

HEINONLINE

Citation:

Timothy John Nolen, Smacking Lesson: How the Council of Europe's Ban on Corporal Punishment Could Serve as a Model for the United States, 16 *Cardozo J.L. & Gender* 519 (2010)

Content downloaded/printed from [HeinOnline](#)

Thu Feb 7 22:09:26 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

SMACKING LESSON: HOW THE COUNCIL OF EUROPE'S BAN ON CORPORAL PUNISHMENT COULD SERVE AS A MODEL FOR THE UNITED STATES

TIMOTHY JOHN NOLEN *

I. INTRODUCTION

Every year, hundreds of thousands of American children are struck in school by their supervisors.¹ Although many European countries have banned the practice in schools and in the home, and though a number of states have banned the practice in schools, corporal punishment in many parts of the United States remains a common form of school discipline.² In several areas, school corporal punishment is even “thriving”: for example, in Mississippi, 7.5% of students were struck by their teachers during the 2006-2007 school year, while in Arkansas, just under 5% were struck by their teachers.³

This Note will look at the use of corporal punishment in the United States and Europe, and propose ways that the United States can follow Europe's lead in banning corporal punishment in schools on a national level. The Council of Europe is a good model for the United States precisely because it demonstrates how a central governing body can ban corporal punishment while still maintaining core federalist principles, allowing member states to implement a variety of different and unique bans. Although this Note mainly focuses on corporal punishment in schools, this should not be construed as approval of it in other forums, such as the home. On the contrary, banning corporal punishment in schools should hopefully

* J.D. Candidate, Benjamin N. Cardozo School of Law, June 2010; B.A. Williams College, 2007. The author wishes to thank Cathy Perifimos and the journal staff for their support and feedback. The author also wishes to thank his parents, brothers, and his entire family for their encouragement.

¹ THE AMERICAN CIVIL LIBERTIES UNION, A VIOLENT EDUCATION: CORPORAL PUNISHMENT OF CHILDREN IN US PUBLIC SCHOOLS (2008), http://www.aclu.org/pdfs/humanrights/aviolenteducation_report.pdf [hereinafter A VIOLENT EDUCATION].

² *Id.* See also 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 (2007) [hereinafter *The Case Against Corporal Punishment*].

³ A VIOLENT EDUCATION, *supra* note 1, at 43. Interestingly, this 5% figure is down from roughly 12% in 1992. Sam Walker, *Southern Schools Rethink Sparing the Rod*, CHRISTIAN SCI. MONITOR, June 21, 1995, available at www.csmonitor.com/1995/0621/21013.html.

be the first step toward a broader revision of laws addressing corporal punishment of children in other contexts.

Part I of this Note will discuss statistics concerning corporal punishment in the United States, focusing on the negative effects such punishment has on children and suggesting why it should be outlawed. Part II will address the legal status of corporal punishment in the United States and the potential challenges a complete federal ban might face, suggesting means whereby the Federal government could implement a national ban. Part III will discuss the legal status of corporal punishment in some member states of the Council of Europe. Part IV will address the effects that European bans have had on discouraging corporal punishment. Finally, Part V will examine the Council of Europe's recent campaign to ban corporal punishment throughout Europe as a model for the United States Federal government.

II. STATISTICS, RESEARCH, AND VIEWS ON CORPORAL PUNISHMENT IN THE UNITED STATES

In legal terminology, corporal punishment is fairly straightforward. Many statutes define it, at least in schools, as a means of discipline involving physical force to restrain a child or strike a child absent an emergency requiring the protection of others.⁴ Often, such corporal punishment takes the form of spanking a child either with a hand or with a paddle.⁵ Other organizations define it more precisely; the United Nations ("U.N.") describes it as any punishment using force intended to cause pain or humiliation of a child, using spanking, kicking, and slapping as examples.⁶ This definition is accepted by many non-governmental organizations: the National Association of School Psychologists, the American

⁴ See, e.g., MASS. GEN. LAWS ch. 71, § 37G (2010); N.Y. COMP. CODES R. & REGS. tit. 8, § 19.5 (2010); W.VA. CODE § 18A-5-1(e) (2010); N.H. REV. STAT. ANN. § 627:6 (2010); CAL. EDUC. CODE § 49000-01 (2010).

⁵ See A VIOLENT EDUCATION, *supra* note 1, at 14.

⁶ See U.N. Comm. on the Rights of the Child ["CRC"], Convention on the Rights of the Child, *The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, ¶ 11, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007):

The [United Nations] Committee defines 'corporal' or 'physical' punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most definitions involve hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child. *Id.*

Civil Liberties Union, and the National Association of Pediatric Nurse Practitioners all use similar definitions.⁷

Scholars, parents, and educators are not in agreement about the lasting effect that corporal punishment has on children, however.⁸ For example, many pediatricians advocate spanking as an effective way to discipline children.⁹ Certainly, spanking is an easy, effective way to discipline a child in the short-term, and it is a form of discipline that does not require a great deal of skill, education, or economic resources.¹⁰ However, prominent medical organizations officially condemn the use of corporal punishment.¹¹ Furthermore, in those jurisdictions that have banned corporal punishment in schools, many teachers have expressed frustration that other methods of discipline are ineffective.¹² Yet, the fact that many of those states have chosen to keep their bans is evidence that schools can operate effectively without hitting children.¹³

Despite numerous bans elsewhere, certain parts of the country—particularly the South—use corporal punishment as a regular means of school discipline.¹⁴ In such places, it is often commonly practiced and even celebrated as an effective way to maintain classroom order.¹⁵ This approach to school discipline is often encouraged by conservative scholars and Christian, particularly Protestant, leaders.¹⁶ Those favoring corporal punishment argue that studies outlining any negative effects are inconclusive, and that the means by which individuals implement corporal punishment—in regards to frequency, degree, or severity—have more of an effect than whether the punishment is used at all.¹⁷ In areas where

⁷ See Nat'l Ass'n of Sch. Psychologists, Position Statement on Corporal Punishment in Schools, http://www.nasponline.org/about_nasp/pospaper_corppunish [hereinafter NASP Position Statement]; Nat'l Ass'n of Pediatric Nurse Practitioners, NAPNAP Position Statement on Corporal Punishment <http://download.journals.elsevierhealth.com/pdfs/journals/0891-5245/PIIS089152450600410X.pdf> [hereinafter NAPNAP Position Statement]; A VIOLENT EDUCATION, *supra* note 1.

⁸ For a good discussion on the conflicting scholarship in the United States, see generally *The Case Against Corporal Punishment*, *supra* note 2.

⁹ Abraham A. Andero & Allen Stewart, *Issue of Corporal Punishment: Re-examined*, 267 J. INSTRUCTIONAL PSYCHOL. 90 (2002) (citing K. McCormick, *Attitudes of Primary Care Physicians Toward Corporal Punishment*, 267 J. AM. MED. ASS'N, 3161 (1992)).

¹⁰ *Id.*

¹¹ See NASP Position Statement, *supra* note 7.

¹² See Robin Brunet, *Maybe the Strap Wasn't So Bad After All: School "Time-Out" Rooms Face Re-evaluation in the Wake of a TV-Driven Protest*, 8 BRIT. COLUMBIA REP. 39 (1997) (noting teachers' statements that "[t]here's nothing like getting a strap across your hand to change your attitude in a hurry," "[w]e're doing a disservice to children by coddling them," and "[s]o we have positive enforcement being used to discipline kids, and they're running amok.").

¹³ The Ctr. for Effective Discipline, U.S.: Corporal Punishment and Paddling Statistics by State and Race, <http://www.stophitting.com/index.php?page=statesbanning> [hereinafter Corporal Punishment and Paddling Statistics].

¹⁴ A VIOLENT EDUCATION, *supra* note 1.

¹⁵ Walker, *supra* note 3.

¹⁶ See generally JAMES DOBSON, *THE NEW DARE TO DISCIPLINE* (Tyndale House 1996); Clifton P. Flynn, *Regional Differences in Attitudes Toward Corporal Punishment*, 56 J. MARRIAGE & FAM. 314, 314-24 (1994).

¹⁷ Robert E. Larzelere, *A Review of The Outcomes of Parental Use of Nonabusive or Customary*

corporal punishment is practiced in schools, such punishment is often met with broad acceptance as a method of discipline by society at large.¹⁸ This support combined with difficulty in maintaining classroom order thus leads many to advocate for its use in the classroom.¹⁹

On the other side of the aisle are those who reject corporal punishment as humiliating and borderline abusive, pointing to numerous studies, which suggest that corporal punishment has a detrimental effect on children.²⁰ Such groups include—but are not limited to—the National Association of School Psychologists, the American Civil Liberties Union, and the National Association of Pediatric Nurse Practitioners.²¹

Physical Punishment, 73 PEDIATRICS 824 (1996), available at <http://pediatrics.aappublications.org/cgi/reprint/98/4/824>.

¹⁸ Flynn, *supra* note 16, at 314-24 (noting that well over 50% of parents in the United States approve of corporal punishment); *Parents 'Back Corporal Punishment'*, BBC NEWS, Jan. 7, 2000 (noting that over 50% of parents in the United Kingdom approve of the use of corporal punishment). Corporal punishment is practiced by some groups more than others within American society and the implementation of corporal punishment varies depending on individuals' backgrounds. Randal Day et al., *Predicting Spanking of Younger and Older Children by Mothers and Fathers*, 60 J. MARRIAGE & FAM. 79 (1998). Protestants and other Christian conservatives tend to use corporal punishment with much higher frequency, and Black parents use corporal punishment more than White parents. *Id.* Furthermore, fathers tend to use it more frequently than mothers, and parents with larger families tend to use it more than parents with smaller families. *Id.* Also, poorer parents, parents with less education, and families with children closer in age tended to corporal punishment much more often than families with larger age gaps between children, middle class families, and better educated parents. *Id.* See also Nancy L. Asdigian & Murray A. Straus, *There Was an Old Woman Who Lived in A Shoe: Number of Children and Corporal Punishment*, Address at the Annual Meeting of the American Sociological Association (Apr. 17, 1997) (transcript available in the University of New Hampshire Family Research Laboratory). These variances could help explain the difference in frequency of implementation from state to state and region to region. In the North, the majority of states ban corporal punishment in school whereas in the South the majority of states do not. Corporal Punishment and Paddling Statistics, *supra* note 13. The top ten states where teachers strike the largest percentage of their students are all in the South—Mississippi, Arkansas, Alabama, Oklahoma, Louisiana, Tennessee, Texas, Georgia, Missouri, and Florida. *Id.* In the South and Midwest corporal punishment in the home is quite common, while in the Northeast, particularly New England, corporal punishment is practiced far more sporadically. *Id.* See also Flynn, *supra* note 16. In New England, the area where it is utilized the least, only about half of parents favor spanking their children, while in the South almost 90% of parents favor the practice. *Id.* at 317.

