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

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The Mother of All Human Rights: The Child’s Right to be Free of Corporal Punishment as Hard International Law

SUSAN H. BITENSKY*

I. INTRODUCTION

Most days, it seems like an awfully scary world out there. The daily mayhem and carnage that mankind wreaks upon itself lends credence to Thomas Hobbes’ pained observation that “Man to Man is an arrant Wolfe.”

It is easy to feel overwhelmed in the face of so much man-made strife and suffering, let alone that caused by the environment. With a crisis around every corner, why focus on, of all things, spanking children as an injustice? For those intent on banning this form of child discipline and someday abolishing it entirely, and there are increasing numbers of us, isn’t this an aggravated case of misplaced priorities?

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


4. I do not have a tally of the exact numbers of people actively opposing corporal punishment of children, but there are telltale signs that the numbers are huge when considered on a global basis. One sign is that, as of this writing, 28 countries have banned all corporal punishment of children. See infra notes 30-32 and accompanying text. Another sign is the existence of worldwide and national organiza-
I am here to tell you that, to the contrary, there is nothing more urgent. Although there are many reasons for saying so, I wish to share with you two of the central reasons, customarily unremarked, for treating the child’s right to be protected from corporal punishment as one of the top priorities of the twenty-first century. The first reason is that this is the mother of all human rights in the sense that adherence to this right should enable full or fuller enforcement of human rights in general, whether possessed by adults or children. The second reason is that adherence to the child’s right to be protected from corporal punishment is a paramount legal duty in the hierarchy of international human rights laws.

Before delving into these reasons in detail, it is important to define the terminology at the heart of the matter. What is corporal punishment of children? Can there even be a single definition for a practice which includes smacks, swats, spankings, thrashings, floggings, birchings, paddlings, etc.? The answer is yes because these disciplinary tactics invariably share certain features. The definition which best captures the common thread is this: corporal punishment of children is the use of physical force upon a child’s body with the intention of causing the child to experience bodily pain in order to correct or punish the child’s behavior.

This is the definition, no matter who administers the punishment or in what venue.

The definition, as used here, is also delimited by two exclusions. It excludes physically restraining children to prevent them from imminently...
injuring themselves or others or from imminently damaging property. This exclusion is inherent in the definition since physically holding a child back is typically done to prevent harm rather than to correct or punish behavior. By author's fiat, the definition also excludes prosecutable physical child abuse. Though such child abuse and corporal punishment of children occur at two different points of intensity along the same continuum of physical violence against children, the two are usually presumed by legal systems and conventional wisdom to be qualitatively distinguishable. Inasmuch as this is neither the time nor place to challenge that presumption, the scope of this article is limited to corporal punishment of children.

II. THE CHILD'S RIGHT TO BE PROTECTED FROM CORPORAL PUNISHMENT IS THE MOTHER OF ALL HUMAN RIGHTS

William Wordsworth once wrote that “[t]he [c]hild is father of the [m]an[.]” enigmatically poeticizing a parent-child role reversal. With the hubris only a law professor can summon, I would edit the poet’s words to more pointedly convey their meaning for me, which is that the unviolated child is the mother of mankind’s humanity. So embellished, or bastardized, as you will, the Wordsworthian role reversal signifies that it is children’s well-being which may hold the key to adults’ future welfare.

Aside from poetry, is there any basis for making this ambitious assertion? The overwhelming weight of recent scientific studies on corporal punishment of children shows that children may suffer mental and emotional impairments from the punishment, in addition to physical

9. CORPORAL PUNISHMENT OF CHILDREN, supra note 7, at xx; Poverty of Precedent, supra note 8, at 1333.

10. CORPORAL PUNISHMENT OF CHILDREN, supra note 7, at xix (noting that, unless purposefully excluded, the definition of corporal punishment of children “necessarily encompasses . . . more severe violations of the child’s physical integrity constituting classic child abuse”). See also 6 AM. JUR. 2D Assault and Battery § 28 (2010) (stating that the difference between corporal punishment and child abuse is a matter of degree).


13. A seminal meta-analytic review by Elizabeth Thompson Gershoff in 2002 establishes that victims may experience at least ten negative outcomes as a result of parental corporal punishment. See Elizabeth Thompson Gershoff, Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review, 128 PSYCHOL. BULL. 539, 543-44 (2002) [hereinafter “Gershoff 2002 review”]. For children subjected to such corporal punishment, the following ten negative outcomes may occur: (1) decreased moral internalization; (2) increased child aggression; (3)
increased child delinquent and antisocial conduct; (4) decreased quality of the parent-child relationship; (5) decreased child mental health; and (6) increased risk of undergoing classic physical child abuse; and, upon reaching adulthood, (7) increased adult aggression; (8) increased adult criminal and antisocial behavior; (9) decreased adult mental health; and (10) increased risk of abusing one's own child or spouse.  

