not extreme enough to be prosecutable under child abuse or child cruelty statutes. The term "subabuse corporal punishment," which will be employed interchangeably with "corporal punishment," may thus be defined for purposes of this Article as follows: the currently nonprosecutable (in the United States) use of physical force with the intention of causing a child to experience bodily pain so as to correct, control, or punish the child's behavior.12

Fourth, the primary focus of this Article will be on corporal punishment administered by parents or other custodians of the child in the family context. One reason for this emphasis is that the legality of corporal punishment in the schools has
already received substantial attention from American legal scholars. The other reason for this delimitation is that banning corporal punishment of children by parents or guardians raises constitutional concerns that are unique to the family and that still await analytical study. However, this emphasis should not be taken to signal the acceptability, from a policy standpoint, of subabuse corporal punishment of children in the schools or in any other milieu. Most of the policy reasons elaborated in Part III of this Article for prohibiting corporal punishment of children in the family apply equally well to corporal punishment of children elsewhere. Indeed, this author advocates the abolition of all corporal punishment of children and proposes a model statute to that end.

The main purpose of this Article, then, is to question the advisability of continuing the legalized status of subabuse corporal punishment of children in the United States, especially when that punishment is administered by parents or guardians. It is an undertaking that necessarily entails discussion of the relevant psychological, sociological, and ethical considerations as well as a proposal for legal reform, matters that have been covered in less depth in other law reviews. Perhaps more significantly, this Article also presents a new framework for analysis by providing a survey of how the

international community has addressed the issue and an examination of whether criminalizing corporal punishment of children would pass muster under the U.S. Constitution.

The Article is divided into four parts that elaborate and develop these themes. Part I surveys statutes enacted in Sweden, Denmark, Norway, Finland, Austria, and Cyprus, as well as a judicial decision by Italy's highest court, expressly prohibiting subabuse corporal punishment of children by their parents or other caretakers. Part I also provides a discussion of Minnesota statutes precluding corporal punishment as a defense to assault charges. Part II reviews various international human rights instruments that may be interpreted to support the prohibition of corporal punishment of children as a matter of international law. Part III describes the psychological, sociological, and ethical reasons that make prohibition an advisable policy change. Part III includes a proposed statute criminalizing all use of corporal punishment on children and a discussion as to why criminal law measures, in tandem with prosecutorial restraint, posttrial or postplea diversion, and a society-wide education campaign, are likely to be the most efficacious means of diminishing the use of such punishment. Finally, Part IV identifies and responds to objections that are likely to be raised under the U.S. Constitution against the proposed statutory criminalization of corporal punishment of children in the family setting.

I. LAWS IN OTHER COUNTRIES AND IN MINNESOTA PROHIBITING CORPORAL PUNISHMENT OF CHILDREN

Of the six countries that have enacted statutes prohibiting all corporal punishment of children, four countries have lived with these laws for ten years or more. Sweden's statute has been on the books for over seventeen years. The circumstances surrounding this longevity are cause for reassurance

14. Judge Leonard Edwards has included Poland as among the countries that have legislatively prohibited all corporal punishment of children. See Edwards, supra note 5, at 1018. As of this writing, however, Poland has not yet taken such a step. See Letter from Professor Adam Lopatka, The Institute of Law Studies of the Polish Academy of Sciences, Warsaw, Poland (Mar. 8, 1996) (on file with the University of Michigan Journal of Law Reform).
15. See infra notes 155-70 and accompanying text.
16. See infra notes 19, 51, 63-64, & 77 and accompanying text.
17. See infra note 19 and accompanying text.
that such legal reform need not be viewed with trepidation. During these years, none of the enacting countries has repealed its statute or experienced a backlash, even though the prohibition has governed tens of millions of parents and children. Indeed, family life, parental authority, and the rule of law have continued to undergird the social and political structures of these countries much as they do elsewhere in the absence of war or natural catastrophe.

A. Sweden

Sweden became the first country in the world to ban all corporal punishment of children by enacting a statutory prohibition in 1979 that extended to parents and guardians, among others. The statute, as amended in 1983, provides as follows: “Children are entitled to care, security and a good upbringing. They shall be treated with respect for their person and their distinctive character and may not be subject to corporal punishment or any other humiliating treatment.” School personnel also are forbidden by Swedish law from using corporal punishment on students. Prior to the 1979 legislation, Sweden had a long tradition of corporal punishment in the family context. Although the Swedish Parliament had made steady progress toward restricting this tradition by legal reform during the 1950s and


19. 6 kap. 1§ para. 2 föräldrabalken (Swed.) [Swedish Children and Parents Code ch. 6, § 1, ¶ 2] (Swedish Ministry of Justice trans.) (stating that “the parent or guardian shall exercise necessary supervision in accordance with the child's age and other circumstances” and that “the child may not be subjected to physical punishment or other injurious or humiliating treatment”), quoted in Newell, supra note 18, at 73.

20. 6 kap. 1§ föräldrabalken [Swedish Children and Parents Code ch. 6, § 1] (Swedish Ministry of Justice trans.).


22. See Newell, supra note 18, at 70–73; Olson, supra note 9, at 447–52; Adrienne Ahlgren Haeuser, Swedish Parents Don't Spank, 63 MOTHERING 42, 42, 44 (1992).
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1960s, including repeal of a statutory provision allowing reprimands, the perception continued among a substantial number of Swedes that their laws condoned such punishment. In 1977, the Swedish Parliament established the Commission on Children's Rights comprised of lawyers, psychologists, psychiatrists, politicians, and others, that undertook to study the feasibility of adopting an express prohibition of all corporal punishment of children so as to clarify the law. The Commission found subabuse corporal punishment to be deleterious to children's well-being and recommended an explicit ban. When the bill which ultimately became the 1979 law was submitted to the Parliament, it was supported by all political parties and passed by a vote of 259 to six.

The ban on corporal punishment of children by parents and others acting on the parents' behalf does not, on its face, provide for any legal sanctions in case of violation. It appears that the Swedish Parliament enacted the law without express reference to sanctions because the lawmakers conceived of the prohibition as having its primary effect by influencing societal attitudes rather than by more immediately deterring individuals with the threat of penalties or liability. Literature distributed to the public by the Swedish government emphasizes that "while the purpose of the new legislation is indeed to make it quite clear that spanking and beating are no longer allowed, it does not aim at having more parents punished than hitherto."


24. See Newell, supra note 18, at 71; Olson, supra note 9, at 451; Ziegert, supra note 23, at 919.

25. See Newell, supra note 18, at 71-73; Olson, supra note 9, at 451; Ziegert, supra note 23, at 919.

26. See Newell, supra note 18, at 73.

27. See id. at 74-75, 80; Swedish Ministry of Justice, Can You Bring Up Children Successfully Without Smacking and Spanking? (1979) (example of an attempt to influence social attitudes towards corporal punishment); Haeuser, supra note 22, at 44; Olson, supra note 9, at 453-54; Ziegert, supra note 23, at 920.

28. Swedish Ministry of Justice, supra note 27.
Nevertheless, the possibility exists that violators of the ban on corporal punishment may be prosecuted under the provision of Sweden's penal code criminalizing assaults. This is true even if the corporal punishment is not severe—even if it is a solitary smack—provided that the punishment results in some bodily injury, illness, or bodily pain for the child. Moreover, if a parent is prosecuted for assaulting the child, it is conceivable that the child could state a viable claim for damages under the penal code if injury accompanies breach of the child's bodily integrity. It should be emphasized, however, that although prosecuting parents or other caretakers for corporally punishing children under the assault statute is a real option in Sweden, prosecutors almost invariably exercise restraint by electing not to prosecute.

29. The assault provision of Sweden's criminal code provides:

A person who inflicts bodily injury, illness or pain upon another or renders him unconscious or otherwise similarly [sic] helplessness, shall be sentenced for assault to imprisonment for at most two years or, if the crime was petty, to pay a fine or to imprisonment for at most six months.

3 kap. 5 § brottsbalken (Swed.) [Chapter 3 Sec. 5 of the Swedish Penal Code] (Nat'l Swedish Council for Crime Prevention & Katja Levdn trans.) (quoted in Levdn Letter, supra note 21); see also Herman, supra note 2, at 16–17 (stating that if a parent inflicts pain of more than a “very minor and temporary nature” on a child through corporal punishment, “the parent is subject to prosecution under Sweden's criminal assault statute”).

30. See Telephone Interview with Göran Häkansson, Permanent Undersecretary, Swedish Ministry of Health and Social Affairs (July 19, 1996); Herman, supra note 2, at 16–17; cf. NEWELL, supra note 18, at 81 (describing Swedish authorities' assault prosecution of a father for spanking his son); Ziegert, supra note 23, at 920 (noting that the threat of prosecution hangs over parents who would spank in Sweden). Some writers have had the evident misconception that parents in Sweden may not be prosecuted for inflicting subabuse corporal punishment on their children because the ban on corporal punishment mentions no possibility of criminal penalties. See Haeuser, supra note 23, at 18; Olson, supra note 9, at 453–55; Straus & Yodanis, supra note 9, at 65.

31. See Interview with Göran Häkansson, Permanent Undersecretary, Swedish Ministry of Health and Social Affairs, in Dublin, Ireland (Aug. 21, 1996). The relevant section of the Swedish Penal Code states: “Aside from sanction, and in accordance with appropriate statutory provisions, a crime may incur forfeiture of property, a company fine or some other special consequence defined by law and may also incur liability for the payment of damages.” 1 kap. 8§ brottsbalken [Swedish Penal Code ch. 1, § 8] (Nat'l Swedish Council of Crime Prevention trans.). Indeed, Mr. Häkansson raised the possibility that in the future Swedish law may be construed to allow the child monetary recovery under Swedish Penal Code ch. 1, § 8 for breach of bodily integrity where there has been no injury. See Interview with Göran Häkansson, supra.

32. See Elizabeth Ann Gibbons, Note, Surveying Massachusetts' Child Abuse Laws: The Best Protection for Children?, 26 SUFFOLK U. L. REV. 107, 144 (1992) (mentioning that prosecution of parents for corporally punishing their children is rare in Sweden); Interview with Göran Häkansson, supra note 31; Levdn Letter,
The legal repercussions for a parent who violates the ban on corporal punishment are not necessarily limited to prosecution for assault. An offending parent also could run the risk of losing custody of the child in a divorce case if the parent’s use of corporal punishment entails a lasting danger to the child’s health or development. A parent would not be denied custody solely on the basis that the parent corporally punished his or her child, but the fact that a parent used such punishment would be a serious consideration in awarding custody.

supra note 21 (reporting that her research turned up only one prosecution of a parent for mild corporal punishment of a child).

33. The pertinent language of the Swedish Child and Parent Code provides in relation to the custody of the child:

If, when exercising custody of a child, a parent is guilty of abuse or neglect or is otherwise wanting in his or her care of the child in a manner which entails an enduring risk to the child’s health or development, the court shall make a decision changing the custody position.

....

Questions concerning a change of custody position as provided in this section shall be considered on the application of the social welfare committee or, of the court’s own motion, in a divorce case between the parents or some other case referred to in Section 5 or 6.

6 kap. 7§ föräldrabalen [Swedish Children and Parents Code ch. 6, § 7] (Swedish Ministry of Justice trans.).

The Swedish Social Welfare Committee, referred to in the above quoted statutory provision, is obliged to act so as to ensure that children are brought up in a safe and good environment, as follows:

The social welfare committee shall endeavor to ensure that children and young persons grow up in good and secure conditions, act in close co-operation with families to promote the comprehensive personal development and the favourable physical and social development of the children and young persons, and ensure that children and young persons in danger of developing in an undesirable direction receive the protection and support they need and, if their best interests so demand, are cared for and brought up away from their own homes.


Accordingly, the Committee is empowered to initiate judicial proceedings to arrange for the care of a child whose health or development is jeopardized by physical punishment. Swedish statutory law states that, “A care order is to be made if, due to physical abuse, exploitation, deficiencies of care or some other circumstance in the home, there is a palpable risk of the young person’s health or development being impaired.” 2§ lagen med särskilda bestämmelser om vård av unga [Swedish Care of the Young Persons Act (Special Provisions) § 2] (Int’l Secretariat of the Swedish Ministry of Health and Social Affairs trans.).

34. See Telephone Interview with Göran Håkansson (July 19, 1996), supra note 30.
The Swedish experience with the legal prohibition of corporal punishment of children is more interesting and perhaps more significant than that of any other country because the prohibition has been law for so long—for over seventeen years. Contrary to some expectations, Swedish prosecutors have not hauled hordes of parents into court at the behest of children alleging illegal corporal punishment. As mentioned above, the Swedish policy in relation to such parental conduct is one of prosecutorial restraint. It appears that during the entire period since 1979 less than a handful of prosecutions have involved situations where the corporal punishment was not severe, i.e., not what would normally be considered child abuse in the United States. In keeping with the apparent legislative intent, the Swedish government has primarily relied upon the pedagogic effect of the legal prohibition of corporal punishment, enhancing the law’s effectiveness with a massive education campaign and with extensive support services designed to minimize family stress and conflict.

Data is available tracking the effect of the prohibition and education campaign on the incidence of corporal punishment of children. Statistics Sweden, on contract with the Swedish Department of Social Welfare, conducted one survey in the spring of 1994, and another during the spring of 1995, on adults’ and middle school-age children’s opinions, knowledge, and experience of corporal punishment in the familial context. Taken together, the surveys show that 70% of middle school-age children and 56% of adults oppose all forms of physical punishment of children. Another 22% of adults oppose all forms of physical punishment in principle but admit to using such punishment if they are overwrought. Thus, 78%

35. See NEWELL, supra note 18, at 81; Haeuser, supra note 22, at 44. For example, among the few isolated prosecutions one 1986 case involved a father charged with punishing his son by whipping him with a bundle of twigs. The whipping caused some redness on the boy's hips and buttocks. The father was found guilty of assault, but, because the court considered the crime to be petty, the father was fined rather than imprisoned. See RH 1986:163 (Swedish Court of Appeal), cited in Levin letter, supra note 21, at 3.

36. See EK, supra note 23, at 1; NEWELL, supra note 18, at 73–77; Haeuser, supra note 23, at 18–19; Ziegert, supra note 23, at 922–23.


39. See id. at 7, 8.

40. See id. at 8.
of all Swedish adults have become convinced that corporal punishment of children is unacceptable. The policy against corporal punishment appears to have been most persuasive with those proportionally longest under its sway, since the surveys show that more young adults (between the ages of 18 and 34) are against spanking than older adults (between the ages of 55 and 74). In keeping with this attitudinal shift, the surveys found overall "a strong decrease in the use of physical punishment" in Sweden. Specifically, the surveys found that roughly 30% of middle school-age students reported having been exposed to parental corporal punishment before they became teenagers. In contrast, a 1979 survey shows that about half of all Swedish parents surveyed spanked their children.

What makes these findings particularly intriguing is that the decreasing use of corporal punishment has occurred even as Swedes have rejected the permissive child rearing with which they apparently experimented from the late 1940s to the early 1980s. It appears that at least since 1988, Swedish parents have shown a greater predilection for disciplining their children, but mainly by methods other than corporal punishment. For example, Swedish parents are encouraged to control their children by talking and reasoning. Other favored techniques include sending a child to his or her room or depriving the child of privileges. The 1994/1995 surveys found that most people think that deprivation of privileges, such as a weekly allowance, is the preferable form of punishment. For preverbal infants and toddlers, Swedes do not generally believe in punishment and avoid the need for restraints by "childproofing" the home into a safe environment.

41. See id. at 7.
42. See id. at 15.
43. See id.
44. See id.
46. See id. at 24; STATISTICS SWEDEN, supra note 38, at 12.
47. See Haeuser, supra note 23, at 31–33.
48. See id. at 32.
49. See STATISTICS SWEDEN, supra note 38, at 13.
50. See Haeuser, supra note 23, at 33.
B. Finland

The prohibition of corporal punishment of children in the family was enacted in 1983 as part of a general overhaul of Finnish law governing children. The prohibition states: "A child shall be brought up with understanding, security and gentleness. He shall not be subdued, corporally punished or otherwise humiliated. The growth of a child towards independence, responsibility and adulthood shall be supported and encouraged." The ban was adopted unanimously and almost without debate, and went into effect on January 1, 1984. It should be noted that corporal punishment of children in the schools had long been outlawed when the 1983 law was passed and continues to be impermissible under modern Finnish laws governing education.

Matti Savolainen, a member of the Finnish Ministry of Justice who was responsible for drafting the 1983 prohibition, has made clear that three strategies for stopping corporal punishment are contemplated by virtue of the prohibition, including criminal penalties:

Firstly the Act attempts to establish certain "positive" guidelines for the upbringing of the child. Secondly the Act makes it absolutely clear that all violations against the child's integrity (whether "physical" or "spiritual") which would constitute a criminal offence if committed by a third person (e.g. assault, unlawful imprisonment, libel, etc.)

51. See NEWELL, supra note 18, at 87.
52. Laki lapsen huollosta ja tapaanisoikeudesta, 1 luku, 1§, 3 mom. [Finnish Child Custody and Right of Access Act, ch. 1, § 1, subsec. 3] (Finnish Dept' of Legislation, Ministry of Justice trans.).
53. See NEWELL, supra note 18, at 86–87 (stating that the lack of controversy may have been due to the fact that the new prohibition was part of a comprehensive overhaul of children's law and that public attention was diverted by other controversial measures in the proposed reform legislation).
54. The legal prohibition of corporal punishment in Finnish schools dates back to the nineteenth century. See id. at 87. In the twentieth century, the prohibition was again made law in 1914. See Nådig Förordning hvarigenom användandet af kroppslig bestraffning vid läröverken förbjudes, 6 juni 1914/24. [Finnish Gracious Ordinance, whereby the use of corporal punishment in the schools is banned, June 6, 1914/24] (replaced by Kansakoululaki, 1.7.1957/247 [Finnish Act on Primary Schools, July 1, 1957/247] (Isabella Riska trans.), which continued the ban). In the 1980s, Finland reenacted the school ban, stating that "[c]orporal punishment in comprehensive schools is forbidden." See Peruskoululaki, 5 luku, 42§. [Finnish Act on Comprehensive Schools ch. 5, § 42] (Isabella Riska trans.).
slander, etc.) are equally punishable even when committed by a parent with the intent to discipline the child. And under the Criminal Code even a petty assault committed against a child under 15 is subject to public prosecution when committed by a parent at home. Thirdly the Act explicitly forbids also any degrading treatment . . . even where such an act would not constitute a criminal offence and even if there are no other direct legal remedies available.\textsuperscript{55}

In accordance with this intent, it is understood that if parents violate the ban they may be prosecuted for assault under Finland's penal code.\textsuperscript{56} For example, in one case, Finland's Supreme Court found a guardian to be guilty of petty assault because the guardian corporally punished a child by pulling his hair and slapping his fingers.\textsuperscript{57} The Court stated that

\begin{quote}
[T]he purpose of the provision [the prohibition of corporal punishment of children] was to confirm that the guardian has no longer a right to corporally punish his child and that the provision on petty assault in the Penal Code, Chapter 21, Section 7, shall be applied when parents or
\end{quote}

\textsuperscript{55} NEWELL, supra note 18, at 87 (quoting Matti Savolainen of the Ministry of Justice in Helsinki, Finland).

\textsuperscript{56} See id. at 89. Parents or guardians who corporally punish their children also violate the following provisions of Finland's penal code:

\begin{quote}
A person who employs physical violence on another or, without such violence, damages the health of another, causes pain to another or renders another unconscious or to a comparable condition, shall be sentenced for assault to a fine or to imprisonment for at most two years.
\end{quote}

An attempt shall be punished.

\begin{quote}
Rikoslaki, 21 luku, 5§ [Finnish Penal Code ch. 21, § 5] (Finnish Ministry of Justice trans.).
\end{quote}

Even petty assaults by parents upon the child in the name of childrearing will contravene the Penal Code, which states: "If the assault, when assessed as a whole and with due consideration to the minor character of the violence, the violation of physical integrity, the damage to health or other relevant circumstances, is of minor character, the offender shall be sentenced for petty assault to a fine." See Finnish Penal Code ch. 21, § 7 (Finnish Ministry of Justice trans.). In this regard, the Penal Code also provides that "[t]he Public Prosecutor shall not bring charges for petty assault, if the victim has attained the age of fifteen years, nor for negligent injury, unless the complainant reports the offence for the bringing of charges." See id. ch. 21, § 16.

guardians employ physical violence on their child, even if they consider it a means of upbringing.\textsuperscript{58}

Parents who violate the prohibition of corporal punishment may also be sued for damages either in conjunction with an assault prosecution or in an independent action when the parent is not the subject of criminal charges.\textsuperscript{59} In addition, it is possible under Finnish law that parental use of corporal punishment on children may be a factor that influences judicial awards of custody.\textsuperscript{60}

The Finnish government has not been content to rely only upon the law to effectuate reform. The government has also conducted a nationwide campaign to educate adults about better ways to correct children than by using corporal punishment.\textsuperscript{61} For example, Finnish authorities have utilized television spots to urge parents to use reasoned discussion as a substitute for physical chastisement.\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{58} See id.
\item \textsuperscript{59} A child who has suffered corporal punishment at a parent's hands may, in conjunction with pressing criminal charges, bring a civil suit for damages against the parent under the following statutory provisions. First, "[a] civil law claim based on an offence may be presented in the same connection where punishment or a confiscatory sanction is demanded on the basis of the offence. If such a civil law claim is presented in a separate action, the provisions on proceedings in civil law shall apply." Oikeudenkäyntikäärä 1734/4, 14 luku, 8§ [Finnish Code of Judicial Procedure ch. 14 § 8] (Finnish Ministry of Justice trans.). Second,

If it becomes evident in the investigation of a criminal case that the act referred to in the charges is not an offence, or if for another reason no punishment is imposed for the act, a civil law claim presented in the case may nonetheless be considered or the consideration of the claim be continued in the manner stipulated for the consideration of civil cases.

Id. § 11.

Conceivably a child subjected to corporal punishment by a parent could also have monetary redress alone under a statutory provision that states: "Any person who, either wittingly or through negligence, causes prejudice to any other person shall pay compensation for the prejudice so caused, save as otherwise provided in this Act." See Vahingtonkorvauslaki, 2 luku, 1§, 1 mom. [Finnish Compensation for Damages Act ch. 2, § 1, subsec. 1] (English translation obtained from Legislative Series 1974 of the Finnish Int'l Labour Office).

\item \textsuperscript{60} See Letter from Isabella Riska, Attorney, Roschier-Holmberg & Waselius, Helsinki, Finland, to the author 3 (July 26, 1996) (on file with the University of Michigan Journal of Law Reform).
\item \textsuperscript{61} See NEWELL, supra note 18, at 87–89.
\item \textsuperscript{62} See id. at 88–89.
\end{itemize}
In 1985, Denmark became the third Scandinavian country to enact a law directed against corporal punishment of children in the family context. The law, which became effective on January 1, 1986, provided that “Parental custody implies the obligation to protect the child against physical and psychological violence and against other harmful treatment.” On May 28, 1997, the law was amended to delete that language and substitute the following: “The child has the right to care and security. It shall be treated with respect for its personality and may not be subjected to corporal punishment or any other offensive treatment.” Denmark has also banned corporal punishment in the schools.

Unlike its Swedish and Finnish counterparts, the earlier Danish statute dealing with parental corporal punishment was generally understood to be precatory. It did not totally abolish parents’ right to inflict corporal punishment as a child

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63. The measure against corporal punishment of children in the family was originally contained in an amendment to the Danish Majority Act. See Myndighedsloven nr. 443 af. 3 Sept. 1985, jf. § 7, stk. 2 [Danish Majority Act no. 443, § 7, subsec. 2 (Sept. 3, 1985)] (Kromann & Münther trans.); NEWELL, supra note 18, at 91.

64. See NEWELL, supra note 18, at 91.


66. Lov nr. 416 om aendring af lov om foraeldremyndighed og samvaer § 1 [Danish Act to Amend the Act on Parental Custody and Conviviality no. 416 § 1] (Kromann & Münther trans.).

67. See Bekendtgørelse nr. 276 af 14. juni 1967, om fremme af god orden i skolerne, jf. § 8 [Danish Order No. 276 Concerning the Promotion of Order in the Schools § 8 (June 14, 1967)]. The current ban provides:

Subsection 1. Corporal punishment may not be used. Subsection 2. To avoid that students lay violent hands on others or destroy[] or damage gods [sic], it is permitted to use force to such an extent as the circumstances may require.

Bekendtgørelse nr. 27 om foranstaltninger til fremme af god orden i folkeskolerne, jf. § 8, stk 1 og 2 [Danish Order No. 27 Concerning Measures for the Promotion of Order in the Public Schools § 8] (Kromann & Münther trans.).

68. “In principle, the meaning of the statute is ‘only’ to signalize [sic] to the public, that parents ought rather to refrain from corporally punishing their kids.” Letter from Jørn Vestergaard, Assoc. Professor, Inst. of Criminology and Criminal Law, University of Copenhagen to author 2 (July 1996) (on file with the University of Michigan Journal of Law Reform).
rearing technique. Indeed, the defense of "lovig revselse"—legally inflicted punishment—was still available in Danish courts to parents and other custodians of the child for adult conduct which might otherwise have come within penal code provisions on assault. Nor was this simply a matter of judicial interpretation since the explanatory remarks to the 1985 bill manifest a legislative intent to refrain from intruding on the parental right to inflict "minor" or "light" corporal punishment.

This equivocality engendered a continuing debate among Danish politicians and academics as to whether their country should strengthen the 1986 law. The result is the 1997 amendment, which is regarded by its authors and other experts as completely prohibiting all corporal punishment of children. Similar to the situations in Sweden and Finland, violators of the law may be prosecuted under the Danish Criminal Code for assault and battery or other related crimes. Nevertheless, "[t]here will be no intensified or

69. *See id. passim.*
70. *See id. at 1.*
71. *See id.* Professor Vestergaard notes that a minority in the Danish Parliament sought abolition of the parental right to use corporal punishment on children; he characterizes the parliamentary debate as "rather confused." *See id. at 2.*
72. *See id.; see also* Telephone Interview with Göran Håkansson, *supra* note 30.
73. The legislators who introduced the bill which became the 1997 amendment indicate, in the accompanying explanatory remarks submitted to the Danish Parliament, that the amendment is intended to have a prohibitory effect. *See* Margrethe Auken, Anne Baastrop, Steen Gade & Villy Søvndal, *Explanatory Notes to Bill No. 213 passim* (Apr. 2, 1997) (Kromann & Münter trans.); *see also* Letter from Jørn Vestergaard, Assoc. Professor, Inst. of Criminology and Criminal Law, University of Copenhagen, to author 1 (July 3, 1997) (on file with the *University of Michigan Journal of Law Reform*), [hereinafter Vestergaard Letter 7/3/97] (interpreting the new provision as forbidding parents from "smacking" their children).

74. Parents may be prosecuted under the following provisions:

Sec. 213. Any person who, by neglect or degrading treatment, insults his spouse, his child or any of his dependants under the age of 18 or any person to whom he is related by blood or marriage in lineal descent, or who by deliberately evading his duties to maintain or contribute to the maintenance of any such persons, exposes them to distress shall be liable to imprisonment for any term not exceeding 2 years or, in mitigating circumstances, to simple detention.

Sec. 244. Any person who commits violence against, or otherwise attack[s] the person of others shall be liable to a fine, simple detention or imprisonment not exceeding 1 year and 6 month[s].

Sec. 245. Subsec. 1. Any person who commits assault or battery which is exceptionally brutal, cruel or dangerous or are [sic] guilty of maltreatment is liable to
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excessive action taken by law enforcement or social welfare authorities to monitor ordinary families' private lives.76

Apparently, the Danes expect that the 1997 revision will be used primarily for its educational impact in gradually persuading parents to relinquish corporal punishment as a disciplinary technique.76

D. Norway

Joining the other Scandinavian countries in the effort to end corporal punishment of children, in 1987 Norway passed a statute providing that "[the child shall not be exposed to physical violence or to treatment which can threaten his physical or mental health."77 This more general measure is complemented by a statute forbidding corporal punishment of students in Norwegian schools.78

The 1987 law is prohibitory rather than precatory,79 although it also appears to be subject to certain limited

imprisonment not exceeding 4 years. Subsec. 2. The same applies for any person who outside subsection 1 injures the body or health of others.

Sec. 246. Where the act of violence covered by Section 245 has been of such serious character or has entailed [such] serious consequences that there are particularly aggravating circumstances the penalty may be increased to imprisonment for 8 years.

Straffelov nr. 886, §§ 213, 244, 245, 246 [Danish Criminal Code no. 886, §§ 213, 244, 245, 246] (Kromann & Munter trans.); see also Letter from Jørn Vestergaard, Associate Professor, Institute of Criminology and Criminal Law, University of Copenhagen, to author 1 (July 22, 1997) (on file with the University of Michigan Journal of Law Reform) (agreeing that "corporal punishment is now criminalized as an assault and battery, according to exactly the same criteria as if the victim were somebody else than the child").

