

# CORPORAL PUNISHMENT IN THE EDUCATIONAL SYSTEM VERSUS CORPORAL PUNISHMENT BY PARENTS: A COMPARATIVE VIEW

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## I

### INTRODUCTION

My late grandmother was born during the First World War in Tomashov (Tomaszów)-Lubelski, a town in Poland. When she was in elementary school, some of the students disturbed the teacher when she turned to the blackboard. The teacher became very angry. She took her cane and collectively punished the class. She ordered all the students to stretch out their hands for her to hit them with the cane. My grandmother refused; she argued that she had done nothing wrong, she had not spoken or caused a disturbance, so she was not prepared to put out her hand to be punished. The teacher insisted and my grandmother tried to draw back. The teacher grabbed her hand by force, pulled it, and struck her very hard. My grandmother fainted; she lost a lot of blood and became very sick. For two months she hovered between life and death. She survived. Decades later, we, her grandsons, asked her about the indentation on her hand. She told us the story, and how well she remembered the blow. Every winter she felt a deep pain in her left hand; it was a dark memory of that teacher's corporal punishment. The story frightened us. Years later, it encouraged me to research the phenomenon of corporal punishment in general and punishment in schools in particular.

Corporal punishment occurs when a parent or educator hits a child with the purpose of educating him. It usually consists of a light blow with the open hand

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on the buttocks or hand because the child has misbehaved, deviated from the right path, failed to comply with the authority's wishes and instructions, or failed to accept that authority.<sup>1</sup>

In most countries, light corporal punishment is permitted as a way of disciplining and correcting a child. It is less acceptable as a means of discipline in schools than in the home. In many countries teachers are not allowed to corporally punish their students and, should they do so, it would be considered a criminal offense of assault or battery. This prohibition breaches the traditional delegation of authority from parents to teachers and whoever else stands in their place and fulfills the role of educating and correcting the child, that is, the common-law doctrine of *in loco parentis*.<sup>2</sup>

Even though light parental corporal punishment has been banned in one way or another in only about two dozen countries around the world,<sup>3</sup> and even though corporal punishment by teachers has been banned in about ninety countries,<sup>4</sup> there is a worldwide legal and extralegal controversy over the legitimacy of using this method as a means of education. Nothing is controversial, though, about the rejection of harsher modes of conduct, such as child beating, abuse, or maltreatment. In many ways mild corporal punishment is a good test case for the issue of legal intervention in intrafamilial relations, in

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1. Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children: Converging Evidence from Social Science Research and International Human Rights Law and Implications for U.S. Public Policy*, 13 PSYCHOL. PUB. POL'Y & L. 231, 232 (2007). The authors define corporal punishment as

the use of physical force, no matter how light, with the intention of causing the child to experience bodily pain so as to correct or punish the child's behavior. Such physical force typically includes hitting children with either a hand or an object. In the United States, corporal punishment is known by a variety of euphemisms, including spank, smack, slap, pop, beat, paddle, punch, whup/whip, and hit.

*Id.* As to students, see IRWIN HYMAN, READING, WRITING, AND THE HICKORY STICK 10 (1990) (defining corporal punishment by teachers as "the infliction of pain or confinement as a penalty for an offense committed by a student"). *Cf.* MURRAY A. STRAUS & DENISE A. DONNELLY, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES 4 (1994) (defining corporal punishment as "the use of physical force with intention of causing a child to experience pain, but not injury, for the . . . correction or control of the child's behavior," thus differentiating between mild and moderate corporal punishment designed to give the child a painful experience for the purpose of correcting his conduct or controlling his behavior and an injury inflicted on the child through use of this measure).

2. *Stevens v. Fassett*, 27 Me. 266, 279–80 (Me. 1847); Soc'y for Adolescent Med., *Corporal Punishment in Schools: A Position Paper of the Society for Adolescent Medicine*, 13 J. ADOLESCENT HEALTH 240, 242 (1992). *See, e.g.*, *State v. Pendergrass*, 19 N.C. 365, 365–66 (N.C. 1837) (stating that a teacher's power over a student is analogous to that of a parent); *see* 1 WILLIAM BLACKSTONE, COMMENTARIES 441 (noting a father may delegate a part of his parental authority to a tutor or schoolmaster who is then *in loco parentis*); *see also* *Smith v. West Virginia State Bd. of Educ.*, 295 S.E.2d 680, 687 (W. Va. 1982) (stating that using mechanical devices such as whips and paddles often leads to excessive force and injury and, as such, this kind of corporal punishment is not supported by the doctrine of *in loco parentis*).

3. For updated research, see Global Initiative to End All Corporal Punishment of Children Home Page, <http://www.endcorporalpunishment.org/pages/frame.html> (last visited March 30, 2010) (listing twenty-five countries that have abolished corporal punishment completely).

4. *See* Gershoff & Bitensky, *supra* note 1, at 232.

the privacy of the family, and in its autonomy and affairs. As to the educational system, many states have shown a readiness to ban corporal punishment, although they have not taken the same attitude towards parental corporal punishment. If one looks at the situation from the perspective of human rights and children's rights, this outcome seems rather strange: if it is the right of the child to enjoy dignity and not be harmed bodily or emotionally, this should be a general right, irrespective of whether the person inflicting the punishment is a parent or a teacher. If the arguments in favor of mild corporal punishment as an effective and not-so-harmful way of educating are true, it is also open to question why mild corporal punishment should be prohibited in the educational system yet given license in the family sphere. But this distinction is made in many countries, and there may be good reasons for it.

There is much academic literature concerning corporal punishment at home and at schools but almost none analyzing the similarities and differences between the two. This article contributes to the latter, presenting a comparative view of how the world's legal systems treat corporal punishment meted out by both parents and teachers, discussing the differences between parental corporal punishment and corporal punishment done by a teacher in theory and practice. It also deals with arguments both in favor of and against corporal punishment from the perspective of human rights and dignity versus the practical perspective of the need to educate and correct the child. It also offers another angle of comparison—a debate between secular and religious systems of law.

Section II reviews the prevailing law from a comparative perspective, looking first at laws that permit the use of mild corporal punishment meted out by parents and teachers and considering Canadian as well as Jewish law, a religious extraterritorial system of law. Section II then surveys countries that prohibit any kind of corporal punishment, countries whose laws focus on granting children a civil right to freedom from corporal punishment, as opposed to criminalizing parental conduct, and, finally, countries that permit the use of parental corporal punishment but partially prohibit the use of it by teachers.

Section III examines three common perceptions regarding the question whether there should be a distinction between corporal punishment by parents and that by teachers.<sup>5</sup> The first perception is that corporal punishment should be totally prohibited for both parents and teachers. This approach is derived from the perspective of both human and children's rights and from the United Nations Convention on the Rights of the Child (UNCRC), the first international convention to focus solely on the physical, social, cultural, political, and civil rights of children, a Convention that only the United States

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5. In section III, I review the prevailing law from a comparative perspective. The aim at this stage is not necessarily to criticize the different legal systems for choosing one way or another to handle the issue, but rather to provide a description of the prevailing situation. For an extensive criticism of some systems of law, see SUSAN H. BITENSKY, CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION 250 (2006); see also Benjamin Shmueli, *Who's Afraid of Banning Corporal Punishment? A Comparative View on Current and Desirable Models*, 26 PENN. STATE INT'L L. REV. 57 (2007).

and Somalia have failed to ratify.<sup>6</sup> The second perception focuses on the need for discipline and correction of the child; its proponents argue that moderate and reasonable corporal punishment should be permitted for both parents and teachers, as the child's educators. The third perception holds that corporal punishment should be prohibited for teachers only, and permitted, even if only in a particular manner, for parents.

Section IV sets forth an integrated model suggesting a division between parental corporal punishment, which should be banned through civil law in a unique and delicate way, and corporal punishment by teachers, which should be totally and criminally banned.

## II

### CORPORAL PUNISHMENT METED OUT TO CHILDREN BY THEIR PARENTS AND TEACHERS: A COMPARATIVE VIEW

#### A. Laws that Permit the Use of Mild Corporal Punishment by Parents and Teachers

Canadian secular law and Jewish religious law both permit the use of corporal punishment, as long as it is moderate and reasonable. Section 43 of the Canadian Criminal Code of 1985 permits an educator—a teacher and not only a parent—to hit a child for educational purposes if he satisfies constraints coming under the heading of moderation and reasonableness:

Correction of Child by Force: Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.<sup>7</sup>

The section actually leaves parents and teachers and others in loco parentis some discretion.<sup>8</sup> Court rulings have hedged the statutory license by attaching qualifications. Hitting out in anger is disallowed, since this expresses a loss of control,<sup>9</sup> and the child is not to be threatened or frightened by the educator.<sup>10</sup>

6. United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989). The convention is known as UNCRC, UNCROC, or CRC.

7. Canada Criminal Code, R.S.C., ch. C 46, § 43 (1985). This section was included in the 1982 Criminal Code in Canada and has been reenacted and unchanged from the 1970 Criminal Code. Canada Criminal Code, R.S.C. c.34, §43 (1970).

8. See Joan E. Durrant, *The Abolition of Corporal Punishment in Canada: Parent's Versus Children's Rights*, 2 INT'L. J. CHILD. RTS. 129, 130 (1994) (explaining that the rationale of the section rests on the idea that parents are best positioned to decide what is in the best interest of their children and should be given ample discretion).

9. See *R. v. D.W.*, [1995] 176 A.R. 223, 227 (Can.) (“[T]he accused is not entitled to protection under section 43 if the punishment meted out to the infant child was motivated by . . . anger.”); see also *R. v. D.H.*, [1998] O.J. 3347, 77 (Can.) (oral judgment of the Ontario Court of Justice) (holding that a slap made as a reaction to name calling was done out of anger and thus not protected by section 43).

10. See *R. v. Komick*, [1995] O.J. 2939 (O.S.C.J. June 13, 1995) (Can.) (holding that when the purpose is to instill fear in the child, the assault is not justified as educational or corrective).

Factors to be checked when considering reasonableness in the context of the law are the age of the child (a child above the age of fifteen years is not to be hit—an age range that has changed over time),<sup>11</sup> the extent of the child's readiness to learn from the beating and his acceptance of the punishment,<sup>12</sup> the extent of the force used and severity of the beating (sensitive body parts, such as the head, are not to be hit, nor is there to be kicking or strangling),<sup>13</sup> and the beating is not to be administered with a tool or instrument but only with an open hand.<sup>14</sup>

Courts and scholars have criticized the fuzziness of the reasonableness element in the statute,<sup>15</sup> which has resulted in a lack of uniformity in its implementation.<sup>16</sup> The Canadian Supreme Court discussed the issue in 2004 in an appeal that tried to bring about the repeal of section 43 on the ground that it is inconsistent with the Canadian Charter. The court confirmed the judgment of the court of appeals with all the factors qualifying the law and took the opportunity to rule in addition that a child under the age of two and over the age of twelve should not be spanked. The court held that there is no practical difference between corporal punishment meted out by parents and that meted out by teachers. Section 43 creates an appropriate balance between the interest of the child on one hand and the interests of the state and of the parents and teachers on the other, which creates room to correct a child or student without this being criminalized. The section lays down limits that, if not breached, prevent arbitrary enforcement. And its goal is positive—education and not punishment. The judges concurred that the statement “reasonable under the circumstances” indeed seems overly general, but they held that the section *per se* has content and does not defend any action that is tantamount to causing injury to a child. Finally, the court determined that the section does not permit harsh and cruel behavior and is therefore not contrary to the Charter.

Two dissenting justices were of the opinion that the section runs counter to the Charter and to the basic rights of children and should therefore be

11. *R. v. Dupperon*, [1984] 37 Sask. R. 84, 89 (Can.). *See also* *Ogg-Moss v. The Queen* [1984] 2 S.C.R. 173, 185 (Can.) (holding corporal punishment to be reasonable only when the child is under the age of majority).

12. *See Dupperon*, 37 Sask. R. at 89 (holding that in determining the reasonableness of the punishment, the court must consider “the likely effect of the punishment on [the] particular child”).

13. *Id.*

14. *See* Canadian Found. for Children, Youth and the Law v. Attorney General, [2002] 154 O.A.C. 144, O.A.C. LEXIS 36, 12 (Can.) (defining reasonable spanking of a child under the age of two as involving the use of an open hand on the buttocks, which does not cause physical harm), *rev'd*, [2004] 1 S.C.R. 76, 2004 SCC 4 (Can.) (holding that a child under the age of two years is not to be beaten).

15. BITENSKY, *supra* note 5, at 295; Tamar Ezer, *Children's Rights in Israel: An End to Corporal Punishment*, 5 OR. REV. INT'L L. 139 (2003) (pointing at cases in which parents who used mild force had been convicted with cases in which parents who used exaggerated force and painful measures had been acquitted). *See, e.g.*, *R. v. J.O.W.*, [1996] O.J. 4601 (O.S.C.J. Oct. 17, 1996) (Can.).

16. Canadian Found. for Children, Youth and the Law v. Attorney General, [2004] 1 S.C.R. 76, 2004 SCC 4 (Can.), paras. 153–70 (The six justices in the majority were McLachlin, C.J., and Gonthier, Iacobucci, Major, Bastarache & LeBel, JJ.); *J.O.W.*, O.J. 4601; *R. v. James*, [1998] O.J. 1438 (Can.).

repealed.<sup>17</sup> According to them, the use of any force against children not only harms their dignity but turns them into “second class” citizens, creating age discrimination that in effect runs counter to the principle of equality, to the Charter, and to rules of natural justice.<sup>18</sup> These justices believed that the objective of these principles and of the Charter is to protect children, a vulnerable and weak group in society, and not to contribute to the perception of children as the property of adults. The idea that the body and the dignity of children are subject to the parents’ wishes, even if the latter are mistaken, is unacceptable. In their opinion, the purpose of section 43 is actually to defend the rights of parents and teachers and not those of children. According to the dissenters, courts have consistently failed to uniformly construe the section’s reasonableness component and have been embarrassed by its interpretation, since reasonableness is associated with public policy, touched with subjectivity, and dependent on so many variables—including, in particular, cultural and religious beliefs. In their opinion, the majority’s construing by attaching various qualifications in effect rewrites the statute. In their opinion, section 43 is unnecessary, since the Criminal Code contains sufficient general defenses such as necessity, which applies to cases such as preventing a child from running into the street, and *de minimis*, a defense for light cases. Although Canada has not repealed the license granted in section 43 to carry out corporal punishment, it has conducted an informational campaign aimed at teaching parents how to exercise discipline without corporal punishment.<sup>19</sup>

Jewish law, or halakhic law,<sup>20</sup> is a religious extraterritorial system of law. Even though it does not seem that Jewish law influenced Canadian law or vice versa, and although one system is religious and the other is secular, they resemble each other on the issue of corporal punishment. In principle, and according to the traditional conservative approach, Jewish law permits the use of corporal punishment by parents and teachers in a measured way that is circumscribed by clear boundaries and qualifications.<sup>21</sup> Despite their prominence in halakhic discourse, verses from the Old Testament like, “He who spares his rod hates his son but he who loves him is diligent to chastise him,”<sup>22</sup> or

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17. *Canadian Found.*, S.C.C. at 4 (Arbour & Deschamps, JJ., dissenting). One justice took a middle approach, concurring in part and dissenting in part. He held with the majority for parents and with the minority for teachers.

