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ARTICLE

CANING AND THE CONSTITUTION: WHY THE BACKLASH AGAINST CRIME WON'T RESULT IN THE BACK-LASHING OF CRIMINALS

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Ever since Michael Fay[1] was sentenced to six lashes with a cane in a Singapore prison in 1994, state legislators across America have been clamoring to legalize the same punishment here for petty criminals and juvenile offenders.[2] Although legislative attempts to introduce caning

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[1] Michael Fay, an 18 year-old American, was lashed four times with a rattan cane in Singapore in 1994 for vandalizing cars. Larry Copeland, *Movement For Caning in U.S. Beginning To Be Taken Seriously,* HOUS. CHRON., Mar. 12, 1995, at A20. "President Clinton appealed repeatedly to Singapore for clemency, and got the number of strokes reduced to four." *Id.*

[2] *See infra* Part I and accompanying text.

have been defeated in several states in the last two to three years, efforts to authorize it continue across the country.[3] This article describes the caning phenomenon and explains why caning violates both the U.S. Constitution and international law. Part I describes caning and the recent legislative efforts to legalize it as a criminal punishment. Part II briefly considers some possible reasons for the revival of corporal punishment in America and focuses particularly on race-related reasons. Part III explains how caning violates the Eighth Amendment and possibly various other constitutional provisions as well. Part IV demonstrates how caning violates international law. The conclusion forecasts the likely fate of caning in America.

I. THE DEFINITION OF CANING AND LEGISLATIVE EFFORTS TO LEGALIZE IT

Theodore Simon, founder of International Legal Defense Counsel and the defense lawyer for Michael Fay, says that the definition of caning is virtually the same everywhere, whether it comes from an Amnesty International member or a Singaporean prison official. As quoted in the *Legal Intelligencer* on March 24, 1994, Simon cited a definition of caning from a Malayan Law Journal:

> Caners are all robustly built and hold quite high grades in the martial arts. They wield a half-inch thick, four-foot-long rattan cane that the night before is thoroughly soaked in water so that it will not break upon making contact with the victim. The caner then takes a measured distance from the victim, who at this point is bent over a trestle and tied down with his buttocks exposed. From this measured distance he wields with all the force of his body weight and strikes the rear butt with the cane. Upon contact it results in the splitting of the skin, a flaying of the skin where the bare butt ends up entirely bloodied. The

[3] *See infra* notes 12-14 and accompanying text.

> individuals, in addition to screaming, will normally urinate [on] themselves, faint and go into shock. The individuals require hospitalization and it results in permanent physical scarring.[3]

This definition is consistent with the caning Fay suffered in Singapore: "I felt a deep burning sensation throughout my body, real pain. The flesh was ripped open."[4] Nineteenth-century accounts of those who administered beatings with rattan canes described similar effects: "I have found my clothes all over blood from the knees to the crown of my head, and have looked as though I had just emerged from the slaughter-house . . . I have picked and washed off my clothes pieces of skin and flesh that had been cut from the poor sufferer's back."[5]

Although some have assumed that caning in the United States would take a milder form,[6] many proponents of caning, especially in the

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[3] Hank Grezlak, *Phila Lawyer Fights to Prevent 'Caning': Charges in Singapore, U.S. Citizen faces Brutal Punishment*, LEGAL INTELLIGENCER, Mar. 24, 1994, at 1.

[4] Melinda Liu, *"I Tried to Ignore the Pain,"* NEWSWEEK, July 4, 1994, at 36.

[5] JOHN SHIPP, FLOGGING AND ITS SUBSTITUTE 20 (1831).

[6] The only comprehensive constitutional analysis of caning done thus far, which concluded that caning in general does not violate the Eighth Amendment, assumed without discussion that "Singapore-style" caning would violate the Eighth Amendment:

> Similarly, canings, such as those administered to Michael Fay, would not meet Eighth Amendment standards because they often draw blood and cause offenders to lose consciousness. By contrast, a well-monitored whipping that is not intended to break the skin, to leave permanent marks, or to be reasonably expected to cause severe physical or emotional injury should survive constitutional attack.

Daniel E. Hall, *When Caning Meets the Eighth Amendment: Whipping Offenders in the United States*, 4 WIDENER J. PUB. L. 403, 437-38 (1995). Professor Hall really only judged the constitutionality of paddling or some less-violent alternative to flogging, not caning as it is commonly understood. As I discuss later, simple paddling may pass constitutional muster. *See infra* Part III.d. [Despite my agreement with Professor Hall regarding paddling, I disagree with his Eighth Amendment analysis. *See infra* notes 59 and 67.]

Therefore, this article's analysis of caning does not apply to various bills proposing the authorization of paddling, for example, in New Hampshire (Laurette Ziemer, *Graffiti Vandals Face Shame of Public Flogging*, EVENING STANDARD, Feb. 5, 1996, at 3), St. Louis (Thom

Old South, specifically advocate the legalization of "Singapore-style" caning. The supporters of a bill proposed in Alabama last year expressly called for canings like those described above. Alabama Prison Commissioner Ron Jones, a penal professional who expressed support for the bill, said that "he favored the hiring of a martial arts expert 'who knows what he's doing when the licks are given.'"[7] The sponsor of the bill, Senator Charles Davidson of Jasper, Alabama, added that "the state 'may have to import some Chinese to show us how to do it.'"[8] Davidson described the caning instrument as "a bamboo cane split . . . The night before you soak it limber. The edges on which it has been split are sharp as a razor . . . to draw blood."[9] State legislators in Tennessee have also specifically proposed Singapore-style canings that involve "breaking a little skin and seeing a little blood."[10] The Tennessee legislators sought to authorize public caning "on the courthouse steps in the County in which the criminal act was committed."[11]

A number of other state legislatures have recently considered

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Gross, *Campaign Under Way to Adopt Paddling*, ST. LOUIS POST-DISPATCH, Nov. 10, 1994, at 3B), Cincinnati, California (Kendall Anderson, *Backers of Paddling Want Teen Offenders to Feel the Pain*, DALLAS MORNING NEWS, June 6, 1994, at 1A), and New York (Michael Slackman, *State Anti-Graffiti Bill Won't Spare the Paddle*, NEWSDAY, Feb. 24, 1997, at A21). Some of these bills have since been defeated or have lost momentum, *see, e.g.*, Eric Bailey, *Bipartisan Bloc Whips Effort to Require Paddling of Graffiti Vandals*, HOUS. CHRON., Feb. 2, 1996, at 16; however, others are reintroduced on a regular basis. *See* Slackman, *supra at* A21. These bills propose paddling that is specifically intended to embarrass, not to lacerate and permanently scar. *See, e.g.*, Eric Adler, *Back with a Vengeance: Old World Retribution: "An Eye for an Eye, a Tooth for a Tooth" Gains Favor Among Americans Who Want Criminals Stopped Dead in Their Tracks*, FORT LAUDERDALE SUN-SENTINEL, May 26, 1996, at 8 (quoting sponsor of New Hampshire bill: "I'm not talking about caning them Singapore-style, . . . This is more of a public shaming device to teach kids there are consequences to their actions.").

[7] Editorial, *Going Too Far; Proposed Caning Bill Outrageous*, MONTGOMERY ADVERTISER, Oct. 12, 1995, at 14A.

[8] *Id.*

[9] Bill Poovey, *Jones Supports 'Caning' Youths*, MONTGOMERY ADVERTISER, Dec. 14, 1995, at 3B.

[10] Rebecca Ferrar, *State Legislators Seek Caning as Punishment for Vandals, Burglars*, KNOXVILLE NEWS-SENTINEL, Feb. 3, 1995, at A3.

[11] S.B. 380 Sec. 3(d) (Tenn. 1995).

introducing caning as a punishment. For example, Maryland has considered a similar bill allowing the caning of minors,[12] as has Mississippi.[13] Other Southern officials have called publicly for caning without proposing specific legislation.[14] Public support for caning appears strong -- 59% of Americans polled either support caning for drug dealers or think that caning them would be going "too easy" on them.[15] As of this writing, no state legislature has passed a statute authorizing caning.

II. WHY IS CORPORAL PUNISHMENT BECOMING POPULAR AGAIN?

After several hundred years of declining support for flogging[16] in America, it was virtually extinct by the mid-twentieth century, having been banned in every state except Delaware (which finally banned it in 1972, but had not whipped anyone since 1952).[17] Although whipping had been a standard punishment in America from colonial times, the frequency of

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[12] H.B. 1077 (Md. 1995).

[13] H.B. 904 (Miss. 1996) would authorize voluntary submission to whipping in exchange for getting out of prison, and H.B. 381 (Miss. 1997) would authorize caning as a punishment for church-burning.

[14] *See, e.g., Southeast Journal*, WALL ST. J., Jan. 22, 1997 ("Mecklenburg County, N.C., Commissioner Joel Carter recommends caning misdemeanor offenders and suggests that Charlotte turn itself into 'the caning capital of the South.'").

[15] *Poll Update*, NEWSWEEK, Apr. 12, 1994. *But see* Ronald Brownstein, *Singapore's Caning Sentence Divides Americans, Poll Finds*, LOS ANGELES TIMES, Apr. 24, 1994, at A20 (finding that 60% of Americans oppose caning in the United States).

[16] Flogging is basically the same as caning -- Webster's defines it as "to beat or strike hard and repeatedly with a cane." NEW WEBSTER'S DICTIONARY & THESAURUS OF THE ENGLISH LANGUAGE 361 (1992). Also, whipping with a leather strap is similar to inflicting punishment with a rattan cane, as both have the same effect upon the recipient of the blows. In *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), the petitioners, inmates who had been whipped by prison guards, "received lashes on the bare buttocks . . . . There is corroborating and other evidence . . . of deep bruises and bleeding," *id.* at 575, just as convicts would receive blows with a cane that would "draw blood" under the proposed Alabama caning law. Poovey, *supra* note 9, at 3B. Therefore, "caning", "whipping", and "flogging" will be used interchangeably throughout this article and will be considered to be synonymous for analytical purposes (although distinguishable from paddling, *see supra* note 6).