75. Vestergaard Letter 7/3/97, supra note 73, at 1.
76. See id.
77. Endring i 1987 av barnelovens § 30, 3. ledd (Lov av 6. februar 1987 nr 11 om endring i barneloven § 30) [Norwegian Parent and Child Act art. 30, § 3, as amended by the Amending Act no. 11, Feb. 6, 1987] (Finn Erik Engzelius trans.).
78. Lov om grunnskolen nr. 24, § 16, 4. ledd [Norwegian School Act no. 24, art. 16, § 4].
79. See NEWELL, supra note 18, at 95; Telephone Interview with Målfrid Grude Flekkøy, Interim Director, Division of Families and Global Change, Institute for Families in Society, University of South Carolina (July 9, 1996). But cf. Letter from Johan Felix Lous, Executive Officer, Norwegian Royal Ministry of Children and Family Affairs, to author 4 (Oct. 30, 1995) (on file with the University of Michigan Journal of Law Reform) ("The provision does not authorise sanctions. Beyond defining a minimum norm for parental responsibility, the rule can therefore hardly be said to have any direct judicial significance."). It should be noted that Målfrid Grude Flekkøy was
exceptions. The prohibition is conceived primarily as pedagogical in operation—as achieving its objective by shaping Norwegian norms on the subject. That conception is reflected in the language of the act which does not prescribe any penalties or liability for those who might violate its terms.

It is understood, though, that until parental attitudes and behavior conform to the ban, children may have recourse to legal remedies under certain of Norway's other laws. For example, parents who corporally punish their children may be prosecuted for assault and related crimes under Norway's Criminal Act if the punishment results in bodily manifestations such as bruises. The Norwegian government may additionally prosecute such parents under a statutory prohibition against neglect or maltreatment (mental or physical) of persons belonging to the parents' household, including children. A basis also exists in Norwegian law for a tort action to be brought on behalf of a child against his or her parent for serious bodily injuries, if any, or for pain and suffering in connection with an injury caused by parentally administered

the Norwegian Ombudsperson for Children from 1981 to 1989, the period during which Norway's statute prohibiting parental corporal punishment of children was debated among Norway's legislators and ultimately enacted. See Telephone Interview with Målfrid Grude Flekkøy, supra. She was a key figure in lobbying the Norwegian Parliament to adopt the statute. See NEWELL, supra note 18, at 94–95.

80. The various sources which I consulted were at some variance concerning whether there are any exceptions to Norway's ban on corporal punishment of children. Compare NEWELL, supra note 18, at 95 (intimating that the ban is absolute) and Telephone Interview with Målfrid Grude Flekkøy, supra note 79 (advising that the only exception is that parents are allowed to physically restrain children from harming themselves or others) with Letter from Finn Erik Engzelius, of the law firm of Thommessen Krefting Greve Lund, Oslo, Norway, to Nicholas Stasevich 4 (May 21, 1996) [hereinafter Engzelius Letter 5/21/96] (on file with the University of Michigan Journal of Law Reform) (suggesting that the ban does not preclude a parent from giving “light slaps” or from physically restraining children to prevent harm to themselves or others).

81. See Telephone Interview with Målfrid Grude Flekkøy, supra note 79; Letter from Johan Felix Lous, supra note 79, at 4.

82. The provision on assault states that “[a]ny person who commits violence against the person of another or otherwise assaults him bodily, or is [an] accessory thereto, is guilty of assault and shall be liable [for] fines or imprisonment for a term not exceeding six months.” See Straffeloven av 22.mai 1902 nr. 10, § 228 [Norwegian Criminal Act art. 228, § 1] (Finn Erik Engzelius trans.). A related provision states: “Any person who injures another in body or health or reduces any person to helplessness, unconsciousness or any similar state, or who is [an] accessory thereto, is guilty of occasioning bodily harm and shall be liable to imprisonment for a term not exceeding three years . . . .” Straffeloven av 22.mai 1909 nr. 10, § 229 [Norwegian Criminal Act art. 229] (Finn Erik Engzelius trans.); see also Interview with Målfrid Grude Flekkøy, Chief Psychologist, Nic Waals Institute for Child and Adolescent Psychiatry, Oslo, Norway, in New Orleans, La. (Feb. 15, 1997).

83. See Letter from Johan Felix Lous to author, supra note 79, at 2–3.
corporal punishment. As of spring, 1996, this possibility has been of only academic interest; no tort cases have actually been brought in Norwegian courts on behalf of children against their parents to recover damages for parental corporal punishment. Finally, parental use of corporal punishment, even if it is mild, may be a factor influencing the outcome of custody disputes.

E. Austria

In 1989, the Austrian Parliament, by unanimous vote, enacted a law which provides that "[t]he minor child must follow the parents' orders. In their orders and in the implementation thereof, parents must consider the age, development and personality of the child; the use of force and infliction of physical or psychological harm are not permitted." Although the law itself provides no legal remedies for the physically punished child, the intent behind the enactment is to bar all corporal

84. The language of Norway's tort laws makes it possible that children could sue their parents to recover damages for corporal punishment under certain circumstances. See Engzelius Letter 5/21/96, supra note 80, at 3; Letter from Finn Erik Engzelius, of the law firm of Thommessen Krefting Greve Lund, Oslo, Norway, to author 3 (June 6, 1996) (on file with the University of Michigan Journal of Law Reform) [hereinafter Engzelius Letter 6/6/96]. A pertinent statute provides:

Whoever, acting willfully or by gross negligence has (a) caused injury to a person . . . may be sentenced to pay the offended party such a lump sum that the court will hold to represent a just compensation . . . for the pain and suffering and other aggrievances or harm of non-economic nature that was inflicted upon him . . .

Lov om skadeserstatning av 13. juni 1969 nr. 26, § 3-5 [Norwegian Tort Act no. 26, arts. 3-5] (Finn Erik Engzelius trans.). For example, if in administering physical discipline the parent willfully or by gross negligence were to cause injury to the child, it is conceivable that a tort suit would lie against the parent.

85. See Engzelius Letter 5/21/96, supra note 80, at 3; Letter from Johan Felix Lous to author, supra note 79, at 1.


87. See NEWELL, supra note 18, at 68.

88. § 146a ABGB [Austrian Civil Code § 146a] (Berlitz Translation Services trans.).

89. See Interview with Dr. Werner Schütz, Executive Public Prosecutor and Section Head of the Section on Int'l Family Law, Austrian Ministry of Justice, in Vienna, Austria (June 24, 1996); Interview with Dr. Michael Stormann, Executive Public Prosecutor and Section Head of the Section on Nat'l Family Law, Austrian Ministry of Justice, in Vienna, Austria (June 24, 1996).
punishment of children by parents or guardians.90 As in the Scandinavian countries, Austria also has legislation prohibiting corporal punishment of students in the schools.91

To a large extent, the 1989 law represents a logical progression rather than a sudden departure from statutory precedents. In 1977, Austria repealed an explicit authorization of parents to corporally punish their children. Austrian civil law experts believed that this repeal meant that all parental corporal punishment of children had been forbidden except to restrain a child in an emergency situation.92 However, other experts disagreed that the repeal had had such an effect, and the 1989 express prohibition was, in part, a response to this confusion,93 it was hoped that the 1989 reform would produce consistency in judicial decisions on this issue.94 There have, however, been no reported decisions applying the 1989 law except a decision by the Supreme Court of Austria which interpreted the prohibition to deny continuation of custody to a divorced parent who had been using corporal punishment that caused no bodily injury as a child rearing method.95 Interestingly, in that case the father who lost custody was found to have been involved with his children and otherwise to have attended to their needs.96 However, he "believes in strict discipline, expects respect and absolute obedience from his sons and demands that they not engage in self-pity, but bear pain like men. He . . . struck them on several occasions when they 'made trouble.'"97 The court found that this repeated striking of the children, combined with an authoritarian and exacting approach to child rearing,

90. See Interview with Dr. Werner Schütz, supra note 89; Interview with Dr. Michael Stormann, supra note 89.
91. See § 47/3 Schulunterrichtsgesetz [Austrian Teaching Act § 47/3] (Berlitz Translation Services, trans.) (declaring that "[c]orporal punishment . . . [is] forbidden"); see also Interview with Dr. Michael Stormann, supra note 89 (stating that the Teaching Act is good law).
92. See Interview with Dr. Michael Stormann, supra note 89.
93. See NEWELL, supra note 18, at 68; Interview with Dr. Michael Stormann, supra note 89.
94. See Interview with Dr. Michael Stormann, supra note 89.
95. OGH 6/24/1992, 1 Ob 573/92 (Berlitz Translation Services trans.); see also Erwin Bernat, Austria: Legislation for Assisted Reproduction and Interpreting the Ban on Corporal Punishment, 32 U. LOUISVILLE J. FAM. L. 247, 252–53 (1993–94) (describing this decision). Some jurists are of the opinion that the high court did not apply the 1989 law correctly in this case. See Interview with Dr. Michael Stormann, supra note 89.

The Austrian legal system does not require that other Austrian courts follow decisions by the Austrian Supreme Court. See id.
96. See OGH 6/24/1992, 1 Ob 573/92.
97. Id.
violated Austria's ban on corporal punishment and, therefore, warranted awarding custody to the mother. 98

Despite the dearth of reported cases, there is still the possibility that a parent who violates the 1989 prohibition may be subject to prosecution under a number of provisions of the Austrian penal code for the equivalent of assault and battery and related crimes. 99 This is more of a possibility than a reality for Austrian parents because, like many of the Scandinavian countries, Austria enacted the prohibition mainly for its educational effect. 100 In any event, prosecution will not be initiated unless the corporal punishment is serious and produces some evidence on the child's body of perpetration. 101 There is also a

98. See id.


100. See Interview with Dr. Michael Stormann, supra note 89.

101. DIVISION FOR CHILDREN'S RIGHTS, supra note 99, at 66; Interview with Dr. Werner Schütz, Executive Public Prosecutor and Section Head of Section on Int'l Family Law, Austrian Ministry of Justice, in New Orleans, La. (Feb. 15, 1997).
statutory basis for bringing a civil suit against offending parents for causing physical injury or mental anguish.\textsuperscript{102}

Austrian policy against corporal punishment of children relies heavily upon social services and education as well as upon the law. In order to assist parents who have difficulty refraining from corporal punishment or otherwise properly meeting their child rearing obligations, the government has instigated the establishment, among other support services, of child rearing counseling in Youth Welfare Departments, child protection centers, a "child helpline," and a children's ombudsman.\textsuperscript{103} Both children and adults may contact the ombudsman "to make suggestions and lodge complaints" about mistreatment of children, including the use of corporal punishment.\textsuperscript{104} While the emphasis is on the prevention of any violence against children,\textsuperscript{105} steps also have been taken to ensure that children who are exposed to violence receive medical and psychological care.\textsuperscript{106}

Since the enactment of the prohibition on corporal punishment of children "there has been no rush of children reporting their parents to the police for smacking them. State intervention in family life has certainly not increased as a result of the new law . . . ."\textsuperscript{107} Instead, the 1989 ban on corporal punishment and concomitant social services network appear to be undermining the social acceptability of such punishment without prosecutorial intervention. A study commissioned by the Austrian Federal Ministry of the Environment, Youth and the Family indicates that as of the early 1990s, "67.5\% of mothers and 68.8\% of fathers categorically reject serious corporal punishment (beatings) as a means of education."\textsuperscript{108}

\textsuperscript{102} The action would be brought under a statute providing that "[a]nyone injured is entitled to demand reparations from the injuring party for damage that the latter is guilty of having inflicted." § 1295 Abs 1 ABGB [Austrian Civil Code § 1295/1] (Inter-Lingua trans.); see DIVISION FOR CHILDREN'S RIGHTS, supra note 99, at 70; see also Heller Letter 5/28/96, supra note 99, at 2. The word "injured" is used in the statute to mean physical injury and/or mental anguish. See Letter from Dr. Kurt Heller, of the law firm of Heller, Löber, Bahn & Partners, Vienna, Austria, to author 1–2 (July 11, 1996) (on file with the University of Michigan Journal of Law Reform).

\textsuperscript{103} DIVISION FOR CHILDREN'S RIGHTS, supra note 99, at 67–69.

\textsuperscript{104} See id. at 68.

\textsuperscript{105} See id.

\textsuperscript{106} See id. at 70.

\textsuperscript{107} Dr. Werner Schütz, Lecture at the Conference to End Physical Punishment of Children (EPOCH) Worldwide (Mar. 30, 1992) (transcript on file with the University of Michigan Journal of Law Reform).

\textsuperscript{108} DIVISION FOR CHILDREN'S RIGHTS, supra note 99, at 67.
F. Cyprus

Cyprus is the sixth nation to have outlawed corporal punishment of children in the home. In June, 1994, the Cypriots passed a bill entitled, “Prevention of Violence in the Family and Protection of Victims Law.” The Cypriot law not only prohibits parental use of any force against children but also makes it an offense for violent behavior to take place in the presence of minor members of the family:

3.(1) For the purposes of this Law violence means any unlawful act or controlling behavior which results in direct actual physical, sexual or psychological injury to any member of the family and includes violence used for purposes of sexual intercourse without the consent of the victim as well as for [the] purpose of restricting its liberty.

. . . . .

(3) Any act or behavior constituting violence within the meaning of subsections (1) and (2) above or constituting an offense under sections 174, 175 and 177 of the Criminal Code, if it takes place in the presence of minor members of the family shall be considered as violence exercised against the said minor members of the family likely to cause them psychological injury and such act or behavior constitutes an offense punishable under subsection (4) of this section.110

The 1994 law makes clear that parents or other family members who engage in the proscribed conduct may be prosecuted and, if convicted, may be sentenced to fines and/or incarceration.111


110. Id. at § 3(1), (3).

111. See id. § 4(1) (“When violence is used by one member of the family against another, [it] shall be considered for purposes of this Law as particularly aggravated, and the Court . . . may impose increased penalties . . . .”).
G. Italy

On May 16, 1996, Italy's highest court, the Supreme Court of Cassation, issued a decision prohibiting all parental use of corporal punishment on children as a child rearing technique. In this decision the court announced as a new juridical principle that "the use of violence for educational purposes can no longer be considered lawful." The case arose when Natalino Cambria took to repeatedly subjecting his ten-year-old daughter, Danila, to heavy beatings, purportedly to correct her behavior. He would hit or kick the girl for lying, for getting bad grades, or for almost any failure to live up to her father's standards. Cambria's prosecution was heard in the first instance by the Magistrate of Como-Menaggio who found the accused guilty of the crime of abuse of the means of correction—"abuso dei mezzi di correzione"—under article 571 of the Italian Penal Code. On


113. Judge Francesco Ippolito, who wrote the opinion for the court in this case, explained that the principle that parents or other custodians of the child may not use corporal punishment is a juridical principle having the force of law; putting the point in American legal terminology, the court's statement of principle is not merely dictum. \textit{See} Interview with Judge Francesco Ippolito, Judge of the Corte Suprema di Cassazione, Republica Italiana, in Rome, Italy (June 11, 1996).

114. \textit{Cambria}, Foro It. II 1996 at 411, Translation at 4; \textit{see also} Bitensky, \textit{supra} note 112, at 25.

115. \textit{See Cambria}, Foro It. II 1996 at 409, Translation, at 2–3; \textit{see also} Interview with Judge Francesco Ippolito, \textit{supra} note 113; Bitensky, \textit{supra} note 112, at 25; \textit{Italian Court,} \textit{supra} note 112.

116. \textit{See Cambria}, Foro It. II 1996 at 409, Translation at 2; \textit{see also} Interview with Judge Francesco Ippolito, \textit{supra} note 113; Bitensky, \textit{supra} note 112, at 25.

117. \textit{See Cambria}, Foro It. II 1996 at 408, Translation, at 1, ¶ 1. Article 571 states as follows:

Whoever misuses means of correction or discipline to harm a person subject to his authority, or entrusted to him for purposes of education, instruction, treatment, supervision or custody, or by reason of his practice of a profession or craft, shall be punished, if the act results in the risk of physical or mental illness, by imprisonment for up to six months.

If the act results in personal injury, the punishments prescribed in Articles 582 and 583 shall be applied, reduced by one-third; if it results in death, imprisonment for from between three and eight years shall be imposed.
November 23, 1995, the Milan Court of Appeals convicted Cambria for ill-treatment—"maltrattamenti in famiglia o verso fanciulli"—of his daughter under article 572 of the Italian Penal Code\(^\text{118}\) rather than for abuse of the means of correction.\(^\text{119}\)

On appeal to the Supreme Court of Italy, Cambria argued, among other things, that since the beatings did not cause "the danger of a physical or mental illness" as required for a conviction under article 571, he should not have been found guilty of abuse of the means of correction at the first judicial level;\(^\text{120}\) he further argued that the appeals court should not have convicted him of ill-treatment because he lacked the requisite intent to mistreat a child, having administered the beatings only with the purpose of correcting Danila's wayward behavior.\(^\text{121}\) Indeed, Cambria accused the Milan Court of Appeals of "rampant permissiveness."\(^\text{122}\)

The Supreme Court of Italy rejected Cambria's defenses and upheld his conviction for ill-treatment towards a child under article 572 of the Italian Penal Code.\(^\text{123}\) The Court explained that article 571 of the Italian Penal Code could not apply to Cambria's case because that provision is triggered only when a legitimate means of correction is used abusively. The Court

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\(^\text{119}\) The provision making ill-treatment a crime states as follows:

\begin{quote}
Whoever, apart from the cases specified in the preceding Article, maltreats a member of his family or a person under the age of fourteen years, or a person subject to his authority, or entrusted to him for purposes of education, instruction, treatment, or supervision or custody, or by reason of his practice of a profession or trade, shall be punished by imprisonment for from one to five years.

If the act results in serious personal injury, imprisonment for from four to eight years shall be imposed; if it results in very serious injury, imprisonment for from seven to fifteen years; if it results in death, imprisonment for from twelve to twenty years.
\end{quote}

\(^\text{120}\) C.P. art. 572.

\(^\text{119}\) \textit{See Cambria, Foro It. II} 1996 at 408, Translation at 1; \textit{see also} Interview with Judge Francesco Ippolito, \textit{supra} note 113.

\(^\text{120}\) \textit{See Cambria, Foro It. II} 1996 at 409, Translation, at 2; \textit{see also} Interview with Judge Francesco Ippolito, \textit{supra} note 113.

\(^\text{121}\) \textit{See sources cited supra} note 120.

\(^\text{122}\) \textit{Cambria, Foro It. II} 1996 at 409, Translation at 2.

\(^\text{123}\) \textit{See id.} at 409, 412, Translation at 3, 6.
reasoned that corporal punishment, regardless of how it is used, cannot be a legitimate means of correction. 124

"The Cambria case involved the systematic use of serious violence against a child."125 However, the court's ruling was by no means confined to those facts. According to Judge Ippolito, who wrote the opinion on behalf of the Italian Supreme Court, the judges "considered the case as an opportunity to establish the legal principle that parents in Italy are absolutely forbidden from using any violence or corporal punishment to correct their children's conduct."126 That is why, in addition to affirming Cambria's conviction for ill-treatment, the Court laid down as a juridical principle, effective throughout Italy, that violence may never be used on children for educational purposes.127 The ruling is most significant as it relates to familial corporal punishment since even before the Cambria case Italy had outlawed corporal punishment in the schools.128

What considerations prompted the Court to take this dramatic step? Judge Ippolito explained that the Cambria case represents the culmination of ongoing legal reforms and political and cultural changes since the end of Benito Mussolini's fascist dictatorship over Italy in 1945.129 Judge Ippolito observed that in the 1930s and early 1940s, Italian courts, as a matter of course, interpreted the country's penal code based on the authoritarian and hierarchical structure of the family that

124. See id. at 411, Translation at 4 ("[T]he crime committed cannot be said to be the one described in article 571 because the means of correction used were unlawful both in terms of their nature and in terms of the potential damage they could inflict."); see also Interview with Judge Francesco Ippolito, supra note 113 (noting that the Supreme Court wanted to make the point that physical punishment absolutely cannot be used to correct or educate a child).

125. Bitensky, supra note 112; see Interview with Judge Francesco Ippolito, supra note 113.

126. See Bitensky, supra note 112 (quoting from Interview with Judge Francesco Ippolito, supra note 113); see also Italian Court, supra note 112.

127. See supra note 124 and accompanying text. Judge Ippolito explained that lower courts in Italy are theoretically free to ignore the Supreme Court's enunciation of the new juridical principle forbidding all corporal punishment of children. (The Italian judiciary does not formally observe stare decisis.) However, the judge emphasized that as a practical matter the new principle is considered the law throughout Italy because the other Italian courts adhere to the rulings of the Supreme Court unless the lower courts can give very strong reasons for distinguishing the cases before them. See Interview with Judge Francesco Ippolito, supra note 113.

128. See Interview with Judge Francesco Ippolito, supra note 113.

129. See id. Benito Mussolini's dictatorship brought fascism to Italy during the period from 1922 to 1945 and made Italy a member of the Axis in World War II. See David I. Kertzer, Italy, in 10 THE WORLD BOOK ENCYCLOPEDIA 496, 517 (1993) [hereinafter WORLD BOOK]; R. John Rath, Mussolini, Benito, in 13 WORLD BOOK, supra, 967, 967.
prevailed at that time. During this period, the father was the head of the family and almost completely dominated his wife and children. In keeping with this model of family relations, the courts interpreted article 571 of the Penal Code as allowing the father to use virtually any means of “correcting” his wife and children.

Judge Ippolito noted that as Italy moved away from fascism, it also moved away from the concept of the authoritarian father. This movement was reflected in legal innovations such as the inclusion in Italy’s 1948 Constitution of various provisions protecting the dignity of the individual as an inalienable right. Likewise, the Constitution also contains provisions assuring equal protection, including provisions specifically recognizing that marriage must be “based on the moral and legal equality of husband and wife.” Judge Ippolito stated that the Justices in the Cambria case understood these legal and historical trends also in light of the fact that the Italian Constitution repudiates war or the use of violence to settle international disputes.

In the 1950s, Italy’s Supreme Court decided that the Constitution’s provisions on equality in the marital relationship barred the use by husbands of any means of correction, physical or otherwise, against their wives. In 1975, Italy’s Parliament enacted measures to conform the nation’s family laws to the provisions of the Constitution protecting each person’s dignity, equality, and right to be free of violence. In addition, between 1975 and 1995, the Supreme Court of Italy

130. See Interview with Judge Francesco Ippolito, supra note 113.
131. See id.
132. See id.
133. See id.
135. See, e.g., COST. arts. 3, 37; Interview with Judge Francesco Ippolito, supra note 113 (discussing constitutional provisions).
136. COST. art. 29. See also Interview with Judge Francesco Ippolito, supra note 113 (discussing constitutional provisions).
137. See COST. art. 11; Interview with Judge Francesco Ippolito, supra note 113 (discussing constitutional provisions).
138. See Interview with Judge Francesco Ippolito, supra note 113.
139. See, e.g., CODICE CIVILE [C.C.] art. 147 (Italy), translated in 1 THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION 44 (Mario Beltramo et al. trans., 1991) (defining the duties of parents to their children, including the duty to “maintain, educate and instruct the children ... taking into account their ability, natural inclinations and aspirations”).
issued a series of decisions that had the effect of further limiting
the use of force against children in institutional settings.140

These domestic reforms were paralleled by developments in
the international law that governs Italy. In Italy, the constitu-
tional court has long recognized treaties as superior to the
Italian Constitution and other Italian laws.141 Thus, the judges
who decided the Cambria case were influenced not only by
the Italian Constitution and the evolution of Italian family law,
but also by human rights treaties—especially the U.N. Con-
vention on the Rights of the Child142 to which Italy is a party.143
Judge Ippolito reported that, in interpreting Italy's penal code,
he and the other judges of the Supreme Court were especially
swayed by the preamble and articles 2, 3, 18 and 19 of the
Convention.144 Specifically, the court's opinion relies upon the
preamble's recognition of children's need to develop "ful[y]
and harmonious[ly]" and to be brought up "in the spirit . . . of
peace, dignity, tolerance, freedom, equality, and solidarity";145
upon article 2's nondiscrimination principle;146 upon article 3's

140. See Interview with Judge Francesco Ippolito, supra note 113.
141. See id.
the Child].
143. See Interview with Judge Francesco Ippolito, supra note 113. Italy entered
144. See Interview with Judge Francesco Ippolito, supra note 113. Indeed, the
Court's opinion specifically names article 2, article 3(1) and article 18(1), quotes from
the preamble, and paraphrases article 2, article 3(1), article 18(1) and article 19(1) of
145. Cambria, Foro It. II 1996 at 410, Translation at 3 (omissions in original). The
full language of the relevant portions of the preamble to the Convention of the Child
are as follows:

The States Parties to the present Convention

. . . .

Recognizing that the child, for the full and harmonious development of his or
her personality, should grow up in a family environment, in an atmosphere of
happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in
society, and brought up in the spirit of the ideals proclaimed in the Charter of
the United Nations, and in particular in the spirit of peace, dignity, tolerance,
freedom, equality and solidarity. . . .

Convention of the Child, supra note 142, pmbl., at 3.
146. Cambria, Foro It. II 1996 at 410, Translation at 4. The full language of this
portion of the Convention of the Child is as follows:
and article 18's insistence on the primacy of the best interests of the child;\textsuperscript{147} and upon article 19's prohibition on the use of violence against children.\textsuperscript{148}

Judge Ippolito stated that the Court in the \textit{Cambria} case looked to all of these sources—the Italian Constitution, Italian civil law, and the U.N. Convention on the Rights of the Child—to interpret Italy's penal code in a way that would undo the basis of violence against children.\textsuperscript{149} In the judges' view, all of these sources as well as modern Italian values made it clear to the Court that in order finally to address the problem in a meaningful way it would be necessary to forbid any violence against children as a method of instruction or child rearing.\textsuperscript{150}

Judge Ippolito admitted that, in spite of the Court's ruling in the \textit{Cambria} case, enforcement could prove difficult because Italian children do not presently have the right of "denouncing" to authorities so as to initiate prosecution; rather, an adult

\begin{itemize}
\item States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
\end{itemize}

Convention of the Child, \textit{supra} note 142, art. 2(1), at 5.

\textsuperscript{147} \textit{Cambria}, Foro It. II 1996 at 410, Translation at 3–4. The full language of the article 3, paragraph 1 of the Convention of the Child is as follows: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Convention of the Child, \textit{supra} note 142, art. 3(1), at 5. The full language of article 18, paragraph 1 of the Convention of the Child is as follows:

\begin{itemize}
\item States Parties shall use their best efforts to ensure recognition of the principle that both parents within their jurisdiction have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
\end{itemize}

Convention of the Child, \textit{supra} note 142, art. 18(1), at 9.

\textsuperscript{148} \textit{Cambria}, Foro It. II 1996 at 410, Translation at 3. The full language of this portion of the Convention is as follows:

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


\textsuperscript{149} See Interview with Judge Francesco Ippolito, \textit{supra} note 113.

\textsuperscript{150} See \textit{id}. 
must denounce for the child as the child's legal representa-
tive.151 However, the judge was optimistic about the overall
effect of the Cambria decision insofar as it will influence fu-
ture judgments by lower courts in prosecutions that are
brought in connection with parental corporal punishment of
children and insofar as the Supreme Court has set an example
for Italian jurists.152 The judge predicted that the new juridical
principle would "filter into society"153 as a new norm and create
an atmosphere in which physical chastisement of children is
not socially acceptable.154

H. Minnesota

Minnesota does not have a single statute that explicitly pro-
hibits parental corporal punishment of children. Rather, the
state's ban on such punishment must be teased out of four
statutory provisions read together.

Section 609.06, subdivision 1(6) of the Minnesota statutes,
when considered by itself, actually appears to authorize paren-
tal corporal punishment of children:

Except as otherwise provided in subdivision 2, reasonable
force may be used upon or toward the person of another
without the other's consent when the following circum-
stances exist or the actor reasonably believes them to
exist:

(6) when used by a parent, guardian, teacher or other law-
ful custodian of a child or pupil, in the exercise of lawful
authority, to restrain or correct such child or pupil.155

However, this provision must be understood in conjunction
with section 609.379 of the Minnesota statutes, the statute
governing reasonable force as a defense.156 Section 609.379,
subdivision 1(a), in its essential elements, tracks the language
of section 609.06(6), thereby indicating that both statutes refer

151. See id.
152. See id.
153. Id.
154. See id.
155. MINN. STAT. ANN. § 609.06, subd. 1(6) (West Supp. 1997).
to the same "reasonable force." Section 609.379, subdivision 2 further lists the crimes to which reasonable force may be asserted as a defense. Subdivision 2 does not include assault among those crimes. Therefore, in Minnesota, reasonable force is not a defense to assault.