18. *Id.* at 181.

19. See *Canadian Found. for Children, Youth and the Law v. Attorney General*, [2002] 154 O.A.C. 144, O.A.C. LEXIS 36, 19 (Can.).

20. There is some debate over whether these two terms are identical. Most scholars think they are. But, some think that only some parts of the Halakha are considered law, while other parts are between a person and God and are not law in the common meaning.

21. See Ronnie Warburg, *Corporal Punishment in School: A Study in the Interaction of Halakha and American Law with Social Morality*, 37 TRADITION 57 (2003). For an extensive discussion about corporal punishment in Jewish Law, see Benjamin Shmueli, *Corporal Punishment of Children in Jewish Law: Traditional Approaches Meet Modern Trends—A Comparative Study*, 18 JEWISH L. ANNUAL 137 (2010).

22. *Proverbs* 13:24.

other verses from the Book of Proverbs<sup>23</sup> do not reflect the approach of Jewish law.<sup>24</sup> One should differentiate between verses from the Bible on the one hand, verses that in any case should not necessarily be taken literally<sup>25</sup> and have more than one common commentary, and the law, arising in Jewish law from halakhic sources, on the other. In Jewish law, it is generally agreed that corporal punishment is not an independent commandment, but rather a means of fulfilling the commandments to educate<sup>26</sup> and reprove.<sup>27</sup> Consequently, corporal punishment is not an obligation but merely an act permitted in principle for both parents and teachers.<sup>28</sup> Thus it is proper and permissible under the law to educate a child without making use of corporal punishment. Still, the option to use corporal punishment is qualified in view of its ineffectiveness as an educational device in certain cases and by considerations of children's rights and of children's vulnerability (and by the interrelationship of the two). The qualifications on this religious license to employ corporal punishment are reminiscent of those in Canadian law. Corporal punishment may be administered for exclusively educational objectives.<sup>29</sup> Corporal punishment is

23. Cf. Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 631–32 (2002–2003) (raising and refuting scripturally based arguments in support of corporal punishment).

24. See generally Shmueli, *supra* note 21.

25. See HYMAN, *supra* note 1, at 31, for Christian theology of the use of corporal punishment as related to the sins of the child and the need to combat Satan by “beating the devil” out of the children. Cf. Pollard, *supra* note 23, at 631–32 (addressing scripturally based arguments supporting corporal punishment). Pollard also deals with passages from the New Testament. I do not necessarily agree with her conclusions about the differences between the Old Testament and the New Testament, but further discussion of this matter extends beyond the scope of this article. I do agree that it is not acceptable to support corporal punishment nowadays for religious reasons. Pollard espouses this view especially as to modern Christians. I will show that the same is true regarding modern Jewish law.

26. *Deuteronomy* 11:19; see also *Kiddushin* 29b.

27. *Leviticus* 19:17.

28. Cf. Warburg, *supra* note 21, at 62 (discussing the permissive and discretionary nature of corporal punishment in the school).

29. RABBI YEHUDAH HA-CHASSID, SEFER CHASSIDIM § 155, 186. (Because an English translation is unavailable, this and a number of other sources have not been verified by Law and Contemporary Problems editors. These sources are signaled hereinafter as “unverified.”) A general prohibition against beating is subject to exceptions, one of which is when a father or a rabbi strikes a child exclusively for the purpose of the child's education in the course of fulfilling the commandment of educating the child. The exemption is not related to a particular result, as it is valid even if “the father who beats the child and the rabbi who tyrannizes his student” eventually causes the death of the child as a result of this beating. In fact, neither the father nor the rabbi need be exiled to a city of refuge, as would any other be for killing someone by mistake. For an explanation of this exemption from criminal liability and exile, see *Makkot* 8a–b; Maimonides, Code, Laws concerning Murder and the Preservation of Life 5:5–6; *Mishnah Makot* 2:2–3. For an explanation of the exemption from tortious liability, see *Baba Kamma* (Lieberman) 9:11 (unverified). The exemption is granted so that the educator would not refrain from hitting children in the process of educating them under the belief that, without the option of corporal punishment, the children's education would suffer. Nevertheless, even in the case of death, the exemption is available only when injury occurs following corporal punishment administered for purely educational purposes. It is certainly not available when the child dies or is injured as a result of cruelty or when the beating was not intended for educational purposes. In these latter cases, the original prohibition on hitting remains in force and in some cases a social penalty is also imposed, such as banishment or even the removal of the child from the parents' custody. These punishments do not

permitted only for children of certain ages—usually six to twelve or thirteen.<sup>30</sup> When the child is younger than six, corporal punishment is both dangerous and inefficient—the child will not make the connection between what he did and the punishment. Above the age of thirteen it is ineffective, for a teenager thinks that no one can educate him, since he is already mature, and there is also a fear that he will hit or curse the parent or teacher.

In addition, corporal punishment should be given only to appropriate children, that is, to children between the ages of six to twelve or thirteen who the educator can assume will understand the errors of their ways and how to improve them. When this test is not met, corporal punishment is prohibited in this age range as well.<sup>31</sup>

Threatening the child is also prohibited; the punishment must be carried out immediately or not at all. Threats on their own merely play with the child's emotions.<sup>32</sup> The beating should be only light and symbolic, not intense, and should be administered without the use of accessories and implements; it is forbidden to strike cruelly.<sup>33</sup> Similarly, beating in anger and frustration is prohibited, as the blows may be hard and dangerous and the motivation is rage and not an educational purpose.<sup>34</sup> Also, the beatings should not be frequent.<sup>35</sup>

In addition, the license to spank depends on time and season; for example, during the hot summer season the educator should be more permissive,<sup>36</sup> and when a new student comes to the school the teacher is instructed not to hit him or any other student in order not to frighten him.<sup>37</sup> Finally, the educator should appease the child after the spanking and should treat him gently in order that he be made to understand that the punishment relates to the specific offense and that he is still loved.<sup>38</sup> Corporal punishment that deviates from the boundaries established by all or any of the qualifications is strictly prohibited.

Most of the ancient sources in Jewish law refer to teachers. In the past, and to some extent even today in the ultraorthodox Jewish world, the child spends more of the day with the teacher than with the parent. The teacher was granted

absolve the assailant from begging forgiveness from the child and paying damages. See Warburg, *supra* note 21, at 61.

30. See *Maimonides Code, Laws Concerning Torah Study* 2:2 (establishing that the learning age for a child begins at age six or seven); *Moed Katan* 17a (guiding that hitting an adult son is not appropriate); *Tur YD* 245 (unverified); cf. *Kitzur Shulhan Arukh* 143:18 (guiding parents not to hit “grownup” children and basing this qualification not on age but on the child's level of maturity).

31. See *Kitzur Shulhan Arukh* 143:18; *Responsa Igrot Moshe, YD* 3:76 (unverified).

32. *Semahot (Heiger)* 2:4-5 (unverified); *Kitzur Shulhan Arukh* 165:7; *Responsa Igrot Moshe, YD* 4:30 (unverified).

33. *Igrot Moshe, YD* 4:30 (unverified); *Maimonides Code, Laws on Torah Study* 2:2; *Shulhan Arukh, YD* 245:10 (unverified).

34. Warburg, *supra* note 21, at 61-62; see *Hulin* 94a.

35. *Igrot Moshe, YD* 3:76, 4:30 (unverified).

36. *Shulhan Arukh, OH* 551:18 (unverified); see *Kitzur Shulhan Arukh* 122:2.

37. RABBI AVRAHAM BEN MADILL SEGAL, *MAARACHOT AVRAHAM* 196 (1769) (unverified).

38. See *Sotah* 47a. (“[A]s to a child . . . one should push away with the left hand and draw near with the right hand.”).



the parents' authority derived from the parents' obligation to educate the child, including the right to inflict corporal punishment, subject to the same qualifications on the license to exercise corporal punishment. The sages of Jewish law emphasize that the permission to employ force must be reassessed from time to time and should not be used when it is contrary to the spirit of the time or place or is unsuitable for a particular child in a specific situation; in such cases, parents and teachers are instructed to use alternative educational methods.<sup>39</sup>

Following numerous changes in parent-child relations, a modernist trend began to develop in Jewish law in the eighteenth century.<sup>40</sup> This trend coexists with the conservative-traditional trend that permits corporal punishment within the limits of the traditional qualifications. The modernist trend is to prefer educational methods other than corporal punishment to correct behavior. That trend takes into account changes in parent-child relations, such as the growing recognition of children's rights; the trend seeks to render corporal punishment a practical impossibility or calls for it to be used only symbolically. Although some early indications of this trend can be found in *responsa* literature,<sup>41</sup> for the most part it is to be found in the literature and opinions of moralists and educators.<sup>42</sup> The result is that corporal punishment still continues to be viewed at some level as a legitimate means of education. It seems that present-day halakhic arbiters have the authority, as a continuation of the modernist trend, to explicitly prohibit corporal punishment if the time and place so require. Such a step would not signify an innovation but rather an adaptation of Jewish law to the time and circumstances, either by the extension of an ancient prohibition to new circumstances or by means of a new emergency act.

In earlier generations, however, two important arbiters found a distinction between parental and teachers' corporal punishment. Their approach may create an opening for a prohibition on corporal punishment by teachers, even if not on that by parents. First, Rabbi Moshe Feinstein, the most important Jewish arbiter in the United States in the twentieth century, says that the teacher has a license to spank children only in studies-related matters and only for serious offenses; even then, it is preferable to avoid spanking. The parent, however, has

39. See, e.g., Rabbi Haim David Halevy, *Responsum 28: The Rule of Beating Students*, in V ASEH LEKHA RAV 195-97 (unverified); Rabbi Shlomo Aviner, *Parental Violence in the Family against Children*, in 163 ITUREI COHANIM 9 (1998) (unverified).

40. *Responsa Shevut Yaakov*, HM 3:140 (unverified); Rabbi Gershon Koblentz, *Responsa Kiryat Hannah, Question 22*, in NATANEL WEIL, SEFER TORAT NATANEL: TESHUVOT GEONEI ASHKENAZ 1991 (1785) [hereinafter *Respona Kiryat Hannah*] (unverified).

41. See *Responsa Igrot Moshe*, YD 3:76, 4:30 (unverified); *Responas Kiryat Hannah*, supra note 40 (unverified); Rabbi Yehiel Yaakov Weinberg, *Responsa Seridei Eish* 3:95 in the old edition, 2:49 in the new edition (unverified).

42. See, e.g., RABBI SAMSON RAPHAEL HIRSCH, II FOUNDATIONS OF EDUCATION—PEDAGOGICAL CONVERSATIONS 65 (1958) (unverified); RABBI AVRAHAM YITZHAK HA'COHEN KOOK, EIN AYAH UN BERAKHOT 31 (1987) (unverified); Rabbi Itzhak Levy, *Child Beating (Response)*, 17 TECHUMIN 157, 157-59 (1987) (unverified); RABBI AHARON PAPO, I PELEH YOETZ HASHALEM, 175 (1987) (the "Beating" entry) (unverified);

a license to spank the child for bad behavior and for trivial offenses as well.<sup>43</sup> Second, Rabbi Haim David Halevy, who was the Chief Rabbi of Tel-Aviv, states that a teacher has only the license to hit lightly, and merely as a warning to the student. This would only apply to a good student who is being slack in his studies and whose conduct, in the eyes of the teacher, would likely be improved by the spanking.<sup>44</sup> But if the student is behaving wildly and is disturbing the class, there is no license to hit him, even lightly, since such a corrective would be ineffective, and a heavier beating would in any event be forbidden. In these circumstances, other alternatives, such as removing the student from the classroom, should be used. The teacher in such a case is no longer in loco parentis regarding spanking, since in a similar case the parent would be able to spank his unruly child.<sup>45</sup> Rabbi Halevy says that in the case of corporal punishment administered by parents and teachers, everything depends upon the scholastic character of the individual student, the locale, societal conditions, etcetera.<sup>46</sup> Thus, Rabbi Halevy does not encourage corporal punishment by teachers even though he himself does not explicitly forbid it.

In principle, Jewish law today seems to permit moderate and reasonable corporal punishment by parents and teachers, although it is not encouraged and is regarded as increasingly undesirable. But in practice, the license to use it depends increasingly on the discretion of the arbiters of every generation who choose one of a variety of possible solutions that they believe to be legitimate and to accord with the norms of Jewish law.

#### B. States that Prohibit the Use of Corporal Punishment by Both Parents and Teachers

Many states have banned the use of corporal punishment both in the educational system and in the parents' home; each has used different methods in so doing. Cypriot and Israeli law use criminal law, but Cyprus established a statutory ban, whereas in Israel—a common-law country, in which the precedents of its Supreme Court are binding—changes have been effected mostly through the case law. In other European countries the ban was implemented through civil family law, emphasizing the child's right not to be subject to corporal punishment rather than imposing a criminal prohibition and sanctions on the parents. In the law of the civil-law countries, a general clause establishes this right, though without pointing directly at the person who is obliged to fulfill it. The outcome is an overall prohibition on the use of corporal punishment against children by both parents and teachers in each country's civil human-rights law.

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43. *Responsa Igrot Moshe*, YD 4:30, 1:140 (unverified).

44. Halevy, *supra* note 39, at 195–96 (unverified).

45. *Id.*

46. *Id.* See also Warburg, *supra* note 21, at 64–65 (discussing Halevy's view and those of other scholars).