[17] Tom Troy, *Castle Opposes Whipping Post*, U.P.I., Feb. 7, 1989.

its application began to decline in the early to mid-1800's with the spreading influence of Utilitarian theories of punishment,[18] which fueled the American prison reform movement.[19] The campaign against flogging in prisons grew to encompass all forms of brutal corporal punishment, and before long, the whipping of soldiers, juvenile offenders, and students was prohibited or was severely curtailed.[20] Today, the only state-sanctioned corporal punishment in our society exists in the nation's schools (twenty-three states permit corporal punishment in schools).[21]

The recent movement to authorize caning cannot be blamed wholly on the Fay episode, though undoubtedly that event triggered the sudden flood of proposed legislation. The proponents of these bills have offered a number of other justifications for them. The original motivation behind the Alabama caning bill, for example, was purportedly financial: "[t]he caning issue surfaced in the budget hearing as Dr. [Ron] Jones told lawmakers the department [would] need an additional $5 million in its General Fund appropriation for fiscal 1997. He said an increasing number of 15- 16- and 17-year-old offenders [were] being sentenced to adult prisons."[22] Because the caning of juveniles would be "in lieu of going to prison," it "would be an alternative to taxpayers paying the cost of incarcerating an increasing number of young offenders."[23] Interestingly, prison overcrowding is the same reason why whipping enjoyed a brief upswing in popularity in the mid-1800's -- between 1843 and 1847, Sing

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[18] These theories, popularized by the British philosopher Jeremy Bentham, sought to expand the purposes of punishment from simple, vicious retribution, to encompass the aims of specific and general deterrence, rehabilitation, and incapacitation. Therefore, reformers advocated the substitution of imprisonment and treatment of offenders for brutal corporal punishments. HARRY ELMER BARNES, THE STORY OF PUNISHMENT 101 (2d ed. 1972).

[19] MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT 12 (1984).

[20] *Id.* at 146.

[21] *See Public Likes Proposed Public-Beating Laws, Experts Do Not*, CHARLESTON GAZETTE & DAILY MAIL, Mar. 12, 1995, at 5A; *but see* Beth Ashley, *Spanking on the Decline in Public Schools*, USA TODAY, Dec. 2, 1996, at 8D (noting that the U.S. Department of Education recorded 1,415,540 instances of corporal punishment in schools in 1982, but only 555,531 in 1992).

[22] Poovey, *supra* note 9, at 3B.

[23] *Id.*

Sing Prison in New York administered nearly 2500 lashes to convicts.[24]

Also, Senator Davidson of Alabama has claimed that the caning of juveniles would serve as an effective deterrent to later misconduct: "If we do a little caning early on in life and get their attention, I don't think we will have to deal with them later in life."[25] Dr. Jones echoed those sentiments: "I think at that age, caning would work real well."[26]

Another conceivable reason for the caning initiative that is not likely to be trumpeted by its supporters is the hysteria over crime that is now the driving force behind most criminal reform proposals in America, a hysteria that is often fueled by popular images of violent black criminals. This hysteria reaches extremes in the Old South, where all of the "Singapore-style" caning bills introduced in the United States have germinated. For example, in Alabama, espousing severe punishments that border on the absurd is *de rigueur*.[27]

The hysteria over crime is by no means restricted to Alabama, though some have traced its genesis to one of Alabama's most famous citizens:

> At least since the George Wallace campaign of 1968, fear of crime (and the racism that often fuels it) has been at the heart of the right-wing revolution. Conservative candidates of both parties have prospered by whipping up fear of a rising tide of lawbreaking and threats to individual safety,

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[24] GLENN, *supra* note 19, at 10.

[25] Editorial, *Sanctioning Cruelty; Caning Proposal Sheer Stupidity*, MONTGOMERY ADVERTISER, Dec. 15, 1995, at 5.

[26] *Id.* However, Jones has expressed doubt about the deterrent effect on adult prisoners: "I don't think it would work well on the adult offender." Rhonda Cook, *Around the South: Back to Hard Labor*, ATLANTA J. & CONST., Aug. 20, 1995, at 4D.

[27] *See, e.g.*, Soapbox, *Deserves Chair*, MONTGOMERY ADVERTISER, Apr. 3, 1996, at 17A ("I believe whoever stole my Jimmy Buffett CDs deserves the electric chair."); *Q & A*, ENTERPRISE LEDGER (Enterprise, Ala.), June 9, 1995, at 11. ("Q: How long do you think prisoners convicted of capital crimes should be allowed to stay in prison on appeal before being executed? A: Art Audette: I say kill 'em immediately or at least within 48 hours.").

despite twenty years of declining victimization rates.[28]

In Alabama, this tradition takes the form of citing falsely inflated crime statistics, for example: "8 in every 10 Alabamians will be a victim of violent crime at least once in their lifetime . . . the average career criminal, once out of jail, is committing about three crimes per week."[29] The first statistic is simply wrong -- even assuming that no person is a victim twice, the rate is not even half that high.[30] The second statistic can be slanted according to how "average career criminal" is defined, and is thus meaningless.

Such sensationalistic propaganda is now commonplace, as criminal defendants have become the most recent devils at which we as a society can direct our hatred and condemnation:

> For the right, crime is the communism of the post-cold war era: the principal vehicle for exploiting fear of social decay, not to mention inchoate racism and anti-urban prejudice . . . [conservatives] offer a simple, reductionist answer: authority of church, authority of prison and authority of state, a powerful and dangerous formula.[31]

Some scholars have characterized this as an "'authoritarian trend' in the United States, characterized by increasingly passionate calls for the death penalty . . . carrying concealed weapons . . . [and] public paddling."[32]

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[28] Bruce Shapiro, *How the War on Crime Imprisons America*, NATION, Apr. 22, 1996, at 20; *see also* Dan Goodgame, *Why Bigotry Still Works at Election Time*, TIME, Nov. 25, 1991, at 44 (tracing today's race-baiting crime rhetoric to the Wallace campaign).

[29] Michael Sibley, *Brown Says She's Tough on Crime*, TROY MESSENGER (Alabama), Feb. 14, 1996 (quoting Court of Criminal Appeals candidate Jean Brown).

[30] ALABAMA CRIMINAL JUSTICE INFORMATION CENTER, CRIME IN ALABAMA 24 (1994).

[31] Shapiro, *supra* note 28, at 20.

[32] Anderson, *supra* note 6, at 1A (quoting Dr. William F. Stone, a political psychologist at the University of Maine).

"Authoritarian trends" appear to have the same characteristics regardless of the era in which they arise -- the eighteenth-century abuses that led to the criminal reforms described above seem to be reappearing today: "secret accusations" [as authorized by 8 U.S.C. §§ 1531-1534, allowing the use of secret evidence in deportation hearings], "almost complete absence of provision for the defense of the accused" [as has occurred in many states regarding death-row inmates, since the de-funding of capital resource centers], "an incredibly large number of capital crimes" [provided by, for example, the Federal Death Penalty Act of 1994], "and barbarous lesser punishments, such as whipping" [as could soon be legalized in a number of states].[33]

Such authoritarian trends have often been connected with white fears of black crime: "Across the South, white reaction [to black crime after Emancipation] was intense. There were calls to bring back the gallows for serious property crimes, and the whipping post for misdemeanors such as vagrancy and petty theft."[34] This is because one of the prerequisites for administering such draconian punishments involves defining the condemned class in terms that allow the majority of society to separate themselves from the group and look down on it with derision: "Define people as sub-social and strongarm measures become more palatable."[35] John DiIulio, the G.O.P.'s premier expert on crime, describes America's urban black community as "deviant, delinquent, and criminal adults surrounded by severely abused and neglected children,"[36] and he refers to today's young urban males as "'fatherless, Godless and jobless,' a national 'wolf pack' of conditioned 'superpredators.'"[37] This demonization of a group is necessary to justify extreme solutions to perceived crises:

> In some periods, society needed to suppress a group, as

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[33] BARNES, *supra* note 18, at 97.

[34] DAVID OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 33 (1996).

[35] Shapiro, *supra* note 28, at 17.

[36] *Id.*

[37] *Id.* at 15.

> with blacks during Reconstruction. Society coined an image to suit that purpose -- that of primitive, powerful, larger-than-life blacks, terrifying and barely under control. At other times, for example during slavery, society needed reassurance that blacks were docile, cheerful, and content with their lot.[38]

Today, one image of African-Americans that society has chosen is typified by the infamous Willie Horton ad, created by Republicans backing President Bush in 1988, that depicted a black man who raped a white woman while on prison furlough. In the 1990s, "the spirit of Hortonism is thriving" in political campaign commercials, albeit with more care taken to avoid overt racism.[39] This image of blacks, if reinforced enough, allows society to impose severe criminal penalties on the demonized class: "A group that is criminal, vicious, animal-like, with designs on white people's lives and pocketbooks -- such a group would need to be controlled."[40] Therefore, caning, which is not a penalty that anyone can see being justified as a punishment for themselves or for their children, is acceptable, even necessary, to keep the animalistic "wolf pack of superpredators" in line. Of course, once someone from outside the demonized group receives the caning penalty, its brutality may no longer be considered justifiable: "A few places might try it, and then you'll see some upper-middle-class parent upset that their kid is going to get it . . .

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[38] Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1276 (1992).

[39] Howard Kurtz, *In 1994 Political Ads, Crime Is the Weapon of Choice*, WASH. POST, Sept. 9, 1994, at A1; *see also* Goodgame, *supra* note 28, at 44 (according to a close adviser of George Bush, "[some of us would like to get beyond this business of scaring people and dividing them against blacks, but it's hard to argue against a formula that's seen as successful.").

[40] Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears -- On the Social Construction of Threat*, 80 VA. L. REV. 503, 514 (1994).

It's different when people are confronted with the issue in reality."[41]

Like chain gangs, whipping also "conjures up an image of slavery"[42] and is reminiscent of the time when any white could whip any black slave for insubordination.[43] This imagery may offer psychological comfort to many poor Southern whites,[44] "the only ethnic group in America not permitted to have a history."[45] Since the end of the Civil War, poor Southern whites have been in conflict with blacks:

> For the poor white farmer, . . . [e]mancipation had not only crushed his passionate dreams of slaveholding; it had also erased one of the two 'great distinctions' between himself and the Negro. The farmer was white and free; the Negro was black -- but also free. How best to preserve the remaining distinction -- white supremacy -- would become an obsession in the post-Civil War South.[46]

Today, white supremacy in Alabama takes the form of devout worship of Confederate ancestors -- for example, Montgomery's city motto is "Montgomery: The Cradle of the Confederacy," Confederate Memorial Day is a state holiday (instead of Memorial Day), millions of dollars are spent to preserve Confederate relics like the First White House of the Confederacy,[47] and the Confederate battle flag is ubiquitous.[48] The

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[41] Anderson, *supra*, note 6, at 1A (quoting University of South Carolina government professor Dr. Betty Glad).

[42] Tanya Hodges, *Chain Gangs: An Interview with Dr. Jones*, FREE PRESS (MONTGOMERY), Apr., 1996, at 7.

