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# The Right of Privacy and Minors' Confidential Access to Contraceptives

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## FREEDOM FROM CORPORAL PUNISHMENT: ONE OF THE HUMAN RIGHTS OF CHILDREN

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The United Nations Commission on Human Rights is presently drafting a Convention on the Rights of the Child. To facilitate this endeavor, members of the open-ended Working Group are using as their model a draft convention submitted to the Commission by Poland in the Fall of 1979.<sup>1</sup> Since the beginning of its deliberations concerning the Convention, the Working Group has adopted a preamble and eighteen articles. It has also received from participating and observing delegations and from non-governmental organizations recommendations for amendments and additions to the remaining, proposed fifteen articles.<sup>2</sup>

Unfortunately, the draft Convention has a glaring omission. Not one of the drafted or proposed articles addresses the subject of the discipline and punishment of children. Yet discipline and punishment can be integral parts of a child's daily life. Children are required to be obedient and often are subjected to correction at home, in school and at play. Those in authority use diverse methods to assure a child's compliance, ranging from pleasure to pain, including rewards, positive reinforcement, persuasion, mild rebukes, deprivation of privileges and corporal punishment.

The purpose of the Convention is to protect the rights of children from birth to approximately eighteen years of age.<sup>3</sup> Because children are the members of society most frequently subjected to disciplinary measures, it is imperative that the Convention contain an article establishing guidelines concerning appropriate disciplinary measures that may be used by parents, educators, and others in authority.

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1. U.N. Doc. E/CN.4/1349.

2. U.N. Doc. E/CN.4/1984/L. 1.

3. See *supra* note 1.

## I. CORPORAL PUNISHMENT AND CHILDREN

In order to prepare children to be responsible, functioning members of society, and to protect them from injuries, it is necessary to place restrictions on their behavior. For example, small children must be taught not to play with fire or dangerous objects, not to lean out of high windows, not to fall into water before they can swim, not to eat paint or to talk to strangers, and to obey their parents and other adults. As children mature they must attend school, dress and behave properly, do their homework assignments and, perhaps, work or carry out chores at home.

The tasks of child-rearing are difficult enough for a parent or teacher when the child is completely cooperative. But, when a child refuses to obey, or is "stubborn," the person in authority is faced with the problem of overcoming this resistance. Often this can be accomplished by simple persuasion. Sometimes, a reward or compliment can be a motivating factor. Unfortunately, when the resistance is very strong, all too often the chosen method of discipline is some form of corporal punishment.

Corporal punishment can be roughly defined as a painful, intentionally inflicted physical penalty, administered by a person in authority, for disciplinary purposes. It is accomplished by striking or hitting the child. Corporal punishment, typically, may occur in the home, school, playground, correctional facility, work place, orphanage, or religious institution. In previous centuries it was used as a method of punishing criminals, soldiers, sailors, slaves, servants, members of certain religious orders, and wives, as well as children.<sup>4</sup> Whipping, beating, paddling and flogging are forms of corporal punishment.

The history of childhood is not attractive. According to Lloyd de Mause, "the further back one goes in history, the more likely children are to be killed, abandoned, beaten, terrorized and sexually abused."<sup>5</sup> Over the centuries, babies were swaddled to keep them physically restrained, given up to wet nurses for feeding, and often abandoned by their parents, who either sold

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4. G. SCOTT, *THE HISTORY OF CORPORAL PUNISHMENT* (1983) at Parts II and III.

5. De Mause, *The Evolution of Childhood* in *THE HISTORY OF CHILDHOOD* 1 (L. de Mause ed. 1974).

them outright or sent them away for "their own good."<sup>6</sup> Although its frequency diminished after the Middle Ages, infanticide was commonplace well into the nineteenth century. De Mause states that "[e]ven though Thomas Coram opened his Foundling Hospital in 1741 because he couldn't bear to see the dying babies lying in the gutters and rotting on the dung-heaps of London, by the 1890's dead babies were still a common sight in London streets."<sup>7</sup>

Some authorities doubt that childhood, as we now know it, existed prior to the seventeenth century. For example, Richard Farson declares that "[b]efore the latter part of the Middle Ages there was no concept of childhood. Most languages had no words meaning child."<sup>8</sup> Prior to that period children, if they survived, were treated as small adults.<sup>9</sup>

About the time of the Reformation and Renaissance, children began to be separated from adults and viewed as clay to be "molded" by education and protected from bad influences in order to prepare them for adulthood.<sup>10</sup>

It is not possible to study the history of child-rearing without encountering descriptions of corporal punishment. The Bible contains many passages encouraging parents to correct their children's behavior with a "rod":

Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him. *Proverbs 22:15*.

Withhold not correction from the child; for if thou beatest him with the rod, he shall not die. *Proverbs 23:13*.

He that spareth his rod hateth his son; but he that loveth him chasteneth him betimes. *Proverbs 13:24*.<sup>11</sup>

Historians recount that corporal punishment of children was a common practice among Ancient Greeks as well as Hebrews. Both Homer and Horace are said to have been beaten by their tutors. The list of historical figures who were flogged in

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6. *Id.* at 32-34.

7. *Id.* at 29.

8. R. FARSON, BIRTHRIGHTS 17 (1974). See also P. ARIES, CENTURIES OF CHILDHOOD ch. 2 (1960).

9. *Id.* at 22.

10. *Id.* at 19.

11. See also A. MAURER & J. WALLENSTEIN, THE BIBLE AND THE ROD (1977).

childhood includes the children of monarchs and such notables as Rousseau, Rabelais, Erasmus, Milton, and Voltaire.<sup>12</sup>

Dr. Johnson is quoted as defending his schoolmaster, who was being prosecuted for cruelty, by saying, "[m]y master whipt me very well. Without that, sir, I should have done nothing." He went on to state that "no scholar has gone from him either blind or lame."<sup>13</sup>

Not all students were so fortunate. One Scottish schoolmaster was tried in 1699 for the murder of a student he had disciplined too vigorously.<sup>14</sup> The jury found the schoolmaster's three successive beatings to be the cause of the boy's death.<sup>15</sup>

Overzealous corporal punishment of children was not confined to the classroom. One notorious case involved the death of an orphan servant girl, Mary Clifford, who was vigorously flogged by her mistress, Elizabeth Brownrigg.<sup>16</sup> After Mary died, authorities discovered that Mrs. Brownrigg had regularly flogged the servant girls who worked for her. According to the account by Daniel Mannix:

They found that Mrs. Brownrigg used to strip the girls stark naked, hang them up by their wrists and then beat them with a horsewhip until she could no longer swing it. She would occasionally vary this routine by having her husband tie the girl on a bench and then lash her naked body with a cane until the blood squirted. The doctor who examined Mary thought she had been slashed to pieces with a knife.<sup>17</sup>

Mrs. Brownrigg was hanged at Tyburn on September 14, 1637.<sup>18</sup>

When it was most widely used, corporal punishment was not confined to any one country or age group. Whipping and flogging were standard criminal punishments among the French, Germans, Russians, English and Chinese, as well as among the Ancient Hebrews, Greeks and Romans.<sup>19</sup> Corporal punishment

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12. See *supra* note 4, at 95-98.

13. *Id.* at 97.

14. *Id.* at 98.

15. *Id.*

16. D. MANNIX, *THE HISTORY OF TORTURE* 127 (1964).

17. *Id.*

18. *Id.*

19. See *supra* note 4, at 38 and 55 ff.

was usually administered in public to deter future offenders, and was applied to children and adults. It is reported that in 1630 the City of London had sixty public whipping posts.<sup>20</sup>

London's infamous Bridewell prison was renowned for its "flogging parties." At Bridewell, watching women and girls being beaten was a sport and, for a tip to the warden, arrangements could be made to have the girls flogged on their bare buttocks, instead of merely being stripped to the waist.<sup>21</sup> In *Nell in Bridewell*, detailed stories are recounted of fourteen- and fifteen-year-old boys and girls who were beaten until blood ran down their legs.<sup>22</sup> Although generally considered to be less serious than torture or other forms of physical punishment, whipping and flogging, nevertheless, frequently resulted in the death of the person being beaten.<sup>23</sup>

It should be remembered that pain and injury to the body of the condemned were the only methods of punishment prior to establishment of prisons. Torture, in the form of the rack, drawing and quartering, and burning at the stake were acceptable punishments well into the 1700's.<sup>24</sup> The penalty for such minor crimes as pickpocketing was death by hanging, and as recently as the early 1800's English law listed 233 capital crimes.<sup>25</sup>

A strong movement against cruel punishments did not emerge until the eighteenth century.<sup>26</sup> The publication in 1764 of the treatise *On Crimes and Punishments* by Cesare Beccaria marked the turning point in theories of punishment. Beccaria's utilitarian viewpoint led him to question the effectiveness of extreme penalties and to advocate making the punishment fit the crime. In his opinion, the "evil" inflicted "need only to exceed the advantage derivable from the crime."<sup>27</sup> Consequently, he recommended imprisonment as the humanitarian alternative to execution and torture.<sup>28</sup> Beccaria also thought that institutional-

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20. See *supra* note 16, at 126.