In 1994 Cyprus enacted a criminal statute prohibiting corporal punishment.<sup>47</sup> This was replaced in 2000 by a new criminal law that prohibits any type of domestic violence.<sup>48</sup> Scholars explain that the law applies to all forms of violence towards children, including corporal punishment, although corporal punishment is not mentioned explicitly in the law.<sup>49</sup> Corporal punishment is also prohibited by criminal law in Cypriot schools and educational institutions.<sup>50</sup> A teacher (or other person responsible for a child at an educational institution) who breaches the prohibition would be exposed to a string of charges for battery of various degrees of severity, from simple assault to assault causing grievous bodily harm.<sup>51</sup> Scholars point out that it is rare for light and moderate violence against pupils to lead to an actual indictment.<sup>52</sup> Cyprus launched a campaign for the assimilation of the new norm.<sup>53</sup>

In Israel, the supreme court explicitly prohibited corporal punishment in rulings handed down in 1998 (as to the educational system) and in 2000 (as to the parents), repealing, in stages, a 1953 former judgment, *Rassi*.<sup>54</sup> In *Rassi*, the Israeli Supreme Court permitted the use of corporal punishment in the family unit (with certain qualifications), as well as in the educational system, following the *in loco parentis* doctrine. The court held that parents and educators could impose physical punishments in order to educate children but had to exercise great caution to ensure that punishment was for the sake of education alone and not in order to satisfy any desire for revenge—in accordance with the principles of proportionality and reasonableness as distinct from acts of cruelty and abuse.

The supreme court prohibited corporal punishment entirely in the educational system by the *Sde-Or* judgment in 1998.<sup>55</sup> That judgment repealed the *Rassi* judgment as to the educational system and totally forbade all forms of corporal punishment by teachers, kindergarten teachers, and educators. The defendant in *Sde-Or*, a kindergarten teacher, had been accused of acting violently towards children in her class, aged three to five years. This violence included frightening the children, hitting them on various parts of the body, pulling their ears and hair, pushing them forcibly into a chair or onto the floor, grabbing them by the neck and so on. The kindergarten teacher also spoke to the children insultingly. The conduct was systematic and occurred over a long

47. See BITENSKY, *supra* note 5, at 174–80; Shmueli, *supra* note 5, at 99–101.

48. The Law Which Provides for the Prevention of Violence in the Family and Protection of Victims, Annex (I), Laws of Cyprus 2000/I, Law No. 119(1) of 2000, Criminal Code, ch. 154.

49. See BITENSKY, *supra* note 5, at 175.

50. Cyprus' ban on corporal punishment came about by ratification of Articles 19 and 28 of the UNCRC and by the implication of section 7(1) of the Cypriot Constitution. BITENSKY, *supra* note 5, at 176–77.

51. Cypriot Criminal Code, ch. 154, §§ 231, 234, 242, 243.

52. BITENSKY, *supra* note 5, at 178.

53. *Id.* at 179.

54. CrimA 7/53 *Rassi v. Attorney General* [1953] IsrSC 7(2) 790, *English translation available at* [http://elyon1.court.gov.il/files\\_eng/53/070/000/Z01/53000070.z01.htm](http://elyon1.court.gov.il/files_eng/53/070/000/Z01/53000070.z01.htm) (last visited July 15, 2009).

55. CrimA 5224/97, *Israel v. Sde-Or* [1998] IsrSC 54(3) 572 (unverified).

period of time. The teacher admitted some of these actions but argued that she had used moderate force that, although applied out of anger, anxiety, pressure, and intolerance, was intended for the education of the children and clarification of the disciplinary rules in the kindergarten. The case initially came before the Haifa District Court, which acquitted the teacher.<sup>56</sup>

The Israeli Supreme Court accepted the state's appeal and ruled that the actions were not educational and satisfied the elements of battery.<sup>57</sup> The court ruled that the *Rassi* decision was inconsistent with currently accepted norms and that in contemporary times, any use of force by educators, even for educational purposes, was forbidden. Corporal punishment would achieve the opposite of what was hoped for when the educator, who served as a model for emulation, himself adopted violent measures. In this respect, the corporal punishment used against the children was severe since it jeopardized the welfare of the child and could prejudice the basic values of Israeli society and of the UNCRC—human dignity, bodily integrity.

Between 2000 and 2002 the supreme court reviewed a number of judgments by the Civil Service Disciplinary Tribunal relating to teachers who hit students. The court again stated the grave prohibition against striking a student for the purposes of education. It ruled that such a teacher should be subjected to a severe penalty, including a reprimand, a fine, and even dismissal.<sup>58</sup> These cases regarding the educational system did not permeate public awareness when they were decided, but they definitely played a central role in legal developments in the family context.

In 2000 the Israeli Supreme Court prohibited corporal punishment within the family.<sup>59</sup> The court held in *Plonit* that corporal punishment administered by parents was a completely improper form of education and a remnant of an outdated social–educational concept. Justice Beinisch, writing for the majority, held that the principles laid down in the *Sde-Or* judgment regarding educators also applied to parents, notwithstanding the difference between the two roles.<sup>60</sup> The court qualified its ruling somewhat, though, by holding that the currently recognized defenses, including de minimis harm and the state attorney's discretion to refrain from prosecution, reflected the appropriate distinction

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56. Cr.F. (Hi) 117/95, *Israel v. Sde-Or* [1998] Tak-Meh 97(3) 506 (unverified). The lower court noted that the teacher's actions went beyond what was reasonable but that two central grounds existed for permitting the use of force in this case: the limited use of force that did not result in marks on the child's body, and the teacher's objective of deterring the child, which required that the use of force be for an educational purpose. The judge explained that it was not always possible to give effect to the ideal that no hitting at all should take place.

57. *Id.* at paras. 9–10; Penal Law, Section 379, 5737-1977, LSI 98 (1977–78) (Isr.).

58. Civil Service Appeal 1682/02 *Abed El-Wahab v. Israel* [2002] Tak-El 2002(2) 1300; Civil Service Appeal 3362/02 *Israel v. Abu Asbah* [2002] IsrSC 56(5) 6; Civil Service Appeal 4503/00 *Amin v. Israel* [2000] Tak-El 2000(3) 1296; Civil Service Appeal 1730/00 *Anon. v. Israel* [2000] IsrSC 54(5), 437–38 (unverified).

59. CrimA 4596/98 *Plonit v. Israel* [2000] IsrSC 54(1) 145, *English translation available at* [http://elyon1.court.gov.il/files\\_eng/98/960/045/n02/98045960.n02.htm](http://elyon1.court.gov.il/files_eng/98/960/045/n02/98045960.n02.htm) (last visited July 15, 2009).

60. *Id.* at para. 26.

between parents' use of force for educational purposes, which is improper and forbidden, and "the reasonable use of force which is intended to prevent harm to the child or to others, or to allow minor physical contact, even if it is forceful, with the child's body in order to maintain order."<sup>61</sup> This defense is vague and unclear; the court presumably meant to refer to cases of forcibly clothing a resisting child or dragging him if he refuses to come when called, et cetera. Thus, the *Rassi* ruling was also overturned in relation to the family unit.

It is interesting that in the *Sde-Or* judgment these filters, the defenses, were not mentioned. It is true that the de minimis rule always exists in the penal law, and that the state attorney's discretion to refrain from prosecution, which is not a real defense to be used by courts but only a filter to be used by the prosecution, also always exists; but the third, judicially created, defense of forceful contact to maintain order was not mentioned in *Sde-Or*, so it is apparently not applicable to teachers, but only to parents.<sup>62</sup>

As a common-law jurisdiction, Israel follows the principle of stare decisis; the rulings of the supreme court are deemed binding unless reversed by the court itself or by Knesset (Israel's parliament) legislation. The process of corporal-punishment reform continued in legislation too, but only as to the educational system. Following the ruling in *Sde-Or*, the legal defense to tortious liability of parents and teachers in cases of light corporal punishment was repealed in 2000,<sup>63</sup> and a declarative section on punishment was added to the law.<sup>64</sup> But no prohibition on corporal punishment has been enacted in Israeli legislation in relation to the family.

Possibly, Israel took an extremist path by banning corporal punishment through the criminal law and in court rulings without first preparing the multicultural population in Israel and without launching an awareness campaign even after the rulings. Even though polls show some decrease in support for corporal punishment,<sup>65</sup> the debate in Israel, particularly in connection with parental corporal punishment, is far from over.

### C. Corporal Punishment Bans in Scandinavia and Europe

The most interesting model regarding the ban on corporal punishment in both the educational system and the parents' home may be seen in countries in Scandinavia and in Europe, including Austria and Germany. These countries have chosen a more moderate way to ban corporal punishment by both parents and teachers. In order to create an opening for a value-laden legal attitude that would, by educating the public in stages, create empathy for a ban on corporal punishment, these countries have adopted a rationale of a structured gap

61. *Id.* at para. 30.

62. For a discussion of the various possibilities, see BITENSKY, *supra* note 5, at 206–07.

63. Civil Wrongs Ordinance § 24(7), 1947, *repealed by* Civil Wrongs Ordinance, 2000, S.H. 1742, 213, amend. no.9.

64. Pupils' Rights Law § 10, 2000, S.H. 1761, 42.

65. *See* Shmueli, *supra* note 5, at 99 n.119.

between a clear declaration that corporal punishment is forbidden and moderate civil enforcement. This approach conveys a firm message as to the importance of protecting children's rights without irreparably harming the family unit in mild cases. The purpose of the declarative statement is a legal declaration that is not intended to be enforced in practice.

A similar approach was adopted by several other states, mainly in Europe, where a "prohibition" in civil law was also created and massive educational campaigns were launched. The intention was not necessarily to criminalize parents and teachers but to pursue real social change. Two of the prominent states that took this approach were Austria and Germany.

### 1. Sweden

Sweden was the first country in Scandinavia—and apparently in the world—to prohibit corporal punishment through legislation.<sup>66</sup> In 1958 Sweden prohibited corporal punishment in schools, and in 1979 it repealed the penal defense against battery by parents who hit their children (causing light injuries) for educational purposes.<sup>67</sup> In 1979, the 1949 law—a civil statute—was amended by parliament by a majority of two hundred and fifty-nine to six.<sup>68</sup> The current formulation, after a further amendment in 1983, states as follows: "Children are to be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other humiliating treatment."<sup>69</sup>

The Swedish legislation establishes a right for the child and does not spell out upon whom the obligation is imposed. Sweden accompanied the legislation with a massive publicity-awareness campaign explaining the new norm and providing for alternatives, beginning years before the legislation and continuing well after.<sup>70</sup> The campaign achieved its objective: most of the population

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66. As early as in 1949, Sweden enacted the New Parental and Guardianship Code, which limited parental rights to administer physical punishment and stated that such acts were reprehensible. Even if this was not an effective remedy, for that period this was a revolutionary law. For a summary of the Swedish ban, see BITENSKY, *supra* note 5, at 154–60. See also Joan E. Durrant, *Evaluating the Success of Sweden's Corporal Punishment Ban*, 23 CHILD ABUSE & NEGLECT 435, 435 (1999) (describing the history of the corporal-punishment ban in Sweden).

67. See BITENSKY, *supra* note 5, at 155–56; Durrant, *supra* note 66, at 436.

68. BITENSKY, *supra* note 5, at 155.

69. 6 ch. 1 § Children and Parents Code (SFS 1979) (Swed.).

70. Following the final amendment to the law, the Swedish Ministry of Justice sent a pamphlet to all households explaining that the purpose of the law was to forbid any form of hitting children apart from a light smack administered, for example, to keep a child away from a burning stove or an open window, posing a danger that he might be injured. See JOAN E. DURRANT, *THE SWEDISH BAN ON CORPORAL PUNISHMENT: ITS HISTORY AND EFFECTS, FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY* 23–25 (1996). This letter was just one part of an extensive publicity campaign for that statute. Leaflets and colored booklets (in Swedish and in ten minority languages) were also distributed. *Id.* at 22. Advertisements were placed on milk cartons and appeared on television specifying the reasons for the enactment of the statute and describing how to discipline a child without smacking him. *Id.* at 23–24. These advertisements provided parents specific alternatives and directives on how to exercise discipline in a correct way. See *id.* at 23–24. The Swedish government also established an ombudsman for children's complaints. See Marian Koren, *A Children's Ombudsman in Sweden*, 3 INT'L. J. CHILD. RTS. 101, 101 (1995).

supports the ban, child-abuse rates have declined,<sup>71</sup> and child injuries from assaults have also decreased.<sup>72</sup> The Swedish solution seems successful, since from the time of the enactment of the statute hardly any cases have been recorded in which parents have been indicted for engaging in light corporal punishment. Scholars dispute whether it is possible to enforce the statute penally, since it is a civil law and not accompanied by any sanction.<sup>73</sup> Even those who think that parents and teachers can be indicted for engaging in light corporal punishment admit that this is a theoretical possibility only and was not the purpose of the legislation: to educate the public and set new norms in the hope that these norms would change the current situation without penal intervention. In practice, parents and teachers who physically punish children mildly are not indicted.<sup>74</sup> Still, even though no explicit prohibition was enacted on corporal punishment, it is nonetheless clear, to some, that such a prohibition exists.<sup>75</sup>

Other Scandinavian countries—Finland, Denmark, and Norway—followed Sweden’s example. In some the prohibition in the educational system was more explicit.

## 2. Finland

In 1969 the Finnish penal code was amended to remove a defense given to parents who used corporal punishment, although no law explicitly prohibiting such punishment was drafted.<sup>76</sup> In 1983, the Finnish parliament unanimously passed The Child Custody and Right of Access Act, which is similar to, but more detailed, than its Swedish counterpart.<sup>77</sup> Since 1983, there has been a large decrease in the use of corporal punishment in Finland—a 1993 study indicated that few respondents had experienced violence in the preceding twelve months,

71. *Id.* at 22–23; Gershoff & Bitensky, *supra* note 1, at 250–51.

72. Gershoff & Bitensky, *supra* note 1, at 251.

73. Some scholars opine that as civil sections these have only declaratory force so that, in Sweden, a parent cannot be indicted for breach of this statute. See BITENSKY, *supra* note 5 at 156; Dennis Alan Olson, *The Swedish Ban of Corporal Punishment*, 4 BYU L. REV. 447, 453–55 (1984); Murray A. Straus & Carry L. Yodanis, *Corporal Punishment by Parents: Implication for Primary Prevention of Assaults on Spouses and Children*, 2 U. CHI. L. SCH. ROUNDTABLE 35, 65 (1995). *But see* BITENSKY, *supra* note 5, at 155–57 (noting that indictments are possible and that parents can be charged with battery).