[43] LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 86 (1993).

[44] "Caning was how a master treated a slave; it expressed the presumption that the social status of the victim was below the social status of the attacker." Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2183 (1996).

[45] DENNIS COVINGTON, SALVATION ON SAND MOUNTAIN 3 (1995).

[46] OSHINSKY, *supra* note 34, at 14.

[47] "In Alabama, they are promoting recognition of an all-but-forgotten Jefferson Davis Hwy. They demand prominent restoration of memorials discreetly removed to cemeteries years ago." Tom Teepen, *Confederate Flag: South Keeps Raising Nostalgia for Bad Old Days*, MINNEAPOLIS-ST. PAUL STAR TRIB., Jan. 12, 1997, at 16A.

whipping and chaining of blacks fits in neatly with this longing for the "good old days" of cotton plantations, antebellum mansions, and slavery.[49]

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[48] The popularity of the Confederate flag in the South dates not from the Civil War but from the 1950s and 60s, when it was resurrected to protest racial desegregation:

> In 1956, when the South was facing the integration of its public schools, the Georgia legislature changed the state flag and inserted the Stars and Bars – one emblem of the Confederacy. Given the timing, the revised flag was not a harmless expression of regional pride. It was a political statement, a way to tell black citizens what the white legislature thought of them.

Ed Quillen, *And soon, perhaps, those Confederate bonds will pay off*, DENVER POST, July 9, 1996, at B7; *see also* Teepen, *supra* note 47, at A16 ("Alabama and South Carolina took to flying Confederate flags over their statehouses in the '60s, ensigns of their defiance of the Constitution."); Jonathan Yardley, *Is S.C.'s Civil War Fervor Flagging?*, WASH. POST, Dec. 2, 1996, at C2 ("in South Carolina . . . resistance to desegregation was so adamant that in 1962 it raised the Confederate battle flag over its Capitol").

[49] Senator Davidson, the sponsor of the Alabama caning bill, is one of the world's few remaining slavery apologists:

> [I]n a speech he prepared for a state Senate debate over his proposal to fly the Confederate battle flag over the state Capitol. . . . [Davidson] reached for Bible verses to justify slavery, not only as good for blacks but also as God's will. He referred to Leviticus 25:44–You may acquire male and female slaves from the pagan nations that are around you. He also quoted I Timothy 6:1, where it says slaves should regard their masters as worthy of all honor. . . .The incidence of abuse, rape, broken homes and murder are 100 times greater, today, in the housing projects than they ever were on the slave plantations of the Old South, Davidson wrote in his speech. The truth is that nowhere on the face of the earth, in all of time, were servants better treated or better loved than they were in the Old South by white, black, Hispanic and Indian slave owners.

Clarence Page, *Fables Not Worth Telling*, CHI. TRIB., May 12, 1996, at 23.

On the other hand, the South's history of slavery may also work against the imposition of caning because of concerns about resurrecting memories of the cruel and unjust punishment of slaves: "For many, the mental picture of a caning in the courthouse square resonates too closely with the cultural recollection of the runaway slave who was led, shackled, back to the plantation and given 40 lashes as an example to others." Larry Copeland, *Politicians Feed Cry for Caning Lawbreakers: But Some Object to the Flurry of Proposals as an Echo of Whippings of Slaves*, ORANGE COUNTY REGISTER, Mar. 12, 1995, at A1; *see also* Editorial, *Whipping, Caning Can't Be the Best Solution to Crime*, GREENSBORO NEWS & REC., Mar. 16, 1995, at A15 ("It wouldn't do much for the sorry state of race relations in America to have a whipping post set up in city hall courtyard, considering the relatively high proportion of African-American

These are just a few of the possible reasons for widespread public support for caning in Alabama and elsewhere in the Old South. The only thing that is certain is that politicians propose severe corporal punishment laws because "it plays really well politically."[50] Senator Davidson of Alabama has expressed his political motive for sponsoring the caning bill, admitting that he doesn't "know if it'll stand up in court, but it should get some darn good publicity."[51] A number of political candidates have proposed caning to bring attention to their candidacies.[52]

III. CONSTITUTIONAL ARGUMENTS AGAINST CANING

A. The Eighth Amendment Bar Against Cruel and Unusual Punishment

1. Whipping Precedent

Before the Eighth Amendment to the U.S. Constitution was

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defendants, and our shameful history of slavery -- when floggings were routine."); Editorial, *Singapore, USA?*, USA TODAY, Feb. 9, 1995, at 10A ("Mississippi's [caning] proposal . . . is particularly painful to descendants of slaves.").

[50] Anderson, *supra* note 6, 1A (quoting Cincinnati City Council member Todd Portune).

[51] *Going Too Far, supra* note 7, at 14A.

[52] *See, e.g.*, John Iwasaki, *Bergeson Maps Out Agenda After Outdistancing Taber*, SEATTLE POST-INTELLIGENCER, Nov. 6, 1996, at A15 (stating that State Superintendent of Public Instruction Candidate Ron Taber advocated Singapore-style caning for drug dealers); *Florida: Dem Pollster Has Bush Up by Ten Points*, THE HOTLINE (AMERICAN POLITICAL NETWORK, INC.), Oct. 11, 1994 (stating that Florida Governor candidate Jeb Bush supported caning); *Taylor: Takes His Me$ Ge East*, THE HOTLINE (AMERICAN POLITICAL NETWORK, INC.), Aug. 30, 1995 (stating that Presidential candidate Morry Taylor stood behind flogging); *Overlooked*, THE HOTLINE (AMERICAN POLITICAL NETWORK, INC.), June 24, 1994 (stating that California U.S. House candidate supported caning of wife-beaters); *House Briefings: May 3rd Primaries*, THE HOTLINE (AMERICAN POLITICAL NETWORK, INC.), Apr. 21, 1994 (stating that Ohio U.S. House candidate supported caning).

applied to the states through the Fourteenth Amendment,[53] courts considered the legality of severe corporal punishments like whipping and flogging under state law.[54] Most of these early decisions came out of North Carolina,[55] which initially condemned flogging;[56] however, these decisions were overturned by *State v. Revis*,[57] which held that any challenge to a statute authorizing flogging of prisoners "should be addressed to the legislative branch of the government," as the statute was "a valid exercise of the legislative power."[58]

The only modern-day court (in the last fifty years) to hold that the practice of whipping convicts is not cruel and unusual,[59] the Supreme

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[53] *See* State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); *see also* Robinson v. California, 370 U.S. 660 (1962).

[54] *See, e.g.*, United States v. Jones, 108 F.Supp. 266, 270 (S.D. Fla. 1952) (holding that "whether whipping or corporal punishment is legal or illegal in a state is purely a matter of state law"), *rev'd on other grounds*, 207 F.2d 785 (5th Cir. 1953).

[55] *But see* Commonwealth v. Wyatt, 6 Rand. 694 (Va. 1828) (finding whipping "odious, but [not] unusual"); Westbrook v. State, 66 S.E. 788 (1909).

[56] State v. Mincher, 90 S.E. 429 (N.C. 1916); State v. Morris, 81 S.E. 462 (N.C. 1914); State v. Nipper, 81 S.E. 164 (N.C. 1914).

[57] 136 S.E. 346 (N.C. 1927).

[58] *Id.*

[59] In 1965, the Eastern District of Arkansas refused to hold that all corporal punishment is per se unconstitutional, but it did impose safeguards which it held were not followed in that case:

> [C]orporal punishment has not been viewed historically as a constitutionally forbidden cruel and unusual punishment, and this Court is not prepared to say that such punishment is per se unconstitutional. . . . But, the Court's unwillingness to say that the Constitution forbids the imposition of any and all corporal punishment on convicts presupposes that its infliction is surrounded by appropriate safeguards. It must not be excessive; it must be inflicted as dispassionately as possible and by responsible people; and it must be applied in reference to recognizable standards whereby a convict may know what conduct on his part will cause him to be whipped and how much punishment given conduct may produce. The Court finds that those safeguards do not exist at the Arkansas Penitentiary today, and until they are established the further corporal punishment of petitioners must and will be enjoined.

Talley v. Stephens, 247 F.Supp. 683, 689 (E.D.Ark. 1965). Although the court did not hold that corporal punishment is per se unconstitutional, it also did not hold that the whipping inflicted in

Court of Delaware, also deferred to the state legislature on the question of its constitutionality, holding that the state legislature's will could be the *only* indicia of present-day morality (and thus the only factor examinable in the constitutional analysis): "[t]he only manner in which such an expression can be made is through the action of duly elected representatives of the Society whose standard is to be applied."[60]

Other commentators have opined that this precedent means that caning would be held to be constitutional today.[61] However, the *Cannon* holding has since been called into question by the Delaware Supreme Court.[62] After holding that the question of whether a sentence violated the cruel and unusual punishment clause of the Delaware Constitution was to be left exclusively to the discretion of the legislature, as in *Cannon*, the *Ayers* court said: "Since Robinson, however, the Eighth Amendment has been made binding on the states, and the answer to the question must be given in the light of the Eighth Amendment."[63] This suggests that the court overruled the contention in *Cannon* that punishments authorized by the state legislature are completely unreviewable. However, the Federal

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that case was not cruel and unusual.

[60] State v. Cannon, 190 A.2d 514, 519 (Del. 1963); *see also* Balser v. State, 195 A.2d 757, 758 (Del. 1963) (reaffirming *Cannon*).

[61] Professor Daniel Hall extensively discussed the *Cannon* case and concluded, based on that precedent, that whipping is not unconstitutional:

> Where does this leave whipping as the nation moves into the twenty-first century? Contemporary caselaw demands a high regard for separation and federalism principles. Deference to legislative determinations of appropriate punishment should underlie judicial review. Unless grossly disproportionate, a sentence of whipping should be left intact.

Hall, *supra* note 6, at 450; *see also* Hall, *supra* note 6, at 456 ("The decisions in Cannon and Balser indicate that whipping is appropriate for [vandalism and theft] crimes."); Whitney S. Wiedeman, *Don't Spare the Rod: A Proposed Return to Public, Corporal Punishment of Convicts*, 23 AM. J. CRIM. L. 651, 657 (1996) ("Courts have failed to directly attack any possible harm corporal punishment may cause. For example, Delaware used the lash to maintain discipline in its prisons until the 1950s. The practice was discontinued and removed from the list of available punishments twenty years later, but not because of any ruling by the Supreme Court.") (citing *Cannon*).

[62] State v. Ayers, 260 A.2d 162, 169 (Del. 1969).

