

1-1-1997

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Recommended Citation

Susan H. Bitensky, *The United Nations Convention on the Rights of the Child and Corporal Punishment of Children: Ramifications for the United States*, 5 *Geo. J. on Fighting Poverty* 226 (1997-1998).

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THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND CORPORAL PUNISHMENT OF CHILDREN: RAMIFICATIONS FOR THE UNITED STATES

Susan H. Bitensky*

INTRODUCTION

What is the big deal with spanking? After all, many of us were spanked as children and we turned out okay. Some of us may also have administered spankings to our own children and we are certainly not ogres. For a long time, most Americans have been accustomed to viewing corporal punishment of children as a mundane, unexceptional part of child rearing—at least as long as the punishment does not deteriorate into child abuse as it is traditionally conceived.¹ Indeed, corporal punishment is common in the United States: more than 90% of American parents have hit toddlers and most continue to hit

their children for many years.² Could something so commonplace be wrong? Is a smack or two on a toddler's bottom a human rights issue?

I submit that, yes, it is a human rights issue and that the conventional wisdom is wrong. More modern conventional wisdom has begun to reflect this idea. Newsweek reported in the summer of 1997 that the present generation of educated middle-class parents tends to view spanking as politically incorrect.³ In any event, this article will demonstrate that corporal punishment of children is a human rights issue of paramount importance and that it is properly treated as such by the United Nations Convention on the Rights of the Child (Convention).⁴ Then this article will explore what ratification of the Convention would mean for the legal status of corporal punishment of children in the United States.

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¹ See Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J. L. REFORM 353, 354-58 (1998).

² See MURRAY A. STRAUSS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES 3 (1994).

³ See Larry Reibstein & Susan Miller, *The Debate over Discipline*, NEWSWEEK SPECIAL ISSUE, Spring/Summer 1997, at 64 (comparing the political correctness of spanking and smoking).

⁴ Convention on the Rights of the Child, *adopted* Nov. 20, 1989. G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/736 (1989) art. 37(a) [hereinafter Convention].

CORPORAL PUNISHMENT AS A HUMAN RIGHTS ISSUE

Corporal punishment of children is a human rights issue for three reasons. First, subjecting children to violence against which adults are protected is patently unfair as unequal treatment. If your *adult* neighbor does something infuriating, you would not swat him to get him to change his behavior. Every state has assault and battery laws, manifesting society's repudiation of swatting as a behavior modification or dispute resolution technique between adults. That moral standard should not change simply because the person on the receiving end is a child. In light of children's vulnerability and dependency on their parents and teachers, subjecting children or pupils to violence and the dread of violence is perhaps even less defensible than subjecting anyone else to such practices. The arbitrariness of this difference in treatment is even more apparent when it is considered that corporal punishment is ineffective. According to most authorities, corporal punishment does nothing to further the main goal of discipline: the child's development of internal control and conscience.⁵ If there is any deterrent effect on the child's conduct, it is of but fleeting duration.⁶

Second, corporal punishment of children is a human rights issue because such punishment causes harm to children, both during childhood and later in life.⁷ By definition, corporal punishment is intended to cause pain as a means of controlling, modifying, or punishing the child's conduct. As an invasion of their bodily integrity, children experience this pain and an accompanying sense of degradation and humiliation. Such suffering is compounded by the fact that children are helpless to alleviate their situation. They cannot retaliate; any anger they feel upon being struck must be repressed. This dynamic may cause adverse psychological and physical symptoms in children because their anger will surface in other ways. Thus, corporal punishment can cause children to exhibit aggressiveness, antisocial behavior, depression, withdrawal, anxiety, tension, and decreased

empathy.⁸ Corporal punishment may also induce physiological damage, including somatic responses such as headaches and stomachaches.⁹ Corporal punishment also can lead to more severe child abuse with attendant injuries.¹⁰

However, some of the most ominous ramifications of corporal punishment are those that are manifested when children who have felt the rod reach adulthood. Analysis by respected psychologists reveals that corporal punishment of a child is all too likely to produce an adult with lasting psychic misery and maiming.¹¹ As psychologist Alice Miller has explained,