74. BITENSKY, *supra* note 5, at 155–57 (“[P]rosecutors almost invariably exercise restraint by electing not to prosecute these cases against parents, especially if only light punishment is involved.”); Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 999–1000 (1995) (suggesting that because each community decides what is excessive punishment, the current situation does not allow indictment for mild corporal punishment and that it should not); Victor I. Vieth, *Corporal Punishment in the United States: A Call for a New Approach to the Prosecution of Disciplinarians*, 15 J. JUV. L. 22, 47–56 (1994) (suggesting factors for prosecutorial discretion in charging disciplinarians).

75. BITENSKY, *supra* note 5, at 154.

76. *Id.* at 160.

77. Child Custody and Right of Access Act, 1963, c. 1, § 1. See ROWAN BOYSON, EQUAL PROTECTION FOR CHILDREN: AN OVERVIEW OF THE EXPERIENCE OF COUNTRIES THAT ACCORD CHILDREN FULL LEGAL PROTECTION FROM PHYSICAL PUNISHMENT 23–24 (Lucy Thorpe ed., 2002).

although many had reported such violence in the years from 1983–1987.<sup>78</sup> Here, too, the purpose of the law is to educate the population to set boundaries for children without spanking them and to create greater public awareness of the law.<sup>79</sup> It is perhaps theoretically possible for an indictment to be brought, but there is a gap between declaration and enforcement.<sup>80</sup> In Finland, an extensive educational campaign was also launched, consisting mainly of advertising through the media and family magazines.<sup>81</sup> No explicit prohibition has been enacted in Finland against corporal punishment in the educational arena, and here too, some scholars opine that despite the lack of legislative clarity, such a prohibition clearly exists.<sup>82</sup>

### 3. Denmark

Denmark's penal code has contained an explicit clause prohibiting parental violence against children since 1966. In practice, however, it was accepted that a parent may use limited force as corporal punishment for educational reasons, although this defense has gradually been whittled away in case law.<sup>83</sup> A few years after the Swedish ban, similar sections were enacted in Danish civil family statutes. The Danish legislature enacted a law requiring that custodians or caretakers protect children from physical violence, mental cruelty, or any other form of humiliation.<sup>84</sup> An amendment was also added to the Parental Custody and Care Act in 1985.<sup>85</sup> In 1997, there was a further amendment, and the current version is "The child has the right to care and security. [He or she] shall be treated with respect for [his or her] personality and may not be subjected to corporal punishment or any other offensive treatment."<sup>86</sup> Scholars point out that this statute does not actually change the norm that was accepted in practice, for previously parents were convicted only when the beating injured the child and left marks.<sup>87</sup> The Danish legislature also enacted a prohibition in the educational system.<sup>88</sup> Here, too, scholars argue that parents and caretakers can be indicted with respect to corporal punishment, but this is only theoretical.<sup>89</sup>

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78. *Id.* at 25.

79. See BITENSKY, *supra* note 5, at 164.

80. See *id.* at 162–63.

81. See BOYSON, *supra* note 77, at 24–25.

82. See BITENSKY, *supra* note 5, at 161.

83. BOYSON, *supra* note 77, at 180; Linda Nielsen & Lis Frost, *Children and the Convention: The Danish Debate*, in CHILDREN'S RIGHTS—COMPARATIVE PERSPECTIVE 55, 65–92 (Michael Freeman ed., 1996).

84. Minors Act, c.1, § 7(2) (1995); Act on Custody and Access, c.1, § 2 (1995).

85. See Minority Act no. 443 §7 (2) (1985) (Den.); Lov nr. 387 af 14. Juni 1995 om forældremyndighed og samvaer, jf. § 2, stk. 2 (in English: Danish Act on Parental Custody and Visiting Rights, No. 387, § 2(2) (1995)).

86. See Lov nr. 416 om ændring af lov om forældremyndighed og samvaer § 1 (in English: Danish Act to amend the Act on Parental Custody and Visiting Rights, No. 416 § 1 (1997)).

87. See Nielsen & Frost, *supra* note 83, at 158.

88. The Danish legislature outlawed corporal punishment in residential institutions for children, permitting the use of force only to prevent the child from harming himself or other children, and this force must be adapted to the specific situation and must not exceed what is necessary. See



#### 4. Norway

In 1972 Norway repealed a criminal statute enacted in 1926 that granted parents a right to use reasonable corporal punishment for the education of a child.<sup>90</sup> Fifteen years later, Norway amended its family law to read, “The child shall not be exposed to physical violence or to treatment which can threaten his physical and mental health.”<sup>91</sup> Thus, Norway gives greater scope to parents than other Scandinavian countries. Some scholars argue that the preparatory work of the law (akin to legislative history in the United States) indicates that two forms of parental conduct are still permissible: (1) the use of force, such as holding or blocking, to prevent children from hurting themselves or others or destroying property (similar to self-defense); and (2) small smacks on the children’s hands or clothed buttocks as a spontaneous reaction may be used as some sort of de minimis defense.<sup>92</sup> Here, too, some argue that parents can be indicted, but merely as a theoretical possibility.<sup>93</sup> Nongovernmental organizations held an educational-awareness campaign.<sup>94</sup> An explicit prohibition on corporal punishment in the educational system has been enacted.<sup>95</sup>

#### 5. Austria

Austria first prohibited corporal punishment in schools in the 1975 Teaching Act.<sup>96</sup> There is no similar legislation with respect to other educational institutions, but scholars argue that a correct analogy leads to a prohibition in all educational institutions.<sup>97</sup> As to the family unit, in 1977 Austria removed a defense to corporal punishment in the Penal Code.<sup>98</sup> In 1989 the Austrian parliament voted unanimously for a section of law that “prohibits” corporal punishment in the civil code: “The minor child must follow the parent’s orders. In their orders and in the implementation thereof, parents must consider the age, development and personality of the child; the use of force and infliction of physical or psychological harm are not permitted.”<sup>99</sup> The section does not explicitly mention corporal punishment, but prohibits inflicting physical or mental harm, as do the laws in the Scandinavian countries. The statute was meant to influence the population to gradually abandon corporal punishment.

Lovebekendtgørelse nr. 764 af 26/08/2003 om social service, capital 21, § 108, stk. 1, 2 (in English: Act on Social Welfare ch. 21, § 108(1), 108(2) (2003)).

89. See BITENSKY, *supra* note 5, at 182.

90. *Id.* at 165.

91. Parent & Child Act, art. 30 § 3, *as amended* by the Amending Act No. 11, 1987 (Nor.).

92. See BITENSKY, *supra* note 5, at 166.

93. *See id.* at 167.

94. *See id.* at 170.

95. Act of Education § 2-9(3) (schools); Child Welfare Services Act § 5-9(3)(a) (other educational institutions); *see also* BITENSKY, *supra* note 5, at 166.

96. *See* Schulorganisationsgesetz geregelten Schulen § 47(3) (1986) (in English: Teaching Act 1986, § 47(3)).

97. *See* BITENSKY, *supra* note 5, at 171.

98. *See id.*

99. Allgemeines Bürgerliches Gesetzbuch § 146a (in English: Austrian Civil Code, § 146a).

Austria also instituted an educational campaign intended to change the norms. In Austria, as in Scandinavia, some scholars claim that although the legislation is civil, parents, teachers, or others who are responsible for children can be indicted.<sup>100</sup> The Austrian policy places strong emphasis on the welfare and education services and on the children's ombudsman and less emphasis on literal enforcement of the law.<sup>101</sup>

## 6. Germany

In 2000 Germany enacted a civil statute stating that “[c]hildren have the right to be brought up without the use of force. Physical punishment, the causing of psychological harm and other degrading measures are forbidden.”<sup>102</sup> A nonpunitive, physical-contact defense exists for saving a child from danger, for example, from running into the street or for possessing matches.<sup>103</sup> Like Austria, the German government and private bodies also invested extensively in an awareness campaign that included large posters on the streets, an explanatory booklet, and monthly distributions of leaflets on the development of children and ways for parents to avoid corporal punishment of children from birth until the age of five.<sup>104</sup> Here too, scholars debated whether mild corporal punishment should be indictable.<sup>105</sup> A further dispute concerned whether a criminal defense allowing parents to punish their children in general terms (applicable to corporal punishment administered prior to 2000) remained valid for moderate and reasonable punishment meant for educational purposes.<sup>106</sup> As in Israel, the attorney general has discretion whether to bring charges, and light corporal punishment may be subject to the *de minimis* rule. In more serious cases, the prosecution may sometimes refrain from bringing charges against the parents if it is convinced that despite the public interest in bringing charges, proper therapeutic steps have been taken.<sup>107</sup>

Of the sixteen federal states of German, thirteen have imposed a prohibition on corporal punishment in their educational systems.<sup>108</sup> In the remaining three, corporal punishment is customary.<sup>109</sup> No explicit legislation exists regarding day-care centers.<sup>110</sup>

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100. See BITENSKY, *supra* note 5, at 172.

101. See *id.* at 173.

102. Inhalt und Grenzen der Personensorge, [Ostracism of Force in Upbringing Act], Aug. 18, 1996, BGB, as amended, § 1631, ¶ 2 (unverified).

103. See BITENSKY, *supra* note 5, at 190.

104. *Id.* at 195.

105. See *id.* at 191–93.

106. See *id.* at 191.

107. See *id.* at 192–93.

108. *Id.* at 190.

109. *Id.*

110. See *id.* at 190.

The German ban on corporal punishment was less productive than the Swedish ban, possibly because the awareness campaign was less successful.<sup>111</sup> But Germany invested considerable resources in therapy by the state. It implements an impressive welfare mechanism, even if only theoretically, which acts in various ways to prevent conflicts within the family and to treat conflicts when they do occur. The government provides advice and implements programs for resolving the conflicts in nonviolent ways, all by virtue of the law.<sup>112</sup>

#### D. States that Permit Parental Corporal Punishment but Prohibit Its Use by Teachers: The United Kingdom and the United States

England permits corporal punishment by parents but has enacted a defense to its prohibition against assault in cases of corporal punishment,<sup>113</sup> available only as long as the punishment comprises “reasonable chastisement.”<sup>114</sup> Qualifications (narrower than those of Canadian or Jewish law) limiting the corporal-punishment defense have been specified in court rulings, including (1) an assessment of the circumstances of the beating, (2) an assessment of the child’s strength and age (any beating a child over sixteen years of age is prohibited under all circumstances), (3) the duration of the beating, and (4) the severity of the beating.<sup>115</sup>

Corporal punishment in the English public schools, though, was effectively prohibited in 1986.<sup>116</sup> Although this prohibition did not apply to private schools,<sup>117</sup> scholars have noted that, in any event, most state-supported schools have abandoned corporal punishment.<sup>118</sup>

The situation in the United States is similar. The American Model Penal Code, which serves as the basis for criminal legislation in many states,<sup>119</sup> permits parental corporal punishment as long as “[its purpose is] promoting the welfare of the minor” and the force is not excessive.<sup>120</sup>

111. See Gershoff & Bitensky, *supra* note 1, at 251–52.

112. See BITENSKY, *supra* note 5, at 190, 193–95.

113. Children and Young Persons Act, 1933, c. 12, § 1 sched. 7, amended in Children Act, 1989, c. 41 (Eng.).

114. *R. v. Hopley*, (1860) 175 Eng. Rep. 1024, 1026 (court from which appeal was heard).

115. *R. v. Woods*, [1921] 85 J.P. 272 (court from which appeal was taken) (unverified). For a discussion of the decision of the European Court of Human Rights against the United Kingdom in *A. v. United Kingdom*, 27 Eur. H.R. Rep. 611 (1998), see Benjamin Shmueli, *The Influence of the U.N. Convention on the Rights of the Child on Corporal Punishment—A Comparative Look*, 10 OREGON REV. INT’L L. 189, 213–16 (2008).

116. Education (No. 2) Act, 1986, c. 61, § 48 (Eng.) (resulting in outlawing the cane, the tool commonly used for corporal punishment in schools).

117. *Id.* §§ 47–48.

118. Brenda Hale, *Understanding Children’s Rights: Theory and Practice*, 44 FAM. COURT REV. 350, 351 (2006).

119. See Pollard, *supra* note 23, at 637–40.

120. MODEL PENAL CODE § 3.08, art. 3 (2001). See also Pollard, *supra* note 23, at 637. The specific provisions of criminal law are, of course, a matter of state jurisdiction.

As to parental corporal punishment, the U.S. Supreme Court has not considered whether parents have a fundamental constitutional right to use corporal punishment.<sup>121</sup> Some sixteen states have enacted statutes that explicitly allow parents and guardians to use reasonable and moderate corporal punishment through a special, justification-based defense of parental discipline; in other states, court rulings achieve the same result.<sup>122</sup> No state has prohibited corporal punishment within the family.<sup>123</sup> All existing laws address parameters of reasonableness, moderation, and necessity according to the circumstances and the need for an educational goal. Among the reservations listed by various states is the readiness of the child to correct his ways and learn a lesson from the punishment, the age of the child, the child's physical and mental state, the intensity of the force, and the necessity of the action.<sup>124</sup>

Scholars have heavily criticized the posture toward corporal punishment in the United States, claiming that it is unconstitutional<sup>125</sup> and that the United States should follow other countries that have banned corporal punishment.<sup>126</sup> These scholars have considered many studies showing that corporal punishment is not effective and harms the child as well as parent-child relations.<sup>127</sup> Others

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121. Mary Kate Kearney, *Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child*, 32 SAN DIEGO L. REV. 1, 3 (1995).

122. Dean Herman, *A Statutory Proposal to Prohibit the Infliction of Violence upon Children*, 19 FAM. L.Q. 1, 11–12 (1985) (discussing the statutes limiting parental punishment and the interpretations of the courts); BITENSKY, *supra* note 5, at 265. See Pollard, *supra* note 23, at 635–42 (discussing the rationales behind the different states' statutes allowing parents and guardians to use reasonable and moderate punishment on their children).

123. See BITENSKY, *supra* note 5, at 270–75 (reviewing, inter alia, the special “intermediate situation” in Minnesota, where several statutes taken together indicate that so-called reasonable parental corporal punishment actually amounts to the criminal offense of assault); Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense —Reasonable and Necessary, or Excused Abuse?*, U. ILL. L. REV. 413, 438–40 (1998) (describing the commonalities between all states' parental privilege doctrines).

