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Section 1983: Agent of Peace or Vehicle of Violence Against Children

Susan H. Bitensky

Michigan State University College of Law, bitensky@law.msu.edu

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SECTION 1983: AGENT OF PEACE OR VEHICLE OF VIOLENCE AGAINST CHILDREN?

SUSAN H. BITENSKY*

Sir, a Government . . . that cannot snatch from oppression the feeblest . . . child, is not a Government. It is wanting in the vital attribute of government. The power to protect its people inheres indestructibly in all Governments, and that frame of constitution or laws which does not provide for it fails to establish government.

— Senator William Darrah Kelley

Sir, this bill is a measure of peace . . . .

— Senator David Perley Lowe

Introduction

One of the more despicable badges of slavery in the antebellum South was a lacerated back. It was nothing remarkable — indeed, it was customary practice for slaveholders to whip their African American "property" with impunity.\(^3\) Apparently slaveholders believed that violence would beget compliance and surely would not offend moral or legal precepts because the victims were, after all, slaves. Although the Civil War ended slavery, it turned out that this old habit died very hard. Newly freed slaves still frequently received the lash,\(^4\) especially if they were economically

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* Professor of Law, Michigan State University-Detroit College of Law. B.A. 1971, Case Western Reserve University; J.D. 1974, University of Chicago Law School. I am most appreciative of the comments and advice given on earlier drafts of this article by Professors David Achtenberg and Steven L. Winter. The research assistance of Jeffrey Canja, Christopher Stickland, and Sharon Swietek-Madden was invaluable. This article is dedicated to my sister, Nidia Henderson, and my niece, Maxine Lynch.

1. CONG. GLOBE, 42d Cong., 1st Sess. 339 (1871).
2. CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871).
4. See DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMAN'S BUREAU AND THE
successful or if they dared to exercise their political and legal rights. As one observer described upon touring the newly defeated South, corporal punishment of blacks remained a "habit so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible."  

During Reconstruction, the Ku Klux Klan and other vigilante groups played a preeminent role in terrorizing the black population as well as those whites who were foes of an old guard still wedded to slavery and notions of white supremacy. These renegade groups intimidated and assaulted entire black families, including children. The Klan preyed upon its enemies with a standard repertoire of shootings, lynchings, and whippings, in addition to more ghoulishly inventive crimes. Whipping, however, appears to have continued from the days of slavery as a favorite, if not almost reflexive, means of coercing black Southerners.

To the modern student of mid-nineteenth century America, this history of violence against blacks is appalling, yet unsurprising. It is unsurprising because slaveholders attributed to blacks a subhuman status and because many southern

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7. See FonER, supra note 3, at 425-36; TRELEASE, supra note 4, at xxxiv, xlv-xliv; Swinney, supra note 3, at 41, 48.


10. "[W]hipping was the most common form of violence" used by the Ku Klux Klan in resisting Reconstruction. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 53-54 (1985). "[O]ver the course of two and one-half centuries corporal punishment became an accepted mode of dealing with incorrigible Negroes. Following the war it would be difficult to forswear the use of such a proven remedy for insolence and insubordination." Swinney, supra note 3, at 37. "Lynch mobs ordinarily executed their victims, while Ku Kluxers, although capable of murder as a last resort, preferred whipping . . . ." Id. at 47-48. In Tennessee, "[t]he normal punishment [of blacks by the Klan] was a whipping or beating administered on the bare back with 'hickories,' sticks or small branches torn off a nearby tree." TRELEASE, supra note 4, at 29. With respect to the Klan's conduct toward freedmen during Reconstruction, "the most common abuse was flogging." The Ku Klux Klan: A Secret History (History Channel television broadcast, Aug. 13, 1999).

11. See Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404, 427, 451 (1856) (ruling that the blacks
whites in the Reconstruction era continued to hold the same prejudice.\textsuperscript{12} What is surprising, though, is that white children, in addition to slaves and later freedmen, experienced similar abuse under the rod. During this period, it was common for white parents, in the name of discipline, to bring down the rod upon their own flesh and blood.\textsuperscript{13} Abolitionists had picked up on this strange parallel. "[M]any abolitionists, loathing all forms of physical bondage and abuse of the powerless, also fought to end corporal punishment\textsuperscript{14} of children, black or white. The abolitionists' campaign against this scourge only partially succeeded. Given that the country was emerging from a Civil War fought, in large part, over slavery, and certainly not over child welfare issues, parental corporal punishment of children naturally was not on the Reconstruction Congress's reform agenda.\textsuperscript{15}

After the war, Congress did, however, work to stem the tide of vigilante-style violence that oppressed blacks of all ages and their white allies in certain areas of the South. Among the series of laws enacted to remedy this violence and other injustices against blacks,\textsuperscript{16} the Civil Rights Act of 1871,\textsuperscript{17} also popularly known as the Ku Klux Klan Act, is of central interest to this article. Section 1 of the statute marked the first appearance of the language which would, in all but a few particulars, become § 1983.\textsuperscript{11} Because Congress, in adopting § 1983, did not whose ancestors were slaves are not "people of the United States" and that, under the Constitution, slaves are property like "an ordinary article of merchandise"); Alex M. Johnson, Jr., Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law, 84 CAL. L. REV. 887, 952 n.85 (1996) (explaining that the origins of slavery can be traced back to the idea that blacks are subhuman); D. Marvin Jones, Darkness Made Visible: Law, Metaphor, and the Racial Self, 82 GEO. L.J. 437, 462 (1993) (stating that slavery made black identity synonymous with subhuman status). But see Frederick Douglass, "What to the Slave Is the Fourth of July?," in THE OXFORD FREDERICK DOUGLASS READER 108, 117 (William L. Andrews ed., 1996) (1852) (pointing out that Virginia laws making slaves criminally liable for certain conduct or forbidding anyone from teaching blacks to read were actually tacit acknowledgments by whites that blacks are human beings).

12. See TRELEASE, supra note 4, at 17 (noting that during Reconstruction Ku Klux Klan members "did not conceive of the Negro as a man"); James U. Blacksher, Majority Black Districts, Kiryas Joel, and Other Challenges to American Nationalism, 26 CUMB. L. REV. 407, 421 (1995-1996) (indicating that during Reconstruction "the view persisted of blacks as subhuman beings").


14. Stephen Nissenbaum, Lighting the Freedom Tree, N.Y. TIMES, Dec. 25, 1996, at A17; see also GLENN, supra note 13, at 39-40, 54, 57 (observing that critics of slavery also frequently criticized corporal punishment of children); STEPHEN NISSENBAUM, THE BATTLE FOR CHRISTMAS 186-87 (1997) (remarking that abolitionists had a general abhorrence of corporal punishment). But see STRAUS, supra note 13, at 19-20 (stating that early nineteenth-century efforts against corporal punishment of children were mostly directed at eliminating severe physical chastisement).


18. Section 1 of the Civil Rights Act of 1871 provided as follows:
include legislative history to shed light on its meaning,\(^{19}\) the legislative history accompanying passage of the Civil Rights Act of 1871 has become key to understanding the proper role of § 1983.\(^ {20}\)

While Congress aimed some provisions of the Civil Rights Act of 1871 directly at punishing and restraining the vigilantes themselves,\(^ {21}\) section 1 focused on deterring the violence by holding state and local officials accountable for failing to stop the mayhem. Section 1 did this by creating a cause of action against any person who, under color of state laws, customs, or usages, deprived the plaintiff of certain federally guaranteed rights.\(^ {22}\) Section 1 meant that southern authorities could face civil liability for using their official status to permit or abet Klan outrages resulting in a denial of federal rights.\(^ {23}\) In a very real sense, then, section 1 of the Civil Rights Act of 1871 was intended as an agent of peace as well as of social justice.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Id. § 1.


20. See infra notes 37-67 and accompanying text.

21. See infra notes 42-47 and accompanying text.

22. See supra notes 17-18 and accompanying text. Section 1 originally provided a cause of action only for deprivation of federal constitutional rights. The section was amended to protect also against deprivation of federal statutory rights. Rev. Stat. § 1979 (1878).

In light of this history, it would be reasonable to expect that section 1's modern incarnation, § 1983, would continue to be invoked in a way that discourages violent deprivation of federal rights. Section 1983, substantially tracking the language of section 1, provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The differences in language between § 1983 and section 1 are, for purposes of this article, substantively insignificant; nor is there any legislative history indicating that the recodification of section 1 as § 1983 represented any important change in meaning. The obvious conclusion is that § 1983, as a continuation of section 1, inherited the latter's mission as an agent of peace and social justice. Laws serving as agents of peace are, of course, highly desirable and even essential in our present violence-prone society where random mass murders in the nation's schools and office buildings have become commonplace. It is therefore disturbing to discover that these days even § 1983 is being marshaled for violent purposes. Section 1983 has become a sometime vehicle for litigants seeking elevation of interpersonal

25. Id.
26. See 1 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS ¶ 1.27, at 1-332 n.47 (1983) (noting that "the few differences between section 1 of the original Act and its current codification are inconsequential").
27. See supra note 19 and accompanying text.
violence into a constitutional right. What is more, they have invoked § 1983 with respect to the very form of violence — hitting — to which the Klan so frequently resorted during Reconstruction. Described in the abstract, litigation furthering interpersonal violence seems iniquitous and incredible. Who would bring such a suit? It turns out that plaintiffs hardly hail from some mysterious unusually brutal sect; rather, they are a representative handful of the millions of American adults who corporally punish their children.

In a culture habituated to spanking its young, this answer may dispel the aura of iniquity. What is not dispelled, however, is the betrayal of § 1983’s legacy and of the aspirations of all those who struggled against the badges of slavery, no matter who wore them. These parental plaintiffs’ quest, if fulfilled, would make a perfect nightmare of the abolitionists’ dreams. Corporal punishment of children persists to this day in the United States; and now, to add insult to injury, the Reconstruction legislation that helped to eradicate such punishment of blacks is being turned on its head in an attempt to transform physical chastisement of children into a federal


31. See supra notes 3-10 and accompanying text; infra notes 89-160 and accompanying text.

32. See infra notes 33, 89-160 and accompanying text.

33. According to a study done in 1995, in the United States, the percentage of parents using corporal punishment during the previous year was 35% for infants, 94% at ages three and four, over 50% at age twelve, 33% at age fourteen, and 13% at age seventeen. See Murray A. Straus & Julie H. Stewart, Corporal Punishment by American Parents: National Data on Prevalence, Chronicity, Severity, and Duration, in Relation to Child and Family Characteristics, 2 CLINICAL CHILD & FAMILY PSYCHOLOGY REV. 55, 59-60 (1999). However, a survey published in 1999 reveals that the use of corporal punishment is declining in the United States:

[O]nly 41% of the parents in our most recent survey reported that they had spanked or hit their child in the last year, 17% fewer parents than reported this behavior in 1988. Another way of stating this decline is that almost one-third fewer parents are reporting the use of corporal punishment today than did so in 1988.

constitutional right.34 The assertion of such a "parental right" is probably the only conceivable way of undermining § 1983's role as an agent of peace. It is hard to imagine § 1983 actions claiming a constitutional right to hit people in any other context. Thankfully, the federal courts have, thus far, roundly rebuffed plaintiffs and have refused to recognize the existence of a parental right to corporally punish children under the U.S. Constitution.35

The reasons for the unanimous rebuff have had nothing to do with § 1983 and everything to do with the nonexistence of the asserted constitutional right. Courts cannot, of course, use § 1983 as a measure by which to determine whether to extend or deny recognition to implied constitutional rights. But while § 1983 cannot be the ratio decidendi for the outcome in these cases, perhaps courts should at least be conscious that a win for plaintiffs would be a threat to § 1983's ienic aspect. Why, after all, would we want judges kept in the dark that recognition of a federal right to spank may mean gutting § 1983 and other constitutional values as well as putting society at large in some peril? A little knowledge is not always such a dangerous thing.

This article identifies the unfolding historical irony implicit in these cases because it is interesting in itself and is a phenomenon about which the academy should be cognizant. It is painful, at least to this author, to observe § 1983 being enlisted for an end at such cross-purposes with the statute's noble origins. Hence, this article highlights the improbable but real linkage that has developed between judicial repudiation of corporal punishment of children as a constitutional right and preservation of § 1983's essential meaning as an agent of peace in our society. The article's other mission is more subtextual but no less important: it aims to highlight that corporal punishment once served as a badge of slavery and racism; as such, perhaps parents, and especially parents of color, should think twice before visiting this form of punishment on their children.36 For when the rod is wielded on children's bodies, intimations that they are mere property and unworthy of esteem also may steal into children's hearts and minds.