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.¹²

Studies have drawn correlations, for instance, between corporal punishment and such adult disorders as depression, obsessive-compulsive behavior, dissociation, paranoia, aggressiveness, authoritarianism, and lack of empathy.¹³ Some of these

⁵ See Bitensky, *supra* note 1, at 426 n.354 (citing PETER NEWELL, CHILDREN ARE PEOPLE TOO: THE CASE AGAINST PHYSICAL PUNISHMENT 19 (1989); NANCY SAMALIN, LOVING YOUR CHILD IS NOT ENOUGH: POSITIVE DISCIPLINE THAT WORKS 74 (1987)).

⁶ Bitensky, *supra* note 1, at 424 n.348.

⁷ See *id.* at 425-35.

⁸ See *id.* at 424 nn.347, 427 nn.357-60 (citing PHILIP GREVEN, SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE 122-23, 129 (1991); IRWIN A. HYMAN, READING, WRITING, AND THE HICKORY STICK: THE APPALLING STROY OF PHYSICAL AND PSYCHOLOGICAL ABUSE IN AMERICAN SCHOOLS 94, 99-100 (1990); Murray A. Straus et al., *Spanking by Parents and Subsequent Antisocial Behaviour of Children*, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 761, 762-64 (1997)).

⁹ See *id.* at 427 n.365 (citing IRWIN A. HYMAN, READING, WRITING, AND THE HICKORY STICK: THE APPALLING STORY OF PHYSICAL AND PSYCHOLOGICAL ABUSE IN AMERICAN SCHOOLS 95, 100 (1990)).

¹⁰ See *id.* at 427 n.366 (citing PENELOPE LEACH, YOUR GROWING CHILD: FROM BABYHOOD THROUGH ADOLESCENCE 224 (1996); PETER NEWELL, CHILDREN ARE PEOPLE TOO: THE CASE AGAINST PHYSICAL PUNISHMENT 21-31 (1989)).

¹¹ See *id.* at 428.

¹² ALICE MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE 61 (Hildegard & Hunter Hannum trans., The Noonday Press 3d ed. 1990).

¹³ See Bitensky, *supra* note 1, at 430-31 nn.377-83 (citing PHILIP GREVEN, SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE 126-41, 148-74, 198-204 (1991); MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMI-

syndromes have implications for society at large as well as for personal welfare. Authoritarianism, aggressiveness, and lack of empathy are the stuff from which tyranny and genocide are made.

The third reason corporal punishment is a human rights issue is because an assumption underlying the punishment is that children are their parents' chattel. When parents spank children, they, wittingly or not, presume that they own children, otherwise they would not feel free to do to their children that which cannot be done to people who are not "owned." The notion that anyone can be another's property is repugnant to basic human rights norms. It is telling that as historically oppressed peoples have liberated themselves from being legally categorized as the property of others, such liberation typically has engendered legal protection from physical chastisement.¹⁴ With the emancipation of Confederate slaves, Caucasians could no longer legally beat African-Americans; likewise, American women ultimately achieved reform such that husbands could no longer legally beat their wives. Perhaps if children were no longer regarded as parental chattel, they too would soon be spared the rod. Because corporal punishment of children is a human rights issue, it should not come as a surprise to find that it is prohibited by the United Nations Convention on the Rights of the Child.

*Corporal Punishment and the Convention
on the Rights of the Child*

Although the Convention on the Rights of the Child does not mention corporal punishment or spanking, the Convention does clearly forbid all corporal punishment of children. The Committee on the Rights of the Child (Committee), the body that monitors compliance with the Convention and issues authoritative interpretations of its provisions, has advanced the idea that the Convention as a whole is inconsistent with corporal punishment of children. In an official report issued in 1994, the Committee declared:

LIES 67-146 (1994).

¹⁴ See Bitensky, *supra* note 1 at 440 nn.426-27 (citing Stephen Nissenbaum, *Lighting the Freedom Tree*, N.Y. TIMES, Dec. 25, 1996, at A17); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 129 (1989).