Subsequent scientific studies confirm or expand upon the foregoing findings. See, e.g., Tracie O. Afifi et al., Physical Punishment, Childhood Abuse and Psychiatric Disorders, 30 CHILD ABUSE & NEGLECT 1093, 1094, 1099 (2006); George G. Bear et al., Children's Reasoning About Aggression: Differences Between Japan and the United States and Implications for School Discipline, 35 SCH. PSYCHOL. REV. 62, 63-64 (2006); Heather L. Bender et al., Use of Harsh Physical Discipline and Developmental Outcomes in Adolescence, 19 DEV. & PSYCHOPATHOL. 227, 238-41 (2007) (finding parental corporal punishment to be correlated with children's ensuing deteriorating mental health); Sarah E. Fine et al., Anger Perception, Caregivers' Use of Physical Discipline, and Aggression in Children at Risk, 13 SOC. DEV. 213, 224 (2004); Elizabeth Thompson Gershoff, Corporal Punishment, Physical Abuse, and the Burden of Proof: Reply to Baumbard, Larzelere, and Cowan (2002), Holden (2002), and Parke (2002), 128 PSYCHOL. BULL. 602, 609 (2002) (observing that the "current state of the field" is that at worst parental corporal punishment may have destructive consequences for children and at best no effect whatsoever); Elizabeth T. Gershoff et al., Shared Book Reading and Children's Language Comprehension Skills: The Moderating Role of Parental Discipline Practices, 19 EARLY CHILDHOOD RES. Q. 319, 332 (2004); Joseph T. F. Lau et al., The Relationship Between Physical Maltreatment and Substance Use Among Adolescents: A Survey of 95,788 Adolescents in Hong Kong, 37 J. ADOLESCENT HEALTH 110, 111, 115-18 (2005) (finding an association between corporal punishment and later alcohol and drug use in the children who were hit); Prabhjot Malhi & Munni Ray, Prevalence and Correlates of Corporal Punishment Among Adolescents, 46 STUDIA PSYCHOLOGIA 219, 224-25 (2004) (discovering that adolescents whose parents corporally punished them had lower overall adjustment, especially at home and school); Catherine A. Taylor et al., Mothers' Spanking of 3-Year-Old Children and Subsequent Risk of Children's Aggressive Behavior, 125 PEDIATRICS 1057, 1063 (2010) (concluding that parental corporal punishment of children increases the risk for higher levels of child aggression).

The weight of scientific authority is overwhelmingly ranged against corporal punishment of children because of its adverse outcomes for children. However, for the sake of thoroughness, it should be noted that there are two recent isolated studies that unsuccessfully attempt to swim against the current. See Robert E. Larzelere et al., Do Nonphysical Punishments Reduce Antisocial Behavior More Than Spanking? A Comparison Using the Strongest Previous Causal Evidence Against Spanking, BMC PEDIATRICS, Feb. 22, 2010, http://www.biomedcentral.com/1471-2431/10/10 [hereinafter "Larzelere study"] (finding that spanking, grounding, and psychotherapy each equally appear to increase children's antisocial behavior, and that deprivation of privileges and sending children to their rooms each partially appears to have the same effect, but contending that these appearances are due to residual confounding such that child effects on parents are mistaken for increased child antisocial behavior); Rosemary Black, Spanking Makes Kids Perform Better in School, Helps Them Become More Successful: Study, N.Y. Daily News, Jan. 4, 2010, http://www.nydailynews.com/lifestyle/2010/01/04/2010-01-04_spanking_makes_kids_perform_better_in_school_study.html (reporting on research by Marjorie Gunnoc showing that children who were corporally punished before age 6 grew up to be more successful, but that children who were corporally punished after that age were more likely than other children to have behavioral difficulties).

The Larzelere study has credibility problems even before one delves into its contents. The study is published in an "open access" journal that does minimal peer review and that is excluded from the ISI Journal Citation Database, an omission indicating that the journal is neither well-established nor
The list of associated impairments includes, but is not limited to: decreased moral internalization, increased aggression, increased antisocial traumas. The contents of the Larzelere study fail to do much in the way of rehabilitating this credibility deficit. For example, the study relies upon the National Longitudinal Study of Youth which has been used in many papers to document the link between corporal punishment and children's externalized behaviors over time. See e.g., Andrew Grogan-Kaylor, Corporal Punishment and the Growth Trajectory of Children's Antisocial Behavior, 10 CHILD MALTREATMENT 283, 284-85 (2005) [hereinafter “Growth Trajectory”]; Andrew Grogan-Kaylor, The Effect of Corporal Punishment on Antisocial Behavior in Children, 28 SOCIAL WORK RESEARCH 153, 155 (2004). Yet, the Larzelere does not even cite to the papers by Grogan-Kaylor in which the latter employed a more rigorous method of examining longitudinal impacts of corporal punishment, leading to findings of long-term negative impacts of the punishment after controlling for children’s initial behavior. See generally id.; Growth Trajectory, supra note 13.

The Larzelere study also stumbles in using poor logic as well as in presenting incomplete research. The main thrust of the study is that it makes the case that early childhood spanking is no worse than early childhood grounding and psychotherapy, in terms of increasing child antisocial behavior over time. See generally Larzelere study, supra note 13. From this premise, the study’s authors infer that what gives rise to findings of increased child antisocial behavior is not the punishment or therapy, but, rather, the circumstance that the children were more antisocial to begin with. See id. The logical weakness of this argument stems from the fact that the Larzelere study is focused on early discipline as predicting changes in child behavior over time, while any effect the child has ab initio on eliciting more discipline generally is controlled. See Gershoff E-mail, supra note 13. So, the Larzelere study does not ultimately measure much of anything of interest vis-a-vis corporal punishment’s outcomes for children.

Finally, even if the Larzelere study did not suffer from such problems, it is interesting that its authors fail to offer their findings as a basis for sanitizing corporal punishment of its adverse impacts on children or for recommending use of the punishment. See id. at 15. Indeed, the study recommends using the “mildest” form of discipline possible in lieu of corporal punishment. Id.