Southerners have the most favorable attitudes, with 86.1% supporting corporal punishment. Over one-third (36.1%) of southerners strongly agreed with spanking, while only 1.5% strongly disagreed. The east south central states showed the highest support, with 92.8% agreeing that spanking was sometimes necessary. The Northeast was the region expressing the least favorable attitudes, with about two-thirds of respondents agreeing with spanking. One out of 8 respondents from the northeast strongly disagreed with corporal punishment. This was twice the rate of those in the West and Midwest, and eight times the rate of those in the South. And in New England, nearly as many respondents disagreed with spanking (46.1%) as agreed with it (53.9%). Compared with southerners, northeasterners were more than twice as likely to oppose spanking—31.2% versus 13.9%. *Id.*

¹⁹ Carol Chmelynski, *Is Paddling on its Way Back?*, 61 EDUC. DIG. 49 (1996).

²⁰ See discussion *infra* pp. 5-10.

²¹ See NAPNAP Position Statement & NASP Position Statement, *supra* note 7.

First, studies suggest that children who are struck at a young age are more aggressive and rebellious years later.²² Although such studies seem to acknowledge that corporal punishment is an effective means to control a child in an immediate situation, it has the effect of exacerbating behavior problems in the long run and making children more likely to use violence against others.²³ Specifically, a study by Dr. Murray Straus and Carrie Yodanis suggests that children who are struck have a tendency later in life to be more violent toward their own children or partners.²⁴ These studies, which traced the prevalence of violence and aggressive behavior between children who had been subject to corporal punishment and children who had not, suggest that such antisocial behavior could be decreased if parents and teachers employed non-violent methods of disciplining children rather than hitting them.²⁵

The effects of corporal punishment go beyond the domestic sphere. As the increase in domestic violence might suggest, there is an overall increase in violent behavior toward other individuals more broadly.²⁶ For example, there is a strong correlation between corporal punishment and higher rates of other crimes later in life. Indeed, regardless of ethnicity or socio-economic background, the use of corporal punishment on children increased the likelihood that they would engage in criminal activity.²⁷ Beyond physical manifestations, corporal punishment seems to have a lasting effect on individuals' mental health and appears to do significant psychological damage.²⁸ Those who are hit have a higher rate of alcohol abuse than the population at large.²⁹ Children who are spanked also have a lower rate of high school and college graduation³⁰ and a higher rate of depression later in life.

²² See Ulrich Boser, *The Unsparring Rod: Schools Are Still Fighting Over the Right to Paddle*, U.S. NEWS & WORLD REP., June 18, 2001, at 43, http://www.usnews.com/culture/articles/010618/archive_037706_2.htm.

²³ *Id.* ("The problem with corporal punishment . . . is that it has lasting effects that include increased aggression and social difficulties.")

²⁴ See generally Murray A. Straus & Carrie L. Yodanis, *Corporal Punishment in Adolescence and Physical Assaults on Spouses in Later Life: What Accounts for the Link?*, 58 J. MARRIAGE & FAM. 825-41 (1996).

²⁵ Murray A. Straus et al., *Spanking by Parents and Subsequent Antisocial Behavior of Children*, 151 ARCH PEDIATRIC & ADOLESCENT MED. 761 (1997).

When parents use corporal punishment to reduce ASB [antisocial behavior], the long-term effect tends to be the opposite. The findings suggest that if parents replace corporal punishment by nonviolent modes of discipline, it could reduce the risk of ASB among children and reduce the level of violence in American society. *Id.*

²⁶ A VIOLENT EDUCATION, *supra* note 1.

²⁷ See generally Sean Lauer & Murray A. Straus, *Corporal Punishment of Children and Crime in Ethnic Group Context*, Address at the Annual Meeting of the American Society of Criminology (May 25, 1994) [hereinafter *Corporal Punishment of Children*].

²⁸ See discussion *infra* pp. 6-10.

²⁹ Harriet L. MacMillan et al., *Slapping and Spanking in Childhood and its Association with Lifetime Prevalence of Psychiatric Disorders in a General Population Sample*, 161 CANADIAN MED. ASS'N J. 805, 808 (1999), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1230651/.../cmaj_161_7_805.pdf.

³⁰ See Murray A. Straus & Anita K. Mathur, *Corporal Punishment of Adolescents and Academic*

Further, the greater the frequency and severity of such punishment, the more likely the recipient will suffer from depression.³¹ There is even a correlation between corporal punishment of teenagers and increased thoughts of suicide throughout their teenage years.³²

Although many argue that the findings of these and similar studies are not reliable or conclusive,³³ such studies do seem to highlight at least a potential for corporal punishment to cause great and lasting harm. Even if one is skeptical about the magnitude of evidence suggesting that corporal punishment has such negative impacts, such research should at the very least give reason for concern because it may not be worth subjecting American children to the negative effects of corporal punishment when other forms of discipline are readily available. Although many of these studies focus on the effects of corporal punishment in the home, they illustrate its effects generally and suggest that such punishment in schools could likewise be harmful.

Coupled with this research, there appears to be uneven usage rates of corporal punishment against different groups in American schools.³⁴ The American Civil Liberties Union (“ACLU”) has noted that school officials tend to hit black students with far greater frequency than white students.³⁵ In 2004 and 2006, 38% and 36%, respectively, of those struck in school were black, which is disproportionately high considering the percentage of black students.³⁶ The percentage of students struck in school who are black is actually higher than the percentages in the late 1970s—in 1976 and 1978, only 29% of those struck in school were black.³⁷ Such research is certainly not new; over ten years ago, studies were published which demonstrated that black school children were struck three times more often than white children.³⁸ Despite such studies, the trend continues. Coupled with racial

Attainment, Address at the Pacific Sociological Annual Meeting (Mar. 30, 1995) (transcript available in the University of New Hampshire Family Research Laboratory). See generally MURRAY A. STRAUS, CORPORAL PUNISHMENT AND ACADEMIC ACHIEVEMENT, SCORES OF YOUNG CHILDREN: A LONGITUDINAL STUDY, IN THE PRIMORDIAL VIOLENCE: CORPORAL PUNISHMENT BY PARENTS, COGNITIVE DEVELOPMENT, AND CRIME (Altamira 2003).

³¹ Murray A. Straus, *Corporal Punishment of Children and Adult Depression and Suicidal Ideation*, in COERCION AND PUNISHMENT IN LONG-TERM PERSPECTIVE, 67-68 (Joan McCord ed., Cambridge 2000).

There is a clear tendency for depressive symptoms to increase with each increment of corporal punishment . . . it is important to note that the significant effect of corporal punishment occurs despite controlling for possible confounding with the five other variables – SES, gender of the child, husband-to-wife violence, excessive drinking, and witnessing violence between parents . . . it is remarkable that corporal punishment per se accounts for any of the variance in depression after subtracting out their effect. *Id.*

³² *Id.* at 72 (“The more corporal punishment experienced as a teenager, the greater the probability of thinking about suicide, and that applies equally to women and men.”).

³³ Larzelere, *supra* note 17.

³⁴ A VIOLENT EDUCATION, *supra* note 1, at 14.

³⁵ *Id.*

³⁶ Corporal Punishment and Paddling Statistics, *supra* note 13.

³⁷ *Id.*

³⁸ James F. Gregory, *The Crime of Punishment: Racial and Gender Disparities in the Use of*

bias is a strong gender bias—boys are struck four times more often than girls.³⁹ Often, boys are simply blamed for this discrepancy, since the common perception is that they misbehave more often than girls.⁴⁰ With age and race considered, the discrepancy between white girls struck in school and black boys is particularly marked.⁴¹

What might be the greatest toll of all, though, and often times cannot be easily measured, is the effect that corporal punishment has on individual students' psyche and the potential for parents and educators alike to "cross the line" from "reasonable" corporal punishment into child abuse or assault.⁴² For the students who are struck in school, it is reasonable that they would fear returning to school out of fear of being hit. It would seem, after all, that instilling the fear of being hit into students is precisely the logic behind any effectiveness it would have. The instances and effects of individual pain and humiliation are documented in official reports and in court rulings. The ACLU, for example, describes how a fifth-grade boy named Tim,⁴³ who was struck several times after misbehaving in gym class, bled all over his clothing. He was humiliated and requested that he be withheld from school. Days later, Tim was hit again in the rear. This time his genital area became swollen. When Tim's mother complained to school officials, she was told that school corporal punishment was legal and they would do nothing about it. Indeed, Tim's teachers were never sanctioned.⁴⁴ The ACLU and even popular magazines have documented a series of similar incidents.⁴⁵

Overshadowing this is the potential that "reasonable" corporal punishment could escalate into abuse or assault. A study in the early 1980s uncovered that, among abusive families, excessive corporal punishment which escalated into abuse was the most common form of child abuse.⁴⁶ Other studies note that a majority of child abuse cases arise in situations where the abuser intended to discipline the child, while two-thirds of abusive parents admit that their abuse began as an attempt to discipline their child.⁴⁷ Although these studies focus on corporal

Corporal Punishment in U.S. Public Schools, 64 J. NEGRO EDUC. 454, 457 (1995).

³⁹ *Id.* at 457.

⁴⁰ *Id.* at 455.

⁴¹ *Id.* ("If African American children as well as boys as a whole are more at risk for CP [corporal punishment] than are their White and/or female peers, it would not be surprising that Black males in particular are prone to being struck by school personnel.").

⁴² MURRAY A. STRAUS, *BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECT ON CHILDREN*, (2nd ed. 2003) [hereinafter *BEATING THE DEVIL OUT OF THEM*].

⁴³ Tim's situation is based on the fact pattern of "Tim L." outlined by the American Civil Liberties Union in *A VIOLENT EDUCATION*, *supra* note 1. The plight of children hit in school is reflected in popular media as well. See e.g., Richard Jerome & Linda Kramer, *Spare the Rod*, *PEOPLE MAG.*, Apr. 15, 2002, at 69-70 [hereinafter *Spare the Rod*].

⁴⁴ *A VIOLENT EDUCATION*, *supra* note 1.

⁴⁵ *A VIOLENT EDUCATION*, *supra* note 1; *Spare the Rod*, *supra* note 43.

⁴⁶ *BEATING THE DEVIL OUT OF THEM*, *supra* note 42.

