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# Spare the Rod, Embrace Human Rights: International Law's Mandate Against All Corporal Punishment of Children

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# SPARE THE ROD, EMBRACE HUMAN RIGHTS: INTERNATIONAL LAW'S MANDATE AGAINST ALL CORPORAL PUNISHMENT OF CHILDREN

SUSAN H. BITENSKY\*

If your adult neighbor engaged in annoying or objectionable behavior, would you hit him? Probably not. What if that neighbor had less than average adult physical or mental abilities? Given his relative vulnerability, you would be even less likely to “knock” some sense into him. And, if you loved that neighbor as if he were a family member, hitting him would seem a downright bizarre way of dealing with the situation. Now, imagine that the offender is your child—typically a person of less than average adult abilities and a person whom you love as a family member. Would you hit him?<sup>1</sup> Many American parents would do so with the conviction that responsible child rearing requires no less.

Many adults were spanked as children, and most American children continue to be spanked.<sup>2</sup> It is generally assumed in our society that parents, and in some jurisdictions, teachers, should be able to spank

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1. Cf. Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 435 (1998) (setting forth a similar hypothetical problem).

2. *Id.* at 354, 355 & n.3.

children as a corrective or educational measure—as long as the spanking does not rise to the level of child abuse as traditionally conceived.<sup>3</sup> This assumption owes much of its vitality to the role of law: forty-nine states permit parents to use “reasonable” corporal punishment on their offspring,<sup>4</sup> and approximately half of the states permit educators to do the same to students.<sup>5</sup> Indeed, in *Ingraham v. Wright*,<sup>6</sup> the U.S. Supreme Court ruled in 1977 that the Eighth Amendment’s prohibition against cruel and unusual punishment does not apply to the paddling of students by school personnel.<sup>7</sup>

Does this normative and legal context mean that you should answer my hypothetical question in the affirmative? Could something so commonplace, and legally acceptable to boot, be wrong? What, after all, is the big deal? We’re not talking genocide or the rack. A smack or two on a toddler’s bottom is not exactly a human rights issue, is it?

True. Spanking is not genocide or the rack. But, pain is pain, harm is harm, and unfair treatment is unfair treatment, especially when the victim is as small, weak, and helpless as children tend to be in comparison to adults. Imagine the situation from the child’s perspective. An adult upon whom she is utterly dependent, and whom she desperately wants to love, looms on the child’s horizon glowering, threatening. Fear and panic grip the child. Then comes the blow—a blow that hurts the body and mortifies the ego. But there is nothing that the child can do to palliate the pain and indignity. There is no recourse against this exercise of raw power. You see, once we look at things from children’s viewpoint and empathize with children as full-fledged human beings capable of being wounded in body and soul, logic inexorably drives us to the realization that corporal punishment is experienced by children in the same way that other human rights violations are experienced by adults.

To be less impressionistic and more analytical, corporal punishment of children is a human rights issue for three reasons. First, corporal punishment hurts. By definition, spanking is intended to cause pain as a way of controlling, modifying, or punishing a child’s conduct.<sup>8</sup>

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3. *Id.* at 358 & n.7.

4. *Id.* at 355, 356 & n.5.

5. *Id.* at 355 & n.4.

6. 430 U.S. 651 (1977) (5-4 decision).

7. *Id.* at 664.

8. See JAMES DOBSON, *THE STRONG-WILLED CHILD: FROM BIRTH THROUGH ADOLESCENCE* 47 (1978); J. RICHARD FUGATE, *WHAT THE BIBLE SAYS ABOUT . . . CHILD TRAINING* 136 (1980); PHILIP GREVEN, *SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE* 122-23 (1991);

Corporal punishment is intended to cause pain based on the premise that the discomfort itself will induce the child to alter bad behavior.<sup>9</sup> For the corporal punisher, pain is indispensable to correcting behavior. Torturers proceed upon the same assumption: pain is essential to extracting information or intimidating the opposition. Such intentional infliction of pain is the very stuff of which human rights violations are made.<sup>10</sup> Worse still, its use to correct children is specious. Most child care experts agree that spanking does nothing to further the main disciplinary goals of developing the child's conscience and preference for peaceful conflict resolution; in contrast, reasoning with the child and nonviolent punishments such as deprivation of privileges are regarded as much more effective for these purposes.<sup>11</sup>

Second, corporal punishment of children is a human rights issue because such punishment causes serious harm, even beyond inflicting pain, both during childhood and later in the victim's life. As an invasion of their bodily integrity, children experience corporal punishment with a sense of degradation and humiliation.<sup>12</sup> Such suffering is compounded by the fact that children are helpless to alleviate their situation. An adult who is smacked can vent his anger by smacking back or calling the police. A child who is smacked usually has no option but to repress his anger—either because he cannot conceptualize what is happening to him<sup>13</sup> or because an outbreak of anger could elicit adult re-

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MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES 5, 7, 9-10 (1994).