The research by Marjorie Gunnoe does not fare well on the credibility front either. One expert summarizes the problems in Gunnoe’s work as follows:

My approach to the Gunnoe study has been to point out that this study contradicts more than a hundred studies which have found harmful effects of spanking. This includes studies of harmful effects such as physical violence, delinquency, and depression. It also includes doing less well on positive things such as school performance, college graduation, and occupational achievement. There is always going to be some exception, but when 93% of the studies agree in finding that spanking is related to an increased probability of things that no parents wants [sic] for their child, that exception needs to be treated as just that—a rare exception. The defenders of spanking, like the deniers of climate change, size [sic] on the exceptions that agree with their opinions, and disregard the overwhelming body of evidence that does not.

E-mail from Murray A. Straus, Professor of Sociology and Co-Director, Family Research Laboratory, University of New Hampshire, to Nadine Block, Executive Director, Center for Effective Discipline, and Co-Chair, EPOCH-USA (End Physical Punishment of Children-USA) (Jan. 28, 2010, 4:52 PM) (on file with author). The expert also remarked that, from a methodological standpoint, the Gunnoe study did not meet “the ‘gold standard’ for research on spanking.” Id.

or criminal conduct, and decreased mental health.\textsuperscript{15} The scientific studies further show that there is negligible benefit from using the punishment.\textsuperscript{16} At most, a smack may cause the child to immediately cease misbehaving, but the cessation is always short-lived.\textsuperscript{17} The temporariness of the child’s obedience may stem from the fact that, as previously noted, one of the negative outcomes of the punishment may be, perversely, to impede moral internalization or the growth of conscience.\textsuperscript{18}

Applying a routine cost-benefit analysis to the foregoing data, and assuming that we care about children, the policy choice on whether society should encourage or discourage the punishment is clear: we should do everything in our power to spare the rod so as not to spoil the child’s healthy development.\textsuperscript{19} This conclusion is all the more compelling in light of the existence of non-violent disciplinary techniques, some of which are also more effective and less threatening to children’s interests than physical chastisement.\textsuperscript{20}

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ASS., Europe-Wide Ban on Corporal Punishment of Children, Doc. No. 10199 (June 4, 2004) (observing that corporal punishment frequently results in physical injury); Society for Adolescent Medicine, Position Paper, Corporal Punishment in Schools, 32 J. ADOLESCENT HEALTH 385, 389 (2003) (relating that corporal punishment of children has resulted in hematomas, abrasions, and whiplash).\textsuperscript{15} Gershoff 2002 review, supra note 13, at 543-44. \textit{See also} e.g., IRWIN A. HYMAN & PAMELA A. SNOOK, DANGEROUS SCHOOLS: WHAT WE CAN DO ABOUT THE PHYSICAL AND EMOTIONAL ABUSE OF OUR CHILDREN 48 (1999) (asserting the existence of a correlation between school corporal punishment and increased student aggression); Bender et al., \textit{supra} note 13, at 238-41 (reporting that corporal punishment of children is associated with their deteriorating mental health); Growth Trajectory, \textit{supra} note 13, at 290 (finding that parental corporal punishment of children is linked with increases in children’s antisocial behavior); N.L. Lopez et al., \textit{Parental Disciplinary History, Current Levels of Empathy, and Moral Reasoning in Young Adults}, 3 N. AM. J. PSYCHOL 193, 200-01 (2001) (determining that young adults, who had undergone corporal punishment during childhood, were apt to have low levels of empathy); Malhi & Ray, \textit{supra} note 13, at 224-25 (showing that adolescents whose parents corporally punished them displayed lower overall adjustment); Taylor et al., \textit{supra} note 13, at 1063 (ascertaining that mothers’ use of corporal punishment increased the risk for higher levels of child aggression).


18. \textit{See supra} notes 13, 15-17 and accompanying text. It has also been theorized that spanking may stun a child into momentary compliance borne of the child’s sense of outrage rather than on any lessons learned. \textit{See generally} e.g., WILLIAM SEARS & MARTHA SEARS, THE DISCIPLINE BOOK: EVERYTHING YOU NEED TO KNOW TO HAVE A BETTER-BEHAVED CHILD — FROM BIRTH TO AGE TEN 150 (1995); SAL SEVERE, \textit{HOW TO BEHAVE SO YOUR CHILDREN WILL, TOO!} 139 (2000).

19. For scholarly works, from various academic disciplines, which reach the same conclusion, \textit{see e.g.}, CORPORAL PUNISHMENT OF CHILDREN, \textit{supra} note 7, at 1-151 (international human rights law and morality); PHILIP GREVEN, SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE 46-47 (1991) (history); SUSAN M. TURNER, SOMETHING TO CRY ABOUT: AN ARGUMENT AGAINST CORPORAL PUNISHMENT OF CHILDREN IN CANADA, at xiii (2002) (philosophy); American Academy of Pediatrics, \textit{supra} note 14 (pediatrics).