⁴⁷ *The Case Against Corporal Punishment*, *supra* note 2.

punishment in the home rather than in schools, they demonstrate the potentially fine line between “reasonable” and “unreasonable” punishment, as parents can abuse their children when they originally intended to discipline them.⁴⁸ The line between “reasonable” and “unreasonable” punishment in schools could be just as ambiguous. It seems clear, then, that even “reasonable” corporal punishment, whether in the home or in school, is dangerous since it can easily escalate into child abuse.⁴⁹

Despite the arguments in favor of allowing parents and teachers to use corporal punishment, the evidence of the damage that it poses to children—increased crime, suicidal thoughts, individual fear, racial prejudice, gender bias, and child abuse—seems far more daunting and outweighs the potential “good” that could come from hitting children. Although traditional federalism arguments might be persuasive when discussing a number of controversial issues—if you do not like your state’s laws, move to a state with laws more suitable—the argument seems to fail here. After all, children do not have the option to simply “get up and move” to another state if they are being hit. Many children, therefore, are forced to go to schools that allow corporal punishment. The questions, then, are how can the United States ban corporal punishment, what social or legal obstacles might jeopardize passage of a federal prohibition of it in schools, and is there any model that the United States could look to as an example of how such a diverse and varied organization could prohibit corporal punishment?

III. THE LEGALITY OF CORPORAL PUNISHMENT IN THE UNITED STATES

In 1977, in the case of *Ingraham v. Wright*,⁵⁰ the U.S. Supreme Court was faced with the question of whether corporal punishment in American schools was a violation of children’s right to due process and whether it was cruel and unusual punishment.⁵¹ There, a group of junior high school students in Florida brought a civil rights claim against school officials, claiming their rights had been violated when teachers struck them with a paddle in school.⁵² Despite the physical pain and actual injury that the paddling caused, the Supreme Court found that corporal

⁴⁸ *Id.*

⁴⁹ *Id.* at 95.

During the past 25 years, many well-respected scholars have argued that corporal punishment by parents increases the chances that they will go too far and physically abuse their children. The scientific evidence showing that corporal punishment is a risk factor for physical abuse, although not conclusive, is as good or better than the evidence for other suspected causes. *Id.*

Perhaps based on this difficulty in determining what is “reasonable” and what is not, some very prominent legislators such as former Senate Majority Leader Mitch McConnell, have proposed going so far as to grant teachers who hit their students qualified immunity. See Boser, *supra* note 22, at 43.

⁵⁰ *Ingraham v. Wright*, 430 U.S. 651 (1977).

⁵¹ *Id.* at 653.

⁵² *Id.*

punishment in American schools was not cruel or unusual in violation of the Eighth Amendment so long as it was pursuant to a legitimate end—such as disciplining students—and its implementation was not excessive.⁵³ Nevertheless, the court failed to address the fact that it can be difficult to decide what is “reasonable” and what is “excessive.”⁵⁴ The Court simply relied on lower courts’ case-by-case review of whether school officials’ actions were excessive, finding that the Florida school’s policy allowing teachers to “use their discretion” was a sufficient safeguard to protect students from any violation of their Eighth Amendment rights.⁵⁵

Ingraham was not unique in its holding and followed a series of cases which held that corporal punishment in schools was not cruel or unusual. For example, in 1976, in *Sims v. Waln*,⁵⁶ the Sixth Circuit held that hitting students in school was not excessive when it was limited to a three-hit policy.⁵⁷ In that case, the court found that the plaintiff failed to state a cause of action for a civil rights violation even though she presented evidence that black students in her school were hit more frequently than white students.⁵⁸ Similarly, in 1973, in *Gonyaw v. Gray*,⁵⁹ a district court in Vermont dismissed a civil rights violation claiming that whipping a student with a belt and getting smacked across the face were not cruel or unusual.⁶⁰

In recent years, courts have generally held a slightly higher standard for what is considered excessive, but courts have nonetheless consistently upheld the use of striking students as constitutional. For example, in 1984, the Fifth Circuit, in *Woodard v. Los Fresnos Independent School District*,⁶¹ found that the student failed to state a cause of action when her teacher struck her, even though the victim’s parents had requested that their daughter not be hit in school.⁶² More recently, several state and federal courts have consistently held that smacking students is not cruel so long as it is not “excessive,” citing *Ingraham* for this proposition.⁶³

Although corporal punishment in schools, pursuant to *Ingraham*, is not unconstitutional, many states have nonetheless taken the initiative to ban the practice.⁶⁴ In fact, to date, twenty-nine states—including such populous states as

⁵³ *Id.* at 671.

⁵⁴ *Id.*

⁵⁵ *Id.* at 676.

⁵⁶ *Sims v. Waln*, 536 F.2d 686 (6th Cir. 1976).

⁵⁷ *Id.* at 689.

⁵⁸ *Id.* at 690.

⁵⁹ *Gonyaw v. Gray*, 361 F. Supp. 366 (D. Vt. 1973).

⁶⁰ *Id.* at 367-71.

⁶¹ *Woodard v. Los Fresnos Independent School District*, 732 F.2d 1243 (5th Cir. 1984).

⁶² *Id.* at 1245-46.

⁶³ See, e.g., *Campbell v. Gahanna-Jefferson Bd. of Educ.*, 717 N.E.2d 347 (Ohio Ct. App. 1998); *Jones v. Witinski*, 931 F. Supp. 364 (M.D. Pa. 1996); *King v. State*, 903 So.2d 954 (Fla. Dist. Ct. App. 2005); *Daniels v. Lutz*, 407 F. Supp.2d 1038 (E.D. Ark. 2005).

⁶⁴ See, e.g., MASS. GEN. LAWS. ch. 71, § 37G (2010); N.Y. COMP. CODES R. & REGS. tit. 8, §19.5 (2010).

Massachusetts, New York, Pennsylvania, Michigan, Virginia, New Jersey, Wisconsin, Minnesota, California, Illinois, and Washington—have banned corporal punishment in schools and several school districts in other states have passed their own prohibitions.⁶⁵ However, some other populous states still allow the practice—among them, Texas, Florida, Ohio, Georgia, North Carolina, Tennessee, Missouri, Indiana, Colorado, and Arizona.⁶⁶

Overall, it appears dubious whether the federal government could implement a full-scale ban on corporal punishment in either the home or in schools.⁶⁷ In recent years, the Supreme Court has strictly adhered to federalism principles and found that Congress lacks grounds to establish federal regulations that the Commerce Clause or other articles of the Constitution did not strictly grant Congress power to regulate.⁶⁸ For example, in *United States v. Morrison*,⁶⁹ the Supreme Court found that Congress lacked the authority to establish civil remedies in federal courts for victims of domestic violence despite the fact that Congress held substantial hearings on the effect that such violence had on interstate commerce.⁷⁰ Likewise, in *United States v. Lopez*,⁷¹ the Supreme Court found that Congress lacked authority to prohibit carrying firearms within school zones, despite the effect that such actions might have on education, child development, and, by extension, interstate commerce, finding the connection too remote.⁷²

What does seem clear, however, is that states could likely, either under their police power or pursuant to the state interest of protecting their citizens at large, prohibit corporal punishment, at least in schools.⁷³ In the home context, the Supreme Court has noted that, although parents have a strong interest in shaping the ways in which they rear their children absent government involvement, this right is far from absolute, particularly when the safety and welfare of the child is in question.⁷⁴ Hence, prohibitions of corporal punishment on the state level, both in the home and in schools, could be justified in that they are enacted pursuant to the police power to protect children from assault since the line between “reasonable chastisement” and abuse is too hard to define.⁷⁵ Furthermore, the Supreme Court often grants states deference in implementing legislation pursuant to their legitimate police power, which would likely mean that state power to ban corporal

⁶⁵ Corporal Punishment and Paddling Statistics, *supra* note 13.

⁶⁶ *Id.*

⁶⁷ See discussion *infra* pp. 12-15; see also Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447 (2002) [hereinafter *Banning Corporal Punishment*].

⁶⁸ *Id.* See also discussion *infra* pp. 12-15.

⁶⁹ *United States v. Morrison*, 529 U.S. 598 (2000); see also *Printz v. United States*, 521 U.S. 898 (1997).

⁷⁰ *Morrison*, 529 U.S. at 617-18; *Banning Corporal Punishment*, *supra* note 67.

⁷¹ *United States v. Lopez*, 514 U.S. 549 (1995).

⁷² *Id.*

⁷³ *Banning Corporal Punishment*, *supra* note 67, at 453.

⁷⁴ *Id.* at 464. See *Prince v. Mass.*, 321 U.S. 158 (1944).

⁷⁵ *Banning Corporal Punishment*, *supra* note 67, at 467.

punishment would be acceptable.⁷⁶ This is further evidenced by the fact that, at least in the school context, neither the Supreme Court nor any federal circuit court has yet overturned a state's prohibition on corporal punishment in schools as unconstitutional.

One potential option open to the federal government would be to take an indirect approach to encourage the states to implement their own statutes banning corporal punishment in schools. Such an approach could take the form of a campaign on the national level to inform state legislators and citizens of the negative effects of corporal punishment and the human-rights aspect of hitting children. Theoretically, citizens and legislators would then move to ban the practice either in schools or in the home. Although this would be an attractive approach for several reasons, it would face heavy criticism and potentially be ineffective since a majority of parents approve of using corporal punishment.⁷⁷ Waging a campaign to effectively inform all these individuals would likely be costly and difficult and would face substantial backlash from state lawmakers who have entrenched beliefs about the practice.⁷⁸

An arguably more productive strategy for banning corporal punishment on the national level would be to make certain federal spending provisions conditional on banning corporal punishment. In the past, this approach has been regarded as constitutional; in *South Dakota v. Dole*,⁷⁹ the Court upheld a federal statute which made receipt of federal funds for highway maintenance conditional on states' raising the drinking age to twenty-one.⁸⁰ The Supreme Court found that so long as the federal spending was reasonably related to the state policy targeted, the federal government could make the receipt of funds conditional on passage of such legislation.⁸¹ Likewise, in *United States v. American Library Ass'n*,⁸² the Court upheld a statute making the receipt of federal funds for libraries conditional on certain restrictions on the content of their materials.⁸³

Similarly, the federal government could pass legislation which would make the receipt of federal money for schools conditional on states passing legislation which would ban corporal punishment in their school systems. Although withholding federal money for schools seems like a harsh penalty, anything less severe might face the risk of being ineffective, as state legislatures where corporal punishment is widespread might choose to forego passing such legislation and instead accept decreased federal aid. Optimism that such legislation could pass in

⁷⁶ *Id.* See, e.g., *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Jacobson v. Mass.*, 197 U.S. 11 (1905).

⁷⁷ See discussion *supra* pp. 12-14.