This article is divided into three parts that elaborate and develop these themes. Part I reviews the historical context within which section 1, § 1983's predecessor statute, was passed, and the congressional intent undergirding the statute. Part II surveys § 1983 cases brought by parents alleging that they have a federal constitutional right to corporally punish their children. In so doing, Part II examines how judicial refusal to constitutionalize corporal punishment of children has become integral to § 1983's continuation as an agent of peace. Part III discusses the broader

34. See supra notes 30-33 and accompanying text; infra notes 89-160 and accompanying text.
36. For sociological critiques of African-American parents' propensity to use corporal punishment on their children, see CARL HUSEMOLLER NIGHTINGALE, ON THE EDGE: A HISTORY OF POOR BLACK CHILDREN AND THEIR AMERICAN DREAMS 98, 101, 103, 104-05, 190 (1993), and STRAUS, supra note 13, at 116-17.
values at stake in maintaining § 1983's pacific role, including preserving constitutional values, reducing violent crime, furthering our regard for children, and retaining our collective memory of this country's struggles against barbarism and racism.

I. History and Legislative Intent Behind § 1983

The codification of § 1983, being purely ministerial in nature, has no accompanying elaboration in the congressional record to clarify the statute's meaning. That circumstance does not necessitate, though, that our understanding of § 1983 must be derived from a purely textual analysis. Section 1983 did not suddenly spring forth, Minerva-like, out of modern legislators' heads. To the contrary, § 1983 had a gestation that began over a century ago. Section 1983, with a few amendments not relevant here, embodies and continues intact section 1 of the Civil Rights Act of 1871. As legislative history aplenty exists to illuminate the purposes of section 1, this genealogy offers rich opportunities for insight into the
legislative intent ultimately giving rise to § 1983.\footnote{40}

The raison d'\'etre for the Civil Rights Act of 1871 was to put a stop to the violence perpetrated after the Civil War by the Ku Klux Klan and other like-minded groups against blacks and against whites identified with the federal government.\footnote{41} The Act contained several provisions empowering the federal government to go after the Klan in immediate and sometimes dramatic ways. Section 2 authorized federal prosecution of persons engaged in conspiracies to thwart or overthrow the national government or who "shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person . . . of the equal protection of the laws."\footnote{42} Section 2 additionally created a cause of action for damages in federal court against Klan-type conspirators who deprived others of their rights as United States citizens.\footnote{43} Section 3 gave the President the right and the duty to use military force for the suppression of domestic violence or conspiracies depriving persons of their constitutional rights.\footnote{44} Section 4 also made it legal for the President to suspend the privilege of the writ of habeas corpus in any situation where conspiracy should rise to the level of rebellion.\footnote{45} Section 5 barred such conspirators from sitting as jurors in any proceeding under

\footnotesize

slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27; see infra note 61 for a discussion of the relevancy of section 2 to interpreting § 1983.

40. There has been some controversy over the legitimacy of using legislative intent to interpret statutes. Compare T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 MICH. L. REV. 20, 21-22, 27-30, 46, 56-61 (1988) (favoring a "nautical" model of statutory construction whereby statutes are informed by contemporary norms), and William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479, 1481-82, 1538-39 (1987) (arguing that statutes should be interpreted dynamically in light of evolutive context), with Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845 passim (1991) (emphasizing the usefulness of legislative intent and highlighting the likely harm if legislative intent were abandoned), and M.B.W. Sinclair, Statutory Reasoning, 46 DRAKE L. REV. 299, 299-303, 381-82 (1997) (pointing out that despite attacks upon it, "legislative intent has provided the guiding light for judicial decisions under statutes" and should remain so). The dominant view is that legislative intent is a valid tool of statutory construction. See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.05, at 22 (5th ed. 1992) (maintaining that legislative intent is the criterion most often recited in interpreting statutes); Earl M. Maltz, Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach, 63 TUL. L. REV. 1, 2-3 (1988) (remarking that the U.S. Supreme Court regards legislative intent as "the touchstone of statutory interpretation"). In any event, legislative intent is generally accepted as an important and sometimes decisive source for understanding the parameters of § 1983. See infra notes 61-70 and accompanying text. But see Jack M. Beermann, A Critical Approach to Section 1983 with Special Attention to Sources of Law, 42 STAN. L. REV. 51, 56-57 (1989) (surveying various critiques of legislative intent as a tool in interpreting § 1983).

41. See infra note 50 and accompanying text.
43. Id.
44. Id. § 3, 17 Stat. at 14.
45. Id. § 4, 17 Stat. at 14.
the 1871 Act and imposed an oath upon these jurors that they had not aided such conspiracies.\textsuperscript{46} Finally, section 6 allowed for damages actions against anyone who had knowledge that the wrongs proscribed under section 2 were planned and who did not prevent, or try to prevent, the wrongs when it was in his or her power to do so.\textsuperscript{47}

Section 1, of a somewhat different stripe than the foregoing provisions, did not attempt to punish or restrain the marauders themselves. Rather, section 1 was directed at state employees and officials who, through complicity or fear, used their authority in ways that permitted or abetted the night riders' illegal activities. Section 1 accomplished this end by creating a cause of action such that any person within the United States could bring suit against any other person who, under color of the law, statute, ordinance, regulation, custom, or usage of the state deprived the plaintiff of his or her federal constitutional rights.\textsuperscript{48} (Congress subsequently amended this section to protect against deprivation of federal statutory rights as well.\textsuperscript{49})

The 1871 congressional record leaves no doubt that lawmakers intended the forthcoming legislation as a check on vigilante violence. Certainly, legislators fully appreciated that they had been called upon and were expected to tackle terrorism in the South. For example, a Senate committee issued a majority report on March 10, 1871, studying then current social conditions in the South, and especially in North Carolina.\textsuperscript{50} The report chronicled a pervasive pattern of "intimidation, whipping and murder" by the Ku Klux Klan and similar organizations.\textsuperscript{51} The committee's "detailed findings did much ... to confirm and amplify Congressional understanding of the Ku Klux conspiracy."\textsuperscript{52} The record of the debates in the forty-second Congress is replete with legislators' references to the overwhelming evidence of Klan atrocities,\textsuperscript{53} including countless descriptions of Klansmen's special penchant

\begin{itemize}
  \item \textsuperscript{46} Id. § 5, 17 Stat. at 15.
  \item \textsuperscript{47} Id. § 6, 17 Stat. at 15.
  \item \textsuperscript{48} Id. § 1, 17 Stat. at 13.
  \item \textsuperscript{49} See supra note 22.
  \item \textsuperscript{50} S. REP. No. 42-1 (1871).
  \item \textsuperscript{51} TRELEASE, supra note 4, at 387; see also, e.g., S. REP. No. 42-1, at XVIII-XXXII, XXXIX-XLIV, LV, LVIII, LXII-LXVII, LXIX, LXXII, LXXXII, XC-XCV, XCVII, CI, 1, 3, 6, 78-80, 85-86, 241-43, 248, 408, 415-16, 418-20, 422 (1871).
  \item \textsuperscript{52} TRELEASE, supra note 4, at 387.
  \item \textsuperscript{53} See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 437-38 (1871) (setting forth the comments of Rep. Cobb concerning whippings, shootings, and drownings perpetrated against blacks and their white sympathizers in North Carolina); CONG. GLOBE 42d Cong., 1st Sess. app. 196 (1871) (reporting the observations of Rep. Snyder that vigilante groups existed in the South with the aim of overthrowing Reconstruction by "threats, intimidations, whipping, scourging, hanging, shooting, and murdering"); CONG. GLOBE, 42d Cong., 1st Sess. app. 276 (1871) (recording Rep. Porter's reference to the 423 pages of testimony given before a Senate committee on the "whipping, scourging, lacerating, malming, hanging, drowning, and murdering" of freedmen and other victims of the Ku Klux Klan); CONG. GLOBE, 42d Cong., 1st Sess. app. 312 (1871) (reflecting Rep. Burchard's remarks that secret organizations in the South had bruised and maimed their victims for life and caused the victims to flee in terror); CONG. GLOBE, 42d Cong. 1st Sess. app. 181 (1871) (documenting Rep. Mercu's enumeration of vigilante whippings, shootings, and drownings of blacks and whites in three North Carolina counties); CONG.
for "persuad[ ]ing men by the lash." As Senator Boreman summarized, the evidence before Congress showed that the Ku Klux Klan "murdered many inoffensive people; ... stripped naked and scourged large numbers of men and women; ... [and] been guilty of barbarities unparalleled in the history of civilized nations." Lest any legislator doubted the gravity of the threat to peace, President Grant sent a message entreat ing Congress to pass a law that would empower the federal government to "secure life, liberty and property" against the continuing depredations.

The congressional debates of April 1871 make clear that the bill's proponents not only thoroughly understood the unrest to which they were responding, but also viewed the bill as imperative to ending the violence. As might be expected,
different legislators were preoccupied with different provisions of the bill during the debates. Naturally, some legislators gave particular attention to measures such as section 3, empowering the President to use force, and/or section 4, empowering the President to suspend the writ of habeas corpus — drastic measures more immediately targeted at halting Klan crimes. However, many legislators also referred to the bill in its entirety as offering the desired ameliorative effect and at least five congressmen singled out section 1 in particular as advancing that end. The logical inference is that these congressmen must have contemplated that section 1 would, in its way, albeit a more indirect one, also contribute to deterring the provisions of this bill . . . will aid in the restoration of order . . . tranquilize [sic] the disturbed portions of the Republic, and realize the prayer of the President and responsive wish of the American people, 'Let us have peace.'


59. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 68-69 (1871) (containing Rep. Shellabarger's statements to the effect that "the entire bill" and "the whole bill" would help combat the violence); CONG. GLOBE, 42d Cong., 1st Sess. app. 277 (1871) (documenting Rep. Porter's references to the proposed "legislation" as necessary to controlling the violence); CONG. GLOBE, 42d Cong., 1st Sess. app. 196 (1871) (setting forth Rep. Snyder's assertions that "this measure" was essential to remedying the Klan's "evils"); CONG. GLOBE, 42d Cong., 1st Sess. app. 316 (1871) (recording Rep. Buchard's claim that "the provisions of this bill" would aid in restoring order and tranquility); CONG. GLOBE, 42d Cong. 1st Sess. app. 78 (1871) (memorializing the comments of Rep. Perry that "the provisions of this bill" were intended to respond to the violence); CONG. GLOBE, 42d Cong., 1st Sess. app. 190 (1871) (containing Rep. Buckely's assertion that "the pending bill" was drafted to protect property and lives); CONG. GLOBE, 42d Cong., 1st Sess. app. 228 (1871) (documenting Sen. Boreman's understanding that "[t]his bill has been introduced" to remedy the "great wrongs," including acts of violence, perpetrated upon "the loyal people of the southern States"); CONG. GLOBE, 42d Cong., 1st Sess. app. 180 (1871) (recording Rep. Mercur's description of the object of "the bill now pending" as "the suppression of the outrages which exist in the South").

60. Rep. Shellabarger observed that section 1 was "wholly devoted to securing the equality and safety of all the people" and to "protection of the citizens of the United States." CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871). Rep. Buchard referred to the entire bill, and specifically included section 1, as a measure "for the suppression of this violence." CONG. GLOBE, 42d Cong. app. 313 (1871). Rep. Stevenson hailed as a means for securing peace the bill's extension of the federal courts' jurisdiction. CONG. GLOBE, 42d Cong., 1st Sess. app. 299 (1871). Rep. Blair disparagingly characterized section 1 as designed to remedy assaults and batteries. CONG. GLOBE, 42d Cong., 1st Sess., app. 209 (1871). Sen. Sherman, in critiquing section 1 as ineffective, tacitly acknowledged that it was intended as a remedy for Ku Klux Klan violence. CONG. GLOBE, 42d Cong., 1st Sess. 820 (1871). It is, however, not entirely clear whether Sen. Sherman was referring to section 1 or to civil remedies also available under section 2 of the bill.
torment. Section 1 did not empower militias to march or force perpetrators to languish in jail for want of a writ of habeas corpus, but it did put pressure on state officials to ensure that states did not enact laws or use state authority in aid of Klan outrages violative of federal rights. Section 1 made it more problematic for state

61. See supra notes 18-23 and accompanying text. In Monroe v. Pape, 365 U.S. 167, 172-82 (1961), overruled in part on other grounds by Monnell v. Dept of Social Servs., 436 U.S. 658 (1978), the Court interpreted the "under color of" state law language of section 1 as making state officers subject to suit under that section even when the officers act contrary to or without authorization of state law. A few commentators, and most prominently Professor Eric Zagrans, have criticized this interpretation, concluding that section 1 was not intended to reach nonenforcement or violation of valid state laws. See, e.g., Zagrans, supra note 23, at 501-02, 525-35, 540-60; Jay I. Sabin, CLIO and the Court Redux: Toward a Dynamic Mode of Interpreting Reconstruction Era Civil Rights Laws, 23 COLUM. J. L. & SOC. PROBS. 369, 380-82, 399 (1990). But see Beermann, supra note 40, at 55-57 (asserting that legislative history surrounding section 1's "under color of" state law clause is conflicting and that Professor Zagrans ignored legislative history contrary to his interpretation of the clause); Gene R. Nichol, Jr., Federalism, State Courts, and Section 1863, 73 VA. L. REV. 959, 988 n.165 (1987) (opining that "any interpretation of the Ku Klux Act that leaves the actions of the Ku Klux Klan unregulated — as Zagrans' would — should be rejected out of hand"); Steven L. Winter, The Meaning of "Under Color of" Law, 91 MICH. L. REV. 323, 324-25, 378, 387-88 (1992) (characterizing Professor Zagrans' interpretation of § 1863's reference to "under color of" state law as "wrong" and "wildly ahistorical").