124. BITENSKY, *supra* note 5, at 266. See also Pollard, *supra* note 23, at 636–37.

125. See, e.g., Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447 (2002). Pollard argues that the current state laws that exclude children from protection against assault and battery are unconstitutional and that therefore state legislatures should repeal laws that permit child corporal punishment and adopt laws prohibiting it. Pollard further argues that if states fail to take this action, courts should declare laws permitting child corporal punishment unconstitutional based on the Equal Protection Clause and the Due Process Clause. Pollard thinks that states could ban corporal punishment by invoking either their police power to protect society or their *parens patriae* power to protect children in particular, based on social science studies that demonstrate that corporal punishment causes harm to children, parents and society at large. She also argues that current state laws excluding children from protection against assault and battery are unconstitutional and that these laws violate children's liberty interest in being free from physical invasion. Cf. Lynn Roy, *Chalk Talk: Corporal Punishment in American Public Schools and the Rights of the Child*, 30 J.L. & EDUC. 554, 563 (2001) (“It is time for federal courts to recognize that the state has no compelling interest in the educational sense of imposing punishment that causes either physical or psychological harm to a student.”).

126. Pollard, *supra* note 23, at 578.

127. See, e.g., Pollard, *supra* note 23, at 634–57 (arguing for the abolishment of the U.S. “parental discipline” defense, which is essentially a justification-based defense that operates to defend parents for even severe physical violence and injury to children).

think that there is a lack of uniformity amongst the states in construing the term “reasonableness,” sometimes even within the same state.<sup>128</sup>

As in other countries, corporal punishment is treated differently in the educational system than in the home.<sup>129</sup> In *Goss v. Lopez*, the U.S. Supreme Court agreed that some form of discipline may be necessary for a teacher to maintain order in the classroom.<sup>130</sup> Discipline promotes learning.<sup>131</sup> And in *Ingraham v. Wright*, a five-to-four majority ruled that without some form of disciplinary sanction for misbehavior, students who wish to learn may be unfairly deprived of that right.<sup>132</sup> The Court ruled that the Eighth Amendment to the Constitution does not apply to school children, although they have a liberty interest in their bodily integrity, since the law provides adequate protection against due-process violations.<sup>133</sup> According to the Court, corporal punishment does not constitute cruel and unusual punishment under the Eighth Amendment,<sup>134</sup> nor does it violate the guarantee of liberty contained in the Fourteenth Amendment.<sup>135</sup>

*Ingraham* has been subject to considerable criticism. Some scholars have argued that the Ninth Amendment provides a constitutional challenge to corporal punishment in public schools and that parents’ rights are a clear example of rights “retained by the people”: since parents are charged with the upbringing of their children, they retain an inherent right to discipline their children accordingly.<sup>136</sup> According to this argument, the *Ingraham* court may have failed to consider the implications of the Ninth Amendment and the protection it may provide to children. These scholars maintain that corporal punishment in public schools unreasonably interferes with the liberty of parents to direct the upbringing and education of their children. Punishment forces

128. Gershoff & Bitensky, *supra* note 1, at 247–48; Shmueli, *supra* note 5, at 78–79.

129. For the history of corporal punishment administered by parental and teachers in the United States, see IRWIN A. HYMAN & JAMES H. WISE, CORPORAL PUNISHMENT IN AMERICAN EDUCATION: READINGS IN HISTORY, PRACTICE AND ALTERNATIVES 23 (Irwin A. Hyman & James H. Wise eds., 1979); *see also* Pollard, *supra* note 23, at 579–80, 585–87 (discussing the statutes prohibiting corporal punishment in schools and the more rapid decline of its use in the school setting).

130. 419 U.S. 565, 580 (1975).

131. Roy, *supra* note 125, at 556.

132. 430 U.S. 651, 682 (1977).

133. *Compare id.* at 669 with Cynthia Denenholz Sweeney, *Corporal Punishment in Public Schools: A Violation of Substantive Due Process*, 33 HASTINGS L.J. 1245, 1257 (1982) (examining cases in which the specific application of the corporal punishment, rather than the provision allowing the punishment, were challenged and suggesting a less strict test for determining the constitutionality of corporal punishment under due process).

134. 430 U.S. at 683.

135. In other words, it does not require schools to provide notice and a hearing before application of physical discipline. *Id.*; Sims v. Waln, 388 F. Supp. 543, 549 (S.D. Ohio 1974). *See also* Angela Bartman, *Spare the Rod and Spoil the Child? Corporal Punishment in Schools Around the World*, 13 IND. INT’L & COMP. L. REV. 283, 307 (2002); Roy, *supra* note 125, at 560; Note, *Corporal Punishment: For School Children Only*, 27 DRAKE L. REV. 137, 158, 160 (1977–1978).

136. Comment, *The Ninth Amendment: A Constitutional Challenge to Corporal Punishment in Public Schools*, 55 KAN. L. REV. 429, 430–31 (2007) [hereinafter *The Ninth Amendment*].

minor children to be subjected to abuse without parental input and within the compulsory setting of the public school. By forcing parents to accept the emotional and physical marks that corporal punishment leaves on their children, corporal punishment in public schools unconstitutionally abridges the parents' right to direct the upbringing of their children. According to this argument, parents should thus have the right not to agree to the use of corporal punishment in public schools; any corporal punishment administered in public schools without such consent would be a violation of the Ninth Amendment. Because parents are nominally in control of educating their child's behavior, they voluntarily choose whether the child should receive such discipline in the school.<sup>137</sup> This argument may serve both perceptions, since if the parents support corporal punishment, teachers that carry out that punishment are fulfilling parents' wishes and rights and not threatening them.

Another criticism is that corporal punishment in public school disadvantages African American students, making them feel inferior (since such punishment is reminiscent of slavery), thereby stifling their intellectual growth while encouraging discrimination. Accordingly, *Ingraham* should be overturned and the Eighth Amendment and the full ban on corporal punishment in public schools relitigated.<sup>138</sup> In practice, more than half of the United States jurisdictions, including the District of Columbia, have so far chosen to prohibit corporal punishment in public elementary and secondary schools.<sup>139</sup> Other states have left the matter to the discretion of the administration in each school,<sup>140</sup> while in others corporal punishment is permitted in a manner similar to that in the family unit. In many districts in some of the largest cities in the country,

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137. *Id.* at 453–54.

138. Susan H. Bitensky, *The Constitutionality of School Corporal Punishment of Children as a Betrayal of Brown v. Board of Education*, 36 LOY. U. CHI. L.J. 201 (2004). For an argument that this discrimination violates the First Amendment, in addition to substantive due process, equal protection, and the free exercise of religion under that amendment, see Andre R. Imbrogno, *Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of The Child: A Case for Nonratification*, 29 J.L. & EDUC. 125, 134–38 (2000) (adding to this proposal the use of parental choice to determine whether their children should be subject to corporal punishment in public schools, something that the courts have not allowed until now). *Cf.* Pollard, *supra* note 125, at 467–70, 473–81 (suggesting that state laws banning corporal punishment would survive even “strict scrutiny” and arguing that laws that exclude children from protection against corporal punishment violate equal protection); *see also* Bitensky, *supra* at 214 (presenting data that shows that African American students are hit at a rate more than double their proportion of the population).

139. Only two states had done so by the end of the 1970s and only five states by 1986. BITENSKY, *supra* note 5, at 290; Pollard, *supra* note 23, at 586. For an updated list of states that prohibit corporal punishment in school, see Gershoff & Bitensky, *supra* note 1, at 259. *See also* Timothy Garrison, *Part Two: Rights of Parents: From Parent to Protector: The History of Corporal Punishment in American Public Schools*, 16 J. CONTEMP. LEGAL ISSUES 115, 115–19 (2007) (describing the history of corporal punishment in public schools and the gradual and partial shift from the *in loco parentis* doctrine as a justification for corporal punishment in public schools to the *parens patriae* doctrine, which justifies the use of corporal punishment as a means to further the state's role as a protector and educator and the state's interest in controlling children's behavior and providing for their safety and security).

140. Warburg, *supra* note, 21 at 57.

corporal punishment has been prohibited.<sup>141</sup> Most of the states (forty-two) do not allow corporal punishment in residential institutions and agency group homes; more than half of the states (thirty-nine) ban it in day-care centers; and about two-thirds (thirty-two states) ban it family-care centers.<sup>142</sup> In private schools the situation differs according to the contract of each school with its students' parents. Some of these contracts include an explicit clause allowing school staff to physically punish the pupils.<sup>143</sup>

The situation in the U.S. educational system is consistent with public opinion: people's approval of corporal punishment varies with the context; almost ninety percent of parents use it against their children, yet only about half the population supports corporal punishment in the public-education system.<sup>144</sup> Although some of the public approves of corporal punishment in the academic setting, scholars have criticized this situation, which allows corporal punishment in the educational system in some jurisdictions, and have called on the federal courts to intervene.<sup>145</sup>

It seems that in the United States, prohibiting corporal punishment in schools and in the parents' home depends greatly on social norms and the extent of the population's readiness to accept this norm and assimilate it.<sup>146</sup> The United States has not ratified the UNCRC. If one hopes for a genuine change in the attitude of the American people, the population is readier to embrace this shift in the educational system than in the family arena.<sup>147</sup>

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141. Gershoff & Bitensky, *supra* note 1, at 246 (including school districts in Atlanta, Georgia; Dallas, Texas; Houston, Texas; Memphis, Tennessee; Miami, Florida; and Tucson, Arizona).

142. *Id.* at 247.

143. Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in Public Schools*, 65 GEO. WASH. L. REV. 49, 88-90 (1996) (explaining the legal differences between private and public schools).

144. Murray A. Straus & Michael Donnelly, *Theoretical Approaches to Corporal Punishment*, in CORPORAL PUNISHMENT OF CHILDREN IN THEORETICAL PERSPECTIVE 3, 4 (Michael Donnelly & Murray A. Straus eds., 2005); Herman, *supra* note 122, at 12 ("As of 1970, over 90 percent of all American adults were subject to corporal punishment as youngsters and approximately the same percentage of today's children face the same treatment."); Pollard, *supra* note 23, at 581-83; Murray A. Straus, David B. Sugarman & Jean Giles-Sims, *Spanking by Parents and Subsequent Antisocial Behavior of Children*, 151 ARCHIVES PEDIATRIC ADOLESCENT MED. 761, 761 (1997).

145. See Jerry Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence that Is Literally Shocking to the Conscience*, 39 S.D. L. REV. 276, 310-11 (1994).

146. Warburg, *supra* note 21, at 65-66.

147. Imbrogno, *supra* note 138, at 144.

## III

CORPORAL PUNISHMENT METED OUT BY PARENTS VERSUS CORPORAL  
PUNISHMENT METED OUT BY TEACHERSA. First Perception: The Human-Rights and Children's Rights Perspective and  
the UNCRC—Corporal Punishment by Parents and Teachers Should Be  
Totally Prohibited

In modern society, increasingly unequivocal attitudes have been expressed against parental behavior that harms children, even that allegedly undertaken in the interest of the children, when this behavior inflicts damage on the children, violates their dignity, or is contrary to justice and equality.<sup>148</sup> Unlike society's traditional view of the family, this approach views the individual in the family unit and does not look at the family as a whole. The child is seen as an independent entity for almost all purposes, even at the expense of eroding the parents' authority, despite the natural inequality inherent in the structure of the classic family unit, at the center of which are strong parents and weak children. The same structure applies to teachers and students. Children are physically weaker and psychologically more vulnerable than adults and therefore deserve a greater degree of protection.

This first perspective follows from the human-rights approach. If the actions of the parents and educators harm the child, these actions should be restricted even if the adult is acting for the benefit of the child or student out of a positive educational motive.<sup>149</sup> This approach attempts to shake off the traditional paternalistic attitudes that leave it to the adults to decide what is in the best interest of the child<sup>150</sup>—even if the paternalistic decision purports to be made in the name of the positive goal of forging children as independent human beings who understand boundaries and have learned to accept discipline and values. According to this human-rights approach, it is obvious that even mild corporal punishment meted out by parents and teachers should be totally prohibited,

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148. This approach is based mainly on the views of liberal thinkers who believe that the rights of the individual have to supersede all else. See generally Charles Taylor, *Multiculturalism and 'The Politics of Recognition,'* in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1992) (advocating a multicultural society that protects the rights of every individual based on recognition of their human dignity); see also JOHN LOCKE, TWO TREATIES OF CIVIL GOVERNMENT 142–54 (1955) (discussing the duties of a parent to a child); JOHN RAWLS, A THEORY OF JUSTICE 11–16 (1971); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223–51 (1985).

149. See generally C. Harry Hui, *Measurement of Individualism-Collectivism*, 22 J. OF RES. IN PERSONALITY 17, 17–36 (1988) (describing the differing attitudes of Chinese and American students towards individual rights versus collective good and discussing individualistic and collectivistic approaches).

150. See Michael D.A. Freeman, *The Morality of Cultural Pluralism*, 3 INT. J. OF CHILD. RTS. 1, 16–17 (1995) (describing how pluralism must respond to cultures that allow parents to violate what we see as the rights of the child).



since the right to be free from violence is one of the basic human rights afforded to adults and is a right that children should also be granted.<sup>151</sup>

The controversies regarding the legitimacy of corporal punishment as an educational tool and regarding its effectiveness have been raging for many generations, both among pedagogues and educators and among academics from social sciences and the law. Many behavioral-research studies describe the physical harm<sup>152</sup> and emotional-behavioral disorders (antisocial, cognitive or developmental, psychological, and psychiatric) created by even light corporal punishment.<sup>153</sup> Researchers also offer evidence of its ineffectiveness<sup>154</sup> or that, at best, it is no more effective than other forms of punishment that carry less risk.<sup>155</sup> These researchers argue that corporal punishment cannot be said to be effective, since correcting behavior immediately is different than teaching a child not to engage in the behavior again, so any perceived immediate effectiveness must be weighed against future problems.<sup>156</sup> In addition, scholars have emphasized the damage caused to the parents as well,<sup>157</sup> damage that passes down from generation to generation.<sup>158</sup> Discipline serves as a common defense claim even in harsh cases,<sup>159</sup> and sometimes spanking is a precursor for abuse.<sup>160</sup> Scholars also point to inevitable societal harm that can result from violent behavior, including corporal punishment: family breakdown, violence, and illness.<sup>161</sup> Some scholars raise policy considerations, arguing that even if spanking is not so harmful, banning it would encourage parents to find

151. ADAH MAURER, PADDLES AWAY: A PSYCHOLOGICAL STUDY OF PHYSICAL PUNISHMENT IN SCHOOLS 133–34 (1981).

152. See, e.g., ALICE MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD REARING AND THE ROOTS OF VIOLENCE 61, 65–66, 115–16, 232 (H. Hannum & H. Hannum trans., 1990) (explaining how corporal punishment leads to aggression, inability to express anger healthily, lack of empathy, and violence as adults); Peter Newell, *Respecting Children's Right to Physical Integrity—What the World Might Be Like*, in THE HANDBOOK OF THE CHILDREN'S RIGHTS—COMPARATIVE POLICY AND PRACTICE 224–25 (Bob Franklin ed., 1995).