⁷⁸ See discussion *supra* Part I.

⁷⁹ *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *United States v. American Library Ass'n*, 539 U.S. 194 (2003).

⁸³ *Id.*

Congress seems reasonable in light of the fact that over half the states ban corporal punishment in schools and so it is likely that at least half of all U.S. senators and Congress members would support it.⁸⁴ The prospects for federal legislative action to ban corporal punishment in the home, however, appear much more daunting, since no states currently ban the practice, and since a clear majority in every region of the country, except the region of New England, favor the practice.⁸⁵ To ban the practice in the home would likely require a much more far-reaching campaign on the federal level.

IV. A CORPORAL-PUNISHMENT-FREE-SOCIETY AND THE LEGAL ERADICATION OF CORPORAL PUNISHMENT IN EUROPE

A. *The United Nations—Corporal Punishment in a Human Rights Context*

In recent years, there has been an increasing movement toward disapproval of corporal punishment in the international community.⁸⁶ A total of nineteen European countries ban the practice in both the home and in school—Spain, Portugal, the Netherlands, Greece, Hungary, Romania, the Ukraine, Italy, Iceland, Germany, Bulgaria, Croatia, Latvia, Denmark, Cyprus, Austria, Norway, Finland, and Sweden.⁸⁷ This movement appears particularly marked in the United Nations, where, in its Convention on the Rights of the Child, it officially condemned the use of corporal punishment, both in the home and in school, and called on governments to ban its use entirely.⁸⁸ The U.N. encourages this ban on the grounds that freedom from being hit is a universal human right, from which children are not exempt and which cannot be sacrificed in the pursuit of maintaining order or discipline.⁸⁹

⁸⁴ See discussion *supra* pp. 11-14.

⁸⁵ See discussion *supra* pp. 11-12.

⁸⁶ See generally *The Case Against Corporal Punishment*, *supra* note 2.

⁸⁷ Global Initiative to End All Corporal Punishment of Children: States with Full Abolition, http://www.endcorporalpunishment.org/pages/progress/prohib_states.html (last visited Oct. 10, 2008).

⁸⁸ U.N. Comm'n on the Rights of the Child ["CRC"], *The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007).

⁸⁹ *Id.* at 5.

Once visible, it is clear that the practice directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity. The distinct nature of children, their initial dependent and developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence. *Id.*

See also *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights Including the Right to Development*, at 6-7, U.N. Doc. A/HRC/7/L.34 (Mar 26, 2008).

Deeply concerned by the horrific scale and impact of all forms of violence against children, in all regions, in their homes and families, in schools, care and justice systems, workplaces and in communities, and urges States: . . . [t]o take measures to eliminate the use of corporal punishment in schools and to take urgent measures to protect students from violence of any kind, injury or abuse, including sexual abuse, intimidation or maltreatment in schools, to establish complaint mechanisms that are age-appropriate and

Pursuant to this condemnation, the U.N. has repeatedly reprimanded countries which have failed to adequately protect children, or at least failed to take steps to do so.⁹⁰ The U.N.'s call on states to ban corporal punishment has been met with mixed success. There remain a number of nations, including the U.S., which still allow corporal punishment and have not banned the practice either in the home or in school. However, progress has been made; in 2006, the E.U. officially adopted the recommendations of the U.N. as a goal that its member states ought to work toward.⁹¹

Of the European nations that have banned corporal punishment, there exists great discrepancies between the methods and breadth of such prohibitions. Some countries ban corporal punishment in schools; perhaps the first country to do so was Poland in 1783.⁹² Two nations, Portugal and Italy, have banned it as a result of rulings from their highest courts.⁹³ Other states, such as Germany, have banned corporal punishment both in schools and in the home through statutory enactment

accessible to children and to undertake thorough and prompt investigations of all acts of violence. *Id.*

Furthermore, the U.N. ties in elimination of corporal punishment to the right to be educated; when discussing children's right to an education, for example, it explicitly states that that right entails that education be corporal punishment-free. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, at 5, U.N. Doc. A/HRC/8/L.5 (Jun. 12, 2008).

[T]ake all appropriate legislative, administrative, social and educational measures, in accordance with the best interest of the child, to protect the child from all forms of physical . . . violence . . . and in this context to take measures to eliminate corporal punishment in schools, and to incorporate in their legislation appropriate sanctions for violations . . . *Id.*

⁹⁰ See U.N. Comm'n on the Rights of the Child [CRC], *Consideration of Reports of State Parties, United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CRC/C/SR.205 (1995); U.N. Comm'n on the Rights of the Child [CRC], *Concluding Observations of the Committee on the Rights of the Child: Luxembourg*, U.N. Doc. CRC/C/15/Add/92 (1998); U.N. Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex to Human Rights Council Resolution 5/1, Switzerland*, U.N. Doc. A/HRC/WG.6/2/CHE/3 (Sept. 8, 2008).

⁹¹ *Opinion of the European Economic and Social Committee on the Communication from Commission – Towards an EU Strategy on the Rights of the Child*, at 68, COM (2006) 367 final (Dec. 13, 2006).

3.24 The EESC welcomes the recently published report of the independent expert . . . for the United Nations study on violent against children . . . [t]he report 'urges state to prohibit all forms of violence against children, in all settings, including all corporal punishment . . .' [t]he EESC urges the Commission to consider the appointment of a Special Representative on Violence against Children in order to promote and support the implementation of the recommendations made in the report. *Id.*

⁹² Rowan Boyson, *Equal Protection for Children, An Overview of the Experience of Countries that Accord Children Full Legal Protection from Physical Punishment*, http://www.nspcc.org.uk/Inform/publications/Downloads/equalprotectionforchildren_wdf48095.pdf (last visited Oct. 10, 2008) [hereinafter *Equal Protection For Children*].

⁹³ Susan Bitensky, *The Final Straw: To Spank or Not To Spank?*, CHI. TRIB., July 25, 1996, available at <http://www.nospank.net/bitensky.htm>. Subsequently, Portugal banned corporal punishment through statute as well. See Penal Law 59/2007 (Portugal). In 2005, Italy likewise adopted a partial legislative prohibition. See C.P. Art. 571-72 (Italy).

and have made its use a criminal offense.⁹⁴ Noteworthy among countries is Sweden, which banned corporal punishment in the home in the late seventies and has made it a civil offense.⁹⁵ Although this variety of different bans may appear confusing and inconsistent, it highlights a movement toward greater restriction of corporal punishment and potentially puts forward a number of different models for legislation that American states could consider.

B. Sweden and the Scandinavian Countries – Early Civil Bans

The first country to extend a ban on corporal punishment to cover both the use of it in the home and in schools was Sweden in 1979.⁹⁶ Sweden did not just ban corporal punishment; rather it phrased its ban in human rights terms: “Children are entitled to care, security and a good upbringing. 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.”⁹⁷ Corporal punishment had been commonplace in Sweden into the early twentieth century.⁹⁸ However, beliefs about childrearing began to change in the early to mid twentieth century and Sweden, as a result, began to implement legislation which sought to guide methods of raising children.⁹⁹ Among early legislation, codified largely in the 1960s and 1970s, were bans on excessive corporal punishment and laws establishing youth centers, schools, and welfare programs.¹⁰⁰

Sweden’s prior childrearing legislative acts, coupled with high profile cases of excessive corporal punishment, laid the foundation for the popular, although not uncontroversial, acceptance and passage of the 1979 ban.¹⁰¹ The basis for the ban was simple: legislators were not interested in dictating how parents ought to raise their children, but instead wanted to lower the frequency of domestic violence and child abuse, acknowledging the tendency for corporal punishment to “cross over the line” into full-scale child abuse.¹⁰² This is evidenced by the fact that, like the legislation establishing youth centers and schools, the 1979 ban was incorporated

⁹⁴ Kai-D. Bussman, *Evaluating the Subtle Impact of a Ban on Corporal Punishment of Children in Germany*, 13 CHILD ABUSE REV. 292 (2004).

⁹⁵ Klaus A. Ziegret, *The Swedish Prohibition of Corporal Punishment: A Preliminary Report*, 45 J. MARRIAGE & FAM. 917 (1983).

⁹⁶ *Id.*

⁹⁷ Föräldrabalk [FB] [Code Relating to Parents, Guardians, and Children] 1979 (Sweden), as translated in *Equal Protection for Children*.

⁹⁸ *The Case Against Corporal Punishment*, *supra* note 2.

⁹⁹ Ziegret, *supra* note 95, at 919.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* *The Case Against Corporal Punishment*, *supra* note 2.

¹⁰² Ziegret, *supra* note 95, at 917.

The central starting point of the Swedish regulation of the ban on corporal punishment is the psychologically and sociologically assumed connection between corporal punishment, domestic violence and child abuse. The law is not directed at a limitation of parental responsibility in the rearing of children but at the formulation of *clear behavior guidelines* for the responsible upbringing of children by their parents. *Id.*

into Sweden's civil law rather than its criminal law.¹⁰³ Furthermore, in the hearings that the legislature held to consider the bill, many researchers and child psychologists testified concerning the negative effects it had on children and the potential risk that it would spill over into abuse.¹⁰⁴ In passing legislation, the legislators' goal was not to punish parents or to create harsher penalties for parents who were excessive with their forms of discipline; to the contrary, they sought to change parents' attitudes toward child rearing gradually so as to eradicate child abuse and other negative effects of corporal punishment.¹⁰⁵ Sweden's minimally-intrusive civil ban could thus serve as an acceptable model for American states concerned about interfering too heavily in parents' rights to raise their children without substantial government intrusion.

The passage of Sweden's ban and the attention it garnered in the international arena helped to pave the way for bans in other European countries and helped to promote freedom from being hit as a fundamental human right. This is evidenced by the fact that several of Sweden's neighbors passed similar bans, particularly other Scandinavian and Baltic countries—Finland in 1969, Denmark in 1985, Norway in 1987, and Latvia in 1998.¹⁰⁶ The language of these bans appears to borrow heavily from Sweden's ban, at least to the extent that they readily acknowledge that the freedom from being hit is a fundamental right and that the laws are similarly part of these respective countries' civil, rather than criminal codes.¹⁰⁷

Following the wave of Scandinavian countries' bans and the U.N.'s condemnation, another larger European country passed legislation outlawing corporal punishment: Germany.¹⁰⁸ In the 1970s, Germany passed legislation to prohibit the use of corporal punishment in schools; however, in the 1980s, despite effort to the contrary, legislation which would have banned it in the home failed in the Reichstag.¹⁰⁹ Although Austria, Germany's neighbor to the south, had banned

¹⁰³ *The Case Against Corporal Punishment*, *supra* note 2, at 249-50.