At first blush Professor Zagrans' critique, if sound, might seem detrimental to this article's conclusion that section 1 was an anti-violence measure. It is true that if section 1 were read only to make official action pursuant to unconstitutional state laws vulnerable to suit, the statute would have been less effective against the Ku Klux Klan's violence than if the statute were given the reading adopted in Monroe. But the truth of the foregoing observation also highlights the ultimate irrelevancy of Zagrans' critique to this article; even assuming arguendo that Zagrans' critique was correct, section 1 could still have had and been intended to have had some effect in restraining the Klan's rampages by preventing illegal state laws from being used to aid the Klan. But see Zagrans, supra note 23, at 549 (drawing the inference from his critique that section 1 could not logically have been intended as a counterweight to the Klan rebellion). The thesis of this article is that since section 1 was directed against violence, § 1863 should not be invoked to promote interpersonal violence. As a matter of logic, this thesis is supported whether section 1 was enacted to produce only some rather than a great deterrent against Klan violence.

Nor is Professor Zagrans' critique successfully buttressed by his argument that the legislative intent giving rise to section 2 of the Civil Rights Act of 1866 is determinative of the congressional intent with which section 1 of the 1871 Act was drafted. See Zagrans, supra note 23, at 540-59. It is well accepted that Congress adopted the 1866 statute to counteract the Black Codes, laws passed by the southern states for the purpose of placing severe restrictions on the activities of blacks in the years immediately following the Civil War. See COOK & SOBIESKI, supra note 26, ¶ 1.19, at 1-174 to 1-177; NIEMAN, supra note 4, at 109-10; JACOBUS TENBROEK, EQUAL UNDER LAW 177-81 (1965); Bennett, supra note 3, at 457; cf. PATRICK W. RIDDLEBERGER, 1866: THE CRITICAL YEAR REVISITED 87-88 (1979) (recounting Sen. Trumbull's defense of the proposed 1866 Act as responding to the near slavery caused by the Black Codes). It is also well accepted that section 1 of the 1871 Act was modeled after section 2 of the 1866 Act. See supra notes 18-29 and accompanying text; CONG. GLOBE, 42 Cong., 1st Sess. app. 68 (1871). From these premises, Professor Zagrans has reasoned that the former statute, like the latter, must not have been meant to suppress violence. Zagrans, supra note 23, at 540-59. This inference is unsupported as a matter of logic and, perhaps, history. Logic does not support Professor Zagrans' inference because it is entirely possible that the language of section 1 could be similar to the language of section 2, and, yet, Congress could have had quite different purposes in enacting each statute to meet, in each case, unique historical situations. That is, why should Congress not seek to make persons acting "under color of" state law accountable for the discriminatory Black Codes in 1866 and then again accountable for complicity with or tolerance of Ku Klux Klan violence in 1871? Professor Zagrans'
representatives to engage in what the congressional record shows to be their postbellum modus operandi of turning a blind eye to or even participating in Klan vendettas.\textsuperscript{62} Section 1 was, in short, part of a package crafted to meet and suppress the paramilitary onslaught in multifaceted ways. That is no doubt why the legislation was dubbed the Ku Klux Klan Act and why Representative Lowe stated

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\item See \textit{The Political History of the United States of America During the Period of Reconstruction (From April 15, 1865, to July 15, 1870)} (Edward McPherson ed., Negro Universities Press 1969) (1875) (setting forth code provisions allowing physical punishments in North Carolina, Georgia, South Carolina, and Florida); \textit{see also} Schurz, \textit{supra} note 6, at 387 (lamenting that "[h]ere is South Carolina . . . with a black code, reestablishing even the names of 'master' and 'servant,' only transferring the whipping business from the master to the town magistrate); Bennett, \textit{supra} note 3, at 457 (explaining that the 1866 Act allowed blacks "to conduct themselves in ways designed to preserve their safety"); Colbert, \textit{supra} note 23, at 511-12, 514-15, 517 (asserting that the 1866 Act was intended to counter white violence). Implementation of such violence under the Black Codes arguably contravened the guarantee of "security of person" in section 1 of the 1866 Act — a guarantee made enforceable by section 2 of the Act. \textit{See Cong. Globe, 39th Cong., 1st Sess.} 1118 (1866) (reflecting Rep. Wilson's interpretation that the Act was needed to protect personal security, i.e., "a person's . . . uninterrupted enjoyment of his life, his limbs, his body, his health" (quoting from Blackstone)); \textit{Cong. Globe, 39th Cong.,} 1st Sess. 474 (1866) (containing Sen. Trumbull's assertions that section 1 of the Act was designed to protect against such provisions as that enacted by Mississippi authorizing up to thirty-nine lashes on the bare back of a black functioning as a minister); \textit{cf. Cong. Globe, 39th Cong.,} 1st Sess. 1160 (1866) (recording Rep. Thayer's rationales for the 1866 Act that the Black Codes allowed freedmen to be "whipped for insolence," to be "whipped [and] . . . whipped again" for complaining about the pass system, and then recording his question, "Sir, do you at this late day call the whipping-post and the pass system evidence of liberty"). Implementation of such violence, if meted out only to blacks, could also be prosecuted under section 2's prohibition on governmentally imposed punishments that differed according to the race of the convict. \textit{See, e.g., Nieman, supra note 4, at 73, 90, 95 (observing that Freedmen's Bureau officials were incensed by southern criminal laws that allowed courts to give harsher criminal punishments to blacks than to whites and recounting such laws as permitted the lash for blacks but not for whites); The Political History of the United States of America During the Period of Reconstruction (From April 15, 1865, to July 15, 1870), supra, at 29 (setting forth a North Carolina law that made rape of a white woman by a black man, and not by a white man, a capital crime). But see Theodore Brantner Wilson, The Black Codes of the South 89 (1965) (contending that states resorted to corporal punishment "frequently without regard for race or color").

In any event, it bears emphasizing that Zagrans' critique does not have the force of law. Since the \textit{Monroe} decision, it has been settled that the "under color of" state law phraseology of section 1's successor, § 1983, makes state officers subject to suit under that section even if the officer acted without authorization or in contravention of state law. \textit{Monroe}, 365 U.S. at 171-87; \textit{see also} Erwin Chemerinsky, \textit{Federal Jurisdiction} 459-60 (3d ed. 1999); \textit{4 Ronald D. Rotunda & John E. Nowak, Treatise On Constitutional Law: Substance and Procedure} § 19.14, at 58 (3d ed. 1999).

that "this bill is a measure of peace,"63 without making distinctions as to its parts.

Drawing upon the context in which the bill was passed, twentieth-century U.S. Supreme Court opinions,64 scholarly commentary,65 and portions of the congressional record66 all manifest a contemporary consensus that section 1 was intended as an agent of peace. Moreover, this consensus has not been reached as mere academic odyssey. The discussions of section 1 have generally been for the very definite and practical purpose of illuminating the meaning of § 1983.67 It follows

63. CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871).
65. See, e.g., Achtenberg, supra note 56, at 6-7; Alfred Avins, The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment, 11 ST. LOIS U. L.J. 331, 331-32 (1967); Colbert, supra note 23, at 505-06, 510, 513-17; Michael G. Collins, Implied Constitutional Actions, and the Scope of Section 1983, 77 GEO. L.J. 1493, 1507 (1989); Gildin, supra note 23, at 560-61; A. E. Dick Howard, State and Local Government Issues Before the Supreme Court, 31 CATH. U. L. REV. 375, 376-77 (1982); Mead, supra note 23, at 15-16; Xi Wang, The Making of Federal Enforcement Laws, 1870-1872, 70 CHI.-KENT L. REV. 1013, 1048-50 (1995); Michael Wells, Federalism: Allocating Responsibility Between the Federal and State Courts: Why Professor Redish Is Wrong About Abstention, 19 GA. L. REV. 1097, 1098, 1103-04 (1985); Michael B. Brennan, Note, Orure v. Owens: Choosing Among Personal Injury Statutes of Limitations for Section 1983, 82 NW. U. L. REV. 1306, 1330-1334 (1988); Paul Howard Morris, Note, The Impact of Constitutional Liability on the Privatization Movement After Richardson v. Mc Knight, 52 VAND. L. REV. 489, 497-98 (1999); Daniel Steiner, Note, Due Process in Section 1983: Limiting Parratt v. Taylor to Negligent Conduct, 71 CAL. L. REV. 253, 258 (1983); see also Cushman, supra note 23, at 720, 723 (acknowledging that section 1 was intended to respond to Ku Klux Klan violence, but also asserting that a primary purpose of the statute was to compel state officials to uphold laws uniformly); Eisenberg, supra note 23, at 484-85, 509, 519 (noting that enactment of the Civil Rights Act of 1871 was prompted by Ku Klux Klan violence, but also contending that a central purpose of section 1 was to combat race discrimination); Kevin J. Hamilton, Section 1983 and the Independent Contractor, 74 GEO. L.J. 457, 460 (1985) (contending that section 1 was a "minor part" of an enactment drafted to curtail Ku Klux Klan outrages). But see Zagrajs, supra note 23, at 549 (claiming that section 1 "is actually an interloper in the Ku Klux Klan Act" and not "an integral part of the solution to the Klan problem").
66. The legislative history accompanying more recent amendments and attempted amendments to § 1983 demonstrate Congress's continued conception of section 1 as an agent of peace. In 1977, a bill was introduced which, had it not died in committee, would have provided, among other things, that states, municipalities, and subdivisions of these governments could be sued pursuant to § 1983. Civil Rights Improvements Act of 1977, S. 35, 95th Cong.; see also Bill Summary & Status for the 95th Congress, at http://thomas.loc.gov/bss/d095query.html (last visited Aug. 7, 2001). In discussing the bill, Sen. Mathias noted that the amendment's primary purpose would be to insure "the continued vitality of the Civil Rights Act of 1871," which had been expected to interpose the federal government as "guarantor against the violence that had plagued the early years of . . . [blacks'] freedom." 123 CONG. REC. 554 (1977) (statement of Sen. Mathias); see also H.R. REP. NO. 96-548, at 1 (1979), reprinted in 3 U.S.C.C.A.N. 2609 (stating, in connection with a 1979 amendment to § 1983, that section 1 of the Civil Rights Act of 1871 served as a deterrent against the oppression of blacks and Republicans during the Reconstruction era).
67. See, e.g., Ngiraingas, 495 U.S. at 187-88; Jett, 491 U.S. at 722-31; Wilson, 471 U.S. at 276-79; Briscoe, 460 U.S. at 336-41; Carter, 409 U.S. at 425-29, 432; Mitchum, 407 U.S. at 238-42; Monroe, 365 U.S. at 174-83; Achtenberg, supra note 56, passim; Colbert, supra note 23, at 505, 509-10, 513-18;
that if section 1 was an agent of peace, § 1983 now carries that mantle as well.\textsuperscript{68} That is why the Supreme Court has characterized § 1983 as creating a cause of action for personal injury, including injury induced by assault and other violence.\textsuperscript{69} The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under § 1983 . . . .\textsuperscript{70} In keeping with its pacific origins, § 1983 has been routinely invoked by modern plaintiffs seeking redress for officially perpetrated violence alleged to be violative of federal rights. It has recently been estimated that the largest number of § 1983 cases are claims that state and local law enforcement personnel have used excessive force.\textsuperscript{71}

In light of the terrible suffering that led to § 1983's enactment and of the statute's past and present role as a guardian of peace, it would be sad indeed if society now failed to honor this history. One way of failing § 1983 would be to ignore it, and, as a matter of fact, § 1983 was virtually ignored for the first ninety years of its existence.\textsuperscript{72} Scholars have ascribed this sterility to various causes, the nature of which exceed the scope of the present article.\textsuperscript{73} Suffice it to say that those causes

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68. Cf. Wilson, 471 U.S. at 276-77, 279-80 (holding that, for purposes of selecting an applicable statute of limitations, § 1983 claims are best conceptualized as personal injury actions); Bannard, supra note 23, at 978 (stating that suits such as those brought under § 1983 have reduced by half the number of citizens killed pursuant to government policies of major metropolitan areas); Beermann, supra note 40, at 90 (describing the liberal perspective on § 1983 as serving to restrain prison guards and officials from abusing prisoners in the same way that blacks were mistreated during Reconstruction); Colbert, supra note 23, at 525 (observing that § 1983's purpose is to create a federal civil rights remedy for "official lawlessness and organized, racially motivated violence"); Gilles, supra note 67, at 19-21, 63-65, 90-92 (arguing that § 1983 actions should be employed to reach the "custom" of the police code of silence that protects officers who violate civil rights through violence and other misconduct); Lee L. Cameron, Jr., Note, Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims, 61 NOTRE DAME L. REV. 440, 451 (1986) (noting that Congress's intent was for § 1983 "to promote peace, justice, and the security of life, liberty, and property through civil enforcement").