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 educational campaigns, to prevent child abuse and the physical punishment of children.¹⁵

The Committee has articulated and elaborated this idea many times in its concluding observations following examination of progress reports submitted by various countries.¹⁶

Specific Provisions in the Convention

With respect to specific provisions of the Convention, it is Article 19, paragraph 1 that most readily lends itself to interpretation as prohibiting corporal punishment of children. Article 19, paragraph 1 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 . . . while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."¹⁷ That Article 19 prohibits corporal punishment of children would seem evident as a semantic matter since the provision requires nations to protect children from "all forms of physical . . . violence."¹⁸ Article 19 would not refer to "all forms of physical . . . violence" in addition to "injury or abuse" unless the former phraseology was meant to cover corporal punishment as opposed to only traditional conceptions of child abuse. The interpretation that Article 19 prohibits corporal punishment is not only scholarly surmise, but has been the position of the Committee on the Rights of the Child as well.¹⁹

As further evidence of its belief that the Conven-

¹⁵ U.N. Doc. CRC/C/34, Annex IV, at 63 (1994)

¹⁶ See Bitensky, *supra* note 1, at 392 n.193 (citing various concluding observations of the Committee on the Rights of the Child).

¹⁷ Convention, *supra* note 4, at art. 19(1).

¹⁸ See Bitensky, *supra* note 1, at 394 n.195 (citing 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, 278-79 (1994)).

¹⁹ See *id.* at 395 nn.198-200.

tion bans corporal punishment, the Committee has repeatedly relied on Articles 28 and 37 of the Convention as a basis for criticizing countries that have not repudiated corporal punishment of children.²⁰ Article 37, paragraph (a) provides, in part, that, "States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."²¹ Marta Santos Pais, a former rapporteur of the Committee, explained that it is too narrow a reading of Article 37 to identify torture only with "extremely serious and massive cases."²² She noted that torture may cover a variety of situations, even those that cause "unperceivable mental suffering" or those involving "a disciplinary measure which may be degrading or inhuman."²³

Article 28, paragraph 2 of the Convention provides 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."²⁴ The Committee on the Rights of the Child and the commentators have read Article 28, paragraph 2 as requiring states parties to take measures proscribing corporal punishment in the schools.²⁵ Such a reading ensures that school discipline is "in conformity with the . . . Convention," because, as aforementioned, other parts of the Convention outlaw corporal punishment of children.²⁶ Such a reading also is "consistent with the child's human dignity" because being physically attacked as a matter of right reduces the child to chattel, a subhuman status that is inherently demeaning.

Article 28, paragraph 2 is not the only provision of the Convention protective of the child's dignity. For example, the Convention's preamble extols

"the inherent dignity . . . of all members of the human family," the "dignity . . . of the human person," and the need for children to be raised "in the spirit of . . . dignity."²⁷ Article 39 directs that children who have been the victims of any form of cruel or degrading treatment shall recover "in an environment which fosters the . . . dignity of the child."²⁸ Judith Karp, the current Vice-Chair of the Committee on the Rights of the Child, has categorically stated, "[p]hysical punishment is a form of violation of the human dignity of the child."²⁹

In addition to finding further support for the ban on corporal punishment in the Convention's provisions on dignity, the Committee on the Rights of the Child has taken the position that at least three other provisions of the Convention may contain the ban. First, the Committee has found that the right to be free of corporal punishment is protected by the Convention's nondiscrimination principle in Article 2, paragraph 1.³⁰ The reasoning is that the principle forbids justifying corporal punishment of children simply because they hold the status of children.³¹ Second, the Committee has advised that spanking is barred by the insistence on the primacy of the best interests of the child in Convention Article 3, paragraph 1.³² Third, the Committee has also discerned a prohibition on corporal punishment in the assurance of Article 12, paragraph 1, that the child should be allowed to participate in all matters affecting his or her life.³³ Ms. Santos Pais elucidated that participation implies dialogue and peaceful conflict resolution, thereby excluding violent solutions to family differences.³⁴

Both semantics and authoritative interpretation make clear that the Convention forbids all corporal punishment of children. But, one must con-

²⁰ See *id.* at 202.

