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Susan H. Bitensky

*Michigan State University College of Law*, [bitensky@law.msu.edu](mailto:bitensky@law.msu.edu)

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# THE CHILD'S RIGHT TO HUMANE DISCIPLINE UNDER THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: THE MANDATE AGAINST ALL CORPORAL PUNISHMENT OF CHILDREN

*Susan H. Bitensky\**

My father, a professor of social work, said that often the key to understanding an individual's personality is to look at the very things that tend to go unnoticed — seemingly insignificant traits and idiosyncrasies. It has occurred to me that this may be true of humanity in general, that the key to understanding the human condition may be in looking at behaviors which are so much a part of daily life for so many that no one steps back to question them. I believe that one such key behavior is corporal punishment of children. I am not referring to child abuse as is traditionally conceived. Rather, I am referring to spankings and smacks that ordinarily would not be prosecutable in the United States.

As it stands now, about half the states in this country allow school personnel to mete out corporal punishment to students in elementary and secondary schools.<sup>1</sup> All states permit parents or guardians to administer "reasonable" corporal punishment upon their children.<sup>2</sup> A bill was even introduced in Congress that, if enacted, would give parents an express federal right to subject

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\* Professor of Law, Detroit College of Law at Michigan State University. B.A., Case Western Reserve University, 1971; J.D., University of Chicago Law School, 1974.

1. 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 (1994); Scott Bloom, Comment, *Spare the Rod, Spoil the Child? A Legal Framework for Recent Corporal Punishment Proposals*, 25 GOLDEN GATE U. L. REV. 361, 368-69 (1995).

2. See Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 984 (1996); Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 526 (1987).

their children to "reasonable" corporal punishment.<sup>3</sup> In fact, corporal punishment of children in the family setting is a long-standing and pervasive practice in the U.S. that is taken for granted by many parents as their right and understood by many children as their due.<sup>4</sup>

Disagreement has been developing among sociologists, pediatricians, psychologists, and others with expertise in child development over whether corporal punishment does not do considerably more harm than good.<sup>5</sup> The weight of authoritative expert opinion is that corporal punishment of children is not very effective in promoting long term positive behavior modification.<sup>6</sup> Indeed, there is an empirical and theoretical basis for concluding that the effects of such punishment are not only not helpful, but are profoundly deleterious.<sup>7</sup>

How, you may be wondering, can a few spankings by a loving parent or concerned teacher cause any serious damage? For one thing, corporal punishment may physically injure the child<sup>8</sup> and is often a prelude to full-blown child abuse.<sup>9</sup> Corporal punishment causes other less palpable damage. This sort of damage

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3. The Parental Rights and Responsibilities Act of 1995, S.984, 104th Cong., 1st Sess. (1995).

4. See Edwards, *supra* note 2, at 984.

5. For some of the authorities disfavoring corporal punishment of children, see PHILIP GREVEN, SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE *passim* (1991); PENELOPE LEACH, YOUR GROWING CHILD: FROM BABYHOOD THROUGH ADOLESCENCE 224-25 (1995); NANCY SAMALIN, LOVING YOUR CHILD IS NOT ENOUGH: POSITIVE DISCIPLINE THAT WORKS 73-74 (1978); MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES (1994). For some of the authorities favoring corporal punishment of children, see JAMES DOBSON, THE STRONG-WILLED CHILD: BIRTH THROUGH ADOLESCENCE 34-35 (1978); ROY LESLIE, SPANKING: WHY, WHEN, HOW? (1979); DIANA BAUMRIND, PARENTING: THE DISCIPLINE CONTROVERSY REVISITED, 45 FAM. RELATIONS 405, 409-13 (Oct. 1996).

6. See LEACH, *supra* note 5, at 224; WILLIAM SEARS & MARTHA SEARS, THE DISCIPLINE BOOK: EVERYTHING YOU NEED TO KNOW TO HAVE A BETTER-BEHAVED CHILD - FROM BIRTH TO AGE TEN 149-50 (1995).

7. See GREVEN, *supra* note 5 *passim*; SEARS & SEARS, *supra* note 6, at 146-54; STRAUS, *supra* note 5 *passim*.

8. See LEACH, *supra* note 5, at 224; PETER NEWELL, CHILDREN ARE PEOPLE TOO: THE CASE AGAINST PHYSICAL PUNISHMENT 16-21 (1989); STRAUS, *supra* note 5, at 149-51.

9. See NEWELL, *supra* note 8, at 21-31; SEARS & SEARS, *supra* note 6, at 149; STRAUS, *supra* note 5, at 81-87, 90-97.

results from the fact that a child, like any human being, experiences rage and indignation upon being struck, but cannot express these feelings because of the risk that there will be further punishment or withdrawal of adult approval and love.<sup>10</sup> Repression, however, is only a momentary solution. The anger must go somewhere and it does. Time does not permit a full cataloging of the psychological effects of this repressed anger, but a few of the more pernicious ones are aggressiveness,<sup>11</sup> lack of empathy,<sup>12</sup> and a tendency toward either authoritarianism<sup>13</sup> or blind obedience.<sup>14</sup> The first two symptoms may appear during childhood, and all four symptoms may surface during the teenage years and adulthood.