69. See Wilson, 471 U.S. at 276-77, 279-80.

70. Id. at 277 (citation omitted).

71. CHEMERINSKY, supra note 61, § 8.9, at 539 (reporting a recent estimation that the largest number of § 1983 cases consists of claims against law enforcement personnel for using excessive force); IA MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 3.13, at 227 (3d ed. 1997) (indicating that most § 1983 actions are brought against law enforcement personnel for using excessive force); Barbara E. Armacost, Race and Reputation: The Real Legacy of Paul v. Davis, 85 Va. L. Rev. 569, 581 (1999) (referring to the fact that in recent times the biggest category of § 1983 cases has been Eighth Amendment claims by prisoners and excessive force complaints against law enforcement officials); John R. Williams, Trial and Post-Trial Issues: The Plaintiff's Perspective, 622 PLULit 201, 207 (2000) (stating that the most ubiquitous form of § 1983 litigation involves unreasonable force by police officers and brutality by prison guards.)

72. See CHEMERINSKY, supra note 61, § 8.2, at 455-56; Collins, supra note 65, at 1498; Colbert, supra note 23, at 506, 518; Mead, supra note 23, at 19.

73. For brief surveys of the reasons why the legal system disregarded § 1983 for nearly a century, see CHEMERINSKY, supra note 61, § 8.2, at 455 and Collins, supra note 65, at 1495 n.14, 1498-99.
ceased to be a factor and that federal judges have had their hands full with a superabundance of § 1983 cases ever since.\footnote{Since 1961,... the growth in § 1983 litigation has been phenomenal. In 1977, there were over 20,000 such suits; in 1985, the number grew to over 36,000; by 1995, the number had increased to over 57,000.} There is, however, another, more blatant, way to undermine § 1983: plaintiffs could try to marshal the statute to actually promote interpersonal violence. Under the aegis of § 1983, plaintiffs could try to sue on the theory that state or local officials interfered with a purported federal right to engage in interpersonal violence. Such litigation would seem a strange and shameful dénouement for an agent of peace; it would signal that instead of making steady progress toward a civilized and humane social order, a trend in which § 1983 has played a crucial part, society is regressing toward condoning and even exalting the raised hand. It should be, therefore, disturbing to learn that such litigation exists and that plaintiffs have relied upon § 1983 to assert the right to hit people\footnote{See infra notes 89-160 and accompanying text.} — the right to use precisely the Ku Klux Klan's favorite mode of attacking blacks and white Republicans during Reconstruction.

\textbf{II. Section 1983 Cases Brought by Parents Alleging a Federal Constitutional Right to Corporally Punish Their Children}

Over the course of the past fifteen years, a small but nonetheless perturbing number of suits have appeared in which parents have invoked § 1983 to state a cause of action against governmental employees who interfered with the parents' power to hit their children.\footnote{See infra notes 89-160 and accompanying text.} The parents have premised these suits upon the supposition that this type of governmental interference violates a purported parental federal constitutional right to administer corporal punishment upon minor offspring.\footnote{See infra notes 89-160 and accompanying text.} Although the U.S. Supreme Court has never held that parents have such a right,\footnote{See infra notes 89-160 and accompanying text.} plaintiffs have argued for variously locating it in the substantive due
process right of parents to raise and educate their children, in a family privacy right, in the Free Exercise Clause of the First Amendment, and/or in the Equal Protection Clause of the Fourteenth Amendment. In most of these cases, the defendants have asserted qualified immunity as a defense; in particular, defendants have argued for such immunity on the ground that, at the time of the governmental interference in issue, there was no clearly established federal constitutional right lodged in parents to corporally punish their children.

In making this argument, defendants have followed well-settled law on qualified immunity. For the U.S. Supreme Court has held that in deciding whether qualified immunity protects a government official, a court must first ascertain whether a "plaintiff has alleged the deprivation of any actual constitutional right at all, and if so, then proceed to determine whether that right was clearly established at the time of the alleged violation" such that a reasonable person would have known of the

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Ingraham, a 5-4 decision, may be ripe for overruling. Indeed, Ingraham appears positively incongruous when considered in juxtaposition to Hudson v. McMillian, 503 U.S. 1 (1992). In McMillian, security guards beat a prison inmate while he was handcuffed and shackled. Id. at 4. The guards punched him in the mouth, eyes, chest, and stomach, and kicked him from behind. Id. Consequently, the victim suffered minor bruises and swelling, some loosened teeth, and a crack in his partial dental plate. Id. The U.S. Court of Appeals for the Fifth Circuit acknowledged the use of force as excessive but refused to rule for the prisoner because his injuries were "minor" and did not require medical attention. See id. at 5. The Supreme Court reversed, holding that the use of excessive force that inflicts only minor injuries on a prisoner may constitute an Eighth Amendment violation as long as the prisoner's injuries are more than de minimis. Id. at 9-10.

Thus, under the present state of the law, a schoolchild paddled so severely as to require medical aid does not have a viable Eighth Amendment claim, while a prisoner hit by guards so as to cause minor injuries that do not require medical interference does have a viable Eighth Amendment claim.

Incidentally, the plaintiffs in both Ingraham and McMillian brought their claims pursuant to § 1983. McMillian, 503 U.S. at 4; Ingraham, 430 U.S. at 653. Insofar as Ingraham leaves schoolchildren without an Eighth Amendment claim against corporal punishment administered by school personnel, the case would seem to be inconsistent with the history and intent behind § 1983. No party in Ingraham, however, sought recognition of a constitutional right to engage in interpersonal violence and the Ingraham Court did not rule that school personnel have any such right. See Sweeney v. Ada County, 119 F.3d 1385, 1390 (9th Cir. 1997). Rather, the Supreme Court held that school personnel could hit children in the name of discipline without running afool of the Eighth Amendment. Ingraham is thus still a far cry from those suits, described in the text above, brought in quest of an actual constitutional right to engage in interpersonal violence against children. See infra text accompanying notes 89-152.


80. For a thorough exegesis concerning a constitutional family privacy right and that right's relation to parental corporal punishment of children, see id. at 453-54, 461-73.

81. For a full analysis of Free Exercise Clause law in relation to parental corporal punishment of children, see id. at 453-54, 457-61, 464-73.

82. See infra notes 114-35 and accompanying text.

83. See infra text accompanying notes 93-146.

84. See infra text accompanying notes 93-146.

right's existence. It is in the context of deciding the qualified immunity question that each court has had occasion to issue the interesting holding that there is no clearly established federal constitutional parental right to physically chastise children and, in two cases, no right of corporal punishment at all. These cases are, of course, noteworthy because they provide insight into contemporary federal courts' thinking about the existence of the alleged right. But, more to the point here, the cases warrant close attention because they reflect little-noticed and rather alarming attempts to convert § 1983 from its traditional role as an agent of peace into a vehicle of violence against children.

The earliest in this series of cases is Backlund v. Barnhart. The suit was brought under § 1983 by foster parents asserting that officials of the Washington State Department of Social and Health Services interfered with plaintiffs' "right" to exercise their religious beliefs by spanking their foster child, eight-year-old Pamela. "The Backlunds explained that they followed 'Biblical mandate' requiring them to spank the girl with a paddle or stick." According to plaintiffs, state officials interfered with this religious mandate by directing the foster parents to stop using such punishment and by removing Pamela when plaintiffs refused to comply. The defendants' qualified immunity defense was that their official intervention against this treatment of the child violated no clearly established constitutional right to corporally punish children.

The Ninth Circuit upheld this defense on two grounds. First, the court reasoned that, even assuming arguendo that foster parents enjoy the same rights as natural parents, the latter do not possess a "clearly established right to unlimited exercise of religious beliefs on their children," including "religious beliefs about punishment." Moreover, the Backlunds "failed to show a violation of any constitutional right, clearly established or not." Second, the court opined that, in any event, foster parents are not entitled to the same constitutional protections as natural parents vis-à-vis the children in their custody.

Although the Backlund court did not deal with the propriety of plaintiffs' use of § 1983, the court's rebuff to plaintiffs' argument had the effect of preventing § 1983 from being turned into a vehicle of violence, a vehicle for constitutionalizing corporal punishment of children. The Backlund decision, fortunately for children and § 1983's legacy, presaged the way in which other federal courts would...

86. See, e.g., Wilson, 526 U.S. at 609; Conn, 526 U.S. at 290; United States v. Lanier, 520 U.S. 259, 270 (1997).
87. See infra text accompanying notes 94-152.
88. See infra text accompanying notes 110-52.
89. 778 F.2d 1386 (9th Cir. 1985).
90. Id. at 1387-88.
91. Id. at 1387.
92. Id. at 1387.
93. Id. at 1388-89.
94. Id. at 1389.
95. Id. at 1390 (emphasis added).
96. Id. at 1389.
subsequently dispose of these types of cases.97

Indeed, the Ninth Circuit had occasion to again deal with a Backlund-type case in Sweaney v. Ada County.98 In Sweaney, the government prosecuted Sherie Sweaney for striking her son Brian five to seven times with a belt, leading to a bruise on Brian's arm.99 After a jury acquitted Sweaney of willfully causing her son to be injured under state law,100 she filed a § 1983 action in federal court against Ada County and the county's sheriff and deputy sheriff on the theory that these defendants had violated her parental right to corporally punish her son under the Fourteenth Amendment to the U.S. Constitution.101 The deputy sheriff responded by raising the defense of qualified immunity, i.e., that at the time of the deputy sheriff's investigation of Sweaney, parents had no clearly established federal constitutional right to corporally punish their children.102

Plaintiff-appellant Sweaney's argument before the court of appeals turned on the notion that a parental right to spank children is implicit in a right to family privacy or integrity, which, in turn, is implicit in the Fourteenth Amendment.103 In support of this argument, Sweaney invoked U.S. Supreme Court precedents dealing with a variety of parental constitutional rights in relation to children.104 For example, she

97. See infra text accompanying notes 98-152.
98. 119 F.3d 1385 (9th Cir. 1997).
99. Id. at 1387-88.
100. Id. at 1388.
101. Id. The appellate court opinion does not disclose whether Sweaney specified a particular clause of the Fourteenth Amendment in making her claim. Sweaney also brought her § 1983 action on the basis that defendants had contravened her Fourth Amendment rights. Id. passim. However, the appellate court opinion does not refer to any precedents or argumentation that would support placing an implied parental right to corporally punish children in the Fourth Amendment. Id. passim.
102. Id. at 1388-92. Defendants also argued that Sweaney incorrectly relied on the doctrine of respondeat superior to support her claims against the county and the sheriff. Id. at 1388.
103. Id. at 1388-89.
104. Sweaney referred the court to such U.S. Supreme Court precedents as Meyer v. Nebraska, 262 U.S. 390, 399-403 (1923), establishing parents' substantive due process rights to raise and educate their children; Prince v. Massachusetts, 321 U.S. 158, 164 n.8, 165-66, 169-70 (1944), holding that a state child labor law, prohibiting children from disseminating religious literature on the streets, was a proper exercise of the State's authority to protect children and did not violate the Free Exercise Clause or, by implication, a substantive due process child rearing right; Stanley v. Illinois, 405 U.S. 645, 649, 657-58 (1972), ruling that procedural due process requires that an unwed father be accorded a hearing on his fitness as a parent before removing his children from him and ruling that the State denied an unwed father equal protection rights by denying him such a hearing while providing it to all other parents who faced losing custody of their children; Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942), finding an equal protection violation exists with respect to a law providing for sterilization of persons convicted of grand larceny but not imposing such a punishment on persons convicted of embezzlement; May v. Anderson, 345 U.S. 528, 528-29, 534-35 (1953), holding that an Ohio state court was not required to give full faith and credit to a Wisconsin divorce decree awarding custody of minor children to their father where the decree was obtained in an ex parte divorce action in a Wisconsin state court that did not have personal jurisdiction over the mother; Lassiter v. Department of Social Services, 452 U.S. 18, 32-33 (1981), ruling that failure to appoint counsel for an indigent parent in a proceeding for termination of parental status did not deprive the parent of due process under the particular circumstances of this case; Ingraham v. Wright, 430 U.S. 651, 664, 670-71, 680, 682 (1977), finding that the Eighth Amendment's prohibition on cruel and unusual punishments does not apply to corporal punishment of students in public...
relied on *Meyer v. Nebraska*, a case in which the U.S. Supreme Court struck down a statute prohibiting the teaching of subjects in foreign languages or the foreign languages themselves to students who had not yet passed the eighth grade. The *Meyer* Court had found that the statute ran afoul of substantive due process by interfering with students' freedom to acquire useful knowledge, the parents' right to direct the upbringing of their offspring, teachers' right to teach, and parents' and teachers' right to contract with each other for the latter's instructional services. In short, *Meyer* did not involve allegations of parental corporal punishment of children and the Court in that case certainly did not announce a constitutional right to physically chastise children. In actuality, neither *Meyer* nor any of the federal court cases cited by Sweaney as precedent involved such punishment or announced such a new right.