²¹ Convention, *supra* note 4, 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 10 (Aug. 22, 1996) (transcript on file with the author).

²³ *Id.*

²⁴ Convention, *supra* note 4, at art. 28(2).

²⁵ See e.g., *Concluding Observations on the Committee on the Rights of the Child: Zimbabwe*, U.N. Comm. on the Rts. of the Child, 12th Sess., ¶18, U.N. Doc. CRC/C/15/Add. 55 (1996).

²⁶ See *id.* at 392-401 nn.193-210 & 219-30.

²⁷ Convention, *supra* note 4, at pmbi.

²⁸ *Id.* at art. 39.

²⁹ Judith Karp, Address at the International Seminar on Ending All Physical Punishment of Children in Europe 3 (Oct. 19, 1997) (transcript on file with the author).

³⁰ See Convention, *supra* note 4, at art. 2(1).

³¹ See Pais, *supra* note 22.

³² See Convention, *supra* note 4, at art. 3(1).

³³ See *id.* at art. 12(1).

³⁴ See Pais, *supra* note 22.

sider what this means for nations that become parties to the Convention, most pertinently, what the implications would be for the United States if it were to ratify the Convention. In its concluding observations and elsewhere, the Committee on the Rights of the Child has urged states parties to engage in educational campaigns against corporal punishment of children.³⁵ This stands to reason. If a country is going to forbid corporal punishment, its leaders had better educate the populace that this is their national policy. However, the Committee has urged an even more dramatic step. The Committee has urged nations to adopt legislation outlawing all corporal punishment of children.³⁶

Existing Laws That Prohibit Corporal Punishment

Before dismissing this latter recommendation as unworkable or outlandish, one should realize that six nations have already enacted laws against all corporal punishment of children and one nation has achieved the same end by judicial decision. Sweden led the way with legislation adopted in 1979.³⁷ Finland, Norway, Austria, and Cyprus followed with their own enactments during the 1980s.³⁸ Italy's Supreme Court of Cassation issued a ruling in 1996 ending corporal punishment of

children in that country.³⁹ And, Denmark, improving upon an earlier law discouraging corporal punishment of children, enacted an outright prohibition in 1997.⁴⁰

The pattern of these laws is that they announce an explicit prohibition against caretakers using corporal punishment on children along with other language protective of the child's well-being.⁴¹ Sweden's statute is fairly typical, providing that "[c]hildren 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."⁴²

Cyprus' statute is alone in providing for penalties on its face.⁴³ The anti-spanking statutes of the Scandinavian countries and Austria are silent about legal penalties for violations.⁴⁴ In spite of this silence, in each of the enacting countries and in Italy, a statutory basis does exist upon which to prosecute offenders for assault and battery or related crimes. This does not mean, though, that parents in these countries are routinely prosecuted for spanking their children. Prosecution of parents for corporally punishing children is rare or nonexistent inasmuch as all of these countries have opted for prosecutorial restraint on this issue.⁴⁵ In

³⁵ See, e.g., *Concluding Observations on the Committee on the Rights of the Child: Guatemala*, U.N. Comm. on the Rts. of the Child, 12th Sess., ¶45 U.N. Doc. No. CRC/C/15/Add. 58 (1996); *Concluding Observations on the Committee on the Rights of the Child: Honduras*, U.N. Comm. on the Rts. of the Child, 7th Sess., ¶27 U.N. Doc. No. CRC/C/15/Add. 24 (1994); *Concluding Observations on the Committee on the Rights of the Child: France*, U.N. Comm. on the Rts. of the Child, 6th Sess., ¶24 U.N. Doc. No. CRC/C/15/Add. 20 (1994).