[63] *Id.*

District Court in Delaware later relied on *Cannon* as standing for the proposition that courts may never review punishments authorized by the state legislature.[64] Since then, the Delaware Supreme Court has reiterated its rejection of *Cannon*:

> [I]f we are to adhere to Eighth Amendment principles in interpreting Article I, Section 11, we must bring our own judgment to bear upon the proportionality of Sanders' sentence . . . if we automatically conclude that Sanders' sentence is proportionate to his fault merely because the General Assembly has ordained that death is an acceptable punishment for a defendant such as Sanders, the proportionality test becomes meaningless.[65]

Therefore, the *Cannon* precedent is virtually obsolete in Delaware.

Even apart from the apparent death of this precedent, it can be argued that the *Cannon* court misread the Supreme Court's findings regarding whipping when it stated that "[t]he Supreme Court, however, has not as yet held the punishment of whipping, in itself, cruel. It has spoken of it as infamous, but that is possibly true of all punishment for crime."[66] The court seems to have overlooked or misinterpreted the following passage:

> The court in [*Commonwealth v. Wyatt*[67]] pronounced [whipping] 'odious but not unusual.' Other cases have seen something more than odiousness in it, and have regarded it as one of the forbidden punishments. It is certainly as odious as the pillory, and the latter has been

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[64] Valley Forge Insurance Company v. Jefferson, 628 F.Supp. 502, 511 (D. Del. 1986).

[65] Sanders v. State, 585 A.2d 117, 144-45 (Del. 1990).

[66] 190 A.2d at 518. The court is probably referring to *Ex Parte Wilson*, 114 U.S. 417, 427 (1885), in which the Supreme Court said, "at the present day either stocks or whipping might be thought an infamous punishment."

[67] 6 Va. (1 Rand) 694 (1828).

> pronounced to be within the prohibitory clause.[68]

This passage can be read as prohibiting whipping constitutionally, for the chain of reasoning runs as follows: Since some courts have prohibited whipping because it is "something more" than odious, and the pillory has been constitutionally prohibited as "something more" than odious, then any act which reaches that level of "something more" than odious must also be constitutionally prohibited. Because the court finds that whipping reaches that level of "something more" than odious by virtue of being equally as odious as the pillory, it must be constitutionally prohibited.[69]

Those commentators who have opined that caning is constitutional have also downplayed or overlooked important federal precedent holding that whipping prisoners violates the Eighth Amendment.[70] In *Jackson v. Bishop*,[71] the Eighth Circuit, in an opinion written by then-Circuit Judge Harry Blackmun, held that prison officials' use of a leather strap to whip inmates violated the Eighth Amendment:

> [W]e have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century,

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[68] Weems v. United States, 217 U.S. 349, 377-78 (1910).

[69] However, this precedent is not determinative of a constitutional challenge to caning because it is in dicta, and because it is so archaic -- the interpretation of the Eighth Amendment is now vastly different from what it was in 1910.

[70] *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.). Mr. Wiedeman completely overlooked this important precedent, stating that "no federal court has ever found corporal punishment of criminals unconstitutional." Wiedeman, *supra* note 61, at 657-58. Professor Hall briefly described the *Jackson* case and noted that it "is often cited by opponents of corporal punishment for the proposition that whipping is per se cruel and unusual." Hall, *supra* note 6, at 445-46. He then extensively discussed the *Cannon* case and concluded that a modern court would follow the *Cannon* precedent. Professor Hall did not discuss why a court would not follow *Jackson*, nor did he discredit or attack the opinion. He merely noted that the *Jackson* court's statement that it would not distinguish between a statutorily authorized whipping and one imposed by corrections officials of their own accord was dictum. *Id.* at 446.

[71] 404 F.2d 571 (8th Cir. 1968).

> runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess.[72]

This holding has been cited with approval by the United States Supreme Court[73] and by several other federal circuit courts.[74]

Despite this compelling precedent, the fact that the U.S. Supreme Court has never directly ruled on the constitutionality of caning makes reliance on this precedent alone unwise. Therefore, a full Eighth Amendment analysis of caning must be undertaken to determine its constitutionality.

2. Eighth Amendment Analysis

The Supreme Court has delineated four general approaches in interpreting and applying the Eighth Amendment prohibition against cruel and unusual punishment.[75] The first method, applied by Justice Scalia in

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[72] *Id.* at 579.

[73] Furman v. Georgia, 408 U.S. 238 (1972) (Powell, J., dissenting) ("Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears – punishments that were in existence during our colonial era. Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution.") (citing Jackson v. Bishop, 404 F.2d 571).

[74] Roberts v. Williams, 456 F.2d 819, 827 (5th Cir. 1971); Nelson v. Heyne, 491 F.2d 353, 355 n.4 (7th Cir. 1974); Campbell v. Wood, 18 F.3d 662, 707 (9th Cir. 1993) (Reinhardt, J., dissenting in part and concurring in part) ("The *Jackson* court engaged in the proper constitutional analysis, for whatever the value of the strap to prison discipline might be . . . that method of punishment [whipping] is out of place in late 20th Century American society, a society that demands respect for human dignity.").

[75] The Eighth Amendment to the U.S. Constitution prohibiting cruel and unusual punishment applies to the states through the Fourteenth Amendment's Due Process clause. *Robinson*, 370 U.S. at 667. The Eighth and the Fourteenth Amendments protect all citizens, including imprisoned convicts: "No government can, within the bounds of the Constitution, cruelly punish a citizen whether he be in jail or at liberty." Adams v. Mathis, 458 F.Supp. 302,

the majority opinion in *Stanford v. Kentucky*,[76] involves asking whether a punishment was considered cruel and unusual at the time of the adoption of the Bill of Rights, and is described in Part "a" of this Section. The second view consists of defining "evolving standards of decency" in society by looking at objective indicia of contemporary public opinion, mainly legislative enactments.[77] The applicability of this approach to caning is described in Part "b" of this Section. The third inquiry, described in Part "c", involves asking whether a punishment is "excessive," that is, whether it involves the unnecessary and wanton infliction of pain, and whether it is grossly disproportionate to the severity of the crime.[78] The fourth approach, expressed in *Robinson v. California*,[79] involves condemning any punishment at all for an action or status that is not punishable constitutionally because a non-punitive measure would do as well.[80] Because that inquiry focuses on the offense, not the punishment, it is inapplicable to assessing the constitutionality of caning in the abstract, and will not be discussed further. Finally, because some recent caning proposals focus on juvenile offenders, the applicability of the Eighth Amendment to minors will be discussed in Part "d" of this Section.[81]

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308 (M.D. Ala. 1978). The Eighth Amendment may also protect some juveniles in detention centers from cruel and unusual punishment. Martarella v. Kelley, 349 F.Supp. 575, 597 (S.D.N.Y. 1972). *See infra*, Part III. d on the application of the Eighth Amendment to minors. It applies to different types of punishment administered by the state: "Neither do we wish to draw . . . any meaningful distinction between punishment by way of sentence statutorily prescribed and punishment imposed for prison disciplinary purposes . . . the Eighth Amendment's proscription has application to both." *Jackson*, 404 F.2d at 580-81.

[76] 492 U.S. 361 (1989). Justice Scalia's opinion in *Stanford* was joined by Chief Justice Rehnquist, Justice White, Justice O'Connor, and Justice Kennedy.

[77] Trop v. Dulles, 356 U.S. 86 (1958); Gregg v. Georgia, 428 U.S. 153 (1976).

[78] *Gregg*, 428 U.S. at 173 (joint opinion of Stewart, Powell, and Stevens, JJ.).

[79] 370 U.S. 660 (1962).

[80] *Robinson*, 370 U.S. 660, 661 (holding that criminally punishing the status of drug addiction was unconstitutional because a civil commitment would have done as well).

[81] This section actually addresses whether or not the Eighth Amendment applies to any citizens, not just juveniles, in domains that can be analogized to the school setting, because the Supreme Court has held that the Eighth Amendment does not apply to punishments meted out in schools. Ingraham v. Wright, 430 U.S. 651 (1977). However, the focus is on juveniles because most bills proposed thus far authorize caning only for that group.

a. Was the Punishment Considered Cruel and Unusual in 1791?

In his majority opinion in *Stanford v. Kentucky*,[82] Justice Scalia began his Eighth Amendment analysis of the juvenile death penalty by asking whether the punishment was "one of 'those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'"[83] After concluding that it was not, Scalia went on to assess the juvenile death penalty in light of the other modes of analysis, such as the "evolving standards of decency" test. Although some of Scalia's recent public comments suggest that he believes that this "originalist" approach should be the only test under the Eighth Amendment (a stance that could doom an Eighth Amendment challenge to caning),[84] the fact that he went on to analyze the juvenile death penalty

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[82] 492 U.S. 361 (1989).

[83] *Id.* at 368 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

[84] Justice Scalia has publicly expressed conflicting opinions on the constitutionality of caning. At first, he admitted that one of the central flaws in originalist methodology was that it must sometimes be violated to avoid outrageous results, and he cited flogging as an example of a punishment which originalist doctrine would mandate upholding, but which could not practically be upheld by a modern court: "I am confident that public flogging . . . would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989). Justice Scalia has dubbed this the problem of the "faint-hearted originalist," and he has speculated that if he were to judge the constitutionality of flogging, he may have to join that group: "I hasten to confess that in a crunch I may prove to be a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging." *Id.* at 864. It was easy for Scalia to minimize the import of that defect in originalist philosophy, for he assumed that such barbaric punishments would never be proposed again: "But then I cannot imagine such a case's arising either . . . I expect I will rarely be confronted with making the stark choice. . ." *Id.* Now that caning and flogging may become a reality in the United States, Scalia can no longer dismiss this flaw in his judicial philosophy as insignificant. He has also come under heavy attack from the academic world because of this defect in his methodology. *See, e.g.*, Lawrence Tribe and Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1090 (1990) ("How do we know when to reject an historical pattern or understanding?"); *See also* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1187 (1993) ("Justice Scalia blinked"). For whatever reasons, Justice Scalia appears to have fortified his "faint heart" at some point in the last several years, because he has recently said publicly that he thinks caning is probably

under the other modes of analysis shows his acceptance of them as valid constitutional inquiries.[85] This part of Justice Scalia's opinion reinforces the Supreme Court's view that while a punishment is not necessarily constitutional because it passes the originalist test, the punishment almost certainly fails to pass constitutional muster if it cannot even clear this first hurdle: "At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted. The prohibitions of the Eighth Amendment are not limited, however, to those practices condemned by the common law in 1789."[86]

Therefore, one must initially determine if caning would have been considered cruel and unusual at the time of the adoption of the Bill of Rights. A number of courts have held that whipping was not cruel and unusual in the minds of the Founding Fathers when the Eighth Amendment was enacted: "the people who made this Constitution . . . uniformly held that the punishment of whipping was not included in that class which the Constitution forbids. . . ."[87] However, judicial opinion has not been unanimous on this question: "The word 'cruel', when considered in relation to the time when it found place in the bill of rights, meant . . .

