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

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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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This Article is dedicated to my son, William N. Meyrowitz.

## 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;<sup>1</sup> 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.<sup>2</sup>

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

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1. See NANCY SAMALIN, *LOVING YOUR CHILD IS NOT ENOUGH: POSITIVE DISCIPLINE THAT WORKS* 73 (1987); WILLIAM SEARS & MARTHA SEARS, *THE DISCIPLINE BOOK: EVERYTHING YOU NEED TO KNOW TO HAVE A BETTER-BEHAVED CHILD—FROM BIRTH TO AGE TEN* 148 (1995).

2. See MURRAY A. STRAUS, *BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES* 163 (1994); Dean M. Herman, *A Statutory Proposal to Prohibit the Infliction of Violence upon Children*, 19 *FAM. L. Q.* 1, 18–21 (1985); see also ALICE MILLER, *THOU SHALT NOT BE AWARE: SOCIETY'S BETRAYAL OF THE CHILD* 161, 209–10, 299 (1984) (describing generally the way children react to trauma caused by their parents).

children have been hit by an adult in one venue or another.<sup>3</sup> Indeed, corporal punishment of children in the schools is, as of this writing, legal in about half the states.<sup>4</sup> "Reasonable"

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3. 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;<sup>5</sup> even so, recently

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(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 “maintain[ing] order and control”); WASH. REV. CODE ANN. § 28A.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).

Also, “[c]orporal punishment is no longer practiced in most Catholic schools . . .” Karen W. Arenson, *Parochial School Mystique*, N.Y. TIMES, Sept. 22, 1996, § 4 (Week in Review), at 14.

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 (1995). 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.<sup>6</sup>

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11, § 468 (1995); GA. CODE ANN. § 19-15-1(3)(A) (Supp. 1997); HAW. REV. STAT. § 703-309(1) (1993); IDAHO CODE § 16-2002 (1996); IND. CODE ANN. § 31-34-1-15 (West Supp. 1997); KY. REV. STAT. ANN. § 503.110(1) (Michie 1990); LA. REV. STAT. ANN. § 14:18(4) (West 1997); ME. REV. STAT. ANN. tit. 17-A, § 106(1) (West 1983); MD. CODE ANN., FAM. LAW § 4-501(b)(2) (Supp. 1997); MICH. COMP. LAWS ANN. § 750.136b (West 1991); MISS. CODE ANN. § 43-21-105 (Supp. 1997); MO. REV. STAT. § 210.110(1) (1994); N.H. REV. STAT. ANN. § 627:6(I) (1996); N.Y. PENAL LAW § 35.10(1) (McKinney 1998); N.D. CENT. CODE § 12.1-05-05(1) (1985); OHIO REV. CODE ANN. § 2151.03.1(B) (Anderson Supp. 1996); OKLA. STAT. ANN. tit. 21, § 844 (West 1983); OR. REV. STAT., § 161.205(1) (1995); PA. STAT. ANN. tit. 18, § 509(1) (West Supp. 1997); S.C. CODE ANN. § 20-7-490(3)(a) (West Supp. 1997); S.D. CODIFIED LAWS § 22-18-5 (Michie Supp. 1997); TEX. FAM. CODE ANN. § 261.001(1)(C) (West 1996); UTAH CODE ANN. § 76-2-401(3) (1995); WASH. REV. CODE § 26.44.015 (1996); WIS. STAT. ANN. § 939.45 (West 1996 & Supp. 1997).

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.<sup>7</sup> Indeed, while most psychologists, pediatricians, social workers, and other experts in child development have questioned the wisdom of corporal punishment of children,<sup>8</sup> 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.<sup>9</sup> 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,

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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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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

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10. See *infra* notes 391–405 and accompanying text.

11. See PENELOPE LEACH, *YOUR GROWING CHILD: FROM BABYHOOD THROUGH ADOLESCENCE* 205–08, 211–13, 217 (1996) (defining the proper nature and role of discipline as affected by the variable of a child's age); SEARS & SEARS, *supra* note 1, at 158–59; BENJAMIN SPOCK, *DR. SPOCK ON PARENTING* 145–53 (1988) (denying that lack of corporal punishment amounts to permissive parenting); ALICE MILLER, *FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE* 177 (1990) (rejecting permissiveness in child rearing).

12. This formulation is derived in large measure from Professor Murray A. Straus' definition of corporal punishment. See STRAUS, *supra* note 2, at 4.



already received substantial attention from American legal scholars.<sup>13</sup> 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

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13. See, e.g., Lawrence A. Alexander & Paul Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 S. CAL. L. REV. 1305, 1326-49, 1382-93, 1399-1403 (1979); Gerard J. Clark, *Ingraham v. Wright and the Decline of Due Process*, 12 SUFFOLK U. L. REV. 1151 (1978); Cynthia Price Cohen, *Beating Children Is as American as Apple Pie*, HUM. RTS., May, 1978, at 24; Cynthia Price Cohen, *Freedom from Corporal Punishment: One of the Human Rights of Children*, N.Y.L. SCH. HUM. RTS. ANN. 95, 101-11 (1984) [hereinafter Cohen, *Corporal Punishment*]; John Dayton, *Corporal Punishment in Public Schools: The Legal and Political Battle Continues*, 89 EDUC. L. REP. 729 (1994); Cecelia M. Espenosa, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L. Q. 407, 425-27 (1996); Donald H. Henderson, *Constitutional Implications Involving the Use of Corporal Punishment in the Public Schools: A Comprehensive Review*, 15 J. L. & EDUC. 255 (1986); Joan L. Neisser, *School Officials: Parents or Protectors? The Contribution of a Feminist Perspective*, 39 WAYNE L. REV. 1507, 1522-25, 1530, 1542, 1546-47 (1993); Parkinson, *supra* note 4; Cary W. Purcell, *Limiting the Use of Corporal Punishment in American Schools: A Call for More Specific Legal Guidelines*, 13 J. L. & EDUC. 183 (1984); Irene Merker Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools*, 27 HOUS. L. REV. 399 (1990); Irene Merker Rosenberg, *Ingraham v. Wright: The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75 (1978); Jacqueline A. Stefkovich, *Students' Fourth and Fourteenth Amendment Rights After Tinker: A Half Full Glass?*, 69 ST. JOHN'S L. REV. 481, 507-08 (1995); Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 216, 219-21, 252-57 (1984).

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.<sup>14</sup> Part I also provides a discussion of Minnesota statutes precluding corporal punishment as a defense to assault charges.<sup>15</sup> 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.<sup>16</sup> Sweden's statute has been on the books for over seventeen years.<sup>17</sup> The circumstances surrounding this longevity are cause for reassurance

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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<sup>18</sup> by enacting a statutory prohibition in 1979 that extended to parents and guardians, among others.<sup>19</sup> 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."<sup>20</sup> School personnel also are forbidden by Swedish law from using corporal punishment on students.<sup>21</sup>

Prior to the 1979 legislation, Sweden had a long tradition of corporal punishment in the family context.<sup>22</sup> Although the Swedish Parliament had made steady progress toward restricting this tradition by legal reform during the 1950s and

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18. See PETER NEWELL, CHILDREN ARE PEOPLE TOO: THE CASE AGAINST PHYSICAL PUNISHMENT 67 (1989); Dennis A. Olson, Comment, *The Swedish Ban of Corporal Punishment*, 1984 BYU L. REV. 447, 447.

19. 6 kap. 1§ para. 2 föräldrabalken (Swed.) [Swedish Children and Parents Code ch. 6, § 1, ¶ 2] (Swedish Ministry of Justice trans.) (stating that "[t]he parent or guardian shall exercise necessary supervision in accordance with the child's age and other circumstances" and that "[t]he 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.).

21. See Letter from Göran Håkansson, Permanent Undersecretary, Swedish Ministry of Health and Social Affairs, to the author (May 6, 1997) (on file with the *University of Michigan Journal of Law Reform*); Letter from Katja Levén, attorney with the law firm of Lagerlöf & Leman, Stockholm, Sweden, to Nicholas J. Stasevich 6 (May 30, 1996) (on file with the *University of Michigan Journal of Law Reform*) (hereinafter Levén Letter).

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).

1960s, including repeal of a statutory provision allowing reprimands, the perception continued among a substantial number of Swedes that their laws condoned such punishment.<sup>23</sup> 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.<sup>24</sup> The Commission found subabuse corporal punishment to be deleterious to children's well-being and recommended an explicit ban.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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."<sup>28</sup>

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23. See NEWELL, *supra* note 18, at 71; Olson, *supra* note 9, at 448-51. For a fuller history of the legal status of corporal punishment of children in Sweden before the 1979 reform, see NEWELL, *supra* note 18, at 70-73; SIMONE EK, RÄDDA BARNEN [SWEDISH SAVE THE CHILDREN], THE FIRST ANTI-SPANKING LAW IN THE WORLD 1-5 (1994) (presented as a paper before the U.N. Committee on the Rights of the Child on Oct. 10, 1994 in Geneva, Switzerland); Klaus A. Ziegert, *The Swedish Prohibition of Corporal Punishment: A Preliminary Report*, 45 J. MARRIAGE & FAM. 917, 919 (1983); Adrienne A. Haeuser, *Reducing Violence Towards U.S. Children: Transferring Positive Innovations from Sweden* 16-17 (1988) (unpublished report of study visit to Sweden May 14 through June 16, 1988 in fulfillment of a grant award from the U.S. Department of Health and Human Services) (on file with the *University of Michigan Journal of Law Reform*).

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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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 Levén trans.) (quoted in Levén 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 Håkansson, 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 Håkansson, 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. Håkansson 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 Håkansson, *supra*.

32. See Elizabeth Ann Gibbons, Note, *Surveying Massachusetts' Child Abuse Laus: 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 Håkansson, *supra* note 31; Levén 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.<sup>33</sup> 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.<sup>34</sup>

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*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.

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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§ föräldrabalken [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.

12§ socialtjänstlagen [The Social Services Act § 12, Swedish Code of Statutes] (Int'l Secretariat of the Swedish Ministry of Health and Social Affairs & Katja Levén trans.) [hereinafter Swedish Social Services Act].

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.<sup>35</sup> 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<sup>36</sup> and with extensive support services designed to minimize family stress and conflict.<sup>37</sup>

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.<sup>38</sup> Taken together, the surveys show that 70% of middle school-age children and 56% of adults oppose all forms of physical punishment of children.<sup>39</sup> Another 22% of adults oppose all forms of physical punishment in principle but admit to using such punishment if they are overwrought.<sup>40</sup> Thus, 78%

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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* Levén 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.

37. See Haeuser, *supra* note 23, at 26, 28-29.

38. See STATISTICS SWEDEN, DEMOGRAPHY, THE FAMILY AND CHILDREN, SPANKING AND OTHER FORMS OF PHYSICAL PUNISHMENT: A STUDY OF ADULTS' AND MIDDLE SCHOOL STUDENTS' OPINIONS, EXPERIENCE, AND KNOWLEDGE (1996).

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).<sup>41</sup> In keeping with this attitudinal shift, the surveys found overall "a strong decrease in the use of physical punishment" in Sweden.<sup>42</sup> Specifically, the surveys found that roughly 30% of middle school-age students reported having been exposed to parental corporal punishment before they became teenagers.<sup>43</sup> In contrast, a 1979 survey shows that about half of all Swedish parents surveyed spanked their children.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> For example, Swedish parents are encouraged to control their children by talking and reasoning.<sup>47</sup> Other favored techniques include sending a child to his or her room or depriving the child of privileges.<sup>48</sup> The 1994/1995 surveys found that most people think that deprivation of privileges, such as a weekly allowance, is the preferable form of punishment.<sup>49</sup> 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.<sup>50</sup>

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41. *See id.* at 7.

42. *See id.* at 15.

43. *See id.*

44. *See id.*

45. *See Haeuser, supra* note 23, at 22-24.

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.<sup>51</sup> 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."<sup>52</sup> The ban was adopted unanimously and almost without debate, and went into effect on January 1, 1984.<sup>53</sup> 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.<sup>54</sup>

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,

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51. See NEWELL, *supra* note 18, at 87.

52. Laki lapsen huollosta ja tapaamisoikeudesta, 1 luku, 1§, 3 mom. [Finnish Child Custody and Right of Access Act, ch. 1, § 1, subsec. 3] (Finnish Dep't 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 Nädig Förordning hvarigenom användandet af kroppslig bestraffning vid läroverken 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.<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup> The Court stated that

[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

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

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

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.

An attempt shall be punished.

Rikoslaki, 21 luku, 5§ [Finnish Penal Code ch. 21, § 5] (Finnish Ministry of Justice trans.).

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.

57. *See* Memorandum from Isabella Riska, Attorney, Roschier-Holmberg & Waselius, Helsinki, Finland, to Nicholas J. Stasevich 4 (June 25, 1996) (on file with the *University of Michigan Journal of Law Reform*) (describing Korkeimman oikeuden ratkaisuja [Decision of the Highest Court of Finland] 1993:151, Helsinki 1994, at 685).

guardians employ physical violence on their child, even if they consider it a means of upbringing.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup> For example, Finnish authorities have utilized television spots to urge parents to use reasoned discussion as a substitute for physical chastisement.<sup>62</sup>

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58. *See id.*

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." Oikeudenkäymiskaari 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* Vahingonkorvauslaki, 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).

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*).

61. *See* NEWELL, *supra* note 18, at 87-89.

62. *See id.* at 88-89.