³⁶ See, e.g., *Concluding Observations on the Committee on the Rights of the Child: Germany*, U.N. Comm. on the Rts. of the Child, 10th Sess., ¶30 U.N. Doc. No. CRC/C/15/Add. 43 (1995); *Concluding Observations on the Committee on the Rights of the Child: Senegal*, U.N. Comm. on the Rts. of the Child, 10th Sess., ¶24 U.N. Doc. No. CRC/C/15/Add. 44 (1995); *Concluding Observations on the Committee on the Rights of the Child: Ukraine*, U.N. Comm. on the Rts. of the Child, 10th Sess., ¶29 U.N. Doc. No. CRC/C/15/Add. 42 (1995); *Concluding Observations on the Committee on the Rights of the Child: Belgium*, U.N. Comm. on the Rts. of the Child, 9th Sess., ¶15 U.N. Doc. No. CRC/C/15/Add. 38 (1995); *Concluding Observations on the Committee on the Rights of the Child: Poland*, U.N. Comm. on the Rts. of the Child, 8th Sess., ¶30 U.N. Doc. No. CRC/C/15/Add. 31 (1995).

³⁷ See 6 kap. 1§ föräldrabalken (Swed.) [Swedish Children and Parents Code ch. 6, §1] (Swedish Ministry of Justice trans.).

³⁸ See Bitensky, *supra* note 1, at 368-70 nn.51-62, 380-82 nn.77-111.

³⁹ See *id.* at 380-82 nn.112-27 (citing *Cambria*, Cass., sez. VI, 18 marzo 1996, [Supreme Court of Cassation, 6th Penal Section, March 18, 1996], Foro It. II 1996, 407 (Italy)).

⁴⁰ See *id.* at 371 nn.66-67 (citing Lov nr. 416 om ændring af lov om forældremyndighed og samvær § 1 [Danish Act to Amend the Act on Parental Custody and Conviviality no. 416 § 1] (Kromann & Munter trans.)).

⁴¹ See *id.* at 362 n.20, 368 n.52, 371 n.66, 373 n.77, 375 n.88.

⁴² See 6 kap. 1§ föräldrabalken (Swed.) [Swedish Children and Parents Code ch. 6, §1] (Swedish Ministry of Justice trans.).

⁴³ See Bitensky, *supra* note 1, at 379 nn.109-11 (citing 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.)).

⁴⁴ See *id.* at 362, 368, 371, 373, 375.

⁴⁵ See *id.* at 364-77 nn.32, 75-76, 89 & 100 (citing Interview with Göran Hokansson, Permanent Undersecretary, Swedish Ministry of Health and Social Affairs, in Dublin, Ir. (Aug. 21, 1996); Letter from Jorn Vestergaard, Assoc. Professor, Inst. of Criminology and Criminal Law, University of Copenhagen, to the author 1 (July 3, 1997) (on file with *University of Michigan Journal of Law Reform*); Interview with Dr. Michael Stormann, Executive Public Prosecutor and Section Head of the Section on National Family Law, Austrian Ministry of Justice, in Vienna, Aus. (June 24, 1996)).

some countries, such as Sweden, Finland, Norway, and Austria, violation of the anti-spanking statutes may also adversely affect custody awards in divorce cases.⁴⁶

Nor is the prohibition of all corporal punishment of children purely a foreign phenomenon. America's best kept secret is that Minnesota also prohibits all such punishment. Unlike its European counterparts, Minnesota does not have a single statute that explicitly forbids parental corporal punishment of children. Rather, the state's ban must be teased out of four statutory provisions read together.⁴⁷ These statutes have removed the use of reasonable force, including corporal punishment, as a defense to assault charges.⁴⁸ 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. As one expert has noted, "corporal punishment is considered a crime to the same extent as any assault" in Minnesota.⁴⁹

Although Minnesota has lived with this prohibition for many years, there are no reported cases of a parent being prosecuted for administering mild corporal punishment to children. As in the European countries that have banned corporal punishment of children, it appears Minnesota exercises prosecutorial restraint in relation to this issue.

Prosecutorial Restraint and the Efficacy of Anti-spanking Laws

Although governments use prosecutorial restraint, anti-spanking laws are not meaningless and

the Committee on the Rights of the Child shows much wisdom in promoting them. Aristotle said that the essence of law is not that it commands conduct but that it creates a habit of obedience to itself over time.⁵⁰ In other words, law has a pedagogical role. Law has an educative effect because it crystallizes and makes visible in an impressive way, at the level of governmental authority, those norms that constitute a society's priorities and aspirations. Law tells us who we are and should be.