This analysis still leaves the question of whether "reasonable" corporal punishment of children is an assault under Minnesota law. Section 609.224, subdivision 1(1)(2) of the Minnesota statutes defines assault as an act committed "with intent to cause fear in another of immediate bodily harm or death" or the actual infliction of bodily harm. Section 609.02, subdivision 7 of the Minnesota statutes defines bodily harm as "physical pain or injury, illness, or any impairment of physical condition." As one expert on the foregoing Minnesota statutes observed, "[a]pplying these statutes to acts of corporal punishment, it is clear that such discipline constitutes an assault. This is because physical punishment, at a minimum, involves the infliction of pain or placing the child in fear of pain."  

157. The language of Section 609.06, subdivision 1(6) should be compared to that of section 609.379, subdivision 1(a). The latter section provides as follows:

Subdivision 1. Reasonable force. Reasonable force may be used upon or toward the person of a child without the child's consent when the following circumstance exists or the actor reasonably believes it to exist:

(a) when used by a parent, legal guardian, teacher, or other caretaker of a child or pupil, in the exercise of lawful authority, to restrain or correct the child or pupil ....

Id. § 609.379, subd. 1(a).


159. Indeed, section 260.315 concerns contributing to the need for protection or services or to the delinquency of a child, MINN. STAT. ANN. § 260.315 (West 1987); section 609.255 deals with false imprisonment, MINN. STAT. ANN. § 609.255 (West 1987 & Supp. 1997); section 609.376 defines the terms child, caretaker, and complainant, MINN. STAT. ANN. § 609.376 (West 1987); section 609.378 covers neglect or endangerment of a child, MINN. STAT. ANN. § 609.378 (West Supp. 1997); and section 626.556 addresses the reporting of maltreatment of minors, MINN. STAT. ANN. § 626.556 (West Supp. 1997). See also Vieth, Corporal Punishment, supra note 5, at 42 & n.160 (stating that subdivision 2 of section 609.379 does not list the crime of assault).

160. See Vieth, Corporal Punishment, supra note 5, at 42 & n.160.

161. MINN. STAT. ANN. § 609.224, subd. 1(1) (West 1987).

162. See id. § 609.224, subd. 1(2).

163. Id. § 609.02, subd. 7.

164. Vieth, Corporal Punishment, supra note 5, at 44.
Thus, the reasonable force defense provided in section 609.06, subdivision 1(6) and 609.379, subdivision 1(a) is made inoperative by subdivision 2 of section 609.379 when parents are charged with assault for corporally punishing their children. That is, if parents use "reasonable force" on a child as a disciplinary tactic, they may be prosecuted by Minnesota for assault and may not hide behind the excuse that they were just using "reasonable" corporal punishment. "[C]orporal punishment is considered a crime to the same extent as any assault" in Minnesota.\textsuperscript{165}

Although Minnesota has lived with this prohibition on corporal punishment of children for many years,\textsuperscript{166} there are no reported cases of a parent being prosecuted for administering mild corporal punishment to children.\textsuperscript{167} As in the European countries that have banned corporal punishment of children, Minnesota has exercised prosecutorial restraint in relation to "minor" instances of corporal punishment.\textsuperscript{168} Minnesota's law on corporal punishment of children is not widely known either by commentators, practitioners, or the general public.\textsuperscript{169} This is probably due to the relative complexity and obtuseness of the prohibition's provisions.\textsuperscript{170}

II. LEGAL STATUS OF CORPORAL PUNISHMENT OF CHILDREN UNDER INTERNATIONAL LAW

There is a traditional view that international human rights instruments should be interpreted according to a public/private distinction.\textsuperscript{171} Under this view, such instruments apply to human rights deprivations by governments and their agents against individuals but not to deprivations by private

\textsuperscript{165} Letter from Victor I. Vieth to Nadine Block, \textit{supra} note 5.
\textsuperscript{166} See \textit{id}.
\textsuperscript{167} See \textit{id}.
\textsuperscript{168} See \textit{id}.
\textsuperscript{169} See Telephone Interview with Victor I. Vieth, Senior Attorney, National Center for Prosecution of Child Abuse (Dec. 11, 1997).
\textsuperscript{170} See \textit{id}.
individuals against other individuals.172 For example, the traditional view would interpret language lending itself to a prohibition on corporal punishment as only reaching judicially imposed or public school corporal punishment but not paren tally administered corporal punishment.

The traditional view, however, has lost much of its credibility and influence by virtue of the inclusive language of many post-World War II international human rights instruments.173 The phenomenon is perhaps most strikingly manifested in the U.N. Convention on the Rights of the Child (Convention of the Child) which uses language throughout the document expressly indicative of an intent to impose human rights obligations protective of children on both states parties and private actors.174 The other human rights treaties and declarations discussed in Part II.B of this Article also employ language that, either explicitly or implicitly, obligates both the public and private sectors to observe human rights—an interpretation reflected in the comments of the respective official bodies monitoring treaty compliance175 and in the scholarly literature.176 The only arguable exception is the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention),177 but, as will

172. See Clapham, supra note 171, at 91 nn.10–11 (citations omitted).
174. See, e.g., Convention of the Child, supra note 142, arts. 3(1) (best interests of the child), 18(1) (best interests of the child), 19(1) at 5, 9 (protection from abuse); see also Clapham, supra note 171, at 101 (referring to articles 3(1) and 16 of the Convention of the Child as examples of human rights obligations imposed on the private sector).
175. See infra Part II.B; see also Clapham, supra note 171, at 107–11 (surveying the positions announced by the Human Rights Committee with respect to the application of the International Covenant on Civil and Political Rights to human rights duties of private actors).
be shown, even that convention is being interpreted in some circles as extending to private individuals' transgressions.\(^{178}\)

In light of the broadly inclusive language of the provisions under discussion here and of the fact that there is scholarly and other authoritative support for repudiating the public/private distinction with respect to these provisions, this Article proceeds upon the assumption that each instrument applies to corporal punishment of children by parents and other private actors as well as to state inflicted corporal punishment. Indeed, a contrary reading would do violence to the very language and essence of these instruments.

### A. U.N. Convention on the Rights of the Child

Of the numerous international human rights instruments that may be understood to prohibit corporal punishment of children, the Convention of the Child presents the strongest case for such an interpretation. The Convention of the Child was adopted by the General Assembly of the United Nations on November 20, 1989.\(^ {179}\) To date, 191 countries have become parties.\(^ {180}\) The President of the United States signed the Convention of the Child on February 16, 1995,\(^ {181}\) but, to date, Congress has not ratified it; thus, the United States is presently not a party to the Convention of the Child.\(^ {182}\)

It should be pointed out that lack of ratification is not necessarily dispositive as to whether the Convention of the Child should govern the United States. Even treaties to which a country is not a party or particular principles set forth in those treaties may, under certain circumstances, constitute evidence of binding customary international law.\(^ {183}\) Factors

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178. See infra notes 263–69 and accompanying text.
179. See United Nations, Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1995, at 198 (1996).
181. United Nations, supra note 179, at 199.
182. See id. at 199; see also U.S. CONST. art. II, § 2, cl. 2 (granting the U.S. President power "to make Treaties, provided two thirds of the Senators present concur").
serving to signify that a treaty manifests customary international law include "virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights..." The Convention of the Child has arguably become customary international law, applicable even to non-parties such as the United States, because it was adopted by consensus of the U.N. General Assembly and has been ratified by an overwhelming majority of nations.

However, even if the Convention of the Child does not govern the United States as either treaty law or customary international law, discussion of corporal punishment of children would be incomplete without an analysis of highly pertinent provisions of the Convention. Because the Convention of the Child is regarded as applicable international law for most countries and is an authoritative expression of world opinion, it is a resource that should serve to enrich and embolden consideration of the issue in the United States.

The Convention established the Committee on the Rights of the Child for the purpose of monitoring compliance by the

Customary international law is considered binding federal common law. See The Paquete Habana, 175 U.S. 677, 700 (1900); Richard B. Lillich, The Constitution and International Human Rights, 83 AM. J. INT'L L. 851, 856-58 (1989); Karen Parker & Lyn B. Neylon, Jus Cogens: Compelling the Law of Human Rights, 12 HASTINGS INT'L & COMP. L. REV. 411, 417 (1989). But see Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 VA. L. REV. 1071, 1072 (1985) (contending that although customary international law is, as a theoretical matter, the law of the land, domestic courts have held that Congress has authority to disregard such law).


185. See Ramsey & Braveman, supra note 183, at 1641; see also Elizabeth M. Calciano, United Nations Convention on the Rights of the Child: Will It Help Children in the United States?, 15 HASTINGS INT'L & COMP. L. REV. 515, 531 (1992) (suggesting that while many of the rights set forth in the Convention of the Child will not be considered customary international law, some of the rights contained therein could be elevated to that status when considered in combination with other evidence that those rights constitute customary international law).

186. See Ramsey & Braveman, supra note 183, at 1641.


188. See Multilateral Treaties, supra note 180; (asserting that by mid-1997, 191 countries had become parties to the Convention of the Child); see also Ramsey & Braveman, supra note 183, at 1641 (characterizing the number of nations that have ratified the Convention of the Child as "a large majority"). Only the United States and Somalia have yet to ratify the Convention of the Child. See Multilateral Treaties, supra note 180.
treaty's parties. The Committee is considered the "authoritative source" with respect to interpretation of the Convention of the Child, and the Committee's understanding of the Convention's meaning is, therefore, decisive. The Committee has expressly taken the position that the Convention as a whole is inconsistent with corporal punishment of children. In an official report issued in November, 1994, the Committee declared:

In the framework of its mandate, the Committee has paid particular attention to the child's right to physical integrity. In the same spirit, it has stressed that corporal punishment of children is incompatible with the Convention and has often proposed the revision of existing legislation, as well as the development of awareness and education campaigns, to prevent child abuse and the physical punishment of children.

The Committee has had occasion to articulate and elaborate upon this position during 1994–97 in its concluding observations following examination of progress reports submitted by various countries to the Committee. The Committee, invoking a variety of the Convention's provisions or sometimes none in particular, has stated repeatedly in these observations that banning corporal punishment of children in families is essential in order for reporting countries to achieve treaty compliance.

189. See Convention of the Child, supra note 142, arts. 43(1), 44–45, at 20–22; Marta Santos Pais, Address at the International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (Dublin, Ireland, Aug. 22, 1996) (transcript on file with University of Michigan Journal of Law Reform). Marta Santos Pais was one of the ten experts who served as a member of the Committee on the Rights of the Child and was also the Committee's rapporteur.


192. See Convention of the Child, supra note 142, art. 44, at 21–22 (requiring states parties to submit progress reports on their compliance with the treaty's terms).

With respect to the specific provisions of the Convention of the Child, article 19, paragraph 1 most readily lends itself to


interpretation as prohibiting corporal punishment of children. Article 19, paragraph 1 provides:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.\textsuperscript{194}

That article 19, paragraph 1 prohibits parental corporal punishment of children would seem evident as a semantic matter since the provision requires nations to protect children against "all forms of physical \ldots violence."\textsuperscript{195} If one adult hits another—even once and not so as to cause any significant injury—the slap would be considered a form of violence. For, a "violent" action may be defined as one "marked by extreme force or sudden intense activity."\textsuperscript{196} If the slap is administered by a parent to his or her child, pure logic would seem to require that the inherent nature of the act does not change from violent to nonviolent simply because the victim is smaller, less powerful, and the aggressor's own flesh and blood.\textsuperscript{197} Why else would article 19, paragraph 1 refer to "all forms of physical \ldots violence" in addition to "injury or abuse" unless the former phraseology was meant to include violent conduct that does not necessarily cause injury or rise to the level of conventional conceptions of abuse?

While such an interpretation seems to be the plain meaning of the provision's text, it is not necessary to rely on dictionary definitions and logic to interpret article 19, paragraph 1 as

\begin{itemize}
\item \textsuperscript{194} Convention of the Child, supra note 142, art. 19(1), at 10.
\item \textsuperscript{195} Id.; see Parkinson, supra note 4, at 278–79; Kerri A. Law, Note, Hope for the Future: Overcoming Jurisdictional Concerns to Achieve United States Ratification of the Convention on the Rights of the Child, 62 Fordham L. Rev. 1851, 1858 (1994).
\item \textsuperscript{196} Webster's Ninth New Collegiate Dictionary 1316 (9th ed. 1988). The concept of violence also is capable of other connotations. The term may also be defined as "exertion of physical force so as to injure or abuse" or "injury by or as if by distortion, infringement, or profanation." Id. As used in article 19, paragraph 1 of the Convention of the Child, however, definitions of violence that require an injury appear less appropriate because they make the article's reference to "forms of \ldots injury" a redundancy. See Convention of the Child, supra note 142, art. 19(1), at 10; see also Peter Newell, Respecting Children's Right to Physical Integrity, in The Handbook of Children's Rights: Comparative Policy and Practice 215, 222 (Bob Franklin ed., 1995) (stating that article 19(1) protects children from all forms of violence).
\item \textsuperscript{197} See Newell, supra note 196, at 222.
\end{itemize}
prohibiting all corporal punishment of children. The periodic reports which states parties are required to submit to the Committee on the Rights of the Child are supposed to conform to the Committee's General Guidelines Regarding the Form and Content of Periodic Reports. The guidelines, drawing upon the language of article 19, provide:

Reports should indicate, in particular:

whether legislation (criminal and/or family law) includes a prohibition of all forms of physical and mental violence, including corporal punishment, deliberate humiliation, injury, abuse, neglect or exploitation, *inter alia* within the family, in foster and other forms of care, and in public or private institutions, such as penal institutions and schools. . . .

In addition, some of the Committee's concluding observations single out article 19 in particular as a basis for admonishing countries to take measures against corporal punishment of children.

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199. *Id.* at ¶ 88.

It may be predicted that proponents of corporal punishment of children will argue that article 5 of the Convention of the Child justifies reasonable physical chastisement. Article 5 provides:

States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.


When the United Kingdom raised this argument with the Committee on the Rights of the Child, a Committee member stated:

It must be borne in mind, however, that article 19 of the Convention required all appropriate measures, including legislative measures, to be taken to protect the child against, *inter alia*, physical violence. A way should thus be found of striking the balance between the responsibilities of the parents and the rights and evolving capacities of the child that was implied in article 5 of the Convention.
Although such authoritative interpretations of article 19, paragraph 1 by the Committee make that provision the most obvious and justifiable home for an international law banning parental corporal punishment of children, the Committee has found that other discrete provisions of the Convention of the Child serve this purpose as well. In a lecture on the subject in August, 1996, Marta Santos Pais, one of the ten members of the Committee on the Rights of the Child at that time and the Committee's then rapporteur, detailed the relevance of several of these provisions.\textsuperscript{201} Her explanations are offered as a glimpse into the legal reasoning of the Committee and as a reflection of the purposiveness with which the Committee has proceeded on the issue of corporal punishment.

The Committee has repeatedly relied on articles 28 and 37 of the Convention of the Child as a basis for criticizing countries that have not repudiated corporal punishment of children.\textsuperscript{202} According to Ms. Santos Pais, articles 19, 28 and 37 make "a clear statement against the use of any form of violence" in the treatment of children.\textsuperscript{203} Article 37, paragraph (a) provides, in pertinent part, that "States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."\textsuperscript{204} Ms. Santos Pais explained that while nations commonly identify torture with "extremely serious and massive cases," this is too narrow a reading of the term as it is used in the Convention of the Child.\textsuperscript{205} Rather, "torture may cover a wide degree of situations," even those which cause "unperceivable mental suffering" or those involving "a disciplinary measure which may be degrading or inhuman."\textsuperscript{206} What is more, this prohibition

\begin{quote}
There was no place for corporal punishment within the margin of discretion accorded in article 5 to parents in the exercise of their responsibilities.
\end{quote}


Thus, there is a basis for the view that, due to the operation of article 19, article 5 should not be read to allow parental corporal punishment of children.

\begin{enumerate}
  \item Santos Pais, supra note 189.
  \item See, e.g., Concluding Observations on Zimbabwe, supra note 193, at \textsuperscript{1} 18; Concluding Observations on Canada, supra note 193, at \textsuperscript{1} 25; Concluding Observations on the United Kingdom, supra note 193, at \textsuperscript{1} 31.
  \item See Santos Pais, supra note 189; see also Law, supra note 195, at 1858.
  \item Convention of the Child, supra note 142, art. 37(a), at 17.
  \item See Santos Pais, supra note 189.
  \item Id.
\end{enumerate}
applies in "all circumstances of the life of a child, including in family life or in the school system."\textsuperscript{207}

Article 28, paragraph 2 of the Convention of the Child states that "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."\textsuperscript{208} The Committee on the Rights of the Child and the commentators have understood article 28, paragraph 2 as requiring states parties to take measures proscribing corporal punishment in the schools,\textsuperscript{209} an understanding reiterated by Ms. Santos Pais.\textsuperscript{210} Indeed, such an interpretation is all but inescapable when it is considered that if school discipline is to be administered "in conformity with the present Convention," the discipline must conform to the authoritative interpretation discussed above that the Convention as a whole and certain of its individual provisions forbid corporal punishment of children.\textsuperscript{211}

Article 28, paragraph 2's prohibition of corporal punishment in the schools is significant not only in itself but also because of its bearing on other provisions of the Convention of the Child. That is, while article 28, paragraph 2 states that school discipline must be "administered in a manner consistent with the child's human dignity," there are also numerous other references to preserving the child's dignity throughout the Convention of the Child.\textsuperscript{212} For example, the preamble to the Convention of the Child refers to "the inherent dignity . . . of all members of the human family,"\textsuperscript{213} the "dignity . . . of the human person,"\textsuperscript{214} and the need for children to be brought up

\textsuperscript{207} Id.
\textsuperscript{208} Convention of the Child, supra note 142, art. 28(2), at 14.
\textsuperscript{210} See Santos Pais, supra note 189.
\textsuperscript{211} See supra notes 193–210 and accompanying text; infra notes 219–30 and accompanying text.
\textsuperscript{212} See, e.g., Convention of the Child, supra note 142, pmbl., at 3; id. arts. 37(c), 39, 40(1), at 17–18.
\textsuperscript{213} Id. pmbl., at 3.
\textsuperscript{214} Id.
“in the spirit of . . . dignity.” Similarly, article 39 directs that states parties shall take all appropriate measures to promote the physical and psychological recovery of children who have been the victims of any form of cruel or degrading treatment such that “recovery . . . shall take place in an environment which fosters the . . . dignity of the child.” As a matter of logic and linguistics, these provisions, when read in light of the received meaning of article 28, paragraph 2, support the notion that the spirit of the Convention of the Child in protecting the child’s dignity is inconsistent with allowing parental or other corporal punishment of children. As Marta Santos Pais put it, “the right not to be subject to any form of physical punishment . . . flows as a consequence of the consideration [in the Convention of the Child] of the child as a person whose human dignity should be respected.

In addition to finding the right in the Convention’s provisions on dignity, the Committee on the Rights of the Child and its former rapporteur have advised that at least three other principles of the Convention of the Child may also imply a child’s right to be free of corporal punishment. First, the right is protected by the Convention’s nondiscrimination principle. This principle is set forth in article 2, paragraph 1 which states that, “States Parties shall respect and ensure the rights set forth in the present Convention to each child . . . without discrimination of any kind, irrespective of the child’s . . . status.” Ms. Santos Pais elaborated that the principle of nondiscrimination “means that no child should be . . . punished . . . on the ground of his or her . . . status.”

215. Id.
216. Id. art. 39, at 18.
217. Cf. VAN BUEREN, supra note 187, at 249 (noting that international human rights instruments predating the Convention of the Child use the phrase “human dignity” in a way that implies repudiation of corporal punishment). In fact, when the Italian Supreme Court ruled in May 1996 that no corporal punishment may be used on children in Italy, the Court’s opinion relied heavily on the fact that both the Italian Constitution and the Convention of the Child mandate respect for human dignity. See Cambria, Cass., sez. VI, 18 marzo 1996, Foro It. II 1996, 407, 410, Translation, supra note 112, at 3–4; Interview with Judge Francesco Ippolito, supra note 113. See supra notes 112–37, 142–54 and accompanying text for a full discussion and analysis of the Italian decision. As one commentator has observed, “[a] child cannot grow up in ‘dignity’ if it is not guaranteed bodily integrity.” Cohen, Corporal Punishment, supra note 13, at 130.
218. Santos Pais, supra note 189.
219. See Concluding Observations on Nepal, supra note 193, at ¶ 10 (1996); Concluding Observations on Senegal, supra note 193, at ¶ 24; Santos Pais, supra note 189.
220. Convention of the Child, supra note 142, art. 2(1), at 5.
221. Santos Pais, supra note 189.
is that article 2 forbids justifying corporal punishment of children simply because they are children. Second, the Committee has taken the position that the legality of corporal punishment is affected by the Convention of the Child’s insistence on the primacy of the best interests of the child. Article 3, paragraph 1 states that, “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”^{222} Ms. Santos Pais elucidated that the Committee on the Rights of the Child has considered article 3, paragraph 1 as setting a framework that is incompatible with corporal punishment of children.^{223} Third, the Committee has also found the child’s right to be free from violence in the assurance of article 12, paragraph 1 that the child should be allowed to participate in all matters affecting his or her life.^{224} Ms. Santos Pais explained that “[p]articipation implies dialogue, mutual respect and tolerance. It facilitates the negotiation of solutions and promotes the growing responsibility of children. Similarly, participation in family life is a form of dialogue which leads to the ability for negotiation and peaceful conflict resolution.”^{225} The inference is that if participation leads to peaceful conflict resolution it should necessarily exclude the violent conflict resolution of which corporal punishment is a form.

While the above analysis of the Convention of the Child as prohibiting all corporal punishment of children is based on

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222. Convention of the Child, supra note 142, art. 3(1), at 5. The Convention of the Child invokes the standard of the best interests of the child in several provisions. See, e.g., id. art. 9(1), at 6 (“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine . . . that such separation is necessary for the best interests of the child.”); id. art. 18(1), at 9 (“Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”); id. art. 21, at 10 (“States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration . . . .”).

223. See Santos Pais, supra note 189; see also Concluding Observations on Senegal, supra note 193, at ¶ 24; Concluding Observations on Canada, supra note 193, at ¶ 25; Concluding Observations on the United Kingdom, supra note 193, at ¶ 31.

224. See Concluding Observations on Senegal, supra note 193, at ¶ 24. The provision states in full that, “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” Convention of the Child, supra note 142, art. 12(1), at 8.

225. Santos Pais, supra note 189.
authoritative sources, there is at least one other provision of the Convention which may be interpreted to the same purpose as a matter of simple logic. Article 24, paragraph 3 of the Convention of the Child provides that "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." "Health" may be defined as "the condition of being sound in body, mind, or spirit." As Part III of this Article will demonstrate, there is data indicating that even corporal punishment of children which does not cause physical injury may still do harm to the child's mental health, and that such punishment can lead to child abuse resulting in physical harm as well. This reasoning would support an interpretation of article 24, paragraph 3 as requiring states parties to take measures abolishing the traditional practice of spanking or other corporal punishment of children because these practices are "prejudicial to the health of children." The drafting history of the Convention also arguably supports such a reading of the provision: at the insistence of the Senegalese delegation, the drafters refused to limit "traditional practices" to female circumcision and equally severe practices and opted instead for broader language.

228. See infra notes 349-50, 355-63 and accompanying text.  
229. See infra notes 366-67 and accompanying text.  
230. During discussions that led to the formulation of article 24, paragraph 3 of the Convention of the Child, the United Kingdom's and United States' representatives took the position that the language proscribing traditional practices should expressly designate female circumcision as such a practice. The U.S. representative advocated that such specification would demonstrate that the practices to be abolished were those of a serious nature. See THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 352 (Sharon Detrick ed., 1992) (hereinafter GUIDE TO THE "TRAVAUX PRÉPARATOIRES"). The delegations of Canada, Japan, Sweden, and Venezuela stated that the term "traditional practices" should be understood to include all those practices outlined in the 1986 report of the Working Group on Traditional Practices Affecting the Health of Women and Children. See id. (citing Report of the Working Group on Traditional Practices Affecting the Health of Women and Children, U.N. Economic and Social Council, Commission on Human Rights, 42d Sess., Provisional Agenda Item 19, U.N. Doc. E/CN.4/1986/42 (1986)). The report lists practices to be given priority consideration and as topics of discussion and does not mention corporal punishment. See Working Group on Traditional Practices, supra, at ¶¶ 22–24. However, neither the positions of the Canadian et al. delegations nor the report of the Working Group purport to exclude corporal punishment as a traditional practice affecting the health of children. In any event, Senegal's representatives sought more general language that would not specify the precise practices prohibited thereby. The Finnish delegation also advocated that the word "health" must be used in its broadest sense. The final language reflects the Senegalese preference. See GUIDE TO THE "TRAVAUX PRÉPARATOIRES," supra, at 352.
Marta Santos Pais, in her capacity as a member of the Committee on the Rights of the Child, observed that the Convention of the Child brought together different norms previously set forth in earlier international instruments and further improved these norms as a means to effectively ensure the fundamental rights of the child, "including the one not to be subject to any form of violence, treatment or punishment inconsistent with his/her dignity and integrity." Even before the Convention of the Child, then, there were international instruments arguably protecting children against corporal punishment.

From an American perspective, it may be of special interest to explore the ramifications of this observation that the Convention of the Child incorporates and draws upon the standards of earlier international instruments. For purposes of this Article, the interest lies in the fact that if this body of law applies to children and implicitly prohibits corporal punishment, then the international consensus against corporal punishment is even more weighty and influential than might be supposed from only consulting the Convention of the Child. Quite apart from the ongoing controversy over whether any of these instruments are domestically enforceable, their status as international consensus is a compelling reason to look to them for guidance as additional credible exemplars of legal regimes evolving in relation to this issue. In this regard, the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Economic, Social and Cultural Rights (Economic Rights Covenant), the International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter Universal Declaration].
Civil and Political Rights (Civil and Political Rights Covenant), the American Convention on Human Rights (American Convention), the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and the Torture Convention are particularly relevant.

A considerable number of commentators are of the view that these instruments generally apply to children, regardless of whether or not they also have provisions specifically addressing children’s rights. This analysis is based on the fact that these documents contain language safeguarding rights for all human beings as well as provisions that are obviously meant only for adults. The Universal Declaration uses inclusive
language such as article 1's statement that "[a]ll human beings are born free and equal in dignity and rights," supranote 240 and article 2's promise that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration..." supranote 241 In a similar vein, the Torture Convention indicates that it is meant to protect "all members of the human family." supranote 242 Likewise, the Economic Rights Covenant, the Civil and Political Rights Covenant, and the European Convention all employ the term "everyone" in guaranteeing various rights. supranote 243 The latter two covenants also use the phrase "no one" as a term of general applicability in protecting all persons, supranote 244 including children, against the infringement of certain rights. supranote 245 The American

240. Universal Declaration, supra note 232, art. 1; see VAN BUEREN, supra note 187, at 17 (pointing out that the Universal Declaration "proclaims a catalogue of human rights which apply to 'all human beings' and therefore implicitly to children") (citation omitted).

241. Universal Declaration, supra note 232, art. 2; cf. Bennett, supra note 238, at 27–28 (suggesting that the word "everyone" as used in the Economic Rights Covenant and in the Civil and Political Rights Covenant should be taken to include children); Volio, supra note 238, at 186 (stating that the term "everyone" as used in article 16 of the Civil and Political Rights Covenant encompasses both adults and children).

242. Torture Convention, supra note 177, pmbl., S. TREATY DOC. No. 100-20 at 19, 1465 U.N.T.S. at 113; cf. Bennett, supra note 238, at 25 (stating that the convention protects children as members of the human family from torture).

243. For instance, the Economic Rights Covenant requires that States Parties recognize the rights of "everyone" to an adequate standard of living and to be free from hunger. See Economic Rights Covenant, supra note 233, art. 11, at 7. That instrument also recognizes the right of "everyone" to partake "of the highest attainable standard of physical and mental health." Id. art. 12(1), at 8. The Civil and Political Rights Covenant provides that "everyone" has the right to "security of person." See Civil and Political Rights Covenant, supra note 234, art. 9(1), at 175. That covenant further states that "everyone" shall have a right to "recognition... as a person before the law." See id. art. 16, at 177; cf. Bennett, supra note 238, at 27–28 (suggesting that the word "everyone" as used in the Economic Rights Covenant and in the Civil and Political Rights Covenant should be understood to include children); Volio, supra note 238, at 186 (asserting that "everyone" as used in article 16 of the Civil and Political Rights Covenant encompasses both adults and children). The European Convention uses the same terminology, such as its guarantee that "[e]veryone's" right to life will be protected. See European Convention, supra note 236, art. 2(1), at 224. Indeed, the case law which has developed under the European Convention "shows that all rights phrased in terms of general application apply" to children. See Bennett, supra note 238, at 29.

244. The Civil and Political Rights Covenant declares in article 7 that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Civil and Political Rights Covenant, supra note 234, art. 7, at 175. Similarly, the European Convention provides in article 3 that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention, supra note 236, art. 3, at 224.

