

UPHOLDING THE DIGNITY AND BEST INTERESTS OF CHILDREN: INTERNATIONAL LAW AND THE CORPORAL PUNISHMENT OF CHILDREN

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I

INTRODUCTION—A PRE-HISTORY

Early legal statements are conspicuously silent on children's rights: the Ten Commandments, arguably the most influential of all legal codes, contains a clear normative pronouncement on parent-child relations—"Honor, thy father and thy mother."¹ But the commandment is in terms of respect for parents, and it is silent on the obligations of parents to love and nurture their children.² Is it then surprising that well into early modern times children were being prosecuted in England for abusing parents, but that prosecutions of parents for beating children appear not to have taken place?³

One of the earliest recognitions of children's rights is found in the Massachusetts *Body of Liberties* of 1641. Parents are told not to choose their children's mates and not to use unnatural severity against their children.⁴ Children, furthermore, are given "free liberty to complain to the Authorities for redress."⁵ But this is also the law that prescribes the death penalty for children over sixteen who disobey their parents.⁶ There is no evidence that children did in fact successfully litigate against their parents, nor is there any evidence that any disobedient children were executed.⁷ This recognition of children's rights nevertheless remains interesting in showing, as it does, that 370 years ago, protection of children went hand-in-hand with adding the power of the state to parental authority.

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1. *Exodus* 20:12; *Deuteronomy* 5:16.

2. On religion and corporal punishment of children, see generally PHILIP GREVEN, *SPARE THE CHILD* (1991).

3. Richard Helmholz, *And Were There Children's Rights in Early Modern England?*, 1 INT'L J. CHILD. RTS. 23, 27 (1993).

4. ELIZABETH PLECK, *DOMESTIC TYRANNY* 22 (1987).

5. *Id.*

6. *Id.* at 25.

7. *See id.* at 26-27.

The two centuries that followed are hardly notable for their propagation of the rights of children. The Victorian novel is replete with floggings of children: *David Copperfield*, *Nicholas Nickleby*, *Oliver Twist*, *Jane Eyre*, *The Way of All Flesh*—the litany is almost endless. Indeed, graphic descriptions of floggings permeate novels well into the twentieth century: D.H. Lawrence's *The Rainbow*, Richard Llewellyn's *How Green Was My Valley*, Lucy Maud Montgomery's *Anne of Avonlea*, and the popular *Billy Bunter* stories.⁸ The nineteenth century, not surprisingly, also saw the birth of the child-saving movement, spawning institutions like the juvenile court.⁹ Child-protection legislation also came about, commonly in the English-speaking world, after a campaign for its passage in England and after a similar campaign to protect domestic animals.¹⁰ Yet cruelty remained a social construct, and founders of societies to protect children from abuse still vigorously defended corporal chastisement. Thus, one of the founders of the New York Society for the Prevention of Cruelty to Children (SPCC), Henry Bergh, was prepared to uphold “a good wholesome flogging” as appropriate for “disobedient children.”¹¹ Others began to advocate children's rights and to voice some discomfort with corporal chastisement, as well.¹² Thus in 1892 the American children's novelist Kate Douglas Wiggin thought it likely that the “rod of reason” would have to replace “the rod of birch.”¹³ In Sweden, Ellen Key in *The Century of the Child* looked forward to “increasing limitations on the rights of parents over children,” and to the end of corporal punishment.¹⁴ She described such punishment as “humiliating for him who gives it as for him who receives it.”¹⁵ She looked forward to the time when children would be treated as equals and be given “the same consideration, the same kind confidence” which is shown to adults.¹⁶

But the most significant of these early thinkers was Janusz Korczak, best known today as the man who voluntarily accompanied 200 children on their

8. CHARLOTTE BRONTË, *JANE EYRE* (1847); SAMUEL BUTLER, *THE WAY OF THE FLESH* (1903); CHARLES DICKENS, *DAVID COPPERFIELD* (1850); CHARLES DICKENS, *NICHOLAS NICKLEBY* (1839); CHARLES DICKENS, *OLIVER TWIST* (1839); D.H. LAWRENCE, *THE RAINBOW* (1915); RICHARD LLEWELLYN, *HOW GREEN WAS MY VALLEY* (1939); LUCY MAUD MONTGOMERY, *ANNE OF AVONLEA* (1909); FRANK RICHARDS, *BILLY BUNTER OF GREYFRIARS SCHOOL* (1947); *see generally* EDWARD ANTHONY, *THY ROD AND STAFF* (1995); HUGH CUNNINGHAM, *CHILDREN OF THE POOR* (1991); JOHN WALLER, *THE REAL OLIVER TWIST 109–15* (2006); JAMES WALVIN, *A CHILD'S WORLD 45–60* (Penguin Books 1982), especially ch. 3.

9. *See* ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 3 (1969).

10. *See* GEORGE K. BEHLMER, *CHILD ABUSE AND MORAL REFORM IN ENGLAND 1870–1908* (1982).

11. *See* JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* 21 (1991).

12. The etymology of chastisement is interesting. It originates in the same source as “chaste,” and thus denotes “making pure.” NICHOLAS ORME, *MEDIEVAL CHILDREN* 84 (2001).

13. KATE DOUGLAS WIGGIN, *CHILDREN'S RIGHTS* 19 (1892).

14. ELLEN KEY, *THE CENTURY OF THE CHILD* 317 (1909) (originally published in Swedish in 1900).

15. *Id.* at 327.

16. *Id.* at 109.

journey to Treblinka, where he and they were duly slaughtered.¹⁷ His *How to Love a Child* and *The Right of the Child to Respect* contain a “Convention” on the Rights of the Child so far ahead of its time—formulated as it was in the 1910s—that it is not surprising the world barely noticed.¹⁸ Even today Korczak’s writings have not been fully translated into English.¹⁹ Of the many rights Korczak accorded children was the right to a government that protects them from neglect, cruelty, and any exploitation of any kind.²⁰ This is as close as he got to emphasizing that corporal punishment was wrong, but this is what he believed: the institution he ran did not use corporal punishment. And a brief lecture he gave on child psychology makes it clear what his view was. Entitled *The Heart of The Child*, it was given in the X-ray room of the children’s hospital.²¹ Korczak entered with a small boy clutching his hand. Without a word he took the boy’s shirt off, placed him behind a fluoroscope and turned off the overhead light. Everyone could now see the boy’s heart beating rapidly on the screen. “Don’t ever forget this sight,” Korczak told his audience.²² “Before you raise a hand to a child, before you administer any kind of punishment, remember what his frightened heart looks like.”²³ That was the sum total of the lecture. Korczak also observed that there are many terrible things in this world, but “the worst is he who is afraid of his father, mother or teacher. He fears them instead of loving and trusting them.”²⁴

II

INTERNATIONAL DECLARATIONS ON CHILDREN’S RIGHTS: GUIDING PRINCIPLES

The first international declaration on children’s rights was emerging as Korczak wrote, but it was limited in its aspirations. The 1924 Declaration of Geneva was premised on “mankind[’s]” owing the child “the best it has to give.”²⁵ It is stated in five terse principles, and these emphasize welfare.²⁶ The issue of corporal chastisement is not raised.²⁷ Interestingly, Korczak commented upon the Geneva Declaration, saying that its authors “ha[d] mistaken duties for

17. See BETTY J. LIFTON, *THE KING OF CHILDREN* 338–45 (1988).

18. JANUSZ KORCZAK, *LOVING EVERY CHILD—WISDOM FOR PARENTS* xi (Sandra Joseph ed., 2007).

19. *But see id.* (good selection of Korczak’s writings in English). See generally JANUSZ KORCZAK, *GHETTO DIARY* (2003) (recording Korczak’s thoughts in the Warsaw Ghetto in 1942).

20. JANUSZ KORCZAK, *PRAWO DZIECKA DO SZACUNKU [THE CHILD’S RIGHT TO RESPECT]* (1929).

21. LIFTON, *supra* note 17, at 144.

22. *Id.*

23. *Id.*

24. *Id.*

25. Dominique Marshall, *The Construction of Children as an Object of International Relations: The Declaration of Children’s Rights and the Child Welfare Committee of the League of Nations, 1900–1924*, 7 INT’L J. CHILD. RTS. 103, 103 (1999).

26. *Id.* at 129.

27. *Id.*

rights. Instead of making demands they try to persuade. The Declaration is only an appeal for good-will, a request for more understanding.”²⁸ Nothing came of the Geneva Declaration.

The next Declaration, the UN Declaration on the Rights of the Child, came thirty-five years later.²⁹ It repeated the exhortation that mankind owed the child “the best it has to give.”³⁰ It mentioned the need for children to have “a happy childhood.”³¹ Principle 2 stressed that children should be given “opportunities and facilities . . . to enable [them] to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”³² This may have been the first time the “dignity” of the child was recognized in an international document. The same principle also stressed that “in the enactment of laws for this purpose the best interests of the child shall be the paramount consideration.”³³ Two observations implicating corporal punishment may be made: First, although the corporal-punishment issue is not specifically addressed, one can read Principle 2 as discouraging its use. Second, by stating that children’s best interests be paramount, the standard goes beyond “a primary consideration,” the language of the Convention adopted thirty years later.³⁴ Principle 7 is also significant: it states that the “best interests of the child shall be the guiding principle of those responsible for [the child’s] education and guidance.”³⁵ Since corporal punishment is not in a child’s best interests, this principle is a further endorsement of the beginnings of an international understanding that hitting children is wrong.