## C. Denmark

In 1985, Denmark became the third Scandinavian country to enact a law directed against corporal punishment of children in the family context.<sup>63</sup> The law, which became effective on January 1, 1986,<sup>64</sup> provided that "Parental custody implies the obligation to protect the child against physical and psychological violence and against other harmful treatment."<sup>65</sup> 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."<sup>66</sup> Denmark has also banned corporal punishment in the schools.<sup>67</sup>

Unlike its Swedish and Finnish counterparts, the earlier Danish statute dealing with parental corporal punishment was generally understood to be precatory.<sup>68</sup> 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 & Münter trans.); NEWELL, *supra* note 18, at 91.

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

65. Lov nr. 387 af 14. juni 1995 om foraeldremyndighed og samvaer, jf. § 2, stk. 2 [Danish Act on Parental Custody and Conviviality no. 387, § 2, subsec. 2 (June 14, 1995)] (revision of 1985 law) (Kromann & Münter trans.), *quoted in* NEWELL, *supra* note 18, at 91.

66. Lov nr. 416 om ændring af lov om foraeldremyndighed og samvaer § 1 [Danish Act to Amend the Act on Parental Custody and Conviviality no. 416 § 1] (Kromann & Münter 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 & Münter 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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup>

This equivocality engendered a continuing debate among Danish politicians and academics as to whether their country should strengthen the 1986 law.<sup>72</sup> The result is the 1997 amendment, which is regarded by its authors and other experts as completely prohibiting all corporal punishment of children.<sup>73</sup> 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.<sup>74</sup> Nevertheless, “[t]here will be no intensified or

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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 Bastrup, 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

excessive action taken by law enforcement or social welfare authorities to monitor ordinary families['] private lives."<sup>75</sup> 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.<sup>76</sup>

### D. Norway

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

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

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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 authorize 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.<sup>80</sup> The prohibition is conceived primarily as pedagogical in operation—as achieving its objective by shaping Norwegian norms on the subject.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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

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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 assails 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.<sup>84</sup> 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.<sup>85</sup> Finally, parental use of corporal punishment, even if it is mild, may be a factor influencing the outcome of custody disputes.<sup>86</sup>

### *E. Austria*

In 1989, the Austrian Parliament, by unanimous vote,<sup>87</sup> 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.”<sup>88</sup> Although the law itself provides no legal remedies for the physically punished child,<sup>89</sup> the intent behind the enactment is to bar all corporal

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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 grievances 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.

86. See Letter from Finn Erik Engzelius, of the law firm of Thommessen Krefting Greve Lund, Oslo, Norway, to author 1-2 (July 24, 1996) (on file with the *University of Michigan Journal of Law Reform*).

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.<sup>90</sup> As in the Scandinavian countries, Austria also has legislation prohibiting corporal punishment of students in the schools.<sup>91</sup>

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.<sup>92</sup> 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;<sup>93</sup> it was hoped that the 1989 reform would produce consistency in judicial decisions on this issue.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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.'"<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> There is also a

98. See *id.*

99. See DIVISION FOR CHILDREN'S RIGHTS, AUSTRIAN FED. MINISTRY FOR YOUTH AND FAMILY AFFAIRS, INITIAL REPORT OF AUSTRIA IN ACCORDANCE WITH ARTICLE 44 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 66, 68-70 (1996) (on file with the *University of Michigan Journal of Law Reform*); see also Interview with Dr. Michael Stormann, *supra* note 89; Letter from Dr. Kurt Heller, of the law firm of Heller, Löber, Bahn & Partners, Vienna, Austria, to Nicholas J. Stasevich 2-3 (May 28, 1996) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter Heller Letter 5/28/96].

For example, a parent violating the 1989 law could be prosecuted under a penal code provision which states:

1. Any person who physically injures another or harms his [or her] health shall be sentenced to a prison term of up to six months or a fine of up to 360 days pay.
2. Any person who physically abuses another and negligently injures him as a result or harms his health shall also be sentenced.

§ 83 Abs 1-2 StGB [Austrian Penal Code § 83 parts 1-2] (Berlitz Translation Services trans.).

Such a parent could also face possible prosecution under another penal code provision, which states in pertinent part:

1. Any person who inflicts physical or psychological suffering on another, who is under his care or custody and who has not yet completed his 18th year or who is defenseless because of infirmity, illness or mental deficiency, shall be sentenced to a prison term of up to three years.
2. Any person who grossly neglects his duty of custody or care for such a person and as a result, even when also only negligent, considerably harms his health or his physical or mental development shall also be sentenced.

§ 92 Abs 1-2 StGB [Austrian Penal Code § 92 parts 1-2] (Berlitz Translation Services trans.).

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.<sup>102</sup>

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.<sup>103</sup> Both children and adults may contact the ombudsman "to make suggestions and lodge complaints" about mistreatment of children, including the use of corporal punishment.<sup>104</sup> While the emphasis is on the prevention of any violence against children,<sup>105</sup> steps also have been taken to ensure that children who are exposed to violence receive medical and psychological care.<sup>106</sup>

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 . . . ."<sup>107</sup> 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."<sup>108</sup>

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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*).

103. DIVISION FOR CHILDREN'S RIGHTS, *supra* note 99, at 67-69.

104. See *id.* at 68.

105. See *id.*

106. See *id.* at 70.

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*).

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."<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup>

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109. Act of June 17, 1994, Law 147(1), OFFICIAL GAZETTE OF THE REPUBLIC OF CYPRUS NO. 2886 (Leonidas Markides, Embassy of the Republic of Cyprus trans.).

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.<sup>112</sup> In this decision the court announced as a new juridical principle<sup>113</sup> that "the use of violence for educational purposes can no longer be considered lawful."<sup>114</sup>

The case arose when Natalino Cambria took to repeatedly subjecting his ten-year-old daughter, Danila, to heavy beatings, purportedly to correct her behavior.<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup> On

112. *Cambria*, Cass., sez. VI, 18 marzo 1996, [Supreme Court of Cassation, 6th Penal Section, Mar. 18, 1996], *Foro It.* II 1996, 407 (Italy) (Translation by Triangle Translations on file with the *University of Michigan Journal of Law Reform*); Susan H. Bitensky, *Final Straw: To Spank or Not to Spank?*, CHI. TRIB., July 25, 1996, § 1, at 25; *Italian Court: Don't Hit Kids*, DET. FREE PRESS, May 20, 1996, at 4A [hereinafter *Italian Court*].

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. See Interview with Judge Francesco Ippolito, Judge of the Corte Suprema di Cassazione, Repubblica Italiana, in Rome, Italy (June 11, 1996).

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

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

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

117. 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<sup>118</sup> rather than for abuse of the means of correction.<sup>119</sup>

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;<sup>120</sup> 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.<sup>121</sup> Indeed, Cambria accused the Milan Court of Appeals of "rampant permissiveness."<sup>122</sup>

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.<sup>123</sup> 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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CODICE PENALE [C.P.] art. 571 (Italy), translated in THE ITALIAN PENAL CODE 190-91 (Edward M. Wise & Allen Maitlan trans., 1978).

118. The provision making ill-treatment a crime states as follows:

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.

C.P. art. 572.

119. See *Cambria*, Foro It. II 1996 at 408, Translation at 1; see also Interview with Judge Francesco Ippolito, *supra* note 113.

120. See *Cambria*, Foro It. II 1996 at 409, Translation, at 2; see also Interview with Judge Francesco Ippolito, *supra* note 113.

121. See sources cited *supra* note 120.

122. *Cambria*, Foro It. II 1996 at 409, Translation at 2.

123. 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.<sup>124</sup>

"The *Cambria* case involved the systematic use of serious violence against a child."<sup>125</sup> 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."<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup>

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.<sup>129</sup> 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.<sup>130</sup> During this period, the father was the head of the family and almost completely dominated his wife and children.<sup>131</sup> 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.<sup>132</sup>

Judge Ippolito noted that as Italy moved away from fascism, it also moved away from the concept of the authoritarian father.<sup>133</sup> 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.<sup>134</sup> Likewise, the Constitution also contains provisions assuring equal protection,<sup>135</sup> including provisions specifically recognizing that marriage must be "based on the moral and legal equality of husband and wife."<sup>136</sup> 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.<sup>137</sup>

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.<sup>138</sup> 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.<sup>139</sup> 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.*

134. See, e.g., COST. [Constitution] arts. 2, 3, 32, 36, 41 (Italy), translated in Gisberth H. Flanz, *Italy*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisberth H. Flanz eds., 1987) [hereinafter COST.]; Interview with Judge Francesco Ippolito, *supra* note 113 (discussing constitutional provisions).

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.<sup>140</sup>

These domestic reforms were paralleled by developments in the international law that governs Italy. In Italy, the constitutional court has long recognized treaties as superior to the Italian Constitution and other Italian laws.<sup>141</sup> 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. Convention on the Rights of the Child<sup>142</sup> to which Italy is a party.<sup>143</sup> 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.<sup>144</sup> Specifically, the court's opinion relies upon the preamble's recognition of children's need to develop "full[y] and harmonious[ly]" and to be brought up "in the spirit . . . of peace, dignity, tolerance, freedom, equality, and solidarity";<sup>145</sup> upon article 2's nondiscrimination principle;<sup>146</sup> upon article 3's

140. See Interview with Judge Francesco Ippolito, *supra* note 113.

141. See *id.*

142. U.N. Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., at 3, U.N. Doc. A/RES/44/25 (1989) [hereinafter Convention of the Child].

143. See Interview with Judge Francesco Ippolito, *supra* note 113. Italy entered into the Convention of the Child on September 5, 1991. See *Status of U.N. Convention on the Rights of the Child*, 30 I.L.M. 1780 (1991).

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 the Convention of the Child. See *Cambria*, Foro It. II 1996 at 410, Translation at 3–4.

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, pmb., 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,<sup>147</sup> and upon article 19's prohibition on the use of violence against children.<sup>148</sup>

Judge Ippolito stated that the Court in the *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.<sup>149</sup> 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.<sup>150</sup>

Judge Ippolito admitted that, in spite of the Court's ruling in the *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

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.

Convention of the Child, *supra* note 142, art. 2(1), at 5.

147. *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, *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:

States Parties shall use their best efforts to ensure recognition of the principle that both parents 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.

Convention of the Child, *supra* note 142, art. 18(1), at 9.

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

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.

Convention of the Child, *supra* note 142, art. 19(1), at 10.

149. See Interview with Judge Francesco Ippolito, *supra* note 113.

150. See *id.*

must denounce for the child as the child's legal representative.<sup>151</sup> However, the judge was optimistic about the overall effect of the *Cambria* decision insofar as it will influence future 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.<sup>152</sup> The judge predicted that the new juridical principle would "filter into society"<sup>153</sup> as a new norm and create an atmosphere in which physical chastisement of children is not socially acceptable.<sup>154</sup>

### *H. Minnesota*

Minnesota does not have a single statute that explicitly prohibits 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 parental 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 circumstances exist or the actor reasonably believes them to exist:

(6) 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.<sup>155</sup>

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

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151. *See id.*

152. *See id.*

153. *Id.*

154. *See id.*

155. MINN. STAT. ANN. § 609.06, subd. 1(6) (West Supp. 1997).

156. *See* MINN. STAT. ANN. § 609.379 (West 1978 & Supp. 1997).

to the same "reasonable force."<sup>157</sup> Section 609.379, subdivision 2 further lists the crimes to which reasonable force may be asserted as a defense.<sup>158</sup> Subdivision 2 does not include assault among those crimes.<sup>159</sup> Therefore, in Minnesota, reasonable force is not a defense to assault.<sup>160</sup>

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"<sup>161</sup> or the actual infliction of bodily harm.<sup>162</sup> Section 609.02, subdivision 7 of the Minnesota statutes defines bodily harm as "physical pain or injury, illness, or any impairment of physical condition."<sup>163</sup> 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."<sup>164</sup>

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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).

158. The text of section 609.379, subdivision 2, provides: "Subd. 2. Applicability. This section applies to sections 260.315, 609.255, 609.376, 609.378, and 626.556." MINN. STAT. ANN. § 609.379, subd. 2 (West Supp. 1997).

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.<sup>165</sup>

Although Minnesota has lived with this prohibition on corporal punishment of children for many years,<sup>166</sup> there are no reported cases of a parent being prosecuted for administering mild corporal punishment to children.<sup>167</sup> 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.<sup>168</sup>

Minnesota's law on corporal punishment of children is not widely known either by commentators, practitioners, or the general public.<sup>169</sup> This is probably due to the relative complexity and obtuseness of the prohibition's provisions.<sup>170</sup>

## 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.<sup>171</sup> Under this view, such instruments apply to human rights deprivations by governments and their agents against individuals but not to deprivations by private

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165. Letter from Victor I. Vieth to Nadine Block, *supra* note 5.

166. *See id.*

167. *See id.*

168. *See id.*

169. *See* Telephone Interview with Victor I. Vieth, Senior Attorney, National Center for Prosecution of Child Abuse (Dec. 11, 1997).

170. *See id.*

171. *See* ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 91-94 (1993) (discussing the traditional view of the public/private distinction in interpreting international human rights instruments); *see also* Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 97-106 (1993) (describing and critiquing the public/private distinction in human rights law from a feminist perspective).

individuals against other individuals.<sup>172</sup> 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 parentally 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.<sup>173</sup> 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.<sup>174</sup> 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 compliance<sup>175</sup> and in the scholarly literature.<sup>176</sup> The only arguable exception is the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention),<sup>177</sup> but, as will

172. See CLAPHAM, *supra* note 171, at 91 nn.10–11 (citations omitted).

173. See *id.* at 95–104 (discussing the evolution of international human rights instruments from the 1946 Charter of the International Military Tribunal at Nuremberg to the U.N. conventions on discrimination of the 1990s); MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 350–57 (1980); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 *passim* (1992).