9. See Bitensky, *supra*, note 1 at 359.

10. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted*, Dec. 10, 1984, arts. 1(1), 16(1), S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Torture Convention] (entered into force for the United States Nov. 20, 1994). For example, article 1(1) of the Torture Convention provides, in pertinent part, that "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is *intentionally* inflicted on a person." *Id.* at art. 1(1) (emphasis added).

11. See PETER NEWELL, CHILDREN ARE PEOPLE TOO: THE CASE AGAINST PHYSICAL PUNISHMENT 19 (1989); NANCY SAMALIN, LOVING YOUR CHILD IS NOT ENOUGH: POSITIVE DISCIPLINE THAT WORKS 74 (1987); STRAUS, *supra* note 8, at 100.

12. See JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 73-74 (1979); ALICE MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE 17 (1990); NEWELL, *supra* note 11, at 12; WILLIAM SEARS & MARTHA SEARS, THE DISCIPLINE BOOK: EVERYTHING YOU NEED TO KNOW TO HAVE A BETTER-BEHAVED CHILD - FROM BIRTH TO AGE TEN 152 (1995).

13. See GREVEN, *supra* note 8, at 19; J. KONRAD STETTbacher, MAKING SENSE OF SUFFERING: THE HEALING CONFRONTATION WITH YOUR OWN PAST 28 (1991); Dean M.

taliation.<sup>14</sup> The anger is then later expressed when it is "safe" in the form of self-destructiveness and/or destructiveness towards others. Thus, spanking may cause children to experience such inward-turning syndromes as depression,<sup>15</sup> withdrawal,<sup>16</sup> anxiety,<sup>17</sup> and tension.<sup>18</sup> Spanking may also cause children to exhibit such outward-turning syndromes as aggressiveness,<sup>19</sup> antisocial behavior,<sup>20</sup> and decreased empathy for others.<sup>21</sup> Corporal punishment can also induce physiological responses such as headaches and stomachaches,<sup>22</sup> and is often a prelude to more severe child abuse with attendant physiological injuries.<sup>23</sup>

However, some of the most ominous ramifications of corporal punishment of children are manifested when children who have felt the rod reach adulthood. Analysis by respected psychologists as well as recent neurobiological studies<sup>24</sup> reveals that spanking a child is all too

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Herman, *A Statutory Proposal to Prohibit the Infliction of Violence upon Children*, 19 FAM L.Q. 1, 21 (1985).

14. See GREVEN, *supra* note 8, at 123; PENELOPE LEACH, *YOUR GROWING CHILD: FROM BABYHOOD THROUGH ADOLESCENCE* 224 (1996); ALICE MILLER, *BREAKING DOWN THE WALL OF SILENCE* 55 (Simon Worrall trans., Dutton Books 1991).

15. See IRWIN A. HYMAN, *READING, WRITING, AND THE HICKORY STICK: THE APPALLING STORY OF PHYSICAL AND PSYCHOLOGICAL ABUSE IN AMERICAN SCHOOLS* 43 (1990); ALICE MILLER, *THE DRAMA OF THE GIFTED CHILD* 43 (1994); NEWELL, *supra* note 11, at 46.

16. See GREVEN, *supra* note 8, at 350; HYMAN, *supra* note 15, at 94, 100; SEARS & SEARS, *supra* note 12, at 148, 152.

17. See GREVEN, *supra* note 8, at 122-23; HYMAN, *supra* note 15, at 94, 99-100.

18. See HYMAN, *supra* note 15, at 945, 100; *cf.* Herman, *supra* note 13, at 39 (asserting that spanking induces compliance by children due to fear of their parents).

19. See LEACH, *supra* note 14, at 224; SEARS & SEARS, *supra* note 12, at 154; STRAUS, *supra* note 8, at 22, 100; FELICITY DE ZULUETA, *FROM PAIN TO VIOLENCE: THE TRAUMATIC ROOTS OF DESTRUCTIVENESS* 218 (1993).

20. See Murray A. Straus et al., *Spanking by Parents and Subsequent Antisocial Behavior of Children*, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 764-67 (1997).

21. See GREVEN, *supra* note 8, at 127-29; Norma D. Feshbach, *The Effects of Violence in Childhood*, 2 J. CLINICAL CHILD PSYCHOL. 28, 30 (1973); *see also* MILLER, *supra* note 14, at 88 (describing how physical punishment by his parents during childhood was a factor contributing to Hitler's later callousness).