A. Dignity

The claim was emerging during the early part of the twentieth century that corporal punishment was inconsistent with “dignity,” and that it was not in a child’s best interests. What these concepts involve would require books: only the surface is scratched here.

“Dignity” comes from the Latin *dignitas*. The Latin term denotes both the status of an individual and the bearing that is associated with that status.³⁶ Immanuel Kant sought to derive man’s dignity from autonomy and rationality;

28. PHILIP E. VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD* 96 (1992).

29. Declaration on the Rights of the Child, G.A. Res. 1386, U.N. Doc. A/4354 (Nov. 20, 1959).

30. *Id.* pmbl.

31. *Id.* pmbl.

32. *Id.* princ. 2.

33. *Id.*

34. See UN Convention on the Rights of the Child art. 3, para. 1, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

35. Declaration on the Rights of the Child, *supra* note 29, princ. 7.

36. GIORGIO AGAMBEN, *REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE* 66 (1999).

earlier thinkers had found it in revealed religion.³⁷ Radical Enlightenment thinkers like Tom Paine democratized human dignity: it no longer depended on whether one was an aristocrat or a labourer.³⁸ Dignity was to become a key normative principle in post-World War II Holocaust thinking. It is a foundational norm of the UN.³⁹ International legality was premised on a shared commitment to the value of the individual over and above the interests of the state. And these commitments are in turn supported by an appeal to human dignity. Yet “dignity” remains a contested and problematic concept.⁴⁰ Part of the reason why appeals to dignity are debated and contested is that they have an appearance of finality about them. Once dignity is invoked, the inquiry collapses—one can go no further. Dignity asserts the worth of the person who is imbued with it. We cannot define what a human being is without recourse to an essential characteristic such as dignity. Animals do not have dignity; children, I would argue, do.

The UN Convention on the Rights of the Child emphasizes dignity in a number of places.⁴¹ Article 37(a) lays down the right of the child not to be subjected to cruel, inhuman, or degrading treatment or punishment. This provision is designed to protect both the dignity and the physical and mental integrity of the child. Article 16 gives the child the right not to be subjected to “unlawful attacks on his or her honour and reputation” and the right to protection against such attacks.⁴² Article 28(2) specifically invokes “dignity.”⁴³ It requires that the signatory parties (States Parties) “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the . . . Convention.” Punishment should rehabilitate, not mark a child’s body.⁴⁴ Article 40(1) also invokes “dignity”: States Parties are required to ensure that a child accused of violating penal law be “treated in a manner consistent with the promotion of the child’s sense of dignity and worth”⁴⁵ This “reinforces the child’s respect

37. See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 97 (H. Paton trans., 1948).

38. See generally TOM PAINE, *RIGHTS OF MAN* (Henry Collins ed., Penguin Books 1969). Paine did not go so far as to talk of the dignity of a child.

39. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 144 (2001).

40. This article shall not address questions whether dignity can exist in a stratified society, even one like Nazi Germany, where, of course, dignity was denied to non-Aryans (as well as to Communists, homosexuals, et cetera). For these debates, see generally CHRISTIAN JOERGES & NAVRAJ SINGH GHALEIGH, *DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS* 264–66 (2003).

41. See UN Convention on the Rights of the Child, *supra* note 34.

42. *Id.* art. 16.

43. *Id.* art. 28, para. 2.

44. See generally Anne McGillivray, ‘He’ll Learn It On His Body’: *Disciplining Childhood in Canadian Law*, 5 INT’L J. CHILD. RTS. 193 (1997).

45. UN Convention on the Rights of the Child, *supra* note 34, art. 40, para. 1.

for the human rights and fundamental freedoms of others.”⁴⁶ The same emphasis is placed on the treatment of children who have been convicted. A child so deprived of liberty must be treated “with humanity and respect for the inherent dignity of the human person.”⁴⁷ Some of these provisions refer to “dignity,” others to “human dignity” and to “inherent dignity.”⁴⁸

Article 28(2) of the Convention, which evokes the child’s “human dignity” in the administration of school discipline, does not mention disciplining specifically by parents or other caretakers. By contrast, Article 19 makes no mention of dignity, but it deals with the need “to protect the child from all forms of physical or mental violence, injury, or abuse . . . *while in the care of parent(s), legal guardian(s),*” and other caretakers.⁴⁹ Though some would contest this, it is clear (and the UN Committee on the Rights of the Child regularly affirms) that, in this provision and others, corporal punishment by parents and others is outlawed by the Convention.

B. The Best Interests of the Child

The international framework for a prohibition on corporal punishment of children also embraces a “best interests” principle.⁵⁰ This is set out in Article 3 of the UN Convention on the Rights of the Child, which states, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The “best interests” is a new and controversial principle of interpretation in international law, for “[d]eciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.”⁵¹ Of course, what is in a child’s best interests is value-laden, and to some extent indeterminate. But it may be argued that there are some givens and that violence against a child may be considered one matter upon which there should be consensus. The best-interests principle can, of course, cloak prejudices: it can act as a smokescreen for a phobia about a particular religion, for example, or for anti-gay prejudices.⁵² Attacks on male circumcision in the name of the child’s best interests may reflect antisemitism or

46. *Id.*

47. *Id.* art. 37, para. c.

48. The Preamble (in its first paragraph) recognizes “the inherent dignity” and “the equal and inalienable rights of all members of the human family” as the “foundation of freedom, justice and peace in the world.” *Id.* pmbl.

49. *Id.* art. 19 (emphasis added).

50. See generally MICHAEL FREEMAN, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: ARTICLE 3—THE BEST INTERESTS OF THE CHILD (2007).

51. Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (Summer 1975).

52. See Helen Reece, *The Paramountcy Principle: Consensus or Construct?* 49 CURRENT LEGAL PROBS. 267, 286–303 (1996) (criticizing the application of the “best interests” principle to deny homosexual parents custody of their children).

hostility towards Muslims.⁵³ The principle can also be a reflection of “dominant meanings.”⁵⁴ The French sociologist Irene Théry sees it as an “alibi for dominant ideology, an alibi for individual arbitrariness, an alibi for family and more general social policies for which the law serves as an instrument.”⁵⁵ There is also a distinction between current best interests and future-orientated interests,⁵⁶ and the two can come into conflict. What makes a child happy at age seven (corporal punishment does not) may have adverse consequences at twenty-one (when the absence of discipline leads to conduct that may not be in his best interests).⁵⁷

Article 3, which first mentions the child’s best interests, does not refer to parents. The 1979 Polish draft to the Working Group would have applied the best-interests principle to all actions concerning children “whether undertaken by their parents, guardians, social or state institutions”⁵⁸ It was at the behest of the United States⁵⁹ (ironically one of only two countries not to have ratified the Convention)⁶⁰ that the principle was limited to “official” actions (though this word is not used in the final formulation). The final text reflects a dominant view that obligations should not be imposed on parents and guardians.⁶¹

The best-interests principle is extended, if rather weakly, to parents in Article 18(1), which states that “[p]arents or . . . guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”⁶² The principle’s weakness is in the use of the word “will,” in contrast to the mandatory “shall” in Article 3(1), which addresses actions taken by institutional, legal, administrative, or legislative authorities, for all of which “the best interests of the child shall be a primary consideration.”⁶³

53. James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 LAW & CONTEMP. PROBL. 189 (Spring 2010).

54. Irene Théry, “*The Interest of the Child*” and the Regulation of the Post-Divorce Family, in CHILD CUSTODY AND THE POLITICS OF GENDER 78, 81 (Carol Smart & Selma Sevenhuijsen eds., 1989).

55. *Id.* at 82.

56. See ALLEN BUCHANAN & DAN BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 247 (1989) (discussing the two types of interests in the context of infants).

57. Mnookin, *supra* note 51, at 260.

58. Comm’n on Human Rights, *Question on a Convention on the Rights of the Child*, at 2–3, U.N. Doc. E/CN.4/1349 (Jan. 17, 1980).

59. SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 90 (1999) (citing U.N. Doc. E/CN.4/L.1575, ¶ 20 (1981)).

60. Somalia is the other, and it does not have a Government. It is said you should be known by the company you keep!

61. See Comm’n on Human Rights, 45th Sess., Item 13 ¶¶ 117, 126, E/CN.4/1989/48 (Mar. 2, 1989).

62. UN Convention on the Rights of the Child, *supra* note 34, art. 18.

63. There is a clear preference for the nuclear family structure implicit in Article 18. See Frances Olsen, *Children’s Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, in CHILDREN, RIGHTS AND THE LAW 192, 199 (Philip Alston, Stephen Parker & John Seymour eds., 1992) (noting that the provision makes both parents responsible for children).