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).

176. See CLAPHAM, *supra* note 171, at 93–133; LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 76–78 (1989); MCDUGAL ET AL., *supra* note 173, at 350–57; Louis Henkin, *International Human Rights and Rights in the United States*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25, 36 (Theodor Meron ed., 1984); Paust, *supra* note 173, *passim*; Romany, *supra* note 171, at 97–121.

177. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Torture Convention] (entered into force for the United States Nov. 20, 1994).

be shown, even that convention is being interpreted in some circles as extending to private individuals' transgressions.<sup>178</sup>

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.<sup>179</sup> To date, 191 countries have become parties.<sup>180</sup> The President of the United States signed the Convention of the Child on February 16, 1995,<sup>181</sup> but, to date, Congress has not ratified it; thus, the United States is presently not a party to the Convention of the Child.<sup>182</sup>

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.<sup>183</sup> 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).

180. *Multilateral Treaties Deposited with the Secretary-General, United Nations*, N.Y. ST/LEG/SER. E. (visited July 24, 1997) <[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boofiv\\_boofiv\\_11.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boofiv_boofiv_11.html)> [hereinafter *Multilateral Treaties*] (on file with the *University of Michigan Journal of Law Reform*).

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").

183. See MCDUGAL ET AL., *supra* note 173, at 266–72; Louis Sohn, "Generally Accepted" International Rules, 61 WASH. L. REV. 1073, 1073–74, 1077–79 (1986); Sarah Ramsey & Daan Braveman, "Let Them Starve": Government's Obligation to Children in Poverty, 68 TEMP. L. REV. 1607, 1639–42 (1995).

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. . . ."<sup>184</sup> The Convention of the Child has arguably become customary international law,<sup>185</sup> applicable even to non-parties such as the United States,<sup>186</sup> because it was adopted by consensus of the U.N. General Assembly<sup>187</sup> and has been ratified by an overwhelming majority of nations.<sup>188</sup>

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

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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).

184. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 rep. note 2 (1987).

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.

187. See GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 15 (International Studies in Human Rights Vol. 35, 1995).

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.<sup>189</sup> The Committee is considered the "authoritative source" with respect to interpretation of the Convention of the Child,<sup>190</sup> 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.<sup>191</sup>

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.<sup>192</sup> 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.<sup>193</sup>

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.

190. See Cynthia Price Cohen, *A Guide to Linguistic Interpretation of the Convention on the Rights of the Child: Articles 1, 4, 41 and 45*, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 33, 33 (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

191. U.N. Comm. on the Rts. of the Child, *Report on the Seventh Session*, U.N. Doc. CRC/C/34, Annex IV, at 63 (Nov. 1994).

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).

193. See, e.g., *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, 14th Sess., ¶ 27, U.N. Doc. CRC/C/15/Add.67 (1997) (recommending that Ethiopian legislation allowing "light bodily punishment" of children within the family should be abrogated "as a matter of priority"); *Concluding Observations of the Committee on the Rights of the Child: Nepal*, 12th Sess., ¶ 19, U.N. Doc. CRC/C/15/Add.57 (1996) [hereinafter *Concluding Observations on Nepal*] (voicing concern that Nepal had not yet taken measures to prevent corporal punishment of children within the family); *Concluding Observations of the Committee on the Rights of the Child: Zimbabwe*, 12th Sess., ¶ 18, U.N. Doc. CRC/C/15/Add.55 (1996)

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

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[hereinafter *Concluding Observations on Zimbabwe*] (expressing dismay that Zimbabwe's law tolerates corporal punishment of children in the family); *Concluding Observations of the Committee on the Rights of the Child: Republic of Korea*, 11th Sess., ¶ 15, U.N. Doc. CRC/C/15/Add.51 (1996) (articulating concern that in the Republic of Korea corporal punishment is still widely regarded by parents as an educational measure); *Concluding Observations of the Committee on the Rights of the Child: Germany*, 10th Sess., ¶ 30, U.N. Doc. CRC/C/15/Add.43 (1995) (proposing that Germany consider adding an absolute ban on corporal punishment to its civil code); *Concluding Observations of the Committee on the Rights of the Child: Portugal*, 10th Sess., ¶ 15, U.N. Doc. CRC/C/15/Add.45 (1995) (recommending that Portugal should take measure to prevent corporal punishment of children, especially in the family); *Concluding Observations of the Committee on the Rights of the Child: Senegal*, 10th Sess., ¶ 24, U.N. Doc. CRC/C/15/Add.44 (1995) [hereinafter *Concluding Observations on Senegal*] (stating that Senegal's domestic law should include a specific provision outlawing "any form of corporal punishment within the family"); *Concluding Observations of the Committee on the Rights of the Child: Ukraine*, 10th Sess., ¶ 29, U.N. Doc. CRC/C/15/Add.42 (1995) (suggesting that the Ukraine should enact a ban on corporal punishment in the family); *Concluding Observations of the Committee on the Rights of the Child: Tunisia*, 9th Sess., ¶ 17, U.N. Doc. CRC/C/15/Add.31 (1995) (proposing that Tunisia should employ measures against corporal punishment in the family); *Concluding Observations of the Committee on the Rights of the Child: Belgium*, 9th Sess., ¶ 15, U.N. Doc. CRC/C/15/Add.38 (1995) (encouraging Belgium to consider legislative reforms ensuring the prohibition of corporal punishment within the family); *Concluding Observations of the Committee on the Rights of the Child: Canada*, 9th Sess., ¶¶ 14, 25, U.N. Doc. CRC/C/15/Add.37 (1995) (recommending that Canada prohibit physical punishment in the family); *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, 8th Sess., ¶ 31, U.N. Doc. CRC/C/15/Add.34 (1995) [hereinafter *Concluding Observations on the United Kingdom*] (recommending that the United Kingdom should prohibit physical punishment of children in families); *Concluding Observations of the Committee on the Rights of the Child: Poland*, 8th Sess., ¶ 30, U.N. Doc. CRC/C/15/Add.31 (1995) (suggesting that Polish legislation should be reformed to reflect a prohibition on corporal punishment in the family); *Concluding Observations of the Committee on the Rights of the Child: Honduras*, 7th Sess., ¶ 27, U.N. Doc. CRC/C/15/Add.24 (1994) (advising Honduras to improve family education on child rearing, "including the importance of avoiding the physical punishment of children").

The Committee on the Rights of the Child has also made statements in its concluding observations that generally condemn corporal punishment of children, but without any special reference to the family context. See, e.g., *Concluding Observations of the Committee on the Rights of the Child: Sri Lanka*, 9th Sess., ¶¶ 15, 32, U.N. Doc. CRC/C/15/Add.40 (1995); [hereinafter *Concluding Observations on Sri Lanka*] *Concluding Observations of the Committee on the Rights of the Child: Jamaica*, 8th Sess., ¶ 7, U.N. Doc. CRC/C/15/Add.32 (1995); *Concluding Observations of the Committee on the Rights of the Child: France*, 6th Sess., ¶ 24, U.N. Doc. CRC/C/15/Add.20 (1994). Some concluding observations also criticize continued allowance of corporal punishment in the schools or commend its disallowance in educational institutions, as the case may be. See, e.g., *Concluding Observations of the Committee on the Rights of the Child: Guatemala*, 12th Sess., ¶ 33, U.N. Doc. CRC/C/15/Add.58 (1996); *Concluding Observations of the Committee on the Rights of the Child: Lebanon*, 12th Sess., ¶ 37, U.N. Doc. CRC/C/15/Add.54 (1996); *Concluding Observations on Zimbabwe, supra*, at ¶ 18; *Concluding Observations on Sri Lanka, supra*, at ¶¶ 15, 32.

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.<sup>194</sup>

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 . . . violence."<sup>195</sup> 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."<sup>196</sup> 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.<sup>197</sup> Why else would article 19, paragraph 1 refer to "all forms of physical . . . 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

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194. Convention of the Child, *supra* note 142, art. 19(1), at 10.

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).

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 . . . 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).

197. See Newell, *supra* note 196, at 222.

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.<sup>198</sup> 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. . . .<sup>199</sup>

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.<sup>200</sup>

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198. See *General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(b), of the Convention*, U.N. GAOR, Comm. on the Rts. of the Child, 343d mtg., U.N. Doc. CRC/C/58 (1996).

199. *Id.* at ¶ 88.

200. See, e.g., *Concluding Observations on Zimbabwe*, *supra* note 193, at ¶ 18; *Concluding Observations on Sri Lanka*, *supra* note 193, at ¶ 32; *Concluding Observations on Canada*, *supra* note 193, at ¶ 25; *Concluding Observations on the United Kingdom*, *supra* note 193, at ¶ 31.

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.

Convention of the Child, *supra* note 142, art. 5, at 6.

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.<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> 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."<sup>204</sup> 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.<sup>205</sup> 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."<sup>206</sup> What is more, this prohibition

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There was no place for corporal punishment within the margin of discretion accorded in article 5 to parents in the exercise of their responsibilities.

*Summary Record of the 205th Meeting*, U.N. GAOR, Comm. on the Rts. of the Child, 8th Sess., 205th mtg. at 17, U.N. Doc. CRC/C/SR.205 (1995).

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.

201. Santos Pais, *supra* note 189.

202. See, e.g., *Concluding Observations on Zimbabwe*, *supra* note 193, at ¶ 18; *Concluding Observations on Canada*, *supra* note 193, at ¶ 25; *Concluding Observations on the United Kingdom*, *supra* note 193, at ¶ 31.

203. See Santos Pais, *supra* note 189; see also Law, *supra* note 195, at 1858.

204. Convention of the Child, *supra* note 142, art. 37(a), at 17.

205. See Santos Pais, *supra* note 189.

206. *Id.*

applies in "all circumstances of the life of a child, including in family life or in the school system."<sup>207</sup>

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."<sup>208</sup> 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,<sup>209</sup> an understanding reiterated by Ms. Santos Pais.<sup>210</sup> 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.<sup>211</sup>

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.<sup>212</sup> For example, the preamble to the Convention of the Child refers to "the inherent dignity . . . of all members of the human family,"<sup>213</sup> the "dignity . . . of the human person,"<sup>214</sup> and the need for children to be brought up

207. *Id.*

208. Convention of the Child, *supra* note 142, art. 28(2), at 14.

209. *See Concluding Observations on Zimbabwe, supra* note 193, at ¶ 18; *Concluding Observations on Canada, supra* note 193, at ¶ 25; *Concluding Observations on the United Kingdom, supra* note 193, at ¶ 31; VAN BUEREN, *supra* note 187, at 249; Susan H. Bitensky, *Educating the Child for a Productive Life: Articles 28 and 29*, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 167, 174 (Cynthia Price Cohen & Howard A. Davidson eds., 1990); Law, *supra* note 195, at 1858; Telephone Interview with Cynthia Price Cohen, former member of the Ad Hoc Nongovernmental Group on the Drafting of the Convention on the Rights of the Child (Aug. 13, 1996).

210. *See Santos Pais, supra* note 189.

211. *See supra* notes 193-210 and accompanying text; *infra* notes 219-30 and accompanying text.

212. *See, e.g.,* Convention of the Child, *supra* note 142, pmb., at 3; *id.* arts. 37(c), 39, 40(1), at 17-18.

213. *Id.* pmb., at 3.

214. *Id.*

“in the spirit of . . . dignity.”<sup>215</sup> 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.”<sup>216</sup> 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.<sup>217</sup> 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.”<sup>218</sup>

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.<sup>219</sup> 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.”<sup>220</sup> Ms. Santos Pais elaborated that the principle of nondiscrimination “means that no child should be . . . punished . . . on the ground of his or her . . . status.”<sup>221</sup> The idea

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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."<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup> 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."<sup>225</sup> 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."<sup>226</sup> "Health" may be defined as "the condition of being sound in body, mind, or spirit."<sup>227</sup> 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,<sup>228</sup> and that such punishment can lead to child abuse resulting in physical harm as well.<sup>229</sup> 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.<sup>230</sup>

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226. Convention of the Child, *supra* note 142, art. 24(3), at 13.

227. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 558 (9th ed. 1988).

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.

### *B. Other International Human Rights Instruments*

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."<sup>231</sup> 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),<sup>232</sup> the International Covenant on Economic, Social and Cultural Rights (Economic Rights Covenant),<sup>233</sup> the International Covenant on

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231. See Santos Pais, *supra* note 189; see also BEVERLY C. EDMONDS & WILLIAM R. FERNEKES, *CHILDREN'S RIGHTS: A REFERENCE HANDBOOK* 2-3, 27 n.1 (1996) (observing that the Convention of the Child was preceded by various international human rights instruments that provided protections for children); Anders Rönquist, Counselor, Permanent Mission of Sweden to the United Nations, Speech at United Nations Convention on the Rights of the Child: Prospects for the Year 2000, Loyola University New Orleans School of Law (Feb. 14, 1997) (making the point that the Convention of the Child develops principles that were already applicable to children through earlier international human rights instruments).