¹⁰⁴ Ziegret, *supra* note 95, at 919-20.

¹⁰⁵ *Id.* at 920.

¹⁰⁶ Finland's Child Custody and Rights of Access Act (Family Law) 1983 ("A child shall be brought up in the spirit of understanding, security, and love. He shall not be subdued, corporally punished or otherwise humiliated. The growth of a child towards independence, responsibility and adulthood shall be encouraged, supported and assisted"), Denmark's Majority Act of 1985 ("Parental custody implies the obligation to protect the child against physical and psychological violence and against other harmful treatment") and Parental Custody and Care Act of 1997 ("A child has the right to care and security. He or she shall be treated with respect as an individual and may not be subjected to corporal punishment or other degrading treatment"), Norway's Parent and Child Act (Family Law) of 1987 ("The Child shall not be exposed to physical violence or to treatment which can threaten his physical or mental health."), and Latvia's On Children's Rights Protection, 1998 ("1. A child has rights to his private life, secrecy of apartments and correspondence, personal inviolability and freedom / 2. Cruel treatment of a child, physical punishment and offences against the child's honour and respect are not allowed"), translated in *Equal Protection For Children*, *supra* note 92, at 8-9.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 52.

certain forms of corporal punishment in 1989, Germany did not do so until 2000.¹¹⁰

In 2000, Germany passed legislation which reads “[c]hildren have a right to a non-violent upbringing. Corporal punishment, psychological injuries and other degrading measures are impermissible.”¹¹¹ The ban followed a governmental investigation into corporal punishment in the country which concluded that it was commonplace and had been for decades, and also that it quite often spilled over into physical abuse.¹¹² What is more noteworthy about Germany’s ban, besides its use of human rights terms similar to Sweden’s, is that, unlike the Scandinavian states, corporal punishment in Germany can be tried as a criminal offense since it is contained in Germany’s criminal code.¹¹³ The practical effect this may have is still unclear, but this criminal prohibition provides another example of a ban that American states could consider.

C. The United Kingdom of Great Britain and Northern Ireland: A Path For the United States?

Despite legal progress in Scandinavia and Germany, bans on corporal punishment have not been adopted throughout the entire continent.¹¹⁴ The United Kingdom is one prominent example. Corporal punishment has a lengthy and well-entrenched history in the U.K.’s educational system.¹¹⁵ In an early case on the

¹¹⁰ Austrian Youth Welfare Act (Civil Law) of 1989, translated in *Equal Protection For Children*, *supra* note 92, at 8-9 (“[In the implementation of parents’ orders to the child] the use of force and the infliction of physical or mental suffering are unlawful.”).

¹¹¹ Bürgerliches Gesetzbuch [BGB] [Civil Code] 2000 §1631 II, translated in Kai-D. Bussman, *Evaluating the Subtle Impact of a Ban on Corporal Punishment of Children in Germany*, 13 CHILD ABUSE REV. 292, 293 (2004). For another example of a statutory corporal punishment, see Spain’s Right to Education (Organization) Act (1985).

¹¹² Kai-D Bussman, *supra* note 94, at 292 (2004).

[T]he German Government was convinced that physically punishing children could tip over into physical abuse, and therefore the legal solution had to be the absolute prohibition of any corporal punishment. In the face of these empirical results, effective crime prevention could no longer stop at the front doors of families. *Id.*

¹¹³ *Id.* at 293-94.

[I]t [the German statute banning corporal punishment] does have a number of subtly legal consequences. Until this legal reform was introduced, the civil code provided justification for a wide range of corporal punishments, even severe ones at time, but the new ban rules out any legal justification of violence in the upbringing of a child. Under German law, this means that physically punishing one’s own child is now a criminal offence (physical injury, see Strafgesetzbuch [StGB] [Penal Code] §223, which could be pursued by the public prosecutor. *Id.*

¹¹⁴ Mario de Queiroz, *Rights: Abolish Corporal Punishment, Council of Europe Says*, GLOBAL INFORMATION NETWORK, May 19, 2002.

¹¹⁵ This lengthy history in the U.K. is evidenced by the fact that British high courts upheld the use of corporal punishment statutes in the nineteenth century and the country did not take steps to eradicate corporal punishment in schools under the later twentieth century. *Company Cleary v. Booth*, (1893) 1 Q.B. 465 and §97 Elementary Education Act, 1870, 33 & 34 Vict., c. 7 (Eng.) with the Education Act, 1997, c. 44, § 4 (Eng.).

matter, *Cleary v. Booth*,¹¹⁶ a British high court reviewed, albeit in an indirect manner, whether teachers could hit children in British schools.¹¹⁷ The case reviewed the then-in-effect Education Acts.¹¹⁸ The issue for the court was not whether teachers had the right to strike students—which the court assumed teachers had—but, instead, whether they could strike students for actions taken on the way to or from school.¹¹⁹ Subsequently, in a move that was clearly a sign that teachers in the U.K. had great authority to hit students, the Queen’s Bench Division held that teachers had the right to strike students for such behavior.¹²⁰

Effectively, early U.K. case law made corporal punishment an explicit affirmative defense to assault.¹²¹ *M’Shane v. Paton*,¹²² another early U.K. case, sought to answer the question of whether corporal punishment in schools is an exception to standard assault and battery charges.¹²³ In that case, the victim was an eight-year-old Scottish boy who had missed a day of school without a written excuse from his parents.¹²⁴ When the boy went to school the next school day without such an excuse, his teacher, M’Shane, took out a leather strap and struck the boy with it, badly hurting him.¹²⁵ The teacher was charged and convicted of assault when she could not cite any statute or school policy warranting her actions.¹²⁶

Despite the trial court’s recognition that the teacher’s actions were not warranted by statute or school policy, the *M’Shane* conviction was overturned and vacated on appeal in 1922.¹²⁷ On appeal, the teacher successfully argued that such punishment in school was common and ordinary, and that corporal punishment, so long as it was not excessive, was an affirmative defense against a charge of assault.¹²⁸ Even though smacking the boy’s hand caused great pain and swelling, it was found not to be excessive.¹²⁹ This judgment, unfortunately, was customary of

¹¹⁶ (1893) 1 Q.B. 465.

¹¹⁷ *Id.*

¹¹⁸ *Id.* §97 Elementary Education Act, 1870, 33 & 34 Vict., c. 75 (Eng.); §101 Code of the Education Department (1892) (Eng.).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See, e.g., M’Shane v. Paton*, 1922 J.C. 26; *Brown v. Hilson*, 1924 J.C. 1.

¹²² *M’Shane v. Paton*, 1922 J.C. 26.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 26-27.

¹²⁶ *Id.*

¹²⁷ *M’Shane v. Paton*, 1922 J.C. 26 (1922).

¹²⁸ *Id.* at 31.

But even as regards civil responsibility, that does not arise where a teacher has been punishing a child for a school offence, unless there has been very grave excess in the administration of the punishment. Here there is no excess whatever alleged. The facts show, as one would expect, that the child’s hands were somewhat swollen after the chastisement had been inflicted, but that was the natural and inevitable result of such chastisement, and does not seem to me even to suggest undue severity. *Id.*

¹²⁹ *Id.*

early decisions concerning corporal punishment and courts in the U.K. upheld “reasonable chastisement” as a defense against a charge of assault at least until the 1990s.¹³⁰

In all fairness to the U.K., it at least held fast to the position that corporal punishment should not be a defense when such punishment is excessive.¹³¹ In *Brown v. Hilson*,¹³² tried shortly after *M’Shane*, the same court upheld an assault charge against a school official who hit a student.¹³³ There, a school master was charged with assault when he struck a student across the face with his hand and beat him several times on his hips with a piece of leather, injuring the boy as a result.¹³⁴ Subsequently, the *Brown* court distinguished *M’Shane* on its facts: without giving much guidance concerning what about the two situations was substantially different, the court found that the beating suffered by the student in *Brown* was excessive while the beating in *M’Shane* was not.¹³⁵ Of course, one can see and perhaps even concede that the physical beating in *Brown* was much more excessive than that in *M’Shane*. However, this undoubtedly raises very tough questions—where do you draw the line between excessive and “reasonable” corporal punishment, and why is striking someone across the hand, causing swelling, “reasonable” while striking someone across the face and hips is excessive?

Unfortunately, looking to more recent U.K. case law on the matter does not easily answer these questions. In 1982, the U.K.’s allowance of corporal punishment was challenged before the European Court of Human Rights (“E.C.H.R.”).¹³⁶ In *Campbell & Cosans v. United Kingdom*,¹³⁷ two parents, on behalf of their children, brought suit against the U.K. for smackings the children received in public schools. Both parents, for financial reasons, sent their children to public school knowing they would be struck there.¹³⁸ One child was not struck, but the school refused to honor a request not to hit him, while the other child was struck with a leather strap in front of his classmates, causing bruising, pain, swelling, and embarrassment.¹³⁹ At that time, corporal punishment in Scotland

¹³⁰ See *Ryan v. Fildes*, 3 All E.R. 517 (1938) (holding that teachers may use corporal punishment against students); *Campbell & Cosans v. United Kingdom*, 4 Eur. Ct. H.R. 293 (1982) (finding that in the United Kingdom, corporal punishment is a defense against assault so long as such corporal punishment is not excessive); *A v. United Kingdom*, 27 Eur. Ct. H.R. 112 (1994) (finding that corporal punishment is a defense against assault, although in this particular case it was found to be excessive).

¹³¹ *Brown v. Hilson*, 1924 J.C. 1.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 1.

¹³⁵ *Id.*

¹³⁶ See *Campbell & Cosans v. United Kingdom*, 4 Eur. Ct. H.R. 293 (1982).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

was governed by common law.¹⁴⁰ A pamphlet in Scotland advised teachers to strike students only under certain circumstances, including when the child was at fault, had been warned, and was not an “infant;” and the striking should be limited to the child’s hand.¹⁴¹ Despite the parents’ objections, the court nonetheless found that striking students in U.K. public schools did not violate any provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms since hitting students only under such limited circumstances is “reasonable” and not a form of torture, inhumane, or degrading treatment or punishment.¹⁴²

Later cases before the E.C.H.R. had mixed effects on this “reasonableness” standard.¹⁴³ Two cases brought before the court in 1994 were particularly troublesome and seemingly conflicting.¹⁴⁴ In *Y v. United Kingdom*,¹⁴⁵ a fifteen-year-old boy brought suit against the U.K. for failing to charge his headmaster with assault after the headmaster struck him in the rear four times with a cane, causing significant pain and bruising.¹⁴⁶ In a mixed decision, the court found that the U.K. had failed to adequately protect the boy from this beating.¹⁴⁷ The outcome of *Y v. United Kingdom* could reasonably be seen as an important step toward recognizing that striking children in schools is inhumane and a violation of children’s rights. That is, it could be viewed as a triumph were it not for the fact that the U.K., by virtue of the fact that it was the defendant, opposed the ruling, and in light of the E.C.H.R.’s ruling in *Costello-Roberts v. United Kingdom*,¹⁴⁸ which was issued soon thereafter.