22. See HYMAN, *supra* note 15, at 95, 100.

23. See NEWELL, *supra* note 11, at 21-31; STRAUS, *supra* note 8, at 81-87, 90-97; DAVID A. WOLFE, *CHILD ABUSE: IMPLICATIONS FOR CHILD DEVELOPMENT AND PSYCHOPATHOLOGY* 51 (Developmental Clinical Psychology and Psychiatry Series No. 10, 1987).

24. For descriptions of the findings of such studies, *see* ROBIN KARR-MORSE & MEREDITH S. WILEY, *GHOSTS FROM THE NURSERY: TRACING THE ROOTS OF VIOLENCE* 33-45 (1997).

likely to produce an adult with lasting psychic misery and maiming. As the psychologist Alice Miller has explained:

What becomes of this forbidden and therefore unexpressed anger? Unfortunately, it does not disappear, but is transformed with time into a more or less conscious hatred directed against either the self or substitute persons, a hatred that will seek to discharge itself in various ways permissible and suitable for an adult.<sup>25</sup>

A correlation has been drawn, for instance, linking corporal punishment to such self-destructive adult disorders as depression,<sup>26</sup> obsessive-compulsive behavior,<sup>27</sup> dissociation,<sup>28</sup> and paranoia.<sup>29</sup> The same correlation has been found with respect to adult disorders that are destructive of others, such as aggressiveness,<sup>30</sup> authoritarianism,<sup>31</sup> and lack of empathy.<sup>32</sup> Obviously, some of these disorders have implications for society at large, as well as for the mental health of the individual who has been spanked. Aggressiveness, authoritarianism, and lack of empathy are the very personality traits that enable tyrants to tyrannize, and that allow millions of people to acquiesce in, or abet crimes against, humanity. Thus, spanking is a human rights issue in itself, and also because spanking creates the later predisposition to perpetrate human rights violations on a societal scale.

The third reason why corporal punishment implicates human rights concerns is because subjecting children to violence against which adults are protected is patently unfair as unequal treatment. To refer back to my opening hypothetical, if your beloved impaired adult neighbor misbehaved, there is little chance that you would swat him to cor-

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25. MILLER, *supra* note 12, at 61.

26. See GREVEN, *supra* note 8, at 130-35; STRAUS, *supra* note 8, at 67-79; Herman, *supra* note 13, at 39.

27. See GREVEN, *supra* note 8, at 135-41.

28. See GREVEN, *supra* note 8, at 148-68; *cf.* MILLER, *supra* note 15, at 30-38 (noting that if a child is compelled to follow parental dictates that do not serve the child's needs, the child may split feelings of need from the rest of his or her psyche and submerge such feelings).

29. See GREVEN, *supra* note 8, at 168-74; *cf.* MILLER, *supra*, note 14, at 86-87, 108-09, 111 (suggesting that paranoia, such as that exhibited by Adolf Hitler and Nicolae Ceausescu, may be caused by childhood beatings).

30. See GREVEN, *supra* note 8, at 126-67; MILLER, *supra*, note 12, at 61, 65-66, 115-17, 172; Herman, *supra* note 13, at 36.

31. See GREVEN, *supra* note 8, at 198-204; *see also* MILLER, *supra*, note 14, at 84-85; NEWELL, *supra* note 11, at 46.

32. See GREVEN, *supra* note 8, at 127-29; MILLER, *supra* note 12, at 79-83, 115.

rect his conduct. Your revulsion at such a course has its roots not only in common decency, but also in our laws. Every state has laws criminalizing assault and battery,<sup>33</sup> reflecting that society has repudiated swatting as a behavior modification or dispute resolution technique as between adults. Why should that moral standard change simply because the person on the receiving end is a child who is a student or our own flesh and blood? In light of children's vulnerability and dependency on their parents and teachers, subjecting one's own children or pupils to violence, and the dread of violence, is perhaps even less defensible than subjecting anyone else to such practices.

The reason why this disparate treatment has evolved may result from an antecedent and even more basic inequity in the way we view children. When parents spank children, they, unwittingly or not, presume that they own the children; otherwise, they would not feel free to do to their children that which cannot be done to people who are not "owned," i.e., physically attack the children.<sup>34</sup> The notion that anyone can be another's property is, of course, repugnant to basic human rights norms. It is telling that as historically oppressed peoples have liberated themselves from being legally categorized as the property of others, such liberation typically has engendered legal protection from physical chastisement. With the emancipation of confederate slaves, Caucasians could no longer legally beat African-Americans.<sup>35</sup> Likewise, American women ultimately achieved reform such that husbands could no longer legally beat their wives.<sup>36</sup> Perhaps if children were no longer regarded as parental chattel, they too would soon be spared the rod.