245. Cf. Bennett, supra note 238, at 27–28 & n.176 (remarking that in referring to "no one," article 7 of the Civil and Political Rights Covenant means no children as well as no adults).
Convention even specifies in article 1, paragraph 2 that "person," as used in that treaty, means every human being — demonstrating an unmistakable statement of intent to include children.

Having concluded that these international instruments are generally protective of children's human rights, the next analytical problem is to identify those provisions that implicitly prohibit corporal punishment and that have served as the normative and conceptual basis for the Convention of the Child.

1. Provisions Protective of Dignity—As noted above in Part II.A, the Convention of the Child assumes an inherent irreconcilability between fostering dignity and administering corporal punishment to children. Article 1 of the Universal Declaration provides that "[a]ll human beings are born free and equal in dignity and rights." Article 11, paragraph 1 of the American Convention announces that "[e]veryone has the right to have . . . his dignity respected." Insofar as preserving dignity is inconsistent with undergoing corporal punishment, these provisions may be interpreted to prohibit corporal punishment without reference to other sources. However, these provisions also appear to be precursors of those provisions of the Convention of the Child protecting children's dignity. As such, the provisions of the Convention of the Child represent a retrospective affirmation and further strengthening of the view that article 1 of the Universal Declaration and article 11 of the American Convention make corporal punishment of children unacceptable.

2. Provisions Against Torture or Cruel, Inhuman, or Degrading Treatment or Punishment—The Convention of the

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246. See American Convention, supra note 235, art. 1(2), at 145.
247. See Bennett, supra note 238, at 29.
248. See supra notes 208–18 and accompanying text.
249. Universal Declaration, supra note 232, art. 1.
250. American Convention, supra note 235, art. 11(1), at 148.
251. Cf. Cohen, Corporal Punishment, supra note 13, at 112–14, 129–30 (discussing the recognition in the Universal Declaration's preamble of "the inherent dignity . . . of all members of the human family" and implying that the preservation of human dignity is incompatible with corporal punishment of children); Santos Pais, supra note 189 (stating that protection of human dignity in "a variety of international [human rights] instruments" preceding the Convention of the Child is tantamount to protection against corporal punishment).
252. Cf. Santos Pais, supra note 189 (equating the term "dignity," as it is used in international human rights instruments predating the Convention of the Child, with freedom from corporal punishment).
Child's absolute prohibition of corporal punishment of children also builds upon and, indeed, represents a further progression from interpretations of article 7 of the Civil and Political Rights Covenant, which forbids subjecting anyone to torture or to cruel, inhuman, or degrading treatment or punishment. In a recent reiteration of its 1982 comments, the Human Rights Committee, charged with monitoring compliance with the Civil and Political Rights Covenant, made the following observations about article 7 of that covenant:

The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the state party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as a punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.

253. See Civil and Political Rights Covenant, supra note 234, art. 7, at 175. With respect to interpretations of article 7 by the Human Rights Committee, see infra notes 254–55 and accompanying text.

254. See Civil and Political Rights Covenant, supra note 234, arts. 28, 40, at 238, 240, 244; Cohen, Corporal Punishment, supra note 13, at 114.

Thus, article 7 of the Civil and Political Rights Covenant may be understood to prohibit excessive corporal punishment in familial or other contexts. By inference, the Human Rights Committee's interpretation of article 7 of the Civil and Political Rights Covenant as prohibitive of excessive corporal punishment may apply to the identical language of article 5 of the Universal Declaration since the Covenant is an outgrowth of the Universal Declaration.\(^{256}\)

The Torture Convention also contains prohibitions against torture in article 1\(^{257}\) and against cruel, inhuman, or degrading treatment or punishment in article 16.\(^{258}\) In light of the discussion above, this prohibitory language would seem to warrant the conclusion that the Torture Convention forbids at least excessive corporal punishment of children. There is, in addition, some support for the conclusion that the Torture Convention forbids all corporal punishment. The Committee Against Torture, the body which monitors compliance with the

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\(^{257}\) The pertinent provision reads in full:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.


\(^{258}\) The relevant provision reads in part:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id. art. 16(1), S. Treaty Doc. No. 100-20 at 23, 1465 U.N.T.S. at 116.
Corporal Punishment of Children has suggested that corporal punishment in general could be incompatible with the provisions of the Convention—without specifying that the offending punishment must be excessive. In any event, these interpretations may be somewhat weaker with respect to parental corporal punishment of children than under other international human rights instruments. One reason is because both articles 1 and 16 stipulate that the proscribed conduct must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Some analysts have opined that the Torture Convention thus only reaches the conduct of government actors and not private perpetrators. Under this view, the Torture Convention may cover only corporal punishment meted out by or at the behest of governmental authorities—such as school personnel—but not that administered by parents.

Nevertheless, some commentators have argued that articles 1 and 16 of the Torture Convention should apply to private actors. For example, one commentator maintains that the

259. See id. arts. 17–24, S. TREATY DOC. No. 100-20 at 23–28, 1465 U.N.T.S. at 116–21 (detailing the composition, procedures, and functions of the Committee Against Torture).


Torture Convention's provisions should apply to situations of domestic violence against women.\textsuperscript{264} Essentially, she gives two reasons for this conclusion. First, the Torture Convention may be read not only to govern official behavior but also to "hold states responsible for . . . failure to take steps to avert private violence."\textsuperscript{265} Second, domestic violence has many of the same characteristics as torture or cruel, inhuman, or degrading treatment or punishment at the hands of the state. Both domestic violence and governmental violence may produce equal degrees of physical and/or mental pain or suffering,\textsuperscript{266} represent an intentional infliction against the will of the victim,\textsuperscript{267} and are legitimated by the victim's status.\textsuperscript{268} With respect to article 16, this argument is equally cogent in relation to parental corporal punishment of children since the pain or suffering and intentionality elements are similar where a child is the victim as where a woman is the victim and since the punishment is typically legitimated by the victim's status as a child.\textsuperscript{269}

It may also be objected that corporal punishment of children typically falls short of the definition of "torture" in article 1 as "any act by which severe pain or suffering, whether physical or mental" is caused to the victim.\textsuperscript{270} This problem with article 1's applicability is more readily resolved since, as shown in Part

\begin{itemize}
\item \textsuperscript{264} See Copelon, supra note 263, at 298–99, 352–53, 355–56.
\item \textsuperscript{265} Id. at 299.
\item \textsuperscript{266} See id. at 308–25.
\item \textsuperscript{267} See id. at 325–29.
\item \textsuperscript{268} See id. at 330–31.
\item \textsuperscript{269} These aspects of corporal punishment of children are explored more fully in Part III of this Article.
\item The argument set forth in the text above is perhaps less persuasive with respect to article 1 of the Torture Convention insofar as it provides that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Torture Convention, supra note 177, art. 1(1), S. TREATY DOC. NO. 100–20 at 19, 1465 U.N.T.S. at 113–14. A country's "lawful sanctions" conceivably could encompass legal authorizations of parental corporal punishment. But see Report of the Special Rapporteur, supra note 260, ¶ 8 (stating that flogging would not be permissible under article 1 of the Torture Convention simply because this punishment had been duly promulgated under the domestic law of a nation). Then again, the United States has enunciated an understanding to this part of article 1 to the effect that "a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture." 136 CONG. REC. S17491 (daily ed. Oct. 27, 1990) (statement of understandings to apply to the Senate's advice and consent to the ratification of the Torture Convention). Thus, the "lawful sanctions" caveat cannot take corporal punishment outside of article 1's prohibition if it is the object and purpose of the Torture Convention to outlaw such chastisement.
\item \textsuperscript{270} Torture Convention, supra note 177, art. 1(1), S. TREATY DOC. NO. 100-20 at 19, 1465 U.N.T.S. at 113–14 (emphasis added).
\end{itemize}
III, even "reasonable" corporal punishment may cause severe psychological suffering and is felt more acutely as physical pain by a child than an adult. Be this as it may, the difficulties in applying article 1 probably make article 16 of the Torture Convention the more convincing source of an international prohibition against parental corporal punishment of children.

Article 5, paragraph 2 of the American Convention likewise contains a provision against torture or cruel, inhuman, or degrading treatment or punishment. The Inter-American Commission on Human Rights has urged that in order for countries to achieve full observance of the American Convention, they should ratify the Convention of the Child and ensure that children "are not the targets of violence." Given the absolute prohibition against corporal punishment in the Convention of the Child, this commentary may mean that article 5 of the American Convention would be best understood as forbidding all corporal punishment of children and not just that which is excessive.

Article 3 of the European Convention contains a further variation on this type of language to the effect that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." The European Court of Human Rights and the European Commission of Human Rights have developed a distinct body of case law indicating that corporal punishment of children falls within the purview of article 3 of the European Convention and may violate that provision depending upon the particular circumstances. For example,

271. See infra notes 355–60 and accompanying text.
272. See infra note 368 and accompanying text.
273. American Convention, supra note 235, art. 5(2), at 146.
in Costello-Roberts v. United Kingdom, the European Court of Human Rights ruled that when a headmaster hit a seven-year-old student three times on his clothed buttocks with a rubber-soled gym shoe, the punishment was not severe enough to constitute a violation of article 3; yet the court at the same time cautioned that its ruling should not be taken to mean that corporal punishment must have severe or long-lasting effects in order to violate article 3. The court even issued a disclaimer that it did not wish to be taken as having in any way approved of corporal punishment as part of the disciplinary regime of a school. That this cautionary language was not a momentary slip of the pen is borne out by the European Commission of Human Rights having previously held, in Warwick v. United Kingdom, that just one cane stroke to a female student's hand by a male teacher, in the presence of another male teacher, violated the prohibition in article 3 against degrading punishments.

Until 1996, the cases arising under article 3 of the European Convention involved either judicially mandated corporal

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278. See id. at 174.
279. See id.
280. See VAN BUEREN, supra note 187, at 251 (discussing the Warwick decision); see also Bahrampour, supra note 276 (citing the holding of Warwick).
Corporal Punishment of Children

Notably, in September 1996, the European Commission of Human Rights took cognizance in A & B v. United Kingdom of a complaint arising in the familial setting under articles 3, 8, 13, and 14 of the European Convention. The Commission concluded that a boy stated a viable claim pursuant to these provisions against his stepfather based on the complainant’s allegation that the stepfather had administered degrading punishment by hitting the boy’s buttocks and legs with a stick so as to cause bruises. The Commission issued a decision on the merits two years later finding that the stepfather’s actions violated article 3. However, the Commission also stressed “that this finding does not mean that Article 3 is to be interpreted as imposing an obligation on States to protect, through their criminal law, against any form of physical rebuke, however mild, by a parent of a child.”

In sum, article 3 of the European Convention has given rise to an adjudicative approach that may reflect normative tension and transition. The case law reveals that the European Court of Human Rights and the European Commission of Human Rights have read article 3 to tolerate some milder or less degrading corporal punishments. The cases under the European Convention also reflect that at least some corporal punishment of children administered by either the authorities or parents violates article 3 of that treaty. The European Court

281. See, e.g., Tyrer, 26 Eur Ct. H.R. (ser. A) at 6–9.
284. See id. at 190.
285. See id. at 193. Article 8(1) of the European Convention provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” European Convention, supra note 236, art. 8(1), at 230. Article 13 of the European Convention states that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” Id. art. 13, at 232. Article 14 of the European Convention declares that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Id. art. 14, at 232.
287. See id. at 191.
289. Id.
has issued conflicting pronouncements on whether article 3's application should be keyed to the harshness of the punishment. It is, therefore, an open question whether the court will find in a future case that all corporal punishment of children violates article 3 regardless of the severity of the punishment.

3. Provisions Protective of Personal Security—There are articles guaranteeing "security of person" in the Universal Declaration, the Civil and Political Rights Covenant, and in the European Convention. Article 5 of the American Convention expresses a similar assurance, providing that "[e]very person has the right to have his physical, mental, and moral integrity respected." It has been suggested that the security of one's person is necessarily transgressed by being subjected to corporal punishment.

4. Provisions Protective of Privacy—The American Convention, the Civil and Political Rights Covenant, the European Convention, and the Universal Declaration, protect against undue interference with personal privacy. There is some authority for the proposition that "corporal punishment violates a child's right to privacy, because the concept of privacy encompasses the concept of bodily integrity." Although the European Court of Human Rights held in Costello-Roberts that a headmaster's punishment of a pupil by hitting the latter's

290. Universal Declaration, supra note 232, art. 3, at 72.
291. Civil and Political Rights Covenant, supra note 234, art. 9(1), at 175.
292. European Convention, supra note 236, art. 5(1), at 226.
293. American Convention, supra note 235, art. 5(1), at 146.
294. See Cohen, Corporal Punishment, supra note 13, at 119 (arguing that the commitment to "security of [every human being's] person" made in the American Declaration on the Rights and Duties of Man could be read to bar corporal punishment of children if the Commission found Article I applicable to children); cf Santos Pais, supra note 189 (offering the idea that the various provisions of the Convention of the Child implicitly outlawing corporal punishment of children affirm that a range of more broadly phrased norms in earlier international human rights instruments have the same effect).
295. See American Convention, supra note 235, art. 11(2)–(3), at 148 (stating that "[n]o one may be the object of arbitrary or abusive interference with his private life [or] his family" and that "[e]veryone has the right to the protection of the law against such interference"); Civil and Political Rights Covenant, supra note 234, art. 17(1)–(2), at 177 (providing that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy [or] family" and that "[e]veryone has the right to the protection of the law against such interference"); European Convention, supra note 236, art. 8(1), at 230 (declaring that "[e]veryone has the right to respect for his private and family life"); Universal Declaration, supra note 232, art. 12, at 73 (asserting that "[n]o one shall be subjected to arbitrary interference with his privacy [or] family").
296. VAN BUEREN, supra note 187, at 251.
clothed buttocks three times with a soft-soled gym shoe did not violate the European Convention's guarantee in article 8 of respect for everyone's private life,” the court observed that “the possibility that circumstances might exist in which Article 8 could be regarded as affording a protection which went beyond that given by Article 3 was not excluded.” In fact, in App. No. 10592/83 v. United Kingdom, the European Commission of Human Rights concluded that child complainants stated an actionable claim for violation of their privacy under article 8 arising out of incidents where school personnel used a leather strap to strike one student on each palm and another student twice on the buttocks. As previously mentioned, in the recent case of A & B v. United Kingdom, the European Commission also held that a child complainant stated an actionable article 8 claim based on the allegation that his stepfather caned his lower body so as to leave visible marks.

Thus, the European Court of Human Rights and the European Commission of Human Rights have left no doubt that corporal punishment of children may, in appropriate cases, implicate juveniles' privacy rights. By analogy and in the absence of contrary authority, this reasoning seems equally applicable to the privacy guarantees in article 12 of the Universal Declaration, article 17 of the Civil and Political Rights Covenant, and article 11 of the American Convention. Indeed, the Human Rights Committee has taken the position that the nondiscrimination policy of the Civil and Political Rights Covenant set forth in article 24 must permeate the rest of that covenant, including article 17, so as to spare children

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298. Id.
300. See supra notes 285–87 and accompanying text. At a subsequent stage of the same case, the European Commission refused to reach the merits on whether the child applicant should prevail on his article 8 claim. See supra notes 283–91 and accompanying text.
301. The privacy claim under article 8 of the European Convention took an interesting twist in X et al. v. Sweden, 1982 Y.B. Eur. Conv. on H.R. 36 (Eur. Comm'n on H.R.). In that case, parents challenged Sweden's statutory prohibition of corporal punishment in tandem with its criminal law on assaults as violative of article 8 as well as other articles of the European Convention. See id. at 43, 45–46. The Court held that in extending criminal liability for assault to ordinary parental physical chastisement of children, Swedish law did not contravene the “right to respect for private and family life” within the meaning of article 8. See id. at 49.
302. Cf. Sohn, supra note 256, at 20 (stating that “European jurisprudence throws light not only on the provisions of the European Convention, but also on the similar provisions in the Covenant on Civil and Political Rights”).
"from being subjected to acts of violence." Furthermore, since the Convention of the Child is understood to forbid all corporal punishment of children, its prohibition may be understood to retrospectively affirm that the privacy guarantees of these other international human rights instruments have the same prohibitory meaning as well.

5. The Provision Protective of Physical and Mental Health—No mention has been made thus far of any specific provisions of the Economic Rights Covenant although that treaty was previously enumerated as among the international instruments germane to corporal punishment of children. The truth is that there is only one relevant provision, but it is nonetheless potentially quite important. Article 12, paragraph 1 of the Covenant provides for the recognition of the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health." As detailed in Part III of this Article, corporal punishment of children is likely to impair either physical or mental health or both and, therefore, would contravene article 12's right to health. This reading becomes even more plausible inasmuch as article 12 may be informed by article 24, paragraph 3 of the Convention of the Child. It will be recalled that article 24, paragraph 3 of the Convention of the Child requires states parties to "abolish[] traditional practices prejudicial to the health of children," one of which may be corporal punishment. It is therefore arguable that article 12 of the Economic Rights Covenant necessitates the elimination of corporal punishment because, as a traditional practice prejudicial to children's health, such punishment also is an obstacle to children's enjoyment of the highest attainable standard of physical and mental health.

304. See Santos Pais, supra note 189.
305. Economic Rights Covenant, supra note 233, art. 12(1), at 8.
307. See supra notes 226–30 and accompanying text.
308. Cf. Santos Pais, supra note 189 (discussing that the Convention of the Child draws upon the norms of preceding international human rights instruments and further clarifies their meaning).
C. Summation

This survey should leave no doubt that many international human rights instruments touch upon corporal punishment of children. But what, after all is said and analyzed, is the principle that emerges as a matter of international law? A synthesis of the aforesaid documents, taken together, ultimately yields the international law principle that all corporal punishment of children is prohibited—even though a few isolated treaty provisions have been interpreted in a less absolute manner. To recapitulate, the Convention of the Child unequivocally prohibits all corporal punishment of children;309 arguably the Torture Convention310 and the American Convention,311 as well as a host of provisions in the Universal Declaration,312 the Civil and Political Rights Covenant,313 and the Economic Rights Covenant,314 may be construed to do the same. In contrast, article 7 of the Civil and Political Rights Covenant315 and article 3 of the European Convention316 have been interpreted to prohibit some, but not all, corporal punishment of children; a semantic analysis would arguably allow for a similar reading of analogous provisions in the Universal Declaration.317 These interpretations and analyses of articles 7 and 3 do not, however, change the fact that an absolute bar to all corporal punishment of children may be found and does exist in international law.

Finally, it would be a distortion of modern human rights law to suggest that the Universal Declaration, the Civil and Political Rights Covenant, the Economic Rights Covenant, the American Convention, the European Convention, and the Torture Convention are the only international law documents addressing the legal status of corporal punishment of children.318 The reason that this Article focuses on the

309. See supra notes 191, 193–230 and accompanying text.
310. See supra notes 257–72 and accompanying text.
311. See supra notes 250–52, 273–74, 293–95, 302 and accompanying text.
312. See supra notes 249, 252, 256, 290, 294, 295 and accompanying text.
313. See supra notes 291, 294–95, 302 and accompanying text.
314. See supra notes 305–08 and accompanying text.
315. See supra notes 253–56 and accompanying text.
316. See supra notes 275–91 and accompanying text.
317. See supra notes 290, 294 and accompanying text.
318. See, e.g., Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, art. 1, 25 I.L.M. 519, 521 [hereinafter Inter-American Convention] (committing
aforementioned instruments is twofold. First, the United States is a party to the Civil and Political Rights Covenant and to the Torture Convention, a fact which should enhance their credibility with Americans. Second, an impressive number of American international law scholars credit these six instruments with having attained the status of customary international law. Indeed, the Universal Declaration, the

states parties to prevent and punish torture); id. art. 6, at 522 (committing states parties to take effective measures to prevent and punish cruel, inhuman, or degrading treatment or punishment); African Charter on Human and Peoples' Rights, June 24-27, 1981, art. 4, 21 I.L.M. 59, 60 (1982) [hereinafter African Charter] (asserting that "[h]uman beings are inviolable" and that "[e]very human being shall be entitled to respect for his life and the integrity of his person"); id. art. 5 (enunciating that "[e]very individual shall have the right to the respect of the dignity inherent in a human being" and that "[a]ll forms of exploitation and degradation of man particularly ... torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"); id. art. 6 (protecting every individual's right "to the security of his person"); id. art. 16(1), at 61 (affirming that "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health"); id. art. 18(1) (stating that "[t]he family ... shall be protected by the State which shall take care of its physical ... and [moral health]"); id. art. 18(3), at 62 (proclaiming that "[t]he State shall ... ensure the protection of the rights of ... the child as stipulated in international declarations and conventions"); American Declaration of the Rights and Duties of Man, art. I. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, Mar. 30-May 2, 1948, art. I. reprinted in PAN AMERICAN UNION, FINAL ACT OF THE NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES 39 (1948) [hereinafter American Declaration] (providing that "[e]very human being has the right to ... security of his person"); id. art. V, at 40 (stating that "[e]very person has the right to the protection of the law against abusive attacks upon his ... private ... life"); id. art. VII (declaring that "all children have the right to special protection, care and aid"); id. art. XVII, at 42 (posing that "[e]very person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights"); id. art. XXIX, at 44 (stating that every person has the obligation "so to conduct himself in relation to others that each and every one may fully form and develop his personality"); id. art. XXX (imposing the duty on every person "to aid, support, educate and protect his minor children").


320. See supra note 177.

321. See Florentino P. Feliciano, The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making, 37 AM. J. JURIS. 17, 50 (1992) (maintaining that customary international law is embodied in the Universal Declaration, the Civil and Political Rights Covenant, the Economic Rights Covenant, the European Convention, and the "Inter-American Conventions"); John P. Humphrey, The International Bill of Rights: Scope and Implementation, 17 WM. & MARY L. REV. 527, 529 (1976) (asserting that the Universal Declaration has become customary international law); Richard B. Lillich, Invoking International Human Rights in Domestic Courts, 54 U. CIN. L. REV. 367, 396 (1985) (making the point that at least articles 3, 5,
Civil and Political Rights Covenant, and the Economic Rights Covenant have been especially esteemed as a veritable International Bill of Rights.\textsuperscript{322}

Customary international law is binding as federal common law in the United States.\textsuperscript{323} The fact that some of these international instruments, or pertinent portions of them,\textsuperscript{324} constitute federal common law capable of being interpreted to prohibit corporal punishment of children may, therefore, be of some moment for the United States as a country which has not yet ratified the Convention of the Child. However, the current enforceability of these instruments in state and federal courts as federal common law presents difficult and complex questions that are beyond the scope of this Article.\textsuperscript{325}

\textsuperscript{322} 7, 9, 12, and 13 of the Universal Declaration and articles 7, 9, 10, and 12 of the Civil and Political Rights Covenant reflect customary international law; Scaperlanda, \textit{supra} note 256, at 1014–15 (stating that “many would argue” that all or portions of the Universal Declaration and of the Civil and Political Rights Covenant are “embedded in customary international law”); Louis B. Sohn, \textit{The New International Law: Protection of the Rights of Individuals Rather than States}, 32 AM. U. L. REV. 1, 17, 32 (1982) (indicating that the principles laid down in the Universal Declaration, the Civil and Political Rights Covenant, the European Convention, and “inter-American instruments” have, generally speaking, become a part of international customary law); Nadine Strossen, \textit{Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis}, 41 HASTINGS L.J. 805, 817 (1990) (stating that the human rights values in the Universal Declaration and in the Civil and Political Rights Covenant are customary international law); Christopher J. Borgen, Note, \textit{The Theory and Practice of Regional Organization Intervention in Civil Wars}, 26 N.Y.U. J. INT’L L. & POL. 797, 820 (1994) (contending that the Civil and Political Rights Covenant “is taking on the mantle of customary international law”); see also MCDOUGAL ET AL., \textit{supra} note 173, at 327 (noting that the Universal Declaration has become customary international law and that the Civil and Political Rights Covenant and the Economic Rights Covenant “create[] the expectations comprising customary international law”). \textit{But see} Suzanne M. Bernard, \textit{An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners}, 25 RUTGERS L.J. 759, 768 (1994) (declaring that the Civil and Political Rights Covenant has not yet become customary international law); Humphrey, \textit{supra}, at 533 (intimating that the Civil and Political Rights Covenant and the Economic Rights Covenant were not customary international law in the 1970s because “they [applied] only to those states that ratified them”).


\textsuperscript{324} For example, the late Professor Richard Lillich was of the opinion that articles 3, 5, 7, 9, 12, and 13 of the Universal Declaration and articles 7, 9, 10, and 12 of the Civil and Political Rights Covenant constitute customary international law. See Lillich, \textit{supra} note 321. As discussed in the text above, articles 3, 5, and 12 of the Universal Declaration and articles 7 and 9 of the Civil and Political Rights Covenant may be interpreted to prohibit corporal punishment of children. See \textit{supra} notes 243–45, 251–56, 290, 294–95.

\textsuperscript{325} \textit{Compare} THEODOR MERON, \textit{HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW} 114–15, 119–32 (1989) (observing that although “it has not been easy to extend the reach of international human rights in the United States through the
The enforceability of a prohibition of corporal punishment of children as it is manifested in articles 7 and 17 of the Civil and Political Rights Covenant and article 16 of the Torture Convention is equally problematic even though the United States is a party to these treaties. Putting aside the thorny issue of whether these treaties should be self-executing,\(^\text{326}\) it is the case that this law is self-executing in American courts and should be further promoted, and Lillich, supra note 321, at 368–69, 393, 412–15 (stating that while customary international law should be enforceable in domestic courts and that some courts have responded accordingly, in the near future these courts are more likely to use customary law to inform the federal Constitution and statutes), with Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225, 225–26 (1995–96) (noting that U.S. federal courts are reluctant to incorporate customary international law as directly applicable federal law), and Strossen, supra note 321, at 815–16, 818–23 (remarking that while customary international law has occasionally been judicially enforced in the United States and while there is support for the view that such law should be controlling, relatively few courts have actually implemented this approach), and Margaret Hartka, Note, *The Role of International Law in Domestic Courts: Will the Legal Procrastination End?*, 14 MD. J. INT'L L. & TRADE 99, 99, 124–25 (1990) (mentioning that the judiciary has failed to properly use customary international law).

326. Enforceability may turn on whether the Civil and Political Rights Covenant and the Torture Convention are self-executing or non-self-executing. If the Covenant and the Convention were self-executing, they would be enforceable, barring other legal obstacles; if the Covenant and the Convention were non-self-executing, they would be unenforceable without federal implementing legislation. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]; see also Lillich, supra note 321, at 368; John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1297–1300 (1993); Strossen, supra note 321, at 812–13.

Interestingly, some commentators opine that the terms of the Civil and Political Rights Covenant are inconsistent with non-self-executing status and urge that the judiciary should hold the Covenant to be self-executing. See Jordan J. Paust, Avoiding “Fraudulent” Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights, 42 DEPAUL L. REV. 1257 passim (1993); Quigley, supra, at 1300–10; cf. Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 68–69 (1990) (claiming that many of the provisions in the Civil and Political Rights Covenant “appear to be self-executing in character,” but expressing concern that a Senate declaration that the treaty is non-self-executing would be given “great weight”). But see Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT'L L. 403, 416 n.70 (1995) (stating that the Covenant is not self-executing); Jaleen Nelson, Comment, *Sledge Hammers and Scallops: The FBI Digital Wiretap Bill and Its Effect on Free Flow of Information and Privacy*, 41 UCLA L. REV. 1139, 1150 n.56 (1994) (stating that since the Covenant is not self-executing, U.S. courts will not enforce it). This is a view that has also been articulated with respect to the Torture Convention. See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 631–32 (1991) (stating that it is likely that the Torture “Convention will be deemed self-executing”). But see 136 CONG. REC. S17492 (daily ed. Oct. 27, 1990) (statement of declarations to which the Senate's advice and consent is subject, announcing that articles 1 through 16 of the Torture Convention are not self-executing); Message of the President Transmitting the Torture Convention, S. TREATY
that the United States has made a reservation in relation to the Civil and Political Rights Covenant’s article 7 (the clause forbidding torture or cruel, inhuman, or degrading treatment or punishment) and to the Torture Convention’s article 16 (the clause forbidding cruel, inhuman, or degrading treatment or punishment). Such reservations undoubtedly would impede article 7’s and article 16’s respective enforceability in relation to corporal punishment of children. The reservation to the Civil and Political Rights Covenant states that, “[t]he United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendment to the Constitution of the United States.” The reservation to article 16 of the Torture Convention is, in substance, of the same import.

In Ingraham v. Wright (which is examined more thoroughly in Part IV), the U.S. Supreme Court held, among other things, that corporal punishment of students by school personnel does not contravene the Eighth Amendment.

The Senate’s advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under Article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

136 CONG. REC. S17491 (daily ed. Oct. 27, 1990) (statement of reservations to which the Senate’s advice and consent is subject).