21. *Id.*

22. See *supra* note 4, at 48-49.

23. *Id.* at 75-76 and 88-91.

24. See, e.g., *supra* note 16, at 78-79.

25. THE DEATH PENALTY IN AMERICA 2 (H. Bedau ed. 1967).

26. See *supra* note 16, at 133.

27. Beccaria, *On Crimes and Punishments* in THEORIES OF PUNISHMENT 126 (S. Gupp ed. 1971). See also *supra* note 16, at ch. 12.

28. Beccaria, *supra* note 27, at 127.

ized violent punishments encouraged an atmosphere of violence which was counter-productive. He stated that:

[t]he severity of the punishment itself emboldens men to commit the very wrongs it is supposed to prevent; they are driven to commit additional crimes to avoid the punishment for a single one. The countries and times most notorious for severity of penalties have always been those in which the bloodiest and most inhumane deeds were committed.<sup>29</sup>

Since Beccaria's time, there has been a continuing trend away from the use of extremely cruel punishment and a growing rejection of the official uses of torture and flogging.

In *Discipline and Punish*, Michel Foucault explains this change by pointing out that modification of criminal penalties coincided with the end of torture as a "public spectacle."<sup>30</sup> He states that by the end of the eighteenth and the beginning of the nineteenth century, "the gloomy festival of punishment was dying out . . ."<sup>31</sup> and that by 1848, for example, public execution had been abolished in France.<sup>32</sup> He argues that there has been a gradual trend away from punishment of the body toward punishment of the "soul."<sup>33</sup> According to his theory,

[t]he body now serves as an instrument or intermediary: if one intervenes upon it to imprison it or to make it work, it is in order to deprive the individual of a liberty that is regarded both as a right and as a property. . . . Physical pain, the pain of the body itself, is no longer the constituent element of the penalty. From being an art of unbearable sensations punishment has become an economy of suspended rights.<sup>34</sup>

The movement, observed by Foucault, away from direct, painful punishment, to the establishment of prison systems in the early nineteenth century<sup>35</sup> is paralleled by the broad spec-

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29. *Id.*

30. M. Foucault, *DISCIPLINE AND PUNISH* 7 (1975).

31. *Id.* at 8.

32. *Id.*

33. *Id.* at 11.

34. *Id.*

35. *Id.* at part four.

trum of humanitarian reforms, including those which recognized the special needs of the child. By the beginning of the twentieth century, children had been guaranteed the right to an education, to special treatment if physically or mentally handicapped, to special care if orphaned,<sup>36</sup> and to separation from adults in prisons and criminal proceedings.<sup>37</sup> Concern for child welfare also brought about an end to child labor in many countries. Oddly, the matter of school discipline escaped humanitarian scrutiny until recently.

#### A. Corporal Punishment in School

A recent survey of forty-five countries revealed that corporal punishment has been outlawed in the schools of thirty-two of them.<sup>38</sup> Corporal punishment has never been practiced in the schools of Greece, Italy, or Luxembourg and was officially outlawed by Poland in 1783.<sup>39</sup> The Netherlands, Belgium, Austria, France and Finland passed similar laws against corporal punishment in the 1800's.<sup>40</sup> However, the majority of countries surveyed did not take similar steps against corporal punishment until the middle of the twentieth century.<sup>41</sup>

Curiously, almost all the countries in which corporal punishment remains legal at one time were under British control or influence.<sup>42</sup> Both Canada and Australia use corporal punishment as a school disciplinary technique. It is also practiced in the schools of New Zealand, South Africa, Barbados, and Trinidad and Tobago. It remains an important element of classroom control in the United States and continues to be an integral part of the British educational system.<sup>43</sup> The present status of corporal

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36. See Cohen, *The Human Rights of Children*, 12 CAP. U.L. REV. 369, 390 (Fall, 1983).

37. See A. PLATT, *THE CHILD SAVERS* 124-34 (1969). See also H. LOU, *JUVENILE COURTS IN THE UNITED STATES* (1927).

38. Report of the Society of Teachers Opposed to Physical Punishment (STOPP), *The Use of Corporal Punishment in Schools Outside the United Kingdom* (1984). See also ABOLITION HANDBOOK (STOPP).

39. *Id.*

40. *Id.*

41. *Id.*

42. P. Wilby, *Corporal Punishment* (a discussion paper published by the U.K. Association for IYC) at 6.

43. Countries where corporal punishment in schools is legal include Australia, Barbados, Kenya, New Zealand, South Africa, Swaziland, Thailand, Trinidad and Tobago, Su-



punishment as a method of school discipline can be better understood by examining its use in these latter two countries.

*B. Discipline in the Schools of the United Kingdom*

It is the British for whom the birching of school children became an entrenched tradition: a tradition which can be traced as far back as the middle 1400's and which continues today, despite numerous appeals to Parliament that it be outlawed. Since its establishment, birching has been an integral part of the finest English educational institutions. The headmaster of Harrow was reputed to flog all the students in a form "rather than bother to find out who had committed an offense."<sup>44</sup> At Eton, parents were charged half a guinea for each birch switch which had been used on their child.<sup>45</sup> The following quotation from the *Edinburgh Review* of April, 1830, appears to sum up the importance of flogging in the British educational system:

For all offences, except the most trivial, whether for insubordination in or out of school, for inability to construe a lesson, or to say it by ear, for being discovered out of bounds, for absence from chapel or school—in short, for any breach of the regulations of the school—every boy, below the 6th form, whatever be his age, is punished by flogging. This operation is performed on the naked back, by the headmaster himself, who is always a gentleman of great abilities and acquirements, and sometimes of high dignity in the church.<sup>46</sup>

As the backbone of discipline in British schools, corporal punishment has generally been restricted to two techniques. In England, schoolmasters preferred to strike the student across the buttocks with a "cane" or "birch." In Scotland the student's hands were struck with a leather strap known as a "tawse."<sup>47</sup>

In both countries, there have been many cases of excessive punishment and injuries to students. Birching has been shown to produce injuries to the small blood vessels, the coccyx and the

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dan, Canada and the United States. See *supra* note 38.

44. See *supra* note 16, at 128.

45. *Id.*

46. See *supra* note 4, at 99.

47. See *supra* note 42, at 10.

sciatic nerve.<sup>48</sup> Psychological injury accompanies the deplorable sexual dimension of birching. It is well known that students have frequently been required to bare their buttocks to receive their punishment. Sir Laurence Olivier is quoted as recalling, "[t]he first time a schoolmaster ordered me to take my trousers down, I knew it was not from any doubt that he could punish me efficiently enough with them up."<sup>49</sup>

While the psychological damage caused by using the tawse may be less traumatic than bare-bottomed birching, the risk of serious permanent physical injury is much greater. Striking the hands has been reported to cause "deformed fingers, stiffness of joints, permanent injury to nerves in the hand and ruptured tendons," as well as broken bones<sup>50</sup> and paralysis.<sup>51</sup>

The actual number of British students who are subjected to corporal punishment is difficult to ascertain. One study undertaken by the Scottish Council for Research in Education<sup>52</sup> revealed that of the secondary school students surveyed, 84% of the boys and 57% of the girls reported having been struck at least once during primary school.<sup>53</sup> It has been estimated that there are approximately 30,000 applications of the tawse each year to the hands of Edinburgh's school population of 70,000 students.<sup>54</sup> Studies of individual schools in Inner London have found that reports of canings in some schools has been estimated as high as 96.35% of the boys and 18.4% of the girls.<sup>55</sup>

In England, the legal right of schoolmasters to punish their charges has been staunchly upheld by the courts.<sup>56</sup> Rooted in the common law concept of *in loco parentis*, the schoolmaster stands in the place of the parent, and to the extent that the parent can discipline a child, that right is delegated to the schoolmaster.<sup>57</sup> The power of the schoolmaster to punish is not limited to misbehavior in school but extends to misbehavior going to

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Scorgie v. Lawrie* 10 R. 610 (1833).