Because corporal punishment of children is a human rights issue, it should come as no surprise that international human rights law prohibits spanking children. Indeed, a number of the most revered human rights treaties and declarations have been authoritatively interpreted to this effect. The United States is not a party to several of these human

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33. See Bitensky, *supra* note 1, at 435 & n.407.

34. See *id.* at 438-39.

35. See Stephen Nissenbaum, *Lighting the Freedom Tree*, N.Y. TIMES, Dec. 25, 1996, at A17. (stating that "many abolitionists, loathing all forms of physical bondage and abuse of the powerless, also fought to end corporal punishment . . . [E]ducational reformers viewed the whipping of children in schools and at home as similar to the lashing of slaves."). For additional descriptions of the lashing of slaves, see JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 251 (1979).

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

rights conventions and in those conventions to which the United States is a party, there are complex issues of enforceability.

Assuming a worst-case scenario, that we are not bound to enforce, domestically, any of the relevant international laws, do we not ignore the international consensus at our peril? If the principle has been established in the international arena that spanking is a human rights violation, this principle should at least be taken into account if the United States is to formulate a position on this matter that is well considered and empirically sound. Certainly, the United States, as a self-proclaimed champion of human rights in other countries, owes it to our children to make policy on this matter that conforms to human rights laws, regardless of whether we consider ourselves legally obligated to follow those laws.

The strongest pronouncements on this subject may be found in the U.N. Convention on the Rights of the Child (Committee).<sup>37</sup> The Committee on the Rights of the Child is the body officially designated to monitor compliance with the Convention and, in so doing, issues authoritative interpretations of its provisions.<sup>38</sup> The Committee has taken the position that the Children's Convention as a whole is inconsistent with corporal punishment of children.<sup>39</sup> In fact, the Children's Convention contains at least eight specific provisions that are inconsistent with spanking. For example, Article 19, paragraph 1 states, in part, that nations must take "all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence . . . while in the care of parent(s), . . . or any other person who has the care of the child."<sup>40</sup> That Article 19 prohibits spanking would seem evident as a semantic matter since the provision requires nations to protect children from "all forms of physical . . .

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37. U.N. Convention on the Rts. of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., at 3, U.N. Doc. A/RES/44/25 (1989) [hereinafter *Children's Convention*].

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

39. See *Report on the Seventh Session*, U.N. Comm. on the Rts. of the Child, Annex 4, at 63, U.N. Doc. CRC/C/34 (Nov. 1994); see also Bitensky, *supra* note 1, at 392 & n.193.

40. *Children's Convention*, *supra* note 37, art. 19(1), at 10.

violence."<sup>41</sup> The Committee on the Rights of the Child sees it this way as well.<sup>42</sup>

The Committee has also repeatedly relied on Articles 28 and 37 of the Children's Convention as a basis for criticizing countries that have not repudiated corporal punishment of children. Article 37, paragraph (a) provides, in part, that, "States Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."<sup>43</sup> Marta Santos Pais, a former rapporteur of the Committee, has explained that it is too narrow a reading of Article 37 to identify torture only with "extremely serious and massive cases."<sup>44</sup> She noted that torture undoubtedly might include "a disciplinary measure [that] may be degrading or inhuman."<sup>45</sup>

Article 28, paragraph 2 of the Children's Convention provides that, "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."<sup>46</sup> The Committee on the Rights of the Child has read Article 28, paragraph 2 as requiring nations to take measures proscribing corporal punishment in the schools.<sup>47</sup> Such a reading ensures that school discipline is "in conformity with the . . . Convention" because other parts of the Con-

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41. See Bitensky, *supra* note 1, at 394.

42. See, e.g., *General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(b), of the Convention*, U.N. GAOR, Comm. on the Rts. of the Child, 343d mtg., U.N. Doc. CRC/C/58 (1996); *Concluding Observations of the Committee on the Rights of the Child: Zimbabwe*, 12th Sess., ¶ 18, U.N. Doc. CRC/C/15/Add. 55 (1996) [hereinafter *Concluding Observations on Zimbabwe*]; *Concluding Observations of the Committee on the Rights of the Child: Sri Lanka*, 9th Sess., ¶¶ 15, 32, U.N. Doc. CRC/C/15/Add. 40 (1995); *Concluding Observations of the Committee on the Rights of the Child: Canada*, 9th Sess., ¶¶ 14, 25, U.N. Doc. CRC/C/15/Add. 37 (1995) [hereinafter *Concluding Observations on Canada*]; *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, 8th Sess., ¶ 31, U.N. Doc. CRC/C/15/Add. 34 (1995) [hereinafter *Concluding Observations on the United Kingdom*].