331. See id. at 664.
rationale for the reservation to article 7, the American government specifically indicated that protection against corporal punishment should be considered excluded by its reservation.\textsuperscript{332} Some commentators have theorized that the reservation to article 7 is not valid.\textsuperscript{333} They are not alone in this opinion: eleven European countries have objected to the U.S. reservation to

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332. The pertinent rationale provided by the Bush Administration for the United States' reservation to article 7 of the Civil and Political Rights Covenant reads as follows:

Because the [U.S.] Bill of Rights already contains substantively equivalent protections, and because the Human Rights Committee \ldots has adopted the view that prolonged judicial proceedings in cases involving capital punishment could in certain circumstances constitute such treatment, U.S. ratification of the Covenant should be conditioned upon a reservation limiting our undertakings in this respect to the prohibitions of the Fifth, Eighth and/or Fourteenth Amendments. This would also have the effect of excluding such other practices as corporal punishment and solitary confinement, both of which the Committee has indicated might, depending on the circumstances, be considered contrary to article 7.

SENATE COMM. ON FOREIGN RELATIONS, supra note 328, at 12 (emphasis added.).

333. Commentators have cited a number of grounds for finding the reservation invalid. First, some commentators have advanced the notion that the American reservation to article 7 is incompatible with the object and purpose of the Civil and Political Rights Covenant and therefore is not valid. See, e.g., Michael H. Posner & Peter J. Spiro, Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993, 42 DEPAUL L. REV. 1209, 1216-17, 1226-27 (1993); Schabas, supra note 319, at 291. This theory relies on the principles of the Vienna Convention on the Law of Treaties, which provides that a reservation to a treaty is not valid if the reservation is "incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 19(c), 1155 U.N.T.S. 331 (1969) [hereinafter Vienna Convention]; see also RESTATEMENT OF FOREIGN RELATIONS, supra note 326, § 313(1)(c) (reiterating the Vienna Convention principle). Second, at least one commentator has noted with approval that the Human Rights Committee considers that article 7, as nonderogable customary international law, may not be the subject of a valid reservation. See Schabas, supra note 319, at 295, 308 (citations omitted). Finally, another analyst has contended that, as a general matter, reservations intended to reject international obligations rising above a nation's existing law are of doubtful validity and, perhaps, even of questionable constitutionality. See Louis Henkin, Comment, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 AM. J. INT'L L. 341, 343, 348 (1995). This contention is highly relevant since the United States' reservation to article 7 is designed precisely to limit article 7 to the parameters of constitutional law under the Fifth, Eighth, and Fourteenth Amendments. See supra note 328; cf. Ved P. Nanda, The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights, 42 DEPAUL L. REV. 1311, 1331-32 (1993) (suggesting that because it is incompatible with the object of the Civil and Political Rights Covenant, the United States' reservation to the Covenant's ban on capital punishment of juveniles is invalid); Paust, supra note 326, at 1277-78 (theorizing that the reservation to article 7 of the Civil and Political Rights Covenant should be treated as meaningless because in interpreting domestic law "our reading of [the Fifth, Eighth, and Fourteenth Amendments] \ldots can be conditioned by \ldots the Covenant").
article 7, and the Human Rights Committee concluded that the reservation is invalid as well. As might be expected from this reaction, the reservation to article 16 of the Torture Convention has also been the object of scholarly criticism.

This short digression into the problems of enforceability is offered to help set the relevant international law in historical context. But, lest the thread be lost, it bears reiteration that the point is not whether these international instruments are or are not enforceable in the United States. Rather and again, the point is simply that since the principle has been established in the international arena and especially under the Convention of the Child that corporal punishment of children is prohibited, this principle should at least be taken into account if the United States is to formulate a position on this matter that is sophisticated and has legitimacy before the rest of the world. The status of international law on corporal punishment of children, like the laws in jurisdictions that prohibit such punishment, is offered as information that provides a more empirically sound context and more realistic parameters within which Americans can reconsider the issue.

334. See Schabas, supra note 319, at 277, 310.
336. See Riesenfeld & Abbott, supra note 326, at 629–30; cf. Schabas, supra note 319, at 282–84 (likening the reservation to article 16 of the Torture Convention to the reservation to article 7 of the Civil and Political Rights Covenant and intimating that the former is as objectionable as the latter).
337. A nation's fulfillment of international human rights law standards correlates with its prestige and legitimacy as an enlightened world leader. See Louis Henkin, The Age of Rights 74 (1990) (offering that the United States' failure to live up to the standards of international human rights instruments has been "resented as arrogant" and "derided as hypocritical"); Paust, supra note 326, at 1283 (remarking that the policy of non-self-execution vis-a-vis the Civil and Political Rights Covenant has seriously dishonored the United States); Scaperlanda, supra note 256, at 1016 (opining that the United States has expended "a large measure of moral capital in the world market place" because of its historic reluctance to become a party to the major international human rights covenants); David P. Stewart, United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DePaul L. Rev. 1183, 1183–84 (1993) (stating that American adherence to the Civil and Political Rights Covenant would enhance the United States' international role in promoting the rule of law and democratic ideals).
III. POLICY REASONS WARRANTING A LEGAL PROHIBITION OF CORPORAL PUNISHMENT OF CHILDREN

The fact that seven other countries and Minnesota prohibit subabuse corporal punishment of children and that international law supports such a prohibition should be highly persuasive in reconsidering policy on the subject. Still, prohibiting all subabuse corporal punishment of children would represent a veritable sea change in Americans' traditional approach to the subject, especially as it relates to punishment within the family. In order for a proposal of such far-reaching proportions to be taken seriously, this Part offers psychological and sociological data and theories as well as philosophical considerations demonstrating that a ban on all corporal punishment of children would significantly improve individual lives and the condition of society as a whole. Because there are ample bases for prohibition, this Part also examines the question of whether legal reform is advisable or whether reliance exclusively on other means of changing public attitudes would be more appropriate.

Incidentally, in laying out the policy rationales for prohibiting corporal punishment of children, the author is not unmindful that some may object to prohibition on the grounds that it does not take cultural or racial identities of families into account as extenuating circumstances. For instance, many African-Americans contend that "'strong discipline' in the form of corporal punishment is necessary to keep children out of trouble in an environment where trouble lurks on every block. Some also argue that corporal punishment is just a part of black culture." Professor Murray Straus refutes this argument by making three points. First, he notes that corporal

338. The argument that there should be a culturally and/or racially based exemption to a ban on corporal punishment of children is undermined by the fact that this form of discipline is common in different cultures. For example, before the Swedish prohibition on corporal punishment of children, the Swedes had a tradition of harsh physical chastisement of their children. See supra notes 22-26 and accompanying text. Likewise, the English still frequently use corporal punishment on children. See NEWELL, supra note 18, at 53-55, 97-101. Also many immigrant parents in the United States prefer to use corporal punishment when their children misbehave. See Celia W. Dugger, A Cultural Reluctance to Spare the Rod, N.Y. TIMES, Feb. 29, 1996, at B1.

339. STRAUS, supra note 2, at 117; see also Hyman, Corporal Punishment, supra note 3, at 119–20 (stating that many African-American parents believe that physically chastising their young children will spare the latter from getting into trouble later in life and from experiencing brutalization by the authorities).
Corporal Punishment of Children

Corporal punishment became a part of black culture in response to a history of slavery and oppression and suggests that "the continuation of that aspect of black culture interferes with progress towards equality."340 Second, he argues that corporal punishment is not an essential element of strong discipline and does not ultimately help people defend their honor.341 Third, he suggests that those successful African-American adults who were corporally punished as children have not flourished because of corporal punishment, but, rather, in spite of it and due to other parenting strategies.342

This Article purposefully declines to recommend a relativistic approach. If this decision is misguided, let it be known that it is born out of concern for the welfare of all children and social groups rather than out of insensitivity to multiculturalism issues. The decision is predicated upon the tautology that human beings share the quality of being human. They have it in common to flinch from pain; they share psychological reactions to being rendered simultaneously helpless and maddened by the use of force against which there is no redress.343 As this Part will show, these are reactions that may be ruinous for people across the spectrum of nationalities and races.344 These are also reactions that mirror a universal human hunger for right treatment and for a respect that acknowledges each person's humanity.345 It is not far-fetched, therefore, to suggest that abolition of corporal punishment of children may actually serve rather than disserve the cause of diversity by strengthening all children's protection from violence and from the dehumanization of undergoing violence, regardless of any particular child's background or identity.346

340. STRAUS, supra note 2, at 117.
341. See id.
342. See id.
343. See infra notes 348–65, 368–84 and accompanying text.
344. See infra notes 368–405 and accompanying text.
345. See infra notes 406–27 and accompanying text; see also THOMAS HOBBES, LEVIATHAN 106, 149 (Herbert W. Schneider ed. 1958) (describing the respect that people naturally seek from each other); IMMANUEL KANT, THE PHILOSOPHY OF LAW 54, 56 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1796–97) (urging that people should regard themselves as an end rather than a means and that every person ought to be his or her own master by right).
346. The international human rights instruments discussed in Part II of this Article may also be interpreted to contribute toward equalizing the status of all children to that of adults insofar as protections against violence are concerned. See supra Part II.
A. Reasons for Prohibiting Corporal Punishment of Children

1. Psychological and Sociological Reasons for Prohibiting Corporal Punishment of Children—Respected theoretical constructs and accumulating data indicate that corporal punishment jeopardizes children while they are children and that such punishment has lasting deleterious effects upon reaching adulthood. The harm done represents personal loss and pain for the individuals who undergo corporal punishment but it also may exact a considerable toll on a society-wide scale. While it would be impossible within the confines of this Article to give a comprehensive description of these phenomena, even a superficial foray into the theories and data establishes a persuasive policy basis for reform directed toward prohibiting corporal punishment of children. Persuasive but not perfect. At the outset of this discussion, it should be candidly acknowledged that there is some controversy among health and child care professionals over whether light or moderate spanking does any actual harm. Nevertheless, this Article will take the position, in company with most experts on the subject, that, on balance, persuasive policy reasons for a prohibition exist. The various theories and data, considered in total, make it apparent that the overwhelming evidence of the injurious effects of corporal punishment of children is accompanied by almost no evidence of lasting benefits. Moreover, corporal punishment may be challenged on moral grounds.

347. For commentators acknowledging the existence of the controversy, see Edwards, supra note 5, at 990–94; Hyman, Corporal Punishment, supra note 3, at 118–20; Kenelm F. McCormick, Attitudes of Primary Care Physicians Toward Corporal Punishment, 267 JAMA 3161, 3163–65 (1992); Murray A. Straus et al., Spanking by Parents and Subsequent Antisocial Behavior of Children, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 761, 762–64 (1997); and Fredric P. Nelson, A Letter Supporting Physical Discipline, NEWSLETTER OF THE SECTION ON CHILD ABUSE & NEGLECT (Am. Acad. of Pediatrics, Elk Grove Village, Ill.), Sept. 1993, at 1, 1–3. A recent article takes the position that parents who are authoritative (rather than authoritarian) in their parenting and who have established a “warm, engaged rational parent-child relationship” may use spanking without any adverse consequences. See Diana Baumrind, Parenting: The Discipline Controversy Revisited, 45 FAM. REL. 405, 412 (1996). However, an even more recent article reports on a study showing that parental corporal punishment causes an increase in children’s antisocial behavior regardless of the warmth and cognitive stimulation parents provide. See Straus et al., supra, at 764–67.

348. Although there is some evidence that corporal punishment may have “an immediate deterrent effect” on children’s misbehavior, see Hyman, Corporal Punishment, supra note 3, at 119, there is also data showing that any deterrent effect is
Turning first to the damage which physical chastisement may work during childhood, it appears that there are a number of potential adverse effects. Corporal punishment may cause children to exhibit increased physical aggressiveness. Worse still, for both the child-victims and society at large, children who are corporally punished also tend to have less capacity for empathy. Coupling aggressiveness with lack of empathy creates a propensity to hurt others without compunction. This correlation of corporal punishment with childhood aggression and lack of empathy is no minor consideration in an era when the incidence of youth violence has reached unacceptably high levels.
Ironically, corporal punishment, which often is the result of parental concern, may actually hamper relations between parents and their children. This impairment of the parent-child bond is not only unfortunate but, it appears, is quite unnecessary: there is considerable data indicating that corporal punishment does not, in any consistent way, deter misbehavior or encourage good behavior on the part of children. Most experts agree that corporal punishment does nothing to fulfill the disciplinary goal of developing a child's conscience so as to enable him or her to behave well without parental prodding.

Physical attacks on a child intended to inflict pain generally do just that—they cause the child to feel physical pain and an accompanying terror of that pain. As an invasion of their bodily integrity, children may find the experience "humiliating and degrading." Experts have also found that corporal punishment is associated with juvenile delinquency. See NEWELL, supra note 18, at 43-46; STRAUS, supra note 2, at 108-09.

See GREVEN, supra note 350, at 123-27; SEARS & SEARS, supra note 1, at 148-49 (stating that hitting devalues the parent-child relationship); STRAUS, supra note 2, at 153-54; Herman, supra note 2, at 18; Jan Hunt, Ten Reasons Not to Hit Your Kids, in MILLER, supra note 350, app. D at 169; Lawrence S. Wissow, & Debra Roter, Toward Effective Discussion of Discipline and Corporal Punishment During Primary Care Visits: Findings from Studies of Doctor-Patient Interaction, 94 PEDIATRICS 587, 587 (1994). But see J. RICHARD FUGATE, WHAT THE BIBLE SAYS ABOUT . . . CHILD TRAINING 111 (1980) (maintaining that proper use of physical chastisement is the only way to foster family fellowship); ROY LESSIN, SPANKING: WHY, WHEN, HOW? 22-23 (1982) (asserting that a truly loving relationship between parent and child may necessitate spanking).

See LEACH, supra note 11, at 224; NEWELL, supra note 18, at 16-21; SEARS & SEARS, supra note 1, at 164 (explaining thatspanking doesn't work because it does not promote good behavior, creates a distance between parent and child, and contributes to a violent society); STRAUS, supra note 2, at 149-51; Caldwell, supra note 349, at 384-85; Edwards, supra note 5, at 1020; Herman, supra note 2, at 27-32; McCormick, supra note 347, at 3161-62. But see FUGATE, supra note 352, at 127-130 (arguing that physical chastisement helps children to be obedient).


See DOBSON, supra note 349, at 47; FUGATE, supra note 352, at 136; GREVEN, supra note 350, at 122-23; NEWELL, supra note 18, at 12; STRAUS, supra note 2, at 5, 7, 9-10; Feshbach, supra note 349, at 29-30; Graziano & Namaste, supra note 354, at 450; Herman, supra note 2, at 21; McCormick, supra note 347, at 3162.

See NEWELL, supra note 18, at 12; see also JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 73-74 (1979); MILLER, supra note 11, at 17; SEARS
punishment may produce in children neurotic reactions such as depression, withdrawal, anxiety, tension, and, in older children, substance abuse, interference with school work, and precocious sexual behavior. Corporal punishment can cause serious physiological damage as well, including somatic responses such as headaches and stomachaches. Even more dangerous, corporal punishment of children is often the prelude to child abuse as more traditionally conceived. It

& SEARS, supra note 1, at 152 (explaining that children may feel anger, humiliation, and a sense of unfairness in response to corporal punishment). But see DOBSON, supra note 349, at 84 (arguing that corporal punishment can and should be used so as not to break the child's spirit). Some who favor corporal punishment of children see its value precisely in that it humbles the child. See, e.g., FUGATE, supra note 352, at 139.

357. See HYMAN, READING, WRITING, AND THE HICKORY STICK, supra note 3, at 94, 99–100; ALICE MILLER, THE DRAMA OF THE GIFTED CHILD 43 (1994); NEWELL, supra note 18, at 46; Herman, supra note 2, at 18; Wissow & Roter, supra note 352, at 588.

358. See GREVEN, supra note 350, at 129; HYMAN, READING, WRITING AND THE HICKORY STICK, supra note 3, at 94, 100; SEARS & SEARS, supra note 1, at 148, 152.


360. See HYMAN, READING, WRITING AND THE HICKORY STICK, supra note 3, at 95, 100; cf Herman, supra note 2, at 39 (stating that corporal punishment causes children to obey their parents out of fear).

361. See HYMAN, READING, WRITING AND THE HICKORY STICK, supra note 3, at 96; NEWELL, supra note 18, at 46; Wissow & Roter, supra note 352, at 587; cf MILLER, supra note 357, at 97 (explaining that people who as children "repressed their intense feelings" may try to regain those feelings by means of drugs or alcohol) (citation omitted).

362. See HYMAN, READING, WRITING AND THE HICKORY STICK, supra note 3, at 96, 99; Herman, supra note 2, at 39.

363. See HYMAN, READING, WRITING AND THE HICKORY STICK, supra note 3, at 96.

364. See id. at 1; LEACH, supra note 11, at 225; NEWELL, supra note 18, at 31–33; JORDAN RIAK, PLAIN TALK ABOUT SPANKING 3 (1994); Hyman, Corporal Punishment, supra note 3, at 114–16; Corporal Punishment in the Home: Commentary, NEWSLETTER OF THE SECTION ON CHILD ABUSE & NEGLECT (Am. Acad. of Pediatrics, Elk Grove Village, Ill.), Mar. 1992, at 1, 2; Wissow & Roter, supra note 352, at 587.

365. See HYMAN, READING, WRITING AND THE HICKORY STICK, supra note 3, at 95, 100.

366. See NEWELL, supra note 18, at 21–31; SEARS & SEARS, supra note 1, at 149; STRAUS, supra note 2, at 81–87, 90–97; DAVID A. WOLFE, CHILD ABUSE: IMPLICATIONS FOR CHILD DEVELOPMENT AND PSYCHOPATHOLOGY 51 (Developmental Clinical Psychology and Psychiatry Series No. 10, 1987) (suggesting that child abuse may be caused by social structures which neither sanction nor provide alternatives to the use of corporal punishment); Richard J. Gelles, Violence Toward Children in the United States, in CRITICAL PERSPECTIVES ON CHILD ABUSE 53, 75 (Richard Bourne & Eli H. Newberger eds., 1979); Gibbons, supra note 32, at 112; Herman, supra note 2, at 40–41; McCormick, supra note 347, at 3161; see also LEACH, supra note 11, at 224 (noting that use of corporal punishment on children has a tendency to escalate in intensity); Caldwell, supra note 349, at 381–82 (observing that corporal punishment can lead to child abuse); cf Brandt F. Steele, The Psychology of Child Abuse, 17 FAM. ADVOC., Winter 1995, at 19, 21 (stating that abusive parents tend to believe "in the educational value and necessity of using physical punishment as a disciplinary tool"). But see Demie Kurz, Corporal Punishment and Adult Use of Violence: A Critique of
is no secret that severe child abuse has become a deplorably pervasive problem in American society.\textsuperscript{367}

The ill effects of corporal punishment on children's lives are reason enough to consider prohibition. However, as pathetic as the child's plight may be, some of the most ominous ramifications of corporal punishment of children are those that are manifested when children who have felt the rod reach adulthood. Analysis by respected psychologists and experts in related fields reveals that corporal punishment of a child is all too likely to produce an adult with lasting psychic suffering and maiming. The root cause of the ensuing adult disorders is that children are not permitted to vent the rage and humiliation they feel upon being struck.\textsuperscript{368} They may not express these feelings for a variety of reasons. Looked at from a child's point of view, it is dangerous to react hostilely toward the very people upon whom one is dependent\textsuperscript{369} and with whom one invariably identifies\textsuperscript{370}—especially if an outbreak of hostility is

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"Discipline and Deviance", 38 SOC. PROBS. 155, 155–57 (1991) (arguing that there is no convincing evidence for singling out corporal punishment as a major cause of child abuse without also considering gender, race and class).
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367. See Elizabeth Gleick, The Children's Crusade: A '60's-Style Campaign Aims to Put Kids First in This Year's Budget Battles and the Presidential Race, TIME, June 3, 1996, at 31, 32 (reporting that in 1992 there were 850,000 substantiated cases of child abuse or neglect in the United States); Bob Herbert, In America: Turning Children's Rights into Reality, N.Y. TIMES, May 27, 1996, at 19 (relating that every seven hours an American child dies from abuse or neglect); Sweeney, supra note 351, at 53 (advising that from 1985 to 1994, the number of reported cases of child abuse nationwide increased 64 percent); Who Stands for Children?, N.Y TIMES, June 1, 1996, at 18 (stating that each day nearly 8,500 children are abused or neglected in the United States).

368. Children are likely to experience anger and a sense of degradation when they are corporally punished. See GREVEN, supra note 350, at 124–27, 132; LEACH, supra note 11, at 224; MILLER, supra note 350, at 92–94; SEARS & SEARS, supra note 1, at 147, 152; STRAUS, supra note 2, at 69; Herman, supra note 2, at 18. These reactions are especially understandable in light of the fact that children, even more so than adults, experience being physically struck as a profoundly traumatic event. See STRAUS, supra note 2, at 9–10; Herman, supra note 2, at 21; cf. MILLER, supra note 357, at 78–79 (discussing the intensity of feelings unique to young children).

369. See GREVEN, supra note 350, at 132 (describing how a child cannot afford to react with anger towards a punitive parent "on whom he or she depends for nurturance and life itself"); MILLER, supra note 357, at 8; MILLER, supra note 2, at 6; J. KONRAD STETTBRACHER, MAKING SENSE OF SUFFERING: THE HEALING CONFRONTATION WITH YOUR OWN PAST 27–28 (1991).

370. See GREVEN, supra note 350, at 132 (theorizing that children suppress anger in response to hurtful discipline administered "by adults whom the child loves"); ALICE MILLER, BANISHED KNOWLEDGE: FACING CHILDHOOD INJURIES 98–105 (1988) (explaining that the child identifies so thoroughly with the punishing parent that the child is unable to comprehend when an injustice is being done to him or her); ALICE MILLER, PICTURES OF A CHILDHOOD 4–5 (1986) [hereinafter MILLER, PICTURES] (suggesting that because children love their parents the former tend to absolve the latter from responsibility for cruelty to the children); STRAUS, supra note 2, at 163 (noting that it is difficult to
likely to be met with more intimidation and pain. It may also be inconceivable, especially to younger children, that the parent’s punitiveness could be wrong. Nor can very young children and babies even accurately conceptualize what is happening to them so as to respond consciously to their predicament.

Despite its function as a natural defense mechanism, this quiescence does nothing to assuage the child’s hurt and anger; to the contrary, such feelings must go somewhere and, ultimately, many children have no alternative but to repress them. The psychologist Alice Miller has explained the dynamic as follows:

If there is absolutely no possibility of reacting appropriately to hurt, humiliation, and coercion, then these experiences cannot be integrated into the personality; the feelings they evoke are repressed, and the need to articulate them remains unsatisfied, without any hope of being fulfilled.

....

... What becomes of this forbidden and therefore unexpressed anger? Unfortunately, it does not disappear, but is transformed with time into a more or less conscious hatred directed against either the self or substitute persons, a hatred that will seek to discharge itself in various ways permissible and suitable for an adult.

The repressed childhood fury does, then, “go somewhere”; after years of smoldering intrapsychically, the accumulated ire can emerge in some adults in the guise of personality

acknowledge that corporal punishment is destructive because it means condemning one’s own parent(s).

371. See GREVEN, supra note 350, at 123; LEACH, supra note 11, at 224; MILLER, supra note 350, at 55.

372. See MILLER, supra note 11, at 59, 61, 74, 247–48; MILLER, supra note 350, at 19–20, 55.

373. See GREVEN, supra note 350, at 19; STETTRACHER, supra note 369, at 28; HERMAN, supra note 2, at 21.

374. See GREVEN, supra note 350, at 126; MILLER, supra note 11, at 7, 61; ALICE MILLER, THE UNTOUCHED KEY: TRACING CHILDHOOD TRAUMA IN CREATIVITY AND DESTRUCTIVENESS 159–60, 168 (1990) [hereinafter MILLER, UNTOUCHED KEY]; STRAUS, supra note 2, at 69; HERMAN, supra note 2, at 19.

375. MILLER, supra note 11, at 7, 61.
disorders characterized by destructiveness either toward the self or toward others.\textsuperscript{376}

A correlation has been drawn, for instance, linking repressed childhood anger with such inward-turning adult disorders as depression,\textsuperscript{377} obsessive-compulsive behavior,\textsuperscript{378} dissociation,\textsuperscript{379} and paranoia.\textsuperscript{380} Such childhood anger is also thought to contribute to adult aggressiveness,\textsuperscript{381} authoritarianism,\textsuperscript{382} and lack

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\item \textsuperscript{376} See Greven, supra note 350, at 128–74, 186–212; Miller, supra note 350, at 82, 94–95; Sears & Sears, supra note 1, at 153–54 (listing the negative long term effects of spanking such as psychological disturbances, aggressive behavior, and increased rate of abusing a child or spouse); Straus, supra note 2, at 67–146; Herman, supra note 2, at 25, 36–39; Wissow & Roter, supra note 352, at 587–88.
\item \textsuperscript{377} See Greven, supra note 350, at 130–35; Straus, supra note 2, at 67–79; Herman, supra note 2, at 39; Wissow & Roter, supra note 352, at 588. If a child is unable to retaliate verbally in response to corporal punishment, an urge to punish in turn may be directed toward himself or herself upon reaching adulthood. Depression or even suicide are forms of such self-punishment. See Greven, supra note 350, at 131–32; Straus, supra note 2, at 77–79.
\item \textsuperscript{378} When a child represses the anger he or she feels upon being corporally punished, this dynamic may cause resort to self-imposed rituals, rules, and controls to keep the repressed anger within bounds later in life. These rituals, rules, and controls are symptomatic of obsessive-compulsive behavior. See Greven, supra note 350, at 135–41.
\item \textsuperscript{379} See Greven, supra note 350, at 148–68. Dissociation may be manifested by hysterical trances, multiple personalities, or more benign dissociative states. See id. at 148. The process of dissociation may occur when the anger and/or pain caused by corporal punishment is so unbearable that the victim creates alternative selves to deal with such feelings or, in a milder reaction, induces himself or herself to render the feelings distant and unconscious. See id. at 148; cf. Miller, supra note 357, at 30–38 (explaining that when a child is forced to adapt to parental dictates that are not geared to the child’s needs, the child will split feelings of need from the rest of his or her psyche and submerge such feelings).
\item \textsuperscript{380} See Greven, supra note 350, at 168–74; cf. Miller, supra note 350, at 86–87, 108–09, 111 (indicating that paranoia, such as that exhibited by Adolf Hitler and Nicolae Ceausescu, may result from beatings and harsh discipline in childhood). The etiology of paranoia may be in the child’s continuing fear of pain caused by corporal punishment. The child is imbued with a continuing sense of endangerment and of a need for vigilance. See Stettbacher, supra note 369, at 16, 18 (pointing out that physical attacks on a child can lead to “a constant state of readiness to ward off perceived dangers”). However, because the child’s anger at being so punished is suppressed, the anger persists into adulthood when it is displaced onto others who, as stand-ins for the punishing parents, also become objects of a now grown-up unreasonable fear. See Greven, supra note 350, at 168–69, 173.
\item \textsuperscript{381} The anger repressed in childhood is acted out or repeated in adult life as aggression against others who are perceived as surrogates for the once punitive parents. See Greven, supra note 350, at 126–27; Miller, supra note 11, at 61, 65–66, 115–17, 172; Miller, supra note 350, at 91, 108; Sears & Sears, supra note 1, at 153–54; Herman, supra note 2, at 36; see also Straus, supra note 2, at 99, 103, 106, 110, 113–15 (describing the linkages between corporal punishment and criminal behavior).
\item \textsuperscript{382} The psychologist Alice Miller has explained that corporal punishment of children can lead to their development into authoritarian adults in the following manner:
of empathy,\textsuperscript{383} conditions in which repressed anger is acted out at the expense of others. Not uncommonly these others are the adult's own children, thereby perpetuating an intergenerational cycle of childhood trauma and adult neurosis or psychosis.\textsuperscript{384}

Parental corporal punishment may adversely affect adult sexuality as well. Because a person whom the child loves is doing the hitting, the child may confuse love with being hurt. It appears that this fusion of love and pain can lead to a predisposition for sadomasochism when the child becomes an adult.\textsuperscript{385} This may especially be the case because corporal punishment is often administered upon a child's buttocks,\textsuperscript{386}

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The victims of such an upbringing ache to do to others what was once done to them. If they don't have children, or their children refuse to make themselves available for their revenge, they line up to support new forms of fascism. Ultimately, fascism always has the same goal: the annihilation of truth and freedom. People who have been mistreated as children, but totally deny their suffering, use the mottoes and labels of the day. . . . They are consumed by the perverse pleasure in the destruction of life that they observed in their parents when young. They long to at last be on the other side of the fence, to hold power themselves, passing it off, as Stalin, Hitler, or Ceausescu have done, as "redemption" for others. . . . The unconscious compulsion to revenge repressed injuries is more powerful than all reason. That is the lesson that all tyrants teach us.
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\textsuperscript{383} See GREVEN, supra note 350, at 127–29 ("The parent who hurts a child while imposing discipline is teaching a lesson in indifference to suffering . . . ."); MILLER, supra note 11, at 79–83, 115; cf. MILLER, supra note 357, at 34 (theorizing that when the child is forced to adapt to parental needs, through corporal punishment or otherwise, a consequence is the impossibility of experiencing "consciously certain feelings of his own . . . . either in childhood or later in adulthood").