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constitutional: "Deriding the court's modern view that the constitutional ban on cruel and unusual punishment must be interpreted according to 'evolving standards of decency,' Scalia said the ban should be understood in light of the punishments that were allowed in 1791, when the Eighth Amendment was adopted." *Justice Scalia Says Caning Likely Constitutional*, SAN FRANCISCO CHRON., May 7, 1994, at A18. It remains to be seen whether this comment was merely an off-hand remark, or whether it signals a true reassessment by Scalia of his 'faint heart.' However, it has already been used as ammunition by proponents of corporal punishment: "The safety committee's analysis of the [California paddling] legislation found support for the law in a recent speech by U.S. Supreme Court Justice Antonin Scalia . . . Scalia surmised that a caning . . . would not violate the Eighth Amendment's prohibition against cruel and unusual punishment." Mark Walsh, *Paddling Law Up for Debate?*, RECORDER, Aug. 10, 1994, at 3.

[85] Scalia also acknowledged them by joining the opinion in *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[86] *Id.* at 330 (joint opinion of O'Connor, J., Rehnquist, Ch. J., White, Scalia, and Kennedy, JJ.) (citation omitted).

[87] Foote v. State, 59 Maryland 264, 267-68 (1883); *see also* Aldridge v. Commonwealth, 2 Va. Cases 447, 450 (1824).

such as that inflicted at the whipping post. . . ."[88] Despite some judicial disagreement on this issue, the fact that whipping was included as a punishment in the first Crimes Act of the United States[89] and in the first Judiciary Act of the United States[90] is convincing evidence that whipping was not considered by the Founding Fathers to be cruel and unusual punishment.

b. The "Evolving Standards of Decency" Test

This method of Eighth Amendment analysis, more well-developed under Supreme Court jurisprudence than the originalist approach, involves discovering what constitutes present-day societal mores: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[91] Courts have looked to a variety of sources in making this determination.

i. Refer to the Legislatures

The predominant sources a court must look to under this analysis are legislative enactments: "First among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives."[92] This analysis begins by counting how many states allow a certain punishment and how many states do not allow it so as to ascertain a "national consensus" on the issue.[93] In *Enmund v. Florida*,[94] the Supreme Court struck down capital punishment for

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[88] Miller v. State, 49 N.E. Rep. 894, 897 (Ind. 1898); *see also* Hobbs v. State, 32 N.E. Rep. 1019, 1021 (Ind. 1893) (restating language from *Miller).*

[89] Act of April 30, 1790, ch. 9; 1 Stat. 112-119.

[90] Act of September 24, 1789, ch. 20, Sec. 9; 1 Stat. 76.

[91] *Trop*, 356 U.S. at 101.

[92] *Stanford*, 492 U.S. at 370 (quoting McCleskey v. Kemp, 481 U.S. 279, 300 (1987) and *Gregg*, 428 U.S. at 173).

[93] *Stanford*, 492 U.S. at 371; *see also* Thompson v. Oklahoma, 487 U.S. 815, 822-29 (1988).

[94] 458 U.S. 782 (1982).

participation in a robbery where an accomplice caused a death that the defendant did not intend, because only eight jurisdictions authorized that punishment. In *Stanford*, the Court held that because less than half of the states authorizing the death penalty prohibited it for 16- and 17-year-olds, there was no national consensus against it, rendering the punishment constitutional.[95] Since only a handful of states have even proposed caning statutes, there might appear to be an overwhelming national consensus against it, rendering it clearly unconstitutional. On the other hand, one state always has to be the first to implement a new punishment, and being the first does not necessarily mean that whatever punishment it implements must be held to be unconstitutional.[96] That is why other sources should also be considered when determining what constitutes the "evolving standards of decency" of society.

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[95] *Stanford*, 492 U.S. at 370-72.

[96] In several Supreme Court opinions, the number of states needed to express a "national consensus" against a punishment has neared complete unanimity. In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court held that even though only three states allowed a judge to override a jury's recommendation of life, the override did not violate the Eighth Amendment: "The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Id.* at 464. This position was taken to its logical extreme by the Supreme Court in Harris v. Alabama, 115 S. Ct. 1031 (1995), in which the majority upheld Alabama's standardless jury override system against Eighth Amendment challenge despite the fact that it is the only state that has such a system. *See* 130 L. Ed. 2d at 1023 (Stevens, J., dissenting) ("The Spaziano Court held that the rejection . . . of capital jury overrides by all but (at that time) three (states), did not demonstrate an 'evolving standard' disfavoring overrides. (cite omitted) Surely, however, the rejection of standardless overrides by every State in the Union but Alabama is a different matter"). However, the Court seems to consider procedural rules (as in *Spaziano* and *Harris*) to be in a separate category from classes of offenders and punishments (as in *Stanford*, *Enmund*, and *Coker*), with the consideration of the former's constitutionality much less influenced by national consensuses than the consideration of the cases in the latter group. In other words, the decisions in *Spaziano* and *Harris* were not based on a simple tallying of states, but on an assessment of the procedure itself. Because caning falls into the latter group, the tallying of states is still an important exercise, yet one in which the *Harris* and *Spaziano* precedents should not be applied to destroy this aspect of the "evolving standards" test.

ii. Other Sources

The Supreme Court has held that the "evolving standards" of society cannot be ascertained by looking only at legislative judgments: "Legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power."[97] Thus, courts may bring their own judgments to bear on the value of the punishment: "Although the judgments of legislatures . . . weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty."[98]

This concept has prompted judges to utilize a wide variety of sources when determining what constitutes the "evolving standards of decency" of society. Some courts have relied on their own set of values to strike down punishment that they deem to be cruel and unusual.[99] In *Jackson v. Bishop*,[100] the Eighth Circuit relied on "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" in holding that Arkansas prison guards' use of a leather whipping strap against prisoners violated the Eighth Amendment.[101] Some courts have looked at the prevailing standards throughout other environments, including other prison systems[102] and other countries.[103] The U.S. Supreme Court has also held that international law informs the interpretation of the cruel and

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[97] *Gregg*, 428 U.S. at 174 n19; *see also* Furman v. Georgia, 408 U.S. 238, 313-14 (1972) (White, J., concurring).

[98] *Thompson*, 487 U.S. at 833 (quoting *Enmund*, 458 U.S. at 797).

[99] *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

[100] 404 F. 2d 571.

[101] *Id.* at 579.

[102] *See* Nelson v. Heyne, 491 F.2d 352, 356 (7th Cir. 1974) (noting that "the current sociological trend is toward the elimination of all corporal punishment in all correctional institutions"), *cert. denied*, 417 U.S. 976 (1974).

[103] *Nipper*, 81 S.E. at 165 ("Flogging has long since been abolished as a part of prison discipline by all the great and enlightened nations of the world.").

unusual clause of the Eighth Amendment.[104]

c. The "Excessiveness" Approach

The third approach courts have taken in interpreting the Eighth Amendment is to bar punishment involving the unnecessary and wanton infliction of pain and resulting in disproportionality between the offense and the punishment.[105] This method supplements the "evolving standards" test.[106]

i. The Unnecessary and Wanton Infliction of Pain

This component of the "excessiveness" test requires a sanction to serve a legitimate penal aim: "the sanction imposed cannot be so totally without pedological justification that it results in the gratuitous infliction of suffering."[107] The idea behind it is to decide whether "the lawmaking power, in fixing the punishment, was sufficiently impelled by a purpose to effect a reformation of the criminal."[108] If the lawmakers were not motivated by that purpose, then the punishment is unnecessary and wanton.

In analyzing the purposes of a sanction, it is useful to divide the inquiry according to the four rationales for punishment: rehabilitation,

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[104] *Trop*, 356 U.S. at 102; Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); *Enmund*, 458 U.S. at 796-97 n.22; *Thompson*, 487 U.S. at 830-31. *But see Stanford*, 492 U.S. at 369 n1 ("We emphasize that it is *American* conceptions of decency that are dispositive. . . .").(emphasis in original) The status of international law regarding caning will be discussed *infra*, Section IV.

[105] *Gregg*, 428 U.S. at 173.

[106] *See, e.g., Penry*, 492 U.S. at 334.

[107] *Gregg*, 428 U.S. at 183; *see also Penry*, 492 U.S. at 335-36. *But see Stanford*, 492 U.S. at 377-78 ("We also reject petitioners' argument that we should invalidate capital punishment of 16- and 17-year old offenders on the ground that it fails to serve the legitimate goals of penology . . . socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.") (This section of Justice Scalia's opinion was not joined by a majority of the court.).

[108] *Weems*, 217 U.S. at 386-87 (White, J., dissenting).

incapacitation, deterrence, and retribution.[109] The proponents of caning do not claim that it serves a rehabilitative purpose, and substituting caning for a prison sentence, as several bills proposed to do,[110] actually defeats the goal of incapacitation, as some dangerous criminals, still furious from their caning humiliation,[111] may be put back on the streets. Therefore, the punishment can only be justified as fulfilling the goals of deterrence and retribution. Determining the retributive goal involves a highly subjective "ethical judgment" by the court.[112] It boils down to deciding whether or not a convict is getting his "just desserts" for the crime he or she has committed: "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[113] Since that test has only been applied in capital cases, and the culpability of the offender is not relevant to the caning analysis,[114] the only goal that can be debated according to objective evidence is the deterrence rationale.

This focus is appropriate, since those who support caning cite deterrence as its prime goal: "If we do a little caning early on in life and

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[109] *Spaziano*, 468 U.S. at 477-78 (Stevens, J., dissenting); *see also* Pugh v. Locke, 406 F.Supp. 318, 330 (M.D. Ala. 1976), *rev'd on other grounds*, Alabama v. Pugh, 438 U.S. 781 (1978) (stating that punishments are unconstitutional when they "militate against reform and rehabilitation" or "increase the likelihood of future confinement.").

[110] *See, e.g.*, Mississippi House Bill 904, introduced in 1996: "It shall be considered lawful for any judge, or any district attorney, at his discretion, to waive any or all of a sentence of imprisonment . . . and instead, impose a sentence including corporal punishment."

[111] *See, e.g., Whipping, Caning, supra* note 49, at A15 ("The guy whose flesh has been ripped open, under the gaze of his fellow citizens, emerges from this treatment feeling a trifle bitter, and instead of being penitent, is more apt to beat up the next person he sees.").