What is meant by “best interests,” or at least what the UN Committee on the Rights of the Child (the Committee) believes it means, can be understood by examining its reports on the practices of States Parties. The Committee condemns corporal punishment, whether within the family, at schools, or in institutions, as not being in the child’s best interests as addressed in both Article 19 and Article 3. Thus, in relation to Australia, the Committee expressed its concern about the lack of prohibition of corporal punishment “however light” in schools, at home, and in institutions.⁶⁴ This, it said, contravened many provisions in the Convention, including Article 3. In relation to Canada, the Committee recommended that physical punishment of children in families be prohibited: it cited both Articles 3 and 19.⁶⁵ In relation to the Czech Republic, the Committee was “concerned that corporal punishment [was] still used by parents and that internal school regulations do not contain provisions explicitly prohibiting corporal punishment, in conformity with articles 3, 19 and 28 of the Convention.”⁶⁶ And the Committee has consistently criticized the United Kingdom for its refusal to ban corporal punishment by parents. In 1995, it suggested that the United Kingdom undertake “additional educational campaigns”

in connection with the child’s right to physical integrity . . . and in the light of the best interests of the child Such measures would help to change societal attitudes towards the use of physical punishment in the family and foster acceptance of the legal prohibition of the physical punishment of children.⁶⁷

Since then, laws have been passed in England and Wales effecting a compromise: reasonable chastisement remains a defense only to common assaults on children (in lay language, when a mark is not left), but not to occasioning actual bodily harm.⁶⁸ The Committee, unsurprisingly, has condemned this half-way solution. And rightly so: the message it gives to parents is that they may hit their children.⁶⁹

There are many other examples of the Committee’s recommendations regarding corporal punishment, including those made to Fiji,⁷⁰ Ghana,⁷¹

64. Comm. on the Rights of the Child, *Concluding Observations: Australia*, ¶ 15, U.N. Doc. CRC/C/15/Add.79 (Oct. 10, 1997).

65. Comm. on the Rights of the Child, *Concluding Observations: Canada*, ¶ 25, U.N. Doc. CRC/C/15/Add.37 (June 20, 1995).

66. Comm. on the Rights of the Child, *Concluding Observations: Czech Republic*, ¶ 18, U.N. Doc. CRC/C/15/Add.81 (Oct. 27, 1997).

67. Comm. on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, ¶ 31, U.N. Doc. CRC/C/15/Add.34 (Feb. 15, 1995).

68. See, e.g., Children Act, 2004, c. 31, § 58 (Eng., Wales).

69. This was the evidence in Canada (which has effected a similar compromised measure). See Joan Durrant, Nadine Sigvaldason & Lisa Bednar, *What Did the Canadian Public Learn from the 2004 Supreme Court Decision on Physical Punishment?*, 16 INT’L J. CHILD. RTS. 229, 242–43 (2008) (study results indicated that a majority of parents focused on right to use force, not the limitations on the use of force, after Canada’s Supreme Court issue a ruling on the corporal punishment).

70. Comm. on the Rights of the Child, *Concluding Observations: Fiji*, ¶ 16, U.N. Doc. CRC/C/15/Add.89 (June 24, 1998).

Ireland,⁷² Jamaica,⁷³ Korea,⁷⁴ Kyrgyzstan,⁷⁵ Lebanon,⁷⁶ Senegal,⁷⁷ and Togo.⁷⁸ In the case of Ghana, the Committee referred specifically to caning (recommending that it should be “withdrawn from the Teachers Handbook”).⁷⁹

III

THE UN CONVENTION ON THE RIGHTS OF THE CHILD: PROVISIONS AND INTERPRETATION

A. Article 19

The UN Convention on the Rights of the Child is the first treaty to address directly the protection of children from violence. It requires the 193 States Parties to take

all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁸⁰

Although the Article imposes an obligation on States Parties, understood together with the objects and purposes of the Convention, it gives children the right to be protected against abuse and neglect, as defined in the Article. When the Article was being drafted, the Informal NGO *Ad Hoc* Group on the Drafting of the Convention on the Rights of the Child wanted a fuller exposition of what the Article was targeting. It proposed,

[A]ll acts or omissions that are, or are likely to be, detrimental to the child’s present or future welfare and development, including cruelty, injury, exploitation, discrimination

71. Comm. on the Rights of the Child, *Concluding Observations: Ghana*, ¶ 36, U.N. Doc. CRC/C/15/Add.73 (June 18, 1997).

72. Comm. on the Rights of the Child, *Concluding Observations: Ireland*, ¶ 16, U.N. Doc. CRC/C/15/Add.85 (Feb. 4, 1998).

73. Comm. on the Rights of the Child, *Concluding Observations: Jamaica*, ¶ 7, U.N. Doc. CRC/C/15/Add.32 (Feb. 15, 1995); Comm. on the Rights of the Child, *Concluding Observations: Jamaica*, ¶ 33, U.N. Doc. CRC/C/15/Add.210 (July 4, 2003).

74. Comm. on the Rights of the Child, *Concluding Observations: Democratic People’s Republic of Korea*, ¶ 13, U.N. Doc. CRC/C/15/Add.88 (June 5, 1998); Comm. on the Rights of the Child, *Concluding Observations: Republic of Korea*, ¶ 38, U.N. Doc. CRC/C/15/Add.197 (Mar. 18, 2003).

75. Comm. on the Rights of the Child, *Concluding Observations: Kyrgyzstan*, ¶ 40, U.N. Doc. CRC/C/15/Add.127 (Aug. 9, 2000).

76. Comm. on the Rights of the Child, *Concluding Observations: Lebanon*, ¶¶ 38–39, U.N. Doc. CRC/C/15/Add.169 (Mar. 21, 2002).

77. Comm. on the Rights of the Child, *Concluding Observations: Senegal*, ¶ 24, U.N. Doc. CRC/C/15/Add.44 (Nov. 27, 1995).

78. Comm. on the Rights of the Child, *Concluding Observations: Togo*, ¶ 40, U.N. Doc. CRC/C/15/Add.83 (Oct. 10, 1997).

79. Comm. on the Rights of the Child, ¶ 36, *supra* note 71. It is surprising that caning is not specifically cited in the reports of other countries where it remains prevalent. The Committee has also issued General Comment No. 8 on the topic of corporal punishment. *See infra* VI.

80. U.N. Convention on the Rights of the Child, *supra* note 34, art. 19. There is a good analysis of Article 19 in DETRICK, *supra* note 59, at 318–29.

and humiliating or degrading treatment, whether physical, psychological, emotional or sexual in nature, perpetrated by the child's parent(s), guardian or any other individual or social welfare institution responsible for the child's well-being.⁸¹

Such *travaux préparatoires* make evident the emphasis of Article 19 on prevention.⁸² That is why Article 19(1) refers to "social and educational measures," and why Article 19(2) requires "effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention."

Article 19 does not specifically refer to corporal punishment, but the general guidelines for periodic reports do. States Parties are requested to indicate in their reports to the Committee all appropriate legislative, administrative, social, and educational measures taken for the implementation of Article 19.⁸³ In particular, reports must note

[w]hether legislation (criminal and/or family law) includes a prohibition of all forms of physical and mental violence, including corporal punishment, deliberate humiliation, injury, abuse, neglect or exploitation, *inter alia* within the family, in foster or other forms of care, and in public or private institutions, such as penal institutions and schools.⁸⁴

Other matters requested include complaint procedures, "educational and other measures adopted to promote positive and non-violent forms of discipline," and "awareness-raising campaigns to prevent situations of violence, abuse or negligence and to strengthen the system for the child[']s protection."⁸⁵ And Article 19(2) requests that States Parties provide information in their reports on "system[s] of mandatory reporting for professional groups working with and for children . . . ; confidential help lines, advice or counselling for child victims of violence, abuse or neglect . . . ; [and] special training provided for relevant professionals."⁸⁶

B. General Comment No. 8

The Committee on the Rights of the Child has adopted a number of General Comments that pertain to corporal punishment. Among them is General Comment No. 8, entitled *The Right to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*.⁸⁷ It aims "to

81. DETRICK, *supra* note 59, at 321.

82. See generally Comm'n on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child*, Annex II, U.N. Doc. E/CN.4/1983/62 (Mar. 23, 1983) (and papers cited therein).

83. Comm. on the Rights of the Child, *General Guidelines for Periodic Reports*, ¶¶ 88, 92, U.N. Doc. CRC/C/58, 22-23 (Nov. 20, 1996).

84. *Id.* ¶ 88.

85. *Id.*

86. *Id.* ¶ 89.