The court in *Sweaney* did concede that by "broadly" extending the *ratio decidendi* of these cases, a court conceivably could interpret them to hold that parents do have an implicit constitutional right to strike children. However, the *Sweaney* court concluded that the existence of such a possibility did not demonstrate that the right was clearly established at the time of the alleged violation or even that the right

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105. 262 U.S. 390 (1923).
106. Id. at 396-97.
107. Id. at 399-403.

109. *The* *Sweaney* court's discussion of the cases relied upon by plaintiff-appellant makes it clear that none of those cases involved parental corporal punishment of children or announced an express constitutional right to carry out such punishment. *See Sweaney v. Ada County*, 119 F.3d 1385, 1389-91 (9th Cir. 1997).
110. Id. at 1390.
111. Id. at 1390-92.
exists at all.\textsuperscript{112} The court therefore upheld the deputy sheriff’s qualified immunity defense and repudiated Sweaney’s federal claim.\textsuperscript{113}

The most recent case invoking § 1983 on behalf of corporal punishment of children is \textit{Balden v. Cottle}.\textsuperscript{114} In this case, Blair Balden assaulted his fifteen-year-old son Benjamin, causing multiple bruises and scratches on the boy’s face.\textsuperscript{115} Various state and county employees, including social worker Cathy Cottle, investigated the family for child abuse.\textsuperscript{116} During the course of her investigation, Cottle ascertained that Mr. and Mrs. Balden had used corporal punishment on Benjamin\textsuperscript{117} and believed in spanking as a child-rearing technique.\textsuperscript{118} The authorities placed Benjamin and his sister in foster care,\textsuperscript{119} and, pursuant to an order of the Chief Referee of the Family Division of Kalamazoo County Circuit Court, made the children’s return contingent upon the natural parents’ compliance with certain conditions.\textsuperscript{120} The conditions included requirements that the Baldens must not use corporal punishment on their children\textsuperscript{121} and that the family must cooperate with the “Families First” program of Family and Children Services of the Kalamazoo area.\textsuperscript{122} Shari Boone, of the Families First program, required plaintiffs to sign the following statement in order to participate in the program:\textsuperscript{123}

\begin{quote}
I fully understand and agree that there is no situation that would warrant my physically disciplining any of my children. No matter how mad or upset I am, I will not strike them in any fashion. I am to use the beeper instead of hitting and I am to use the beeper instead of leaving my children alone.\textsuperscript{124}
\end{quote}

The Balden parents ultimately complied with the conditions and resumed custody of their children.\textsuperscript{125}

Their compliance was apparently under protest because Mr. and Mrs. Balden subsequently responded to these events by filing an action in federal court under §§ 1983 and 1985\textsuperscript{126} against the various personnel involved in investigating the

\begin{footnotesize}
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\item Id. at 1388 (disagreeing with Sweaney’s argument “that parents have a federally protected constitutional ‘right to incorporate reasonable corporal punishment as a manner of disciplining their children’”).
\item Id. at 1392-93.
\item Id. at *2.
\item Id. at *2-*6.
\item Id. at *3.
\item Cf. id. at *3, *5-*6 (stating that Cottle lectured the Baldens about the unacceptability of parental corporal punishment, and describing how officials required the Baldens to agree that they would not use corporal punishment on their children).
\item Id. at *4.
\item Id. at *5.
\item Id.
\item Id.
\item Id. at *6.
\item Id.
\item Id. at *5.
\item 42 U.S.C. § 1985(3) (1994). This provision creates a cause of action for damages against those
\end{enumerate}
\end{footnotesize}
Balden family and removing the children. Plaintiffs contended, among other things, that Cottee violated the Balden's federal constitutional right to corporally punish their children and that Boone violated their right to decline expression of sentiments against corporal punishment of children. Plaintiffs did not specify which clause of the Constitution would support a parental right to use this form of punishment; they instead vaguely claimed that Cottee's investigation of the spanking incidents violated generic "constitutional rights." However, plaintiffs apparently located the purported right to decline expressing anti-corporal punishment views in the Free Exercise Clause of the First Amendment. Against Boone, they contend[ed] that their First Amendment rights were violated by signing an agreement to principles in which they did not believe. Specifically, they assert[ed] that in accordance with their religion, they believe[d] that corporal punishment is in some circumstances an appropriate disciplinary tool for parents to use in raising their children.

Finally, plaintiffs also made a related claim under the Equal Protection Clause of the Fourteenth Amendment. They argued that Cottee's intervention in the Balden family constituted invidious discrimination against plaintiffs because of the latter's religious belief in spanking children.

The district court issued two opinions in the case, one giving reasons for granting Cottee's motion for summary judgment, and the second giving reasons for granting the other defendants', including Boone's, motion for summary judgment. In support of her motion, Cottee asserted entitlement to absolute immunity or, in the
alternative, to qualified immunity.\textsuperscript{138} The court held that Cottee's actions in relation to the Balden case entitled her to absolute immunity.\textsuperscript{139} Although this holding was dispositive of plaintiffs' § 1983 claim against Cottee, the court, "[f]or the sake of completeness[,] . . . analyze[d] the qualified immunity defense as well."\textsuperscript{140}

As in Backlund and Sweaney, Cottee's qualified immunity defense hinged upon whether she had violated a clearly established federal right of which a reasonable person would have known at the time of the supposed violation.\textsuperscript{141} Because the court had already concluded that Cottee deserved absolute immunity, the opinion concerning her qualified immunity defense is necessarily dicta. Nevertheless, this dicta has significance not only because of its ringing clarity, but also because it is reiterated by similar dicta rendered in the separate opinion disposing of Boone's motion for summary judgment.\textsuperscript{142}

The dicta responsive to Cottee is unequivocal: "Plaintiffs have no clearly established right to practice corporal punishment,"\textsuperscript{143} and, further, there is no precedent for the proposition that parents have a constitutional right, clearly established or otherwise, to corporally punish children without state intervention.\textsuperscript{144} Also in dicta, the court went on to repudiate plaintiffs' equal protection argument on grounds that (1) an investigation of parental spanking is not, by itself, evidence of a religiously based animus against those persons who espouse a religious belief in spanking; and (2) plaintiffs presented no other evidence of such animus.\textsuperscript{145}

Boone did not raise an absolute immunity defense, moving instead for summary judgment solely on the basis of qualified immunity.\textsuperscript{146} The court granted her motion inasmuch as the Baldens had "fail[ed] to state a claim of constitutional violation."\textsuperscript{147} The court reasoned that Boone had not coerced Mr. and Mrs. Balden into signing the form renouncing corporal punishment; rather, the Baldens elected to sign so as to avoid litigation.\textsuperscript{148} Thus, the court held that Boone had not unconstitutionally suppressed the Baldens' freedom to refrain from falsely declaring their repugnance to corporal punishment of children.\textsuperscript{149} In its opinion, the court

\begin{itemize}
\item \textsuperscript{138} Balden, 1999 U.S. Dist. LEXIS 9524, at *7, *10.
\item \textsuperscript{139} Id. at *13, *15-16.
\item \textsuperscript{140} Id. at *17.
\item \textsuperscript{141} Id. at *18.
\item \textsuperscript{142} Balden, No. 4:98-cv-54, slip op. at 19-23.
\item \textsuperscript{143} Balden, 1999 U.S. Dist. LEXIS 9524, at *25.
\item \textsuperscript{144} Id. at *25.
\item \textsuperscript{145} Id. at *26-27.
\item \textsuperscript{146} Balden, No. 4:98-cv-54, slip op. at 15. As mentioned above, Boone was in the employ of the Families First program of Family and Children Services of the Kalamazoo area, a private nonprofit corporation under contract to provide services to the Kalamazoo County Probate Court — Juvenile Division. See id. at 1, 16. The district court observed that private individuals utilizing government authority are not, ipso facto, thereby entitled to qualified immunity. Id. at 16. Nevertheless, the court concluded that the qualified immunity defense should be extended to Boone because doing so would serve the traditional purposes of immunity. Id. at 17-19.
\item \textsuperscript{147} Id. at 20.
\item \textsuperscript{148} Id. at 21-22.
\item \textsuperscript{149} Id.
\end{itemize}
again included emphatic dicta that "[p]laintiffs have no clearly established right to practice corporal punishment."150

Balden's dicta is of a piece with Backlund and Sweaney.151 In all three cases, plaintiffs asserted a constitutional right to spank their children and all three federal courts refused to find the existence of such a clearly established right. In Sweaney and Backlund, the courts further held that no such right exists at all. Likewise, and because of these rulings and pronouncements, the courts spared themselves the discredit of inadvertently transforming § 1983 into a vehicle of violence against children — a fate, as this article proves, that would be totally at odds with the congressional intent undergirding § 1983.152 In this sense, the decisions in these cases demonstrate an inextricable linkage between protecting children from a constitutionally sanctioned parental power to corporally punish and protecting § 1983's longstanding role as guardian of societal peace.

A § 1983 suit was also brought, in part, to promote corporal punishment of children in Fowler v. Robinson.153 This case, however, does not quite fit the pattern presented in Backlund, Sweaney, and Balden because the Fowler court, in disposing of the corporal punishment claim, did not discuss a qualified immunity defense.154 This is a major difference because the qualified immunity defense necessitates that a court consider whether defendants violated a clearly established federal constitutional right of which a reasonable person in defendants' position would have known,155 here, an alleged parental right to corporally punish children. In the absence of the defense, a court would not need to address whether the right exists unless the legal posture of the case otherwise requires such an analysis, a circumstance not presented in Fowler. The subject matter of Fowler and its relation to § 1983, nevertheless, bear enough similarity to Backlund, Sweaney, and Balden to warrant inclusion of Fowler in this discussion.

The Fowler case grew out of a family car ride gone bad. Frank Vincent had a temper tantrum, refused to wear a seat belt, and kicked his father, and the father slapped his son in response.156 Subsequently, the child had a large bruise on that part of his face where his father had hit him.157 The incident came to the attention of the child's schoolteacher who reported the father for suspected child abuse.158 County authorities investigated, leading to the arrest and prosecution of Reverend

150. Id. at 20.
151. It should be noted that the congruence between Backlund and Balden, on the one hand, and Sweaney, on the other hand, is not complete with respect to the existence of a parental constitutional right to corporally punish children. Sweaney also offers dicta suggesting that a court taking a broad view could construe precedents like Meyer to give rise to the right. See Sweaney v. Ada County, 119 F.3d 1385, 1390 (9th Cir. 1997).
152. See supra text accompanying notes 37-67.
154. Id. at *13-*14.
155. See supra notes 85-86 and accompanying text.
157. Id. at *2.
158. Id.
Fowler. He was acquitted and, with his family, filed a § 1983 action against county personnel who had been involved in the matter and against the county itself.

Plaintiffs claimed, among other allegations, that a county caseworker violated their free exercise of religion by advising them that corporally punishing children is inappropriate under all circumstances and by requiring the Fowler parents to sign a child-care plan disavowing the use of corporal punishment. Plaintiffs maintained that, as members of the Church of God, they adhered to Biblical pronouncements allowing parents to corporally punish their children in certain situations and that accordingly the caseworker’s conduct unconstitutionally inhibited practice of their religious beliefs.

Defendants moved for summary judgment on the merits of the free exercise cause of action, and the court granted the motion by relying on Department of Human Resources v. Smith. In Smith, the U.S. Supreme Court had held that, with certain exceptions inapplicable to the Fowler case, neutral laws of general applicability, incidentally burdening a particular religious practice, do not constitute a violation of the Free Exercise Clause. The court in Fowler determined that the county’s policy on corporal punishment, implemented by the case worker, did not target religious practices and was merely a generally applicable law incidentally imposing on the religiously motivated conduct of these Church of God members.