43. Children's Convention, *supra* note 37, art. 37(a), at 17.

44. Marta Santos Pais, Address at the International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (Dublin, Ireland, Aug. 22, 1996) (transcript on file with *University of Michigan Journal of Law Reform*).

45. *Id.*

46. Children's Convention, *supra* note 37, art. 28(2), at 14.

47. See *Concluding Observations on Zimbabwe*, *supra* note 42, at ¶ 18; *Concluding Observations on Canada*, *supra* note 42, at ¶ 25; *Concluding Observations on the United Kingdom*, *supra* note 42, at ¶ 31.

vention outlaw corporal punishment of children.<sup>48</sup> Such a reading also is “consistent with the child’s human dignity,” since being physically attacked as a matter of right reduces the child to chattel, a subhuman status that is inherently demeaning.<sup>49</sup>

Article 28, paragraph 2 is not the only provision of the Children’s Convention protective of the child’s dignity. For example, the preamble to the Children’s Convention extols “the inherent dignity . . . of the human person,”<sup>50</sup> and the need for children to be raised “in the spirit of . . . dignity.”<sup>51</sup> Judith Karp, Chair of the Committee on the Rights of the Child, categorically stated that, “Physical punishment is a form of violation of the human dignity of the child.”<sup>52</sup>

In addition to finding a ban on corporal punishment in Articles 19, 28, and 37, and in the provisions on dignity, the Committee has located the ban in at least three other provisions of the Children’s Convention as well.<sup>53</sup> First, the right to be free of corporal punishment is protected by the Convention’s nondiscrimination principle in Article 2, paragraph 1.<sup>54</sup> The idea is that the principle forbids justifying corporal punishment of children simply because they hold the status of children.<sup>55</sup> Second, the Committee has advised that spanking is barred by the insistence on the primacy of the best interests of the child in Article 3, paragraph 1 of the Children’s Convention.<sup>56</sup> Third, the Committee has also discerned a

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48. See Bitensky, *supra* note 1, at 397.

49. Cf. *id.* at 398 (stating that corporal punishment of children is inconsistent with human dignity).

50. Children’s Convention, *supra* note 37, preamble.

51. *Id.*

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

53. See Bitensky, *supra* note 1, at 398.

54. The principle is that “States Parties shall respect and ensure the rights set forth in the present Convention to each child . . . without discrimination of any kind, irrespective of the child’s . . . status.” Children’s Convention, *supra* note 37, art. 2(1), at 5.

55. See Bitensky, *supra* note 1, at 398-99; see also *Concluding Observations of the Committee on the Rights of the Child: Nepal*, 12th Sess. ¶ 19, U.N. Doc. CRC/C/15/Add. 57 (1996) [hereinafter *Concluding Observations on Nepal*]; *Concluding Observations of the Committee on the Rights of the Child: Senegal*, 10th Sess. ¶ 24, U.N. Doc. CRC/C/15/Add. 44 (1995) [hereinafter *Concluding Observations on Senegal*]; Santos Pais, *supra* note 44.

56. The provision states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Children’s Convention, *supra* note 37, art. 3(1), at 5. The Committee on the Rights of the Child has repeatedly taken the position that article 3, paragraph 1 implic-

prohibition on corporal punishment in the assurance of Article 12, paragraph 1 that the child should be allowed to participate in all matters affecting his or her life.<sup>57</sup> Ms. Santos Pais elucidated that participation implies dialogue and peaceful conflict resolution, thereby excluding violent solutions to family differences.<sup>58</sup>

The Children's Convention was not woven from whole cloth, but rather, builds upon and elaborates protections for children who are contained in earlier international human rights instruments. The Universal Declaration of Human Rights,<sup>59</sup> the International Covenant on Civil and Political Rights,<sup>60</sup> and the American Convention on Human Rights<sup>61</sup> have also been authoritatively construed to ban corporal punishment of children. Scholars have found the ban to exist implicitly in provisions of these instruments protecting human dignity,<sup>62</sup> personal security,<sup>63</sup> and privacy.<sup>64</sup>

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itly forbids spanking. *See Concluding Observations on Senegal, supra* note 55 at ¶ 24; *Concluding Observations on Canada, supra* note 43, at ¶ 25; *Concluding Observations on the United Kingdom, supra* note 42, at ¶ 31; *see also Santos Pais, supra* note 44.