20. \textit{See e.g.}, JAMES P. COMER & ALVIN F. POUSSAINT, RAISING BLACK CHILDREN 50 (1992) (reasoning); KATHARINE C. KERSEY, \textit{DON'T TAKE IT OUT ON YOUR KIDS! A PARENT'S GUIDE TO POSITIVE DISCIPLINE} 63-64 (1994) (letting the child suffer the logical consequences, within reason, of his or her misconduct); SEARS & SEARS, \textit{supra} note 18, at 181 (deprivation of privileges); SEVERE, \textit{supra}
Although the corporal punishment issue bears enormously on the experience of childhood, it is not necessarily all about the children. Indeed, in order to understand why the child’s right to be free of corporal punishment is the mother of all human rights, it avails much to look through a wider lens, which, beyond scrutiny of the findings discussed above, also permits consideration of the following three facts:

1. The increased aggression, increased antisocial and criminal predisposition, and increased mental instability, which may be produced by corporal punishment of minors, may also persist into and throughout their adulthoods;²¹

2. Corporal punishment of children has been largely a global phenomenon throughout human history, and, for the most part, still is so;²² and

3. In order for people to commit or tolerate atrocities and inhumane acts upon each other, it is to be expected that most perpetrators will have psychological characteristics of either increased

¹¹See Gershoff 2002 review, supra note 13, at 543-44. See also e.g., Greven, supra note 19, at 130-35 (linking childhood corporal punishment to depression upon reaching adulthood); Alice Miller, Breaking Down the Wall of Silence: The Liberating Experience of Facing the Painful Truth 86-87, 108-09, 111 (Simon Worrall trans., 1991) (tracing adult paranoia to experiencing childhood corporal punishment) [hereinafter “Wall of Silence”]; Alice Miller, For Your Own Good: Hidden Cruelty in Child-Rearing and the Roots of Violence 61, 65-66, 115-17, 172 (Hildegarde Hannum & Hunter Hannum trans., 1990) (theorizing that childhood corporal punishment may lead to the victims becoming more aggressive adults when such children grow up) [hereinafter “Hidden Cruelty”].

²²For discussion as to the probability that corporal punishment of children is a practice going back to mankind’s earliest years, see Jonathan Glover, Humanity: A Moral History of the Twentieth Century 41 (1999) (positing that prehistoric men were only apt to survive and gain dominance if they were superior at using their hunting skills to kill animals, including other human beings); Thomas Hobbes, Leviathan 83 (Penguin Books, 1985) (stating that, in a state of nature, men were brutish and used violence to achieve mastery over their children).

With respect to the global persistence of corporal punishment of children in the twenty-first century, see Global Initiative to End All Corporal Punishment of Children, States with Full Abolition (Aug. 2010), http://www.endcorporalpunishment.org/pages/frame.html (click “Global Progress” at left, then click “States with Full Abolition” at top) (listing the 28 nations which have totally outlawed corporal punishment of children) [hereinafter “Abolition”]. See also Felicity de Zulueta, From Pain to Violence: The Traumatic Roots of Destructiveness 212-18 (1993) (providing support for the conclusion that physical punishment of children is virtually universal).
aggressiveness, increased antisocial or criminal tendencies, increased mental instability, or some combination of these traits. 23

With the perspective an enlarged view facilitates, an epiphany of sorts coalesces and comes into focus. Since corporal punishment of children is correlated with such exacerbated aggression, antisocial or criminal leanings, and mental instability in adults, 24 and since the punishment has occurred and is occurring on almost a worldwide basis, 25 then for so long as the punishment is used, it follows that there will be an abundance of adults walking amongst us who exhibit this psychological profile. 26 Masses of adults who possess these traits effectively form a toxic pool from which the perpetrators of serious human rights violations, as well as those kindred spirits likely to turn a blind eye to the wrongdoing, have emerged and will continue to emerge. 27

Thus, safeguarding children from corporal punishment means safeguarding everyone from a higher incidence of human rights travesties. The child’s human right to be shielded from corporal punishment is nothing less than a hidden key to more vigorous, widespread enforcement of all human rights. Over the long haul, less corporal punishment of children augurs fewer people inclined to commit these transgressions and more people inclined to prevent and redress them. 28

One caveat is in order, however. It should be clarified that the “mother-of-all-human-rights” thesis advanced here is not offered as a panacea to all that ails the human race or to every human rights infringement. It would be simplistic in the extreme to contend otherwise. An array of political, economic, ideological, and other dynamics may also operate to make a brute of man. 29 But, these complexities do not change the portentously loaded

23. It should be self-evident that psychological characteristics such as enhanced aggressiveness, pronounced antisocial or criminal inclinations, increased mental instability, or a combination of any of the foregoing, enable people to perpetrate inhumane acts. For further discussion of this phenomenon, see e.g., CORPORAL PUNISHMENT OF CHILDREN, supra note 7, at 24-28. See also e.g., GREVEN, supra note 19, at 199, 201-04, 206-07; HIDDEN CRUELTY, supra note 21, at 62, 66-75, 79-84, 86-91, 115, 139-97, 242-43, 264-65.


25. See generally supra notes 7, 13, 14, 22 and accompanying text.


27. Id.

28. See CORPORAL PUNISHMENT OF CHILDREN, supra note 7, at 24-28 (contending that corporal punishment of children may, when those children reach adulthood, predispose them to commit, acquiesce in, or fail to protest the victimization of others). See also WALL OF SILENCE, supra note 21, at 81-113 (demonstrating through case studies how corporal punishment and other violence against children may lead these children, in turn, to grow up into perpetrators of mass violence).

29. The examples are legion of various political, economic, and ideological dynamics causing people to act inhumanely toward each other. See e.g., PAMELA CONSTABLE & ARTURO VALENZUELA, A NATION OF ENEMIES: CHILE UNDER PINOCHET 62 (1993) (noting that rabid anticommunism helped to
fact that corporal punishment of children gives rise to the requisite mindset for brutishness. It is as if corporal punishment of children and a chronic adult penchant for brutishness have been entwined together in a self-destructive and lockstep pas de deux, across national boundaries and over the millennia.