52. *See supra* note 42, at 4.

53. *Id.*

54. *Id.*

55. *Id.*

56. Wallington, *Corporal Punishment in Schools*, 18 JURID. REV. 124, 128-42 (1973).

57. *Id.*

and from school. The 1893 case of *Cleary v. Booth*<sup>58</sup> simply restates the theory of delegation of parental powers as found in Blackstone:

He [the parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.*, that of restraint and correction, as may be necessary to answer the purposes for which he is employed.<sup>59</sup>

An earlier case, *Re Baskingstroke School*,<sup>60</sup> had supported the right of schoolmasters to further delegate the authority received from parents, thus making it possible for a student to be corporally punished by a fellow student who was exercising the schoolmaster's delegated authority.<sup>61</sup>

Decisions in cases where parents have attempted to use their authority to exempt their child from school regulations conflict. For example, a mother's right to forbid her son from doing homework assignments was upheld<sup>62</sup> while a father's right to permit his son to smoke in school was not.<sup>63</sup> One reason for the different decisions in these cases is that the statutes depended upon by the ruling judges forbade smoking in school but contained no reference to enforcing homework assignments.<sup>64</sup>

Scotland has never relied on the theory of delegation in upholding the right of schoolmasters to punish students. Instead, Scottish courts base this right on what might be called quasi-parental status, which springs from the notion that similarities exist between the parent-child and teacher-student relationship and, to the extent that they are analogous, the teacher may discipline the student.<sup>65</sup>

There is a functional difference between the quasi-parental status theory and the delegation theory. It arises when the par-

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58. 1 Q.B. 465 (1893).

59. BLACKSTONE, COMMENTARIES I, 452, as quoted in *supra* note 56.

60. 41 J.P. 118 (1877).

61. *Id.*

62. *Hunter v. Johnson*, 13 Q.B.D. 225 (1884).

63. *R v. Newport (Salop) Justices*, 2 K.B. 416 (1929).

64. See *supra* note 56, at 140.

65. *Id.* at 137.

ent attempts to alter the existing teacher-student relationship by, perhaps, forbidding the schoolmaster from using corporal punishment as a disciplinary measure. Under the delegation theory, since the schoolmaster is *in loco parentis*, the parents' wishes should, in theory, be upheld without question. By contrast, the quasi-parental status theory forces parents who object to a schoolmaster's behavior to formulate their complaints in terms of an action for breach of contract. Unfortunately, this option is available only to parents who send their children to private schools.<sup>66</sup> Thus, dissatisfied parents of public school pupils are, in effect, barred from having their wishes enforced.

English and Scottish courts deciding cases based on claims of excessive punishment have regularly upheld the use of the tawse and cane, even where there was humiliation<sup>67</sup> or minor injury.<sup>68</sup> Only where there has been medical evidence supporting claims of physical injury, such as damage to muscle and blood vessels,<sup>69</sup> or a ruptured ear drum<sup>70</sup> has the court been willing to hold that the punishment was excessive.

Objections to British reliance on corporal punishment for disciplining schoolchildren dates back as far as the seventeenth century. The first known appeal to Parliament was the Children's Petition of 1669, which concludes with the plea: "[w]e humbly implore the higher powers, that this impure practice, which hath continued in our schools hitherto, without contract or detection (unless what hath been private only) may come under public censure, and consequently prohibition, and extermination."<sup>71</sup> Both the Children's Petition of 1669 and its sequel, the 1698 *Lex Forica*, make it clear that the sexual aspects of corporal punishment are an important element of the students' complaint.<sup>72</sup>

According to the records, these two documents were presented to Parliament and were sufficiently persuasive to inspire the Marquess of Townshend to propose to the House of

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66. *Id.* at 142-44.

67. *See supra* note 62.

68. *Ridley v. Little*, C.L.Y. 1088 (1960).

69. *Moone v. Ryan and Quinn*, Dublin Dist. Ct. (1968).

70. *Ryan v. Fildes*, 3 All E.R. 517 (1938).

71. Freeman, *The Children's Petition of 1669 and Its Sequel* in *CORPORAL PUNISHMENT IN AMERICA* 41-43 (I. Hyman & J. Wise eds. 1979).

72. *Id.* at 43.

Lords three separate bills on the control of corporal punishment. None of the bills was successful.<sup>73</sup>

Contemporary studies of corporal punishment presented to Parliament, such as the 1937 *Report of the Departmental Committee on Corporal Punishment* and the 1963 and 1967 *Reports of the Central Advisory Council for Education* (England and Wales)<sup>74</sup> have been equally unsuccessful in bringing about legislation outlawing corporal punishment in school.<sup>75</sup> Parliament did, however, outlaw the corporal punishment of prisoners in 1948.

A greater degree of success has been reported by the Society of Teachers Opposed to Physical Punishment (STOPP), which has been working to influence individual English LEA's (Local Education Authorities) to abolish corporal punishment. Thus far, STOPP has been able to persuade approximately 60% of the LEA's to make modifications in local regulations. At present, a substantial number have either established guidelines for the use of corporal punishment, or limited its use to specific circumstances. In some schools it has been eliminated completely.<sup>76</sup>

### C. Discipline in the Schools of the United States

Unlike the British disciplinary systems, corporal punishment in American schools has never been limited to one particular instrument or method. Although corporal punishment is practiced in forty-six of the fifty states, it has been eliminated by the school systems of many major cities.<sup>77</sup> The first state to reject corporal punishment was New Jersey, which did so in 1867.<sup>78</sup> It was over a hundred years until other states followed its example.<sup>79</sup>

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73. *Id.* at 48.

74. *Children and Their Primary Schools*, Central Advisory Council for Education (England) H.M.S.O. 1967.

75. *See generally supra* notes 38 and 42.

76. *Children Free From Threat of Beating*, STOPP, 1984.

77. *E.g.*, Atlanta, Georgia; Baltimore, Maryland; New Orleans, Louisiana; New York, New York; Pittsburgh, Pennsylvania; Portland, Oregon; Salt Lake City, Utah; San Francisco, California; Washington, D.C.; St. Louis, Missouri; and Chicago, Illinois. *See infra* note 89.

78. *See Raichle, The Abolition of Corporal Punishment in New Jersey's Schools*, in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* (I. Hyman & J. Wise eds. 1979).

79. The following states have banned the use of corporal punishment: New Jersey

Courts in the United States have applied the English theory of *in loco parentis* to uphold the teacher's right to paddle students. While there are English precedents granting the parent some measure of control over how the child is treated in school, this right has been consistently rejected by American courts. For example, in *Baker v. Owen*,<sup>80</sup> the leading case on this matter, the district court, while recognizing the existence of a parental right, nevertheless held that state interests were paramount:

We hold that the fourteenth amendment liberty embraces the right of parents generally to control means of discipline of their children, but that the state has a countervailing interest in the maintenance of order in the schools, in this case sufficient to sustain the right of teachers and school officials to administer reasonable corporal punishment for disciplinary purposes.<sup>81</sup>

Excessive punishment *per se* has not been the primary focus of American litigation to protect schoolchildren's rights. Unlike the British cases, most major American lawsuits have claimed constitutional violations rather than abuses of teacher privilege. Consequently, the Supreme Court held in *Ingraham v. Wright*<sup>82</sup> that the unquestionably excessive punishment of James Ingraham did not violate the eighth amendment. According to the Court, the eighth amendment's protection from "cruel and unusual punishment" is applicable in criminal cases only.<sup>83</sup> The Court further held that there was no violation of Ingraham's fourteenth amendment procedural due process rights. The Court deemed as adequate the local criminal and tort remedies which are available to redress student injury when punishment is later found to have been excessive.<sup>84</sup>

Although criminal and tort remedies may well be sufficient to satisfy constitutional requirements, the difficulty of attempting to criminally prosecute or even to sue a schoolteacher makes such litigation highly impractical. State law protecting teachers,

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(1867), Massachusetts (1972), Hawaii (1973), and Maine (1976). See *infra* note 89.