159. Id. at *1.
160. Id.
161. In addition to the claims described in the text above, plaintiffs alleged that defendants engaged in the following misconduct: false arrest, malicious prosecution, false imprisonment, denial of equal protection, denial of due process, violation of liberty rights, failure to intervene, supervisory liability, and failure to train and supervise. Id. None of these claims are germane to this article, however.
162. Id. at *13.
163. Id. Plaintiffs also made a second free exercise claim that the allegations of child abuse and consequent prosecution of Reverend Fowler caused a hostile community reaction that interfered with his ability to practice his religion or fulfill his ministerial duties to his church and that even forced the family to relocate. Id.
164. Id.
165. Id. at *14, *19.
167. 494 U.S. at 881-85. In Smith, the Court identified two exceptions to the rule that neutral laws of general applicability, incidentally burdening a religious practice, do not violate the Free Exercise Clause. One exception is presented by what the Court called a hybrid situation. A hybrid situation arises where a plaintiff challenges a law of general applicability not only because it burdens a religious practice so as to violate the Free Exercise Clause, but also because the law violates some other constitutional protection. In these hybrid cases, the Court has held that such laws violate the Free Exercise Clause when the laws also violate another constitutional right. Id at 881-82. The other exception occurs when state unemployment compensation rules condition eligibility for benefits upon an applicant’s working under conditions forbidden by his or her religion. In these unemployment compensation cases, the Court has used a balancing test to determine whether the unemployment compensation rules contravene the Free Exercise Clause. Under this test, "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." Id. at 883.
168. Id. at 878-80, 882, 885, 888-90.
If, of course, the court had considered a qualified immunity defense, the court would have been obliged to ascertain whether county employees had violated a clearly established constitutional parental right to corporally punish children as implicit in the Free Exercise Clause. However, the irrelevance of the defense rendered that undertaking unnecessary. *Smith* had relieved the *Fowler* court of responsibility to assess whether such an implied right to spank exists in the Free Exercise Clause inasmuch as any incidental imposition on the "right" could not cause the county's policies to be invalidated under the clause. Consequently, the *Fowler* court had no occasion to pass upon and did not pass upon the existence or nonexistence of a parental constitutional right to corporally punish children. The net effect is that *Fowler*, like *Backlund*, *Sweaney*, and *Balden*, represents another instance in which a federal court has been faced with and rejected plaintiffs' attempts to use § 1983 in the service of interpersonal violence.

Section 1983 evidently did not figure into any of these judges' conscious reasoning processes. Certainly none of the opinions in these cases manifest that the congressional intent behind § 1983 was on these judges' minds. That fact, though, does not change the basic anomaly inherent in plaintiffs marshaling § 1983 for violent purposes. And it is still a saving grace that these judges have found themselves, due to the qualified immunity defense or, in the case of *Fowler*, to Free Exercise Clause law, in the more seemly and salutary position of preserving § 1983 from being turned into a mockery of itself.

Finally, it should be mentioned that another line of cases exists in which parents have relied upon § 1983 to further their perceived power to behave violently with their children, but in which cases plaintiffs did not, as in *Backlund*, *Sweaney*, *Balden*, and *Fowler*, assert a constitutional right to corporally punish children. These parents were investigated for child abuse, including physical assaults in the form of hitting or spanking — classic corporal punishment of children. Either

170. See supra notes 85-86 and accompanying text.


in relation to the investigations, removal of their children, and/or institution of child
abuse proceedings,173 the parents filed § 1983 actions claiming that by such
measures governmental authorities had violated the following various constitutional
rights: rights to protection against governmental removal of children from parental
custody;174 rights to family integrity;175 rights to a relationship with a minor;176
rights to privacy;177 rights to association;178 and rights to enjoyment of family
relations.179 In effect, these plaintiffs may have been seeking constitutional
insulation of parental violence, but without providing the "justification" that they
were "only" dispensing corporal punishment. In any event, the courts seem to have
been comfortable rejecting plaintiffs' various constitutional constructs in these
contexts and holding in favor of the government.180

In sum, Backlund, Sweaney, Balden, and Fowler represent the emergence of a
disquieting, although as of yet limited, phenomenon in which parents have sought
to elevate hitting children to a constitutional art. Plaintiffs have undoubtedly

173. E.g., Farley, 2000 WL 1033045, at *1 (suing in response to removal of children); Foy, 94 F.3d at
1533 (suing to challenge the investigation and removal of children); Jenks, 1995 U.S. App. LEXIS
32755, at *1-*2 (suing in reaction to removal of a child into temporary protective custody on the basis
of suspected child abuse without a predeprivation hearing); DeCosta, 59 F.3d at 280 (suing over an
investigation); Van Emrik, 911 F.2d at 865 (suing in response to removal of children); Hodorowski, 844
F.2d at 1211 (suing to challenge removal of children); Ancona, 1999 WL 1069537, at *1 (suing in
response to removal of children); Sundbye, 3 F. Supp. 2d at 257, 261 (suing over the institution of child­
abuse proceedings and threatened and actual removal of children); Spencer, 986 F. Supp. at 721-22
(suing over removal of children); Chayo, 844 F. Supp. at 165 (suing to challenge removal and medical
examination of children); Charron, 811 F. Supp. at 770 (suing in relation to removal of children);

174. E.g., Farley, 2000 WL 1033045, at *6; Van Emrik, 911 F.2d at 864-65; Ancona, 1999 WL
1069537, at *1; Sundbye, 3 F. Supp. 2d at 257; Spencer, 986 F. Supp. at 721.

175. E.g., Jenks, 1995 U.S. App. LEXIS 32755, at *2; DeCosta, 59 F.3d at 280; Hodorowski, 844
F.2d at 1211-12; Chayo, 844 F. Supp. at 171.

177. E.g., Foy, 94 F.3d at 1532.
179. E.g., Charron, 811 F. Supp. at 770.
DeCosta, 59 F.3d at 280-81; Van Emrik, 911 F.2d at 864-68; Hodorowski, 844 F.2d at 1211, 1217-18;
Ancona, 1999 WL 1069537, at *5-6; Spencer, 986 F. Supp. at 721-23; Chayo, 844 F. Supp. at 168-73;
1033045, at *3-7 (affirming the district court's order denying defendants' summary judgment motions
on the ground, among others, that government employees violated a mother's substantive due process
right to immediate physical custody of her children because the employees engaged in arbitrary, vengeful
conduct toward her); Sundbye, 3 F. Supp. 2d at 261-62, 265-67 (granting defendants' motions for
summary judgment with respect to, among other claims, plaintiff's substantive due process claim that a
government employee improperly threatened to remove and coerced the removal of a child from the
mother's custody and also granting such motions with respect to certain defendants' related qualified
immunity defenses).
proceeded upon the assumption that if hitting is "corporal punishment of children," then the attempt to give hitting constitutional status should not seem outlandish or inconsistent with constitutional values. Plaintiffs have tried to accomplish this transformation by stating causes of action under § 1983, effectively enlisting that statute in aid of the very type of violence the statute was enacted to defuse. The courts thus far have had none of it. They have refused to find a constitutional right or a clearly established constitutional right in parents to corporally punish their children. In the process, although probably unwittingly, the courts have refused to do violence to § 1983 itself.

If an adult went to court arguing for a right to hit randomly chosen people, his or her claim would seem downright preposterous. It is by denoting the hitting as "corporal punishment of children" that plaintiffs have been able to make a right to hit children appear legitimate, viable, and normal. The real threat, then, to § 1983's continued credibility as an agent of peace lies in the parental claim for a constitutional right to corporally punish children. The Backlund line of cases expresses a singular nexus between repudiating corporal punishment of children as a constitutional right and respecting § 1983's very essence.

III. If § 1983 Is Not Preserved as an Agent of Peace, Constitutional Values May Be Undermined, Society May Become More Violent, Children May Be Demeaned, and Civil Rights Struggles May Be Dishonored

The process of norm creation flows from the very nature of law. Law is promulgated to be known; it could hardly restrain or shape people's behavior if the contents of laws were kept secret. By knowing the law, people not only learn the kind of rule obedience that is expected of them, but they also learn the government's message or opinion on a matter. This message or opinion has an extremely strong influence precisely because it carries the imprimatur of the State. And an influential message is a pedagogical message — one that has the potential to give rise to widely shared values. For example, all states except Minnesota

181. See supra notes 37-67 and accompanying text.
182. See supra notes 94-152 and accompanying text.
185. See Bitensky, supra note 79, at 441; Susan H. Bitensky, Theoretical Foundations for a Right
currently permit "reasonable" parental corporal punishment of children. This means that in forty-nine states, the law is already fostering a normative environment favorable to such punishment.

186. Some commentators assert that all states permit parents or guardians to administer "reasonable" corporal punishment upon children. See Leonard P. Edwards, Corporate 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.25, 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").


Other states have also legitimated "reasonable" parental corporal punishment by judicial decision. See, e.g., State v. Arnold, 543 N.W.2d 600, 603 (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.").

At first glance, Minnesota also appears to have a statute permitting parental corporal punishment of children. See MINN. STAT. ANN. § 609.06(1)(d) (West 1987 & Supp. 2001) (allowing reasonable force "[w]hen 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(1)(a) (West 1987 & Supp. 2001) (same). However, Minnesota precludes the use of reasonable force, including corporal punishment, as a defense to assault charges, while defining assault so as to encompass corporal punishment. See MINN. STAT. ANN. § 709.379(2) (West 1987 & Supp. 2001) (authorizing the use of reasonable force as a defense to certain criminal offenses, not including assault); MINN. STAT. ANN. § 609.24(1)(a)(2) (West 1987 & Supp. 2001) (defining assault as an act committed "with intent to cause fear in another of immediate bodily harm or death" or the actual infliction of bodily harm); MINN. STAT. ANN. § 609.02(7) (West 1987 & Supp. 2001) (defining bodily harm as "physical pain or injury, illness, or any impairment of physical condition"). The upshot is that if parents use reasonable force, such as physical chastisement, on a child as a disciplinary measure, they may be prosecuted by Minnesota for assault and may not hide behind the excuse that they were just using "reasonable" corporal punishment. For a more detailed analysis of Minnesota's statutory scheme in relation to corporal punishment of children, see Victor I. Vieth, Corporate Punishment in the United States: A Call for a New Approach to the Prosecution of Disciplinarians, 15 JUV. L. 22, 41-45 (1994).
Giving constitutional status to a practice, however, exalts it in a way that no other domestic law can do because the federal Constitution represents the paramount law of the land. Americans cherish the Constitution; it is "the only law that we virtually worship as a nation" and "the only law that has attained almost the status of scripture." Were the courts to accept plaintiffs' arguments in Backlund, Sweaney, Balden, and Fowler asserting a parental constitutional right to physically chastise children, the courts would exalt the practice and import a normative lesson that parental corporal punishment is of eminent and virtually unassailable social acceptability. The result would be that, over time, even more children would be hit, causing immediate physical pain and possible long-term physiological and psychological harm to those who were hit. The potential for psychological harm should especially catch the nation's attention. The development of pervasive mental disorders may give rise to adverse mass social psychology, the prevention of which warrants particular solicitude for § 1983 as an agent of peace, even beyond sparing individual children the rod. It is thus essential to acquire some understanding of the effects of corporal punishment of children.

It is self-evident that smacking causes pain; by definition, corporal punishment


189. See infra text accompanying notes 196-205.

190. See infra notes 216-26 and accompanying text.

191. See infra notes 212-16 and accompanying text. Shortly before this article was published, Dr. Diana Baumrind, a child development expert at the University of California, gave a speech asserting "that social scientists had overstepped the evidence in claiming that spanking caused lasting harm to the child." Erica Goode, Findings Give Some Support to Advocates of Spanking, N.Y. TIMES, Aug. 25, 2001, at A6. Although she does not advocate corporal punishment of children, she also claims that her research shows "that mild to moderate spanking . . . [has] no detrimental effects." Id. However, Dr. Baumrind's study has not yet been published and is, at the time of this writing, in the process of being reviewed. Corrections, N.Y. TIMES, Aug. 30, 2001, at A2.