232. Universal Declaration of Human Rights, G.A. Res. 217A, (III), U.N. GAOR, 3rd Sess., pt. 1, U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration].

233. 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 Economic Rights Covenant].

Civil and Political Rights (Civil and Political Rights Covenant),<sup>234</sup> the American Convention on Human Rights (American Convention),<sup>235</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),<sup>236</sup> and the Torture Convention<sup>237</sup> 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.<sup>238</sup> 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.<sup>239</sup> The Universal Declaration uses inclusive

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234. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1967) (ratified by the United States on June 8, 1992, *see* UNITED NATIONS, *supra* note 179, at 122) [hereinafter Civil and Political Rights Covenant].

235. American Convention on Human Rights, *done on* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].

236. European Convention on the Protection of Human Rights and Fundamental Freedoms, *done on* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

237. Torture Convention, *supra* note 177.

238. *See* VAN BUEREN, *supra* note 187, at 17, 19–23 (indicating that the Universal Declaration, the Economic Rights Covenant, the Civil and Political Rights Covenant, the European Convention, and the American Convention apply generally to children); Fernando Volio, *Legal Personality, Privacy, and the Family*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 185, 186–88, 205–08 (Louis Henkin ed., 1981) (contending that the Civil and Political Rights Covenant applies generally to children); Walter H. Bennett, Jr., *A Critique of the Emerging Convention on the Rights of the Child*, 20 *CORNELL INT'L L.J.* 1, 25–29 (1987) (noting that the Universal Declaration, the Economic Rights Covenant, the Civil and Political Rights Covenant, the European Convention, the American Convention, and the Torture Convention apply generally to children); Calciano, *supra* note 185, at 518 & n.25 (1992) (arguing that the Universal Declaration, the Economic Rights Covenant, and the Civil and Political Rights Covenant apply generally to children); Christine A. Corcos, *The Child in International Law: A Pathfinder and Selected Bibliography*, 23 *CASE W. RES. J. INT'L L.* 171, 172 (1991) (suggesting that the Universal Declaration applies generally to children); Rönquist, *supra* note 231 (stating generally that many international human rights instruments predating the Convention of the Child apply to children). *But see* Cynthia Price Cohen, *The Human Rights of Children*, 12 *CAP. U. L. REV.* 369, 376 (1983) (remarking that except for certain articles which expressly refer to juveniles, nothing in either the Economic Rights Covenant or in the Civil and Political Rights Covenant clearly states that these instruments apply generally to children).

239. *See* Bennett, *supra* note 238, at 27 (explaining that although the rights contained in the Universal Declaration, the Economic Rights Covenant, and the Civil and Political Rights Covenant apply generally to children, there are some rights "obviously intended exclusively for adults, such as the rights to vote and hold public office"); Cohen, *supra* note 238, at 378 (asserting that there are provisions of the Economic Rights Covenant and the Civil and Political Rights Covenant which obviously do not apply to children, such as the right to form trade unions and the right to vote).

language such as article 1's statement that "[a]ll human beings are born free and equal in dignity and rights,"<sup>240</sup> and article 2's promise that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration. . . ."<sup>241</sup> In a similar vein, the Torture Convention indicates that it is meant to protect "all members of the human family."<sup>242</sup> Likewise, the Economic Rights Covenant, the Civil and Political Rights Covenant, and the European Convention all employ the term "everyone" in guaranteeing various rights.<sup>243</sup> The latter two covenants also use the phrase "no one" as a term of general applicability in protecting all persons,<sup>244</sup> including children, against the infringement of certain rights.<sup>245</sup> The American

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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, pmb., 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<sup>246</sup>—demonstrating an unmistakable statement of intent to include children.<sup>247</sup>

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.<sup>248</sup> Article 1 of the Universal Declaration provides that "[a]ll human beings are born free and equal in dignity and rights."<sup>249</sup> Article 11, paragraph 1 of the American Convention announces that "[e]veryone has the right to have . . . his dignity respected."<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup>

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

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.<sup>253</sup> In a recent reiteration of its 1982 comments, the Human Rights Committee, charged with monitoring compliance with the Civil and Political Rights Covenant,<sup>254</sup> 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.

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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.<sup>255</sup>

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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.

255. *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Hum. Rts. Comm., General Comment 20, ¶¶ 2, 5, U.N. Doc. HRI/GEN/1/Rev.2 (1996) (substantially restating the substance of General Comment 7, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.2 (1996)); see also Tamela R. Hughlett, Comment, *International Law: The Use of International Law as a Guide to Interpretation of the United States Constitution*, 45 OKLA. L. REV. 169, 189 n.144 (1992) (suggesting that article 7 of the Civil and Political Rights Covenant may apply to corporal punishment); Elizabeth M. Misiaveg, Note, *Important Steps and Instructive Models in the Fight to Eliminate Violence Against Women*, 52 WASH. & LEE

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.<sup>256</sup>

The Torture Convention also contains prohibitions against torture in article 1<sup>257</sup> and against cruel, inhuman, or degrading treatment or punishment in article 16.<sup>258</sup> 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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L. REV. 1109, 1130-31 (1995) (noting that article 7 may be interpreted to proscribe gender-based violence perpetrated by private persons).

256. See MCDUGAL ET AL., *supra* note 173, at 321-22, 327; Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1012; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 19 (1982).

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.

Torture Convention, *supra* note 177, art. 1(1), S. TREATY DOC. NO. 100-20 at 20, 1465 U.N.T.S. at 113-14.

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.

Torture Convention,<sup>259</sup> 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.<sup>260</sup> 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.”<sup>261</sup> Some analysts have opined that the Torture Convention thus only reaches the conduct of government actors and not private perpetrators.<sup>262</sup> 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.<sup>263</sup> For example, one commentator maintains that the

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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).

260. See *Report of the Committee Against Torture*, U.N. GAOR, 50th Sess., Supp. No. 44, ¶¶ 169, 177, U.N. Doc. A/50/44 (1995); see also *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Comm. on Human Rts. Res. 1997/38, ¶ 9 (1997) (reminding governments that “corporal punishment can amount to cruel, inhuman or degrading punishment or even to torture”); *Report of the Special Rapporteur*, U.N. Comm. on Human Rts., 53d Sess., Provisional Agenda Item 8(a); ¶¶ 3–11, U.N. Doc. E/CN.4/1997/7 (1997) (stating that corporal punishment is inconsistent with the Torture Convention).

261. Torture Convention, *supra* note 177, arts. 1(1), 16(1), S. TREATY DOC. NO. 100-20 at 19, 23, 1465 U.N.T.S. at 113–14, 116.

262. See Katherine M. Culliton, *Finding a Mechanism to Enforce Women’s Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT’L L.J. 507, 554 (1993); David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449, 455–56 (1991); Kristen Walker, *An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law*, 26 N.Y.U. J. INT’L L. & POL. 173, 193–94 (1994); Andrew M. Wolfenson, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT’L L.J. 705, 717 (1989–90).

263. See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 298–99, 308–53, 355–56 (1994); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 60–61 (1992); see also Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 27 B.C. INT’L & COMP. L. REV. 275, 314 (1994) (stating that the Torture Convention may apply even if public officials do no more than tolerate an ongoing practice of torture).



Torture Convention's provisions should apply to situations of domestic violence against women.<sup>264</sup> 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."<sup>265</sup> 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,<sup>266</sup> represent an intentional infliction against the will of the victim,<sup>267</sup> and are legitimated by the victim's status.<sup>268</sup> 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.<sup>269</sup>

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.<sup>270</sup> This problem with article 1's applicability is more readily resolved since, as shown in Part

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264. See Copelon, *supra* note 263, at 298–99, 352–53, 355–56.

265. *Id.* at 299.

266. See *id.* at 308–25.

267. See *id.* at 325–29.

268. See *id.* at 330–31.

269. These aspects of corporal punishment of children are explored more fully in Part III of this Article.

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.

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).

III, even "reasonable" corporal punishment may cause severe psychological suffering<sup>271</sup> and is felt more acutely as physical pain by a child than an adult.<sup>272</sup> 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.<sup>273</sup> 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."<sup>274</sup> 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."<sup>275</sup> 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.<sup>276</sup> For example,

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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.

274. *Areas in Which Steps Need to Be Taken Towards Full Observance of the Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights*, 1994 INTER-AM. Y.B. ON H.R. (INTER-AM. COMM'N ON H.R.) 690, 704.

275. European Convention, *supra* note 236, art. 3, 213 U.N.T.S. at 224.

276. See, e.g., *Y v. United Kingdom*, 1992 Y.B. Eur. Conv. on H.R. 196 (Eur. Ct. H.R.) (taking note of a settlement reached after the European Commission of Human Rights found that article 3 of the European Convention had been violated when school personnel caned a fifteen-year-old pupil four times on his clothed buttocks so as to cause bruises, bruising, and swelling); *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 6–9, 17 (1978) (holding that when authorities inflicted a judicially mandated birching on a fifteen-year-old, they violated the prohibition in article 3 of the European Convention against degrading treatment); *A & B v. United Kingdom*, App. No. 25599/94, 22 Eur. H.R. Rep. 190, 194 (1996) (Commission Report) (on file with the *University of Michigan Journal of Law Reform*) (ruling admissible an application of a boy claiming that his stepfather violated article 3 of the European Convention by

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;<sup>277</sup> 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.<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup>

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

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hitting the boy with a stick over the course of a week so as to cause bruises on the boy's legs and buttocks); App. No. 10592/83 v. U.K., 9 Eur. H.R. Rep., 277, 278 (1987) (Eur. Comm'n on H.R.) (holding admissible a complaint that article 3 of the European Convention was violated when school personnel struck one student's palms and struck another student's buttocks twice with a leather strap); *Warwick v. United Kingdom*, App. No. 9471/81 (Eur. Comm'n on H.R., July 18, 1986) (unreported) (holding on the merits that one cane stroke to a female student's hand by a male teacher so as to break a blood vessel violates the prohibition of Article 3 of the European Convention against degrading punishment), discussed in VAN BUEREN, *supra* note 187, at 251, and cited in Firouzeh Bahrapour, Comment, *The Caning of Michael Fay: Can Singapore's Punishment Withstand the Scrutiny of International Law?*, 10 AM. U. J. INT'L L. & POL'Y 1075, 1093 n.118 (1995); *Mrs. X & Ms. X v. United Kingdom*, App. No. 9471/81, 7 Eur. H.R. Rep. 450, 450-51 (1985) (finding admissible a sixteen-year-old student's claim that article 3 of the European Convention was contravened when the headmaster caned her); cf. *Campbell & Cosans v. United Kingdom*, 1982 Y.B. Eur. Conv. on H.R. 3,4 (Eur. Ct. of H.R.) (holding that there was no violation of article 3 of the European Convention when school personnel threatened to strike two students' palms with a leather strap, but also noting that mere threats to administer corporal punishment could violate article 3 if the actual punishment would violate that article). *But see Costello-Roberts v. United Kingdom*, 1993 Y.B. Eur. Conv. on H.R. (Eur. Ct. of H.R.) 172, 172-74 (5-4 decision) (ruling that a headmaster did not violate article 3 of the European Convention by hitting a seven-year-old student three times on his clothed buttocks with a rubber-soled gym shoe, but observing that a punishment which did not have any severe or long-lasting effects could still fall within the ambit of article 3).

277. See *Costello-Roberts*, 1993 Y.B. Eur. Conv. on H.R. at 172-74.

278. See *id.* at 174.

279. See *id.*

280. See VAN BUEREN, *supra* note 187, at 251 (discussing the *Warwick* decision); see also Bahrapour, *supra* note 276 (citing the holding of *Warwick*).

punishment<sup>281</sup> or corporal punishment in the school context.<sup>282</sup> Notably, in September 1996, the European Commission of Human Rights took cognizance in *A & B v. United Kingdom*<sup>283</sup> of a complaint arising in the familial setting<sup>284</sup> under articles 3, 8, 13, and 14 of the European Convention.<sup>285</sup> The Commission concluded that a boy stated a viable claim pursuant to these provisions<sup>286</sup> 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.<sup>287</sup> The Commission issued a decision on the merits two years later finding that the stepfather's actions violated article 3.<sup>288</sup> 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."<sup>289</sup>

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.

282. See, e.g., *Costello-Roberts*, 1993 Y.B. Eur. Conv. on H.R. at 172-74; *Y*, 1992 Y.B. Eur. Conv. on H.R. at 196; *Campbell & Cosans*, 1982 Y.B. Eur. Conv. on H.R. at 3; *App. No. 10592/83*, 9 Eur. H.R. Rep. at 277; *Warwick*, *supra* note 276; *Mrs. X & Ms. X*, 7 Eur. H.R. Rep. at 450.

283. *App. No. 25599/94*, 22 Eur. H.R. Rep. 190 (1996) (Commission Report).

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.

286. See *A & B*, 22 Eur. H.R. Rep. at 195.

287. See *id.* at 191.

288. See *A v. United Kingdom*, *App. No. 25599/94*, Report of the Commission (Sept. 18, 1997), at 15.

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,<sup>290</sup> the Civil and Political Rights Covenant,<sup>291</sup> and in the European Convention.<sup>292</sup> 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."<sup>293</sup> It has been suggested that the security of one's person is necessarily transgressed by being subjected to corporal punishment.<sup>294</sup>

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.<sup>295</sup> 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."<sup>296</sup> 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,<sup>297</sup> the court observed that "[t]he 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."<sup>298</sup> 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.<sup>299</sup> 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.<sup>300</sup>

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.<sup>301</sup> 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.<sup>302</sup> 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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297. See *Costello-Roberts*, 1993 Y.B. Eur. Conv. on H.R. at 174.