80. 395 F.Supp. 294 (M.D.N.C.), *aff'd without comment*, 423 U.S. 907 (1975).

81. 395 F.Supp. at 296.

82. 430 U.S. 651 (1977).

83. *Id.* at 671.

84. *Id.* at 681.

coupled with community pressure on students and their families discourages the use of these methods of redress.

It is unclear whether Ingraham's attorneys ever considered utilizing the alternative legal remedies suggested by the Supreme Court, even though the plaintiff, James Ingraham, a junior high school student, had been so severely beaten on his buttocks by the principal that his injuries required hospital treatment for ten days, during which "fluid oozed from the main wound, which was six inches in diameter and he was unable to lie on his back."<sup>85</sup> Furthermore, since the original complaint was filed on January 7, 1971 and the Supreme Court did not render its decision until April 19, 1977, there is a strong likelihood that, if any tort complaint against the principal had not been filed prior to the Supreme Court's decision, it would have been barred by the statute of limitations.

The Supreme Court's decision in *Ingraham* left open the question of whether there may have been a substantive due process violation, since this claim had not been raised by the appellant. Three years later, with somewhat mixed results, the substantive due process argument was addressed by the United States Court of Appeals for the Fourth Circuit in *Hall v. Tawney*.<sup>86</sup> The court concluded that:

[t]here may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights under 42 U.S.C. § 1983. We further conclude that whether those circumstances existed in the instant case could not be properly determined as to the defendants directly involved in the paddling . . . and that the case must therefore be remanded for further proceedings in respect of [the plaintiff's] substantive due process claim.<sup>87</sup>

Unfortunately, although the court did outline a standard for measuring whether a plaintiff's substantive due process rights have been violated by corporal punishment, the fact that the

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85. Cohen, *Beating Children Is As American As Apple Pie*, 7 HUM. RTS. 24 (Spring 1978).

86. 621 F.2d 607 (4th Cir. 1980).

87. *Id.* at 611. Hall made an out-of-court monetary settlement of her case.

case was remanded for further proceedings, which were never undertaken, weakened its precedential value and failed to provide a concrete example of punishment which would clearly be violative of constitutional rights.

The plaintiff, Naomi Hall, like James Ingraham, was the victim of excessive corporal punishment. After being severely paddled on the buttocks and thighs with a "thick rubber paddle," Hall was hospitalized for ten days. Some of her injuries were classified as traumatic and required the "treatment of specialists for possible permanent injuries to her lower back and spine."<sup>88</sup> From the students' point of view, the outcome of these cases, whose arguments were based on constitutional claims, is probably less satisfactory than results that could be obtained in British courts under theories of teacher privilege abuse.

*Ingraham* and *Hall* are the tip of the iceberg of cases of excessive punishment in the United States.<sup>89</sup> *Ingraham's* preclusion of future cruel and unusual punishment and procedural due process claims has not diminished efforts by students' and children's rights advocates to find a satisfactory legal means of redressing the wrongs perpetuated by overzealous paddlers.<sup>90</sup>

Numerous groups in the United States actively keep track of corporal punishment cases while advocating permanent eradication of corporal punishment from American schools. Probably the most active advocacy group is a California organization known as the Committee to End Violence Against the Next Generation (EVAN-G),<sup>91</sup> which publishes a quarterly to keep members abreast of the latest corporal punishment developments. Also active in the field is the research-oriented National Center for the Study of Corporal Punishment and Alternatives in the Schools (NCSCPAS) at Temple University in Philadelphia,<sup>92</sup>

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88. *Id.* at 614. See also 9 DUQ. L. REV. 801 (1981); 17 WAKE FOREST L. REV. 72 (1981).

89. See *The Last ? Resort* (all editions), published by Committee to End Violence Against the Next Generation (EVAN-G) for update on corporal punishment cases and abolition tactics. See also N. HENTOFF, *DOES ANYBODY GIVE A DAMN?* (1977).

90. See *infra* notes 106-160 and accompanying text for a description of international remedies that have yet to be invoked in corporal punishment cases.

91. Committee to End Violence Against the Next Generation (EVAN-G), 977 Keeler Avenue, Berkeley, CA 94708 (1498).

92. National Center for the Study of Corporal Punishment and Alternatives in the Schools, 833 Ritter Hall South, Department of Psychology, Temple University, Philadelphia, PA 19122.



which has been responsible for coordinating information gleaned from social science studies of corporal punishment, initiating new research on the subject, and organizing conferences to encourage the sharing of information between the social sciences and abolitionist groups.

According to NCSCPAS, corporal punishment research has been undertaken by a wide variety of academic disciplines that have studied its effects on children at home and at school. Medical researchers have estimated the various risks of injury to the student being punished and have concluded that, although the buttocks are the area where there is the least danger of serious injury because they contain no vital organs, if applied with sufficient vigor, a paddling could, nevertheless, cause nerve damage and fractured bones.<sup>93</sup> Studies have shown that corporal punishment, while possibly working to keep classrooms temporarily under control, unfortunately has long-range negative effects on learning.<sup>94</sup> Correlation studies have shown a relationship between the corporal punishment of children and their approval of violence as adults.<sup>95</sup> Similar studies have related the corporal punishment of children to their behavior as adult child or spouse abusers.<sup>96</sup> Severe parental punishment of children has also been linked to delinquent and aggressive behavior.<sup>97</sup> Cases of excessive punishment have been collected and documented.<sup>98</sup> Statistics gathered on the numbers of children actually hit indicate that beating is widespread in Arkansas, Florida, Mississippi and Tennessee, followed by Georgia, Alabama, Texas and Oklahoma.<sup>99</sup> Estimates have been made of the percentage of

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93. Friedman & Friedman, *Pediatric Considerations in the Use of Corporal Punishment in the Schools*, in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* (I. Hyman & J. Wise eds. 1979).

94. Lamberth, *The Effect of Punishment on Academic Achievement: A Review of Recent Research*, in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* (I. Hyman & J. Wise eds. 1979). See also Wallenstein & Maurer, *infra* note 99.

95. Owens & Strauss, *The Social Structure of Violence in Childhood and Approval of Violence as an Adult*, in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* (I. Hyman & J. Wise eds. 1979).

96. Kemp, et al. *The Battered Child Syndrome*, 18 J.A.M.A. 17 (1962).

97. Welsh, *Severe Parental Punishment and Aggression: The Link Between Corporal Punishment and Delinquency* in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* (I. Hyman & J. Wise eds. 1979).

98. This information has been compiled by NCSCPAS. See *supra* note 92.

99. Wallenstein & Maurer, *The Influence of Corporal Punishment on Learning: A*

teachers who hit students because they, themselves, are emotionally disturbed. These figures were used in 1975 to estimate that approximately 4 ½ million school students were victims of the mental illnesses of about 180,000 disturbed teachers.<sup>100</sup> Extensive work has been done by scholars, educators and psychologists in developing alternative methods of classroom control and discipline.<sup>101</sup>

The outcome of corporal punishment litigation in the United States has been curious and tragic. At the present time, the only persons who can still be legally subjected to institutionalized beatings are schoolchildren.<sup>102</sup> The courts have abolished corporal punishment in prisons as a violation of the eighth amendment.<sup>103</sup> It has even been declared unconstitutional in juvenile correctional facilities.<sup>104</sup> Unfortunately, the 1853 observation of a justice of the Supreme Court of Indiana remains applicable:

The husband can no longer moderately chastise his wife; nor . . . the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the school boy, "with his shining morning face," should be less sacred in the eyes of the law than that of the apprentice or sailor, is not easily explained.<sup>105</sup>

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*Statistical Survey*, 12 THE LAST ? RESORT 18 (Fall, 1983). See also *supra* note 89.

100. P. Walford and T. Chibucos, Research Evidence on Corporal Punishment: Needs and Roadblocks (paper presented at the meeting of the American Psychological Association, Chicago, September, 1975).