153. PHILLIP GREVEN, SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE 193–98 (1990); HYMAN, *supra* note 1, at 19; Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-analytic and Theoretical Review*, 128 PSYCHOL. BULL. 539 (2002) (a comprehensive meta-analysis of eighty-eight studies conducted over a period of sixty-two years); Joan McCord, *Unintended Consequences of Punishment*, 98 PEDIATRICS 832, 832 (1996); Pollard, *supra* note 23, at 594–608.

154. Pollard, *supra* note 23, at 596, 624–27; see also Gershoff & Bitensky, *supra* note 1, at 233–34 (stating that studies have shown that in the short term the efficacy of corporal punishment is mixed, but in the long term it is not efficacious).

155. Pollard, *supra* note 125, at 449 & nn. 4–6.

156. Pollard, *supra* note 23, at 630.

157. Identified damage includes guilt, loss of parent-child bonding and affection, and harm to the integrity of the family unit. Gershoff & Bitensky, *supra* note 1, at 239–40 (discussing the erosion of the closeness in the parent-child relationship); Pollard, *supra* note 23, at 596–97, 610–12, 620–21.

158. Pollard, *supra* note 23, at 609–610.

159. See *id.* at 583–84 (bringing data regarding American society and the use of the discipline defense). Corporal punishment that does not rise to the level of child abuse is often referred to as “subabusive” corporal punishment. Pollard, *supra* note 125, at 449.

160. Gershoff & Bitensky, *supra* note 1, at 240–41; Pollard, *supra* note 23, at 583–84, 621–22.

161. Pollard, *supra* note 23, at 578.

alternative disciplinary methods that do not carry the risks associated with spanking.<sup>162</sup> Indeed, scholars offer alternatives to corporal punishment, such as deprivation of privileges, reasoning, time-out, grounding, negotiation and compromise, asking the children themselves to come up with a fitting nonviolent punishment, holding the child, and letting the child suffer the logical consequences, within reason, of his acts.<sup>163</sup>

Scholars note that corporal punishment administered by educators also harms children. It interferes with students' ability to do schoolwork.<sup>164</sup> Scholars point at more-effective disciplinary techniques for controlling children and teaching them moral values, such as expulsion, suspension, detention, parental pick-ups, time-outs, deprivation of privileges, and explaining why misbehavior is unacceptable.<sup>165</sup> The story about the consequences of corporal punishment that my late grandmother experienced is a good example for this standpoint.

If one sees a ban on corporal punishment as a child's right, that is, focusing on the right of the child and not on the duty of the parent or teacher, there should be no difference between parents and teachers. Since this is the right of the child—not to be exposed to corporal punishment—this right will always vest irrespective of the identity of the adult and his role in the child's life. The adult—the educator or parent—should, of course, be given authority to correct the child, but it should not be absolute and it must be withdrawn when it clashes with the child's rights over his body and his dignity.

Some scholars claim that the need to prohibit corporal punishment by both parents and teachers is derived, explicitly or implicitly, from the UNCRC.<sup>166</sup> The UNCRC constitutes the summit of development for children's rights in the international arena, emphasizing their rights to dignity and recognition as autonomous persons, effectively making them independent beings in terms of their rights, including their rights within the family.<sup>167</sup> All UN members except the United States and Somalia have signed and ratified the UNCRC.<sup>168</sup>

Does the UNCRC ban the use of light, educational corporal punishment?<sup>169</sup> Some scholars claim that because the UNCRC specifically mentions only "violence" or "abuse," but not "corporal punishment," it does not and must not

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162. *See id.* at 629.

163. BITENSKY, *supra* note 5, at 2–3; *see* STRAUS & DONNELLY, *supra* note 1, at 150 (reviewing social-science experiments on the effectiveness of various forms of punishment).

164. Bitensky, *supra* note 138, at 211.

165. *Id.*

166. *See* Bartman, *supra* note 135, at 294–96; Gershoff & Bitensky, *supra* note 1, at 242–43 (both pointing also to other international documents giving rise to a ban on corporal punishment).

167. Stephen J. Toope, *The Convention on the Rights of the Child: Implications for Canada*, in CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE 33, 41–43, 47–48 (Michael Freeman ed., 1996).

168. *See* Imbrogno, *supra* note 138, at 138–46 (discussing the possible impact of ratification on the American public).

169. For an extensive discussion, *see* Shmueli, *supra* note 115, at 197–209.

prohibit corporal punishment.<sup>170</sup> Others insist that the UNCRC purposely establishes only a minimum standard in the hope that all states parties will indeed comply with it, rather than set an upper threshold that some states parties would be unlikely to reach.<sup>171</sup> Still other scholars claim that the UNCRC does explicitly prohibit corporal punishment and that it can constitute a human-rights violation.<sup>172</sup> Opinions as to the specific article of the UNCRC from which this ban is derived differ.<sup>173</sup> Article 19(1) is the main article ascribed to corporal punishment. It states,

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Even assuming the UNCRC prohibits mild corporal punishment, whether such mild punishment not causing injury is included in the term “violence” is also debated.<sup>174</sup> It is a matter of interpretation, although it may be assumed that

170. Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 LOY. POVERTY L.J. 55, 95–96 (1998).

171. Ruth Lawarence-Karski, *Legal Rights of the Child: The U.S. and U.N. Convention of the Rights of the Child*, 4 INT’L J. CHILD. RTS. 19, 41 (1996).

172. See BITENSKY, *supra* note 5, at 48–49, 53–56; Pollard, *supra* note 23, at 592.

173. Article 37(a) provides that no child shall be subjected to torture or other cruel, inhuman or degrading punishment. Some scholars think that this is a ground for a ban on corporal punishment. See, e.g., Nicola Taylor, *International Law, in THE DISCIPLINE AND GUIDANCE OF CHILDREN: MESSAGES FROM RESEARCH 10* (Anne B. Smith, Megan Gollop, Nicola J. Taylor & Kate Marshall eds., 2005); see also BITENSKY, *supra* note 5, at 59–63 (discussing Article 37(a) and its varying possible interpretations). For other articles that are consistent with a ban on corporal punishment, see *id.* at 63–75. It seems that Article 37(a) applies specifically to punishment imposed by the authorities rather than to that exercised by parents. Others think that Article 24(3), which instructs states to take measures to safeguard the health of children, also provides a basis for a prohibition on corporal punishment. See Ezer, *supra* note 15, at 161 (discussing the Committee’s belief that Article 24(3) supports a ban of corporal punishment); Taylor, *supra*, at 92.

174. Shmueli, *supra* note 115, at 207–10. For different opinions, see BITENSKY, *supra* note 5, at 53–56. Some scholars strongly support the view that Article 19(1) does lay down an explicit prohibition on corporal punishment. *Id.*; Michael Freeman, *Children are Unbeatable*, 13 CHILD. & SOC’Y 130, 135 (1999); Taylor, *supra* note 173, at 87. According to Article 44 of the UNCRC, the states parties must submit periodic reports to the Committee on the Rights of the Child regarding their actions to ensure children’s rights under the UNCRC. The committee calls on states parties to apply the provisions of the UNCRC. It also supervises the progress of the states parties in implementing the UNCRC by making recommendations in response to the states’ periodic reports. In addition, the committee publishes general comments and organizes conferences on topics related to the interpretations of provisions of the UNCRC. It has rejected any interpretation that the UNCRC does not prohibit corporal punishment. See, e.g., Freeman, *supra* at 136 (quoting the UNCRC). The committee has interpreted Article 19(1) as a cornerstone and other articles (like Article 28(2), which imposes a responsibility on the state to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present convention) as clearly prohibiting light corporal punishment in both the family and educational contexts. See, e.g., U.N. Comm. on the Rights of the Child, *General Comment No. 8*, ¶ 18, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007). The Committee has also required states parties to adjust their national law to this interpretation. See U.N. Comm. on the Rights of the Child, *Report on the 17th Session*, ¶ 63, U.N. Doc. CRC/C/34 (Nov. 8, 1994); U.N. Comm. on the Rights of the Child, *Violence against Children within the Family and in Schools*, ¶ 715, U.N. Doc. CRC/C/34 (Sept. 28, 2001); U.N. Comm. on the Rights of the Child, *Convention on the Rights of the Child, Annex IX*:

the human-rights approach derived from the convention's provisions supports banning rather than permitting it. Some states have used the UNCRC as an international source to support the ban, while others have taken the view that they can permit the use of corporal punishment despite the UNCRC.<sup>175</sup>

Most countries are signatories to the UNCRC and have ratified it. By doing so, the international community has expressly recognized the need to protect children from the harmful effects of violence, and it thus seems that from a human-rights perspective, school children should receive the same type of protection,<sup>176</sup> this being the right of every child, a right that imposes a concomitant duty on both parents and teachers.

#### B. Second Perception: The Discipline-and-Correction Perspective—Moderate and Reasonable Corporal Punishment by Parents and Teachers Should Be Permitted

Advocates of the second perception believe that corporal punishment as a means of education can be effective if it is qualified in a manner designed to lessen the harm to the child. The education of children can be carried out in a variety of ways, including coercion and corporal punishment. The educator—parent or teacher—hurts the child in order to correct him, usually because the child misbehaved, acted wrongfully, did not obey instructions, or rejected authority. This type of punishment is commonly considered to be a deterrent, aimed at stopping the child from repeating his misconduct. It is designed to shape the child's character. Thus it teaches obedience and respect for authority.<sup>177</sup>

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*General Comment No. 1 (2001)—Article 29(1): The Aims of Education*, ¶ 8, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Comm. on the Rights of the Child: Zimbabwe*, ¶ 15, U.N. Doc. CRC/C/15/Add. 55 (June 7, 1996); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Comm. on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, ¶ 31, U.N. Doc. CRC/C/15/Add. 34 (Feb. 15, 1995). See also BITENSKY, *supra* note 5, at 120–21; Rachel Hodgkin & Peter Newell, United Nations Children's Fund, *THE IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD* 242–47 (1998); Peter Newell, *The Human Rights Imperative for Ending All Corporal Punishment of Children, in ELIMINATING CORPORAL PUNISHMENT: THE WAY FORWARD TO CONSTRUCTIVE CHILD DISCIPLINE* 25, 25–48 (Stuart N. Hart ed., 2005). The committee's conclusions are merely recommendations, and its interpretation is not binding. Its conclusions, however, should be regarded at least as a complementary authority because the committee is the official and the highest interpreter of the UNCRC. An examination of the committee's interpretations and its contacts with the various countries shows that even though the UNCRC enables the states parties to choose whether to prohibit all forms of physical abuse in criminal or family law, it specifically adopts the common approach of the Scandinavian countries (the civil approach) and encourages states parties to do the same. See U.N. Comm. on the Rights of the Child, *General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(b) of the Convention*, ¶ 88, U.N. Doc. CRC/C/58 (Nov. 20, 1996).

175. See Shmueli, *supra* note 115, at 238–42.

176. Bartman, *supra* note 135, at 296. Some see a ban on corporal punishment that is derived from Article 28(2) of the UNCRC, which refers to schools. See, e.g., Convention on the Rights of the Child, May 15, 2006, Committee on the Rights of the Child, CRC/C/GC/8, at paras. 7, 19–22 (March 2, 2007).

177. GREVEN, *supra* note 153, at 8.

Some behavioral studies show that light corporal punishment, if carried out thoughtfully and nonsystematically, will not necessarily cause mental or physical harm to the child; even if there is minimal harm, it pales in comparison to the efficacy of the punishment in terms of the child's education in the long and short term,<sup>178</sup> and some researchers view such light corporal punishment as harmless and even beneficial.<sup>179</sup>

Social-sciences research presents a series of qualifications on the use of light corporal punishment that are very similar to those prevailing in Canadian, Jewish, English, and American law. One interesting opinion is that espoused by Diana Baumrind, a child-developmental psychologist who for many years argued consistently that even mild corporal punishment was harmful. In 1996 her approach changed, and she has since published several studies showing that physical punishment is not harmful and can even be beneficial.<sup>180</sup> In Baumrind's opinion, corporal punishment for the purpose of inculcating discipline in a child, when administered sensibly, can actually establish correct social behavior and better prepare the child for life while protecting him from sudden exposure to negative and painful experiences and behaviors occurring outside the family arena. According to Baumrind, if a child grows up in a "hothouse" in which the parents fail to react in the face of bad behavior or use "soft" and insufficiently effective alternatives to counter it, the child is, in the end, hurt, since outside this "hothouse" he will be exposed to harsh negative reactions to such behavior without any preparation.<sup>181</sup> Baumrind's research also challenges the argument that light corporal punishment leads to an intergenerational cycle of violence. In her view, children's violence can stem not only from exaggerated corporal punishment but also from the failure to use it at all. She also presents data according to which children whose parents physically punished them mildly were less violent vis-à-vis others.<sup>182</sup>

Baumrind sets clear limits and restraints on the use of corporal punishment. Although she claims that she personally opposes the hitting of children as an

178. See, e.g., Diana Baumrind, Response, *A Blanket Injunction Against Disciplinary Use of Spanking Is Not Warranted by the Data*, 98 PEDIATRICS 828, 829 (1996) (arguing that corporal punishment is more effective than the alternatives); Diana Baumrind, *Parenting: The Discipline Controversy Revisited*, 45 FAM. REL. 405, 413 (1996); Diana Baumrind, Robert E. Larzelere & Philip A. Cowan, *Ordinary Physical Punishment: Is It Harmful? Comment on Gershoff (2002)*, 128 PSYCHOL. BULL. 580, 585 (2002); Marjorie Lindner Gunnoe & Carrie Lea Mariner, *Toward a Developmental-Contextual Model of the Effects of Parental Spanking on Children's Aggression*, 151 ARCHIVE OF PEDIATRICS & ADOLESCENT MED. 768, 773-74 (1997); Pollard, *supra* note 23, at 627-34 (asserting arguments in support of corporal punishment); Straus & Donnelly, *supra* note 144, at 4 (bringing the argument of the efficacy of corporal punishment).