\textsuperscript{384} See MILLER, supra note 2, at 61, 211; MILLER, supra note 11, at 232, 247; MILLER, PICTURES, supra note 370, at 6–7; Herman, supra note 2, at 34–45; Steve Offner, New Light on Child Killings—Study Links Tolerance of Physical Punishment to Deaths, SYDNEY MORNING HERALD, Sept. 15, 1994, at P3.

\textsuperscript{385} See GREVEN, supra note 350, at 174–86; NEWELL, supra note 18, at 48–49; STRAUS, supra note 2, at 130–36; Herman, supra note 2, at 39.

\textsuperscript{386} One writer recommends that "God has given parents the perfect area on which to administer a spanking—the child's bottom. It is a safe place because it is well cushioned, yet it is a highly sensitive area." LESSIN, supra note 352, at 75; see also DOBSON, supra note 349, at 47 (suggesting that when disciplining a toddler, "[t]wo or three stinging strokes on the legs or bottom with a switch are usually sufficient"); FUGATE, supra note 352, at 143 (stating that "[t]he rod should be used on the bare back, preferably on the buttocks"); GREVEN, supra note 350, at 184 (observing that
which are an erogenous zone. Thus, the basis is established for the child to merge love, pain, and sexual feelings into later masochistic sexual desires or other sexual perversions.

Less obviously, there is evidence that corporal punishment during childhood may even impair adult capacities for economic achievement and success in employment. The theory is that corporal punishment is liable to engender certain characteristics, such as passivity, withdrawal, depression, powerlessness, alienation, and/or decreased initiative and creativity, which may interfere with the ability to hold intellectually satisfying, lucrative occupations.

The toll that childhood corporal punishment may take on individual lives is, therefore, multifaceted and baneful. The vitality and equilibrium of an individual's psychic life may be distorted and violated by corporal punishment in ways that cause lasting suffering and varying degrees of persistent dysfunction. This internal debilitation, in turn, has ramifications for a person's relations with others, impairing familial dynamics and personal achievement.

That corporal punishment of children is a widespread practice in the United States means personal despair and suffering for the millions of men and women who have been subjected to such punishment—regardless of whether they are aware of the origin of their tribulations. This, of course, is bad in itself, but the tragedy does not end there. The fact is that corporal punishment is thought by some to have played a decisive role in promoting man's inhumanity to man on a societal scale. Experts have found that criminals are typically people

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388. See Bakan, supra note 387, at 113; Greven, supra note 350, at 183–85; Johnson, supra note 387, at 3; RiaK, supra note 364, at 3; Hunt, supra note 352, at 170.

389. See Straus, supra note 2, at 137–46.

390. See id. at 138–39.

391. See supra notes 3–7 and accompanying text.

who underwent corporal punishment in childhood.\textsuperscript{393} Crime, of course, is a nationwide problem of major concern in the United States.\textsuperscript{394} Regrettably, it is not hard to think of instances of more massive brutality than that perpetrated by the common criminal; the historical evidence comes all too readily to mind. Without even considering the wars and inquisitions of earlier eras, modern history provides a panorama of appalling carnage and mayhem: Nazi torture and extermination of Jews, Gypsies, and others;\textsuperscript{395} Stalin's persecution of kulaks and other dissidents in the then Soviet Union;\textsuperscript{396} American "napalming" of villages in Vietnam,\textsuperscript{397} the Khmer Rouge's butchery of more than one million Cambodians,\textsuperscript{398} the bloody strife between Tutsis and Hutus in Rwanda;\textsuperscript{399} Pinochet's murderous policies against the left in Chile,\textsuperscript{400} and the internecine slaughter in former Yugoslavia.\textsuperscript{401} As we all know, the list could go on and on. But even these few selected examples raise perplexing questions. How do people come to such a pass that they can commit genocide and other atrocities against each other?

\textsuperscript{393} See Greven, supra note 350, at 194–98; Miller, supra note 11, at 198–202, 231, 249; Newell, supra note 18, at 43–46; Straus, supra note 2, at 99, 108–20; Zulueta, supra note 349, at 219; Herman, supra note 2, at 39.

\textsuperscript{394} See Michael Hedges, America's Crime Forecast Grim: Study Warns of Future Loaded with Hoods, Hurts, Cin. Post, Jan. 6, 1996, at A2 (discussing a study on crime that concluded only a minority of criminals are jailed and crime is predicted to get worse); Richard Liefer, Crime Study Paints a Dark Picture, Chi. Trib., Jan. 6, 1996, at 2 (reporting that violent crime is at an all-time high); Violent Crime Labeled "Ticking Bomb", L.A. Times, Jan. 6, 1996, at A4 (explaining that crime levels remain at a historic high and discussing a report that shows that a significant number of crimes are unreported).


\textsuperscript{400} See Javier Martinez & Alvaro Diaz, Chile: The Great Transformation 12–16 (1996).

Where, one wonders, has their empathy and kindness gone? Why is there apparently an impulse to aggress in such monstrous ways and in such monstrous proportions? And, why is this aggression such a pervasive feature of the human condition historically and geographically?

Given the complexity of societal evolution and tensions, it would be simplistic to suggest that any one factor is totally responsible for all historical events involving mass cruelty. Nevertheless, it is interesting indeed that various types of corporal punishment have been part of traditional child rearing practices in most parts of the globe—a shared experience across time, cultural barriers, and national borders. Moreover, corporal punishment of children can give rise to the very symptomology of aggressiveness, authoritarianism, and lack of empathy that characterizes societal acts of inhumanity.

Thus, the commonality of childhood corporal punishment and its adverse effects on adult personality closely parallel the ingredients needed for inhumanity on a grand scale. Corporal punishment of children may be a hidden but potent factor contributing to man's continuing pitilessness and inclination for barbarism. Childhood suffering due to corporal punishment, taken in conjunction with other psychological, political, and economic dynamics, may help to account for the Hitlers, Stalins, and Pol Pots of the world and all those masses of people who willingly followed them. In fact, adults who have been corporally punished in childhood tend to feel most comfortable in roles that, if they are not authoritarian, are alternatively blindly obedient.

In short, there is accumulating data as well as a sort of theoretical new thinking among psychologists, pediatricians, and other experts on human development that establish a

402. See ZULUETA, supra note 349, at 212–18; John E.B. Myers, The Legal Response to Child Abuse: In the Best Interest of Children?, 24 J. FAM. L. 149, 157 (1985–86); Mason P. Thomas, Jr., Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspectives, 50 N.C. L. REV. 293, 298 (1972). To date, only seven countries have adopted legal measures (judicially or through legislation) against corporal punishment of children in the home. See supra notes 19–154 and accompanying text.

403. See supra notes 381–83 and accompanying text.


405. See GREVEN, supra note 350, at 200–04; MILLER, supra note 11, at 70; Herman, supra note 2, at 37; cf STRAUS, supra note 2, at 138–39 (observing that childhood corporal punishment may cause people to become passive and that it "teaches children what to think, not how to think").
scientific basis for concluding that corporal punishment of children is a source of grievous destruction. This destructiveness extends not only to the drama of individual lives, but also to that larger stage where societal dynamics are enacted. The implications of the data and expert analyses bear on the very evolution of human nature and on the future prospects for the human race. However, for those who are not persuaded by scientifically based reasons for prohibiting corporal punishment of children, there are philosophical and moral considerations which should inform further policy decisions on this issue.

2. Philosophical and Moral Reasons for Prohibiting Corporal Punishment of Children—Regardless of the scientific studies and postulates, the argument can be made that corporal punishment of children should be prohibited simply because it is wrong. Three interrelated ideas demonstrate this. First, since it is wrong—indeed, even criminal—to hit adults, it is also wrong to hit less mature human beings who, although they are children, are nonetheless still human beings. Second, human dignity is offended when a child is struck; human dignity is protected under international law and has been recognized as an important factor by the U.S. Supreme Court in cases decided under the U.S. Constitution. Third, permitting corporal punishment of children is tantamount to treating them as chattels, and no one should be another's chattel.

The first point may perhaps best be illustrated by use of a hypothetical problem. If your adult neighbor engages in offensive or even infuriating behavior, you would probably not swat him or her. If that neighbor has less than average adult physical or mental abilities, you would probably be even less likely to use physical force as a dispute resolution technique. And, if you love that neighbor as if he or she were a family member, hitting that neighbor would seem inconceivable. Now imagine that the offender is your child—typically, a person of less than average adult abilities and a person you love as a family member. Would you hit your child? 406

It is common knowledge that if you hit your adult neighbor to get him or her to cease annoying behavior, you could be prosecuted for assault and/or battery since each state has laws criminalizing such conduct. 407 If hitting an adult is assault


407. Every state has statutes criminalizing conduct that would constitute an assault and/or battery. See ALA. CODE §§ 13A-6-20 to -22 (1994); ALASKA STAT.
and/or battery, it would seem even more heinous when the victim is “a person of less than average adult abilities and a person you love as a family member,” i.e., someone more vulnerable and beloved than the average next door neighbor. 408

408 See Edwards, supra note 5, at 983 (stating that one could consider corporal punishment as a battery); CINDY S. MOELIS, BANNING CORPORAL PUNISHMENT: A CRUCIAL
Permitting corporal punishment of children when hitting adults is subject to criminal sanctions seems arbitrary and unjust. This is especially true in light of evidence showing that corporal punishment of children is ineffective as a child rearing technique, that such punishment has negative effects, and that there are alternative ways of guiding and instructing children.

One of the reasons that corporal punishment of children seems unjust is not only the sense that children are being treated unequally in comparison to adults, but also because corporal punishment offends human dignity. The preservation of human dignity is a basic tenet of international human rights law and a federal constitutional value. As such, human
dignity should be a juridically recognized attribute of juveniles as well.\textsuperscript{416} Dignity may be violated by coercive physical attacks on the body.\textsuperscript{417} That the victim is smaller and that the coercion is inflicted by a caregiver does not change the nature of the violation and, therefore, its offensiveness to self-respect.\textsuperscript{418}

Perhaps one of the reasons that mankind has been slow to recognize corporal punishment's infringement on equality and dignity arises from the fact that children have been regarded


That the law should recognize the human dignity of minors does not mean that American law has always embraced this principle in the past. See Tremper, supra note 415, at 1320–44; Woodhouse, supra.

\textsuperscript{417} See \textit{NEWELL}, supra note 18, at 15; Natalie Abrams, \textit{Problems in Defining Child Abuse and Neglect, in HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD} 155, 160 (Onora O'Neill & William Rudderick eds., 1979); Cohen, \textit{Corporal Punishment}, supra note 13, at 113–15; Rhonda Copelon, \textit{Recognizing the Egregious in the Everyday: Domestic Violence as Torture} 25 \textit{COLUM. HUM. RTS. L. REV.} 291, 298, 309–11, 330, 340–41 (1994); Paust, supra note 414, at 168, 178–79; cf Hudson v. McMillian, 503 U.S. 1, 4, 10–11 (1992) (holding that excessive use of physical force against a prisoner may constitute cruel and inhuman punishment in violation of the Eighth Amendment even though the prisoner does not suffer serious injury); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (stating that corporal punishment is "degrading to the punisher and to the punished alike"); Adolf, supra note 415, at 848 (arguing that infliction of unnecessary pain and physical violence in the execution process violates prisoners' dignity); Cohen, \textit{Developing Jurisprudence}, supra note 416, at 65 (noting that respect for the child's physical integrity is "closely linked to concepts of human dignity"). \textit{But see} Ingraham v. Wright, 430 U.S. 651, 664, 671 (1977) (holding that the Eighth Amendment does not apply to paddling children as a disciplinary technique in public schools).

\textsuperscript{418} See \textit{MILLER}, supra note 2, at 312–13 (remarking that beating children is humiliating treatment); \textit{see also} \textit{MILLER}, supra note 11, at 17, 263 (commenting that corporal punishment of children is "always degrading" and that modern child rearing practices, including spankings, do not respect the child); \textit{GREVEN}, supra note 350, at 124–27; \textit{NEWELL}, supra note 18, at 12–16.
as their parents’ chattels.\textsuperscript{419} The underlying assumption appears to have been that if adults conceive children or gain legal custody of them, then those adults effectively own the children and may do to their progeny that which cannot be done to other people who are not “owned”\textsuperscript{440}—including physically attacking children to coerce or enlighten.

The concept goes back to earliest civilizations when it took on its most awful manifestations. For example, under the Code of Hammurabi, a father could legally sell, exchange, or even kill his children.\textsuperscript{421} The ancient Hebrews, Greeks, and Romans all had the legal “right” to kill their children.\textsuperscript{422} Even in the eighteenth century, infanticide was a common practice throughout Europe.\textsuperscript{423} For centuries parents have been permitted to abandon and physically attack or cause pain to their children with impunity.\textsuperscript{424}

Corporal punishment of children, which dates back to antiquity,\textsuperscript{425} reflects children’s continued classification as parental property. It is telling that as historically oppressed peoples have liberated themselves from being legally categorized as


\textsuperscript{420} See Martin Guggenheim, The Best Interests of the Child: Much Ado About Nothing?, in CHILD, PARENT, & STATE: LAW AND POLICY READER 27, 28 (S. Randall Humm et al. eds., 1994); Tremper, supra note 415, at 1318–19; Woodhouse, supra note 419, at 1044–45; cf. Onora O’Neill, Begetting, Bearing, and Rearing, in HAVING CHILDREN, supra note 417, at 25, 27 (describing the ways in which biological parents have disposed of their unwanted children).

\textsuperscript{421} See Herman, supra note 2, at 5.

\textsuperscript{422} See id.; see also Lloyd deMause, The Evolution of Childhood, in THE HISTORY OF CHILDHOOD 1, 25–28 (Lloyd deMause ed., 1974) (detailing the practice of infanticide in early civilizations).

\textsuperscript{423} See deMause, supra note 422, at 29.

\textsuperscript{424} See id. at 32–41.

\textsuperscript{425} See Caldwell, supra note 349, at 371; deMause, supra note 422, at 17, 41–43; Edwards, supra note 5, at 984, 986–87; Herman, supra note 2, at 5–7; see also Straus, supra note 2, at 170 (stating that “[c]ultural norms that make violence by parents legitimate have been the predominant pattern of humanity”).
the property of others, such liberation typically has brought in its wake legal protection from physical chastisement. With the emancipation of Confederate slaves, Caucasians could no longer legally beat African-Americans;\(^ {426}\) likewise, American women ultimately achieved reform such that husbands could no longer legally beat their wives.\(^ {427}\) History and logic would seem to dictate that if children were no longer regarded as parental chattels, they too would soon be spared the rod.

As the above exegesis shows, corporal punishment of children is harmful to individuals and society and is also morally objectionable in view of late twentieth century conceptions of decency and human worth. With such considerations at stake, Americans and, indeed, people everywhere, are faced with the responsibility of making a conscious policy choice of whether to take measures to prevent corporal punishment of children. For those, like this author, who favor prevention, the difficult question remains as to how reform can most successfully be achieved.

### B. Means of Prohibiting Corporal Punishment of Children

An obvious means of preventing corporal punishment of children is to educate people that such punishment is unacceptable. In Ireland, for example, the Irish Society for Prevention of Cruelty to Children (ISPCC) has been campaigning to teach parents to use other disciplinary tactics in lieu of corporal punishment.\(^ {428}\) This enterprise has been accompanied

\(^ {426}\) Indeed, "many abolitionists, loathing all forms of physical bondage and abuse of the powerless, also fought to end corporal punishment. . . . [E]ducational reformers viewed the whipping of children in schools and at home as similar to the lashing of slaves." Stephen Nissenbaum, Lighting the Freedom Tree, N.Y. TIMES, Dec. 25, 1996, at A17. For a further description of the lashing of slaves, see J ohn W. Blassingame, The Slave Community: Plantation Life in the Antebellum South 251 (1979); G age Smith, The Nation Comes of Age: A People's History of the Ante-Bellum Years 585, 615–16 (1981); David Brion Davis, Slavery, in 17 WORLD BOOK, supra note 129, at 501, 503.


by a 12 percent reduction in the number of Irish adults who think slapping children is advisable.\textsuperscript{429} The Swedish government also has waged a strenuous education campaign against corporal punishment of children with the result that there has been a substantial reduction in the incidence of use and approval of parental corporal punishment in that country as well.\textsuperscript{430} However, neither the ISPCC nor the Swedish government has seen fit to rely exclusively on education programs. It is noteworthy that the ISPCC is seeking to have the Irish Parliament enact a prohibition of corporal punishment of children\textsuperscript{431} and that the Swedish government's education effort took place in the context of a legislative ban on all corporal punishment of children.\textsuperscript{432} Apparently, the ISPCC and the Swedish government concluded that law has a crucial role to play in ending corporal punishment of children. In this they are joined by the six other nations, in addition to Sweden, that have adopted legal measures explicitly aimed at forbidding such punishment.\textsuperscript{433} In fact, law can play a pedagogical role that enhances public awareness in decisive ways.

Generally speaking, there is a pedagogical purpose inherent in virtually all law. Laws are made to be known;\textsuperscript{434} otherwise, they would be ineffective as an instrument of governance or restraint. The educational impact of law is perhaps most effectually realized by the reciprocal interplay between law and social values. Law draws its content from the values of the people it governs. Law assimilates not only a society's values and priorities as they are, but also those values and priorities which comprise that society's goals and needs. It is in this latter initiatory phase that law has its most dramatic educative effect because it crystallizes and makes visible the norms which constitute a society's aspirations and ideals.\textsuperscript{435}

\textsuperscript{430} See \textit{supra} notes 23-32, 37-50 and accompanying text.
\textsuperscript{432} See \textit{supra} notes 35-37 and accompanying text.
\textsuperscript{433} See \textit{supra} notes 19-154 and accompanying text.
Were Americans to make the policy choice of abolishing corporal punishment of children, a strong argument can be made that the most efficacious way to achieve abolition would be to enact a prohibition that, in its pedagogical role, would complement and enrich other educational strategies. Such a law should make clear, in the most explicit way, that prevention of corporal punishment of children is government policy. Unlike the Minnesota statutes on the subject, this law should be of sufficient comprehensibility to inform lawyers and laypersons alike that corporal punishment of children is banned. If the law also involved legal repercussions for violators, it would leave no doubt that the policy is of paramount importance. Because of government’s imprimatur and the possibility of liability, a prohibitory law of this nature may well be one of the most potent pedagogical tools available in this context.

As mentioned above, hitting or otherwise physically attacking an adult is generally considered a criminal assault or battery, the precise terminology varying according to the context.


The classic case of government taking a pioneering role through the medium of the law is Brown v. Board of Education, 347 U.S. 483 (1954). It will be recalled that in Brown, the Supreme Court struck down de jure racial segregation in public elementary and secondary schools as inherently violative of the Equal Protection Clause of the Fourteenth Amendment. The civil rights movement which followed on the heels of this decision is a vivid testament to the leadership of the Brown Court in rejecting racial segregation as an acceptable part of American life. See MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM 195, 198–99 (1958).

436. See supra notes 155–70 and accompanying text.

437. See NEWELL, supra note 18, at 104; Caldwell, supra note 349, at 387; Edwards, supra note 5, at 1022; Herman, supra note 2, at 44–45; Gibbons, supra note 32, at 144. But see Paul H. Robinson, Are Criminal Codes Irrelevant?, 68 S. CAL. L. REV. 159, 166–67, 200 (1994) (arguing that much of criminal law’s effect is thwarted because the laws are not adequately communicated to the average person). See generally Francis A. Allen, The Morality of Means: Three Problems in Criminal Sanctions, 42 U. PITT. L. REV. 737, 739, 742, 748, 750–61 (1981) (examining how criminal law may be used to affect public attitudes toward criminalized behavior); Natalie Loder Clark, Crime Begins at Home: Let’s Stop Punishing Victims and Perpetuating Violence, 28 WM. & MARY L. REV. 263, 275–79, 281 (1987) (contending that criminal prohibitions convey a pedagogical message that the proscribed conduct is not socially or morally acceptable).
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It would therefore be logical to enact a statute criminalizing corporal punishment of children and making violators potentially subject to the same criminal penalties as may be imposed for other assaults and/or batteries.439 To carry out the intended purpose, one possible version of such a statute might read as follows:

(1) (a) Corporal punishment is defined as the use of physical force with the intention of causing a child to experience bodily pain so as to correct, control, or punish the child's behavior.

(b) Any person who uses corporal punishment on a child shall be guilty of the crime of battery provided that such physical force would be a battery if used on an adult.

(2) The penalties for conviction pursuant to subsection (1) shall be the same as those for conviction under any other criminal battery provision(s) or, in lieu thereof in appropriate cases, shall be a posttrial or postplea diversion program.

(3) Nothing stated in subsections (1) or (2) herein shall preclude or limit further prosecution under any other applicable laws for the use of corporal punishment described in subsection (1).

(4) The proscription set forth in subsection (1) shall not apply to the use of such physical force as is reasonably necessary to prevent death or imminent bodily pain or injury to the child or others.440

438. See supra note 407 and accompanying text.

439. See NEWELL, supra note 18, at 104; Herman, supra note 2, at 44–45; Zimring, supra note 5, at 523–24, 527; cf. Caldwell, supra note 349, at 386–87 (arguing for an incremental approach beginning with a prohibition of corporal punishment in all schools followed by removal of parental corporal punishment as a defense to assault charges). But see Edwards, supra note 5, at 1020–22 (proposing that legislatures enact a ban on corporal punishment with respect to children under five years of age, but that violations of the ban should not be punished); Gibbons, supra note 32, at 144 (noting that while a complete ban on corporal punishment would be most desirable, it may be more realistic first to attempt only a nationwide prohibition of corporal punishment in the schools).

440. The proposed statute represents an amalgam of my own thinking and that of other commentators. In particular, see NEWELL, supra note 18, at 144–45; STRAUS, supra note 2, at 4–5 (providing a definition of corporal punishment); Herman, supra note 2, at 42. The proposed statute has the virtue of assimilating the "crime" of corporally punishing children as part of the criminal law on battery while retaining its specificity as a particular variant of such general law. See Zimring, supra note 5, at 537.
There are reasons for preferring a federal to a state statute criminalizing subabuse corporal punishment of children. Federal regulation provides for a broader base of expertise upon which to draw. See Tom Stacy, What's Wrong With Lopez, 44 U. KAN. L. REV. 243, 255 (1996). Moreover, if prohibition of corporal punishment of children is, as a matter of policy, desirable, then children across the nation should have the benefit of that policy choice rather than only those children fortunate enough to reside in states with more enlightened and activist legislatures. Federal regulation would provide uniform national standards and a policy consistently applicable to all children. See id.

There is extant authority for the proposition that Congress may be empowered to enact such legislation under the Commerce Clause of the U.S. Constitution. The Clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The U.S. Supreme Court has upheld Congress' power under the Commerce Clause to enact social welfare legislation regulating an intrastate activity which, taken by itself or as part of a class of like activities, substantially affects interstate commerce. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253–62 (1964) (upholding Congress' enactment under the Commerce Clause of Title II of the Civil Rights Act of 1964 proscribing racial and other invidious discrimination by certain places of public accommodation in serving potential patrons). The Court has upheld such legislation even when it contained criminal penalties that would seem to regulate areas traditionally left to the states. See Perez v. United States, 402 U.S. 146, 150–57 (1971) (ruling that Congress had the power under the Commerce Clause to enact Title II of the Consumer Credit Protection Act which made intrastate loan sharking a federal crime). Moreover, the Court has historically refused to find that Congress exceeded its Commerce Clause power even when the legislation in question regulated arguably non-commercial intrastate activities—as long as they demonstrated a sufficient impact on interstate commerce. See Wickard v. Fillburn, 317 U.S. 111, 118–29 (1942) (holding constitutional under the Commerce Clause that section of the Agricultural Adjustment Act limiting cultivation of wheat destined for the farmer's own home consumption). This precedent has been thought to imply that Congress can rely on its commerce power to regulate a range of local social problems, including domestic relations. See Stacy, supra, at 248; cf. Kathleen A. Burdette, Comment, Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez, 144 U. PA. L. REV. 1469, 1518 (1996) (tacitly acknowledging that Congress' regulatory reach under the Commerce Clause extended to family law matters before United States v. Lopez, 115 S. Ct. 1624 (1995), was handed down).

While Heart of Atlanta Motel, Perez, and Fillburn are still good law, a 1995 decision by the U.S. Supreme Court has thrown into question congressional latitude to enact such legislation pursuant to the Commerce Clause. In United States v. Lopez, 115 S. Ct. 1624 (1995), the Court struck down, as exceeding Congress' Commerce Clause authority, a criminal statute that proscribed the "non-economic" intrastate activity of gun possession in and around schools. See id. at 1634. Although it is beyond the scope of this article to engage in an extended discussion of Lopez's significance, the decision seems, at the very least, to mean that it is no longer constitutional for Congress to use the Commerce Clause to regulate non-economic intrastate activities, no matter what their effect is on interstate commerce. See 115 S. Ct. at 1630–31. If this is not an overbroad reading of Lopez, then it may signify that the states rather than Congress should assume the task of banning corporal punishment of children. Cf Stephen R. McAllister, Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?, 44 U. KAN. L. REV. 217, 241 (1996) (arguing that Lopez provides for heightened judicial scrutiny of Commerce Clause legislation that may intrude on individual liberties associated with raising a family); Stacy, supra, at 243–44, 248, 256 (noting that while the scope of Lopez is uncertain, the decision appears to preclude
A statute drafted along these lines would not only be likely to achieve its pedagogical mission, but would also avoid sweeping within its ambit parent-child interactions that do not belong there. First, by enacting a provision expressly creating this new type of criminal battery, the statute would put everyone on notice that corporal punishment of children is as unacceptable as hitting an adult. In order to bring the greatest clarity to this notice function, the proscription in subsection (1) employs both the shorthand term “corporal punishment” and a definition of the elements of corporal punishment as “physical force [used] with the intention of causing a child to experience bodily pain so as to correct, control, or punish the child’s behavior.” This provision is preferable to merely removing corporal punishment as a defense to assault and/or battery, as has occurred in Minnesota, because insofar as it is a plainer and more emphatic repudiation the provision necessarily has greater didactic potential.

Second, even a cursory review of the law on assault and battery demonstrates that the traditional denomination of “battery” would be the most appropriate classification for criminalized subabuse corporal punishment of children. Although different jurisdictions use different nomenclature,
i.e., some use "assault," the concept defining the crime remains the same—that what is proscribed is "unlawful application of force to the person of another" resulting in "either a bodily injury" or, in some states, a mere offensive touching. Under the modern approach exemplified by the Model Penal Code, in order to constitute assault, the attack must cause "bodily injury," defined as, among other things, "physical pain, illness or any impairment of physical condition." Even a "temporarily painful blow" to another will constitute a battery "though afterward there is no wound or bruise or even pain to show for it." The perpetrator must also have a particular mental state, which includes intent to injure or cause bodily pain. Subabuse corporal punishment, as defined in this Article, is characterized by precisely these elements of battery: to state the obvious, corporal punishment is at least a temporarily painful blow, intended to modify behavior by causing bodily pain.

Third, the draft statute is preferable to creating a cause of action in tort against the punishing parent or other caregiver. To subject violators merely to civil liability would

445. *MODEL PENAL CODE* §§ 210.0 & 211.0.
446. *LAFAVE & SCOTT*, *supra* note 407, § 7.15, at 301.
448. *See Herman*, *supra* note 2, at 42-43; *Zimring*, *supra* note 5, at 523-24; *Gibbons*, *supra* note 32, at 112; cf. *Caldwell*, *supra* note 349, at 387 (aiming to have parental physical discipline governed by statutory assault provisions). In those jurisdictions where corporal punishment is not akin to a legislature's definition of assault and battery, the proposed statute could be crafted to indicate that it covers a unique crime, and penalties could be assigned that are commensurate with an assault and battery crime.
449. Battery encompasses and is generally preceded by assault—an attempt to commit battery or the placing of another person in reasonable apprehension of being made the target of a battery. *See LAFAVE & SCOTT*, *supra* note 407, § 7.16, at 312; Mendez, *supra* note 443, at 410. Corporal punishment is, as a matter of course, preceded by the child's being placed in fear of receiving a blow. *See supra* note 355 and accompanying text. Therefore, it is logically possible to classify the threat of corporal punishment as an assault. Although entirely humane treatment of children (which would exclude threats of violence) is most desirable, this Article works toward that ultimate goal by taking a first step in proscribing the most palpable and physically painful child rearing practice—actual corporal punishment. The limited reform proposed here represents an acknowledgment of American political realities. As such, the draft statute is conceived as a beginning rather than an end.
450. The *Restatement (Second) of Torts* repudiates parental immunity from tort liability with the caveat that repudiation "does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is
be to convey the message that physically attacking children is not as objectionable as physically attacking adults—the opposite of the law’s intended pedagogical purpose. The consequence is that the possibility of a tort suit would, by itself, perform the notice or pedagogical function less effectively than the possibility of criminal prosecution. Then, too, civil liability is problematic in that it places the child in a more directly initiating and adversarial role with the offending adult, a posture that may not be emotionally or practically viable for the child. In a criminal case, the child’s burden is substantially shifted to the state, which would initiate legal proceedings and take on the necessary adversarial functions.