101. See, e.g., CORPORAL PUNISHMENT IN AMERICAN EDUCATION (I. Hyman & J. Wise eds. 1979); see also National Education Association Report of the Task Force on Corporal Punishment, 1972.

102. Most states have statutes specifically permitting parents to use reasonable punishment to discipline their children. However, child abuse and intrafamilial violence have been receiving increased scrutiny by social scientists, doctors and psychologists. As a consequence, courts and legislatures have been abandoning their prior reluctance to interfere in what has traditionally been an area of privacy, in order to provide protection for family members against intrafamilial violence.

103. *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

104. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974).

105. *Ingraham v. Wright*, 498 F.2d 248, 250 (5th Cir. 1974), *rev'd on other grounds*, 430 U.S. 651 (1977) (quoting *Cooper v. McJunkin*, 4 Ind. (Porter) 290 (1853)).

## II. HUMAN RIGHTS AND CORPORAL PUNISHMENT

The humanitarian movement, which began with the eighteenth century reform of criminal punishment and expanded to include the rights of slaves, animals, and children during the nineteenth century, has taken on an international dimension in the twentieth century. The beginning of this century was characterized by the internationalization and institutionalization of humanitarian ideals by such groups as the International Committee of the Red Cross, the International Labour Organisation and the League of Nations.

Although the League of Nations was unable to produce lasting results in this area, the aftermath of World War II brought renewed vigor to the drive to establish international standards of treatment for all human beings. The United Nations Charter establishes the main objective of the organization as the promotion of "human rights and fundamental freedoms for all."<sup>106</sup> A major step toward this goal was the completion in 1948 of the Universal Declaration of Human Rights,<sup>107</sup> which reflects an international consensus on the basic rights of man and which signals the beginning of a struggle to create enforceable international norms. The Universal Declaration was followed by a number of other declarations, such as the Declaration on the Elimination of All Forms of Racial Discrimination,<sup>108</sup> The Declaration on the Elimination of Discrimination Against Women<sup>109</sup> and The Declaration of the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>110</sup> The rights protected through these documents were based on the rights originally enumerated in the Universal Declaration.

Although these declarations represent a step toward the achievement of international consensus on human rights, decla-

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106. U.N. CHARTER preamble.

107. G.A. Res. 217, U.N. Doc. A/810 at 71 (1948).

108. G.A. Res. 1904, 18 U.N. GAOR, Supp. (No. 15) at 35, U.N. Doc. A/5515 (1963).

109. G.A. Res. 2263, 22 U.N. GAOR Supp. (No. 16) 35, U.N. Doc A/6716 (1967), *reprinted in Human Rights, A Compilation of International Instruments*, U.N. Sales No. E.83.XIV.1 (1983) at 41 [hereinafter cited as *A Compilation of International Instruments*].

110. G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975), *reprinted in A Compilation of International Instruments*, *supra* note 109, at 82.

rations are, by definition, nonbinding, being mere statements of international agreement on particular sets of values and ideals. What makes these declarations significant is that many of them serve as a framework for binding international agreements, which make those rights legally enforceable. The United Nations International Covenant on Civil and Political Rights<sup>111</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>112</sup> together contain, in a legally enforceable form, the values recognized in the Universal Declaration of Human Rights. These rights have also been legally guaranteed by regional agreements such as the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>113</sup> and the American Convention on Human Rights (the Pact of San Jose).<sup>114</sup> Each agreement contains procedures for the reporting and redressing of violations.

A primary theme of every human rights agreement is the unequivocal recognition of the right to human "dignity." The Preamble of the United Nations Charter contains the following statement of purpose: "to reaffirm faith in fundamental human rights, in the *dignity and worth* of the human person . . . ."<sup>115</sup> These words are rephrased in the first paragraph of the Preamble to the Universal Declaration of Human Rights, which refers to the "recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family . . . ."<sup>116</sup> The phrase "inherent dignity" is repeated in the preambles of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>117</sup> The International Convention on the Elimination of All Forms of Racial Discrimination contains the slightly different wording of "*dignity and equality inherent*

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111. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

112. *Id.*

113. 1950 EUROP. T.S. No. 5, 213 U.N.T.S. 221.

114. O.A.S. OFF. REC. OEA/Ser. K/XVI/1.1 Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

115. In all following quotations from conventions and declarations, emphasis on the words *dignity, integrity, equality, worth, etc.*, is added.

116. See *supra* note 107.

117. See *supra* notes 110 and 111.

in all human beings . . . ,”<sup>118</sup> while the American Declaration of the Rights and Duties of Man<sup>119</sup> speaks of the “*dignity of the individual*” and asserts that “[a]ll men are born free and equal, in dignity and in rights . . . .”<sup>120</sup> In their book *Human Rights and World Public Order*, Professors McDougal, Lasswell and Chen explain that:

[t]he important fact is that the peoples of the world, whatever their differences in cultural traditions and styles of justification, are today increasingly demanding the enhanced protection of those basic rights commonly characterized in empirical reference as those of *human dignity*, by the process of law in all the different communities of which they are members, including especially the international and world community.<sup>121</sup>

One way to measure a society’s respect for human dignity is to examine the ways in which those who have disobeyed its rules and norms are punished. Article 7 of the International Covenant on Civil and Political Rights uses the following language in its definition of the internationally acceptable minimum standard for treatment and punishment: “[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

In 1982, the United Nations Human Rights Committee, which monitors the human rights performance of States Parties to the International Covenant on Civil and Political Rights, noted in its *General Comment* § 7(16)b of July 27, 1982, that “members of the committee have often asked for further information regarding Article 7.” The Committee went on to indicate in Section 1 that the purpose of Article 7 “is to protect the *integrity and dignity* of the individual.” It further stated in Section 2 that:

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118. See *supra* note 108.

119. Resolution XXX, adopted by the Ninth International Conference of American States, held at Bogota, Colombia, 30 March-2 May 1948. Pan American Union, Final Act of the Ninth Conference of American States 38-45 (Washington, D.C. 1948).

120. *Id.*

121. M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 6 (1980).

[t]he scope of the protection required goes far beyond torture as normally understood . . . the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure . . . Moreover, the article clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions.<sup>122</sup>

The protections of Article 7 extend not only to acts committed with official authority but also extend to those acting outside of official authority.<sup>123</sup>

The Committee's interpretation of Article 7 is not particularly useful to individuals. Regrettably, the enforcement mechanism for the International Covenant on Civil and Political Rights is limited under Article 40 to requests by the Human Rights Committee for reports from States Parties to the Covenant "on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights."<sup>124</sup>

Individual complaints can be submitted to the Committee by persons claiming to be victims of a State Party to the Covenant, provided that the State Party is also a party to the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>125</sup> Since the United States has not signed either of these agreements, an American victim of corporal punishment cannot use the Human Rights Committee's interpretation of Article 7 to obtain relief.

The European Convention for the Protection of Human Rights and Fundamental Freedoms is applicable only to Member States of the Council of Europe who have ratified the Convention. Since the United States is not a member, it is excluded. A brief survey of the cases brought under Article 3 of the Convention may, however, provide an indication of possible future interpretations of Article 5, Section 2 of the more recent American Convention on Human Rights (Pact of San Jose). This agreement establishes the Inter-American Court of Human

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122. U.N. Doc. CCPR/C/21/Add/1. (Aug. 26, 1982).

123. *Id.*

124. *See supra* note 111.

125. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

Rights of the Organization of American States, of which the United States is a member. Both Article 3 of the European Convention and Article 5, Section 2 of the American Convention are similar to Article 7 of the International Covenant on Civil and Political Rights quoted above.<sup>126</sup>

Some five years before the 1982 interpretation of Article 7 by the Human Rights Committee, the European Court of Human Rights ruled that Article 3 was applicable in a corporal punishment case. Since that time, the court has decided that Article 7 applies to corporal punishment in two other cases.