298. *Id.*

299. See *App. No. 10592/83*, 9 Eur. H.R. Rep. at 278.

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.”<sup>303</sup> 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.<sup>304</sup>

*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.”<sup>305</sup> 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,”<sup>306</sup> one of which may be corporal punishment.<sup>307</sup> 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.<sup>308</sup>

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303. *General Comments Under Article 40, Paragraph 4, of the Covenant*, U.N. GAOR, Hum. Rts. Comm., 35th Sess., 891st mtg., General Comment 17 (35) 3/(art. 24), ¶¶ 3, 5, U.N. Doc. CCPR/C/21/Add.7 (1989); cf. Santos Pais, *supra* note 189 (remarking that the antidiscrimination policy of the Convention of the Child militates against tolerance of corporal punishment of children).

304. See Santos Pais, *supra* note 189.

305. Economic Rights Covenant, *supra* note 233, art. 12(1), at 8.

306. See Convention of the Child, note 142, art. 24(3), at 13.

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;<sup>309</sup> arguably the Torture Convention<sup>310</sup> and the American Convention,<sup>311</sup> as well as a host of provisions in the Universal Declaration,<sup>312</sup> the Civil and Political Rights Covenant,<sup>313</sup> and the Economic Rights Covenant,<sup>314</sup> may be construed to do the same. In contrast, article 7 of the Civil and Political Rights Covenant<sup>315</sup> and article 3 of the European Convention<sup>316</sup> 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.<sup>317</sup> 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.<sup>318</sup> The reason that this Article focuses on the

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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<sup>319</sup> and to the Torture Convention,<sup>320</sup> 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.<sup>321</sup> Indeed, the Universal Declaration, the

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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 (positing 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”).

319. During the Carter administration, the United States signed the Covenant. See Scaperlanda, *supra* note 256, at 1019 n.272. “On June 8, 1992, the United States deposited its instrument of accession to the International Covenant on Civil and Political Rights.” William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 277 (1995). Three months later the Covenant went into force for the United States. See *id.*

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.<sup>322</sup>

Customary international law is binding as federal common law in the United States.<sup>323</sup> The fact that some of these international instruments, or pertinent portions of them,<sup>324</sup> 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.<sup>325</sup>

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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, *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, *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, *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, *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 MCDUGAL ET AL., *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”). But see Suzanne M. Bernard, *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, *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”).

322. See MCDUGAL ET AL., *supra* note 173, at 320–22; Louis Henkin, *Preface to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* ix (Louis Henkin ed., 1981); Sohn, *supra* note 321, at 19.

323. See *supra* note 183.

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, *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 *supra* notes 243–45, 251–56, 290, 294–95.

325. Compare THEODOR MERON, *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,<sup>326</sup> it is the case

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application of customary law," 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 Scalpels: 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.<sup>327</sup> 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."<sup>328</sup> The reservation to article 16 of the Torture Convention is, in substance, of the same import.<sup>329</sup> In *Ingraham v. Wright*<sup>330</sup> (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.<sup>331</sup> In fact, in giving its

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DOC. NO. 100-20, at 1, 2 (1988); Stewart, *supra* note 262, at 467-68 (taking the position that articles 1 through 16 of the Torture Convention are not self-executing).

327. "A reservation . . . modifies the relevant provisions of the agreement as to the relations between the reserving and accepting state parties but does not modify those provisions for the other parties to the agreement *inter se*." RESTATEMENT OF FOREIGN RELATIONS, *supra* note 326, at § 313(3); *see also id.* at § 314 cmt. a (noting that a reservation modifies the treaty); M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1175 (1993) (stating that reservations leave provisions of treaties "internationally binding yet nationally unenforceable"); Quigley, *supra* note 326, at 1289-90 (remarking that a reservation exempts the nation making it from a particular treaty provision "so long as the reservation is not incompatible with the object and purpose of the treaty").

328. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 22 (1992).

329. The reservation to article 16 of the Torture Convention provides:

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).

330. 430 U.S. 651 (1977) (5-4 decision).

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.<sup>332</sup> Some commentators have theorized that the reservation to article 7 is not valid.<sup>333</sup> 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 . . . 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] . . . can be conditioned by . . . the Covenant”).

article 7,<sup>334</sup> and the Human Rights Committee concluded that the reservation is invalid as well.<sup>335</sup> As might be expected from this reaction, the reservation to article 16 of the Torture Convention has also been the object of scholarly criticism.<sup>336</sup>

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.<sup>337</sup> 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.

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334. See Schabas, *supra* note 319, at 277, 310.

335. See *Consideration of Reports Submitted by States Parties Under Art. 40 of the Covenant*, International Covenant on Civil and Political Rights, Human Rts. Comm., 53rd Sess., 1413th mtg. ¶ 14, U.N. Doc. CCPR/C/79/Add. 50 (1995) (stating that the committee believes the U.S. reservation to article 7 is incompatible with the object and purpose of the Covenant).

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.<sup>338</sup> 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."<sup>339</sup> Professor Murray Straus refutes this argument by making three points. First, he notes that corporal

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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).

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."<sup>340</sup> Second, he argues that corporal punishment is not an essential element of strong discipline and does not ultimately help people defend their honor.<sup>341</sup> 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.<sup>342</sup>

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.<sup>343</sup> As this Part will show, these are reactions that may be ruinous for people across the spectrum of nationalities and races.<sup>344</sup> These are also reactions that mirror a universal human hunger for right treatment and for a respect that acknowledges each person's humanity.<sup>345</sup> 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.<sup>346</sup>

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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 HOBBS, 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.<sup>347</sup> 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.<sup>348</sup> Moreover, corporal punishment may be challenged on moral grounds.

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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.<sup>349</sup> Worse still, for both the child-victims and society at large, children who are corporally punished also tend to have less capacity for empathy.<sup>350</sup> 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.<sup>351</sup>

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fleeting, *see id.*; *infra* notes 353–54 and accompanying text. *See also* LEACH, *supra* note 11, at 224 (stating that smacking children cannot change their behavior and that such punishment does not even produce momentary regret in the child because he or she is “so overwhelmed by [feelings of] pain and indignity”); SAMALIN, *supra* note 1, at 73–74 (mentioning that experience shows corporal punishment to be ineffective); SEARS & SEARS, *supra* note 1, at 150 (explaining that during and immediately after the spanking, the child is so preoccupied with the pain and humiliation involved in the punishment that he or she loses sight of the reason for the punishment). *But see* Baumrind, *supra* note 347, at 412 (theorizing that spanking can be productive in shaping children’s behavior if it is administered by authoritative, warm parents).

349. *See* LEACH, *supra* note 11, at 224 (stating that smacking children contributes to turning them into bullies); JANE NELSEN ET AL., POSITIVE DISCIPLINE A–Z: 1001 SOLUTIONS TO EVERYDAY PARENTING PROBLEMS 164–65 (1993) (pointing out that spanking children encourages them to hit others); SAMALIN, *supra* note 1, at 73; ROBERT R. SEARS ET AL., PATTERNS OF CHILD REARING 266 (1957); SEARS & SEARS, *supra* note 1, at 154 (explaining that the more frequently a child is given physical punishment the more likely it is that she will behave aggressively toward other family members and peers); SPOCK, *supra* note 11, at 152; STRAUS, *supra* note 2, at 22, 100; FELICITY DE ZULUETA, FROM PAIN TO VIOLENCE: THE TRAUMATIC ROOTS OF DESTRUCTIVENESS 218 (1993); J.L. Caldwell, *Parental Physical Punishment and the Law*, 13 N.Z. UNIV. L. REV. 370, 384 (1989); Leonard D. Eron, *Parent-Child Interaction, Television Violence, and Aggression of Children*, 37 AM. PSYCHOL. 197, 203, 208 (1982); Norma D. Feshbach, *The Effects of Violence in Childhood*, 2 J. CLINICAL CHILD PSYCHOL. 28, 29–30 (1973); Herman, *supra* note 2, at 32–35. *But see* JAMES DOBSON, THE STRONG-WILLED CHILD: BIRTH THROUGH ADOLESCENCE 34–35 (1978) (contending that reasonable corporal punishment administered by a loving parent inhibits children’s misbehavior); Baumrind, *supra* note 347, at 410, 412–13 (opining that corporal punishment does not cause children to become more aggressive or delinquent).

350. *See* PHILIP GREVEN, SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE 127–29 (1991) (explaining that children who are hurt by their parents develop immunities to empathy); Feshbach, *supra* note 349, at 30; *see also* ALICE MILLER, BREAKING DOWN THE WALL OF SILENCE 88 (Simon Worrall trans., Dutton Books 1991) (describing how beatings by his parents during childhood were a factor causing Hitler’s later disregard for human life).

351. *See* Daniel Goleman, *Early Violence Leaves Its Mark on the Brain*, N.Y. TIMES, Oct. 3, 1995, at C1 (mentioning that the rate of violence among teenagers has been rising precipitously); Camille Sweeney, *Portrait of the American Child*, 1995, N.Y. TIMES, Oct. 8, 1995, § 6 (Magazine), at 53 (reporting that although crimes of violence decreased nationally between 1985 and 1995, arrest rates for violent crimes committed by children ages 10 to 17 doubled between 1983 and 1992). Indeed, it appears that

Ironically, corporal punishment, which often is the result of parental concern, may actually hamper relations between parents and their children.<sup>352</sup> 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.<sup>353</sup> 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.<sup>354</sup>

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.<sup>355</sup> As an invasion of their bodily integrity, children may find the experience “humiliating and degrading.”<sup>356</sup> Experts have also found that corporal

corporal punishment is associated with juvenile delinquency. See NEWELL, *supra* note 18, at 43–46; STRAUS, *supra* note 2, at 108–09.

352. 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).

353. See LEACH, *supra* note 11, at 224; NEWELL, *supra* note 18, at 16–21; SEARS & SEARS, *supra* note 1, at 154 (explaining that spanking 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).

354. See NEWELL, *supra* note 18, at 19; SAMALIN, *supra* note 1, at 74; STRAUS, *supra* note 2, at 100, 144; Anthony M. Graziano & Karen A. Namaste, *Parental Use of Physical Force in Child Discipline: A Survey of 679 College Students*, 5 J. INTERPERSONAL VIOLENCE 449, 449, 458 (1990); McCormick, *supra* note 347, at 1361; Kathryn D. Perkins, *Parents' Dilemma: To Spank or Not*, THE SACRAMENTO BEE, June 5, 1994, at A1; Murray A. Straus, Remarks at the International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (Dublin, Ireland, Aug. 22, 1996). *But see* FUGATE, *supra* note 352, at 186 (asserting that corporal punishment of children lays the foundation for the development of self-control).

355. 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.

356. 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,<sup>357</sup> withdrawal,<sup>358</sup> anxiety,<sup>359</sup> tension,<sup>360</sup> and, in older children, substance abuse,<sup>361</sup> interference with school work,<sup>362</sup> and precocious sexual behavior.<sup>363</sup> Corporal punishment can cause serious physiological damage as well,<sup>364</sup> including somatic responses such as headaches and stomachaches.<sup>365</sup> Even more dangerous, corporal punishment of children is often the prelude to child abuse as more traditionally conceived.<sup>366</sup> 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.

359. *See* HYMAN, READING, WRITING AND THE HICKORY STICK, *supra* note 3, at 94, 99–100; GREVEN, *supra* note 350, 122–23.

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.<sup>367</sup>

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.<sup>368</sup> 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<sup>369</sup> and with whom one invariably identifies<sup>370</sup>—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).

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 STETTACHER, 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.<sup>371</sup> It may also be inconceivable, especially to younger children, that the parent's punitiveness could be wrong.<sup>372</sup> Nor can very young children and babies even accurately conceptualize what is happening to them so as to respond consciously to their predicament.<sup>373</sup>

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.<sup>374</sup> 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.<sup>375</sup>

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

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acknowledge that corporal punishment is destructive because it means condemning one's own parents).

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; STETTbacher, *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.<sup>376</sup>

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

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.

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.

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.

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 more mild 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).

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.

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).

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,<sup>383</sup> 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.<sup>384</sup>

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.<sup>385</sup> This may especially be the case because corporal punishment is often administered upon a child's buttocks,<sup>386</sup>

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.

MILLER, *supra* note 350, at 84–85; *see also* GREVEN, *supra* note 350, at 198–204; MILLER, UNTOUCHED KEY, *supra* note 374, at 50–52, 60, 62, 68, 149 (tracing the despotism of Stalin and other authoritarian personalities to beatings received in childhood and the lack of adult sympathy for the child's resulting pain); NEWELL, *supra* note 18, at 46; Herman, *supra* note 2, at 38–39 (stating that an "authoritarian personality" can be "correlated with past subjection to corporal punishment").

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").

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 34–35; Steve Offner, *New Light on Child Killings—Study Links Tolerance of Physical Punishment to Deaths*, SYDNEY MORNING HERALD, Sept. 15, 1994, at P3.

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.

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.<sup>387</sup> Thus, the basis is established for the child to merge love, pain, and sexual feelings into later masochistic sexual desires or other sexual perversions.<sup>388</sup>

Less obviously, there is evidence that corporal punishment during childhood may even impair adult capacities for economic achievement and success in employment.<sup>389</sup> 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.<sup>390</sup>

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<sup>391</sup> 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.<sup>392</sup> Experts have found that criminals are typically people

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"[c]orporal punishment commonly focuses upon a child's buttocks, the anal area in the back being the most frequently beaten part of the body").