III. THE CHILD’S RIGHT TO BE PROTECTED FROM CORPORAL PUNISHMENT IS HARD INTERNATIONAL LAW

As of this writing, twenty-eight countries have outlawed all corporal punishment of children. They are Sweden, Finland, Norway, Denmark, Cyprus, Austria, Germany, Israel, Hungary, Romania, Iceland, Portugal, the Netherlands, New Zealand, Ukraine, Liechtenstein, Bulgaria, Croatia, Latvia, Spain, Uruguay, Greece, Venezuela, Republic of Moldova, Costa Rica, Tunisia, Poland, and Luxembourg. The rate of increase of nations adopting full bans has been growing exponentially. For example, in the twenty years between 1979 and 1999, eight nations had joined the abolitionist club, whereas in the ten years between 2000 and 2010, twenty more nations joined. Additionally, over 100 countries have at least banned the punishment from their schools. The United States, incidentally, is not on either list. It may be counterintuitive to most Americans, but only the twenty-eight abolitionist nations are in total compliance with international human rights law. The rest may accurately be termed “rogue states,” figuratively situated in a veritable axis of bad child-rearing praxis.

By my count, a minimum of six treaties prohibit all corporal punishment of children: (1) the Convention on the Rights of the Child (“Children’s Convention”); (2) the International Covenant on Civil and

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inspire Chile’s armed forces to support the tyrannical and abusive regime of Augusto Pinochet). See also e.g., JACK FISCHER, THE HOLOCAUST, at xxix, 6, 13, 79, 127 (1998) (remarking upon the racist ideological orientation of the Nazis); Roger Middleton, Piracy Symptom of Bigger Problem, BBC NEWS, April 15, 2009, http://news.bbc.co.uk/2/hi/africa/8001183.stm (reporting that the epidemic of Somali piracy is the result, in part, of ongoing poverty and political clashes).

30. See Abolition, supra note 22.
31. Id.
32. See id.
33. Id.
34. See id.
35. See generally Abolition, supra note 22.
Political Rights; 37 (3) the International Covenant on Economic, Social and Cultural Rights; 38 (4) the American Convention on Human Rights; 39 (5) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”); 40 and (6) the European Social Charter, 41 as updated by the European Social Charter (Revised). 42

Naysayers may, at this juncture, object that I have seriously overstated my case because a prohibition on corporal punishment of children does not explicitly appear in the texts of these treaties. 43 As any well-trained jurist knows, that alleged lacuna is not necessarily the end of the story; quite the contrary, it may be just the beginning of the legal analysis. Treaties, in a way similar to the U.S. Constitution or statutes, are subject to interpretation which can lead to recognition of unstated rights, duties, or powers flowing from explicit texts by reasoned inference. A classic example of this hermeneutic technique familiar to American lawyers is the U.S. Supreme Court’s reading of the Equal Protection Clause of the Fourteenth Amendment 44 in Brown v. Board of Education. 45 In that decision, the Court held that the Clause’s cryptic words barring states from denying “equal protection of the laws” 46 embrace an implied prohibition on de jure racial segregation of students in public elementary and secondary schools. 47

While there are similarities in the processes for construing treaties and the Constitution, 48 interpretation of treaties is uniquely governed by the

44. The Equal Protection Clause of the Fourteenth Amendment provides: “No State shall [...] deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
47. Brown, 347 U.S. at 495.
Vienna Convention on the Law of Treaties ("Treaty on Treaties"). Article 31 of the Treaty on Treaties spells out that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." The Treaty on Treaties defines "context" as a treaty's text, its preamble, and any annexes, plus certain other agreements, instruments, practices, and rules that relate to the treaty.

With respect to most of the human rights treaties mentioned above, interpretation of text is mainly the responsibility of treaty monitoring committees that were created pursuant to the terms of those treaties. A monitoring committee has the power to interpret only the particular treaty which created the committee, and may be thought of as an authorized interpreter of that treaty. Hence, the Committee on the Rights of the Child ("Children's Committee") may only construe and oversee the Children's Convention, the Committee Against Torture may only construe and oversee

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50. Id. art. 31, para. 1.
51. Id. art. 31, para. 2.
53. SMITH, supra note 52, at 66. This is not to say that there are not other authoritative bodies or persons interpreting these treaties. For example, the special procedures, adopted by the United Nations Human Rights Council, may entail interpretation of a profusion of human rights treaties, including those mentioned above. See generally 17th Annual Meeting of Special Procedures Mandate Holders of the Human Rights Council, June 28-July 2, 2010, Internal Advisory Procedure to Review Practices and Working Methods, http://www2.ohchr.org/english/bodies/chr/ special/index.htm. To take just one such special procedure, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has had many occasions to interpret the Torture Convention. See e.g., Forcible Return of Uighurs from Cambodia Sparks UN Experts' Concern, U.N. NEWS CENTRE, Dec. 22, 2009, http://www.un.org/apps/news/story.asp?NewsID=33325&Cr=china&Cr1=.
the Torture Convention, and so on. Committee interpretive pronouncements are usually issued in concluding observations and in general comments. Concluding observations are documents embodying a committee’s response to an individual state party’s periodic report on its treaty compliance efforts. General comments are not responsive to any particular state party, but are directed at all states parties concerning treaty meaning or other relevant matters. Both types of documents are available to the public at large.