The *Tyrer*<sup>127</sup> case concerned the judicial birching of a fifteen-year-old schoolboy on the Isle of Man, who was sentenced to three strokes of the birch after pleading guilty to assaulting a fellow classmate. In his application to the Commission he alleged, among other allegations, a violation of Article 3 of the Convention, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>128</sup> The Court held that there had, indeed, been a violation of Article 3 and that subjecting Tyrer to three strokes of the birch on his bare buttocks amounted to "degrading punishment" within the meaning of the Convention.<sup>129</sup>

The subsequent Scottish cases of *Campbell* and *Cosans*,<sup>130</sup> brought jointly before the European Court of Human Rights, held that there was no violation of Article 3, because neither of the children were ever actually struck with the tawse. The court held that, although "a mere threat of conduct prohibited by Article 3" could amount to a violation of that Article "provided it is sufficiently real and immediate," the boys' situation in this

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126. See *supra* notes 111, 113 and 114.

127. *Tyrer Case*, Judgment of the Court, April 25, 1978 (Eur. Ct. of Human Rights), Ser. A, No. 26; 2 E.H.R.R. 1. In the period between the first hearing by the Human Rights Commission and submission of the case to the court, the United Kingdom, which in 1967 had listed the Isle of Man as one of the territories for which it would assume responsibility for foreign relations, decided to withdraw the Isle's name from this list. As a result of this action, the United Kingdom had no authority to require enforcement of the decision handed down by the court. See PUB. LAW 4 (Spring 1982); 27 INT'L & COMP. L.Q. 665 (1978); 42 MOD. L. REV. 580 (1979).

128. *Id.*

129. *Id.*

130. *Campbell and Cosans Case*, Judgment of the Court, February 25, 1982 (Eur. Ct. of Human Rights), Ser. A, No. 48; 4 E.H.R.R. 293. See 46 MOD. L. REV. 345 (1983); PUB. LAW 310 (Summer 1982).

case did not constitute "inhuman treatment."<sup>131</sup> As to the alleged violations of Article 2 of Protocol No. 1 of the European Convention, it was the opinion of the court that the school's refusal to abide by parental wishes that their sons not be subjected to corporal punishment, in fact, constituted a violation of the parents' right to educate their children "in conformity with their own religious and philosophical convictions" guaranteed by the second sentence of the Article.<sup>132</sup> The court further held that because Jeffrey Cosans had been permanently suspended from school for his refusal to accept the prescribed corporal punishment, he had personally been denied the education guaranteed to him by the first sentence of Article 2 of Protocol No. 1.<sup>133</sup>

In a subsequent proceeding for damages and legal costs, brought under Article 50, the monetary claims of the parents were denied, since affirmation of their grievances was considered sufficient reward. Jeffrey Cosans was, however, awarded £3000,<sup>134</sup> in compensation for the injuries resulting from his suspension.

The decisions of *Tyrer*, *Campbell* and *Cosans* represent the beginning of a long series of corporal punishment cases slated to be brought before the European Court of Human Rights. STOPP has indicated that there may be as many as twenty-four additional cases waiting to be heard.<sup>135</sup>

It would appear that pressure brought on the educational system of the United Kingdom by corporal punishment cases taken to the European Court of Human Rights may cause that nation to speed up its timetable for abolishing corporal punishment. This welcomed change would bring British school practices into conformity with the education laws of all other member states of the Council of Europe.<sup>136</sup>

As indicated above, there are similarities between the American and European human rights conventions. The previously mentioned Article 5, Section 2 of the American Convention on Human Rights (Pact of San Jose) contains language which is al-

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131. *Id.*

132. *Id.*

133. *Id.*

134. E.C.H.R. 1983 Series A, No. 60.

135. 12 THE LAST ? RESORT 3 (Fall, 1983). See also *supra* note 89.

136. 1 EUR. L. REV. 246-47 (June 1982).



most identical to that of Article 3 of the European Convention: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."<sup>137</sup> In addition, its procedures mirror those of the European Court of Human Rights in that individual cases are first submitted to a Commission and then by the Commission to the Inter-American Court of Human Rights.<sup>138</sup> Regrettably, the jurisdiction of the Inter-American Court is limited to complaints against States Parties to the American Convention. Because the United States has failed to ratify the Convention, the corporal punishment complaints of American school-children cannot be brought before the Inter-American Court of Human Rights.

Nevertheless, the situation is not hopeless. The OAS has an alternative procedure which is also used to call attention to human rights violations. Chapter IV of the Statute of the Inter-American Commission on Human Rights provides, under Article 20, for petitions to be made directly to the Commission "[c]oncerning States that are not parties to the American Convention on Human Rights."<sup>139</sup> Under Article 23 of the Regulations of the Inter-American Commission on Human Rights, petitions may be submitted to the Commission by "[a]ny person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the Organization . . ."<sup>140</sup> and may be on behalf of third parties as well as by injured individuals. Claims taken to the Inter-American Commission on Human Rights cannot be based on the American Convention, but, instead, must allege violations of rights found in the American Declaration on the Rights and Duties of Man. Submission of the complaint is followed by a fact-finding phase, after which the Commission submits a final report to the parties with recommendations and a final deadline for implementation. The only penalty for a state's non-compliance is publication of the Com-

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137. See *supra* note 114.

138. *Id.*

139. HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, GENERAL SECRETARIAT ORGANIZATION OF AMERICAN STATES (updated to July 1983) at 113-15.

140. *Id.* at 129.

mission's report.<sup>141</sup> This, however, can be an effective remedy since states usually seek to avoid embarrassing publicity.

In contrast to the Convention, the American Declaration does not specify the right to be free from degrading treatment or punishment. Article I, however, does state: "Every human being has the right to life, liberty and security of his person."<sup>142</sup> Consequently, a victim of paddling by a teacher in the United States, who has exhausted the legal remedies available in this country, might reasonably argue that the phrase "security of his person," because it implies bodily integrity, could be read to encompass corporal punishment. On the other hand, should the Commission accept this theory, it would then have to decide whether Article I of the Declaration is applicable to children, since children are the subject of Article VII, which states: "All women, during pregnancy and the nursing period, and all children have the right to special protection."<sup>143</sup> This raises the question of whether children are, therefore, excluded from other articles of the Declaration.

Two theories can be used to eliminate confusion as to whether Article I can be applied to children. First, it is logical to argue that simply because children, like pregnant women and nursing mothers, are entitled to "special protection," does not mean that they are not granted other rights. Certainly, nothing in the Declaration could be construed to imply that a woman loses her broader rights when she becomes pregnant. Second, the phrase "special protection" could logically be interpreted to mean that children and mothers have greater rights in certain situations than adults in general have under ordinary circumstances.

Despite the fact that Americans cannot bring complaints before the Inter-American Court of Human Rights, the procedures outlined above are, clearly, available to any American, including a schoolchild, who is seeking redress of human rights violations. The United States is not only a member of the Organization of American States, it has also ratified the American Declaration on the Rights and Duties of Man.<sup>144</sup>

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141. *Id.* at 129-143.

142. *Id.*

143. *Id.* at 119.

144. *Id.*

Another possible avenue of legal relief for American victims of corporal punishment would be to assert principles of customary international law, instead of constitutional theories, when bringing cases in domestic courts. Customary international law is law that is based on the customs and practices of nations (which may or may not have been codified into statutory laws or treaties) and which is sometimes applied in domestic courts as part of a country's law. Although customary international law comes into question most often in issues of jurisdiction over territory, freedom of the high seas or the rights of aliens, it has also been successfully used to establish norms for the treatment of prisoners and the illegality of torture.<sup>145</sup>

Customary international law has long been accepted as being incorporated into the law of the United States. This idea was clearly expressed by Justice Gray in the Supreme Court decision of *The Paquete Habana*:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations<sup>146</sup>

Interestingly, in a number of recent cases involving human rights, courts in the United States have cited customary international law as the grounds for refining a previously ambiguous legal standard.<sup>147</sup> Perhaps the most heart-rending of these cases is *Filartiga v. Pena*,<sup>148</sup> in which a Paraguayan doctor sought damages under the Alien Tort Claims Act, 28 U.S.C. § 1350, for the wrongful death by torture in Paraguay of his teenaged son. In his opinion, Judge Kaufman acknowledged that "International

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145. For a discussion of the rules of customary international law, see, e.g., M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 25-34 (4th ed. 1978).

146. 175 U.S. 677 (1900).

147. See Schneebaum, *Recent Judicial Developments in Human Rights Law*, 1 THE LAW GROUP DOCKET 1 (1981).

148. 630 F.2d 876 (2nd Cir. 1980). See also Tell, *A Death in Asuncion*, NAT. L.J., March 1, 1982, at 6.