387. See DAVID BAKAN, *SLAUGHTER OF THE INNOCENTS: A STUDY OF THE BATTERED CHILD PHENOMENON* 113 (1971); GREVEN, *supra* note 350, at 184; TOM JOHNSON, *THE SEXUAL DANGERS OF SPANKING CHILDREN* 1 (1996); Hunt, *supra* note 352, at 170.

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.

392. See GREVEN, *supra* note 350, at 199, 201-04, 206-07; MILLER, *supra* note 11, at 62, 66-75, 79-84, 86-91, 115, 139-97, 242-43, 264-65; MILLER, *PICTURES*, *supra* note 370, at 18-19; MILLER, *UNTOUCHED KEY*, *supra* note 374, at 50-54, 62-68; MILLER, *supra* note 350, at 81-113; SPOCK, *supra* note 11, at 151-52; Herman, *supra* note 2, at 36-39.

who underwent corporal punishment in childhood.<sup>393</sup> Crime, of course, is a nationwide problem of major concern in the United States.<sup>394</sup> 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,<sup>395</sup> Stalin's persecution of kulaks and other dissidents in the then Soviet Union;<sup>396</sup> American "napalming" of villages in Vietnam;<sup>397</sup> the Khmer Rouge's butchery of more than one million Cambodians;<sup>398</sup> the bloody strife between Tutsis and Hutus in Rwanda;<sup>399</sup> Pinochet's murderous policies against the left in Chile;<sup>400</sup> and the internecine slaughter in former Yugoslavia.<sup>401</sup> 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?

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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.

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).

395. See Leon A. Jick, *Holocaust*, in 9 WORLD BOOK, *supra* note 129, at 296, 296; Mary Nolan, *Nazism*, in 14 WORLD BOOK, *supra* note 129, at 92, 92-93; James L. Stokesbury, *World War II*, in 21 WORLD BOOK, *supra* note 129, at 470, 486.

396. See Albert Marrin, *Stalin, Joseph*, in 18 WORLD BOOK, *supra* note 129, at 824, 826-27; James R. Millar, *U.S.S.R.*, in 20 WORLD BOOK, *supra* note 129, at 28, 37.

397. See JAMES W. GIBSON, *THE PERFECT WAR: TECHNWAR IN VIETNAM* 146, 367-75 (1986).

398. See HERBERT HIRSCH, *GENOCIDE AND THE POLITICS OF MEMORY: STUDYING DEATH TO PRESERVE LIFE* 141 (1995).

399. See Raymond Bonner, *Rwanda Facing Difficult Struggle for Rebirth*, THE PATRIOT LEDGER, Dec. 30, 1994, at 4; Tom Davidson, *1994: Year in Review Throughout the World*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Dec. 31, 1994, at 3A; William Johnson, *Hope and Despair; From Mandela's Election in South Africa to the Nightmare in Rwanda, 1994 Was a Year in Which Hope Grew a Little Taller than Despair*, MONTREAL GAZETTE, Dec. 30, 1994, at B3.

400. See JAVIER MARTINEZ & ALVARO DIAZ, *CHILE: THE GREAT TRANSFORMATION* 12-16 (1996).

401. See *Battles Rake Croatia as Envoys Meet*, COURIER-J., (Louisville, Ky.), Dec. 31, 1991, at 4A; Slobodan Lekic, *Yugoslav Jets Pound Croatia City; Serbs Flee Mountain Strongholds*, BOSTON GLOBE, Dec. 30, 1991, at 2; *Strategic City Near Zagreb Under Heavy Fire*, EDMONTON J., Dec. 30, 1991, at A4.

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.<sup>402</sup> 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.<sup>403</sup> 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.<sup>404</sup> 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.<sup>405</sup>

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

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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.

404. See GREVEN, *supra* note 350, at 199, 201–04, 206–07; MILLER, *supra* note 11, at 62, 66–75, 79–84, 86–91, 115, 139–97, 242–43, 264–65; MILLER, *supra* note 350, at 81–113; Herman, *supra* note 2, at 36–39. See generally HIRSCH, *supra* note 398, at 125–32 (observing that mass murder results from the willingness to obey at all costs).

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?<sup>406</sup>

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.<sup>407</sup> If hitting an adult is assault

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406. Cf. Bitensky, *supra* note 112, at 25 (setting forth a similar hypothetical problem).

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.<sup>408</sup>

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§§ 11.41.200–230 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 13-1203 to -1204 (West 1989 & Supp. 1997); ARK. CODE ANN. §§ 5-13-201 to -207 (Michie 1997); CAL. PENAL CODE §§ 240–41, 242–43 (West 1988 & Supp. 1998); COLO. REV. STAT. ANN. §§ 18-3-202 to -204 (West 1986 & Supp. 1996); CONN. GEN. STAT. §§ 53a-59 to -61a (West 1994); DEL. CODE ANN. tit. 11, §§ 611-613 (1995); D.C. CODE ANN. § 22-504.1 (1996); FLA. STAT. ANN. ch. 784.011, 784.021, 784.03, 784.045 (Harrison 1991 & Supp. 1996); GA. CODE ANN. §§ 16-5-20 to -24 (1996 & Supp. 1997); HAW. REV. STAT. §§ 707-710 to -712 (1993); IDAHO CODE §§ 18-901 to -08 (1996); 720 ILL. COMP. STAT. 5/12-1, 5/12-2, 5/12-3, 5/12-4 to 4.1 (West 1997); IND. CODE ANN. §§ 35-42-2-1 to -1.5 (West Supp. 1997); IOWA CODE ANN. §§ 708.1–708.2 (West 1993 & Supp. 1997); KAN. STAT. ANN. §§ 21-3408, 21-3410, 21-3412, 21-3414 (1995); KY. REV. STAT. ANN. §§ 508.010–508.020, 508.025, 508.030 (Michie 1990 & Supp. 1996); LA. REV. STAT. ANN. §§ 14-33 to -38 (West 1997); ME. REV. STAT. ANN. tit. 17A, §§ 207-208 (West 1983 & Supp. 1997); MD. ANN. CODE art. 27, §§ 12, 12A, 12A-1 (1996 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 265, § 13A (Law. Co-op. 1992); MICH. COMP. LAWS ANN. §§ 750.81–750.82a (West 1991 & Supp. 1997); MINN. STAT. ANN. §§ 609.221–.224 (West 1987 & Supp. 1998); MISS. CODE ANN. § 97-3-7 (1994); MO. REV. STAT. §§ 565.050–.070 (1994); MONT. CODE ANN. §§ 45-5-201 to -202 (1997); NEB. REV. STAT. §§ 28-308 to -310 (1995); NEV. REV. STAT. §§ 200.400, 200.471, 200.481 (1995); N.H. REV. STAT. ANN. §§ 631:1, 631:2, 631:2-a (1996); N.J. STAT. ANN. § 2C:12-1 (West Supp. 1997); N.M. STAT. ANN. §§ 30-3-1 to -5 (Michie 1994); N.Y. PENAL LAW §§ 120.00, 120.05, 120.10 (McKinney 1998); N.C. GEN. STAT. § 14-33 (1993); N.D. CENT. CODE §§ 12.1-17-01 to -02 (1985 & Supp. 1997); OHIO REV. CODE ANN. §§ 2903.12–.14, 5924.128 (Anderson 1996); OKLA. STAT. ANN. tit. 21, §§ 641-642, 644-646 (West 1983 & Supp. 1998); OR. REV. STAT. §§ 163.160, 163.165, 163.175, 163.185 (1995); 18 PA. CONS. STAT. ANN. §§ 2701-02 (West 1983 & Supp. 1997); R.I. GEN. LAWS §§ 11-5-2, 11-5-3 (1994 & Supp. 1997); S.C. CODE ANN. §§ 16-3-610, 16-3-620 (Law. Co-op. 1985); *id.* at 22-3-560 (Law. Co-op. 1989 & Supp. 1997); S.D. CODIFIED LAWS §§ 22-18-1 to -1.1 (Michie 1988 & Supp. 1997); TENN. CODE ANN. §§ 39-13-101 to -102 (1997); TEX. PENAL CODE ANN. §§ 22.01, 22.02 (West 1994 & Supp. 1998); UTAH CODE ANN. §§ 76-5-102, 76-5-103 (1995 & Supp. 1997); VT. STAT. ANN. tit. 13, §§ 1023-1024 (1974 & Supp. 1997); VA. CODE ANN. § 18.2-57 (Michie 1996 & Supp. 1997); WASH. REV. CODE ANN. §§ 9A.36.011, 9A.36.021, 9A.36.031, 9A.36.041 (West 1988 & Supp. 1998); W. VA. CODE § 61-2-9 (1997); WIS. STAT. ANN. § 940.19 (West 1996); WYO. STAT. ANN. §§ 6-2-501 to -502 (Michie 1997). Assault and battery are statutory crimes in all American jurisdictions. However, the nomenclature affixed to these statutes can be confusing:

This is not to suggest, however, that every jurisdiction has statutory crimes labelled both "assault" and "battery" . . . . In some jurisdictions, the attempted-battery type of assault is prosecuted simply as an attempt to commit the crime of battery, and there is either no crime called assault . . . or else the crime of assault is limited to the placing of the victim in apprehension of a battery.

In some jurisdictions there is no statutory crime of battery, but . . . the crime of assault is defined to include what is usually classified as battery.

2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 7.14, at 299–300 n.2 (1986) (citations omitted).

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.<sup>409</sup> This is especially true in light of evidence showing that corporal punishment of children is ineffective as a child rearing technique,<sup>410</sup> that such punishment has negative effects,<sup>411</sup> and that there are alternative ways of guiding and instructing children.<sup>412</sup>

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.<sup>413</sup> The preservation of human dignity is a basic tenet of international human rights law<sup>414</sup> and a federal constitutional value.<sup>415</sup> As such, human

*Step Toward Preventing Child Abuse, in CHILD ABUSE: A MULTIDISCIPLINARY SURVEY* 280, 280 (Byrgren Finkelman ed., 1995) (stating that if an adult hits another person, it is an illegal act—"unless that person is their child or student"); Gibbons, *supra* note 32, at 112 (stating what is considered assault and battery on an adult is considered discipline on a child); see also DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 114 (1993) (arguing that the state sanctions reasonable corporal punishment of children by exempting punishers from assault charges); Thomas, *supra* note 402, at 339 (noting that criminal cases reflect parents' exemption from prosecution when it comes to the right to use reasonable corporal punishment on children).

409. See NEWELL, *supra* note 18, at 12-16; STRAUS, *supra* note 2, at 10; Feshbach, *supra* note 349, at 28; Herman, *supra* note 2, at 10. But see Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1230 & n.134 (1990) (asserting that because children are "intimate dependents," their parents are entitled and obligated to corporally punish them even though in other contexts such adult conduct would be considered an assault).

410. See *supra* notes 348, 353, 354 and accompanying text.

411. See *supra* notes 349-50, 352, 355-66, 368, 376-85, 389-90, 392 and accompanying text.

412. See NEWELL, *supra* note 18, at 15; *supra* notes 46-50, 62 and accompanying text.

413. The psychologist Alice Miller has stated that "[b]eatings . . . are *always* degrading, because the child not only is unable to defend him- or herself but is also supposed to show gratitude and respect to the parents in return." MILLER, *supra* note 11, at 17; see also *Cambria*, Cass., sez. VI, 18 marzo 1996, Foro It. II 1996, 407, 410, Translation, *supra* note 112, at 3 (reasoning that legal protections of dignity must be extended to forbid corporal punishment of children); NEWELL, *supra* note 18, at 15 (commenting that corporal punishment of children shows a "lack of respect for children as people"); SEARS & SEARS, *supra* note 1, at 147-48 (advising that corporal punishment devalues the child in his or her own eyes).

414. See LOUIS HENKIN, *THE AGE OF RIGHTS 7-9* (1990); Cohen, *Corporal Punishment*, *supra* note 13, at 113-14; Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 146, 185-87, 192-93, 200 (1984); Oscar Schachter, Editorial Comment, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848-49, 853-54 (1983); Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1228-29, 1249 (1987); see also *supra* notes 212-16, 249-50 and accompanying text.

415. See William Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433, 438-40 (1986); Alan B. Handler,

dignity should be a juridically recognized attribute of juveniles as well.<sup>416</sup> Dignity may be violated by coercive physical attacks on the body.<sup>417</sup> 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.<sup>418</sup>

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

*Individual Worth*, 17 HOFSTRA L. REV. 493, 495, 512, 515, 516–19, 521, 532–33 (1989); Paust, *supra* note 414, at 148–84; Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1297, 1305–11 (1988); Peter S. Adolf, Note, *Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, "Cruel and Unusual Punishment"?*, 22 HASTINGS CONST. L. Q. 815, 829, 842–44 (1995); Paul V. Regelbrugge, Comment, *Barbarism in the Plastic Bubble: An Application of Existentialist Theory to Capital Punishment in the United States*, 1990 DET. C.L. REV. 1011, 1025, 1040.