179. Robert E. Larzelere, Presentation, *A Review of the Outcomes of Parental Use of Nonabusive or Customary Physical Punishment*, 98 PEDIATRICS 824, 824 (1996) (reaching this outcome after examining thirty relevant studies published between 1974 and 1995).

180. See Baumrind, Larzelere & Cowen, *supra* note 178, at 585; Baumrind, *A Blanket Injunction*, *supra* note 178, at 829; Baumrind, *Parenting*, *supra* note 178, at 413.

181. Baumrind, *Parenting*, *supra* note 178, at 406-10.

182. See *id.* at 583-84.

educational method,<sup>183</sup> her research shows that the occasional use of a smack on the backside of a young child within a loving family, does not cause any long-term emotional or mental damage, and sometimes it is even a necessary tool in educating children, particularly those between the ages of eighteen months to six years. Baumrind states the following limits and restrictions that make mild corporal punishment legitimate:<sup>184</sup> The punishment should be an occasional, infrequent smack, defined as a light and controlled blow and not a serious beating to the child's backside (avoiding more-sensitive organs), and administered only for the imposition of discipline. According to Baumrind, smacking is effective for forming the conduct of children aged eighteen months to six years if it does not take place out of anger or rejection but in a loving family atmosphere with warm and supportive relationships.

All of this is true for the educational system as well, since the teacher is in loco parentis.<sup>185</sup> In that setting, scholars also argue that corporal punishment teaches children to learn, to obey, and to respect the authority of others and that it builds the character of the students.<sup>186</sup> It is consistent with "the right of all students to receive an education uninterrupted by a single, individual, disruptive student,"<sup>187</sup> and it is preferable to harmful alternatives like suspension.<sup>188</sup> An educational means that harms a child excessively or is proven to be ineffective should, in any event, be forbidden. So long as the benefit is the inculcation of boundaries and frameworks, expressed in measured and moderate methods of education and punishment, the benefits of such physical punishment will outweigh any immediate harm to the child's psyche.

This approach is certainly paternalistic, for it calculates what is in the interest of the child from the point of view of his education and normal development in both the short and long term.

### C. Third Perception: Only Teachers Should Be Subject to a Criminal Prohibition Against Corporal Punishment

Due to differences between corporal punishment meted out by parents as opposed to teachers, it should be a criminal offense only for teachers. There are several reasons for this argument; some relate solely to the special structure of the family unit and the unique role played by parents in raising and educating

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183. See Diana Baumrind, Invited Address at the 109th Annual Convention of the Convention of the American Psychological Association: Does Causally Relevant Research Support a Blanket Injunction Against Spanking by Parents? 12 (Aug. 24, 2001), (transcript available at <http://prdupl02.ynet.co.il/ForumFiles/12221272.pdf>).

184. Baumrind, *Parenting*, *supra* note 178, at 413. See also Diana Baumrind, *supra* note 183.

185. See Imbrogno, *supra* note 138, at 130–31.

186. Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 990 (1996).

187. Lansing K. Reinholz, *A Practical Defense of Corporal Punishment in the Schools*, in CORPORAL PUNISHMENT IN AMERICAN EDUCATION: READINGS IN HISTORY, PRACTICE AND ALTERNATIVES 346 (Irwin A. Hyman & James H. Wise eds., 1979).

188. *Id.* at 343.

their children, which totally differs from that of teachers, and some relate to the problems arising from the possibility that teachers will use corporal punishment.

### 1. Legal Intervention in the Family's Privacy: Affairs and Autonomy Versus the Need to Accord Parents Wide Authority when Disciplining Their Children

The family is the most fundamental, basic, and important unit of society.<sup>189</sup> It is an intimate unit in which the relationships between its members are important and fragile. Preserving its autonomy, harmony, and privacy whenever possible, especially in an era of eroding traditional family values, is critical.

In addition, the family unit has a special status in international law. A number of conventions recognize the unique role of the family unit and the protection that society and the state should grant it, together with the need to maintain caution when intervening in its affairs. These conventions grant every person the basic right to establish a family, to belong to a family, and to marry,<sup>190</sup> along with the right of the child to belong to a family unit and to be protected by it.<sup>191</sup> Several articles in the UNCRC also emphasize the importance of a child's rearing and upbringing in a family framework and the efforts that every state party should make in order to guarantee it.<sup>192</sup> Some of these conventions strongly emphasize the dignity that society must accord the family unit<sup>193</sup> and the need for the family to be free of arbitrary interference in its affairs<sup>194</sup> unless that interference is compatible with the law in a democratic society and the need to defend societal and state interests.<sup>195</sup> From this approach, one may understand

189. European Social Charter, art. 16, Oct. 18, 1961, Europ. T.S. No. 35.

190. See Universal Declaration of Human Rights art. 16, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess. U.N. Doc A/810 (Dec. 10, 1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 12, Nov. 4, 1950, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights [ICCPR], art. 23, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); American Convention on Human Rights, art. 17, Nov. 21, 1969, O.A.S. T.S. No. 36; African Charter on Human and Peoples' Rights, art. 18, June 27, 1981, 1520 U.N.T.S. 217; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [ICESCR], art. 15, Nov. 17, 1988, O.A.S. T.S. No. 69.

191. See, e.g., ICCPR, art. 24, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); American Convention on Human Rights, art. 19, Nov. 21, 1969, O.A.S. T.S. No. 36; ICESCR, art. 16, Nov. 17, 1988, O.A.S. T.S. No. 69.

192. United Nations Convention on the Rights of the Child, art. 10, 20, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989). See also the introduction to the UNCRC.

193. Convention for Protection of Human Rights and Fundamental Freedoms, art. 8(1), Nov. 4, 1950, 213 U.N.T.S. 221.

194. Universal Declaration of Human Rights, art. 12, G.A. Res. 217A, at 71, UN GAOR, 3d Sess. U.N. Doc A/810 (Dec. 10, 1948).

195. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(2), 12, Nov. 4, 1950, 213 U.N.T.S. 221; ICESCR, art. 15(2), Nov. 17, 1988, O.A.S. T.S. No. 69. Article 16 of the first part of the 1961 European Social Charter emphasizes the family's right to "appropriate social, legal and economic protection to ensure its full development." European Social Charter, art. 16, Oct. 18, 1961, Europ. T.S. No. 35; Article 18(2) of the African Charter on Human and Peoples' Rights even states that "[t]he state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community." African Charter on Human and Peoples' Rights, art.

the need to give parents wide authority and liberty when disciplining their children. Parents face various difficult situations and should therefore be given authority that exceeds that given to teachers. True, both parents and teachers are responsible for the child's education; but only the parent is really responsible for the child's upbringing and turning him into person who will comply with social norms.

This perception focuses on the family unit rather than on the individual and allows the family unit greater room to act naturally and freely. The objective of this approach is to grant legitimacy to moderate parental behavior that is in the interest of the child even if the child does not always understand that this is the case. Consequently, this approach holds that the parents' actions are not to be restricted, nor their authority prejudiced or their discretion limited, as long as the benefit achieved by their behavior surpasses the damage inflicted and the motive for the behavior was educational. The child is indeed an independent entity, but he is not always capable of differentiating between good and bad, and it is the parent's role to direct and guide him since he cannot be granted absolute autonomy when making decisions. Corporal punishment is, then, only a means and not a goal. This approach favors increased parental authority, expressed in a more forgiving and understanding attitude towards the use of an educational method such as corporal punishment, which on occasion is warranted, as long as it is practiced in a measured and moderate manner. This is not tantamount to encouraging blows for the sake of education.

All this is true only for parents, only in the family sphere. Teachers should have other means to assert authority. Notably, the UNCRC encourages the autonomy only of parents when educating their children. Even if Article 19(1) of the UNCRC is construed as forbidding all violence against children, it must be read together with other articles of the UNCRC that impose a responsibility and obligation on parents to educate and direct their children, such as Article 5 (which refers States Parties to respect the responsibilities, rights, and duties of parents and to provide them, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights in the Convention), and Article 18 (which deals with the basic notion of parents being responsible for their children and refers States Parties to render appropriate assistance to parents in the performance of their child-rearing responsibilities), and that safeguard the best interest of the children, such as Article 3 (that sets the best interest of the child as a primary principle) and Article 18(1) (that emphasizes the role of States Parties to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child). Read thus, Article 19 does not bar educational corporal punishment but bars only violence

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18(2), June 27, 1981, 1520 U.N.T.S. 217; This charter emphasizes the obligation of every family member (not only that of the state and society) toward the family unit, which includes the obligation "to preserve the harmonious development of the family." African Charter on Human and Peoples' Rights, art. 27(1), 29(1), June 27, 1981, 1520 U.N.T.S. 217.



committed for extraneous purposes.<sup>196</sup> There are no similar provisions in relation to teachers.

Court rulings likewise strongly emphasize the importance of the need for parental autonomy and authority.<sup>197</sup> The U.S. Supreme Court has upheld parental rights as constitutionally protected and has stated that parents have a right to control the education of their children, since educational choices are fundamental to the family.<sup>198</sup> Parents play a central role in the affirmative process of teaching, guiding, and inspiring, and their role is “essential to the growth of young people into mature, socially responsible citizens.”<sup>199</sup> The Court has held that the right to bring up children is fundamental, so parents, who nurture their children and direct their destiny, have both the right and the duty to recognize and prepare them for additional obligations.<sup>200</sup> In addition to

196. For further discussion, see Shmueli, *supra* note 115, at 203–04.

197. The majority in *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) wrote,

[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court . . . . “[T]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition[.]”

(quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

Earlier Supreme Court decisions similarly emphasize parents’ rights. *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (“[C]onstitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic to the structure of society.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can either supply or hinder.”). For a lower-court decision doing likewise, see *Doe v. Irwin*, 41 F. Supp. 1247, 1251 (E.D.N.Y. 1977) (“[T]he right of parents to care, custody and nurture of their children is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”). Justice Meir Shamgar, President of the Israeli Supreme Court, echoed these American decisions:

The right of parents to raise and educate their children as they see fit is a fundamental constitutional right. This is a natural right which is derived from the relations between parents and their children . . . . It is the right of parents to have custody over their children and rear them . . . . This right is expressed in the privacy of the family and in its autonomy: parents are autonomous in making decisions for their children—about their education, way of life, etc. . . . Intervention by society and the state in these decisions is an exception requiring justification . . . . Greater intervention by the state, through the courts, in the decisions of parents vis-à-vis their children . . . grants the child a stronger standing within the family. The end of this process is that it will also hurt the children themselves, for it has to be remembered that the logic of the autonomy approach holds that the parents are the best decision makers for their children. The concern is that undermining [the parents’] status in one context will undermine the entire family relationship.

(quote is the author’s translation) CA 2266/93 Anon. v. Anon [1993] 49(1) IsrSC 221, 237–38, 260–61 (unverified).

198. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

199. *Bellotti v. Baird*, 443 U.S. 622, 637–39 (1979).

200. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

recognizing the rights and duties of parents, the Court has recognized the “private realm of family life which the state cannot enter.”<sup>201</sup>

Naturally, however, these rights and this autonomy have boundaries: the parental right to raise a child is not absolute.<sup>202</sup> the state may, and sometimes must, limit those rights.<sup>203</sup> The state can do so under the concept of *parens patriae*—a state’s duty to take care of children and to protect them when the parent does not act in their best interest and when children are incapable of protecting themselves.<sup>204</sup> The state must bear in mind the unique status of the family unit and the need to avoid prejudice to its autonomy, harmony, and privacy insofar as it is possible; the state must also consider society and the law as a representative of society, and be careful when choosing the situations in which there is real cause to intervene in the family unit. The state should do whatever is possible to strengthen the family framework, refraining from interfering, when possible, in the privacy of the family—that is to say, in the parents’ right to raise their children as they choose.<sup>205</sup>

Under this approach, some matters are subject to legal intervention, for example, abuse, maltreatment, and neglect. But balance must be sought, and not all conduct should be legally prohibited, even if it is controversial, like mild and reasonable corporal punishment.<sup>206</sup> In other words, even if moderate corporal punishment entails some harm to the child, the sanctity of the family unit and the problematic nature of intervention in its affairs may ultimately prove to be more harmful to the family unit, to the parents, and even to the children. It is not only about narrowing parental autonomy *ex ante*. *Ex post* legal sanctions against parents, like imprisonment, may harm their children and the family unit as well, so here, too, balance is important.

Indeed, there are scholars who believe that it is possible to preserve the parental privilege of corporal punishment of a child, without harming the child’s right to bodily integrity.<sup>207</sup>

Justice Binnie’s opinion from the Canadian Supreme Court’s split decision in *Canadian Foundation for Children* sums up this point.<sup>208</sup> Justice Binnie

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201. *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

202. Pollard, *supra* note 125, at 454 and the references therein.

203. *Prince*, 321 U.S. at 166; *In re J.P.*, 648 P.2d 1364, 1377 (Utah 1980).

204. Patrick Henigan, *Is Parental Authority Absolute? Public High Schools Which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Right of Parents*, 62 *BROOK. L. REV.* 1261, 1278–79 (1996), and the references there; Pollard, *supra* note 125, at 456.

205. Straus & Donnelly, *supra* note 144, at 182–86 (drawing lessons from the Swedish law but explaining how the differences between American and European culture should limit drawing direct parallels).

206. *Cf. Ingraham v. Wright*, 430 U.S. 651, 676 (1977) (permitting corporal punishment in schools under the U.S. Constitution). Parents’ rights, including the right to corporally punish their children, are also protected by the Ninth Amendment to the U.S. Constitution. *See generally* U.S. CONST. amend. IX.

207. Johnson, *supra* note 123.

concurred with the majority respecting parents and with the minority opinion respecting teachers: section 43 of the Canadian Criminal Code that permits moderate and reasonable parental and teachers' corporal punishment is balanced respecting parents, but its application cannot be justified respecting teachers or anyone else acting in loco parentis. Justice Binnie maintained that it was possible to understand the state's reluctance to intervene in the family unit but that this reluctance was less appropriate in the educational-system context. The teacher plays a role different from that of the parent in the life of the child. In the justice's opinion, correct punishment in the educational system occurs primarily through restraining a student or sending him out of the classroom.