Fourth, the proposed statute makes intention of causing a child to experience physical pain an element of the crime for two reasons. First, the intent requirement is an element of battery. Second, this requirement distinguishes prosecutable conduct from acts that may cause pain for other purposes such as putting antiseptic on a cut or restraining a child from running into traffic. As an extra safeguard the proposed statute only proscribes physical force that would be a battery if used on an adult to make clear that other parental behaviors in relation to the child, including disciplinary measures not tortious. RESTATEMENT (SECOND) OF TORTS § 895G (1979). “Several jurisdictions have either expressly adopted this approach or supported its rationale.” Sandra L. Haley, Comment, The Parental Tort Immunity Doctrine: Is It a Defensible Defense?, 30 U. RICH. L. REV. 575, 596 (1996). States differ as to whether they provide full, partial, or no parental immunity. See Caroline E. Johnson, Comment, A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases, 21 FLA. ST. U. L. REV. 617, 628–52 (1993). Outside the context of such immunity, it is clear that conduct which constitutes criminal assault and battery may also give rise to civil liability. See RESTATEMENT (SECOND) OF TORTS § 874A cmt. f. In those jurisdictions where there is no parental immunity or where there is a willingness to adopt a new exception to parental immunity, civil liability could theoretically be provided in lieu of criminal sanctions for subabuse corporal punishment of children. See Herman, supra note 2, at 44.

451. See NEWELL, supra note 18, at 104; Anne T. Johnson, Criminal Liability for Parents Who Fail to Protect, 5 LAW & INEQ. J. 359, 384–85 (1987); see also Zimring, supra note 5, at 537–38 (noting that criminal law can be used as an instrument of moral education if the law does not extend public tolerance for retributive effects too far); cf. Herman, supra note 2, at 44–45 (suggesting that only criminal sanctions for corporally punishing a child would sufficiently convey the “moral wrongfulness” of such a practice).

452. See Henry M. Hart, The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401, 403–10 (1958); Herman, supra note 2, at 44; Michael P. Rosenthal, Physical Abuse of Children by Parents: The Criminalization Decision, 7 AM. J. CRIM. L. 141, 146 (1979); Zimring, supra note 5, at 536; see also Hedman, supra note 435, at 896 (making this point in the context of environmental legislation).

453. See Herman, supra note 2, at 44.

454. See STRAUS, supra note 2, at 5.
involving painful physical force, do not constitute criminal conduct even though they may cause some mental pain to the child.\textsuperscript{455} For example, the disciplinary tactic of "time out" may cause and may be intended to cause mental pain but would not come within the meaning of the statute because directing an adult to sit quietly apart from others would not qualify as a battery.

Fifth, the proposed statute requires that prosecutable use of physical force must be for the purpose of "correct[ing], control[ling], or punish[ing] the child's behavior" in order clearly to remove correction, control, and punishment as a defense. Of course, jurisdictions that enact the new statute would need to repeal any legislation making corporal punishment a defense as well as any other inconsistent laws.

The above described draft statute is not woven from whole cloth. In substance it embodies aspects of the approaches adopted by those countries that have banned corporal punishment of children. It will be recalled that Sweden, Finland, Denmark, Norway, Austria, and Cyprus have each enacted statutes specifically directed at prohibiting corporal punishment of children;\textsuperscript{456} Italy has accomplished the same end by judicial decision.\textsuperscript{457} Most of the statutes are civil prohibitions without any mention of liability; but the fact is that in all of these countries the statutory basis exists for subjecting offenders to criminal prosecution for conduct that contravenes these civil prohibitions.\textsuperscript{458} The draft statute simply integrates the actual prohibition with the provision for criminal liability, the same pattern followed by the Cypriot statute.\textsuperscript{459}

It is true that bifurcating the prohibitory language from the liability language has some advantages. It emphasizes the pedagogical, exhoratory thrust of the prohibition and downplays the politically less palatable repercussive role of the law. Nevertheless, combining the two may be preferable in the United States as a format that is as familiar as it is unequivocating, and, therefore, more accessible to the average American. Ours, after all, is not a legal system that makes laws merely to announce preferred policies without creating adjunctive enforceable rights, duties, or liabilities.

\textsuperscript{455} See NEWELL, supra note 18, at 144.
\textsuperscript{456} See supra notes 19–111 and accompanying text.
\textsuperscript{457} See supra notes 112–17, 119–38, 140–64 and accompanying text.
\textsuperscript{458} See supra notes 29, 56–60, 74, 82, 99–101, 111 and accompanying text.
\textsuperscript{459} See supra notes 109–11 and accompanying text.
That the prohibition of corporal punishment would carry with it criminal penalties would transmit the message that such conduct is tantamount to and as intolerable as a battery against an adult. Naturally, an offender could be prosecuted under the new statute just as an offender could be prosecuted under any other criminal statute. The existence of criminal liability does not mean, though, that the main purpose of the statute would be to prosecute or to work any immediate deterrence through the imposition of penalties. As in Minnesota and the European countries that have banned corporal punishment of children,\(^\text{460}\) prosecutorial restraint probably would be the most advisable policy. There is precedent in the United States for such a policy with respect to, for example, minor assaults and batteries committed on adults.\(^\text{461}\) A conservative prosecutorial strategy would take cognizance of the fact that the new statute would proscribe what sometimes may be impulsive or habitual behavior that may initially be difficult for adults to control.

Such a strategy would also further important objectives apart from effecting a curb on corporal punishment. In most cases it may be anticipated that children will be key government witnesses; yet, giving trial testimony can be traumatic for children, especially if they are asked to testify against a parent.\(^\text{462}\) Nor would it be politically acceptable or a wise use of judicial resources to have the courts continually clogged with armies of parents undergoing prosecution for corporally punishing their children. On balance, then, the primary value of the proposed statute should be the pedagogic one of having the

\(^{460}\) See supra notes 19–154 and accompanying text.


state serve notice, through the potentiality of prosecution, that all corporal punishment of children must be avoided.

Even in those rare instances where prosecution is instituted against parents for subabuse corporal punishment of their children, the consequences of a guilty judgment need not necessarily take the form of fines or incarceration. There may be dispositions that are more conducive to family integrity and peace. Indeed, in some jurisdictions, certain criminal offenses occurring in the family milieu are often handled by means of diversion, a solution thought to promote such social policy ends.\textsuperscript{463} The idea behind diversion programs is to steer appropriate criminal defendants into rehabilitative services rather than subjecting such defendants to the more punitive aspects of the criminal justice system.\textsuperscript{464} Diversion would dovetail nicely with the pedagogical aims of a prohibition on corporal punishment of children by assisting offenders to acquire more productive and humane parenting skills rather than by exacting retribution. Criminalization of corporal punishment and diversion may even reduce the number of prosecutions of parents because, once such parenting skills become a legal necessity, the incidence of child abuse and neglect may diminish as well.

Diversion of a case away from the regular course of the criminal justice system may occur either before and in lieu of trial, or after an adjudication or plea of guilty but before sentencing. Pretrial diversion channels the accused into a rehabilitative program after a complaint has been filed, such that formal proceedings cease and diversion disposes of the charges unless the accused does not comply with the program or commits another crime.\textsuperscript{465} Posttrial or postplea diversion


\textsuperscript{464} See ATTORNEY GEN., FINAL REPORT, supra note 462, at 35; Besharov, supra note 462, at 354–55; Legal Responses to Domestic Violence, supra note 463, at 1541–43; Melissa Hooper, When Domestic Violence Diversion Is No Longer an Option: What to Do with the Female Offender, 11 BERKELEY WOMEN'S L.J. 168, 168 (1996); Reynolds, supra note 463, at 422–24.

Corporal Punishment of Children occurs after the accused has been found guilty and substitutes a rehabilitative program for a more typical punitive sentence or imposes a rehabilitative program as a condition of probation. With respect to either type of diversion, failure to successfully complete treatment should result in a resumption of traditional criminal justice processes.

In the context of prosecuting parents or other caregivers for violating a criminal prohibition of subabusive corporal punishment of children, posttrial or postplea diversion would appear to be the most attractive alternative. Pretrial diversion has the distinct drawback that by effectively absolving the alleged perpetrator of any finding that he or she is guilty, the message may be communicated to the community that corporal punishment is not as serious an offense as physically attacking adults. While posttrial or postplea diversion could convey the same message, such diversion has the advantage of allowing the judicial system to pronounce the defendant criminally liable before diversion occurs. This pronouncement packs more punch than pretrial diversion while still taking into account the interest in sparing families the practical and emotional hardships that may ensue from fines or incarceration. However, in cases involving more persistent or egregious corporal punishment of children even posttrial or postplea diversion may not be a serious enough response, and more orthodox, punitive sentences could be substituted.

Thus, there exists both a sound rationale for and an arguably workable means of prohibiting subabuse corporal punishment of children. But, answering the why and how questions still leaves unaddressed the crucial issue of whether criminalizing

466. See ATTORNEY GEN., FINAL REPORT, supra note 462, at 35; Vorenberg, supra note 461, at 1531; Legal Responses to Domestic Violence, supra note 463, at 1541-42.
468. See Legal Responses to Domestic Violence, supra note 463, at 1543; Reynolds, supra note 463, at 427, 434; cf. Hooper, supra note 464, at 170-71 (noting that because pretrial diversion does not require the defendant to admit to any wrongdoing, diversion may be seen merely as a means of expunging the defendant's criminal record).
469. See Legal Responses to Domestic Violence, supra note 463, at 1543.
470. See supra notes 439, 461-52, 468 and accompanying text; see also ATTORNEY GEN., FINAL REPORT, supra note 462, at 36 (observing that criminal sentencing "can strongly reenforce [sic] the message that [domestic] violence is a serious criminal matter"); Legal Responses to Domestic Violence, supra note 463, at 1548 (intimating that posttrial diversion is preferable to pretrial diversion in domestic violence cases because under the former system the defendant has to admit guilt or have been found guilty through adjudication).
IV. ADDRESSING PROBLEMS RAISED UNDER THE U.S. CONSTITUTION BY THE PROHIBITION OF CORPORAL PUNISHMENT OF CHILDREN

That the prohibition of corporal punishment of children is an expedient or even urgent palliative for many personal and societal ills does not mean that it would also be legally viable under more paramount law. The U.S. Constitution is supreme such that no other laws may contravene its provisions and survive judicial challenge. It is therefore necessary to analyze whether prohibition would be tolerable as a constitutional matter.

The Constitution is silent on corporal punishment of children. Nor has the U.S. Supreme Court ever characterized such punishment as a constitutionally protected activity. The Court has addressed the subject of corporal punishment of children only with respect to its constitutional permissibility in the schools. In Ingraham v. Wright, the petitioners claimed, among other things, that the paddling administered

471. The primacy of the U.S. Constitution derives from the Supremacy Clause, which provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2; see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803); 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 1.3, 1.4(a), 1.5 (2d ed. 1992).

472. See Sweaney v. Ada, 119 F.3d 1385, 1389–92 (9th Cir. 1997) (holding that U.S. Supreme Court precedent has not accorded parents a clearly established federal constitutional right to corporally punish their children).


474. Petitioners also claimed that the paddling contravened procedural and substantive due process under the Fourteenth Amendment as well as under the Eighth Amendment's prohibition of cruel and unusual punishments. See Ingraham, 430 U.S. at 658, 659 & n.12. The Court only decided the procedural due process and Eighth Amendment claims. See id. at 659 & n.12, 664, 671, 682–83.
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as discipline by school personnel upon two junior high school students constituted cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution. The Court held that "the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools." The Court's rationale was that the Eighth Amendment's reach should be limited to criminal punishments in keeping with the original intent behind the amendment. The result is that elementary and secondary schools are not forbidden by the Eighth Amendment from corporally punishing students. States, however, are still permitted to ban the practice from educational facilities. In fact, as of this writing, at least twenty-three states have legislated such prohibitions.

Prohibition of corporal punishment of children by parents or other adults in the family circle does not lend itself to so tidy an analysis. To the contrary, enactment of a prohibition of parental corporal punishment of children along the lines described in Part III of this Article could raise at least four interrelated problems under the federal Constitution. First, such a prohibition arguably would violate parents' substantive due process right to rear their children as the parents see fit. Second, the prohibition could be viewed as violating parents' free speech right to communicate with their children. Third, the prohibition could be interpreted to constrict parents' right of free exercise of religion insofar as physical chastisement is religiously based. Fourth, the prohibition may be regarded as infringing familial constitutional privacy rights. As will be

475. The Eighth Amendment states that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
476. Ingraham, 430 U.S. at 664.
477. See id. at 664–71. The decision in Ingraham appears somewhat odd when considered in juxtaposition to Hudson v. McMillian, 503 U.S. 1 (1992). In the latter case, a prison inmate was beaten by security guards while he was handcuffed and shackled. See id. at 4. The guards punched him in the mouth, eyes, chest, and stomach, and kicked him from behind. See id. As a result, the victim suffered minor bruises and swelling, some loosened teeth, and a crack in his partial dental plate. See id. The U.S. Court of Appeals for the Fifth Circuit acknowledged the use of force to be excessive but refused to rule for the prisoner because his injuries were "minor," requiring no medical intervention. See id. at 5. The Supreme Court reversed, holding that the use of excessive force against a prisoner may constitute an Eighth Amendment violation even though the prisoner's injuries (which must be more than de minimis) are minor. See id. at 9–10. In contrast, a schoolchild who suffered injuries requiring medical attention after being paddled over 20 times was denied an Eighth Amendment claim in Ingraham. See 430 U.S. at 657.
478. See supra note 4 and accompanying text.
shown, there is a unitary analytical solution\(^{479}\) that is responsive to and puts to rest each of these, or any other, constitutional dilemmas.\(^{480}\)

A. Identification of the Constitutional Problems

1. Substantive Due Process Concerns—The principle that, by virtue of constitutional law, parents have the right to raise their children in accordance with parental beliefs had its inception in two cases decided in the 1920s, *Meyer v. Nebraska*\(^{481}\) and *Pierce v. Society of Sisters*.\(^ {482}\) In *Meyer*, a parochial school teacher challenged a Nebraska statute prohibiting the teaching of subjects in foreign languages or the foreign languages themselves to private and public school students who had not yet passed the eighth grade.\(^ {483}\) The main purpose of the statute was to foster civic development, regardless of parental preferences, by limiting the education of children in foreign languages before they had learned the English language and American ideals.\(^ {484}\) The Supreme Court ruled that Nebraska's prohibition, as applied to this teacher, violated the substantive due process doctrine that held sway

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\(^{479}\) My colleague, Professor Michael Lawrence, has used the term “unitary framework” in a manuscript on the negative Commerce Clause; my choice of the phraseology, “unitary analytical solution,” in the text above may well have been influenced by reading his work.

\(^{480}\) It may be apropos to point out here that school teachers could conceivably raise two of the constitutional arguments described above against prohibiting corporal punishment. That is, school teachers in general might argue that the prohibition implicates their free speech rights while religious school teachers might argue that the prohibition implicates their free exercise rights as well. Teachers' claims will not be addressed separately from parents' claims because the logic of the unitary analytical solution applies to banning corporal punishment in schools as well as in families. *See infra* note 494 and accompanying text.

Indeed, Part IV of this Article is not intended as an exhaustive search for all possible constitutional obstacles to a ban on corporal punishment of children; rather, it is hoped that by anticipating the more obvious constitutional objections this Part will inspire or provoke further analysis of the issue. Given the controversial nature of the proposed ban, the author is confident that other commentators will remedy any oversight in identifying additional constitutional barriers.

\(^{481}\) 262 U.S. 390 (1923).

\(^{482}\) 268 U.S. 510 (1925).

\(^{483}\) *See Meyer*, 262 U.S. at 396–97.

\(^{484}\) *See id.* at 401.
at the time. The Court found that the statute ran afoul of the doctrine by interfering with the student's freedom to acquire useful knowledge, the parents' right to direct the upbringing of their offspring, the teacher's right to teach, and the parents' and teacher's right to contract with each other for the latter's instructional services. The Court indicated that such interference with due process rights could only pass constitutional muster if the interference was reasonably related to some legitimate governmental end. The Court held that the statute served no such end because Nebraska could show no emergency necessitating that its residents have a ready comprehension of political issues and because the statute served no other real purpose.

Two years later, in Pierce, the Supreme Court was confronted with claims by two private schools that Oregon had violated substantive due process in enacting a law that required most school-age children to attend public rather than private schools. The Court invalidated the law on the theory that it was an arbitrary and unreasonable interference with the private schools' clientele and was destructive of the schools' property. The Court also offered as a rationale that, "[u]nder the doctrine of Meyer v. Nebraska," the Oregon statute

485. See id. at 403. The Due Process Clause provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

In brief, substantive due process, as it was understood when Meyer was decided, is a theory fashioned by the U.S. Supreme Court mainly to protect economic liberty rights, such as the right to contract. Under the theory, states could not curtail protected economic rights unless the curtailment represented an exercise of state police power in the interest of the general welfare. See Laurence H. Tribe, American Constitutional Law §§ 8-2 to -4 (2d ed. 1988). The theory was in vogue during the so-called Lochner era spanning 1897 to 1937. See id. Lochner v. New York, 198 U.S. 45 (1905), for which the era was named, typifies the Court's application of substantive due process at the time. In Lochner, the Court struck down a state statute which prohibited bakers from working more than 60 hours per week. See id. The Court's rationale was that the law interfered with the liberty of bakers and their employers to contract under the Fourteenth Amendment's Due Process Clause. See id. Both Meyer and Pierce involved infringements of traditional economic liberty rights as well as a more unusual substantive due process liberty right to be free of government impediments in the acquisition of private education according to parental preferences. See Meyer, 262 U.S. at 399–400; Pierce, 268 U.S. at 533; see also Susan H. Bitensky, Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis, 86 NW. U. L. Rev. 550, 580–81 (1992).

486. See Meyer, 262 U.S. at 399–403.
487. See id. at 399–400.
488. See id. at 401–03.
490. See id. at 536.
"unreasonably interferes with the [substantive due process] liberty of parents and guardians to direct the upbringing and education of children under their control." The Court expostulated upon the Meyer doctrine: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Parents were not litigants in either Meyer or Pierce. Neither case involved child rearing beyond parental decisions to obtain private educational instruction for the children concerned. These factors, taken in conjunction with the absence of analysis of a parental child rearing right beyond a few conclusory sentences, leave some question as to whether the parents' interests in Meyer and Pierce were necessarily integral to the holdings in those cases. Arguably, any references in Meyer and Pierce to the parental prerogative of child rearing are, strictly speaking, dicta.

Nevertheless, it may also be argued that the Court relied in both cases upon a link between the actual plaintiff educators and the affected parents such that restriction of the rights of both were presented as interdependent and inextricable. Indeed, a common view espoused by the U.S. Supreme Court and many commentators is that Meyer and Pierce posit in parents a constitutional child rearing right—even though the

491. Id. at 534—35.
492. Id. at 535.
493. See Andrew Jay Kleinfeld, The Balance of Power Among Infants, Their Parents and the State, 4 Fam. L.Q. 409, 418 (1970); Francis Barry McCarthy, The Confused Constitutional Status and Meaning of Parental Rights, 22 Ga. L. Rev. 975, 988—90, 992 (1988); see also Robert B. Keiter, Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach, 66 Minn. L. Rev. 459, 488—89 (1982) (suggesting that if parents' and children's interests were to collide, it is not clear that Meyer and Pierce would reinforce parental prerogatives); cf Kearney, supra note 5, at 12 (hypothesizing that Meyer and Pierce may only posit rights in parents to make educational and religious choices for their children rather than positing a more general right to rear children).
494. See McCarthy, supra note 493, at 986 & n.53.
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particular brand of economic substantive due process from which the right is derived has fallen by the wayside.\textsuperscript{496} This view of parental rights is a current and prevalent one and, therefore, is a force with which analysis must contend. It is also a view likely to be invoked by opponents of a proposed ban on parental corporal punishment of children. They, no doubt, will argue that a parent's or guardian's use of corporal punishment on his or her child is merely a facet of child rearing; therefore if parents have a constitutional right to be free of governmental interference in child rearing, then they must also have a constitutional right to be free of such interference in choosing the means of disciplining their children.

2. First Amendment Concerns—Free Speech and Free Exercise of Religion—Although the Court predicated its decisions in \textit{Meyer} and \textit{Pierce} on the Due Process Clause and has repeatedly located parental rights in that clause,\textsuperscript{497} some writers are of the opinion that the child rearing right actually may fit more modernly under the Free Speech Clause\textsuperscript{498} and/or Free Exercise Clause\textsuperscript{499} of the First Amendment.\textsuperscript{500} The free speech/free exercise theory is conceived as having two dimensions. One dimension is a purported parental right to live life through one's own children by using them as conduits for the
parents' secular and/or religious beliefs. The other dimension involves a parental right to communicate or pass on such beliefs to one's children for the latter's benefit.

Opponents of a ban on corporal punishment thus may contend that spanking and the like is expressive or symbolic conduct protected from governmental intrusion by the First Amendment. With respect to the Free Speech Clause, the argument might be made that spanking is a way of communicating to children that some of their behavior is unacceptable, thereby molding the child's conduct to parental ideals and benefiting the child's maturation process. With respect to the Free Exercise Clause, an argument might be fashioned that since certain religions are thought by some to condone parental corporal punishment of children, such punishment is a way for parents to live by their religious beliefs and to transmit religiously based values to their young.

While there do not appear to be any relevant decisions by the U.S. Supreme Court that deal with parents' right to engage in free speech with their children, there are decisions by the Court treating parents' free exercise rights vis-à-vis their children. The Court upheld the parents' claim in only one of these cases—Wisconsin v. Yoder. In Yoder, Old Order Amish parents were convicted under and subsequently challenged that portion of a Wisconsin compulsory education statute that required parents to send their children to a public or private school for an additional two years after the eighth grade.

501. See Garvey, supra note 495, at 806; Woodhouse, supra note 419, at 1114–15.
502. See Garvey, supra note 495, at 806–07.
503. See 4 ROTUNDA & NOWAK, supra note 471, § 20.48 (noting that the U.S. Supreme Court has long recognized that speech may be nonverbal or symbolic); TRIBE, supra note 485, § 12-7.
504. See Garvey, supra note 495, at 781–82 (suggesting that spankings are "not for retribution, but rather for providing information").
505. See DOBSON, supra note 349, at 235; FUGATE, supra note 352, at 79, 83–84, 105–21; GREVEN, supra note 350, at 46–49; LESSIN, supra note 352, at 21–30. But see STEPHEN J. BAVOLEK, RED, WHITE & BRUISES: SPANKING IN THE U.S.A. 4–5 (1994) (contending that the Bible may be interpreted as not supporting physical chastisement of children); SEARS & SEARS, supra note 1, at 150–51 (concluding that "nowhere in the Bible does it say you must spank your child to be a godly parent"); Adah Maurer & James Wallerstein, The Bible and the Rod (last modified Nov. 16, 1997) <http://silicon.com/~ptave/maurer3.htm> (making the case that the Bible may be understood to disapprove of corporal punishment of children).
508. See id. at 207–08.
These Amish parents feared "that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but . . . also endanger their own salvation and that of their children."\(^{509}\) This fear had its roots in the Older Order Amish's literal interpretation of biblical commands to live apart from the world and worldly influences.\(^{510}\)

The Court characterized the Amish parents' refusal to allow their children to partake of state sanctioned secondary schooling as religiously based parental conduct within the protection of the Free Exercise Clause.\(^{511}\) According to the Court this is the type of conduct that comes within the "charter of the rights of parents to direct the religious upbringing of their children" as announced in \(\text{Pierce}\).\(^{512}\) Because Wisconsin could not show that the Amish parents' religiously based conduct in relation to their children's education would "jeopardize the health or safety of the child, or have a potential for significant social burdens,"\(^{513}\) the \(\text{Yoder}\) Court held that the Free Exercise Clause prevented Wisconsin from forcing the Amish parents to send their children to a formal high school.\(^{514}\)

There are aspects of \(\text{Yoder}\) that make it a likely source of precedent for the arguments of litigious parents who would object to prohibition of corporal punishment of children for religious reasons. Parents who wish to spank may argue that, like the Amish, they are engaged in religiously based conduct with which government is trying to interfere;\(^{515}\) in fact, both the Amish and many parents who spank for religious reasons rely upon a literal interpretation of the Bible as authority for their conduct.\(^{516}\) It should be noted, though, that in spite of the

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509. \textit{Id.} at 209.
512. \textit{Id.} at 233 (referring to \textit{Pierce} v. \textit{Society of Sisters}, 268 U.S. 510 (1925)).
513. \textit{Id.} at 234.
514. \textit{See id.} In \textit{Employment Division} v. \textit{Smith}, 494 U.S. 872, 881 n.1 (1990), the Court, in dictum, described \textit{Yoder} as a case that involves both the Free Exercise Clause and the substantive due process liberty interest of parents to direct the upbringing and education of their children. \textit{See 4 ROTUNDA \\& NOWAK, supra} note 471, § 21.6, at 526.
515. \textit{See infra} note 520 and accompanying text.

analogy, Yoder will also prove problematic for those who wish to marshall it for such purposes. In reaching its holding, the majority made clear that the Court did not have before it a situation where parents' and children's interests were at loggerheads.\textsuperscript{517} If the decision is properly limited to its facts,\textsuperscript{518} pro-corporal punishment parents would arguably be able to profit from Yoder only if they could show that their children did not oppose receiving corporal punishment.

Another difficulty is that Yoder is legally aberrational. Yoder represents a break with the Supreme Court's longstanding observance of what some have seen as a belief/conduct dichotomy in its Free Exercise Clause cases whereby religious beliefs are accorded constitutional protections that are usually denied to religiously motivated conduct burdened by laws of general applicability.\textsuperscript{519} The fate of litigants favoring parental corporal punishment would thus depend upon the Court's

\textsuperscript{517} See Yoder, 406 U.S. at 230–32. Justice Douglas dissented in Yoder because, among other reasons, the majority failed to consider the rights of those respondents' children whose religious views in relation to high school education had not been canvassed. See id. at 241–46 (Douglas, J., dissenting).

\textsuperscript{518} See 4 ROTUNDA & NOWAK, supra note 471, § 21.8, at 548 (stating that in the absence of "an actual case involving . . . a parent-child conflict, the Court refused to decide if the state's interest in the child would allow the government to require a parent to send a child to school at the child's request over the religious objections of the parent"); William E. Brigman, Circumcision as Child Abuse: The Legal and Constitutional Issues, 23 J. Fam. L. 337, 354 (1984–85); Matt Steinberg, Note, Free Exercise of Religion: The Conflict Between a Parent's Rights and a Minor Child's Right in Determining the Religion of the Child, 34 J. Fam. L. 219, 231 (1995–96); Robert M. O'Boyle, Comment, Voluntary Minor Mental Patients: A Realistic Balancing of the Competing Interests of Parent, Child, and State, 37 Sw. L.J. 1179, 1190 (1984) (noting that the Yoder majority opinion cannot be understood to reach the situation where children's and parents' interests are antagonistic). But see Dwyer, supra note 495, at 1387 (interpreting Yoder as taking the position that parents' free exercise rights trump any conflicting interests of their children). Yoder may also be "read to limit parental rights over education largely to the Amish." David M. Smolin, The Jurisprudence of Privacy in a Splintered Supreme Court, 75 Marq. L. Rev. 975, 1014 (1992).

\textsuperscript{519} See Joanne C. Brant, Not a Prayer for Curricular Reform After Lee v. Weisman, 43 Case W. Res. L. Rev. 753, 754 & n.4 (1993); Marci A. Hamilton, The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct, 54 Ohio St. L.J. 713, 722, 731, 750–52, 771 (1993); Ralph D. Mawdsley, Has Wisconsin v. Yoder Been Reversed? Analysis of Employment Division v. Smith, 63 Ed. L. Rep. 11, 13 (1990); see also 4 ROTUNDA & NOWAK, supra note 471, § 21.6, at 526 (summarizing that except for Yoder and cases dealing with unemployment compensation laws, "the Supreme Court during the 1963–1990 balancing era ruled in favor of the government in every case in which an individual sought a free exercise clause exemption from a government regulation of the actions of persons within its jurisdiction" (emphasis added)). But see Tribe, supra note 485, § 14-13, at 1262 (concluding that the belief/conduct dichotomy "is not generally helpful in illuminating the cases"). Professor Hamilton has stated that "Wisconsin v. Yoder is the single free exercise case that attempts to break through the belief/conduct paradigm." Hamilton, supra, at 756.
willingness to depart again from its dichotomous precedent to extend the compass of the clause to conduct. As a consequence, while adherents of corporal punishment in the home will naturally gravitate to Yoder as constitutional authority for their position against governmental prohibition, their reliance, while not exactly misplaced, will be complicated by Yoder's factual and legal peculiarities.