87. The comment pertains specifically to Articles 19, 28(2), and 37, *inter alia*. It was adopted by the Committee at its forty-second session in Geneva in May and June of 2006. Comm. on the Rights of the Child, *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and*

highlight the obligation of all States Parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that states must take.”⁸⁸ It emphasizes eliminating corporal punishment of children as “a key strategy for reducing and preventing all forms of violence in societies.”⁸⁹

The General Comment defines corporal punishment as

any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement – whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, burning, scalding or forced ingestion (for example, washing children’s mouths out with soap or forcing them to swallow hot spices). . . . [C]orporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment which 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.⁹⁰

The Committee accepts that children need discipline in the form of “necessary guidance and direction.”⁹¹ This is essential for the healthy growth of children. But such guidance is different, it rightly maintains, from violence and from humiliation.⁹² The Committee also accepts that it may be necessary to intervene physically to protect children from harm: pulling a child back when he or she is running into the road or towards a fire.⁹³ But then, as John Stuart Mill noted in a famous example about an unsafe bridge, such actions are justifiable in the case of adults, too.⁹⁴

The Committee recognizes the right of every person to others’ respect for his or her dignity and physical integrity, and equal protection under the law:⁹⁵ “The dignity of each and every individual is the fundamental guiding principle of international human rights law.”⁹⁶ This right, found, the Committee notes, in the original International Bill of Human Rights, is expanded upon in the Convention:

There is no ambiguity: “all forms of physical or mental violence” does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and the state must take

Other Cruel or Degrading Forms of Punishment, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007), available at www2.ohchr.org/english/bodies/crc/comments.htm.

88. *Id.* ¶ 2.

89. *Id.* ¶ 3.

90. *Id.* ¶ 11.

91. *Id.* ¶ 13.

92. *See id.*

93. *Id.* ¶¶ 14–15.

94. JOHN STUART MILL, ON LIBERTY 158 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

95. Comm. on the Rights of the Child, *supra* note 87, ¶ 16.

96. *Id.*

all appropriate legislative, administrative, social and educational measures to eliminate them.⁹⁷

The Committee responds to those who say that neither Article 19 nor Article 28 on school discipline refers to corporal punishment. In its view, this omission does not detract from the state's obligation to prohibit and eliminate corporal punishment. The Committee argues that the Convention (like all human-rights instruments) is "a living instrument."⁹⁸ Its interpretation therefore develops over time:

In the 17 years since the Convention was adopted, the prevalence of corporal punishment of children in their homes, schools and other institutions has become more visible, through the reporting process under the Convention and through research and advocacy by, among others, national human rights institutions and non-governmental organizations (NGOs).

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.⁹⁹

Even if the process of eliminating corporal punishment is an evolutionary one, the Committee emphasizes that it is "an immediate and unqualified obligation of States Parties."¹⁰⁰

The Committee briefly addresses some arguments of the pro-corporal-punishment lobby—for example, that "reasonable" or "moderate" corporal punishment is in the best interests of the child.¹⁰¹ The Committee replies,

[I]nterpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices . . . which conflict with the child's human dignity and right to physical integrity.¹⁰²

Second, proponents argue that how children are raised is up to parents, not the state.¹⁰³ The Convention fully upholds the importance of the family unit,¹⁰⁴ a view that nonetheless treats as unproblematic those decisions that have been

97. *Id.* ¶ 18.

98. *Id.* ¶ 20.

99. *Id.* ¶¶ 20–21.

100. *Id.* ¶ 22.

101. Comm. on the Rights of the Child, *supra* note 87, ¶ 26.

102. *Id.*

103. This view is commonly espoused by writers who take a negative view of children's rights. See, e.g., JOSEPH GOLDSTEIN, ANNA FREUD, SONJA GOLDSTEIN & ALBERT SOLNIT, *THE BEST INTERESTS OF THE CHILD* (1996); MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005). My critiques of these books can be found respectively at Michael Freeman, *The Best Interests of the Child? Is The Best Interests of the Child in the Best Interests of Children?*, 11 J.L. POL'Y & FAM. 360, 360–88 (1997), and Michael Freeman, *What's Right With Rights For Children*, 2 INT'L J.L. IN CONTEXT 89, 89–98 (2006).

104. See U.N. Convention on the Rights of the Child, *supra* note 34, art. 5.

taken from parents, such as whether to educate their children.¹⁰⁵ In time, the decision not to hit a child will fall into an equally unproblematic zone. Third, the Committee recognizes that some justify the practice of corporal punishment in terms of their interpretation of religious teaching.¹⁰⁶ The Committee responds, “[The] practice of a religion or belief must be consistent with respect for others’ human dignity and physical integrity.”¹⁰⁷ Further, “[the] freedom to practise one’s religion or belief may be legitimately limited in order to protect the fundamental rights and freedoms of others.”¹⁰⁸

The Committee argues the need for legal reform. Such reform has taken place in at least twenty-nine countries to date.¹⁰⁹ The Committee advocates that all provisions that allow a “reasonable” degree of corporal punishment (whether in legislation or case law) should be repealed. But it is necessary to go beyond this, according to the Committee. Countries should include an “explicit prohibition” to make it “absolutely clear that it is as unlawful to hit or ‘smack’ or ‘spank’ a child as to do so to an adult, and that the criminal law on assault does apply equally to such violence, regardless of whether it is termed ‘discipline’ or ‘reasonable correction’.”¹¹⁰

But legal reform is not enough:

[I]t is essential that the applicable sectoral legislation – e.g. family law, education law, law relating to all forms of alternative care and justice systems, employment law – clearly prohibits its use in the relevant settings. In addition, it is valuable if professional codes of ethics and guidance for teachers, carers and others, and also the rules or charters of institutions emphasize the illegality of corporal punishment and other cruel or degrading forms of punishment.¹¹¹

The Committee stresses that law reform must be accompanied by awareness-raising, guidance, and training. The goal of the elimination of corporal punishment of children is not to put parents in prison, but to prevent its happening: “to prevent violence against children by changing attitudes and practice, underlining children’s right to equal protection and providing an unambiguous foundation for child protection and for the promotion of positive,

105. *But see* *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (The “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition” per Chief Justice Burger). *See also* M.D.A. FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN* 244–77 (1983) (discussing the role of the state in child-rearing decisions).

106. *But see* GREVEN, *supra* note 2 (deconstructing the arguments of the religious lobby by a careful examination of the texts and history).

107. Comm. on the Rights of the Child, *supra* note 87, ¶ 29.

108. *Id.*

109. Children Are Unbeatable! Newsletter (April 2010), <http://www.childrenareunbeatable.org.uk/pdfs/newsletters/CAU-Issue02.pdf>. A further twenty-four have made public commitments to full prohibition or are actually considering draft legislation to achieve this. *See* Global Initiative to End All Corporal Punishment of Children, www.endcorporalpunishment.org (last visited Oct. 11, 2009) (collection of the latest data country-by-country). Since the above works were written Poland and Lichtenstein have passed anti-spanking legislation and Tunisia and Kenya have become the first African countries to make it unlawful to hit children.

110. Comm. on the Rights of the Child, *supra* note 87, ¶ 34.

111. *Id.* ¶ 35.

non-violent and participatory forms of child-rearing.”¹¹² The Committee stresses that prohibition does not mean “all cases of corporal punishment of children by parents should lead to prosecution”¹¹³ Such cases need appropriate investigation to ensure protection from “significant harm,” but the aim is to ensure that parents do not use “violent or other cruel or degrading punishment through supportive and educational, not punitive, interventions.”¹¹⁴ Effective prohibition requires “comprehensive awareness-raising of children’s right to protection and of the laws that reflect this right.”¹¹⁵

C. General Comment No. 1

General Comment No. 8 was not the first one relevant to the corporal punishment issue. Five years earlier, in 2001, the Committee adopted its first General Comment concerned with violence against children. “Aims of Education,” developing the norm now found in Article 29(1) of the UN Convention on the Rights of the Child, stressed that “children do not lose their human rights by passing through the school gates.”¹¹⁶ Education must be provided in a way that respects “the inherent dignity of the child”¹¹⁷ and that “respects the strict limits on discipline . . . in Article 28(2) and promotes non-violence in school.”¹¹⁸ The Committee emphasized its repeated belief that corporal punishment does not respect the “inherent dignity of the child.”¹¹⁹ It continued, “Compliance with the values recognized in Article 29(1) clearly requires that schools be child-friendly in the fullest sense of that term and that they be consistent in all respects with the dignity of the child.”¹²⁰

D. The Committee’s Jurisprudence on Corporal Punishment

The Committee has been evaluating reports of States Parties since 1993, and in this period of sixteen years it has built up a substantial jurisprudence. This includes a body of comments on the States Parties’ implementation (or nonimplementation) of Article 19. The Committee has expressed continuing concern at the persisting legal and social acceptance of corporal punishment of children in their homes, schools, and other institutions. It has consistently recommended prohibiting all corporal punishment.

112. *Id.* ¶ 38.

113. *Id.* ¶ 40.

114. *Id.*

115. *Id.* ¶ 45.