I have selected these particular psychological effects of corporal punishment of children because they are also human traits that seem to have persisted throughout history and much of the world; they are some of mankind's most troubling traits as well. The traits are certainly not the characteristics of an enlightened and rational citizenry capable of successfully maintaining democracy and a kinder, gentler social order.

Could there be a link between the commonly experienced pain of childhood corporal punishment and the surreal brutality of the Nazis or the Khmer Rouge? From whence comes this capacity, century after century, for mayhem and barbarity on either a societal scale or at the individual criminal level? One of my colleagues has suggested that the answer is simple although

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10. See GREVEN, *supra* note 5, at 132; ALICE MILLER, *THE DRAMA OF THE GIFTED CHILD: THE SEARCH FOR THE TRUE SELF* 8 (1981); ALICE MILLER, *FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE* 7, 61(1990) [hereinafter MILLER, *FOR YOUR OWN GOOD*].

11. With respect to corporal punishment of children causing aggressiveness during childhood, see SAMALIN, *supra* note 5, at 73; SEARS & SEARS, *supra* note 6, at 153-54. With respect to corporal punishment of children causing lack of empathy during childhood, see GREVEN, *supra* note 5, at 126-27; MILLER, *FOR YOUR OWN GOOD*, *supra* note 10, at 61, 65-66, 115-17, 172; STRAUS, *supra* note 5, at 99, 103, 106, 110, 113-15.

12. With respect to corporal punishment of children causing lack of empathy during childhood, see GREVEN, *supra* note 5, at 127-29. With respect to corporal punishment of children causing lack of empathy during adulthood, see GREVEN, *supra* note 5, at 127-29; MILLER, *FOR YOUR OWN GOOD*, *supra* note 10, at 79-83, 115.

13. See GREVEN, *supra* note 5, at 198-204; ALICE MILLER, *BREAKING DOWN THE WALL OF SILENCE: THE LIBERATING EXPERIENCE OF FACING PAINFUL TRUTH* 84-85 (1991); NEWELL, *supra* note 8, at 46.

14. See GREVEN, *supra* note 5, at 200-04; MILLER, *FOR YOUR OWN GOOD*, *supra* note 10, at 70; Dean M. Herman, *A Statutory Proposal to Prohibit the Infliction of Violence Upon Children*, 19 *FAM. L.Q.*, 18-20, 37 (1985).

depressing: we are all inherently only one step above ooze.<sup>15</sup> I disagree, not because I am an optimist, but, rather, because there are other explanations. Obviously all of the world's ills cannot and should not be attributed to corporal punishment of children; but, corporal punishment may be one of those little noticed behaviors, of which my father spoke, revealing a contributing factor in man's continuing propensity for carnage and cruelty.

I am not going to represent that all knowledgeable experts would agree with this assessment. There is, as I mentioned before, some disagreement over whether light or moderate corporal punishment of children is harmful. In one sense the wrangling is beside the point if one acknowledges the possibility that physically attacking children's bodies, even in the name of discipline, is inhumane and morally wrong.<sup>16</sup> If your adult neighbor does something really infuriating, you wouldn't swat him to get him to change his behavior. Similarly, if that adult neighbor's child got out of line, you wouldn't feel free to swat the child, either. Our law on assault and battery manifests that we, as a society, have repudiated swatting as a dispute resolution technique. Does that ethical standard change simply because the bottom on the receiving end belongs to a child who is a student or one's own flesh and blood? In light of children's vulnerability and dependency on their parents and teachers, subjecting one's own children or pupils to violence and the dread of violence is perhaps even less defensible than subjecting anyone else to such treatment. This is especially true since alternative disciplinary tactics are available such as time-out, deprivation of privileges, grounding, or reasoning and explaining.

The U.N. Convention on the Rights of the Child<sup>17</sup> reflects these views against corporal punishment. I am currently writing an article which includes a detailed analysis of the many provisions of the Convention that may be interpreted implicitly to prohibit corporal punishment of children.<sup>18</sup> There are, by my

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15. Assuming that he would appreciate attribution, the comment was made by my colleague Professor Martin L. Kotch several years ago on what I presume was a bad day.

16. See NEWELL, *supra* note 8, at 12-16; STRAUS, *supra* note 5, at 10; Herman, *supra* note 14, at 10.

17. Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/736 (1989) [hereinafter Convention on the Rights of the Child].

18. Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children* (forthcoming).

count, at least eleven such provisions. Consider, for example, article 19.1 which provides, in part:

States Parties shall take all appropriate . . . 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>19</sup>

As a matter of semantics, the conclusion is inescapable that Article 19.1 forbids all corporal punishment of children and not just abuse or punishment which leads to injury. Why else mention "physical . . . violence" separately from "injury or abuse"? Moreover, the Committee on the Rights of the Child, the body which monitors compliance with the Convention, has taken the position that this provision requires States Parties to protect children from all corporal punishment, even in the family context.<sup>20</sup>

Also, consider article 37(a) which declares that, "States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment."<sup>21</sup> By implication, this language may be construed to obligate States Parties to ensure that no child shall be subjected by anyone to corporal punishment because it is a form of torture or cruel, inhuman or degrading punishment. Indeed, the former Rapporteur of the Committee on the Rights of the Child, Marta Santos Pais, stated last August in reference to this provision that "torture may cover a wide degree of situations," including those which result in "unperceivable mental suffering."<sup>22</sup>

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19. Convention on the Rights of the Child, *supra* note 17, at art. 19.1.

20. See, e.g. Concluding Observations: Spain, CRC/C/15 Add. 28, at para. 10 (Oct. 24, 1994); Concluding Observations: Sri Lanka, CRC/C/15 Add. 40 at para. 32 (June 21, 1995); Concluding Observations: United Kingdom, CRC/C/15 Add. 34, at para. 31 (Feb. 15, 1995).

21. Convention on the Rights of the Child, *supra* note 17, at art. 37(a).

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 the author).

Finally, article 28, section 2 states, in part: "States Parties shall take . . . 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>23</sup> The Committee on the Rights of the Child has repeatedly advised that article 28, section 2 is intended to outlaw corporal punishment in the schools.<sup>24</sup>

It may be anticipated that insofar as the U.N. Convention on the Rights of the Child aims at banning all corporal punishment of children, it will be highly controversial in the United States. Some will no doubt argue that such a ban would run counter to the U.S. Constitution, especially parents' substantive due process right to rear their children<sup>25</sup> and family privacy rights.<sup>26</sup> This is a bit like arguing that criminalizing child abuse or wife beating violates the Constitution. Such inhumane conduct can be no part of anyone's constitutional right without undermining the Constitution's credibility and mocking its status as one of the world's leading human rights documents.

That the Convention on the Rights of the Child will bring into high relief the dissension in the United States over corporal punishment of children may be both a drawback and an asset. It is a drawback in that this aspect of the Convention may make it more difficult to persuade our country to become a party to the Convention. However, on balance, I believe that the Convention's language against corporal punishment is more of an asset. It is a principled and well-founded stand on a difficult issue. The Convention, as an authoritative expression of the international community, will impel Americans to regard as questionable that which they have accepted as a matter of course. Moreover, because the Convention legitimizes the idea of prohibiting corporal punishment of children, it may be instrumental in the

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23. Convention on the Rights of the Child, *supra* note 17, at art. 28, para. 2.

24. Concluding Observations: Zimbabwe, CRC/C/15 Add. 55, at para. 18 (June 7, 1996); Concluding Observations: United Kingdom, CRC/C/15 Add. 34, at para. 31 (Feb. 15, 1995); Concluding Observations: Canada, CRC/C/15 Add. 37, at para. 25 (June 20, 1995).

25. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923).

26. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.28 (2d ed. 1992); Marsha Garrison, *Child Welfare Decision-making: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1771 n.116 (1987); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 J.L. REFORM 835, 847 (1985).

gradual creation of a new norm in the United States disfavoring this form of discipline.<sup>27</sup> The development of a new norm may, in turn, set the stage for domestic legal reform.

This type of dynamic can already be seen in other countries. Five years after the adoption of the Convention, Cyprus became the sixth nation, following Sweden, Norway, Finland, Denmark, and Austria<sup>28</sup>, to enact a statute directed at prohibiting all corporal punishment of children.<sup>29</sup> More tellingly, in May 1996, the Italian Supreme Court of Cassation, Italy's highest court, issued a decision forbidding all corporal punishment of children in Italy.<sup>30</sup> The Court relied in significant part on the Convention on the Rights of the Child in deciding the case.<sup>31</sup> As of this writing, efforts have been underway to achieve legislative prohibition in Ireland,<sup>32</sup> Germany,<sup>33</sup> and Croatia.<sup>34</sup> Over the long haul, it is unlikely that the United States can remain totally impervious to and unaffected by these developments, whether or not it finally does the right thing and becomes a party to the Convention.

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27. With respect to the role of law in norm creation, see generally 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); Keith Burgess - Jackson, *Bad Samaritanism and the Pedagogic Function of Law*, 8 CRIM. JUST. J. 1, 3-4, 26 (1985); Philip Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 85 (1985).

28. NEWELL, *supra* note 8, at 67-96.

29. Law 147 (1), OFFICIAL GAZETTE OF THE REPUBLIC OF CYPRUS No. 2886 (June 17, 1994).

30. Judgment of May 16, 1996, Corte Supreme di Cassazione, 6 sezione penale.

31. *Id.*

32. See 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 (Dublin, Ireland, Aug. 22, 1996).

33. Interview with Paula Honkanen-Schoberth, Regional Manager, German Society for Children, Aachen Region, in Dublin, Ireland (Aug. 20, 1996).

34. See Letter from Darija Remeta, Department Head, Department of the Disabled, Croatia Office of Victims of War (Sept. 4, 1996) (on file with author).