[112] *Spaziano*, 468 U.S. at 481.

[113] Tison v. Arizona, 481 U.S. 137, 149 (1987).

[114] The proponents of caning argue that it serves the retributive purpose well, at least for violent criminals, because the most "just desserts" are those that reflect the offense: "For crimes of violence, the offenders should suffer punishments of violence . . . A man who beats up a little old lady surely deserves a thorough beating himself." GRAEME NEWMAN, JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS 35 (1995); *see also* Richard Lacayo, *The Real Hard Cell: Lawmakers Are Stripping Inmates of Their Perks*, TIME, Sept. 4, 1995, at 31 (describing the "undeniable psychological satisfaction" in imposing physically harsh punishments on convicts).

get their attention, I don't think we will have to deal with them later in life," said Alabama State Senator Charles Davidson.[115] Proponents of caning bolster this argument by pointing to the stability and low crime rate of the Singaporean society, which they attribute to its severe criminal penalties, including caning: "A visit to the prosperous nation of Singapore shows that its roadways are litter-free, its people are friendly and polite, and its crime rate is incredibly low."[116]

However, an objective look at these arguments reveals their flaws. First, there is no evidence that corporal punishment is a more effective deterrent than current sanctions,[117] only evidence that it harms the individual and may lead to further misbehavior: "Study after study has shown numerous problems stemming from 'corporal punishment' of children by paddling or whipping: It is ineffective as a penalty, deterrent or behavior modifier. It risks serious, lasting pain and physical and

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[115] Editorial, *Sanctioning Cruelty; Caning Proposal Sheer Stupidity*, MONTGOMERY ADVERTISER, Dec. 15, 1995, at 12A; *see also* Ann O'Hanlon, *Bring back the Rod? America Waves a Stick at Crime*, INTERNATIONAL HERALD TRIB., Mar. 7, 1995 (quoting state legislators); Editorial, *Cane Prisoners on Public Square*, MONTGOMERY ADVERTISER, Dec. 27, 1995, at 18A.

[116] Opinion, *Look to Singapore's Example*, MONTGOMERY ADVERTISER, Dec. 26, 1995, at 11A; *see also* CNN News: *School in Singapore Has Few Disciplinary Problems*, CABLE NEWS NETWORK, Apr. 20, 1994, Transcript #714-13; *see also* Hall, *supra* note 6, at 435.

[117] The proponents of corporal punishment argue that, based on electric shock studies of animals, physical pain has been shown to be a very effective deterrent: "[C]orporal punishment has been so successful that some animals have starved themselves to death rather than eat the forbidden food [which is accompanied by a shock] . . . acute pain is a very efficient and lasting suppressor of unwanted behavior." NEWMAN, *supra* note 114, at 157. At the same time, Newman admits that the only two studies done of deterrent effects of corporal punishment on humans (conducted in Delaware and in England about fifty years ago) concluded that "the whipped group displayed a higher recommittal rate than the unwhipped group." *Id.* at 162. He dismissed these studies as being heavily biased against corporal punishment, since the British study began with the conclusion that corporal punishment should be abolished, and in the Delaware study, "those who were whipped were the more hardened criminals." *Id.* at 158-59. Newman was probably correct in stating that these flawed studies were "not conclusive" on the question of the deterrent effect of corporal punishment on humans, *Id.* at 160, but this does not change the fact that no evidence exists to show that corporal punishment has a greater deterrent effect on humans than any existing criminal sanction.

psychological injury, plus rebelliousness, resentment, and behavior problems."[118] Studies have shown that rather than being a deterrent, corporal punishment actually results in higher rates of recidivism among children than nonviolent punishments: "The facts revealed showed that of all the boys birched, over 25 per cent were re-convicted within one month, and over 76 per cent within two years. No other method had such a startling record of failure."[119] Corporal punishment has also been linked to higher rates of violence among children: "States with high rates of corporal punishment tend to have high rates of murder committed by children and violence between students . . . Children who are spanked are three times more likely to seriously assault a sibling than those who aren't."[120] Corporal punishment can be even more damaging when done at an institution than when done by a family member:

> Dr. Jerome Miller provided an interesting insight about the effect upon a child of physical assault in institutions compared with corporal punishment by parents: "A family can even from time to time strike a youngster or slap an adolescent, and hopefully it is done out of some concern and some love. An institution cannot do that without it being received as an impersonal hatred. Institutions and bureaucracies don't love people."[121]

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[118] Editorial, *Keep Violence Out of Sentencing and Nutcase Judges Off the Bench*, FORT LAUDERDALE SUN-SENT., Oct. 2, 1995, at 6A; *See also* Editorial, *Corporal Stupidity*, SAN FRANCISCO CHRON., Jan. 11, 1996, at A22 ("violence begets violence"); Enrique Lavin, *Anti-Abuse Group Berates Paddling Bill*, LOS ANGELES TIMES, Jan. 12, 1996, at 6 ("The only thing it does is make an angry child angrier"); Sam Walker, *Southern Schools Rethink Sparing the Rod*, CHRISTIAN SCIENCE MONITOR, June 21, 1995, at 1 ("paddling promotes violence").

[119] GEORGE RYLEY SCOTT, THE HISTORY OF CORPORAL PUNISHMENT: A SURVEY OF FLAGELLATION IN ITS HISTORICAL ANTHROPOLOGICAL AND SOCIOLOGICAL ROOTS 189 (1942) (quoting Cicely Craven, Honorary Secretary of the Howard League for Penal Reform in London).

[120] Dana Wilkie, *Corporal Punishment for General Good? Studies Rap the Practice*, SAN DIEGO UNION-TRIB., Aug. 22, 1994, at A3.

[121] State v. Werner, 242 S.E.2d 907, 910 (W.Va. App. 1978).

For all of these reasons, courts have held that severe corporal punishment of juveniles "frustrates correctional and rehabilitative goals."[122]

The same holds true for adult prisoners: "Corporal punishment generates hate toward the keepers who punish and toward the system which permits it . . . It frustrates correctional and rehabilitative goals . . . Whipping creates other penological problems and makes adjustment to society more difficult."[123] Early courts outlawing the whipping of convicts also found that corporal punishment did not help to reform the prisoner: "That which degrades and imbrutes a man cannot be either necessary or reasonable."[124] As with juvenile offenders, its deterrent effect on adults has never been demonstrated: "In the case of the first offender not only does caning, in nine cases out of ten, fail to prevent a repetition of the offence, it nearly always succeeds effectually in ensuring such a repetition."[125] Even some of the strongest supporters of caning question its deterrent effect on adult prisoners.[126] There is no evidence showing that severe corporal punishment improves behavior or reduces recidivism among juvenile or adult offenders.

In addition, Singapore[127] may have a lower crime rate than the U.S., but "the number and seriousness of crimes committed by juveniles is rising dramatically," despite the harsh criminal penalties.[128] Also, no connection has ever been established between the severe punishments and

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[122] *Nelson*, 491 F.2d at 356; *supra* note 74.

[123] *Jackson*, 404 F.2d at 580; *supra* note 70.

[124] *Nipper*, 81 S.E. at 167; *supra* note 56.

[125] SCOTT, *supra* note 119, at 177.

[126] *See* Rhonda Cook, *Around the South: Back to Hard Labor*, ATLANTA J. & CONST., Aug. 20, 1995, at 4D (quoting Alabama Prison Commissioner Ron Jones: "I don't think it would work well on the adult offender.").

[127] A small number of other countries also allow caning, but Singapore is the country that proponents of caning point to when arguing that caning serves as an effective deterrent. *See supra* note 116 and accompanying text. A partial list of the other countries allowing severe corporal punishments includes Afghanistan, Bangladesh, Brunei, the Bahamas, Antigua and Barbuda, Trinidad and Tobago, Iran, Libya, Malaysia, Qatar, Saudi Arabia, Sudan, Swaziland, United Arab Emirates, and Yemen. Tom Kuntz, *Beyond Singapore: Corporal Punishment, A to Z*, COURIER-J. (Louisville, Ky.), July 5, 1994, at 7A.

[128] *Singapore: Caning Shown on CD-ROM*, U.P.I., Jan. 10, 1996.

the low crime rate, which could be attributed to a host of other factors, such as cultural attitudes towards nonconformity and misbehavior, the equitable distribution of wealth, the homogeneity of the population, or pervasive gun control. Other countries that have these same attributes, such as Japan, maintain lower crime rates than Singapore without relying on severe corporal punishment.[129] Singaporean laws allow a host of other measures that contribute to crime control, but that would be unthinkable and unconstitutional in our country: "Singapore allows torture, arbitrary arrest, detention and exile without charges, warrantless searches in some cases and official restrictions of free speech and the media."[130] Also, the 1966 caning law that American legislators want to emulate was not passed because of rising crime rates but "was passed largely to punish political graffiti, most of which was scrawled by the left-wing minority party."[131] There is no evidence that the Singaporean caning law has been an effective deterrent to misconduct.

Because caning does not appear to serve any legitimate penal aim, a court could conclude that it is merely the "unnecessary and wanton infliction of pain" by following the same process that was used by the Supreme Court in *Thompson*:

> [W]e are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, 'nothing more than the purposeless and needless imposition of pain and suffering,' *Coker v. Georgia*, 433 U.S. at 592, 53 L. Ed. 2d 982, 97 S. Ct. 2861, and thus an unconstitutional punishment.[132]

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[129] Wilkie, *supra* note 120, at A3.

[130] *Id.*

[131] *Id.*

[132] *Thompson*, 487 U.S. at 838 (joint opinion of Stevens, Brennan, Marshall, Blackmun, JJ.).

ii. Cruel, Unusual, and Disproportionate

The disproportionality method, the second component of the "excessiveness" approach, cannot be applied to caning unless it is known precisely which offenses will warrant that punishment, because the test involves comparing the relative severity of the offense and the punishment: "A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'"[133] The Supreme Court's opinion in *Harmelin v. Michigan*[134] severely limited this type of challenge in the noncapital context, allowing proportionality review only in cases of "extreme sentences that are 'grossly disproportionate' to the crime."[135] Because "successful challenges to the proportionality of particular sentences [are] exceedingly rare,"[136] and because those that do succeed usually involve a grossly disproportionate prison sentence[137] and not grossly disproportionate corporal punishment, this type of challenge to a caning statute is not likely to bear fruit.