These authorized treaty interpreters have repeatedly construed a range of express provisions in the above-mentioned treaties to interdict, tacitly, but nevertheless surely, all corporal punishment of children. Hundreds of concluding observations and multiple general comments reiterate this exegesis. For example, the committees have enunciated that the interdiction exists, by inference, in express treaty provisions such as those against cruel, inhuman, or degrading treatment or punishment;

54. See supra notes 36, 52 and accompanying text.
56. See SMITH, supra note 52, at 65.
57. See Mechlem, supra note 55, at 922, 926-30.
58. See generally e.g., University of Minnesota Human Rights Library, United Nations Documents, http://www1.umn.edu/humanrts/un-orgs.htm (last visited June 6, 2010) (follow hyperlinks listed under “Other Treaty-Based Committees”); SMITH, supra note 52, at 65 (noting that concluding observations are usually made public).
61. See supra note 13 and accompanying text.
protective of human dignity, and, those guaranteeing physical and mental health. It should be stressed that this is by no means an exhaustive enumeration of express treaty provisions in which the committees have discerned the interdiction.

Concluding observations and, especially, general comments are deemed authoritative and weighty. One would think, therefore, that given the avalanche of authoritative and weighty affirmations of this ilk, there could no longer be any dispute about whether international human rights law proscribes corporal punishment of children. Yet, it must be conceded that there is reason for continued naysaying; there is, in truth, a real snag in recognizing the proscription. The problem concerns the legal status of the exegetic pronouncements rendered by these authorized treaty interpreters.

International law scholars regularly classify monitoring committee interpretations of explicit treaty language as soft law, a designation of somewhat ambiguous import but usually meant to signify that the

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64. See supra notes 59-63 and accompanying text.


66. See infra notes 67-72 and accompanying text.

interpretations are not legally binding.\textsuperscript{68} This is in contrast to the treaty instruments themselves, which are, technically, legally binding on states parties thereto\textsuperscript{69} and therefore hard law.\textsuperscript{70} It is a bit fatuous and illogical to suggest that concluding observations and general comments hold this inferior rank when even hard-law human rights treaties are also honored more in the breach and are virtually impossible to enforce except through the pressure of public opinion.\textsuperscript{71} Regardless, naysayers seemingly struck gold with the soft-law argument, i.e., that the soft-law classification of concluding observations and general comments, taken in conjunction with a purported lack of express treaty language forbidding corporal punishment of children, must demonstrate that there is no hard international law against the punishment.\textsuperscript{72}

There are several counterarguments that underscore why such committee interpretations, (and certain other pertinent soft laws,) have consequential legal heft, even if, doctrinally, the interpretations are not hard law.\textsuperscript{73} I have advanced these counter-arguments in the past,\textsuperscript{74} and I do not retreat from them now. In my opinion, they will only gain strength as the international legal system develops. But, I need not regale you here with the counterarguments because, in the final analysis, they are superfluous. It turns out that there is, after all, hard international human rights law prohibiting corporal punishment of children.\textsuperscript{75} What is more, it is a hard-law prohibition that has been staring the legal community in the face for over twenty years.\textsuperscript{76} I cannot speculate as to the origins of other jurists’ analytical blindness; as for myself, I suspect that I may have succumbed to an acute case of erroneous groupthink.

The hard law to which I refer is set forth in article 19, paragraph 1 of the Children’s Convention, which declares as follows:

\begin{quote}
States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms
\end{quote}

\begin{thebibliography}{10}
\bibitem{68} Dinah Shelton, \textit{Law, Non-Law and the Problem of Soft-Law, in COMMITMENT AND COMPLIANCE, supra note 67, at 1,6.}
\bibitem{69} Id.
\bibitem{70} See Mary Ellen O’Connell, \textit{The Role of Soft Law in a Global Order, in COMMITMENT AND COMPLIANCE, supra note 67 at 100, 111-12.}
\bibitem{72} See supra notes 89-93 and accompanying text.
\bibitem{73} For a summary of some of the reasons why soft international law may have legal weight, see \textit{Poverty of Precedent, supra note 8, at 1384-86.}
\bibitem{74} Id.
\bibitem{75} See infra notes 76-108 and accompanying text.
\bibitem{76} See infra notes 77-95 and accompanying text.
\end{thebibliography}
of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.\footnote{Children’s Convention, supra note 36, art. 19, ¶ 1.}

I draw your attention to this provision’s unequivocal requirement that states parties must protect the child “from all forms of physical . . . violence.”\footnote{Id.} The simple fact is that if corporal punishment of children is axiomatically a form of physical violence, then article 19, paragraph 1 necessarily is hard treaty law outlawing the punishment. I have tentatively raised the feasibility of this reading in an earlier publication,\footnote{Poverty of Precedent, supra note 8, at 1386.} but I am now prepared to assert without qualification that it is the only reading possible – or words have no assigned meanings. Both the definition and inherent attributes of the punishment, as well as a straightforward linguistic parsing of the Children’s Convention, inescapably lead to this result.\footnote{See generally infra notes 83-95 and accompanying text.}

It will be recalled that the definition of corporal punishment of children is the use of “physical force upon a child’s body” in order to induce physical pain as an agent of penalization or behavior modification.\footnote{See supra note 7 and accompanying text.} Common sense and everyday life experience make obvious that physical force used in sufficient degree to induce somatic pain must be a form of physical violence, unless it is a salubrious invasive medical procedure. Were it not so, then corporal punishment would be merely a caress, a tickle, a hug, a tap, or an inadvertent grazing, and would lose all punitive value.\footnote{Poverty of Precedent, supra note 8, at 1332.}