Many European countries are accustomed to laws that are mere pronouncements without reference to penalties. In the Scandinavian countries and Austria, the anti-spanking laws fit this mold. Because these laws are so clear, they can and do play a pedagogical role that creates a habit of obedience to their legal mandate over time. Moreover, it is arguable that the educative effect of these laws is enhanced by the knowledge that although prosecution for corporal punishment is highly unlikely, such prosecutions or adverse custody decisions are still possible. For example, a few isolated prosecutions of parents for spanking their children have occurred in Sweden.⁵¹

Minnesota's laws have less potential to carry out a pedagogical role because they do not explicitly state a ban on all corporal punishment of children. Rather, these laws, through obtuse and intricate statutory construction, achieve a ban by removing reasonable force as a defense to assault. The result is that the notice function of these Minnesota laws has been virtually lost on laypersons and even on the non-prosecutors in the legal community.

An Anti-Spanking Statute for the United States

Despite the educational and, therefore, deterrent effect of the anti-spanking laws adopted in Scandinavia and Austria, my own preference, especially for the United States, is the Cypriot model which makes clear on its face both that corporal punishment is forbidden and that offenders may be subject to prosecution.⁵² This model is prefer-

⁴⁶ See *id.* at 365 n.34, 370 n.60, 375 n.86, 376 n.90 (citing Telephone Interview with Göran Hokansson (July 19, 1996); Letter from Isabella Riska, Attorney, Roschier-Holmberg & Waselius, Helsinki, Finland, to the author 3 (July 26, 1996); Letter from Finn Erik Engzelius, of the law firm of Thommesen Krefthing Greve Lund, Oslo, Norway, to the author 1-2 (July 24, 1996) (on file with *University of Michigan Journal of Law Reform*)).

⁴⁷ See *id.* at 386-87 n.155-59, 161-63 (citing MINN. STAT. ANN. § 609.06, subd. 1(6) (West Supp. 1997); MINN. STAT. ANN. § 609.379 (West 1978 & Supp. 1997); MINN. STAT. ANN. § 609.224, subd. 1(1) (West 1987); MINN. STAT. ANN. § 609.02, subd. 7 (West 1987)).

⁴⁸ Letter from Victor I. Vieth, Senior Attorney, National Center for Prosecution of Child Abuse, to Nadine Block, Director, Center for Effective Discipline 1 (Oct. 29, 1997) (on file with the author.).

⁴⁹ See *id.*

⁵⁰ See Bitensky, *supra* note 1, 441 n.435 (citing Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 927, 952 (W.D. Ross trans. Richard McKeon ed., 1941)).

⁵¹ See *id.* at 366 n.35 (citing PETER NEWELL, *CHILDREN ARE PEOPLE TOO: THE CASE AGAINST PHYSICAL PUNISHMENT* 81 (1989)).

⁵² See *supra* note 43 and accompanying text.

able because the United States has a legal system that does not make laws merely to announce preferred policies without creating adjunctive enforceable rights, duties, or liabilities. I also prefer this model for our country because it seems Americans are highly resistant to the idea of restraining adults from spanking. Combining clearly articulated prohibitory language with the penalty language in one statute may be preferable in the United States because it is in a format that is both familiar and unequivocal and, therefore, more accessible to the average citizen.