116. Comm. on the Rights of the Child, *General Comment No. 1: The Aims of Education*, ¶ 8, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001), available at <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

Before these reports emerged, a few countries had already outlawed corporal punishment of children. Sweden was the first, in 1979,¹²¹ and a number of other countries have done the same since the Committee began its scrutiny.¹²² But in most countries corporal punishment is firmly entrenched, despite the Convention, the General Comments, and the Committee's responses to States Parties' reports. For those latter countries the process of their reporting and the Committee's responses has been one of give and take. When the Committee examined the United Kingdom's report in 1995, it was concerned about the law on reasonable chastisement within the family. It referred to "the imprecise nature of the expression of reasonable chastisement," which could be "interpreted in a subjective and arbitrary manner."¹²³ The Committee recommended that

physical punishment of children in families be prohibited in the light of the provisions set out in Articles 3 and 19 In connection with the child's right to physical integrity, as recognized by the Convention, namely in its articles 19, 28, 29 and 37, and in the light of the best interests of the child, the Committee suggests that the [United Kingdom] consider the possibility of undertaking additional education campaigns. Such measures would help to change societal attitudes towards the use of physical punishment in the family and foster the acceptance of the legal prohibition of the physical punishment of children.¹²⁴

The Committee was also concerned that private schools (anomalously called "public schools" in the United Kingdom) were still permitted to cane pupils, in clear breach of Article 28(2).¹²⁵ Shortly after its recommendation concerning corporal punishment in the context of families, the Committee recommended prohibition of corporal punishment in all private schools. There is no corporal punishment permitted in U.K. schools today.¹²⁶

The Committee looked at the United Kingdom again in 2002.¹²⁷ Though pleased about the progress in schools, it "deeply regret[ted] that [the United Kingdom] persists in retaining the defence of 'reasonable chastisement' and has taken no significant action towards prohibiting all corporal punishment of

121. In 1979 Sweden added a provision to its Parenthood and Guardianship Code which (now) reads: "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." Föräldrabalk [FB] [Parents Code] 6:1 (Swed.). There are many accounts (in English) of the Swedish law and experience. See, e.g., SUSAN H. BITENSKY, CORPORAL PUNISHMENT OF CHILDREN—A HUMAN RIGHTS VIOLATION 154–60 (2006); see also Joan E. Durrant, *Legal Reform and Attitudes Towards Physical Punishment in Sweden*, 11 INT'L J. CHILD. RTS. 147, 147–73 (2003).

122. By now twenty-nine countries have outlawed corporal punishment of children by parents. See Children Are Unbeatable! Newsletter, *supra* note 109.

123. Comm. on the Rights of the Child, *supra* note 67, ¶ 16.

124. *Id.* ¶ 32.

125. *Id.* ¶ 16.

126. See School Standards and Framework Act, 1998, c. 31, § 131 (Eng.) (barring the use of corporal punishment in any school). Anecdotal evidence suggests it is still practiced "unofficially."

127. Comm. on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CRC/C/15/Add.188 (Oct. 9, 2002).

children in the family.”¹²⁸ It opined that the proposals—later implemented¹²⁹—“to limit rather than to remove the ‘reasonable chastisement’ defence [did] not comply with the principles and provisions of the Convention . . . , particularly since they constitute a serious violation of the dignity of the child.”¹³⁰ And, of course, the Committee observed that the proposals “suggest some forms of corporal punishment are acceptable, thereby undermining educational measures to promote positive and non-violent discipline.”¹³¹ It recommended removing the defense of reasonable chastisement and prohibiting “all corporal punishment in the family and any other contexts not covered by existing legislation,” and promoting “positive, participatory and non-violent forms of discipline and respect for children’s equal right to human dignity and physical integrity”¹³²

The Committee’s third examination of the United Kingdom was in 2008.¹³³ It noted amendments to legislation that restricted the application of the reasonable chastisement defense, but expressed continued concern that the defense had not been removed.¹³⁴ It welcomed the commitment of the National Assembly in Wales to prohibit corporal punishment in the home, but recognized that the Assembly lacks the power to do this.¹³⁵ It recommended that the United Kingdom prohibit “as a matter of priority” all corporal punishment in the family.¹³⁶ The other recommendations reiterated those made in 2002.¹³⁷

It is worth comparing the United Kingdom and Spain. Both are members of the Council of Europe and, as of the writing of this article, both have governments that are left of center.¹³⁸ Spain, however, is only thirty-five years out of Fascism. When Spain’s first report was examined in 1994, the Committee was concerned “at the wording of Article 154 of the Spanish Civil Code[,] which provides that parents ‘may administer punishment to their children reasonably and in moderation,’ and which may be interpreted to allow for actions in contradiction with Article 19 of the Convention.”¹³⁹ When it examined Spain’s Second Report in 2002, the Committee said it “deeply regret[ted]” that this law

128. *Id.* ¶ 36.

129. *See* Children Act, *supra* note 68, § 58.

130. Comm. on the Rights of the Child, *supra* note 127, ¶ 37.

131. *Id.*

132. *Id.* ¶ 38.

133. Comm. on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CRC/C/GBR/Co/4 (Oct. 20, 2008).

134. *Id.* ¶ 40.

135. *Id.*

136. *Id.* ¶ 42(a).

137. *Id.* ¶ 42. The Committee added: the United Kingdom “should use these recommendations as a tool for action in civil society and in particular with the involvement of children, to ensure that every child is protected from all forms of physical, sexual and mental violence”*Id.* ¶ 43.

138. In the United Kingdom’s case this may be justifiably contested, but this is how the Brown Government would identify itself.

139. Comm. on the Rights of the Child, *Concluding Observations: Spain*, ¶ 10, U.N. Doc. CRC/C/15/Add.28 (Oct. 24, 1994).

had still not been revised.¹⁴⁰ It reiterated its previous recommendation to amend Article 154 in order to delete the reference to reasonable chastisement.¹⁴¹ It further recommended the prohibition of all forms of violence including corporal punishment and awareness campaigns to promote alternative forms of discipline in families.¹⁴² Spain has now implemented these recommendations and is one of the latest countries to make corporal punishment in families unlawful.¹⁴³

It is possible to find the Committee's criticisms of corporal punishment of children in families, at school, and in institutions in its responses to reports of at least fifty-seven other countries.¹⁴⁴ A few of the criticized countries have since outlawed corporal punishment by parents: Bulgaria,¹⁴⁵ Cyprus,¹⁴⁶ Moldova,¹⁴⁷ the Netherlands,¹⁴⁸ New Zealand,¹⁴⁹ and Romania.¹⁵⁰ One of the first countries to make it unlawful for parents to hit children, Finland,¹⁵¹ is under scrutiny because "the Committee is concerned at the number of cases of violence against

140. Comm. on the Rights of the Child, *Concluding Observations: Spain*, ¶ 30, U.N. Doc. CRC/C/15/Add.185 (June 13, 2002).

141. *Id.* ¶ 31.

142. *Id.* ¶¶ 31(a), 31(b).

143. It did so in 2007, as indicated in Article 154 of the Spanish Civil Code. C.C. art. 154.

144. See 2 CYNTHIA PRICE COHEN, JURISPRUDENCE ON THE RIGHTS OF THE CHILD 1565–780 (2005) (summarizing the Committee's criticisms of each country's implementation of Articles 19 and 39).

145. Bulgaria was criticized in Comm. on the Rights of the Child, *Concluding Observations: Bulgaria*, ¶ 30, U.N. Doc. CRC/C/15/Add.66 (Jan 24, 1997). It passed legislation in 2000. See BITENSKY, *supra* note 121, at 197; see also Velina Todorova, *Children's Rights in Bulgaria After the End of Communism* 17 INT'L J. CHILD. RTS. 623, 630 (2009).

146. Criticized in 2003, Comm. on the Rights of the Child, *Concluding Observations: Cyprus*, ¶ 46, U.N. Doc. CRC/C/15/Add.205 (July 2, 2003). This criticism was strange, though, for Cyprus had already passed its Prevention of Violence in the Family and Protection of Victims Law (in June 1994) (now Law 119 (I) of 2000), see BITENSKY, *supra* note 121, at 174–80.

147. Comm. on the Rights of the Child, *Concluding Observations: Republic of Moldova*, ¶ 31, U.N. Doc. CRC/C/15/Add.192 (Oct. 31, 2002). It passed legislation in 2008. Global Initiative to End All Corporal Punishment of Children, States with Full Abolition, http://www.endcorporalpunishment.org/pages/progress/prohib_states.html (last visited Apr. 3, 2010).

148. Comm. on the Rights of the Child, *Concluding Observations: Netherlands*, ¶ 17, U.N. Doc. CRC/C/15/Add.114 (Oct. 26, 1999) (exhorting the Netherlands to come into line with developments in other European countries). The Netherlands passed legislation in 2007. Global Initiative to End All Corporal Punishment of Children, *supra* note 147.

149. Comm. on the Rights of the Child, *Concluding Observations: New Zealand*, ¶ 16, U.N. Doc. CRC/C/15/Add.71 (Jan. 24, 1997). It passed legislation in 2007. Global Initiative to End All Corporal Punishment of Children, States with Full Abolition, *supra* note 147. New Zealand was the first English-speaking country to effect such a reform, but a threatened referendum might undo it. The referendum is being conducted as this is being written (July 2009). Eighty-seven percent of those voting opposed the ban (children did not, of course, have the vote). Voting results are available at http://www.electionresults.govt.nz/2009_citizens_referendum/2009_referendum_results.html.

150. Comm. on the Rights of the Child, *Concluding Observations: Romania*, ¶ 42, U.N. Doc. CRC/C/15/Add.199 (Mar. 18, 2003). It passed legislation in 2004. Global Initiative to End All Corporal Punishment of Children, *supra* note 147.