Law confers fundamental rights upon all people *vis-a-vis* their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them."<sup>149</sup>

The international agreements, judicial opinions and laws of nations cited earlier, holding corporal punishment to be in violation of either statutes or international norms, can provide the basis for a claim that, like torture, the corporal punishment of schoolchildren has become a violation of the international law of human rights. Understandably, because reference to customary international law is still a relatively new concept in American jurisprudence, the potential success of this line of reasoning remains untested in corporal punishment cases.

The emerging norm of bodily integrity will receive further confirmation upon the ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the Commission on Human Rights early in 1984.<sup>150</sup> While the primary purpose of the Convention is to establish a binding legal agreement abolishing torture, the language of the final paragraph of the Preamble and Article 16 makes it clear that the Convention will also proscribe "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . ."<sup>151</sup> Since the Preamble also cites, as authority, the International Covenant on Civil and Political Rights, it is possible that the language of Article 16 of the Convention Against Torture will be interpreted, in the manner of Article 7 of the Covenant, to include the corporal punishment of schoolchildren.<sup>152</sup>

The draft Convention Against Torture provides for a committee to hear complaints, both from states and from individuals and for implementation of sanctions against torturers.<sup>153</sup> Unfortunately, as is typical of international agreements, it is applicable to States Parties only. Since the United States has not ratified any recent international human rights agreement, including

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149. 630 F.2d at 885.

150. E/CN.4/1984/72.

151. *Id.*

152. See *supra* note 122. The Convention will apply to all "persons" and, therefore, will presumably be applicable to children.

153. See *supra* note 150.

the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>154</sup> it seems unlikely that it will become a State Party to the Convention Against Torture. Therefore, unless an additional procedure is created which will provide for complaints against non-ratifying nations, victims who wish to claim a violation of their rights by the United States will be unable to use the remedies available under this convention.

Although the United States' refusal to ratify international human rights agreements has severely limited claimants' access to international remedies, there is one international human rights procedure which does not require the ratification of any convention. It derives its authority from the United Nations Charter and is applicable to all members of the United Nations. In response to the staggering number of complaints received by the United Nations Secretariat alleging human rights violations, in 1970 the United Nations Economic and Social Council (ECOSOC) adopted Resolution 1503, a procedure for dealing with communications relating to the violations of human rights and fundamental freedoms.<sup>155</sup> This resolution authorizes the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights to appoint a working group to meet once each year "to consider all communications, including replies of Governments thereon, received by the Secretary-General," with a view to bringing to the attention of the Sub-Commission those "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission."<sup>156</sup> Upon the finding of such a pattern, the Sub-Commission may then decide to submit the matter to the Commission on Human Rights. The Commission can, under appropriate circumstances, choose either to conduct a "thorough study" with a report and recommendations to the ECOSOC or appoint an *ad hoc* committee to conduct an investigation, with the express consent of the State concerned with the goal of correcting the violations.<sup>157</sup>

Since the first application of the 1503 Procedure in 1972,

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154. 78 U.N.T.S. 277.

155. 48 U.N. ECOSOC Supp. (No. 1A) p. 8 (1970).

156. *Id.*

157. *Id.*

the Committee On Communications has deemed as "consistent patterns of gross violations" such matters as apartheid, arbitrary arrest, abolition of political liberties, torture, forced labor practices and religious persecution.<sup>158</sup> Admittedly, the corporal punishment of schoolchildren cannot compare with the outrage of apartheid or the disgrace of religious persecution. It is, however, a matter of major importance in the lives of children and, therefore, should not be lightly dismissed.

The United Nations human rights agreements are the main sources for ascertaining recognized human rights. Consequently, the Human Rights Committee's interpretation of Article 7 of the International Covenant on Civil and Political Rights as encompassing the rights of "pupils" makes it theoretically possible to allege in a 1503 communication that the continued use of corporal punishment in American schools is a "gross violation" of human rights. As proof of a "consistent pattern" of violations it can be asserted that: 1) paddling by those in authority is accepted behavior in United States schools, 2) it is legal in forty-six of the fifty states, 3) literally millions of children are corporally punished each year, 4) there are no procedural safeguards against unjust punishments, 5) the United States Supreme Court has held that it does not violate the eighth amendment or the fourteenth amendment's due process clause of the United States Constitution, 6) the National Education Association has consistently refused to take a position against it, and 7) it is so entrenched that organizations have been formed purely for the purpose of fighting it.<sup>159</sup> In answer to such a complaint, the United States government would find itself in the uncomfortable position of having to defend the practice of paddling schoolchildren.

In a 1503 proceeding, individual communications are used merely as evidence and, consequently, communications may be submitted by third parties as well. There is no process for awarding a direct remedy. The main benefit of the 1503 procedure is its effect in strengthening universal norms.

World opinion is an important factor in human rights en-

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158. See Tardu, *United Nations Response to Gross Violations of Human Rights: The 1503 Procedure*, 20 SANTA CLARA L. REV. 559 (1980).

159. See *supra* note 89.

forcement. No country wants to be publicly exposed as practicing torture or otherwise violating human rights. It is for this reason that pressure by non-governmental organizations (NGO's), such as Amnesty International, can often produce outstanding results.<sup>160</sup> While the 1503 procedure does not provide for the compensation of individuals, the threat of publication of alleged human rights violations can often be sufficient to persuade a country to change its policies. Use of this procedure should not be ignored by those seeking to abolish corporal punishment.

### III. HUMAN RIGHTS AND CHILDREN

It was not until after World War I that the special needs of children, which had begun to receive local recognition as a result of the humanitarian reforms of the latter nineteenth century, finally received international attention. Spearheaded by Eglantyne Jebb, an Englishwoman, the Save the Children International Union (SCIU) was formally established in Geneva in 1920. Responding to the plight of children during and after the war, the organization was devoted to the relief of children everywhere. In 1923, under Miss Jebb's guidance, the SCIU drafted and approved the Declaration of Geneva:

*By the present Declaration of the Rights of the Child, commonly known as the "Declaration of Geneva," men and women of all nations, recognizing that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:*

1. The child must be given the means requisite for its normal development, both materially and spiritually.
2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored.
3. The child must be the first to receive relief in times of distress.

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160. The release from prison of Jacobo Timerman by Argentina is an example of the successful use of these tactics.

4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow-men.

A year later, the Declaration of Geneva was adopted by the League of Nations.<sup>161</sup>

Little more was done regarding the human rights of children until 1959,<sup>162</sup> when the United Nations adopted the Declaration of the Rights of the Child.<sup>163</sup> This ten-principle document incorporated almost all the goals of the Declaration of Geneva. One significant change was a restriction on child labor in place of putting the child in a "position to earn a livelihood." Two additions reflect the effects of World War II: Principle 3 (name and nationality) and Principles 1 and 10 (non-discrimination). Unlike the Declaration of Geneva, the 1959 Declaration makes no mention of delinquency. Interestingly, neither declaration mentions punishment.

In celebration of the twentieth anniversary of the Declaration of the Rights of the Child, the United Nations designated 1979 the International Year of the Child. The General Assembly authorized the Commission on Human Rights to draft a Convention on the Rights of the Child, which would put into binding form the ideals embodied in the Declaration.<sup>164</sup>

The first draft convention submitted to the commission was practically identical to the Declaration, with wording so general that, from a legal standpoint, had it been adopted, the Convention would have been virtually meaningless. Fortunately, the Commission rejected the first draft in favor of a more comprehensive document, which would accurately reflect the needs of the child and the state's obligation to recognize those needs. An Open-Ended Working Group on the Convention on the Rights of

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161. See INTERNATIONAL UNION FOR CHILD WELFARE: 50 YEARS, IUCW, No. 7, June 1970.

162. For a discussion of International Labour Organisation Treaties and Recommendations regarding child labor, which were undertaken during the period between the Geneva and United Nations declarations on children's rights, see *supra* note 36, at 381-83.

163. 14 U.N. GAOR Supp. (No. 16), U.N. Doc. A/4054 (1959).

164. U.N. Doc. A/34/424 (1979).



the Child was established at the end of the Twenty-fifth Session of the Commission on Human Rights.