57. The provision state that, "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Children's Convention, *supra* note 37, art. 12(1), at 8. The Committee on the Rights of the Child has construed article 12, paragraph 1 as prohibitive of corporal punishment of children. *See Concluding Observations on Senegal, supra* note 55, at ¶ 24.

58. *See also Santos Pais, supra* note 44.

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

60. *International Covenant on Civil and Political Rts., opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1967) (ratified by the United States on June 8, 1992, *see UNITED NATIONS MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 1995*, at 198 (1996)) [hereinafter *Civil and Political Rights Covenant*].

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

62. The Universal Declaration provides that "[a]ll human beings are born free and equal in dignity and rights." *Universal Declaration, supra* note 59, art. 1. The American Convention states that "[e]veryone has the right to have . . . his dignity recognized." *American Convention, supra* note 61, art. 11(1), at 148. For interpretations that these provisions may be construed to outlaw corporal punishment of children, *see Bitensky, supra* note 1, at 404; *Santos Pais, supra* note 44.

63. The Universal Declaration protects "security of person." *Universal Declaration, supra* note 59, art. 3, at 72. The same guarantee appears in the *Civil and Political Rights Covenant*. *Civil and Political Rights Covenant, supra* note 60, art. 9(1), at 175. It is included as well in the *European Convention on the Protection of Human Rights and Fundamental Freedoms*. *European Convention on the Protection of Human Rights*

Although the ban on corporal punishment of children is, therefore, firmly established in international human rights law, it also is not accurate to say that every provision of every document bearing on the subject gives rise to an absolute prohibition. For example, Article 7 of the Civil and Political Rights Covenant, which forbids torture or cruel, inhuman or degrading treatment or punishment,<sup>65</sup> has been interpreted to extend only to *excessive* physical chastisement.<sup>66</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms contains a similar provision at Article 3.<sup>67</sup> On September 23, 1998, the European Court of Human Rights issued a ruling in *A v. The United Kingdom*,<sup>68</sup> that had the effect of limiting Article 3's applicability only to corporal punishment that attains a minimum level of severity.<sup>69</sup>

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and Fundamental Freedoms, *done on* Nov. 4, 1950, art. 5(1), at 226, 213 U.N.T.S. 221 [hereinafter European Convention]. The American Convention contains similar language to the effect that "[e]very person has the right to have his physical, mental, and moral integrity respected." American Convention, *supra* note 61, art. 5(1), at 146. For interpretations that these provisions establish children's right to be free of corporal punishment, *see* Bitensky, *supra* note 1, at 412; Cynthia Price Cohen, *Freedom from Corporal Punishment: One of the Human Rights of Children*, N.Y.L. SCH. J. HUM. RTS. 95, 119 (1984); Santos Pais, *supra* note 44.

64. American Convention, *supra* note 61, art. 11(2)-(3), at 148 (stating that "[n]o one may be the object of arbitrary or abusive interference with his private life [or] his family" and that "[e]veryone has the right to the protection of the law against such interference"); Civil and Political Rights Covenant, *supra* note 60, art. 17(1) - (2), at 177 (providing that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy [or] family" and that "[e]veryone has the right to the protection of the law against such interference"); Universal Declaration, *supra* note 59, art. 12, at 73 (asserting that "[n]o one shall be subjected to arbitrary interference with his privacy [or] family"). For interpretations that these provisions protect children from corporal punishment, *see* GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 251 (International Studies in Human Rights Vol. 35, 1995); Bitensky, *supra* note 1, at 412.

65. Civil and Political Rights Covenant, *supra* note 60, art. 7, at 175.

66. *See Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Hum. Rts. Comm., General Comment 20, ¶¶ 2, 5, U.N. Doc. HRI/GEN/1/Rev. 2 (1996) (intimating that article 7 of the Civil and Political Rights Covenant proscribes excessive corporal punishment).

67. European Convention, *supra* note 63, art. 3, 213 U.N.T.S. at 224 (stating that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment").

68. *A v. The United Kingdom*, 1998 Y.B. Eur. Conv. on H.R. (Eur. Ct. H.R.) (visited Apr. 11, 1999) <<http://www.dhcour.coe.fr/>>.

69. *See id.*

The case arose when an adult hit his nine-year-old stepson's buttocks and legs with a stick so as to cause bruises and welts.<sup>70</sup> The stepfather was charged with assault under English law.<sup>71</sup> His defense was that the caning constituted reasonable corporal punishment of a very difficult boy.<sup>72</sup> After a jury acquitted the stepfather,<sup>73</sup> the boy sought relief from the European Human Rights Court, alleging, among other things, that Britain's legitimization of this corporal punishment, through the acquittal, violated Article 3 of the European Convention.<sup>74</sup> The European Court ruled that the government violated the Convention because the caning in this case reached the minimum level of severity prohibited by Article 3.<sup>75</sup>

While *A v. The United Kingdom* means that, as of yet, Article 3 of the European Convention does not outlaw all spanking, the decision does represent some grudging progress in the direction of a total ban. It is the first time that the European Court has held that parental, in addition to scholastic<sup>76</sup> or judicially mandated,<sup>77</sup> corporal punishment comes within the purview of Article 3. Also, the court found that a spanking accepted by an English jury as reasonable violates Article 3, indicating that the level of severity required to violate that provision may not be great.