416. See *Cambria*, Foro It. II 1996 at 410–11, Translation at 3 (providing an example of such judicial recognition); Cynthia Price Cohen, *Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 19, 59 (1993) [hereinafter Cohen, *Developing Jurisprudence*]; Henry H. Foster, Jr., & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 344–46, 353 (1972); Paust, *supra* note 414, at 174–75 & n.140; Tremper, *supra* note 415, at 1311–17, 1320–23; Santos Pais, *supra* note 189; cf. Cohen, *Corporal Punishment*, *supra* note 13, at 113–15, 130 (asserting that the child's dignity is protected in certain international human rights instruments); Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1816–17 (1993) (concluding that legal relationships between adults and children should be predicated on respect for children as fellow humans). 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*.

417. See NEWELL, *supra* note 18, at 15; Natalie Abrams, *Problems in Defining Child Abuse and Neglect*, in HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 155, 160 (Onora O'Neill & William Ruddick eds., 1979); Cohen, *Corporal Punishment*, *supra* note 13, at 113–15; Rhonda Copelon, *Recognizing the Eggregious in the Everyday: Domestic Violence as Torture* 25 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, *Developing Jurisprudence*, *supra* note 416, at 65 (noting that respect for the child's physical integrity is "closely linked to concepts of human dignity"). 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).

418. See MILLER, *supra* note 2, at 312–13 (remarking that beating children is humiliating treatment); see also 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); GREVEN, *supra* note 350, at 124–27; NEWELL, *supra* note 18, at 12–16.

as their parents' chattels.<sup>419</sup> 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"<sup>420</sup>—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.<sup>421</sup> The ancient Hebrews, Greeks, and Romans all had the legal "right" to kill their children.<sup>422</sup> Even in the eighteenth century, infanticide was a common practice throughout Europe.<sup>423</sup> For centuries parents have been permitted to abandon and physically attack or cause pain to their children with impunity.<sup>424</sup>

Corporal punishment of children, which dates back to antiquity,<sup>425</sup> reflects children's continued classification as parental property. It is telling that as historically oppressed peoples have liberated themselves from being legally categorized as

419. See JOHN HOLT, *ESCAPE FROM CHILDHOOD* 18, 26, 39, 47–48 (1974); Mary Martin McLaughlin, *Survivors and Surrogates: Children and Parents from the Ninth to the Thirteenth Centuries*, in *THE HISTORY OF CHILDHOOD* 101, 140 (Lloyd deMause ed., 1974); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 256 n.5 (1979); Woodhouse, *supra* note 416, at 1810–12; Barbara Bennett Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997, 1002–03, 1036–38, 1040–51, 1112–14 (1992); cf. Michael A. Slotte, *Obedience and Illusions*, in *HAVING CHILDREN*, *supra* note 417, at 319, 321–22 (analogizing parental authority to divine authority). *But see* Wald, *supra*, at 259 (opining that Americans are not inclined to treat children as the property of adults); cf. MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 36–41 (1981) (asserting that parental control over children has diminished in the modern era); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 283 (1985) (discussing how developments in domestic relations law have reduced parental power over children).

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).

421. See Herman, *supra* note 2, at 5.

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).

423. See deMause, *supra* note 422, at 29.

424. See *id.* at 32–41.

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;<sup>426</sup> likewise, American women ultimately achieved reform such that husbands could no longer legally beat their wives.<sup>427</sup> 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.<sup>428</sup> This enterprise has been accompanied

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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 JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 251 (1979); 4 PAGE 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.

427. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 129 (1989); STRAUS, *supra* note 2, at 174; Herman, *supra* note 2, at 4; Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 839-40, 853-54 (1985).

428. See IRISH SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, ANNUAL REPORT 1995 (on file with the *University of Michigan Journal of Law Reform*); Cian O'Tighearnaigh, Chief Executive, The Irish Society for the Prevention of Cruelty to Children, Address at the International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (Aug. 22, 1996).

by a 12 percent reduction in the number of Irish adults who think slapping children is advisable.<sup>429</sup> 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.<sup>430</sup> 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<sup>431</sup> and that the Swedish government's education effort took place in the context of a legislative ban on all corporal punishment of children.<sup>432</sup> 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.<sup>433</sup> 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;<sup>434</sup> 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.<sup>435</sup>

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429. See IRISH SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, *supra* note 428; O'Tighearnaigh, *supra* note 428.

430. See *supra* notes 23-32, 37-50 and accompanying text.

431. See IRISH SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, *supra* note 428; Mary Flaherty (Member of the Irish Parliament), Address at International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (Aug. 22, 1996).

432. See *supra* notes 35-37 and accompanying text.

433. See *supra* notes 19-154 and accompanying text.

434. Robert H. Bork has observed that "[l]aw is a public act." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990). See also GEORGE HEGEL, *PHILOSOPHY OF RIGHT* 135 (T.M. Knox trans., Oxford Univ. Press, 1967) (stating the importance of knowledge of the law).

435. See Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 927, 952 (W.D. Ross trans., Richard McKeon ed., 1941); Plato, *Book VII*, in *THE LAWS OF*

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,<sup>436</sup> 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.<sup>437</sup>

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

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PLATO 215–16 (Thomas L. Pangle trans. & ed., Basic Books 1980); David R. Barnhizer, *Prophets, Priests and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 162–63 (1988); Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 177–179 (1986); Keith Burgess-Jackson, *Bad Samaritanism and the Pedagogical Function of Law*, 8 CRIM. JUST. J. 1, 3–4, 26 (1985); Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889, 891 (1991); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 180; Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 468–69 (1988); Philip Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 85 (1985).

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, 750–51 (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).

jurisdiction.<sup>438</sup> 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.<sup>439</sup> 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.<sup>440</sup>

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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.<sup>441</sup>

Second, even a cursory review of the law on assault and battery demonstrates that the traditional denomination of "battery"<sup>442</sup> would be the most appropriate classification for criminalized subabuse corporal punishment of children. Although different jurisdictions use different nomenclature,

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Commerce Clause regulation of noncommercial intrastate activities in areas of traditional state law-making such as domestic relations).

On the other hand, some commentators are of the view that *Lopez* is a narrow decision and will not "inaugurate a major change in the Court's inclination to uphold federal legislation." Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554 (1995); see Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 692, 694-95, 727, 729 (1995). If the latter are correct or if *Lopez* is ultimately overruled, then it would be entirely appropriate for Congress to enact the ban on corporal punishment of children. As discussed in Part III of this Article, corporal punishment of children can cause increased crime and diminished earning capacity in adults as well as creating the conditions for political tyranny and even genocide. Thus, Congress could find that corporal punishment of children, when considered as a class of activities, substantially affects interstate commerce.

441. The experience in Sweden is instructive in this regard. Corporal punishment of children was first removed as a defense to assault and battery and, subsequently, Sweden enacted a vaguely worded admonition on child supervision meant to convey the unacceptability of corporal punishment as a means of such supervision. However, these reforms did not edify the average Swede and left Swedish legal experts in disagreement over the laws' meaning. For this reason, the Swedish Parliament ultimately opted to enact an express prohibition of corporal punishment of children. See EK, *supra* note 23, at 1-6; NEWELL, *supra* note 18, at 70-73; Olson, *supra* note 9, at 448-49; Ziegert, *supra* note 23, at 919. Austrians experienced similar difficulties with early vague laws intended to prohibit corporal punishment of children before enacting an explicit ban. See *supra* notes 92-94 and accompanying text.

442. See LAFAVE & SCOTT, *supra* note 407, § 7.15, at 301.

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.<sup>443</sup> Under the modern approach exemplified by the Model Penal Code, in order to constitute assault, the attack must cause “bodily injury,”<sup>444</sup> defined as, among other things, “physical pain, illness or any impairment of physical condition.”<sup>445</sup> 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.”<sup>446</sup> The perpetrator must also have a particular mental state, which includes intent to injure or cause bodily pain.<sup>447</sup> Subabuse corporal punishment, as defined in this Article, is characterized by precisely these elements of battery:<sup>448</sup> to state the obvious, corporal punishment is at least a temporarily painful blow, intended to modify behavior by causing bodily pain.<sup>449</sup>

Third, the draft statute is preferable to creating a cause of action in tort against the punishing parent or other caregiver.<sup>450</sup> To subject violators merely to civil liability would

443. *Id.* § 7.15, at 301; see Miguel Angel Mendez, Essay, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 411–12 (1995).

444. MODEL PENAL CODE § 211.1 (1997); LAFAVE & SCOTT, *supra* note 407, § 7.15, at 302.

445. MODEL PENAL CODE §§ 210.0 & 211.0.

446. LAFAVE & SCOTT, *supra* note 407, § 7.15, at 301.

447. *See id.* § 7.15, at 304.

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.<sup>451</sup> 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.<sup>452</sup> 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.<sup>453</sup> 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.<sup>454</sup> 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

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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.<sup>455</sup> 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[ing], 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;<sup>456</sup> Italy has accomplished the same end by judicial decision.<sup>457</sup> 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.<sup>458</sup> The draft statute simply integrates the actual prohibition with the provision for criminal liability, the same pattern followed by the Cypriot statute.<sup>459</sup>

It is true that bifurcating the prohibitory language from the liability language has some advantages. It emphasizes the pedagogical, exhortatory 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.

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455. See NEWELL, *supra* note 18, at 144.

456. See *supra* notes 19–111 and accompanying text.

457. See *supra* notes 112–17, 119–38, 140–54 and accompanying text.

458. See *supra* notes 29, 56–60, 74, 82, 99–101, 111 and accompanying text.

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,<sup>460</sup> 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.<sup>461</sup> 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.<sup>462</sup> 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

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460. See *supra* notes 19–154 and accompanying text.

461. See Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 257 (1980); Herman, *supra* note 2, at 43; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1531 (1981).

462. See ATTORNEY GEN. TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 38–39 (1984) [hereinafter ATTORNEY GEN., FINAL REPORT]; Mary Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 CRIM. JUST. J. 1, 3–4 (1983); Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 AM. CRIM. L. REV. 315, 353 (1986); Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 21, 67 (1985); Lucy McGough & Mark L. Hornsby, *Reflections upon Louisiana's Child Witness Videotaping Statute: Utility and Constitutionality in the Wake of Stincer*, 47 LA. L. REV. 1255, 1256–58 (1987). *But see* Desmond K. Runyan, *The Emotional Impact of Societal Intervention into Child Abuse*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 263, 269–71 (Gail S. Goodman & Bette L. Bottoms eds., 1993) (finding that the testimony of children in juvenile court can have a salutary effect on the child witness).

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.<sup>463</sup> 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.<sup>464</sup> 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.<sup>465</sup> Posttrial or postplea diversion

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463. See ATTORNEY GEN., FINAL REPORT, *supra* note 462, at 36; Besharov, *supra* note 462, at 355; *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1542-43 (1993) [hereinafter *Legal Responses to Domestic Violence*]; Johnson, *supra* note 451, 386-89; Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 325 (1985); Diane E. Reynolds, Note, *The Use of Pretrial Diversion Programs in Spouse Abuse Cases: A New Solution to an Old Problem*, 3 OHIO ST. J. ON DISP. RESOL. 415, 426 (1988).

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.

465. See ATTORNEY GEN., FINAL REPORT, *supra* note 462, at 35; RAYMOND T. NIMMER, DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION 4-5 (1974); Besharov, *supra* note 462, at 355-56; Vorenberg, *supra* note 461, at 1531-32; Waits, *supra* note 463, at 324-26; *Legal Responses to Domestic Violence*, *supra* note 463, at 1541-43; Reynolds, *supra* note 463, at 422-24.

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.<sup>466</sup> With respect to either type of diversion, failure to successfully complete treatment should result in a resumption of traditional criminal justice processes.<sup>467</sup>

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.<sup>468</sup> While posttrial or postplea diversion could convey the same message,<sup>469</sup> 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<sup>470</sup> 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

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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.

467. See ATTORNEY GEN., FINAL REPORT, *supra* note 462, at 35; Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 140-41 (1984); Waits, *supra* note 463, at 326.

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, 451-52, 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).

such punishment would harmonize with the American legal system. This is, of course, a matter with which Europeans were not confronted when they adopted their respective bans on corporal punishment of children. It is, however, a decisive consideration for Americans.

#### 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.<sup>471</sup> 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.<sup>472</sup> 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*,<sup>473</sup> the petitioners claimed, among other things,<sup>474</sup> that the paddling administered

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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).

473. 430 U.S. 651 (1977) (5-4 decision).

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.

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.<sup>475</sup> The Court held that "the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools."<sup>476</sup> 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.<sup>477</sup> 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.<sup>478</sup>

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

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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<sup>479</sup> that is responsive to and puts to rest each of these, or any other, constitutional dilemmas.<sup>480</sup>

### 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*<sup>481</sup> and *Pierce v. Society of Sisters*.<sup>482</sup> 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.<sup>483</sup> 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.<sup>484</sup> 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.<sup>485</sup> 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.<sup>486</sup> 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.<sup>487</sup> 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.<sup>488</sup>

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.<sup>489</sup> 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.<sup>490</sup> The Court also offered as a rationale that, "[u]nder the doctrine of *Meyer v. Nebraska*," the Oregon statute

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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.

489. See *Pierce*, 268 U.S. at 530-31.

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.”<sup>491</sup> 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.”<sup>492</sup>

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.<sup>493</sup>

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.<sup>494</sup> 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<sup>495</sup>—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.