Naturally, an offender could be prosecuted under such a statute. The existence of criminal liability does not mean, though, that the main purpose of the statute would be to haul parents into court. As in Minnesota and the European countries that have banned corporal punishment of children, prosecutorial restraint would be the most advisable policy. Nothing is lost by such restraint. The existence of the law and threat of prosecution should serve the law's pedagogical goals. A conservative prosecutorial strategy would take cognizance of the fact that the new statute proscribes adult behavior that may be impulsive and difficult to control. Such a policy would also probably make the statute more politically acceptable and prevent the courts from being clogged with armies of parents facing criminal charges. One possible version of a statute that would carry out the intended purposes 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 provisions or, in lieu thereof in appropriate cases, shall be a post-trial or post-plea 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.⁵³

A few explanatory remarks about this draft statute are in order. First, the proscription in subsection (1) employs both the shorthand term "corporal punishment" and a definition of the elements of corporal punishment in order to put everyone on notice and leave no doubt that it is indeed spanking that has been outlawed. Second, subsection (1) includes intent as an element of the crime not only because intent is an element of battery, but also in order to distinguish prosecutable conduct from acts that may cause pain for other purposes such as putting antiseptic on a cut or restraining a child from running into traffic. As an extra safeguard for adults, the proposed statute only proscribes physical force that would be a battery if used on an adult. Third, subsection (1) requires that prosecutable use of force must be "for the purpose of correcting, controlling, or punishing the child's behavior" in order unmistakably to remove correction, control, and punishment as defenses to criminal liability.

Note that subsection (2) makes the penalties for hitting a child the same as for hitting an adult, thereby communicating that children are not chattel worthy of less protection. Subsection (2) also offers diversion as an alternative to traditional criminal penalties in jurisdictions where such programs are available. This option is offered in recognition of the fact that it would probably be more productive for offenders to be counseled about better parenting skills than to be fined or incarcerated. Subsection (3) is designed to ensure that the statute will not be used to preclude prosecutions for more serious child abuse if they would be appropriate. And, finally, subsection (4) recognizes that physical force may be used in emergencies to restrain the child from injuring herself or others.

In sum, the U.N Convention on the Rights of the Child prohibits corporal punishment of children. The Committee on the Rights of the Child has

⁵³ This statute was first set forth in Bitensky, *supra* note 1, at 443.

urged states parties to campaign against corporal punishment and to enact legislation to achieve prohibition. In fact, Minnesota and some European countries have already enacted such legislation. This article proposes a statute that might more effectively achieve prohibition in the United States. The crucial question is whether widespread enactment of such a new statute would fit into the American legal scheme.

The Feasibility of an Anti-spanking Statute

“Reasonable” corporal punishment of children by their parents or guardians is currently legal in every state except Minnesota.⁵⁴ Approximately half of the states permit school personnel to use “reasonable” corporal punishment on students as well.⁵⁵ Thus, law reform on this issue in the United States would require enactment of new statutes prohibiting all corporal punishment of children and repeal of existing state statutes permitting such punishment. Should such an undertaking seem overwhelming, it is worth recalling that similar law reform was needed and implemented to bar husbands from physically chastising their wives.

Finally, it may be objected that what is practically feasible is not necessarily constitutionally permissible. The U.S. Constitution is supreme such that no other laws may contravene its provisions and survive judicial challenge.⁵⁶ Laws forbidding corporal punishment would, therefore, need to be consistent with federal constitutional doctrine.

The Constitution is silent on corporal punishment of children. The United States Supreme Court has never characterized such punishment as a constitutionally-protected activity.⁵⁷ Indeed, the Court has addressed the subject of corporal punishment of children only with respect to its constitutional permissibility in the schools. In 1977, in *Ingraham v. Wright*,⁵⁸ the Court held that the Eighth Amendment does not apply to the paddling of children as a means of maintaining disci-

pline in public schools.⁵⁹ The result is that while elementary and secondary schools are not forbidden by the Eighth Amendment from corporally punishing students, states are still permitted to ban the practice from educational facilities.

However, some will no doubt argue that prohibition of corporal punishment of children by parents or other adults in the family circle raises constitutional concerns arising out of parental or familial prerogatives. It may be anticipated that these naysayers will raise four arguments: first, that 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; and fourth, the prohibition may be regarded as infringing familial privacy rights.