In *Costello-Roberts*, the court again questioned what constitutes “reasonable” punishment.¹⁴⁹ There, a seven-year-old boy was bent over his headmaster’s knee in school and struck three times in the rear; although the boy did not suffer any bruising and was not disrobed, he complained of pain and humiliation and challenged the punishment as unreasonable and degrading.¹⁵⁰ Seemingly contrary to the ruling in *Y v. United Kingdom*, the court found that the punishment here—striking a young child three times—was reasonable and not in violation of any provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁵¹

¹⁴⁰ *Id.*

¹⁴¹ *Campbell & Cosans v. United Kingdom*, 4 Eur. Ct. H.R. 293 (1982).

¹⁴² *Id.*

¹⁴³ *See, e.g., Y v. United Kingdom*, 17 Eur. Ct. H.R. 238 (1994); *A v. United Kingdom*, 27 Eur. Ct. H.R. 611 (1998).

¹⁴⁴ *Id.*

¹⁴⁵ *Y v. United Kingdom*, 17 Eur. Ct. H.R. 238 (1994).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 19 Eur. Ct. H.R. 112 (1994).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

The difficulty in deciding what is “reasonable” and what is “excessive” under U.K. law extends beyond the school. Although corporal punishment in the home raises some different issues from punishment in schools, it nonetheless illustrates the difficulty in determining what is “reasonable” and what is “unreasonable” punishment. In 1998, the E.C.H.R. issued its ruling in *A v. United Kingdom*,¹⁵² finding that a stepfather who had struck his stepson several times with a cane for misbehaving had violated the Convention for the Protection of Human Rights and Fundamental Freedoms’ prohibitions against cruel and degrading punishment.¹⁵³ At trial for assault, the stepfather argued that the punishment was reasonable because the boy had been so unruly and hard to control.¹⁵⁴ The E.C.H.R. subsequently found that beating the child with a cane and causing significant bruising was not “reasonable” and that the U.K. had failed to adequately protect the boy in maintaining such a “reasonableness” defense.¹⁵⁵

What is shocking about *A*, though, is its procedural history. Although the E.C.H.R. may have rightly found that this was an unreasonable form of punishment, despite the boy’s tendency to misbehave, the court in the U.K. found that the stepfather’s actions were reasonable even though they resulted in the child needing serious medical attention.¹⁵⁶ Through a majority verdict, this court actually acquitted the stepfather of any wrongdoing.¹⁵⁷ When the case was appealed to the E.C.H.R., the U.K. argued that *Costello-Roberts*, *Campbell*, and *Y* justified the stepfather’s actions as reasonable and that the U.K. should not be liable for not protecting the child’s rights in allowing for such “reasonable” chastisement.¹⁵⁸

The U.K.’s argument that such severe action was acceptable and the jury’s acquittal of the stepfather are troublesome. First, they demonstrate an acceptance of even severe corporal punishment by many in the U.K. as a reasonable form of discipline. This is further evidenced by the fact that well over 50% of parents in the U.K. approve or strongly approve of it as an acceptable means of disciplining children.¹⁵⁹ As troublesome as the U.K.’s position in *A v. U.K.* may be, the U.K. deserves some credit for at least subsequently excluding the defense of “reasonable chastisement” to exclude punishment that would be degrading or inhumane under the European Conventions.¹⁶⁰ However, the fact that a jury found this type of beating to be “reasonable” while the E.C.H.R. found it unreasonable demonstrates the difficulty—and possible arbitrariness—in allowing case-by-case distinctions

¹⁵² *A v. United Kingdom*, 27 Eur. Ct. H.R. 611 (1998).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *A v. United Kingdom*, 27 Eur. Ct. H.R. 611, 614 (1998).

¹⁵⁸ *Id.*

¹⁵⁹ *Parents ‘Back Corporal Punishment,’ supra* note 18.

¹⁶⁰ *See generally*, R v. H, 2 Crim. App. 431 (2001).

between one mode of corporal punishment as “reasonable” and another as “unreasonable.” That courts come to wildly different conclusions as to whether punishment is “reasonable” is a strong reason why there ought to be a full-fledged ban on corporal punishment so as to err on the side of caution and protect children in schools. Just as courts seem to vary in what home corporal punishment is “reasonable,” it is not hard to imagine that similar issues would arise in the school context, as the U.K.’s school corporal punishment cases demonstrate.

The tide further began to change in the U.K. in 1997. Although the U.K. had previously, to some extent, banned corporal punishment in schools, restricting its use to “reasonable” circumstances and limiting its use in public but not private school, it implemented a more thorough ban in 1997 and eventually applied the ban to both public and private schools.¹⁶¹ The 1997 ban in the U.K. followed similar, although less far-reaching bans in England and Scotland which only applied to public and not private schools.¹⁶² Subsequently, other areas of the U.K., such as Northern Ireland, followed suit and implemented their own bans on the local level.¹⁶³

The 1997 ban received much criticism, however.¹⁶⁴ In 2005, in *Williamson v. Secretary of State for Education*,¹⁶⁵ a group of teachers and parents from private schools sued the Secretary of Education, claiming the ban was unconstitutional in that it violated their ability to freely practice their religion.¹⁶⁶ Despite objections, the court found the ban was entirely neutral to the beliefs of those who wanted to hit their children; as such, the U.K. could prohibit the practice.¹⁶⁷ This freedom of religion argument appeared in at least one other case—as recent as 2008, another religious group in the U.K. sought to declare the ban unconstitutional in *In the Matter of an Application for Judicial Review by the Northern Ireland Commissioner for Children and Young and Young People of Decisions Made by*

¹⁶¹ See Education Act, 1997, c. 44, § 4 (Eng.).

¹⁶² See e.g., *The Education (Abolition of Corporal Punishment: Prescription of Schools) (Scotland) Order, 1987*, (A.S.P. 1140), S.85.

¹⁶³ Explanatory Memorandum to Education and Libraries (Northern Ireland) Order, 2003, SI 2003/424 (N. Ir. 12), § 36.

¹⁶⁴ See e.g., *Schools Demand Right to Corporal Punishment*, BBC NEWS, Feb. 1, 1999, available at http://news.bbc.co.uk/2/hi/uk_news/education/269623.stm; Kathryn Torney, *Calls to Stamp out Ulster School Thugs: Concern Grows as 8,500 Pupils are Suspended*, BELFAST TELEGRAPH, July 20, 2004 [hereinafter *Calls to Stamp out Ulster School Thugs*].

¹⁶⁵ *Williamson v. Sec’y of State for Educ. & Emp.*, [2005] UKHL 15 (U.K.).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Viewed objectively, the act of inflicting corporal punishment is entirely neutral as to the beliefs that inspire it, as it is as to the beliefs that, in the language of the Commission adopted in *Arrowsmith*, it expresses. In the days when corporal punishment was endemic in the British educational system, those who practiced it no doubt had a wide variety of reasons for thinking it to be necessary . . . [t]he infliction of corporal punishment presses nothing as to the religion of the inflictor. That it is accompanied by assertions as to religious motivation, none of which in any way rendered unlawful by section 548, does not alter the position. *Id.*

*Peter Hain The Secretary of State and David Hanson the Minister of State.*¹⁶⁸ Hoping to find a more sympathetic reception in Northern Ireland,¹⁶⁹ the petitioners argued that banning corporal punishment violated their religious freedom.¹⁷⁰ Nonetheless, the court, citing *Williamson* heavily, rejected this argument.¹⁷¹

Since banning it in U.K. schools, the debate over using corporal punishment has persisted among U.K. citizens.¹⁷² Many educators publicly admit they would like to use it as a means of control in the classroom.¹⁷³ Likewise, many parents of school-aged children, faced with media and societal discussion over unruliness in U.K. schools, express desire to have children struck in school.¹⁷⁴ Finally, legislators who have supported bans in the home or in school have come under pressure for that support, some being “forced” to do an about-face on the issue.¹⁷⁵ The U.K., therefore, is extremely important as an example of one country that has taken action to eradicate corporal punishment in schools in the face of widespread support for the practice. Hopefully, the United States could do the same. Nevertheless, despite the U.K.’s progress in banning it in schools, the practice remains legal in the home when not “excessive.”¹⁷⁶ In regards to that policy, the U.K. has come under criticism from the U.N., which has called on the U.K. to ban the practice universally.¹⁷⁷ This remains an obstacle for the U.K. in the years to come.

¹⁶⁸ [2007] NIQB 115.

¹⁶⁹ Recently, Northern Ireland’s majority party, the right-wing Democratic Unionist Party, announced its support for re-instatement of corporal punishment as a means of instilling order in schools. See *Calls to Stamp out Ulster School Thugs*, *supra* note 163.

¹⁷⁰ *Williamson v. Sec’y of State for Educ. & Emp.*, *supra* note 164.

¹⁷¹ *Id.*

¹⁷² *Parents “Back Corporal Punishment,” supra* note 18.

¹⁷³ See *Calls to Stamp out Ulster School Thugs*, *supra* note 163 (outlining many teachers’ frustrations over the ban).

¹⁷⁴ *Parents “Back Corporal Punishment,” supra* note 18.

¹⁷⁵ See Gerard Seenan, *Scottish Executive Under Fire after Smacking U-turn*, GUARDIAN, Sept. 14, 2002, available at <http://www.guardian.co.uk/uk/2002/sep/14/scotland.politics>; Kathryn Torney, *Law Banning Corporal Punishment by Next Year*, BELFAST TELEGRAPH, May 1, 2001.

¹⁷⁶ U.N. Comm. on the Rights of the Child [CRC], *The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007). See also *R v. H*, [2001] 2 Crim. App. 431; *A v. United Kingdom*, 27 Eur. Ct. H.R. 611 (1998).