495. See *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 564 (1996); *Hodgson v. Minnesota*, 497 U.S. 417, 445–47 (1990); *Moore v. City of East Cleveland*, 431 U.S. 494, 505 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *TRIBE*, *supra* note 485, § 15-6; James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CAL. L. REV. 1371, 1418 (1994); John H. Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court’s Recent Work*, 51 S. CAL. L. REV. 769, 805–07 (1978); Kearney, *supra* note 5, at 14; Keiter, *supra* note 493, at 488–89; Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 525–26 (1996); Kleinfeld, *supra* note 493, at 415–18; McCarthy, *supra* note 493, at 986, 991; Sharon Elizabeth Rush, *The Warren and Burger Courts on State, Parent, and Child Conflict Resolution: A*

particular brand of economic substantive due process from which the right is derived has fallen by the wayside.<sup>496</sup> 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 *Meyer* and *Pierce* on the Due Process Clause and has repeatedly located parental rights in that clause,<sup>497</sup> some writers are of the opinion that the child rearing right actually may fit more modernly under the Free Speech Clause<sup>498</sup> and/or Free Exercise Clause<sup>499</sup> of the First Amendment.<sup>500</sup> 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

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*Comparative Analysis and Proposed Methodology*, 36 HASTINGS L.J. 461, 462–63, 483, 486 (1985); Woodhouse, *supra* note 419, at 1042, 1090–91; *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1351 (1980); Michael J. Minerva, Jr., Note, *Grandparent Visitation: The Parental Privacy Right to Raise Their "Bundle of Joy"*, 18 FLA. ST. U. L. REV. 533, 541, 543–44, 548 (1991); Justin Witkin, Note, *A Time for Change: Reevaluating the Constitutional Status of Minors*, 47 FLA. L. REV. 113, 117–18 (1995). Some commentators have made the point that neither *Meyer* nor *Pierce* involved factual situations in which children's interests were opposed to those of their parents; thus, the effect of this precedent in relation to such situations is uncertain. See Keiter, *supra* note 493, at 492; Kleinfeld, *supra* note 493, at 418.

496. See TRIBE, *supra* note 485, §§ 8-5 to -7; Keiter, *supra* note 493, at 489.

497. See *Michael H. v. Gerald D.*, 491 U.S. 110, 120–30 (1989); *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982); *Moore v. City of East Cleveland*, 431 U.S. 494, 499–505 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). *But see* Woodhouse, *supra* note 416, at 1857 (arguing that *Michael H.* “suggests an attenuation of the adult-centric, individualist model” and “respects the child's-eye view”).

498. The Free Speech Clause provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

499. The Free Exercise Clause provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].” *Id.*

500. See 3 ROTUNDA & NOWAK, *supra* note 471, § 18.26; TRIBE, *supra* note 485, § 15-6, at 1320; Garvey, *supra* note 495, at 806–07; McCarthy, *supra* note 493, at 989; *cf.* Woodhouse, *supra* note 419, at 1091, 1115 (indicating that the *Meyer* opinion overlooked the religious freedom and free speech issues, but also noting that *Meyer* and *Pierce* could lead to “vindication of First Amendment liberties”).

parents' secular and/or religious beliefs.<sup>501</sup> The other dimension involves a parental right to communicate or pass on such beliefs to one's children for the latter's benefit.<sup>502</sup>

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.<sup>503</sup> 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,<sup>504</sup> 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,<sup>505</sup> 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.<sup>506</sup> The Court upheld the parents' claim in only one of these cases—*Wisconsin v. Yoder*.<sup>507</sup> 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.<sup>508</sup>

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://silcon.com/~ptave/maurer3.htm>> (making the case that the Bible may be understood to disapprove of corporal punishment of children).

506. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Jehovah's Witnesses v. King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd mem.*, 390 U.S. 598 (1968).

507. 406 U.S. 205 (1972).

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."<sup>509</sup> 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.<sup>510</sup>

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.<sup>511</sup> 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 *Pierce*.<sup>512</sup> 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,"<sup>513</sup> the *Yoder* Court held that the Free Exercise Clause prevented Wisconsin from forcing the Amish parents to send their children to a formal high school.<sup>514</sup>

There are aspects of *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,<sup>515</sup> 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.<sup>516</sup> It should be noted, though, that in spite of the

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509. *Id.* at 209.

510. *See id.* at 216-17.

511. *See id.* at 219-20.

512. *Id.* at 233 (referring to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

513. *Id.* at 234.

514. *See id.* In *Employment Division v. Smith*, 494 U.S. 872, 881 n.1 (1990), the Court, in dictum, described *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. *See* 4 ROTUNDA & NOWAK, *supra* note 471, § 21.6, at 526.

515. *See infra* note 520 and accompanying text.

516. The Bible contains repeated references to parents' use of the rod on children. A few examples follow: "A Father who spares the rod hates his son, but one who loves him keeps him in order." *Proverbs* 13:24 (The New English Bible, Oxford Univ. Press & Cambridge Univ. Press 1970). "Do not withhold discipline from a boy; take the stick to him, and save him from death." *Proverbs* 23:13 (New English Bible). "Rod and reprimand impart wisdom, but a boy who runs wild brings shame on his mother." *Proverbs* 29:15 (New English Bible).

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.<sup>517</sup> If the decision is properly limited to its facts,<sup>518</sup> 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.<sup>519</sup> The fate of litigants favoring parental corporal punishment would thus depend upon the Court's

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).

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).

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.<sup>520</sup> 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*<sup>521</sup> and *Pierce*<sup>522</sup> are considered to be the U.S. Supreme Court’s earliest pronouncements of familial privacy rights<sup>523</sup> as well as of the parental child rearing right. Later, in *Griswold v. Connecticut*,<sup>524</sup> 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.<sup>525</sup> Because of its factual posture involving claimed rights of married partners, *Griswold* is commonly

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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.*

521. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

522. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

523. See 3 ROTUNDA & NOWAK, *supra* note 471, § 18.26, at 299; Marcia Mobilia Boumil, *Dispensing Birth Control in Public Schools: Do Parents Have a Right to Know?*, 18 SETON HALL L. REV. 356, 364–65 (1988); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1083 & n.226 (1991); Garvey, *supra* note 495, at 805–06; Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 531 & n.159 (1988); cf. TRIBE, *supra* note 485, § 11-3 (referring to *Meyer* and *Pierce* as within the line of cases setting the stage for later decisions upholding privacy rights).

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.<sup>526</sup> According to some commentators, subsequent Supreme Court cases developing the right to privacy have further manifested a "constitutional right in family relationships"<sup>527</sup> as a function of substantive due process<sup>528</sup> or equal protection analysis.<sup>529</sup>

526. See Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 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").

527. 3 ROTUNDA & NOWAK, *supra* note 471, § 18.28, at 313. See Boumil, *supra* note 523, at 364; Cahn, *supra* note 523, at 1083 & n.226; Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1771 n.116 (1987); Hardin, *supra* note 523, at 531; Keiter, *supra* note 493, at 465, 508; Kindred, *supra* note 495, at 526; Page McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER & L. 105, 125-26 (1995); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 847-48 (1985); Alicia C. Klyman, Comment, *Family Law—Hawk v. Hawk: Grandparent Visitation Rights—Court Protects Parental Privacy Rights over "Child's Best Interests"*, 24 MEMPHIS ST. U. L. REV. 413, 420 (1994); Ann H. Zgrodnik, Comment, *Smoking Discrimination: Invading an Individual's Right to Privacy in the Home and Outside the Workplace?*, 21 OHIO N.U. L. REV. 1227, 1250-51 (1995).

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).

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."<sup>530</sup>

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.<sup>531</sup> In support of this thesis, they commonly refer to cases such as *Eisenstadt v. Baird*<sup>532</sup> and *Roe v. Wade*,<sup>533</sup> among others.<sup>534</sup> 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.<sup>535</sup> The Court thereby imbued individuals, apart from their families, with the right to privacy, saying that "[i]f 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."<sup>536</sup> 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.<sup>537</sup> 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

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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).

532. 405 U.S. 438 (1972).

533. 410 U.S. 113 (1973).

534. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

535. See *Eisenstadt*, 405 U.S. at 443, 453-55.

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.<sup>538</sup>

### *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."<sup>539</sup> These cases arose in extrafamilial factual

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538. There are readers who would probably respond that an attempt by corporal punishment parents to rely on family privacy rights would be neither dated nor awkward in light of *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *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. *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. *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 . . ." *Id.* at 191. This characterization of earlier decisions has led some analysts to conclude that the *Hardwick* Court was breathing new life into the family privacy doctrine. *See* Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 267-68 (1992); Dailey, *supra* note 526, at 980. *But see* Dolgin, *supra* note 526, at 1569-70 (intimating that *Hardwick* merely revived the rhetoric of family privacy jurisprudence); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 762 (1989) (suggesting that *Hardwick* can be understood as championing self-definition by the legislating community).

539. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (unanimous decision). In *Mitchell*, an African-American was convicted of aggravated battery against a Caucasian. *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. *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. *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<sup>540</sup> or prohibit parents from committing child abuse.<sup>541</sup> 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.<sup>542</sup> 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.<sup>543</sup>

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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.<sup>544</sup> 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.<sup>545</sup>

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

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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. 158, 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).

545. *Jacobson*, 197 U.S. at 26.

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

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<sup>548</sup> and to provide their children with state-approved education,<sup>549</sup> as well as laws prohibiting parental child abuse.<sup>550</sup> There are also laws governing when children may drive, drink, vote, contract, or marry.<sup>551</sup> 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.<sup>552</sup> Indeed, governmental regulation of the parent-child relationship is accepted practice in the United States.<sup>553</sup> 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

546. *Prince*, 321 U.S. at 167.

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,<sup>554</sup> the Court took an entirely different view of the Free Exercise Clause claim of a child's custodian in *Prince v. Massachusetts*.<sup>555</sup> 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.<sup>556</sup> 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.<sup>557</sup> She also claimed that the state law unconstitutionally interfered with the *Meyer-Pierce* parental child rearing right under the Due Process Clause.<sup>558</sup> 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.<sup>559</sup>

The Court noted that counterpoised against these claims stood society's interests in protecting the welfare of children.<sup>560</sup> 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."<sup>561</sup> The Court found that the child's street preaching, even under the supervision of her aunt, was dangerous.<sup>562</sup> 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.<sup>563</sup> As such, the child's street preaching was not and could not be a part of the First Amendment<sup>564</sup> "right to practice religion

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554. See *supra* notes 506-14 and accompanying text.

555. 321 U.S. 158 (1944).

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.

freely.<sup>565</sup> 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.<sup>566</sup> 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.<sup>567</sup>

*Jehovah's Witnesses v. King County Hospital*<sup>568</sup> 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.<sup>569</sup> 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.<sup>570</sup> Although plaintiffs invoked several constitutional provisions as the basis for their challenge,<sup>571</sup> 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.<sup>572</sup>

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."<sup>573</sup> To these Jehovah's Witnesses, the command meant that they and their offspring must refrain from receiving blood

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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.

The *Prince* Court noted that its holding was limited to the facts of the case. *See id.* at 171. This does not mean, however, that Free Exercise Clause claims can only be overridden when the religious expression or conduct occurs on the streets or in other places frequented by the general public. *Cf. Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that Oregon did not violate the Free Exercise Clause by denying unemployment compensation benefits to employees fired for ingesting peyote for sacramental purposes at a ceremony of the Native American Church of which the employees were members).

567. *See supra* text accompanying notes 557-59.

568. 278 F. Supp. 488 (W.D. Wash. 1967) (three-judge district court), *aff'd mem.*, 390 U.S. 598 (1968).

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.<sup>574</sup> They also argued that as parents they had the right to select medical treatment for their children.<sup>575</sup> 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.<sup>576</sup>

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."<sup>577</sup> 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.<sup>578</sup> The Supreme Court affirmed the district court's judgment in a memorandum disposition.<sup>579</sup>

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.<sup>580</sup> Nor

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.<sup>581</sup> 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.<sup>582</sup> In contrast, a host of personal physical and mental ills, manifested during childhood and later in adulthood, have been traced to this practice.<sup>583</sup> 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.<sup>584</sup> 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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cause in the abortion cases the state interference was patently in aid of parental authority and ran counter to the minor's constitutional right to an abortion. A ban on corporal punishment would restrict the extent of parents' powers. Moreover, this Article takes no position on whether children have a constitutional right to be free of corporal punishment.

581. See *supra* note 539 and accompanying text.

582. See *supra* notes 348, 353-54 and accompanying text.

583. See *supra* notes 349-50, 357-66, 376-85, 389-90 and accompanying text.

584. See *supra* notes 393, 404 and accompanying text.



diminished when the child is struck as a matter of right.<sup>585</sup> Indeed, as discussed earlier, corporal punishment of children by any other name is, in its essential elements, a battery.<sup>586</sup> 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.<sup>587</sup>

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 *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

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585. See *supra* notes 413, 417-18 and accompanying text.

586. See *supra* notes 408, 439, 442-49 and accompanying text.

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 excretory 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.<sup>588</sup>

## 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,<sup>589</sup> and physical chastisement of wives was assumed to be every husband's prerogative.<sup>590</sup> 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,<sup>591</sup> and a controversial women's liberation movement contributed to the recognition that wife battering is wrong.<sup>592</sup> 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

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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).

589. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); PETER KOLCHIN, *AMERICAN SLAVERY: 1619–1877* 3 (1993).

590. See LORRAINE DUSKY, *STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA* 262–63 (1996); OKIN, *supra* note 427, at 129.

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).

592. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880–1960*, at 251 (1988); OKIN, *supra* note 427, at 129.

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."<sup>593</sup> 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,"<sup>594</sup> befittingly dignifying child and adult alike.

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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).