Interpretations of Article 7 of the Civil and Political Rights Covenant, and Article 3 of the European Convention must, however, be put in context. The interpretations are of a single provision appearing in two treaties. They do not change the fact that other provisions of international human rights instruments, and especially of the Children's Convention, are understood to outlaw *all* corporal punishment of children.

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70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See, e.g., Costello-Roberts v. United Kingdom*, 1993 Y.B. Eur. Conv. on H.R. (Eur. Ct. of H.R.) 172, 172-74 (5-4 decision) (ruling that a headmaster did not violate article 3 of the European Convention by hitting a seven-year-old student three times on his clothed buttocks with a rubber-soled gym shoe, but observing that a school-administered punishment that does not have any severe or long-lasting effects could still fall within the ambit of article 3).

77. *See, e.g., Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 6-9, 17 (1978) (holding that when authorities inflicted a judicially mandated birching on a fifteen-year-old, they violated article 3 of the European Convention).

Of course, announcing exalted principles of human rights law is one thing; making practical applications of those principles is quite another. Can the international law principle against spanking realistically be transformed into national policy and practice? The Committee on the Rights of the Child clearly thinks so.<sup>78</sup> It has urged nations to engage in education campaigns against corporal punishment of children and to enact legislation prohibiting such punishment.<sup>79</sup> Lest the latter recommendation should appear unworkable or outlandish, it should be noted that eight nations have already enacted statutes against all corporal punishment of children, and one nation has achieved the same end by judicial decision. Sweden led the way with a statute adopted in 1979.<sup>80</sup> Finland,<sup>81</sup> Norway,<sup>82</sup> Austria,<sup>83</sup> and Cyprus<sup>84</sup> followed with

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78. See U.N. Comm. on the Rts. of the Child, *supra* note 39.

79. *Id.*

80. Sweden's statute provides as follows: "Children are entitled to care, security and a good upbringing. They shall be treated with respect for their person and their distinctive character and may not be subject to corporal punishment or any other humiliating treatment." 6 kap. 1 § föräldrabalken (Swed.) [Swedish Children and Parents Code ch. 6, § 1] (Swedish Ministry of Justice trans.).

81. The Finnish law states that, "[a] child shall be brought up with understanding, security and gentleness. He shall not be subdued, corporally punished or otherwise humiliated. The growth of a child towards independence, responsibility and adulthood shall be supported and encouraged." Laki lapsen huollosta ja tapaamisoikeudesta, 1 luku, 1 §, 3 mom. [Finnish Child Custody and Right of Access Act, ch. 1, § 1, subsec. 3] (Finnish Dep't of Legislation, Ministry of Justice trans.).

82. Norway's enactment states that "[t]he child shall not be exposed to physical violence or to treatment which can threaten his physical or mental health." Endring i 1987 av barnelovens § 30, 3. ledd (Lov av 6. februar 1987 nr 11 om endring i barneloven § 30) [Norwegian Parent and Child Act art. 30, § 3, as amended by the Amending Act. no. 11, Feb. 6, 1987] (Finn Erik Engzelius trans.).

83. The Austrian statute provides as follows: "The minor child must follow the parents' orders. In their orders and in the implementation thereof, parents must consider the age, development and personality of the child; the use of force and infliction of physical or psychological harm are not permitted." § 146a ABGB [Austrian Civil Code § 146a] (Berlitz Translation Services trans.).

84. The Cypriot law not only forbids parental use of any force against children, but also makes it an offense even for violent behavior to take place in the presence of children. Cyprus' statute provides, in part, as follows:

3.1 (1) For purposes of this Law violence means any unlawful act or controlling behavior which results in direct actual physical, sexual or psychological injury to any member of the family and includes violence used for purposes of sexual intercourse without the consent of the victim as well as for [the] purpose of restricting its liberty.