Other child development experts have already begun to criticize the science behind the Baumrind study. See, e.g., E-mail from Dr. Eli H. Newberger, Professor at Harvard Medical School and pediatrician at Children's Hospital, Boston, to Susan Bitensky, Professor of Law, Michigan State University — Detroit College of Law (Aug. 31, 2001, 05:06 EST) (on file with author) ("Not only is the Baumrind study flawed by small numbers and inadequate controls, but she does not deal with the most important implications of spanking for character development, particularly for boys."); Murray Straus, Comments on Baumrind’s Data (Aug. 27, 2001), at http://nospank.org/straus10.htm (last visited Sept. 10, 2001) (censuring Baumrind’s findings because she used too small a sample of cases for a longitudinal study and because six previous longitudinal studies did find that corporal punishment of children results in harmful effects). It also bears mentioning that Dr. Baumrind’s study, whatever its scientific soundness or lack thereof, completely ignores the moral objections to corporal punishment of children as well as the fact that such punishment is considered a violation of international human rights law. See, e.g., Susan H. Bitensky, Spare the Rod, Embrace Human Rights: International Law’s Mandate Against All Corporal Punishment of Children, 21 WHITTIER L. REV. 147, 148-58 (1999); Bitensky, supra note 79, at 388-421, 435-40.
serves the purpose of controlling or modifying conduct through infliction of bodily suffering. Spanking may also cause physiological damage precisely because such punishment involves a threat to invade and an invasion of bodily integrity. Spanking may also induce delayed somatic responses and may easily deteriorate into more serious child abuse. Less well known outside of child development and related fields, corporal punishment may also give rise, during childhood, to a host of psychological disorders such as aggression, lack of empathy, and—


193. See Penelope Leach, Your Growing Child: From Babyhood Through Adolescence 225 (1995) (noting that "an unexpectedly large minority of smacked children eventually suffer actual injury" such as from blows accidentally landing on the spine or which catch a child off balance); Peter Newell, Children Are People Too: The Case Against Physical Punishment 31-32 (1989) ( canvassing a range of "accidental" injuries that corporal punishment can produce, including a burst ear drum, whiplash injury to the spine, and injuries to the chest, abdomen, buttocks, and genitals); David Orentlicher, Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Under­valuing Children, 35 Hous. L. Rev. 147, 156 (1998) (stating that corporal punishment may result in inadvertent injuries when the child attempts to avoid being struck or when the parent punishes a baby without taking into account the unique vulnerability of infancy).

194. It has been suggested that corporal punishment of children may lead to headaches and stomachaches. See Irwin A. Hyman, Reading, Writing, and the Hickory Stick: The Appalling Story of Physical and Psychological Abuse in American Schools 95, 100 (1990).


196. See Leach, supra note 193, at 224 (observing that spanking children is instrumental in making them bullies); Jane Nelsen et al., Positive Discipline A-Z: 1001 Solutions to Everyday Parenting Problems 164-65 (1993) (noting that corporal punishment of children encourages them to strike others); Nancy Samalin, Loving Your Child Is Not Enough: Positive Discipline That Works 73 (1987); Robert R. Sears et al., Patterns of Child Rearing 266 (1957); Sears & Sears, supra note 195, at 154 (predicting that the more frequently children are subjected to spanking, the more probable it is that they will aggress toward others); Benjamin Spock, Dr. Spock on Parenting 152 (1988); Straus, supra note 13, at 22, 100; Felicity de Zulueta, From Pain to Violence: The Traumatic Roots of Destructiveness 218 (1993); 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); Orentlicher, supra note 193, at 158; cf. Bruce D. Perry, Incubated in Terror: Neurodevelopmental Factors in the "Cycle of Violence," in Children in a Violent Society 124, 126, 135, 138 (Joy D. Ososky ed., 1997) [hereinafter Perry, Incubated in Terror] (explaining how a child's brain will develop a predisposition for violence when the child is repeatedly exposed to violent or fear-inducing situations). But see Dobson, supra note 192, at 34-35 (maintaining that reasonable corporal punishment administered by a loving parent actually deters children's misbehavior); Diana Baumrind, Parenting: The Discipline Controversy Revisited, 45 Fam. Rel. 405, 410, 412-13 (1996) (opining that spanking does not cause...
tisocial behavior, depression, anxiety, tension, and withdrawal.

Some of these disorders may persist into or surface during adulthood. The manifestation of increased aggression and decreased empathy during adulthood is of particular interest for purposes of this article, because these are the very traits that constitute a predisposition to commit violent crimes and even crimes against humanity. If enough people are corporally punished as children and develop this predisposition as adults, society as a whole will have a tendency to become correspondingly more prone to and tolerant of violence. In short, if courts were to accept plaintiffs' claims in Backlund-type cases of a parental constitutional right to spank children, § 1983 would be reduced to a travesty. It would be a vehicle of violence not only against children, but a vehicle for promoting societal violence across the board. Section 1983 would simultaneously engender and be engulfed by the very syndrome it was enacted to stop.

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197. See GREVEN, supra note 192, at 127-29 (theorizing that a child who is hurt by his or her parents will develop an inability to feel empathy); Feshbach, supra note 196, at 30; see also ALICE MILLER, BREAKING DOWN THE WALL OF SILENCE: THE LIBERATING EXPERIENCE OF FACING PAINFUL TRUTH 88 (Simon Worrall trans., Dutton Books 1991) [hereinafter MILLER, BREAKING DOWN THE WALL] (describing how beatings by his parents during childhood were a factor contributing to Hitler's later callousness); cf. Bruce D. Perry et al., Childhood Trauma, the Neurobiology of Adaptation, and "Use-dependent" Development of the Brain: How "States" Become "Traits," 16 INFANT MENTAL HEALTH J. 271, 278-84 (1995) [hereinafter Perry et al., CHILDHOOD TRAUMA] (elucidating how, in the face of chronic trauma, a young child's brain may evolve from the adaptive state of dissociation to a maladaptive trait of continuing dissociation or numbness).


200. See GREVEN, supra note 192, at 122-23; HYMAN, supra note 194, at 94, 99-100; Orentlicher, supra note 193, at 157; cf. Bruce D. Perry, Anxiety Disorders, in TEXTBOOK OF PEDIATRIC NEUROPSYCHIATRY 579, 586 (C. Edward Coffey & Roger A. Brumback eds., 1998) [hereinafter Perry, Anxiety Disorders] (stating that inasmuch as the young child's brain "organizes ... in a 'use-dependent' manner," children who undergo "traumatic experiences will develop anxiety-regulation problems").

201. See HYMAN, supra note 194, at 95, 100; cf. Herman, supra note 199, at 39 (observing that spanking places children in a relationship of continuing fear of their parents).

202. See GREVEN, supra note 192, at 129; HYMAN, supra note 194, at 94, 100; SEARS & SEARS, supra note 195, at 148, 152.

203. See infra text accompanying notes 212-16.

Indeed, many believe that childhood corporal punishment may produce an adult predisposition for violence because children, upon being struck, are not permitted to vent the rage and humiliation they feel. 205 Children may repress these feelings due to a variety of circumstances. It may seem, from the child's viewpoint, a perilous course to show anger toward the adults upon whom the child depends and with whom the child usually identifies. 206 It may also be inconceivable, particularly to younger children, that parental punitiveness could be inappropriate or unjust. 207 Nor can very young children and babies accurately conceptualize spanking so as to respond consciously to it. 208

This quiescence may provide the child with a momentary escape in the face of imminent danger, but the child and society ultimately can pay a high price for this defense mechanism. Quiescence does nothing to diminish the child's hurt and resentment and many children have no alternative but to repress such feelings. 209 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

205. Children are apt to feel angry and humiliated when they are spanked. See Greven, supra note 192, at 124-27, 132; Leach, supra note 193, at 224; Miller, Breaking Down the Wall, supra note 197, at 92-94; Sears & Sears, supra note 195, at 147, 152; Straus, supra note 13, at 69.

206. See Greven, supra note 192, at 132 (observing that a child cannot afford to react with anger toward a punitive parent "on whom he or she depends for nurturance and life itself"); Miller, Drama of the Gifted Child, supra note 199, at 8; Alice Miller, Thou Shalt Not Be Aware: Society's Betrayal of the Child 6 (1984) [hereinafter Miller, Thou Shalt Not Be Aware]; J. Konrad Stettbacher, Making Sense of Suffering: The Healing Confrontation with Your Own Past 27-28 (1991).

207. See Greven, supra note 192, 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 cannot comprehend when the parent is wronging the child); Alice Miller, Pictures of a Childhood 4-5 (1986) (suggesting that because children love their parents the former tend to absolve the latter from responsibility for cruelty to the children); Straus, supra note 13, at 163 (remarking upon the difficulty of acknowledging that corporal punishment is destructive since such an acknowledgment may mean condemning one's own parents).

208. See Miller, Breaking Down the Wall, supra note 197, at 19-20, 55; Miller, For Your Own Good, supra note 204, at 59, 61, 74, 247-48.

209. See Greven, supra note 192, at 19; Stettbacher, supra note 206, at 28; Herman, supra note 199, at 21.

210. See Greven, supra note 192, at 126; Miller, For Your Own Good, supra note 204, at 7, 61; Alice Miller, The Untouched Key: Tracing Childhood Trauma in Creativity and Destructiveness 159-60, 168 (1990) [hereinafter Miller, The Untouched Key]; Straus, supra note 13, at 69; Herman, supra note 199, at 19.

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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.\footnote{211}

After years of simmering intrapsychically, the repressed hostility can emerge in some adults in personality disorders characterized by destructiveness either toward the self or toward others.\footnote{212} Indeed, this childhood repression may be a root cause of adult aggressiveness,\footnote{213} lack of empathy,\footnote{214} and authoritarianism,\footnote{215} conditions that cause the victim to act out the repressed anger at the expense of family, friends, or the community.

This theoretical construct explaining the correlation between childhood corporal punishment and adult aggression is arguably supported by recent neurobiological studies. According to neurobiologist Dr. Bruce D. Perry, a child's developmental experiences determine the organization and functioning of the adult brain.\footnote{216} When a child is traumatized, his or her brain adapts with physiological hyperarousal and/or dissociation.\footnote{217} If these adaptive states are repeated, they can become maladaptive.

\begin{itemize}
  \item \footnote{211} Miller, For Your Own Good, supra note 204, at 7, 61.
  \item \footnote{212} See Greven, supra note 192, at 128-74, 186-212; Miller, Breaking Down the Wall, supra note 197, at 82, 94-95; Sears & Sears, supra note 195, at 153-54 (enumerating negative long term effects of spanking such as aggressive behavior and an increased rate of perpetrating abuse on a child or spouse); Straus, supra note 13, at 67-146; Herman, supra note 199, at 25, 36-39; Wissow & Roter, supra note 199, at 587-88.
  \item \footnote{213} The anger repressed in childhood is acted out or repeated during adulthood as aggression against others who are perceived as surrogates for the once punitive parents. See Greven, supra note 192, at 126-27; Miller, Breaking Down the Wall, supra note 197, at 91, 108; Miller, For Your Own Good, supra note 204, at 61, 65-66, 115-17, 172; Sears & Sears, supra note 195, at 153-54; Herman, supra note 199, at 36; see also Straus, supra note 13, at 99, 103, 106, 110, 113-15 (describing the linkages between receiving corporal punishment and later engaging in criminal conduct).
  \item \footnote{214} See Greven, supra note 192, at 127-29 ("The parent who hurts a child while imposing discipline is teaching a lesson in indifference to suffering . . . ."); Miller, For Your Own Good, supra note 204, at 79-83, 115; cf. Miller, Drama of the Gifted Child, supra note 199, at 34 (theorizing that when the child is compelled to adapt to parental needs, through corporal punishment or otherwise, what results is the impossibility of experiencing "consciously certain feelings of his own . . . either in childhood or later in adulthood").
  \item \footnote{215} See Greven, supra note 192, at 198-204; Miller, Breaking Down the Wall, supra note 197, at 84-85; Miller, The Untouched Key, supra note 210, at 50-52, 60, 62, 68, 149 (tracing the despotism of Stalin and other authoritarian personalities to beatings received in childhood, unaccompanied by adult sympathy for the child's pain); Newell, supra note 193, at 46; Herman, supra note 199, at 38-39 (remarking that an "authoritarian personality" can be "correlated with past subjection to corporal punishment").
  \item \footnote{217} See Bruce D. Perry & Ronnie Pollard, Homeostasis, Stress, Trauma, and Adaptation: A
traits that the child will carry into adulthood. The resulting mature brain, in other words, may be in a continuing state of vigilance and/or dissociative numbness regardless of the presence of external threats. The "sensitized' hyperarousal response" in particular may set the stage for reenactment of early traumatic experiences. People victimized by violence during childhood may be inclined to respond violently as adults to any perceived or misperceived threats. In this "states-to-traitls" neurobiological process,

[T]he chronic overactivation of neurochemical responses to threat in the central nervous system, particularly in the earliest years of life, can result in lifelong states of either dissociation or hyperarousal. In the case of hyperarousal, overdevelopment of the stress response systems in the brainstem and mid-brain alters the development of the higher cortical functions, creating a predisposition to behave in aggressive, impulsive, and reactive ways.

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Neurodevelopmental View of Childhood Trauma, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 33, 40-46 (1998); Perry, Incubated in Terror, supra note 196, at 135-39; Perry & Pate, supra note 216, at 133-34, 136-37; Perry et al., Childhood Trauma, supra note 197, at 274, 277-85. "Dissociation is a broad descriptive term that includes a variety of mental mechanisms involved in disengaging from the external world and attending to stimuli in the 'internal' world. Perry & Pollard, supra, at 43. "It can involve distraction, avoidance, numbing, daydreaming, fugue, fantasy, derealization, depersonalization, and, in the extreme, fainting or catatonia." Id. Hyperarousal consists of the body's preparation to fight against or flee from a potential threat. See id. at 41.