In the fall of 1979, Poland presented a new draft convention to the Commission.<sup>165</sup> This document has served as a model for the Working Group since 1980.

Work on the Convention is progressing at a slow but steady pace. Articles which have thus far been adopted by the Working Group include all the rights contained in Article 1-13 of the 1979 draft convention, plus five additional articles (6 *bis*, 6 *ter*, 7 *bis*, 8 *bis* and 11 *bis*). The rights now proclaimed by the draft convention include:

Article 1	Definition of the word "child"
Article 2	Right to a name and nationality
Article 3	Protection during legal or administrative proceedings
Article 4	Non-discrimination
Article 5	State implementation
Article 6 <i>bis</i>	Family reunification
Article 6 <i>ter</i>	Intra-familial kidnapping
Article 7	Free expression of opinion
Article 7 <i>bis</i>	Freedom of religion
Article 8	Parental duties in child-rearing
Article 8 <i>bis</i>	Abuse and maltreatment
Article 9	Mass media
Article 10	Emergency and foster care
Article 11	Adoption
Article 11 <i>bis</i>	Refugees
Article 12	Disabled
Article 13	Social Security <sup>166</sup>

Articles 7 *bis*, 8 *bis*, and 13 were adopted by the 1984 Working Group.<sup>167</sup>

During the summer of 1983, a group of representatives from twenty-two international non-governmental organizations<sup>168</sup> interested in the Convention on the Rights of the Child held two

165. See *supra* note 1.

166. E/CN.4/1984/L. 1 Annex I.

167. *Id.*

168. This group of approximately twenty-two NGOs is known as the Informal NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child.

meetings in Geneva to evaluate the remaining text of the 1979 draft convention and to draw up recommendations for alterations in the proposed convention. Their meetings culminated in the publication of the Report of Informal Consultations Among International Non-Governmental Organizations.<sup>169</sup> The Report contained a briefly annotated proposed text for Articles 7 *bis*, 8 *bis*, 9, 13, 14, 15, 16, 17, 18, 19, 20 and proposals for two additional articles concerning treatment of children in armed conflicts and the importance of the family. The NGO Report was distributed to delegates participating in the 1984 Working Group. Its influence on the drafting procedure can be seen in the adopted versions of Articles 7 *bis*, 8 *bis* and 9.

In future sessions the Working Group will address proposed Articles 14-20, which cover such rights as health, standard of living, academic education, education for human rights, recreation, work, penal procedures and eight articles on ratification and implementation. In addition to the 1979 draft convention, the 1985 Working Group will have before it an extensive Canadian proposal for alterations in the language of Articles 14, 15, 16, 17, 18, 19, 20, and 22; a new Article 29, which emphasizes that the new convention cannot be used to diminish already existing rights;<sup>170</sup> the NGO Report (with new additions made at the June 1984 consultations);<sup>171</sup> an article on the rights of illegitimate children, proposed by China; and suggestions by the United States and Iran for amendments to existing articles, and alternate wording from Iran and China regarding Articles 21, 15 and 16.<sup>172</sup>

The punishment phrase "cruel, inhuman or degrading treatment or punishment" found in the International Covenant on Civil and Political Rights and the two regional human rights conventions does not appear anywhere in the 1979 draft Convention on the Rights of the Child. It has, however, been included in both the Canadian and NGO proposals for Article 20. Regrettably, this article deals only with penal procedures.

The Canadian proposal for Article 20(2)(d) reads: "[n]o child shall be subjected to cruel, inhuman or degrading treat-

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169. Copies are available from: Defense for Children International, P.O. Box 359, 1211 Geneva 4, Switzerland.

170. E/CN.4/1984/L.1, Annex II.

171. See *supra* note 168 and accompanying text.

172. See *supra* note 170.

ment or punishment. No child shall be sentenced to death." Section (2)(d) follows sections that refer to arbitrary detention, due process, and treatment during detention. Although the language of the Canadian proposal incorporates the wording of the punishment articles in other human rights agreements, because of its placement in Article 20 (and its reference to the death penalty), its application is limited to the penal process.

Section 3 of the NGO recommendation for Article 20 uses language similar to Canada's, and refers directly to corporal punishment: "[t]orture or other forms of cruel, inhuman or degrading punishment, including the imposition of solitary confinement or corporal punishment, shall be prohibited." Here again, because of its placement within a specifically penal article, its application is strictly limited. It cannot, in the manner of Article 7 of the International Covenant on Civil and Political Rights, be logically extended to cover the rights of schoolchildren.

### CONCLUSION

At this juncture the Working Group has two alternatives: it can draft a separate article on punishment, similar to the articles in other human rights conventions, or it can include specific protections in each article that covers an area in which children are likely to be subjected to punishment, discipline or abuse.

While remaining articles, such as those relating to extrafamilial maltreatment, education and armed conflicts, could possibly be rephrased to include proscriptions against inhuman treatment or punishment,<sup>173</sup> this does not resolve the problem of what should be done with existing articles. Most of the articles already adopted have neglected to include protection from disciplinary abuse. Almost two-thirds of the articles deal directly with situations such as foster care, adoption, free expression or religious freedom, in which a child is vulnerable to some sort of control or coercion. Only Article 8 *bis*, which deals with intrafamilial abuse, seeks to address this problem:

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173. At the June meeting, the NGO Ad Hoc Group rejected the proposal for a separate article on discipline and punishment. This was remedied to some degree at the October meeting by the addition of special protective wording to the proposed articles on Extrafamilial Maltreatment and Compulsory and Free Education.

The States Parties to the present Convention shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental 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 care of the child.<sup>174</sup>

Obviously, Article 8 *bis* addresses intrafamilial maltreatment in a manner that is relatively comprehensive. Nevertheless, because of the wide discretion that most statutory schemes grant to parents in disciplining their children, it would have been much wiser to have stated explicitly that mental and physical injury, resulting from legally authorized punishment, is also to be prohibited.

As can be seen from examining the wording of Article 8 *bis*, to supply children with comprehensive protection from unreasonable punishment on an article-to-article basis is not a simple procedure. It requires a great deal of specificity which is not demanded by an omnibus article. Additionally, absent a change in procedure, articles already adopted will not be re-evaluated until the entire Convention is completed and a total review is undertaken. Considering that the completion of the Convention may require two more years of drafting (for a total of seven), to embark at that time on major revisions of such a large number of articles is to add, possibly, another two years to the process. This seems highly undesirable.

Furthermore, to limit the disciplinary protection of children to special caveats in individual articles is to deny to children the broad protection given to adults by other human rights agreements. This is not only unfair, it is unrealistic and defeats the very purpose of the Convention. In order for children's rights to be adequately protected, children must be regarded as entitled to "human dignity." Paragraphs one, two and nine of the Preamble to the draft Convention on the Rights of the Child all contain references to "*dignity*:" "the inherent *dignity* . . . of all members of the human family," "the *dignity* and worth of the human person" and "peace, *dignity*, tolerance, freedom and brotherhood."

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174. See *supra* note 166.

A child cannot grow up in "dignity" if it is not guaranteed bodily integrity. Children are smaller than adults, they are regularly subjected to disciplinary procedures, and they are easily abused and intimidated. The only way to adequately ensure their dignity and bodily integrity is by drafting a separate article that will guarantee these rights. One solution to the problem is to simply incorporate the language of the articles quoted above from existing human rights agreements. Better still would be a modification of this wording adjusted to the requirements of children: "States Parties shall take steps to encourage respect for a child's human dignity. No child shall be subjected to any form of discipline, punishment, control or treatment which is either mentally or physically cruel or degrading."

Although under proposed enforcement procedures an article on punishment will be applicable only to those nations that become States Parties to the Convention, this does not diminish its importance. As a statement of world opinion, it will reinforce the notion that children are not to be beaten, abused or treated in a degrading manner. To this extent it will strengthen the growing body of human rights law and aid in the creation of a universal norm recognizing the equal dignity of children.<sup>175</sup>

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175. The proposed methods for enforcing the Convention are similar to those of the human rights covenants, relying on reports by the States Parties to ensure compliance. It would strengthen the effectiveness of the Convention if a process for bringing individual complaints were also included in the enforcement procedures.