The very language of Children’s Convention article 19, paragraph 1, considered in its ordinary meaning as required by the Treaty on Treaties’ rules on treaty interpretation,\footnote{Treaty on Treaties, supra note 49, art. 31, ¶ 1.} reflects this same perception. It cannot be emphasized enough that article 19, paragraph 1 expressly mandates protection of the child not just from “all forms of physical . . . violence,” but also from “injury or abuse.”\footnote{Children’s Convention, supra note 36, art. 19, ¶ 1.} The treaty drafters’ inclusion of both phrases leaves no alternative than to acknowledge that the “physical violence” in article 19 encompasses physical violence which does not always produce injury or which might not always, given traditional ways of thinking about child discipline, be deemed abusive. That is, the presence of both phrases

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\footnotetext{77. Children’s Convention, supra note 36, art. 19, ¶ 1.}
\footnotetext{78. Id.}
\footnotetext{79. Poverty of Precedent, supra note 8, at 1386.}
\footnotetext{80. See generally infra notes 83-95 and accompanying text.}
\footnotetext{81. See supra note 7 and accompanying text.}
\footnotetext{82. Poverty of Precedent, supra note 8, at 1332.}
\footnotetext{83. Treaty on Treaties, supra note 49, art. 31, ¶ 1.}
\footnotetext{84. Children’s Convention, supra note 36, art. 19, ¶ 1.}
betokens that the bar on physical violence incorporates a bar on all corporal punishment of children, including milder spankings.85

Perhaps, though, the kiss of death for the naysayers lies in the accumulated acumen and expertise of jurists as manifested in the criminal law of assault and battery, an archetypal crime of physical violence.86 Assault or battery (different states use one or the other term to refer to the same crime) may be accurately described as an “unlawful application of force to the person of another” resulting in “either a bodily injury” or, in some states, a mere “offensive touching.”87 Under the modern approach, exemplified by the Model Penal Code, in order to constitute criminal assault, the attack must cause “bodily injury,”88 defined as, among other things, “physical pain, illness or any impairment of physical condition . . . [.]”89 Even a “temporarily painful blow” to another will be a battery “though afterward there is no wound or bruise or even pain to show for it.”90 The perpetrator must also have the mental state of intending to cause bodily pain or injury to the victim.91

Even the lightest corporal punishment of children is characterized by the above-described elements of assault and battery.92 Corporal punishment of children is always, at the very least, a temporarily painful blow intended to chastise or modify behavior by causing bodily pain.93 And, why else would state legislators make so-called reasonable parental corporal punishment a defense to assault and battery charges94 unless lawmakers had in the first place identified such punishment as a criminal assault and battery?

In sum, analysis yields the following prosaic and yet revealing syllogism: the Children’s Convention, hard law, prohibits all forms of physical violence against children; corporal punishment of children is a

85. CORPORAL PUNISHMENT OF CHILDREN, supra note 7, at 55-56.
86. Id. at 5-6. See also Poverty of Precedent, supra note 8, at 1332.
88. MODEL PENAL CODE (U.L.A.) §211.1 (2001); LAFAVE, supra note 87, at 816 n.6.
89. MODEL PENAL CODE §210.0 (emphasis added).
90. LAFAVE, supra note 87, § 16.2, at 816.
91. Id.
92. See CORPORAL PUNISHMENT OF CHILDREN, supra note 7, at 5-6; see also Poverty of Precedent, supra note 8, at 1332.
93. See supra notes 7, 8, 13 and accompanying text.
94. See e.g., S.D. CODIFIED LAWS § 22-18-5 (2010). See also 2 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW §10.3(a), at 136-37 (2d Ed. 2003); AM. JUR. 2d Assault and Battery § 28 (2010) (stating that “a parent, or one acting in loco parentis, does not [perpetrate] a criminal assault and battery by [administering reasonable] corporal punishment on a person subject to the [punisher’s] authority”).
form of physical violence against them; hence, there is hard international law prohibiting corporal punishment of children.

It is to be anticipated that some naysayers will still not be convinced, even by the foregoing syllogism. For these holdouts, the syllogism would actually be proof positive that the international law against the punishment is of the soft variety. Their probable reasoning would run something like this: the syllogism exposes the necessity of making inferences from article 19, paragraph 1’s express words for purposes of divining an included implied proscription on corporal punishment; and, the necessity of making these inferences has thus far fallen principally to the Children’s Committee, a promulgator of soft-law interpretations of the Children’s Convention, ergo, the proscription on corporal punishment deduced by the Committee must be soft law.