151. Parental corporal punishment ceased to be lawful in 1983 (though there was an attempt to achieve this even earlier in 1969). BITENSKY, *supra* note 121, at 161.

children, including sexual abuse in their homes.”¹⁵² Several other countries are said to have laws targeting corporal punishment, though there is real doubt as to whether this is true. Haiti’s law is said to date from 2001,¹⁵³ and Zambia’s is said to derive from a Constitutional Court case in 1998.¹⁵⁴ Many countries in which corporal punishment is known to be prevalent, for example in Anglophone Africa and in the Caribbean, are not cited in the Committee’s jurisprudence. Trinidad and Tobago are the only Caribbean countries to be criticized,¹⁵⁵ though violence against children (not specifically corporal punishment) is condemned in a report on Jamaica.¹⁵⁶ The African countries criticized by the Committee are Algeria,¹⁵⁷ Cameroon,¹⁵⁸ Egypt,¹⁵⁹ Guinea-Bissau,¹⁶⁰ Libya,¹⁶¹ Malawi,¹⁶² Morocco,¹⁶³ Mozambique,¹⁶⁴ Niger,¹⁶⁵ Sudan¹⁶⁶ (where apparently there has been a move against corporal punishment at least in the

152. Comm. on the Rights of the Child, *Concluding Observations: Finland*, ¶ 39, U.N. Doc. CRC/C/15/Add.132 (Oct. 16, 2000).

153. Comm. on the Rights of the Child, *Concluding Observations: Haiti*, ¶ 36, U.N. Doc. CRC/C/15/Add.202 (Mar. 18, 2003) (The August 2001 Act prohibiting corporal punishment is “welcome[d]” by the Committee.). I have been unable to verify the existence of this Act, but the Global Initiative, *see supra* note 109, makes no reference to it, nor does BITENSKY, *supra* note 121).

154. *See* Comm. on the Rights of the Child, *Concluding Observations: Zambia*, ¶ 30, CRC/C/15/Add.206 (July 2, 2003) (citing the Constitutional Court case as *John Banda v. the People*, HPA/6/1998). The Committee comments that corporal punishment is still practiced and accepted in schools, families, and in care- and juvenile-detention facilities, and recommends legislation. *Id.* ¶¶ 30–31.

155. Comm. on the Rights of the Child, *Concluding Observations: Trinidad and Tobago*, ¶ 31, U.N. Doc. CRC/C/15/Add.82 (Oct. 10, 1997).

156. Comm. on the Rights of the Child, *Concluding Observations: Jamaica*, ¶¶ 32–33, U.N. Doc. CRC/C/15/Add.210 (July 4, 2003).

157. Comm. on the Rights of the Child, *Concluding Observations: Algeria*, ¶¶ 21, 35, U.N. Doc. CRC/C/15/Add. 76 (June 18, 1997).

158. Comm. on the Rights of the Child, *Concluding Observations: Cameroon*, ¶ 41, U.N. Doc. CRC/C/15/Add.164 (Nov. 6, 2001).

159. Comm. on the Rights of the Child, *Concluding Observations: Egypt*, ¶¶ 37–38, U.N. Doc. CRC/C/15/Add.145 (Feb. 21, 2001).

160. Comm. on the Rights of the Child, *Concluding Observations: Guinea Bissau*, ¶ 30 U.N. Doc. CRC/C/15/Add.177 (June 13, 2002).

161. Comm. on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*, ¶ 29, U.N. Doc. CRC/C/15/Add. 84 (Feb. 4, 1998); Comm. on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*, ¶ 34(b), U.N. Doc. CRC/C/15/Add.209 (July 4, 2003).

162. Comm. on the Rights of the Child, *Concluding Observations: Malawi*, ¶ 33, U.N. Doc. CRC/C/15/Add.174 (Apr. 2, 2002).

163. Comm. on the Rights of the Child, *Concluding Observations: Morocco*, ¶ 42, U.N. Doc. CRC/C/15/Add.211 (July 10, 2003).

164. Comm. on the Rights of the Child, *Concluding Observations: Mozambique*, ¶ 38, U.N. Doc. CRC/C/15/Add.172 (Apr. 3, 2002).

165. Comm. on the Rights of the Child, *Concluding Observations: Niger*, ¶ 45, U.N. Doc. CRC/C/15/Add.179 (June 13, 2002).

166. Comm. on the Rights of the Child, *Concluding Observations: Sudan*, ¶ 35, U.N. Doc. CRC/C/15/Add.190 (Oct. 9, 2002).

south of the country),¹⁶⁷ Togo,¹⁶⁸ and Zimbabwe.¹⁶⁹ Only two of these countries are Anglophone: reference has already been made to Ghana,¹⁷⁰ but, for example, nothing appears in the reports on Nigeria or any of the East African nations. There is no report on Somalia (because it has not ratified the Convention) nor on the United States for the same reason. As far as the developing world is concerned, it may be that the problems of children are greater than being beaten by their parents. But, if this is the view, it would be short-sighted. Once the nail is stuck in the coffin of corporal punishment, the burial of child abuse and much else besides will be signaled.

IV

THE UN SECRETARY GENERAL'S STUDY ON VIOLENCE AGAINST CHILDREN

In 2001, on the recommendation of the Committee on the Rights of the Child, the UN General Assembly requested the UN Secretary General to undertake an in-depth investigation into violence against children and to put forward recommendations for consideration by member states to take appropriate action.¹⁷¹ This led to the first comprehensive global study on violence against children.

The report on the investigation, by independent expert Paulo Sérgio Pinheiro, notes that violence against children exists in every country of the world.¹⁷² Violence does not respect culture, class, education, income, or ethnic origin.¹⁷³ The report starts with the assertion that the study should “mark a turning point—an end to adult justification of violence against children, whether accepted as ‘tradition’ or disguised as ‘discipline.’ There can be no compromise in challenging violence against children.”¹⁷⁴ It draws attention to General Comment No. 8 and calls for prohibition of all violence against children to be completed by 2009.¹⁷⁵ (It hardly need be said, but this has not happened.) It recognizes that

eliminating and responding to violence against children is perhaps most challenging in the context of the family, considered by most as the most ‘private’ of private spheres.

167. See Daksha Kassan, *The Protection of Children from All Forms of Violence—African Experiences*, in CHILDREN'S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE 165, 176 (Julia Sloth-Nielsen ed., 2008).

168. Comm. on the Rights of the Child, *Concluding Observations: Togo*, ¶ 40, U.N. Doc. CRC/C/15/Add.83 (Oct. 10, 1997).

169. Comm. on the Rights of the Child, *Concluding Observations: Zimbabwe*, ¶ 18, U.N. Doc. CRC/C/15/Add.55 (June 7, 1996).

170. See *supra* text accompanying note 71.

171. Office of the UN High Commissioner for Human Rights, *The United Nations Study on Violence Against Children*, available at <http://www2.ohchr.org/english/bodies/crc/study.htm>.

172. The Secretary-General, *Report of the Independent Expert for the United Nations Study on Violence Against Children*, ¶ 1, U.N. Doc. A/61/299 (Aug. 29, 2006), available at http://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf.

173. *Id.*

174. *Id.* ¶ 2.

175. *Id.* ¶116.

However, children's rights to life, survival, development, dignity and physical integrity do not stop at the door of the family home, nor do States' obligations to ensure these rights for children.¹⁷⁶

In his report, Pinheiro makes a number of recommendations. He wants prevention to be prioritized.¹⁷⁷ He advocates that states and "civil society" should aim to "transform attitudes that condone or normalize violence against children, including stereotypical gender roles and discrimination, acceptance of corporal punishment and harmful traditional practices."¹⁷⁸ He emphasizes that children's rights should be understood, "including by children." He suggests public-information campaigns to "sensitize" the public about the harmful effects of violence on children.¹⁷⁹ He stresses, as well, the Convention's relationship to Article 12: states should "actively engage with children and respect their views in all aspects of prevention, response and the monitoring of violence against them, taking into account Article 12 . . ."¹⁸⁰ And he flags the importance of child-friendly reporting systems and services.¹⁸¹

Pinheiro's report makes more specific recommendations, too. Those relating to the family include the development of programs to "support parents and other care[givers] in their child-rearing role";¹⁸² targeted programs for families in especially difficult circumstances, for example those caring for children with disabilities;¹⁸³ and gender-sensitive education programs focusing on nonviolent forms of discipline.¹⁸⁴ As far as schools are concerned, "all children must be able to learn free from violence, . . . curricula should be rights based, and . . . schools [should] provide an environment in which attitudes condon[ing] violence can be changed and non-violent values and behaviour learned."¹⁸⁵ Pinheiro makes recommendations as well for the care and justice systems, the workplace, and the community.¹⁸⁶

V

UNITED NATIONS COMMITTEES

A. The Human Rights Committee

The Human Rights Committee monitors the implementation of the UN International Covenant on Civil and Political Rights. Article 7 of the Covenant states, "No one shall be subjected to torture or to cruel, inhuman or degrading

176. *Id.* ¶ 38.

177. *Id.* ¶ 99.