¹⁷⁷ U.N. Comm. on the Rights of the Child [CRC], *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, U.N. Doc. CRC/C/GBR/CO/4 (Oct. 3, 2008). The Committee, while noting amendments to legislation in England, Wales, Scotland and Northern Ireland which restrict the application of the defence of ‘reasonable chastisement’, is concerned that this defence has not been removed. The Committee is concerned at the failure of State party to explicitly prohibit all corporal punishment in the home and emphasizes its view that the existence of any defence in cases of corporal punishment of children does not comply with the principles and provisions of the Convention. *Id.*

D. Ireland and France: Clashes Throughout the Continent and the Need for a Universal Ban

Irish case law is quite illustrative of the conflict between European states as to how to address corporal punishment.¹⁷⁸ In 1982, Ireland passed the Irish Children Act, which prohibited corporal punishment in all schools.¹⁷⁹ For decades before its passage, corporal punishment had been commonplace in Ireland, and the country had been known for excessive administration of such punishment.¹⁸⁰ Although rulings from the E. C. H. R. concerning corporal punishment were known in Ireland, the debate continued, with many questioning whether the E.C.H.R. had overstepped its bounds by finding that certain forms of corporal punishment were unreasonable.¹⁸¹ In 1997, Ireland effectively removed “reasonable” chastisement as a defense for teachers who struck their students, thereby criminalizing its use in schools.¹⁸² The prohibition says nothing about it in the home, however, and Ireland has thus been censured for allowing it.¹⁸³ Though Ireland now prohibits it in school, “reasonable” corporal punishment remains a common-law defense to charges of domestic violence.¹⁸⁴ A marked ruling against Ireland for its failure to prohibit corporal punishment of children can be found in *World Organization Against Torture v. Ireland*,¹⁸⁵ where the European Committee of Social Rights found that Ireland was in violation of its own constitution and its domestic laws in allowing parents, foster care providers, and daycare providers to smack children.¹⁸⁶ Nevertheless, despite debate, significant progress has been made and corporal punishment as a means of discipline is far less common, both in schools—where it is banned—and in the home.¹⁸⁷

France, on the other hand, has been slow to take steps to ban it. As of 2008, France has yet to prohibit any form of corporal punishment in school.¹⁸⁸ The fact

¹⁷⁸ *Id.*

¹⁷⁹ Children Act, 2001 (Act No. 201/2001) (Ir.) (stating that in school “the following forms of discipline shall be prohibited . . . (a) corporal punishment or any other form of physical discipline”).

¹⁸⁰ See generally Raymond Arthur, *The European Court of Human Rights and the Abolition of Corporal Punishment*, 4 IRISH J. FAM. LAW 7 (1999), available at http://www.islr.ie/Reviews/1999/eurocourt_human_rights.php.

¹⁸¹ Editorial, *Spoiling the Child?*, IRISH INDEP, Sept. 25, 1998. See also Moira J. Maguire & Seamus O. Cinneide, ‘A Good Beating Never Hurt Anyone’: *The Punishment and Abuse of Children in Twentieth Century Ireland*, 38 J. SOC. HIST. 635 (2005) [hereinafter ‘A Good Beating Never Hurt Anyone’].

¹⁸² Non-Fatal Offences Against the Person Act, 1997 (Act No. 26/1997) (Ir.).

¹⁸³ Kitty Holland, *Ireland Censured Over Child Slapping*, IRISH TIMES, Jun. 8, 2005, available at <http://www.guardian.co.uk/uk/2002/sep/14/scotland.politics>.

¹⁸⁴ See *World Organisation Against Torture (“OMCT”) v. Ireland*, [2006] 43 Eur. Ct. H.R. 12, 14 (“The Common law provides a defence to a charge of assault against a child that the treatment in question amounted to ‘reasonable chastisement.’ The common law therefore permits parents and other persons in loco parentis to administer moderate or reasonable physical chastisement to a child.”).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See ‘A Good Beating Never Hurt Anyone,’ *supra* note 180.

¹⁸⁸ Peter Newell, *Briefing from Global Initiative to End All Corporal Punishment of Children* (Jan.

that France has not banned it in schools is arguably reflective of wide-spread acceptance of it as a form of discipline; this is particularly evidenced by the fact that some in France have, on several occasions, proposed that the country implement a ban of some form and yet none has been approved.¹⁸⁹

The contrast between France and its European neighbors came to a front in 2008, in the case of *N. v. D.*,¹⁹⁰ before the High Court of Ireland. There, two children's paternal grandparents sued the children's mother claiming she wrongfully took the children out of France and brought them to Ireland, not allowing them to return to France to see their grandparents who had visitation rights.¹⁹¹ In her defense, the mother claimed that she would not return them to France because in France the children had been subject to corporal punishment at the hands of their grandparents and France lacked legal protections to ensure that the children would be safe against excessive beatings.¹⁹² In its discussion on the matter, the High Court of Ireland acknowledged that corporal punishment was legal in France and particularly embraced in rural areas.¹⁹³ At the same time, however, it acknowledged that Ireland had only recently taken steps to restrict it and so ordered that the mother allow the children to return to France, citing the court's belief that France, as a member of the Council of Europe, would not allow for excessive corporal punishment of the children, even if it did allow corporal punishment in some form.¹⁹⁴

There are two important lessons to take from this ruling. First, it demonstrates the differences between states that outlaw corporal punishment in some form and those that do not. What is troublesome, however, as the mother's position seems to demonstrate, is that what is "reasonable" punishment might vary from country to country—what is excessive in Ireland may be acceptable in France or in French schools. Second, it demonstrates how "reasonable" varies between individuals and regions, not just countries. Presumably, the mother thought the corporal punishment implemented by the grandparents was excessive while the grandparents did not. As such, without a complete ban, it is logical to suspect that one parent or teacher could use "reasonable chastisement" against a child despite another parent's belief it was unreasonable.

2008), available at <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/globalall.pdf>.

¹⁸⁹ *Should Parents Smack their Children? The Great Debate, in French*, ECONOMIST, Sept. 18, 2003, available at <http://www.economist.com> (with a subscription).

¹⁹⁰ *N. v. D.*, [2008] IECH 51.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

I don't wish to be too judgmental about it as the evidence before me does not suggest that the children have been actually harmed, either physically or psychologically, on account of this to date. It is not that long ago that corporal punishment was outlawed in this country. The reasons for doing so were many and varied. Some of those reasons included a belief that 'there is a better way' of disciplining children. *Id.*

Finally, *N v. D* demonstrates the potential difficulty of having a “spotty” ban on corporal punishment in any given area. For example, the children’s grandparents, had they been dissatisfied with an Irish, German, or Swedish prohibition, could have simply taken the children to France and smacked them there. Although this choice of law approach does not sound unreasonable on its face, one must keep in mind that children tend not to have much say over which laws will apply to them and have little power to choose whether they reside in a country that outlaws it or one that allows it. One can imagine how an American child, for example, who moved from one state to another or who had separated parents sharing custody but living in different states could be traumatized when they are hit in one state’s school system but not in another. As such, a system of minimal restraints across the board is necessary.

V. POST-BAN DEVELOPMENTS IN EUROPE AND THE POSITIVE SIDE OF BANNING CORPORAL PUNISHMENT ON THE CONTINENT

Certainly, many skeptics question the effectiveness of a ban on corporal punishment. Since its passage in the late 1970s, such bans have not been without criticism. In 1982, a number of individuals challenged Sweden’s ban before the E.C.H.R. in *Seven Individuals v. Sweden*,¹⁹⁵ claiming that it violated religious freedom and that it was contrary to the Convention’s position that member states’ goals will not unreasonably interfere with parents’ rights to raise their children as they saw fit.¹⁹⁶ Similar to the later *Williamson* decision—which found the U.K. ban in schools did not violate this right—the Committee found that the Swedish ban did not violate any provisions of the Convention.¹⁹⁷

The basis for the Committee’s decision was narrower than in *Williamson*.¹⁹⁸ In the first place, absent from the 1982 opinion is any holding that freedom from being hit is a fundamental right.¹⁹⁹ This is in stark contrast with other cases, such as the later opinions in *A v. United Kingdom*.²⁰⁰ Along this line, as well, the court in *Seven Individuals* justified its ruling in respect to the interference with childrearing charge in that the Swedish ban does not impose criminal sanctions upon violators, and therefore it was not an unreasonable interference.²⁰¹ Again, this is in contrast with *Y v. United Kingdom*, where the Court sanctioned the U.K. for not pursuing criminal charges.²⁰² This criminal and civil distinction, unfortunately, may pose a risk to Germany’s prohibition on corporal punishment in

¹⁹⁵ *Seven Individuals v. Swed.*, 29 DR 104 (1982).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Seven Individuals v. Swed.*, 29 DR 104 (1982).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Y v. United Kingdom*, *supra* note 144.

the home and Ireland's prohibition in schools, since both make the use of it in those instances a criminal offense.²⁰³ However, this "civil-only" approach may be a compelling choice for American states which fear interfering too heavily with parents' right to rear their children as they see fit or schoolteachers' authority.

In the years immediately following the Swedish prohibition, a study was taken to gauge the effects of the ban.²⁰⁴ The study acknowledged the difficulty of measuring the effects of the ban so soon after its passage. However, it found that the "soft" ban was actually having a substantial effect on decreasing the use of corporal punishment.²⁰⁵ The study acknowledged that it was difficult to determine whether decrease in support was a result of the ban or of otherwise shifting attitudes, but found that there was at least a correlation between the passage and decrease in support for corporal punishment and a decrease in hitting children in homes.²⁰⁶

A more recent study has reinforced these findings, showing a decline in support for corporal punishment long after the ban.²⁰⁷ This later study recognized Sweden's goals as threefold—(1) changing public perception about corporal punishment to discourage it, (2) identifying children at risk of abuse at the hands of parents using corporal punishment, and (3) promoting social programs encouraging positive non-corporal discipline.²⁰⁸ The study acknowledged that Sweden has met all of these goals, and suggests that, although it is difficult to definitely conclude that child abuse has significantly decreased since the ban, child abuse mortality has declined.²⁰⁹

There are indications, as well, that the long-term goals of Sweden's ban—decreasing the negative effects of corporal punishment—have been met. First, since the ban, Sweden has seen a decrease in the rate of youth involvement in crime.²¹⁰ This is reflected by a decrease in motor vehicle theft, common theft, petty theft, drug trafficking, and major theft among youths since the passage.²¹¹ Furthermore, the rate of youth violence against peers and rape has decreased from 1979, when the ban was passed, to 2000.²¹² Coupled with these is a decrease in the rate of youth consumption of alcohol, drug usage, and suicide.²¹³ Surely, this cannot all be attributed to the ban; however, it demonstrates that there is some

²⁰³ *Id.*

²⁰⁴ Ziegret, *supra* note 95.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Joan E. Durrant, *Evaluating the Success of Sweden's Corporal Punishment Ban*, 23 CHILD ABUSE & NEGLECT 435 (1999).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 446.