## 2. Love, Intimacy, and Drawing a Line Between Mild Corporal Punishment and Abuse

Parents love their children and are more attached to them than teachers are to their students. It is assumed that parents know what is best for their child, so they are aware of the line between mild corporal punishment and abuse. True, it is sometimes hard to draw this line, and corporal punishment may deteriorate into abuse if not carried out correctly.<sup>209</sup> But one can rely more on parents to recognize this line than on teachers—even though sometimes parents do abuse their children.<sup>210</sup> In any case, parent-child abuse is the exception and should be treated separately and should not influence the parent's use of light and moderate corporal punishment.

The relationship of parental love and closeness to the child does not exist between teachers and their students. The teacher should not be permitted to corporally punish his students, as there is a greater likelihood that his actions will cause greater harm to the child than would the actions of a parent. When the punishment is physical, the authority must know the personality, nature, qualities and character of the child and so be able to assess his mental and physical strength and his willingness to change his ways as a result of the spanking. Today's teachers may not have the individual interaction and intimacy necessary to make the appropriate decisions about physical punishment. Contemporary teacher-student relationships are different from those of the past. Contemporary teachers spend just a few hours a week in a classroom often comprising thirty or forty students. Contact with any particular student may last for only a year or two. Under such conditions it is almost impossible for the teacher to really get to know each student. In some schools, mainly private institutions and boarding schools, the situation may be slightly different, but one may conclude that even busy parents know their child better than the teachers of today.

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208. Canadian Found. for Children, Youth and the Law v. Attorney General, [2002] 154 O.A.C. 144, O.A.C. Lexis 36 (Can.).

209. See, e.g., Pollard, *supra* note 23, at 621.

210. Cf. Pollard, *supra* note 125, at 486 (asserting that parents sometimes do not act in their child's best interest).

### 3. Teachers No Longer in Loco Parentis Regarding Corporal Punishment

It is difficult to assert that contemporary teachers are really in loco parentis insofar as knowing the child and exercising corporal punishment on him is concerned.<sup>211</sup> Additionally, modern parents are generally intensively involved in the educational system and at least some of them do not agree that teachers should spank their children. Therefore, the presumption that a parent necessarily delegates his right to the teacher to corporally punish the child no longer exists. Each situation must be examined on its merits. In some private schools parents sign a contract in which they explicitly agree to delegate this authority; in other public or private schools this is not the case.

### 4. Spanking a Student in Public or in Front of Classmates

Spanking a child in a supermarket or in a mall in front of strangers may definitely be humiliating, but this punishment in a class or in the schoolyard in front of the student's classmates and friends is much more so. It seriously violates the child's dignity. This is an additional reason for not allowing this type of punishment to be given by teachers and for the need that they use less humiliating alternatives. Some court rulings hold that spanking in public is so humiliating that it amounts to child abuse per se;<sup>212</sup> some of courts have convicted teachers who did not even physically touch the students.<sup>213</sup>

### 5. Expertise Available to Teachers in Handling Children Without Exercising Corporal Punishment

Teachers, more than parents, should learn to handle different situations in which a child needs correction. This is their job; they take it on freely, and they have (or should have) organized instruction and training in order to face difficult situations in school. They learn to use alternatives to corporal punishment. Teachers can also be assisted by school psychologists and

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211. Cf. Canadian Found. for Children, Youth and the Law v. Attorney General, [2002] 154 O.A.C. 144, O.A.C. LEXIS 36, 3 (Can.) (Binnie, J., Dissenting). Under the Jewish law approach, in order to fulfill some of the cumulative reservations, the educator must really know the child—his age, character, and the degree of his readiness to accept the reproof, et cetera. If the educator finds that, in principle, the circumstances permit striking the child, he must consider how to carry out the punishment in order for it to be compatible with the serious of qualifications listed above. Parents would find it difficult to fulfill all these cumulative conditions, and teachers even more so. It is arguable that preschool and kindergarten teachers know the children in their charge, certainly more than an elementary or high-school school teacher would; but spanking in these ages is both dangerous and inefficient. Some important Jewish law sages and arbiters have declared that nowadays the permission given to teachers to inflict corporal punishment should be narrower than that given to parents, although it is questionable whether teachers should be given any such permission at all, since that permission is based on the assumption that the educator spends most of the day with the student and is familiar with him—whereas the teacher is now no longer really in loco parentis regarding spanking. See Rabbi Haim David Halevy, *supra* note 39; see *Responsa Igrot Moshe*, YD 4:30, 1:140 (unverified); *supra* II.A.

212. See CrimA 6274/98 Anon v. Israel [2000] IsrSC 52(2) 293; CrimA. 1110/00 Israel v. Anon [2000] IsrSC 54(5) 229; CrimA 5598/99 Anon v. Israel [2000] IsrSC 54(5) 1; CrimA 405/03 Anon v. Israel, [2004] 67 Dinim Elion 270 (unverified).

213. See, e.g., Cr.F. (Mag. TA) 1360/97 Israel v. Aziz [1998] (unpublished, dated July 7, 1998); Cr.F. (Mag. TA) 5616/00 Israel v. Peleg [2001] Tak-Shal 01(2) 150 (unverified).

counselors,<sup>214</sup> whereas parents must pay for these services and sometimes are not aware that they exist at all or have no belief in them.

Teachers, being a part of an organized system (public or even private), with its rules and instructions, do not have license to hit any more than professors in a university can hit rude students who disturb the class, even if it can be shown that such physical punishment would be effective.

Nor do parents have unlimited license to punish their children corporally by virtue of their parenthood. There are no organized systems that instruct parents. Only some parents obtain advice from the media or from parental counselors. This does not mean that society and the law must show permissiveness to any parental conduct, but if the conduct is not (so) harmful and has an educational purpose, some distinction should be drawn in this respect between parents and teachers. Teachers are given more tools to handle difficult situations, so society expects more from them.

#### 6. Teachers as Role Models and Taking Students' Violence into Account

That society expects more from teachers leads to another important explanation. Teachers have a tremendous power over the lives of children and are seen as role models in society.<sup>215</sup> Teachers should therefore set themselves up as an example to their students and be of good moral character.<sup>216</sup> Children learn behavior and practices by watching adults, and teachers have psychologically powerful relationships with children. Thus, teachers have the opportunity to either uphold the positive principles set in the home or to destroy them.<sup>217</sup>

All this is hard to achieve when teachers themselves lose their tempers and strike out. Since violence is a learned behavior, children can imitate the aggressive behavior of the teacher.<sup>218</sup> Scholars argue that corporal punishment by teachers is counterproductive: instead of teaching the students the value of settling problems peacefully, it teaches them to solve problems aggressively by exercising force against weaker parties.<sup>219</sup> Corporal punishment thus undermines the image of the teacher as an example of reasoned behavior and creative problem-solving.<sup>220</sup>

This is especially true and significant in these times of aggravated violence by students against teachers and especially against classmates—that is, bullying.<sup>221</sup> Teachers have to play their role in dowsing the fires. It is almost

214. Bitensky, *supra* note 138, at 212.

215. Bartman, *supra* note 135, at 289–90.

216. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534 (1925).

217. *The Ninth Amendment*, *supra* note 136, at 455.

218. *See* Imbrogno, *supra* note 138, at 131.

219. *See* Bartman, *supra* note 135, at 289–90.

220. RONALD T. HYMAN & CHARLES H. RATHBONE, CORPORAL PUNISHMENT IN SCHOOLS: READING THE LAW, NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION 20 (1993).

221. *See, e.g., The Ninth Amendment*, *supra* note 136, at 434.

impossible to fight this phenomenon using violence. The teacher who hits his students cannot be providing a good personal example; the result is that the students will not respect him and will reject adult authority.<sup>222</sup> This argument may apply to parents as well, but, as noted, society expects more from teachers because of their organized training and their role as educators and providers of personal example.

In an era in which students display aggravated violence even towards teachers, there is a real danger that the student will strike back at a teacher who attempts to spank him. Accordingly, it is preferable to apply the Jewish-law rationale that bans corporal punishment of a child who is older than twelve to thirteen to all students of any age, in view of the fear that students might hit back or curse. In other words, if that fear exists for children of lower ages nowadays—and I think it does—it is good reason for prohibiting corporal punishment in schools altogether.<sup>223</sup>

#### IV

#### CONCLUSION AND PROPOSALS

Whether corporal punishment by parents and teachers should be permitted or prohibited is controversial. Differences between parents and teachers are distinguishing in this regard, some arising from the unique role of the parent, the special place of the family unit in our lives, and the delicate problem of the extent to which legal intervention should be carried out in its privacy, autonomy, and affairs. Other differences arise from analyzing the character of the teacher, his training, guidance, and role in society.

Corporal punishment is a bad form of education, whether exercised by parents or by teachers. Good alternatives are less harmful to the child, both mentally and physically. Turning parents into offenders by criminalizing light corporal punishment is improper, both socially and legally. In view of the distinctions between parents and teachers as behavioral authorities, it is more logical to first impose a prohibition on corporal punishment within the educational system before doing so, if at all, in the family unit.

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222. Rabbi Abraham, Yizhak HaCohen Kook, *Hador (The Generation)*, in EDER HAYAKAR VEIKVEI HATZON 107–16 (1985) (Heb.) (linking corporal punishment with the dangers posed by the lack of personal examples for children to imitate) (unverified).

223. See, e.g., *Kitzur Shulhan Arukh* 143:18 (“It is prohibited to beat the grown son, and maturity does not depend on years but everything is according to the nature of the son. If there is a sense that he will defy [the educator] in speech or action, even if he is not yet bar-mitzva [at the age of 13], it is prohibited to beat him, but he must be rebuked verbally. And whoever beats his grown son will be banned because he transgresses against ‘You shall not put an obstacle before the blind.’” See *Leviticus* 19:14). Of course, teachers must have the right to defend themselves or to defend students when they are subject to violence, but this is not educational punishment. This is self defense or necessity. These are defenses of excuse, whereas educational corporal punishment may be considered a defense of justification.

The Scandinavian–Austrian–German civil model regarding parental corporal punishment should be adopted in principle.<sup>224</sup> This would grant the children a civil right to not be subjected to corporal or humiliating punishment yet would stop short of prohibiting corporal punishment as a criminal offense that would turn parents into offenders for breaking the law. Corporal punishment is not necessary; with appropriate guidance, everyone responsible for a child can avoid it. Integrating educational norms into the statutory model and launching a public-awareness campaign to assimilate the new, civil human-rights norm and thereby alter public attitudes would provide a good and balanced solution, for public support is a prerequisite to a successful outcome. In countries in which a ban was created without such public-relations preparation, as in Israel (where it was banned in a court ruling), the ensuing controversies are proof that the process was not undertaken properly. In countries where parents can be criminally indicted for corporal punishment—whether the ban is through statutes or court rulings—it is important for the prosecution to employ a policy of restraint.

Here one must move delicately, especially in countries like the United States, in which corporal punishment is well-rooted in history, culture, and religion. A delicate approach does not mean relinquishing corporal punishment, nor does it necessarily entail criminalizing mild corporal punishment. Rather, it means education. One must understand that comparing corporal punishment with child abuse and suggesting that even mild corporal punishment may be a precursor to abuse, together with the analogy sometimes made between corporal punishment, spousal abuse, and child abuse<sup>225</sup>—even if true—may not be compelling to some segments of society. Corporal punishment is readily distinguishable from abuse by its underlying purpose: it is carried out, at least ostensibly, for the benefit of the child.<sup>226</sup> In practice, it is hard to convince a society that draws a clear distinction between corporal punishment and domestic abuse.<sup>227</sup> Many people also believe that corporal punishment is a religious tool.<sup>228</sup>

Nonetheless, given a complete overview of the objectives and effects of corporal punishment, such punishment in the educational system must be totally and criminally banned, except for understandable cases of self-defense or necessity (as when a teacher must defend himself or others). Therefore, the third perception described above seems the most convincing—modified by

224. See Shmueli, *supra* note 5, at 135–37 (discussing the different spectrums of corporal punishment regulation).

225. See, e.g., Susan H. Bitensky, *The Child's Right to Humane Discipline Under the U.N. Convention on the Rights of the Child: The Mandate Against All Corporal Punishment for Children*, 4 LOY. POVERTY L.J. 47 (1998); Sarah Brady Brundage, Comment, *Spare the Rod, Save the Child: Reviewing Corporal Punishment Through the Lens of Domestic Violence*, 8 WHITTIER J. CHILD & FAM. ADVOC. 83, 101–02 (2008).

226. Imbrogno, *supra* note 138, at 144.

227. See *id.*

228. *Id.* at 146.

adopting the civil-human-rights model respecting parents and not totally disallowing corporal punishment. Teachers and parents are not on equal footing. Both are responsible for the child's education, but society must give the latter the appropriate means and the widest authority possible to raise and educate their own children. The law must direct parents to find alternative solutions to such humiliating and harmful measures as corporal punishment. At the same time, the law must be very careful not to tag corporal punishment as criminal. The civil-rights solution accompanied by a policy of restraint on the part of the prosecution seems to be the appropriate model for parents, in combination with the vital public-awareness campaign that will allow people to assimilate this norm. One cannot ignore public sentiment in countries like the United States, where there is greater approval for a penal prohibition on corporal punishment by teachers than on corporal punishment by parents. Granting civil rights to the child rather than criminalizing the parent seems more appropriate when considering corporal punishment by parents. But when it comes to teachers, the law must be unequivocal. Today's teachers should not be permitted to spank students for many reasons, from teachers' relative ignorance of their students' characters to the preferences of involved, contemporary parents to not delegate all corrective authority to the teacher. Most important, teachers, more than others, should behave as exemplars of nonviolent authority, especially in an era in which students' violence towards their classmates and teachers is on the rise.

It is only logical and natural to ban corporal punishment first in the educational system, as this does not entail the difficulties encountered when intervening in families. Only after this step should consideration be given to some type of a ban in the family sphere, following the path of civil human rights.

Some scholars have suggested looking at the situation from the perspective of adults and parental rights, while others have suggested looking at it from the perspective of children's rights. Best is an integrated approach that focuses mainly on the rights of the child and on his human rights, but does not ignore parental rights, again supporting the civil-human-rights perspective regarding parental corporal punishment. This approach is in line with the UNCRC that sees the child as a human being with rights and not merely as a person who needs extensive protection by society and the law. But when it comes to teachers, state intervention should be unequivocal and decisive and should take effect within the criminal sphere.

To return to the story of my late grandmother: My grandmother was disciplined. She had no devil in her. She was just a little girl who refused to be spanked with a cane for a "sin" she had not committed. I want to believe that in most western liberal countries this kind of case would end with a civil action and criminal charges being pressed against the teacher. To produce positive behavior in class, teachers must find alternatives to corporal punishment.