178. The Secretary-General, *supra* note 172, ¶ 100.

179. *Id.*

180. *Id.* ¶ 103.

181. *Id.* ¶ 104.

182. *Id.* ¶ 110 (a).

183. *Id.* ¶ 110 (b).

184. The Secretary-General, *supra* note 172, ¶ 110 (c).

185. *Id.* ¶ 111.

186. *Id.* ¶¶ 112, 113, 114.

treatment or punishment.”¹⁸⁷ In 1992, the Human Rights Committee adopted General Comment No. 20 relating to this language, saying,

The prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the committee’s view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement offered as a punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.¹⁸⁸

In its examination of the states’ reports, the Committee has expressed concern about the use of corporal punishment and has recommended its prohibition in the family, schools, and penal systems.¹⁸⁹

B. The Committee on Economic, Social, and Cultural Rights

The UN Committee on Economic, Social, and Cultural Rights monitors the implementation of the UN International Covenant on Economic, Social, and Cultural Rights. In 1999 it issued General Comment No. 13 on “The Right To Education,”¹⁹⁰ opining that

corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual. Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant such as the right to food.¹⁹¹

A footnote explains that note had been taken of the “practice evolving elsewhere in the international human rights system.”¹⁹²

The Committee has also commented on corporal punishment within the family. Its concluding observations on the United Kingdom’s periodic report in 2002 state:

Given the principle of the dignity of the individual that provides the foundation for international human rights law . . . and in the light of Article 10.11 and 10.3 of the Covenant, the Committee recommends that the physical punishment of children in families be prohibited, in line with the recommendation of the Committee on the Rights of the Child.¹⁹³

187. UN International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

188. Human Rights Comm., *General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, ¶ 5, U.N. Doc. HRI/GEN/1/ Rev. 9 (Mar. 10, 1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument).

189. One example is Poland. Human Rights Comm., *Concluding Observations: Poland*, ¶ 25, U.N. Doc. CCPR/C/79/Add. 110 (July 29, 1999).

190. Comm. on Econ., Soc. and Cultural Rights, *General Comment 13: The Right to Education (Art. 13)*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

191. *Id.* ¶ 41.

192. *Id.* n.18.

193. Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, ¶ 36, U.N. Doc. E/C.12/1/Add.79 (June 5, 2002). They made a similar recommendation to Malta in 2004, recommending that Malta consider an explicit prohibition on

C. The Committee Against Torture

The UN Committee against Torture, which monitors the implementation of the United Nations Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, has also condemned the corporal punishment of children.¹⁹⁴ It may be argued that what constitutes torture and cruel, inhuman, and degrading treatment or punishment must be understood in relation to the person against whom it is perpetrated, and that what constitutes torture is different for adults and for children. The threshold for experiencing pain and the sensitivity to degrading punishment may be lower for children than for adults.

The Special Rapporteur on Torture of the UN Commission on Human Rights wrote that “any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.”¹⁹⁵ He called upon states to take adequate measures (in particular legal and educational ones) to ensure that “the right to physical and mental integrity of children is well protected in the public as in the private spheres.”¹⁹⁶ He drew attention to the condemnation of all corporal punishment by the Committee on the Rights of the Child, as well as by other treaty bodies.¹⁹⁷ And he welcomes information on measures taken to eradicate the practice of corporal punishment.¹⁹⁸

VI

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Statute of the Council of Europe requires every member state to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”¹⁹⁹ The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature in 1950 and entered into force in 1953.²⁰⁰ Optional protocols have since been added. The Convention was the

corporal punishment within the family. Comm. on Econ., Soc. and Cultural Rights, *Concluding Observations: Malta*, ¶¶ 22, 40, U.N. Doc. E/C. 12.1/Add.101 (Dec. 14, 2004).

194. See, e.g., Comm. Against Torture, *Concluding Observations of the Committee Against Torture: Jordan*, ¶ 177, U.N. Doc. A/50/44 (July 26, 1995); Comm. Against Torture, *Report of the Committee Against Torture*, ¶ 65(i), U.N. Doc. A/51/44 (July 9, 1996).

195. Special Rapporteur Against Torture, *Report of Special Rapporteur Against Torture on Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 28, delivered to the General Assembly, U.N. Doc. A/60/316 (Aug. 30, 2005).

196. Special Rapporteur Against Torture, *Report of Special Rapporteur Against Torture on Cruel, Inhuman or Degrading Treatment*, ¶ 26, U.N. Doc. E/CN.4/2003/68 (Dec. 17, 2002).

197. *Id.*

198. *Id.*

199. Statute of the Council of Europe art. 3, opened for signature May 5, 1949, Europ. T.S. No. 001, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

200. Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Apr. 11, 1950, Europ. T.S. No. 005, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

first international instrument to protect civil and political rights through a treaty binding on all member states. Victims may challenge breaches of their rights before the European Court of Human Rights.²⁰¹ The Committee of Ministers of the Council of Europe supervises governments' execution of judgments of the court. These are final and binding on the respondent state.²⁰²

A number of judgments of the European Court of Human Rights have found corporal punishment of children to be breaches of the European Convention on Human Rights. Most of these cases were brought against the United Kingdom. The earliest (in 1978) challenged judicial birching (then used in the Isle of Man).²⁰³ Schools were the second object of scrutiny,²⁰⁴ and most recently the court has examined corporal punishment within the family home.²⁰⁵

The first case was that of *Tyrer v. United Kingdom*.²⁰⁶ Tyrer was a fifteen-year-old birched after a conviction for assault. The judgment states,

After waiting in a police station for a considerable time for a doctor to arrive [to certify he was fit to receive the punishment], Mr. Tyrer was birched late in the afternoon of the same day. His father and a doctor were present. The applicant was made to take down his trousers and underpants and bend over a table; he was held down by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke.²⁰⁷

The court found that the birching amounted to degrading punishment in breach of Article 3 of the Convention:

[A]lthough the applicant did not suffer any severe or long lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 . . . to protect, namely[,] a person's dignity and physical integrity.²⁰⁸

The court did not rule out the possibility that the punishment may have also had adverse psychological effects on Tyrer. Those inflicting the punishment were “total strangers” and Tyrer was also subjected to the “mental anguish of anticipating the violence he was to have inflicted upon him.”²⁰⁹

In the 1980s many applications were brought concerning school corporal punishment in the United Kingdom. Two cases were brought by Scottish mothers and resulted in a 1982 judgment, *Campbell and Cosans v. United Kingdom*.²¹⁰ The mothers alleged that the corporal punishment used in their

201. Until 1998 there was a two-stage process, with cases first being examined by the European Commission on Human Rights and, only if a breach was revealed and no settlement could be reached between the applicant and the state, by the court.

202. COUNCIL OF EUROPE, Committee of Ministers, *Supervision of Judgments of the European Court of Human Rights*, http://www.coe.int/t/cm/humanRights_en.asp.

203. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978).

204. *See, e.g., Campbell and Cosans v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) (1982) (the first of the school-related cases).

205. Notably in *A. v. United Kingdom*, No. 35373/97, 27 Eur. H.R. Rep. 611 (1998).

206. *Supra* note 203.

207. *Id.* ¶ 10.

208. *Id.* ¶ 33.

209. *Id.*

210. *Supra* note 204.

sons' schools—the use of a thick leather strap (a tawse) on the palm of the hand—was contrary to Article 3. Neither boy had in fact received corporal punishment; this allegation was therefore rejected.²¹¹ But the Commission did find that the United Kingdom had failed to respect the parents' philosophical convictions against the use of corporal punishment. Article 2 of Protocol 1 to the Convention states, "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."²¹² Since Jeffrey Cosans had, at fourteen, been suspended from school for a year for refusing to accept the tawse, the court found he had been denied his right to education. The court defined "philosophical convictions" as views relating to "a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails."²¹³ The court found that the parents' philosophical convictions were compatible with human dignity and worthy of respect in a democratic society. They were therefore distinguishable from opinions "that might be held on other methods of discipline or on discipline in general."²¹⁴

Campbell and Cosans did not establish that corporal punishment in itself is a violation of Article 3. It established only that a child's right to education includes the right to attend a school where he will not be subjected to corporal punishment if that is what the parents want and they can justify this in terms of their "philosophical convictions." The case did not further children's rights but rather those of their parents.

At roughly the same time, in an unnamed case, the U.K. government issued a circular stating that in certain circumstances the use of corporal punishment might amount to treatment contrary to Article 3 of the Convention.²¹⁵ The case centered on a girl of fourteen caned by her headmistress. The caning left welts and caused discomfort for a considerable period of time.²¹⁶ The case was settled—so there was no decision—but the circular remains important.

Numerous other cases in the United Kingdom challenged corporal punishment as a violation of Article 3 of the Convention, and most led to friendly settlements with *ex gratia* payments being made to families. The sums of money paid were relatively small. But these decisions led to the abolition of

211. *Id.* ¶ 25.

212. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, *opened for signature* Mar. 31, 1952, Europ. T.S. No. 009, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/0009.htm>.

213. *Campbell and Cosans*, *supra* note 204, ¶ 36.