²¹⁰ Joan E. Durrant, *Trends in Youth Crime and Well-Being Since the Abolition of Corporal Punishment in Sweden*, 31 YOUTH SOC'Y 437 (2000).

²¹¹ *Id.* at 441; *see also id.* at 444.

²¹² *Id.* at 441-42; *see also id.* at 444.

²¹³ *Id.* at 444.

correlation between banning corporal punishment and reducing crime and substance abuse among youths and at the very least supports the arguments of social scientists who argue that corporal punishment increases the rate crime and substance abuse among such individuals later in life.²¹⁴ It also logically works to refute the arguments of those who believe that banning corporal punishment in schools will lead to chaos.

Other countries which have passed such bans have seen positive results as well. Germany, for example, has seen some changes in parents' attitudes in support of the ban.²¹⁵ For the most part, German parents have changed their attitudes about what is appropriate regarding punishment and so have been much more cautious in implementing discipline.²¹⁶ In the short time since the ban was passed, Germany has seen a reduction of family violence against children.²¹⁷ Although, again, it cannot be wholly attributed to the ban, it is clear that the ban—at least in fostering discussion and awareness about what is legal and what effect hitting children has on their development—has had a substantial effect on the way that parents conceptualize child-rearing and deterring child abuse.²¹⁸

Even in states which were late or down-right resistant in implementing prohibitions against corporal punishment, there have been positive effects following even limited bans and increased social awareness. In Ireland, for example, in 1999, a Limerick principal was convicted of assault for losing his temper and smacking one of his students.²¹⁹ Such measures, trying those who strike children in schools, will go a long way to discourage teachers from crossing the line into potential abuse of their students. Likewise, these developments in the corporal punishment debate have encouraged many in Ireland to call for a full-scale prohibition against corporal punishment.²²⁰ These advocates acknowledge that rates of violence against children are significantly lower in European states that have banned corporal punishment in both the home and in school than those which have only banned it in schools or neither the home nor schools.²²¹

VI. MODELING A CAMPAIGN FOR A WIDER BAN ON CORPORAL PUNISHMENT – THE COUNCIL OF EUROPE'S APPROACH

In 2006, the E.U. officially recognized its adoption of the U.N.'s recommendations that its member states ban corporal punishment both in the home

²¹⁴ *Corporal Punishment of Children*, *supra* note 27.

²¹⁵ Bussman, *supra* note 94, at 299-301.

²¹⁶ *Id.* at 301-03.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Angry Teachers Blame Disciplinary System*, IRISH TIMES, Jan. 1, 1999.

²²⁰ *See, e.g.*, Arthur, *supra* note 179.

²²¹ *Id.*

and in schools.²²² The adoption came years after many recognized an increasing trend in E.U. member states of banning corporal punishment.²²³ The official legislation passed by the Council of Europe (“C.O.E.”), however, was recommended and adopted in 2004, before its 2006 recognition by the E.U. The recommendation by the C.O.E. dictates that its member states must ban all forms of corporal punishment and acknowledges that, despite the fact that five member states allow it, the European Social Charter, Revised European Social Charter, and the E.C.H.R. have consistently found children are entitled to a corporal punishment-free upbringing.²²⁴ Likewise, the recommendation frames the freedom from being hit as a fundamental right that all ought to enjoy.²²⁵ As sweeping as Recommendation 1666 may appear, it is couched in language indicating the Council’s potential inability to force states to adopt such legislation.²²⁶

Perhaps since it seems to acknowledge its lack of authority for simply mandating abolition of corporal punishment, the Recommendation calls on the C.O.E. to start a thorough and extensive campaign to aid member states and educate people on its negative effects.²²⁷ Pursuant to this, in 2008, the C.O.E. began such a campaign—distributing information pamphlets, pamphlets on positive parenting, gathering and publicizing celebrity positions against corporal punishment, distributing legal documentation on corporal punishment, organizing lectures, holding rallies, and lobbying legislators.²²⁸ The C.O.E.’s Commissioner for Human Rights, in a speech given in 2008 before the launch of the campaign, announced the goals of the campaign to be to assist member states in implementing standards protecting children which would satisfy the U.N.’s recommendations to ban it, to develop a practical strategy to enact such legislation, and to improve the C.O.E.’s visibility in championing children’s rights.²²⁹

²²² *Opinion of the European Economic and Social Committee on the Communication from Commission – Towards an EU Strategy on the Rights of the Child*, COM (2006) 367 final (Dec. 13, 2006).

²²³ Peter Ford, *Opponents of Spanking Children Gaining Legal Ground in Europe, Eight Nations Ban Corporal Punishment, and More are Following Suit as Children’s Rights Win Wider Recognition*, OREGONIAN, Feb. 6, 2000, at A20.

²²⁴ EUR. PARL. ASS. DEB. 21st Sess. 1666 (June 23, 2004), available at http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/erec1666.htm#_ftn1.

²²⁵ *Id.*

²²⁶ *Id.*

It [the European Parliamentary Assembly] invites the Committee of Ministers and other Council of Europe bodies concerned, as a matter of urgency, to establish strategies, including technical assistance, for achieving this objective in conjunction with member states . . . [f]inally, the Assembly invites the Committee of Ministers to recommend that the member states . . . *Id.*

²²⁷ *Id.*

²²⁸ *Id.* See also Council of Europe, *Abolishing Corporal Punishment of Children: Questions and Answers*, http://www.coe.int/t/transversalprojects/children/pdf/QuestionAnswer_en.pdf.

²²⁹ Eur. Consult. Ass. Deb. ___ Sess. ___, *Children and Corporal Punishment: “The Right Not To Be Hit, Also a Children’s Right,”* CommDh/IssuePaper (2006)1Rev (2008), available at <https://wcd.coe.int/ViewDoc.jsp?id=1237635&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679> [hereinafter *The Right Not To Be Hit*].

The C.O.E.'s approach may seem too soft and potentially ineffective at first glance; however, as the C.O.E. itself recognizes, it has had great success with similar campaigns in the past. For example, the C.O.E. sought to eliminate capital punishment in its member states many years ago and, despite resistance from some states, the C.O.E. was successful in eliminating the practice in all of its member states.²³⁰ Also, although the campaign to ban corporal punishment has only recently begun, there does not seem to be any reason to suspect that the C.O.E. will be less successful in banning it than it was in banning capital punishment. Since legislation was passed in European countries, on at least two separate occasions individuals from C.O.E. countries have challenged legislation in their respective states.²³¹ On both occasions the E.C.H.R. found such legislation in no way interfered with parents' child-rearing rights, never mind a teacher's rights to hit children.²³² Although certainly not conclusive on the matter, this suggests that European countries' broad and extensive bans on corporal punishment are, by their country and the C.O.E.'s standards, not unfairly burdensome on parent's rights to raise their children as they see fit and could potentially serve as a model for the United States.

As a testament to the campaign's achievements, since the C.O.E. proposed its campaign in 2004 and began to implement it, a number of European countries have taken the initiative either to pass legislation to ban corporal punishment entirely or otherwise announce their intent to do so; such countries include Greece in 2006, Hungary in 2004, the Netherlands in 2007, Portugal in 2007, Romania in 2004, and Spain in 2007; the Czech Republic, Estonia, Ireland, Lithuania, Luxembourg, Slovakia, and Slovenia have likewise all pledged to ban it in the near future.²³³ Such progress suggests that the campaign is working and there is no reason to suppose that such a campaign could not work in the U.S. or that, even if it did not work in all states, it would not have a significant impact in most states.

VII. CONCLUSION

Children in the United States, often for both practical and legal reasons, do not have the option to simply get up and move to jurisdictions which prevent their parents and teachers from hitting them. Although there is some dispute over the extent of the negative impact that corporal punishment has on children, the risks of

²³⁰ *Id.* ("Therefore the Recommendation called for a coordinated and concerted campaign for the total abolition of corporal punishment of children. Noticing the success of the Council of Europe in abolishing the death penalty, it called for Europe to become, as soon as possible, 'a corporal punishment-free zone for children'"); see also Chris Game, *Capital Punishment: The Biggest Question Hanging Over Bush*, BIRMINGHAM POST, NOV. 13, 2003, available at 2006 WLNR 19663086; Amnesty Int'l, *Abolition Throughout the Vast Majority of Europe, Including the Vast Majority of COE States*, available at <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>.

²³¹ See *Williamson v. Sec'y of Educ.*, *supra* note 164; *Seven Individuals v. Swed.*, *supra* note 194.

²³² *Id.*

²³³ See *The Right Not to Be Hit*, *supra* note 228.

subjecting children to being hit by authority figures seem daunting. Drawing the line between “reasonable” and excessive punishment is often subjective and unclear, and too often parents and teachers may cross the line from “reasonable” hitting into abuse or full-scale assault, believing they are acting in an acceptable fashion. As such, we as a nation ought to err on the side of caution and safeguard our children’s protection and welfare, even if it means hindering our unfettered right to discipline children the way we might like to.

The United States and Europe face a number of similar challenges concerning corporal punishment, among them widespread support for hitting children.²³⁴ Likewise, a number of states in both the United States and the Council of Europe ban corporal punishment, at least in some form, while a number do not.²³⁵ The Council of Europe, the European Union, and the United Nations have all found that it is a fundamental human right for defenseless children to have an upbringing free from being smacked by their teachers or parents while the United States, through the Supreme Court in *Ingraham v. Wright*, seems to have rejected such a right.²³⁶ Of course, the Supreme Court could overrule its holding in *Ingraham* in order to uphold human-rights principles supported by the E.C.H.R. and the U.N. which deem corporal punishment of children as cruel.

The main frustration here, though, is that despite the fact that the United States federal government potentially has more authority than the Council of Europe to implement legislation to force the states to ban corporal punishment in its member states, the United States government has failed to do so while the Council of Europe has attempted to do so. The effect that this embrace, or lack thereof, has is evident. Seeing how successful the Council of Europe has been in abolishing capital punishment and how marked the initial success has been in abolishing corporal punishment, the United States federal government ought to embrace an approach similar to that of the Council of Europe. In fact, since it seems that the United States could make abolition of corporal punishment a condition for the receipt of federal funds for education—likely a stronger and cheaper incentive than just implementing a wide-reaching campaign—the United States ought to do just that. When faced with the welfare and safety of our children, a twofold campaign—legislative and informative—is the best, and perhaps only, way that we as a nation can begin to prevent our children from being hit, abused, or even assaulted at the hands of their teachers and even their parents in the pursuit of “order.”

²³⁴ See discussion *supra* Part I.

²³⁵ Compare discussion *supra* Part II with Part IV.

²³⁶ See discussion *supra* Part II and Part III.