218. See Perry, Anxiety Disorders, supra note 200, at 586-89; Perry et al., Childhood Trauma, supra note 197, at 274-85; Perry, Neurobiological Sequelae, supra note 216, at 237-41; Perry & Pollard, supra note 217, at 35-45; Perry, Incubated in Terror, supra note 196, at 129-31, 136; Perry & Pate, supra note 216, at 132-37; Perry & Azad, supra note 216, at 310-11.

Whether maladaptive permanent states of hyperarousal or dissociation ultimately form may also be contingent on the presence of other factors. In other words, the permanence of these states is the result of trauma in complex combination with other variables. For example, the age of the child when a trauma occurs may be a factor. See Perry et al., Childhood Trauma, supra note 197, at 283; Perry & Pate, supra note 216, at 136. The particular genetic composition of a child may contribute to "certain properties of sensitivity of the arousal system." Perry, Anxiety Disorders, supra note 200, at 585. "[E]arly life trauma/stress plays an important role as an experter of genetically determined vulnerabilities to a variety of neuropsychiatric disorders." Perry, Neurobiological Sequelae, supra note 216, at 249. The interference of a protective or supportive caregiver may also be influential in the outcome of the "states-to-traitls" process. See Perry & Pate, supra note 216, at 138; Perry & Azad, supra note 216, at 310.

Psychoeducational and critical incident debriefing can also minimize the development of irreversible sensitization of the alarm reaction. See Perry & Pate, supra note 216, at 139.

219. See Perry, Anxiety Disorders, supra note 200, at 582; cf. Perry, Incubated in Terror, supra note 196, at 135-38 (explaining the dynamic that children exposed to chronic violence will tend later to react aggressively because their brains have maladapted into a persistent state of fear).

220. See Perry, Incubated in Terror, supra note 196, at 141-42, 145; Bruce D. Perry, Neurodevelopmental Adaptations to Violence: How Children Survive the Intragenerational Vortex of Violence, in VIOLENCE AND CHILDHOOD TRAUMA: UNDERSTANDING AND RESPONDING TO THE EFFECTS OF VIOLENCE ON YOUNG CHILDREN 67, 67-68 (1995) [hereinafter Perry, Neurodevelopmental Adaptations]; Perry & Azad, supra note 216, at 312; cf. Perry, Neurobiological Sequelae, supra note 216, at 239 (stating that the neurophysiological activation seen during acute stress may not be reversible if the stressful event is of sufficient duration, intensity, or frequency).

221. ROBIN KARR-MORSE & MEREDITH S. WILEY, GHOSTS FROM THE NURSERY: TRACING THE
Children may undergo many obvious traumas. Severe child abuse, car accidents, or loss of a parent come readily to mind. It is important to consider, however, whether there are more mundane practices towards children that are also traumatic but not evaluated as such by the adult world because these practices are longstanding and are not perceived from the child's vantage point of vulnerability and dependency. Children may, in fact, respond to even garden-variety corporal punishment as a traumatic event. Spanking necessarily involves infliction of fear and pain, violation of bodily integrity, and degradation, experiences likely to be interpreted as threatening to body and soul in the most primal way. Hence, spanking, like more obvious traumas, has the potential to initiate those states in the brain that will lead to permanent adult traits of hyperarousal, dissociation, or both. Spanking may program the brain for a propensity toward violence and/or a lack of feeling.

ROOTS OF VIOLENCE 168 (1997).

222. See GREVEN, supra note 192, at 137, 147, 156-57; STRAUS, supra note 13, at 9-10; Herman, supra note 199, at 21; cf. MILLER, DRAMA OF THE GIFTED CHILD, supra note 199, at 78-79 (discussing the intensity of feelings unique to young children).

223. See DOBSON, supra note 192, at 47; FUGATE, supra note 192, at 136; GREVEN, supra note 192, at 122-23; NEWELL, supra note 193, at 12; STRAUS, supra note 13, at 7-9; Feshbach, supra note 196, at 29-30.

224. See JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 73-74 (1979); MILLER, FOR YOUR OWN GOOD, supra note 204, at 17; NEWELL, supra note 193, at 12; SEARS & SEARS, supra note 195, at 152. But see DOBSON, supra note 192, at 84 (maintaining 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 192, at 139; see also David Benator, Corporal Punishment, 24 SOC. THEORY & PRAC 237, 241-42 (1998) (questioning whether corporal punishment degrades children).

225. Psychologist Alice Miller has described cruel child-rearing practices, including corporal punishment, as perpetrating "soul murder" on children. See MILLER, FOR YOUR OWN GOOD, supra note 204, at 223, 232; see also MILLER, THOU SHALT NOT BE AWARE, supra note 206, at 310-11 (noting how wounding beatings are to children).

226. Dr. Bruce D. Perry, whose neurobiological studies have confirmed a relationship between childhood trauma and impaired brain development, including a propensity toward violence, repeatedly includes as one such trauma victimization of children by domestic violence or domestic battery. See, e.g., Perry et al., Childhood Trauma, supra note 197, at 273 (domestic violence); Perry & Pollard, supra note 217, at 34 (domestic violence); Perry, Incubated in Terror, supra note 196, at 126 (domestic battery); Perry, Neurodevelopmental Adaptations, supra note 220, at 67, 68 (domestic battery); Perry & Azad, supra note 216, at 311 (domestic violence). He has also included under the rubric of childhood trauma incidents where children witness violence but are not its direct victims. See, e.g., Perry, Neurobiological Sequelae, supra note 216, at 234; Perry & Azad, supra note 216, at 313.

As a common sense matter, the term "domestic violence" would seem to encompass corporal punishment of children since this form of punishment consists of hitting and violating bodily integrity. Corporal punishment of children also fits all of the elements of a domestic battery. See Bitensky, supra note 79, at 435-36, 442-46. Moreover, if merely witnessing violence is enough to traumatize children so as to lead to distortions in the developing brain, then experiencing violence in the form of corporal punishment would logically appear to involve the same damaging potential. This seems true since Dr. Perry has acknowledged that a factor in children's development of posttraumatic stress disorder, a condition originating in the brain's response to trauma, is the degree to which children's bodily integrity is threatened. See Perry, Neurobiological Sequelae, supra note 216, at 236.
If enough children are spanked — and many still are — the result may be a high percentage of adults prone toward violence as each generation matures. Research on the brain's adaption to fear during childhood has even yielded evidence that this adaption "may actually become encoded in the genes and passed on to new generations, which may become successively more aggressive." It is thus conceivable that adults who were corporally punished as children may pass on hypervigilance and/or dissociation to their offspring, whether or not the latter are ever traumatized themselves.

The point is this: a great deal is at stake in any future cases in which parents try to state a § 1983 cause of action asserting a constitutional right to corporally punish their children. If the courts do not continue to repudiate such claims, the very nature of the human race could be altered to become more violent and less empathetic. At best, there would be a greater number of violent people among us if the courts were to elevate spanking to a federal constitutional status. More widespread violence leads to a nation on a retrogressive trajectory, in opposition to the values of human dignity and ordered liberty — values inherent in our constitutional regime.

Dr. Perry, however, has indicated that not all corporal punishment will produce this type of traumatic effect:

"Of course domestic assault can be very traumatizing for the witnessing child. And some forms of corporal punishment can be as well — however, not all corporal punishment is traumatizing — it is ineffective as a discipline technique, a terrible way to model problem solving and has a host of negative effects on children but those are not always due to "trauma." There are ... many flavors and grades of corporal punishment.

E-mail from Dr. Bruce D. Perry, Chief of Psychiatry, Department of Psychiatry and Behavioral Sciences, Baylor College of Medicine and Texas Children's Hospital, to Susan H. Bitensky, Professor of Law, Michigan State University-Detroit College of Law (Nov. 6, 2000) (on file with author).

This view of corporal punishment is generally consistent with Dr. Perry's assessment of all violence against children:

All violent behavior impacts the children in its wake, but there is heterogeneity of impact. Important factors in the differential impact on the developing child include the type of violence, the pattern of violence, the presence (or absence) of supportive adult caretakers and other support systems, and, of key importance, the age of the child ....

Perry, Incubated in Terror, supra note 196, at 124, 127.

That is, violence against children, including corporal punishment, may or may not give rise to trauma and ensuing adverse consequences for brain development, depending upon the presence or absence of various contextual factors.

227. See supra note 33 and accompanying text.
228. KARR-MORSE & WILEY, supra note 221, at 169.
229. See id.
§ 1983? Section 1983 would become a means of oppression against children and an engine of social disintegration and of the further brutalization of American culture. Section 1983, as an agent of peace, would cease to exist. The loss of this role for § 1983 may seem trifling in comparison to the long-term harm that would be done to public health and safety if plaintiffs ever prevailed in Backlund-type suits. But § 1983 is laden with an historical and emotional significance that would make its loss as an agent of peace of fateful import even beyond deterring the evolution of an increasingly violent society.

Section 1983, it should be remembered, has lofty origins as postbellum America's early mandate against vigilante-style violence toward blacks and white Republicans.231 The Ku Klux Klan and other paramilitary organizations during Reconstruction made whipping their weapon of choice.232 In so doing, the Klan operated in the tradition of slaveholders who more often than not showed displeasure with their "property" by flogging.233 Our country has, to put the matter simply, a long and despicable history of whites hitting blacks with impunity.

Even before the Union victory, some reformers made the connection between corporal punishment of children and corporal punishment of slaves. To these abolitionists' way of thinking, such punishment of children and slaves alike constituted unacceptable violence resulting from children's and slaves' common status as chattel.234 Once the slaves were freed, § 1983 functioned as a counterweight to the continuation of this shameful tradition vis-à-vis black adults and their white adult allies.235 It being 1871 when § 1983's predecessor statute was enacted, legislators were concerned with rectifying the fallout from the Civil War. Children's right to be protected from violence was not and could not, given the historical framework, have been on the legislative agenda.

Nevertheless, it would be an expression of the utmost disrespect for the struggles against violence during Reconstruction to allow § 1983 now to be used as the vehicle for establishing a constitutional right to corporally punish children. The inevitable inference would be that § 1983 cannot serve the same protective function for children as the statute had served for freedmen and freedwomen and that children are chattel unworthy of the protection accorded blacks. Section 1983's long and venerable history in the deliverance of blacks from violence would be dishonored, and the children of the present era would be relegated by law to a status commensurate with slaves and the hapless victims of the Ku Klux Klan.

Conclusion

An unsettling phenomenon has emerged in the type of litigation coming before the federal courts: cases have been surfacing in which parents rely upon § 1983 to state a cause of action based on the claim that a parental constitutional right to

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231. See supra notes 37-67 and accompanying text.
232. See supra notes 3-10 and accompanying text.
233. See supra notes 3-10 and accompanying text.
234. See supra notes 14-15 and accompanying text.
235. See supra notes 37-63 and accompanying text.
corporally punish their children has been abridged. Thus far, federal judges have denied these plaintiffs' claims either because, under the doctrine of qualified immunity, there is no established or clearly established parental constitutional right to spank children or because there were other grounds for deciding the case not related to the asserted right.

These cases represent not only an attempt to constitutionalize a form of interpersonal violence, but also an assault on § 1983's mission as an agent of interpersonal peace. The Congress that enacted § 1983's predecessor statute, section 1 of the Civil Rights Act of 1871, intended the statute as a deterrent to night riders' violent transgressions, especially their countless whippings of blacks and white Republicans in the South. The U.S. Supreme Court and many commentators have repeatedly acknowledged the congressional intent to keep the peace that prompted section 1's enactment and the continued relevance of that intent to § 1983.

Were the federal courts to accept parents' assertion of a constitutional right to corporally punish children, the courts would unwittingly run roughshod over this legislative intent and impoverish § 1983 by turning it into an agent of violence rather than of peace. The results would be destructive in at least three ways. First, the courts would, in effect, create a norm of the highest order sanctioning interpersonal violence against children. Second, because violence against children tends to produce more aggressive and less empathetic adults, society as a whole would become more violent and destructive of the constitutional values of human dignity and ordered liberty. Third, § 1983 and the struggles to end violent discrimination against blacks would be slighted and children would be devalued in the process. Fortunately, the federal courts have thus far rejected parents' claims for a right of corporal punishment, or, in one case, have not had to reach the issue at all.

All states, save one, continue to permit "reasonable" parental corporal punishment of children. But corporal punishment has not yet been accorded a constitutional dimension and § 1983's historic meaning has not yet been abused so as to enable corporal punishment to acquire such a dimension. Section 1983, in keeping with its tradition of protecting blacks from the more violent badges of slavery, still continues as children's, and indeed our entire society's, inveterate agent of peace.

236. See supra Part II.
237. See supra notes 85-86 and accompanying text.
238. See supra notes 156-71 and accompanying text.
239. See supra notes 37-63 and accompanying text.
240. See supra notes 64-66 and accompanying text.
241. See supra notes 196-216 and accompanying text.
242. See supra Part II.
243. See supra note 186 and accompanying text.