However, once it is known which offenses will warrant the punishment of caning, the three-factored test set out in *Solem* may be applied to caning: "First, we look to the gravity of the offense and the harshness of the penalty."[138] Without other caning laws to compare it to, this could be a highly subjective determination.[139] "Second, . . . compare

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[133] *Robinson*, 370 U.S. at 676; *see also* Williams v. Johnson, 845 F.2d 906, 909 (11th Cir. 1988).

[134] 501 U.S. 957 (1991).

[135] *Id.* at 1001 (quoting Solem v. Helm, 463 U.S. 277, 288, 303 (1983)). However, the portion of Scalia's opinion arguing that the Eighth Amendment did not contemplate any proportionality review was not joined by a majority of the court.

[136] *Solem*, 463 U.S. at 289-90 (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

[137] *See, e.g., id.*

[138] *Solem*, 463 U.S. at 290-91.

[139] The proponents of corporal punishment argue that proportionality is actually less of a problem with corporal punishment than with prison, since everyone feels the same amounts of pain, while people react to the punishment of prison differently: "[T]he amounts of pain administered may better, and perhaps more easily, be adjusted to the injury and damage of the

the sentences imposed on other criminals in the same jurisdiction."[140] This would require a comparison of the caning penalty to the penalties that are now meted out for whatever offenses will become "cane-eligible" under the new law. If the current penalties for these offenses are insignificant, e.g., probation or community service, then caning may be deemed disproportionate to the offense. "Third, . . . compare the sentences imposed for commission of the same crime in other jurisdictions."[141] No jurisdiction has passed a caning bill, so again, this would require a comparison of the caning penalty to penalties that are now given in other jurisdictions for the same offenses.

d. Applying the Eighth Amendment to Juveniles[142]

No modern court has allowed the whipping or caning of juvenile offenders in custodial institutions.[143] However, the U.S. Supreme Court has held that the Eighth Amendment prohibition of cruel and unusual punishment does not apply to the corporal punishment of students in the school setting and that only civil tort remedies are available to students who suffer excessive beatings.[144] Therefore, to make a successful argument that caning juveniles who are not in custodial institutions (those caned pursuant to court order as punishment for a crime) is unconstitutional depends on distinguishing it from corporal punishment in the school setting.

The factors cited in *Ingraham*[145] which differentiated the

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offense." NEWMAN, *supra* note 114, at 51. However, even if corporal punishment is more easily proportioned to the offense than existing punishments, that fact would not help to set the base level of pain needed to proportionately punish any particular offense.

[140] *Id.*

[141] *Id.*

[142] *See supra* note 81, explaining that this section may also be relevant to adults in institutional settings.

[143] Nelson v. Heyne, 491 F.2d 352, 357 (1974); *see also* Morales v. Turman, 383 F.Supp. 53, 77 (E.D. Tex. 1974); Harper v. Wall, 85 F.Supp. 783 (D.N.J. 1949).

[144] Ingraham v. Wright, 430 U.S. 651, 671 (1977).

[145] 430 U.S. 651 (1977).

punishment of convicts and the punishment of children in schools consisted of certain safeguards that ensured that the punishment in school would not be cruel and unusual: "[T]he child is not physically restrained from leaving school . . . Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment."[146] In finding that California's proposed paddling bill would be constitutional, the California Attorney General compared the paddling of juveniles in a courtroom to the paddling of students in schools:

> On balance, we believe that a courtroom is more analogous to a school than to a prison or juvenile custodial institution . . . The paddling would be administered under a judge's supervision by or in the presence of the juvenile's parents. Various other persons would be witnesses. The punishment would be inflicted only on the single occasion. Arbitrary actions undertaken in a custodial setting would not be possible. Indeed, the courtroom setting for administration of the paddling would afford certain protections not found even in a school setting.[147]

However, the Attorney General ignored the observation in *Ingraham* that "these safeguards are reinforced by the legal constraints of the common law,"[148] namely, the civil and criminal liability that results from a teacher using excessive force. The Court relied on the threat of that liability to prevent punishment that would be excessive: "[T]here is no reason to believe that the common-law constraints will not effectively remedy and deter excesses such as those alleged in this case."[149] Unlike an injured student, a caned juvenile might not be able to sue the "caner" for using

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[146] *Id.* at 670.

[147] 78 Op. Cal. Att'y Gen. No. 94-1002 (July 3, 1995).

[148] *Ingraham*, 430 U.S. at 670.

[149] *Id.*

excessive force, as it would be the caner's explicit duty to inflict force that would be deemed excessive if administered by a police officer or a teacher.[150]

Also, the paddlings administered under the California law would be more analogous to the typical beating administered in a school: "No serious or lasting injury would be expected from the paddling,"[151] unlike the canings that would be administered in Alabama and other Southern states, which would cause extreme pain and permanent scarring.[152] The California Attorney General may not have been so willing to approve the measure's constitutionality had it called for the Singapore-style caning of graffiti vandals. Although technically a court would not consider the severity of a punishment once it found that the Eighth Amendment does not apply at all in this setting (because it is analogous to a school, where according to *Ingraham*, the Eighth Amendment does not apply), there must be some consideration of the severity of punishment. Otherwise, taking *Ingraham* to its logical extreme, teachers could impose the death penalty against unruly students without that being ruled violative of the Eighth Amendment. Indeed, the severity of caning is fundamental to its unconstitutionality because simple paddling, which causes no permanent injury and does not even break the skin, is not only allowed in schools but may also be allowed in adult institutions (if the same safeguards applied). However, following the logic of *Ingraham*, the only corrective for official caning or torture in schools would be a civil tort remedy, not a complaint that those practices violate the Eighth Amendment. Again, the key difference from *Ingraham* here is that it would be the caner's explicit duty to inflict force that would be deemed excessive if inflicted by a teacher, so civil tort remedies may not be available.[153]

In addition, some experts contend that the Supreme Court's finding that the safeguards would prevent abuse is wrong: "Students in American schools in the last few years have been hit with straps, arrows, sticks,

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[150] *See* discussion *infra* Part III.C.

[151] 78 Op. Cal. Att'y Gen. No. 94-1002 (July 3, 1995).

[152] Poovey, *supra* note 9, at 3B.

[153] *See infra* Part III.C.

ropes, belts, fists. They have been thrown against walls, desks, concrete pillars . . . And many of these cases have occurred in schools where so-called safeguards were in place."[154]

The caning of juvenile offenders is more analogous to a prison setting than to the school setting, contrary to the California Attorney General's opinion, because juvenile convicts are treated like adult convicts, not like misbehaving students. They go through a formal court proceeding and are given a punishment by a judge, not an arbitrary, on-the-spot beating administered by a teacher to maintain classroom order and discipline. Although the U.S. Supreme Court has held that the Eighth Amendment applies only to criminal punishments,[155] and juvenile adjudications are not technically criminal proceedings, the Court has left the door open for the argument that juveniles should get Eighth Amendment protection: "Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered, thereby justifying application of the Eighth Amendment."[156] Although juvenile proceedings are usually non-adversarial and the judge is given broad discretion to decide the case in the best interests of the child,[157] the Supreme Court has held that at least the Fifth and Sixth Amendments apply to juvenile proceedings.[158] Because the Eighth Amendment is just as critical as the Fifth and Sixth Amendments are to protecting the rights of people brought before a court of law, the judiciary should be willing to apply the Eighth Amendment to juvenile proceedings.[159]

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[154] Interview with Irwin Hyman, *Allow Spanking in Schools?*, U.S. NEWS AND WORLD REP., June 2, 1980, at 65.

[155] *Ingraham*, 430 U.S. at 666-67.

[156] *Id.* at 669 n.37.

[157] *See, e.g.*, Cal. Welf. & Inst. Code section 202 (Deering Supp. 1994).

[158] *In re Gault*, 387 U.S. 1, 27-31 (1967).

[159] For those juveniles who are not convicted of a crime in the juvenile or criminal courts and are merely detained in a juvenile custodial institution for status and minor offenses, their liberty interest is entitled to even more protection. Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir. 1983). The state would thus not be able to use caning as punishment for these detainees, but only as would be necessary to maintain order and discipline. *Id.*; *See also* Jones v. United States, 463 U.S. 354 (1983) (no punishment is allowed without a criminal conviction).

It can also be argued that such a brutal beating of minors would constitute child abuse if administered by a parent and therefore should be enjoined if done by the state:

> Let us suppose they were methods of discipline imposed upon a child by its father: would not this court sustain removal of this child from such a brutal environment? . . [W]e cannot tolerate inhuman treatment by the state that we would not tolerate if practiced upon its victim by his or her own family.[160]

Under Alabama law, for example, responsible persons can be convicted for child abuse if they "torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child under the age of 18 years," and offenders shall "be punished by imprisonment in the penitentiary for not less than one year nor more than 10 years."[161] A showing of physical injury is not required.[162] If hitting a child with a belt constitutes child abuse,[163] surely beating a child with a razor-sharp rattan cane that splits the skin on impact and leaves permanent scars would also violate the law if done by a parent or responsible person. Therefore, pursuant to the *Werner* court's analysis, it should also violate the law if done by a state actor.[164]

B. Equal Protection Challenges

Studies have shown that "minority students and poor white children receive corporal punishment four to five times more frequently

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The Eighth Amendment might not apply to those juveniles, but the Fourteenth Amendment would. *See infra* Part III.C.

[160] *Werner*, 242 S.E.2d at 910.

[161] ALA. CODE § 26-15-3 (1995).

[162] Updyke v. State, 501 So.2d 566, 568 (Ala. Crim. App. 1986).

[163] *Id.* at 567.

[164] On the other hand, many things that are criminal become legal at the hands of a state actor, e.g., homicide is a crime unless done by a state-sponsored executioner.

than middle- and upper-class white children."[165] The same was shown to be true for the whipping of convicts early in the century: "[I]t has lingered here, probably, owing to the fact that an unusually large part of our criminal population are colored."[166] However, courts are generally not receptive to such "racial disparity" arguments and would probably leave such a determination to the legislature.[167] Even if such an argument succeeded, it would probably not be recognized by a court until the canings had been administered and the disparity was shown to exist in this specific context. Therefore, the discussion of equal protection challenges to caning must be left for another day.

C. Substantive Due Process Challenges

Because a court may decide that the Eighth Amendment does not apply to juveniles in various settings (or to adults in those settings, for that matter), the Fourteenth Amendment must also be used to challenge a caning statute: "The eighth amendment applies to 'convicted prisoners' . . . By contrast, the more protective fourteenth amendment standard applies to conditions of confinement when detainees, whether or not juveniles, have not been convicted."[168]

The Supreme Court has recognized that any intrusion into the body that is "needlessly severe" violates the substantive due process element of the Fourteenth Amendment.[169] "Needless severity" is shown when a punishment inflicts pain, causes anxiety of imminent medical danger, causes permanent injury, or leads to health risks.[170] The standard for substantive due process violations consists of condemning state action that "shocks the conscience."[171] This test has been applied by courts in the

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[165] Editorial, *Corporal Stupidity*, SAN FRANCISCO CHRON., Jan. 11, 1996, at A22.