. . . . (3) Any act or behavior constituting violence within the meaning of subsections (1) and (2) above or constituting an offense under sections 174, 175 and 177 of the Criminal Code, if it takes place in the presence of minor members of the family shall be considered as violence exercised against the said minor members of the family likely to

their own enactments during the 1980s. Italy's Supreme Court of *Cassazione* issued a ruling ending corporal punishment of children in that country in 1996.<sup>85</sup> Denmark, improving upon an earlier law discouraging spanking,<sup>86</sup> enacted an outright prohibition in 1997.<sup>87</sup> And, in 1998, Latvia and Croatia also joined the anti-spanking club.<sup>88</sup>

The actions taken above all come from Europe, and Europeans are different, aren't they? In Europe they serve their children wine at dinner, take six-week vacations, and think capital punishment is barbaric. But, the last I heard, Minnesota is not part of Europe. America's best-kept secret is that Minnesota also prohibits all corporal punishment of children.<sup>89</sup> This fact is not widely known because, unlike its European counterparts, Minnesota does not have a single statute that explicitly forbids spanking. Instead, the state's ban must be teased out of several statutory provisions which, when read together, reveal that corporal

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cause them psychological injury and such act or behavior constitutes an offense punishable under subsection (4) of this section. Act of June 17, 1997, Law 147(1), at 33(1), (3), OFFICIAL GAZETTE OF THE REPUBLIC OF CYPRUS No. 2886 (Leonidas Markides, Embassy of the Republic of Cyprus trans.)

85. *Cambria*, Cass., sez. VI, 18 marzo 1996 [Supreme Court of Cassation, 6th Penal Section, Mar. 18, 1996], *Foro It.* II 1996, 407 (Italy) (Translation by Triangle Translations on file with the *University of Michigan Journal of Law Reform*). According to Judge Ippolito, who authored the opinion on behalf of the Italian Supreme Court, the judges "considered the case as an opportunity to establish the legal principle that parents in Italy are absolutely forbidden from using any violence or corporal punishment to correct their children's conduct." Interview with Judge Francesco Ippolito, Judge of the Corte Suprema di Cassazione, Repubblica Italiana, in Rome, Italy (June 11, 1996).

86. The earlier Danish statute stated that "[p]arental custody implies the obligation to protect the child against physical and psychological violence and against other harmful treatment." Lov nr. 387 af 14. juni 1995 om forældremyndighed og samvær, jf. § 2, stk. 2 [Danish Act on Parental Custody and Conviviality no. 387, § 2, subsec. 2 (June 14, 1995)] (revision of 1985 law) (Kromann & Münter trans.), *quoted in* NEWELL, *supra* note 11, at 91.

87. The most recent Danish legislation on the subject of corporal punishment of children provides that "[t]he child has the right to care and security. It shall be treated with respect for its personality and may not be subjected to corporal punishment or any other offensive treatment." Lov nr. 416 om ændring af lov om forældremyndighed og samvær § 1 [Danish Act to Amend the Act on Parental Custody and Conviviality no. 416, § 1] (Kromann & Münter trans.).

88. *See Latvia and Croatia Join the Abolitionist States*, EPOCH WORLDWIDE (EPOCH-WORLDWIDE, London, England), Nov. 1998, at 2 (newsletter is on file with the author.)

89. MINN. STAT. ANN. § 609.06, subd. 1(6) (West Supp. 1997); MINN. STAT. ANN. § 609.379, subd. 1(a) (West 1978 & Supp. 1997); MINN. STAT. ANN. § 609.379, subd. 2 (West Supp. 1997); MINN. STAT. ANN. § 609.224, subds. 1(1)-(2) (West 1987); MINN. STAT. ANN. § 609.02, subd. 7 (West Supp. 1997).

punishment of children is considered an assault rather than a defense to assault charges as in other American jurisdictions.<sup>90</sup>

In sum, corporal punishment of children has all of the attributes of a gross human rights violation and is treated as such by international law. A trend has been evolving, especially in Europe, to make this international law principle operative at the national level. Obviously, when spanking is prohibited by law and becomes socially unacceptable, our children are spared fear-ridden, hurtful childhoods. Perhaps less obviously, but no less importantly, when spanking is abolished, the prospects for human rights in general become immeasurably brighter. We have it within our reach to humanize our species' psychological evolution and societal progress through nonviolent child-rearing. With the eradication of physical coercion as a child-rearing technique, future adults will not be as aggressive, authoritarian, or lacking in empathy. Our descendants will then be poised for an epochal psychological breakthrough: at last the human psyche will be free to shun the tyranny, cruelty, and crimes against humanity that have plagued past millennia. That is an empowering and stunning thought. It is an aspiration that should be a top priority for the twenty-first century.

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90. *Id.* The Minnesota statutes referred to above remove corporal punishment of children as a parental defense to assault charges. For a full description and analysis of these statutes, see Bitensky, *supra* note 1, at 386-88.