There are separate counterarguments to each of these contentions. For example, the Supreme Court has repeatedly held that violence against another person cannot be a part of anyone’s free speech rights.⁶⁰ The reach of the Free Exercise Clause typically protects religious beliefs rather than religiously motivated conduct burdened by laws of general applicability.⁶¹ And, privacy rights may be more personal than they are familial.⁶² But, there is no need to explore separate counterarguments because each of the four previously mentioned constitutional arguments suffer from the same defect. That is, like wife beating or other physical assaults, corporal punishment is so egregious in its effects and so ethically unpalatable that in a civilized society it must be outside the definitional parameters of any constitutional right—be it child-rearing, religious or other expression, or

⁵⁴ See *id.* at 356 n.5.

⁵⁵ See *id.* at 355 n.4.

⁵⁶ U.S. CONST. art. VI, §2.

⁵⁷ See *Sweaney v. Ada County*, 119 F.3d 1385, 1387, 1389-92 (9th Cir. 1997).

⁵⁸ 430 U.S. 651 (1977).

⁵⁹ See *id.* at 664.

⁶⁰ See Bitensky, *supra* note 1, at 464 n.539 (citing *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-18 (1982)).

⁶¹ See *id.* at 460 n.519 (citing 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)).

⁶² See *id.* at 463 nn.531-37 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) and *Roe v. Wade*, 410 U.S. 113, 152-55(1973)).

family privacy. It follows that if corporal punishment is not 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 dictate.

This conclusion is strengthened by the fact that the Supreme Court has not held that under the Constitution familial or parent-child relations must be free of all governmental regulation. The Court has acknowledged "that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare"⁶³ and that "the family itself is not beyond regulation in the public interest."⁶⁴

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. There are state laws requiring parents to have their children vaccinated⁶⁵ and to provide their children with state-approved education⁶⁶ as well as laws prohibiting parental child abuse.⁶⁷ There are also laws governing when children may drive, drink, vote, contract, or marry.⁶⁸

The Supreme Court has approved of the state's inherent *parens patriae* power to intervene in the family and restrict parental conduct so as to protect children's well-being in *Prince v. Massachusetts*.⁶⁹ 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.⁷⁰ The aunt was charged with violating a Massachusetts child labor law that forbade such conduct.⁷¹ She asserted, among other things, that the state law abridged her and her niece's right to free exercise of

religion.⁷² She also claimed that the state law unconstitutionally interfered with the parental child-rearing right under the Due Process Clause.⁷³ The Court found that street preaching was dangerous to the child. Not only would it create the same sorts of difficult situations that adult propagandizing may produce, but it could cause "emotional excitement and psychological or physical injury" to the child.⁷⁴ As such, the child's street preaching was not and could not be part of the aunt's First Amendment right to practice religion freely or of the aunt's substantive due process child-rearing right.

Thus, *Prince* exemplifies 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. Enactment of a prohibition against all 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 in issue in *Prince* because corporal punishment of children may have lasting adverse effects for the persons punished as well as grave societal ramifications.

CONCLUSION

The key to understanding the human condition may be in looking at behaviors that are so much a part of daily life for so many, that no one steps back to question them. One such key behavior is corporal punishment of children—a behavior that may help to account for what is cruel and vengeful in the human heart. The U.N. Convention on the Rights of the Child has given us the immense advantage of clearly putting corporal punishment into its proper perspective as a serious human rights issue and of mandating abolition of such

⁶³ *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

⁶⁴ *Id.* at 166.

⁶⁵ See DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 24.08 (2d ed. 1994).

⁶⁶ See *id.* at § 24.04.

⁶⁷ See *id.* at §§ 16.02-16.22.

⁶⁸ See *id.* Bitensky, *supra* note 1, at 467 n.551 (citing Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 1012, n.143 (1988)).

⁶⁹ 321 U.S. 158, 166 (1944).

⁷⁰ See *id.* at 161-62.

⁷¹ See *id.* at 160-61, 164.

⁷² See *id.*

⁷³ See *id.* at 164

⁷⁴ *Id.* at 169-70.

punishment. If the United States were to ratify the Convention, the Committee on the Rights of the Child would probably recommend that we take educational and legal measures to achieve aboli-

tion. The American legal system presents no significant obstacles to such measures. Indeed, abolition by legislative fiat would comport with some of our most enlightened legal history.