[166] *Nipper*, 81 S.E. at 166.

[167] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987).

[168] Gary v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987).

[169] Rochin v. California, 342 U.S. 165 (1952); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-9, at 1332 (2d ed. 1988).

[170] TRIBE, *supra* note 169, at § 15-9 at 1333.

[171] *Rochin*, 342 U.S. at 172.

context of school children who suffered excessive corporal punishment at the hands of teachers or school officials.[172] In the leading case on the issue, the Fourth Circuit established the test for these types of actions:

> [T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.[173]

Several courts have combined this test with the harsh physical punishments described in *Ingraham* to set a constitutional minimum below which corporal punishment does not give rise to a substantive due process claim.[174] If the punishment is so excessive that it rises above this standard, then it violates substantive due process, thereby subjecting the punishing teacher to civil liability under 42 U.S.C. § 1983.[175] However, the standard requires punishment that is extremely severe, for example, that which would cause permanent scarring or extreme pain.[176]

Although caning would probably meet that high standard by virtue of its brutality and the permanent scars that it usually leaves, a more difficult problem concerns whether or not "caners" or other state actors could be sued under 42 U.S.C. § 1983 for violating substantive due process. Unlike a teacher who has excessively beaten a student to the

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[172] *See, e.g.*, Thrasher v. General Casualty Co., 732 F.Supp. 966, 970 (W.D. Wis. 1990); Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987).

[173] Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).

[174] *See, e.g., Garcia*, 817 F.2d at 655-56.

[175] *Hall*, 621 F.2d at 611.

[176] *See, e.g., Garcia*, 817 F.2d at 653 (girl received permanent scars from being struck with split paddle); *see generally* Jerry Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence That Is Literally Shocking to the Conscience*, 31 S.D. L. REV. 276, 287-94 (1994).

point where permanent scars result, or a policeman who has excessively brutalized an arrestee, a "caner" would have the explicit statutory duty to inflict such a punishment. Therefore, suing a "caner" under 42 U.S.C. § 1983 would require one to tackle thorny issues of qualified immunity (that are beyond the scope of this article). But perhaps state actors may still be enjoined from caning, given the fact that brutal punishment results from a caning statute and is thus still an "inhumane abuse of official power literally shocking to the conscience,"[177] regardless of who is abusing that power. The only difference is that the excessive punishment of caning would be authorized by the state legislature, which doesn't make it any more justifiable under the Fourteenth Amendment (which forbids this type of brutalization). Although the substantive due process argument has typically been used against brutalizing state actors who have overstepped their bounds of authority, such as overzealous police officers (as in *Rochin*), it is the type of standard that is designed to be expanded to include new abuses of power such as this: "[I]t [is] a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible."[178] Therefore, it should be applied by courts to bar caning in situations where Eighth Amendment protections do not apply.

IV. CANING VIOLATES INTERNATIONAL LAW

As noted previously, international law informs the interpretation of the cruel and unusual clause of the Eighth Amendment.[179] Also, international law, as part of federal common law, is binding on the states and state courts.[180] Therefore, if caning can be shown to violate

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[177] *Hall*, 621 F.2d at 613.

[178] *Id.*

[179] *See supra* note 104 and accompanying text.

[180] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 111 comment d (1987) ("international law . . . is cognizable in cases in State courts, in the same way as United States law"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("international law is part of our law").

international law, it not only lends credence to the notion that it is cruel and unusual under the Eighth Amendment, but it might also violate federal common law, which is binding on the states.[181]

The U.S. violates international law when it fails to uphold its treaty obligations or when it violates a norm of customary international law.[182] Two standards must be met for a rule to become a norm of customary international law: it must have been generally adopted by the international community, and it must be reinforced by opinio juris, that is, "evidence that the norm has gained the status of giving rise to a binding international legal obligation, rather than just being a matter of domestic legal policy."[183] U.S. courts have looked to treaties, national laws, "the usage of nations, judicial opinions, and the works of jurists" in deciding whether or not a rule or practice has become a binding norm of customary international law.[184]

Besides binding their signatories in their own right, treaties are also one of the most authoritative sources to be considered in determining whether a norm of customary international law exists.[185] Although the U.S. is a signatory to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and caning would appear to be prohibited by its definition of torture ("any act by which

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[181] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 111 comment d (1987) ("customary international law . . . [is] also federal law and as such [is] supreme over state law").

[182] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 111 (3) (1987) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States. . . .").

[183] Lisa Arnett, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 257-58 (1988).

[184] Filartiga v. Pena-Irala, 630 F.2d 876, 882-84 (2d Cir. 1980). The *Filartiga* court found, after a review of these sources, that "official torture is now prohibited by the law of nations." *Id.* at 884. However, no court, domestic or international, has held specifically that caning constitutes torture.

[185] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note (1987) ("In our day, treaties have become the principal vehicle for making law for the international system, more and more of established customary law is being codified by general agreements.").

severe pain or suffering . . . is intentionally inflicted"), the definition excludes "pain or suffering arising only from, inherent in or incidental to lawful sanctions."[186] This exclusion would appear to make any physical punishment legal by the treaty, no matter how brutal, as long as it is legalized by the state. The United States Senate, in giving its advice and consent to ratification of the treaty, repudiated that notion:

> [W]ith reference to Article 1 of the Convention, the United States understands that 'sanctions' includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.[187]

Therefore, a signatory to the treaty may not avoid its obligations by legalizing torture or cruel, inhuman, or degrading punishment. Several courts have held that caning constitutes punishment that would be prohibited by the treaty (though not specifically constituting "torture"). For example, the European Court of Human Rights has held that "birching" (similar to caning) constituted "degrading punishment" under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits degrading punishment, just as the Convention Against Torture does (Article 16).[188] Also, the Supreme Court of Zimbabwe relied on the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human

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[186] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, June 26, 1987, 23 I.L.M. 1027 (entered into force for the U.S. Nov. 20, 1994) [hereinafter Convention Against Torture].

[187] 136 CONG. REC. S17,486, 17,491-17,492 (Oct. 27, 1990).

[188] Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) (1982). *But cf.* Campbell and Cosans v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) (1982) (corporal punishment in schools not inhuman or degrading punishment).

Rights, as well as cases from the European Court of Human Rights (including *Tyrer*), to support its holding that whipping violated the provision in the Zimbabwe Constitution prohibiting "inhuman or degrading punishment."[189] These cases show the development of an international legal norm interpreting caning as "degrading punishment" that could be binding on signatories to the Convention Against Torture.

The norm may also be binding on all countries if it reaches the level of customary international law and is not objected to consistently from its inception by those countries. Although "a norm does not have to be universally accepted in order to qualify as customary international law,"[190] national law and practice offer mixed evidence as to whether a norm of customary international law exists barring caning as inhuman or degrading. Although the majority of countries do not allow caning, whipping, or flogging, a significant minority continue to administer these punishments, "especially ones professing to adhere to Islamic law, or Sharia."[191] A partial list of the countries allowing severe corporal punishments includes Afghanistan, Bangladesh, Brunei, the Bahamas, Antigua and Barbuda, Trinidad and Tobago, Iran, Libya, Malaysia, Qatar, Saudi Arabia, Sudan, Swaziland, United Arab Emirates, Yemen, and of course, Singapore.[192]

Although no jurisdiction in the U.S. allows caning -- and the U.S. government contended that Michael Fay's caning violated Article Five of the Universal Declaration of Human Rights (prohibiting torture or cruel, inhuman or degrading treatment or punishment)[193] -- nearly half of the states in the U.S. allow the corporal punishment of schoolchildren.[194]

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[189] *See* Keith Highet and George Kahale III, *Zimbabwe--Human Rights--Inhuman or Degrading Punishment--Incorporation of International Law and Diplomacy*, 84 A.J.I.L. 768, 769 (1990) (analyzing Juvenile v. State, Judgment No. 64/89, Crim. App. No. 156/88, Supreme Court of Zimbabwe (1989)).

[190] *Arnett, supra* note 183, at 256.

[191] Kuntz, *supra* note 127, at 7A.

[192] *Id.*

[193] *Id.*

[194] *See Public Likes Proposed Public-Beating Laws, Experts Do Not, supra* note 21, at 5A.

Therefore, although the evidence as to national practice is not determinative, it could be argued that the fact that only about sixteen countries still allow flogging shows that it is condemned by the majority of countries, thereby making it violative of a norm of customary international law.[195]

However, the U.S. Senate entered a reservation to the definition of "cruel, inhuman or degrading treatment or punishment" when it gave advice and consent to the Convention Against Torture to ensure that it could not be bound by international law that was more stringent than the Constitution:

> [T]he United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel,inhuman or degrading punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.[196]

This reservation, if consistently asserted by the U.S., might even shield American caning laws if the norm that caning constitutes cruel, inhuman, or degrading punishment becomes customary international law (which binds all nations, whether or not they are parties to the Convention Against Torture, unless they have been consistent objectors to the norm from its inception).

Nevertheless, the aforementioned cases and the norm of customary international law barring caning (if it exists) are still evidence of present-day international societal mores, which a court should use to inform the interpretation of the Eighth Amendment's "evolving standards

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[195] *See* Joan Hartman, *Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 669 n.50 (1983) (extensively discussing how many nations must conform to a rule to transform it into a norm of customary international law).

[196] 136 CONG. REC. S17,486, 17,491-17,492 (Oct. 27, 1990).

of decency."[197]

V. CONCLUSION

It appears that a combination of constitutional arguments will probably frustrate efforts to cane children and adults in a variety of settings. As of this writing, no state has been able to pass a caning bill, but proposals continue to resurface.[198] What is the likely fate of these proposals, and what do they mean for the future of corporal punishment in America? Are we regressing to the time of the pillory, the rack, and the cat-o'-nine-tails, or is this a short-term trend that will soon disappear forever?

As long as people believe that cruelty can ever be a solution to any predicament, corporal punishment will loom as a possibility on the shelves of our national consciousness, to be dusted off and reinstated every other generation or so. However, unless and until caning becomes widely accepted in American society, the Constitution should ensure that no one will suffer that indignity in the United States.

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[197] *See supra* note 104 and accompanying text.

[198] *See supra* Part I and accompanying text.