Such a construct admittedly has some surface appeal. Yet, I am confident that it ultimately will fail because this line of reasoning, if accepted, would end up making a mockery of most human rights treaty language. It is the nature of language, in treaties and elsewhere, that some words and phrases are so broad or inclusive as to be what I have dubbed “omnibus words.” An omnibus word may contain one or more self-evident implied meanings in the form of concretized itemizations or examples of that word. It is critically important to note that I am referring here solely to implied meanings which are truly self-evident rather than to any which require genuine substantive deductions. Indeed, as conceived here, self-evident implied meanings are so evident that they would hold a tautological relationship with the parent omnibus word but for the

95. See generally supra notes 54-94 and accompanying text. Aside from penal statutes’ justification of assault and battery for parental infliction of reasonable corporal punishment on their children, there are other sources indicating that physical violence includes corporal punishment of children. See e.g., The Secretary-General, Report of the Independent Expert for the United Nations Study on Violence Against Children, submitted pursuant to General Assembly Resolution 60/321, transmitted by note of the Secretary General, ¶¶6, 26, 50, U.N. Doc. A/61/299 (Aug. 29, 2006).
96. See infra notes 97-108 and accompanying text.
97. See supra notes 52-57 and accompanying text.
98. See Poverty of Precedent, supra note 8, at 1381-83; cf. Alex Glashausser, What We Must Never Forget When It Is a Treaty We Are Expounding, 73 U. Cin. L. Rev. 1243, 1300-02 (2005) (pointing out that the “diplomatic purpose” of most treaties is not served by strict textualism, even in relation to provisions which the parties intended to be legally effective). Some legal scholars would even claim that, with respect to most texts, “interpretation is inescapable” and that “[i]t seems interpretation is necessary to apply core texts to real world situations[.]” See e.g., Frank S. Ravitch, Interpreting Scripture/Interpreting Law, 2009 MICHIGAN ST. L. REV. 377, 381.
99. See Poverty of Precedent, supra note 8, at 1381-83.
100. In referring to implied meanings which are self-evident, I am not suggesting such an implied meaning is the sole meaning possible. Indeed, the Treaty on Treaties’ standard, that interpretation must hew to the ordinary meaning of a treaty term or phrase, does not in any way signify that such meaning must be the only one possible. See RICHARD GARDINER, TREATY INTERPRETATION 164 (2008).
circumstance that each itemized implied meaning is narrower in scope than its parent. For instance, “cooking” is an omnibus word that encompasses self-evident implied meanings of scrambling an egg, grilling a steak, or boiling a lobster; “sports” is an omnibus word that includes self-evident implied meanings of basketball, baseball, or badminton; and, “all forms of physical violence” is an omnibus phrase that includes self-evident implied meanings of murder, waterboarding, and corporal punishment of children.

What is true of language in general is all the more true with respect to omnibus word(s) in treaties. It should be remembered that article 31 of the Treaty on Treaties instructs that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given” to the treaty’s terms.101 Article 31 conveys that explicit treaty language is not supposed to be interpreted in an antiseptic, arcane, or crabbed manner, devoid of the self-evident richness of its ordinary meaning.102 Accordingly, the self-evident richness of explicit omnibus treaty language must include the language’s self-evident implications as constitutive of the hard treaty instrument, even if the interpreter identifying those implications is a treaty monitoring committee (or any other authorized treaty interpreter). Otherwise the Treaty on Treaties’ instructions to treaty interpreters would frequently end up denuding the documents of much of their hard-law content.

The risk of unnecessarily eviscerating international law via such indiscriminate analysis is particularly pronounced in relation to human rights treaties which are typically couched in vague, cryptic, or sweeping prose.103 Distinguishing between self-evident implications and non-self-evident implications of black-and-white treaty language and only allowing the former to operate as an integral part of hard treaty law should significantly operate to rescue human rights treaties, or large portions thereof, from perpetually degenerating into soft law. The opposite approach — the one producing the erroneous groupthink referred to above — gratuitously disserves and weakens the human rights system, an unintended consequence the world can ill afford.

101. Treaty on Treaties, supra note 49, art. 31(1).
Thus, the Children’s Convention’s explicit reference to “all forms of physical . . . violence” must be construed consonant with the self-evident richness of the phrase’s ordinary meaning to implicitly include corporal punishment of children. Thus, on this basis alone, the express prohibition in the Children’s Convention on all forms of physical violence constitutes a hard-law prohibition on corporal punishment of children.

Though a pristine ordinary-meaning analysis is more than sufficient to manifest the existence of such hard law, the Treaty on Treaties does not insist on this degree of interpretive purity. Article 31 of that instrument instead states that the ordinary meaning of treaty terms may also be informed by “their context” and “in light of its [the treaty’s] object and purpose,” with “context” understood to include the treaty’s text.

When these sources are consulted in relation to the Children’s Convention, it turns out that they obligingly reinforce the conclusion that article 19 of the Children’s Convention provides a hard-law interdiction on corporal punishment of children. The Children’s Convention is, of course, a human rights treaty; that is, in the broadest sense, the Convention’s context and object and purpose. When a treaty protects the rights of individuals (nonparties), as human rights treaties do, the recommended practice is to liberally interpret the treaty in favor of the express or implied rights contained therein. Otherwise, interpretation of the treaty language’s ordinary meaning would inevitably be antithetical to the treaty’s context and object and purpose of securing individuals’ human rights. Like a grace note embellishing the last bar of a coda, then, interpreting article 19 of the Children’s Convention, so as to favor the article’s express and implied rights, can only enhance and accentuate the hard-law reality of the child’s human right to be free of corporal punishment.

IV. CONCLUSION

It is reassuring to discover that we have it within our power to make the earth a less scary place. Havoc, cruelty, bloodshed, and much of the other

104. Treaty on Treaties, supra note 49, art. 31(1).
105. Id. at art. 31(2).
106. See generally infra notes 83-95 and accompanying text.
unpleasantness attendant on the human spectacle need not be our destiny. We have ever possessed a master key to help us find our better selves: abolishing corporal punishment of children. It is a credit to the legal profession that at its behest, and with uncanny prescience and enlightenment, abolition of the rod has come to be mandated by hard international law.