3. Family Privacy Concerns—Advocates of corporal punishment of children may also claim that a prohibition of parental discretion to mete out such punishment will invade constitutionally protected family privacy rights. They would presumably argue that parental choice of punishment, within the bounds of "reasonableness," is a private family matter in which the state cannot constitutionally interfere without a compelling reason. Meyer and Pierce are considered to be the U.S. Supreme Court's earliest pronouncements of familial privacy rights as well as of the parental child rearing right. Later, in Griswold v. Connecticut, a case involving a challenge to a statute prohibiting the use or abetment of the use of contraceptives by married couples, the Court more explicitly articulated the right to privacy as a function of "penumbras" and "emanations" of various amendments to the Constitution. Because of its factual posture involving claimed rights of married partners, Griswold is commonly

520. Such litigants might benefit from the atmosphere created by Congress' reauthorization and amendment of the Child Abuse Prevention and Treatment Act so as to include a rather obtuse section protecting parents from any federal requirement to provide their child with medical intervention that would be against the parents' religious beliefs. See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, Title I, § 113(a)(1)(C), 110 Stat. 3064, 3079 (1996) (codified at 42 U.S.C.A. § 5106i (West Supp. 1997)). The statute also provides, among other things, that it may not be construed to require a state to find or to prohibit a state from finding abuse or neglect when a parent relies upon "spiritual means rather than medical treatment" in relation to the health needs of the child. Id.


524. 381 U.S. 479 (1965).

525. See id. at 481–86. In his opinion for the Court, Justice Douglas found a right to marital privacy within the zone of privacy located in penumbras created by emanations from the First, Third, Fourth, Fifth, and Ninth Amendments. See id. at 484.
thought to have tied the privacy right to the family.\textsuperscript{526} According to some commentators, subsequent Supreme Court cases developing the right to privacy have further manifested a "constitutional right in family relationships"\textsuperscript{527} as a function of substantive due process\textsuperscript{528} or equal protection analysis.\textsuperscript{529}

\begin{footnotes}
\footnotetext[526]{See Anne C. Dailey, Constitutional Privacy and the Just Family, 87 Tul. L. Rev. 955, 970 (1993); Janet L. Dolgin, The Family in Transition: From Griswold to Eisenstadt and Beyond, 82 Geo. L.J. 1519, 1558 (1994); Yao Apasu-Gbotsu et al., Project, Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 569–70 (1986). But see June Aline Eichbaum, Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy, 14 Harv. C.R.-C.L. L. Rev. 361, 372–73 (1979) (opining that the Griswold opinion was ambiguous as to whether the privacy right applies to the marital institution or to the choice of individuals alone); Jane Rutherford, Beyond Individual Privacy: A New Theory of Family Rights, 39 U. Fla. L. Rev. 627, 635 (1987) (seeing Griswold as "paving the road to individual choice").}


\footnotetext[528]{See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion). Justice Scalia, joined by Justices O'Connor and Kennedy and Chief Justice Rehnquist, found that, in view of the historical sanctity of the unitary family, the unwed biological father of a child born in wedlock has no substantive due process liberty interest in a parental relationship with the child even though he has previously maintained such a relationship with the child. See id. at 124. Justice Stevens, concurring, assumed for purposes of deciding the case that the unwed biological father has a due process liberty interest in maintaining a personal relationship with the child. See id. at 133. Justice Brennan, who was joined by Justices Marshall and Blackmun, and Justice White, all dissenting, opined that the unwed biological father has a substantive due process liberty interest in a parental relationship with the child. See id. at 142–43, 160; see also, e.g., Santosky v. Kramer, 455 U.S. 745, 753, 754 n.7, 758, 766, 768–70 (1982) (holding that a fair preponderance of the evidence standard for governmental termination of parental rights violates procedural due process because such a low standard interferes with natural parents' fundamental liberty interest in the care and custody of their own children); Moore v. City of East Cleveland, 431 U.S. 494, 498–506 (1977) (ruling that an ordinance which limits occupancy of a dwelling unit only to certain relatives and not to others violates the substantive due process liberty to make personal choices in matters of family life).}

\footnotetext[529]{See Caban v. Mohammed, 441 U.S. 380, 381–82, 388–89, 394 (1979) (holding that a state law violates the Equal Protection Clause because it denies to unwed fathers the same opportunity as was given to unwed mothers to block adoption of their children by withholding consent); Gomez v. Perez, 409 U.S. 535, 537–38 (1973) (per curiam) (ruling that under the Equal Protection Clause a state may not deny illegitimate children a judicially enforceable right to support from their biological fathers}
"The integrity of the family unit has found protection in the Due Process Clause . . . the Equal Protection Clause . . . and the Ninth Amendment."

Or at least that is one point of view. Other commentators have taken the position that post-Griswold privacy cases link the privacy right to the individual more comfortably than to the family. In support of this thesis, they commonly refer to cases such as Eisenstadt v. Baird and Roe v. Wade, among others. In Eisenstadt, the Supreme Court struck down on equal protection grounds a state statute that prohibited distribution of contraceptives to unmarried persons while permitting distribution to married persons. The Court thereby imbued individuals, apart from their families, with the right to privacy, saying that "if the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." In Roe, the Court held that each woman, regardless of marital status, has a qualified right to an abortion as part of her constitutional privacy rights. It may be anticipated that this individualistic orientation will not deter pro-corporal punishment parents from seeking support in the privacy right precedents; but an argument based on family privacy, at the possible expense of an

while granting that right to legitimate children); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (deciding that the state's denial to unwed fathers of the hearing on fitness accorded to all other parents whose custody of their children is challenged constitutes a violation of equal protection principles).

530. Stanley, 405 U.S. at 651 (citation omitted). See S. Randall Humm, Comment, Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children, 139 U. PA. L. REV. 1123, 1127-28 (1991) ("The due process and equal protection clauses of the fourteenth amendment, and the ninth amendment each provide the family unit with protection from unwarranted state intrusion.")

531. See TRIBE, supra note 485, §§ 15-1 to -3, 15-20 to -21, at 1302–12, 1414–35; Dolgin, supra note 526, at 1543–46, 1554–55, 1558, 1569–70; cf Apasu-Gbotsu et al., supra note 526, at 566, 580–89 (analyzing the Supreme Court's privacy cases as capable of being understood to recognize a right of personal autonomy).

536. Id. at 453.
537. See Roe, 410 U.S. at 152–55. Complainant Jane Roe was single at the time of the Roe litigation. See id. at 120.
individual child's conflicting claim to bodily privacy, may appear dated and awkward even on its own terms.\textsuperscript{538}

\textbf{B. The Analytical Solution to the Constitutional Problems}

It is not an oversimplification to suggest that there is a single analytical solution to each of the identified constitutional arguments against the criminalization of corporal punishment of children. A unitary solution should suffice because the four constitutional arguments described above all suffer from the same defect. They assume that since corporal punishment is carried out by parents within the family setting and since such punishment has not already been made illegal in most states, then it must have a constitutional dimension. This reasoning ignores the possibility that corporal punishment of children is so inimical to humane values that it has no place in a civilized society's constitution.

The U.S. Supreme Court has ruled in Free Speech Clause cases that physical assaults and violence are not "by any stretch of the imagination expressive conduct protected by the First Amendment."\textsuperscript{539} These cases arose in extrafamilial factual

\textsuperscript{538.} There are readers who would probably respond that an attempt by pro-corporal punishment parents to rely on family privacy rights would be neither dated nor awkward in light of \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986). In \textit{Hardwick}, Michael Hardwick, a homosexual who had been charged under a Georgia statute criminalizing consensual sodomy, brought suit in federal court claiming that the statute unconstitutionally infringed his right to privacy. \textit{See id.} at 187-91. The Court rejected his claim, holding that the Constitution does not confer a right to privacy that encompasses homosexual sodomy. \textit{See id.} at 190-95. The Court refused to extend the right to privacy cases so far because, among other reasons, "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ." \textit{Id.} at 191. This characterization of earlier decisions has led some analysts to conclude that the \textit{Hardwick} Court was breathing new life into the family privacy doctrine. \textit{See} Elvia Rosales Arriola, \textit{Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority}, 14 WOMEN'S RS. L. REP. 263, 267-68 (1992); Dailey, \textit{supra} note 526, at 980. \textit{But see} Dolgin, \textit{supra} note 526, at 1569-70 (intimating that \textit{Hardwick} merely revived the rhetoric of family privacy jurisprudence); Jed Rubenfeld, \textit{The Right of Privacy}, 102 HARV. L. REV. 737, 762 (1989) (suggesting that \textit{Hardwick} can be understood as championing self-definition by the legislating community).

\textsuperscript{539.} Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (unanimous decision). In \textit{Mitchell}, an African American was convicted of aggravated battery against a Caucasian. \textit{See id.} at 479-80. Defendant's sentence was enhanced under a Wisconsin statute that provided for enhancement where the defendant chose a victim because of the latter's race. \textit{See id.} at 480. Defendant challenged the constitutionality of the statute under the First Amendment, claiming, among other things, that the statute penalized him for his bigoted thoughts rather than for his assaultive conduct. \textit{See id.} at 481-83.
situations, but the basic principle should not change simply because the violence occurs at the direction of adults within the family. If it were otherwise, then the law of domestic relations could not prohibit husbands from physically chastising their wives or prohibit parents from committing child abuse. Yet no one would think of proposing in this day and age that husbands and parents should be privileged to engage in this type of aggression by operation of the Due Process Clause, the Free Speech Clause, the Free Exercise Clause or, for that matter, any other provision of the Constitution. Like wife beating and child abuse, corporal punishment of children is so egregious in its effects and so ethically unpalatable that it should be outside the definitional parameters of child rearing, religious or other expression, or family privacy. It follows that if corporal punishment is no part of any constitutional right, legislatures may prohibit it without showing a compelling interest or any other justification beyond what rational legislative discretion and wisdom dictates.

The Supreme Court held that Wisconsin could constitutionally single out for enhancement “bias-inspired conduct” because it inflicts greater harm than other assaultive conduct. See id. at 487–88. Integral to the Court’s holding is the idea that the defendant's belief system motivating the violent act could not transform the violence into expressive conduct protected by the Free Speech Clause of the First Amendment. That is why the Court could conclude that Wisconsin’s statute merely “aimed at conduct unprotected by the First Amendment.” Id. at 487; accord NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916–18 (1982); see also Daniel A. Farber, Foreword: Hate Speech After R.A.V., 18 WM. MITCHELL L. REV. 889, 897 (1992) (opining that “physical assaults are wholly outside the First Amendment”); cf. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 792–93 n.2 (1986) (White, J., dissenting) (stating that parents’ substantive due process liberty to raise their children should not be understood to extend to assaults committed upon children by their parents).

540. See supra note 427 and accompanying text.

541. See 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN §§ 16.02–.04 (2d ed. 1994); Besharov, supra note 462, at 323–24; Johnson, supra note 451, at 365–68; Gibbons, supra note 32, at 119.

542. See Part III of this Article for a full discussion of the deleterious effects of corporal punishment of children. These effects indicate that corporal punishment's inclusion as any part of child rearing, free expression, free exercise of religion, or family privacy is seriously misplaced. Moreover, in relation to the free exercise of religion, it should be pointed out that not all commentators think that the Bible mandates corporal punishment of children. See supra note 352 and accompanying text. See GREVEN, supra note 350, at 50–54; MAURER & WALLERSTEIN, supra note 505; SEARS & SEARS, supra note 1, at 150–51; cf. PETER J. GOMES, THE GOOD BOOK: READING THE BIBLE WITH MIND AND HEART 33–51 (1996) (observing that the Bible necessarily is open to interpretation but that there is a danger of “an idolatry of scripture,” which includes worshipping the text over the spirit of the Bible and conforming the Bible's meaning to prevailing culture).

543. Of course, the conclusion that corporal punishment of children “is no part of any constitutional right” obviates the need for discussion as to whether a law
This conclusion is strengthened by the fact that the U.S. Supreme Court has not held that under the Constitution familial or parent-child relations must be free of all and any governmental regulation. In the Court's view, some governmental interference with each individual's personal liberty is the only means of avoiding anarchy. The Court has stated:

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

The Court has reiterated this principle in the parent-child context, acknowledging "that the state has a wide range of power

criminalizing such punishment should be held to a compelling interest standard in order to survive judicial scrutiny. This standard is only applicable when legislation impacts upon a fundamental constitutional right. See generally 2 ROTUNDA & NOWAK, supra note 471, § 15.7 (describing the compelling interest standard and the increased level of scrutiny in fundamental rights cases); 3 id. § 18.3 (describing the standards of review and illustrating the heightened standard used in fundamental rights cases).

544. See, e.g., Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 285–87 (1990) (upholding a Missouri requirement that family members—in this case, parents—prove by clear and convincing evidence that an incompetent person would wish withdrawal of life support); Lassiter v. Department of Social Servs., 452 U.S. 18, 27–34 (1981) (holding that the Due Process Clause cannot be understood to require the appointment of counsel for indigent parents in every parental termination proceeding); Parham v. J.R., 442 U.S. 584, 604 (1979) (stating that parents do not have absolute and unreviewable discretion to institutionalize a child); Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam) (ruling that a state may not deny illegitimate children the judicially enforceable right to support from their natural fathers when the state gives that right to legitimate children); Prince v. Massachusetts, 321 U.S. 168, 169–71 (1944) (upholding a Massachusetts statute prohibiting a child from street preaching in company with her custodial aunt); Jacobson v. Massachusetts, 197 U.S. 11, 30–34 (1905) (commenting upon state statutes that require vaccination of children as proper exercises of the police power); see also Keiter, supra note 493, at 485 (remarking that the Court does not appear to embrace the idea of absolute parental authority over the child's life).

for limiting parental freedom and authority in things affecting the child's welfare,” 546 and that "the family itself is not beyond regulation in the public interest." 547

In fact, states routinely legislate so as to further child welfare by directing parents to engage in or to desist from engaging in various kinds of conduct. For instance, there are state laws requiring parents to have their children vaccinated 548 and to provide their children with state-approved education, 549 as well as laws prohibiting parental child abuse. 550 There are also laws governing when children may drive, drink, vote, contract, or marry. 551 The Supreme Court has acknowledged the government's inherent parens patriae power to intervene in the family and restrict parental conduct so as to protect children's well-being. 552 Indeed, governmental regulation of the parent-child relationship is accepted practice in the United States. 553 That some child protection laws have on occasion been the subject of successful constitutional challenges by parents does not obviate the fact that extensive regulation of the family continues to coexist with parental or familial constitutional interests.

Nor have parents always prevailed when they have chosen to litigate the constitutionality of such regulations. Rather, the

547. Id. at 166.
548. See 2 KRAMER, supra note 541, § 24.08, at 451 (stating that “many states impose the ... requirement that a child be immunized against smallpox, rubeola (German measles), and other communicable diseases as a precondition to being admitted to school”).
549. See id. § 24.04 (discussing the rights of states to set educational standards); Bitensky, supra note 485, at 551 & n.6 (stating that every state has laws mandating school attendance for certain ages).
550. See 2 KRAMER, supra note 541, §§ 16.02 to 16.22.
551. See McCarthy, supra note 493, at 1012 & n.143.
552. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that the state “may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways”); see also John E.B. Myers, The Child, Parents and the State, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 87, 90 (1990) (pointing to Supreme Court language indicating limitations on parental rights); Johnson, supra note 463, at 363; Keiter, supra note 493, at 488. See generally Thomas, supra note 408, at 313–23, 326 (discussing the role of parens patriae).
553. See Woodhouse, supra note 419, at 1038–41, for a concise review of the history of governmental regulation of the child-parent relationship. See also DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 151 (1993) (observing that in every society “there is always some limit set to acceptable rearing practices”); Wald, supra note 419, at 262 (mentioning that every state has adopted minimal standards for parenting); Humm, supra note 530, at 1129 (referring to the established governmental authority to intervene in the family to protect children from abuse).
Court has opted for a flexible approach that assesses, as a threshold matter, whether parents or guardians are claiming a bona fide constitutional right. For example, although in Wisconsin v. Yoder the Court upheld Amish parents’ Free Exercise Clause challenge, the Court took an entirely different view of the Free Exercise Clause claim of a child’s custodian in Prince v. Massachusetts. In Prince, the custodial aunt of a nine-year-old permitted the child to accompany her on the streets where they attempted to distribute Jehovah’s Witnesses’ publications. The aunt was charged with violating a Massachusetts child labor law that forbade such conduct; she asserted, among other things, that the state law abridged her and her niece’s right to free exercise of religion. She also claimed that the state law unconstitutionally interfered with the Meyer-Pierce parental child rearing right under the Due Process Clause. The Court, however, collapsed the latter claim into the former for the reason that, in this instance, the due process claim only extended as far as the free exercise claim.

The Court noted that counterpoised against these claims stood society’s interests in protecting the welfare of children. The State’s interest, said the Court, was “no mere corporate concern of official authority,” but, rather, was “the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.” The Court found that the child’s street preaching, even under the supervision of her aunt, was dangerous. Not only would it create the same sorts of difficult situations that adult propagandizing may produce, but it might cause “emotional excitement and psychological or physical injury” to the child. As such, the child’s street preaching was not and could not be a part of the First Amendment “right to practice religion

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554. See supra notes 506–14 and accompanying text.
556. See id. at 161–62.
557. See id. at 160–61, 164. The aunt also claimed that the state law denied her and her niece equal protection of the laws, an argument not germane to the discussion in the text of this Article. See id. at 160.
558. See id. at 164.
559. See id. at 164 n.8.
560. See id. at 165.
561. Id.
562. See id. at 169–70.
563. Id.
564. See id. at 170.
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freely." On this basis the Court held that the state child labor law, as applied to the aunt and her ward, did not violate the Free Exercise Clause. Although the Court did not explicitly say so, necessarily this meant that the state law also did not violate the aunt's substantive due process child rearing right.

Jehovah's Witnesses v. King County Hospital is similarly instructive. In this case, the plaintiffs were adult and minor Jehovah's Witnesses, suing on behalf of themselves and as a class action on behalf of Jehovah's Witnesses in the state of Washington. The plaintiffs alleged that Washington's Juvenile Court Law was unconstitutional in allowing medical care providers and judicial personnel to obtain court orders removing the children of Jehovah's Witnesses from the custody of their parents when the latter refused, on medical, religious or other personal grounds, to consent to blood transfusions for their children who had been placed in the care of a physician. Although plaintiffs invoked several constitutional provisions as the basis for their challenge, the three-judge district court only addressed the plaintiffs' arguments under two provisions: the Free Exercise Clause and the Due Process Clause insofar as the latter bears on substantive parental rights.

The plaintiffs' contention under the Free Exercise Clause was that as Jehovah's Witnesses they understood literally the Bible's command that Christians must "'abstain from blood.'" To these Jehovah's Witnesses, the command meant that they and their offspring must refrain from receiving blood

565. Id. at 166.
566. See id. at 170. The Court also held that the challenged state laws did not violate equal protection principles. See id. at 170–71.
567. See supra text accompanying notes 557–59.
569. See id. at 499.
570. See id. at 499–500.
571. See id. at 500–01. Plaintiffs invoked their First Amendment rights of association and free exercise of religion as well as the First Amendment's Establishment Clause; they also claimed, among other things, that they had been denied rights of family privacy and equal protection. See id. at 500–01.
572. See id. at 504–05.
573. Id. at 502 & n.8 (quoting Acts of the Apostles 15:20 and Leviticus 17:10).
transfusions or they would face spiritual harm. They also argued that as parents they had the right to select medical treatment for their children. In plaintiffs’ view, the Washington Juvenile Court Law thwarted Jehovah’s Witness parents from living by these religious beliefs and exercising parental authority over medical decisions affecting their children.

The district court ruled that the Supreme Court’s holding in *Prince* applied so as to require that the Washington law be upheld as a “state intervention in the name of health and welfare.” The court reasoned that the free exercise and parental child rearing rights do not include the right to expose children to illness or to make martyrs of them. The Supreme Court affirmed the district court’s judgment in a memorandum disposition.

Thus, *Prince* and Jehovah’s Witnesses exemplify the Court’s willingness to put to one side plaintiffs’ characterizations of the constitutional status of parental directives and to assess for itself whether those directives are given by constitutional right. The Court has not shied from repudiating that constitutional status where parental conduct would be likely to impair a child’s psychological or physical well-being.

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574. See id. at 502.
575. See id. at 501.
576. See id. at 501–02.
577. Id. at 504–05.
578. See id. at 504.
579. See Jehovah’s Witnesses v. King County Hosp., 390 U.S. 598 (1968) (mem.).
580. It should be noted that the *Prince* Court expressly limited its holding to the facts of that case. See *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944). Nevertheless, *Prince* still stands as a testament to the fact that the Supreme Court may approve of state interference to protect children even when parents argue the Constitution against that intervention. Indeed, the district court invoked *Prince* for precisely this purpose in Jehovah's Witnesses, 278 F. Supp. at 504–05. See also *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (stating in dicta that constitutional parental child rearing rights do not give parents an absolute and unreviewable discretion to institutionalize a child). *But see Dwyer*, supra note 495, at 1382 (detecting a hint in *Prince* that “some lesser harm” may legally befall children when they are included in their parents’ free exercise activities); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 37–38 (1994) (placing parental power to administer corporal punishment within the parents’ constitutional child rearing right).

It is also interesting to note in this connection that in some of the cases involving the constitutionality of state imposed parental consent as a prerequisite to a minor’s decision to obtain an abortion, the Court has favored the minor’s interest over that of the parents. See *Bellotti v. Baird*, 443 U.S. 622, 642–51 (1979) (plurality opinion); Planned Parenthood v. Danforth, 428 U.S. 52, 72–75 (1976). *But see Planned Parenthood v. Casey*, 505 U.S. 833, 899–900, 970–71 (1992) (plurality opinion) (upholding a parental consent provision). However, these cases are inapposite to a discussion of the constitutionality of governmental prohibition of corporal punishment of children be-
is there any reason why this approach should be limited to claims only under the Free Exercise or Due Process Clauses. As was mentioned previously, the Court has refused to protect violent behavior under the Free Speech Clause of the First Amendment. If the use of violence against children, even in the name of discipline, would compromise their well-being, then *Prince*, Jehovah's Witnesses, and the free speech cases teach that parental claims of a right to engage in such conduct should fail no matter which provision of the Constitution is invoked to support the claim.

As Part III shows, enactment of a prohibition against sub-abuse corporal punishment of children would constitute governmental interference with parental conduct to precisely this end of protecting the child's well-being. The prohibition has even more justification than the street peddling statute at issue in *Prince* because corporal punishment of children may have lasting adverse side effects for the persons punished as well as grave societal ramifications. It will be recalled that corporal punishment is assessed by many authorities as doing little to develop a child's conscience or to deter children's objectionable behavior over the long run. In contrast, a host of personal physical and mental ills, manifested during childhood and later in adulthood, have been traced to this practice. Corporal punishment may also be a factor contributing to people's capacity for brutality towards each other on a societal scale, either in the form of crime or of genocide and war. It would seem that alleviating afflictions of this ilk by deterring corporal punishment would ultimately preserve rather than violate the Constitution. Moreover, even if the studies and theories were to be dismissed as inconclusive or invalid, Part III also advances the idea that corporal punishment of children should be criminalized for the simple reason that it is morally wrong. It is morally wrong because a child, like any other person, should be able to live free from violence or the dread of violence. It is morally wrong because the child's human dignity and very status as a human being is

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581. *See supra* note 539 and accompanying text.
582. *See supra* notes 348, 353–54 and accompanying text.
584. *See supra* notes 393, 404 and accompanying text.
diminished when the child is struck as a matter of right.\textsuperscript{585} Indeed, as discussed earlier, corporal punishment of children by any other name is, in its essential elements, a battery.\textsuperscript{586} If the Constitution does not immunize a stranger who hits another adult or even another person's child, then there can be no valid reason, based on the data and principles mentioned above, for the Constitution to immunize a parent who hits his or her own child. This should especially be the case in view of the Supreme Court's traditional sensitivity to the vulnerability of children and recognition that they may therefore deserve special solicitude from the law.\textsuperscript{587}

While a prohibition on all subabuse corporal punishment of children would unquestionably interfere with parental authority, this, by itself, is not necessarily un-American or unconstitutional. American law does not treat the family as a domain for the unfettered exercise of parental power. On the contrary, the parent-child relationship is already subject to a certain amount of regulation as an ordinary, unremarkable incidence of living in a society that prides itself on respect for all individuals, adults or children. Some governmental interference with this relationship is constitutional and some is not. Even more than the state's interference with a child's street peddling in \textit{Prince}, the prohibition of corporal punishment of children will shield children from enduring physical and psychological damage; perhaps such a prohibition would also give new impetus to society's humane impulses. Furthermore, by steering parents towards more productive and healthful disciplinary techniques, the prohibition could also

\textsuperscript{585} See supra notes 413, 417–18 and accompanying text.

\textsuperscript{586} See supra notes 408, 439, 442–49 and accompanying text.

\textsuperscript{587} See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978) (holding that an FCC order regulating a radio program which contained pervasively sexual and excrementary language did not violate the First Amendment's Free Speech Clause because, although adults might have a constitutionally protected right to hear such materials, the broadcast was accessible in private homes and especially to children); Ginsberg v. New York, 390 U.S. 629, 638–43 (1968) (upholding constitutionality of a New York statute prohibiting sale of "girlie" magazines to minors based upon the theory that for children's own good their freedom of expression is not coextensive with that of adults); Prince v. Massachusetts, 321 U.S. 158, 168–70 (1944) (ruling that Massachusetts laws may constitutionally proscribe children's proselytizing on the streets without violating their right to free exercise of religion or to equal protection because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults").
assist parents in their child rearing responsibilities—a proper and highly desirable legislative goal. 588

CONCLUSION

If all of our assumptions were valid, we would need neither to think nor to change. We could simply follow the practices of our forebears. History has shown, however, that assumptions, no matter how longstanding or prevalent, can be ill-advised and even immoral. At one time in the United States, slavery of African-Americans was legal, 589 and physical chastisement of wives was assumed to be every husband's prerogative. 590 Americans thought through these assumptions and ultimately repudiated them. The process was hardly a smooth one. The Civil War was fought, in part, over the legitimacy of slavery, 591 and a controversial women's liberation movement contributed to the recognition that wife battering is wrong. 592 Although abolitionists and women's rights advocates prevailed, initially, their pleas must have struck many as bizarre and too extreme. But, what were radical ideas in one century became the norm in the next century with the help of legal reform and attitudinal transformations.

Like slavery and wife beating, corporal punishment of children is symptomatic of a lack of regard for our fellow human beings. Like slaves in the antebellum South and wives before the advent of protective law reform, children in this country hold an anachronistic subhuman status insofar as they alone

588. See Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."); accord Bellotti v. Baird, 443 U.S. 622, 639 (1979) (plurality opinion); see also James Lindfield, Stopping Spanking: The Parental Cessation of Corporal Punishment 21–34 (Jan. 1997) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform) (describing a study showing that cessation of parental corporal punishment improves the parent-child relationship and parents' control over their children's behavior).


591. See Kolchin, supra note 589, at 201; Smith, supra note 426, at 1175–89; Gabor S. Boritt, Civil War, in 4 The World Book Encyclopedia 614, 614 (1993).

may legally be made the object of violence in the absence of war or other armed conflict. We do not know what the world would be like if a generation of children grew up, with the benefit of adult guidance and discipline, but protected from this legalized everyday violence. Certainly the experience of childhood would be less painful and fearful. Perhaps the reality of childhood would actually live up to its romantic billing as a time of playfulness and trusting innocence. More intriguing still, perhaps a generation raised without violence would have a greater capacity for compassion and rational reflection and less of an appetite for brutality and impulsive acts of anger. Dare we forgo the possibility, novel and strange as it may seem now, that a legal prohibition of corporal punishment of children would someday help lead to a less brutish existence? It is not an awful chance to take, for other countries and even one of our own states have adopted such a prohibition and "society has not collapsed." If we dare to spare the rod, not only will civilization continue, but human mercy may more readily "droppeth as the gentle rain from heaven," befittingly dignifying child and adult alike.

593. Flaherty, supra note 431. Irish Parliamentarian Mary Flaherty described the mission of a recent delegation of Irish legislators to Sweden as being to "see if [Swedish] society had collapsed" due to that country's prohibition of parental and other corporal punishment of children. Id. She noted that the delegation was able to bring home so favorable a report that two barristers were appointed to draft a new law prohibiting all corporal punishment of children in Ireland. Id.

594. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, l.185 (George Lyman Kittredge ed., Ginn and Company 1945).