214. *Id.*

215. World Corporal Punishment Research, The Archive, <http://www.corpun.com/uksc8202.htm> (last visited Apr. 3, 2010).

216. *Id.*

corporal punishment in state schools in the United Kingdom in 1987.²¹⁷ Corporal punishment lingered for pupils in private schools not receiving state support in England and Wales until September 1999.²¹⁸ In Scotland it remained lawful until 2000;²¹⁹ in Northern Ireland it was finally abolished in 2003.²²⁰

But what of corporal punishment by parents? The landmark decision here is *A v. United Kingdom*.²²¹ The European Court of Human Rights found that corporal punishment with a garden cane of a boy of nine by his stepfather was a breach of Article 3. The stepfather had been prosecuted in an English court but had been acquitted on the grounds that the punishment satisfied the common-law test of “reasonable chastisement.”²²² The European Court of Human Rights found the United Kingdom to be responsible because its domestic law, in allowing “reasonable chastisement,” failed to provide children with adequate protection. The court ordered the United Kingdom to pay £10,000 compensation to the boy. The court ruled, “Children and other vulnerable individuals, in particular, are entitled to state protection, in the form of effective deterrence, against serious breaches of personal integrity”²²³ It cited, *inter alia*, the UN Convention on the Rights of the Child, Articles 19 and 37.²²⁴ The court quoted the judge’s instructions to the jury:

What is it the prosecution must prove? If a man deliberately and unjustifiably hits another and causes some bodily injury, bruising or swelling will do, he is guilty of actual bodily harm. What does unjustifiably mean in the context of this case? It is a perfectly good defence that the alleged assault was merely the correcting of a child by its parent, in this case the stepfather, provided the correction be moderate in the manner, the instrument and the quantity of it. Or, put another way, reasonable. It is not for the defendant to prove it was lawful correction. It is for the prosecution to prove it was not.²²⁵

The execution of judgments of the European Court of Human Rights by the state government is supervised by the Committee of Ministers of the Council of Europe. It is still supervising the execution of *A v. United Kingdom*.²²⁶ This is not surprising because legislation in England and Wales still permits a parent to hit a child. As recently as 2007, the Crown Prosecution Service in England and

217. See *id.* (example of settlement). See Education (No. 2) Act, 1986, c. 61, § 47 (Eng., Wales) (abolishing corporal punishment in publicly supported schools).

218. See School Standards and Framework Act, 1998, c. 31, § 131 (Eng., Wales) (abolishing corporal punishment in all schools).

219. See Standards in Scotland’s Schools Act, 2000, (A.S.P. 6) § 16, available at <http://www.hmsso.gov.uk/legislation/scotland/acts2000/20000006.htm>.

220. See Education and Libraries (Northern Ireland) Order, 2003, SI 2003/424 (N. Ir. 12), ¶ 36 (abolishing corporal punishment in all schools).

221. *Supra* note 205.

222. *Id.* ¶ 23. The defense is usually assumed to derive from Chief Justice Cockburn’s judgment in *R v. Hopley*, (1860) 175 Eng. Rep. 1024 (Q.B.).

223. *A v. United Kingdom*, *supra* note 205, ¶ 22.

224. *Id.*

225. *Id.* ¶ 10.

226. Council of Europe, Committee of Ministers Publishes Decisions on the Execution of Judgments of the European Court of Human Rights, <https://wcd.coe.int/ViewDoc.jsp?id=1455657&Site=DC> (last visited Apr. 3, 2010).

Wales²²⁷ advised that if a parental assault on a child leads to an injury that “amounts to no more than reddening of the skin, and the injury is transient and trifling, a charge of common assault may be laid against the defendant for whom the reasonable chastisement defence remains available to parents or adults acting *in loco parentis*.”²²⁸

The law in England and Wales,²²⁹ as in Canada,²³⁰ effects a bungling compromise that satisfies no one. Abolitionists find it offensive, those who support corporal punishment do not know where the line has been drawn, the police are puzzled as to what their powers are, and social workers have no clear advice as to when intervention is appropriate.²³¹ The new law, according to one of England’s local Safeguarding Children Boards, can be seen as “a licence to hit rather than promoting more constructive and positive alternatives.”²³² Another Safeguarding Children Board commented that there is no evidence that the new law has “improved the protection of children in any way. [It] . . . has caused general confusion. . . . [I]t is virtually impossible to persuade/convince parents not to use physical chastisement.”²³³ And the British Association of Social Workers asks, “Are we teaching perpetrators to become more skilled in physical abuse, perfecting the art of not leaving bruises?”²³⁴ In New Zealand, by contrast, where smacking was banned in June 2007, the Deputy Commissioner of Police reported (in December 2008) “a decline in the total number of child assault events,” as well as “a corresponding decrease in the number of child assault events involving smacking and minor acts of physical discipline.”²³⁵ Nevertheless, the law in New Zealand remains under scrutiny and the legislation may be reversed.²³⁶

It was inevitable that some parents would object to legislation curtailing their liberty to use physical chastisement on their children. A challenge was mounted by Swedish parents belonging to a Protestant free church congregation in Stockholm, who believed that corporal punishment was right,

227. The Service is in charge of criminal prosecutions.

228. THE CROWN PROSECUTION SERVICE, REASONABLE CHASTISEMENT REPORT (2007), available at http://www.cps.gov.uk/publications/research/chastisement.html#_01.

229. Children Act, 2004, c. 31, § 58 (Eng., Wales).

230. See Anne McGillivray & Joan Durrant, *Child Corporal Punishment: Violence, Rights and Law*, in CRUEL BUT NOT UNUSUAL: VIOLENCE IN CANADIAN FAMILIES 177, 194 (Ramona Alaggia & Cathy Vine eds., 2006) (summarizing law in Canada and recommending reforms).

231. See MICHAEL FREEMAN, UNDERSTANDING FAMILY LAW 197–98 (2007).

232. CHILDREN ARE UNBEATABLE! ALLIANCE, BRIEFING (2009) 1, available at http://www.rcpch.ac.uk/doc.aspx?id_Resource=4296.

233. *Id.* at 3.

234. *Id.*

235. ROB POPE, THIRD REVIEW OF POLICE ACTIVITY FOLLOWING THE ENACTMENT OF THE CRIMES (SUBSTITUTED SECTION 59) AMENDMENT ACT 2007 at 1 (2008), http://www.police.govt.nz/resources/2008/section-59-activity-review/section59_crime_ammendment_act_2007.pdf.

236. A portion of the New Zealand population demanded the change be reversed, and a referendum was held on the subject (in 2009). See 3 News, *Anti-Smacking Debate Goes to Referendum* (June 15, 2009), <http://www.3news.co.nz/Anti-smacking-debate-goes-to-referendum/tabid/423/articleID/108706/Default.aspx>.

necessary, and supported by their interpretation of Biblical texts.²³⁷ But the European Commission in 1982 declared their application inadmissible.²³⁸ The Commission concluded,

The fact that no distinction is made between the treatment of children by their parents and the same treatment applied to an adult stranger cannot, in the commission's opinion, constitute "an interference" with respect for the applicant's private and family lives since the consequences of an assault are equated in both cases The Commission finds that the scope of the Swedish law of assault and molestation is a normal measure for the control of violence and that its extension to apply to the ordinary physical chastisement of children by their parents is intended to protect potentially weak and vulnerable members of society.²³⁹

Another case was brought in England by Christian fundamentalist parents and teachers who alleged that the legislation which prohibited corporal punishment in private schools infringed their rights.²⁴⁰ The parents wanted the teachers to be able to use corporal punishment, and the teachers believed the practice of corporal punishment was right. The House of Lords (the highest court in the United Kingdom, now replaced by the Supreme Court) accepted that the legislation did interfere with the right to religious freedom in Article 9 of the European Convention on Human Rights, but held that the interference could be justified.²⁴¹ Lord Nicholls explained, "Corporal punishment involves deliberately inflicting physical violence. The legislation is intended to protect children against the distress, pain and other harmful effects this infliction of physical violence may cause."²⁴² However, the same judge indicated that corporal punishment does not necessarily infringe a child's rights under Article 3 or Article 8. In other words, he did not rule out corporal punishment.²⁴³ But Baroness Hale, who showed her full commitment to children's rights in a wonderful passage on the subject of her judgment, was not so categorical. She stated, "If a child has a right to be brought up without institutional violence, as he does, that right should be respected whether or not his parents and teachers believe otherwise."²⁴⁴ She also said, however, that in a free society parents should have a "large measure of autonomy" in deciding how to raise their children.²⁴⁵ In England and Wales, as in most of the world, such autonomy extends to physical discipline.

237. *Seven Individuals v. Sweden*, Application No. 8811/79 (1982), available by searching at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

238. *Id.*

239. *Id.*

240. *R v. Sec'y of State for Educ. and Employment ex parte Williamson*, [2005] 2 A.C. 246 (H.L.) ¶ 8 (appeal taken from Eng.).

241. *Id.* ¶ 21.

242. *Id.* ¶ 49.

243. *Id.* ¶ 26.

244. *Id.* ¶ 86.

245. *Id.* ¶ 72.

VII

EUROPEAN BODIES CONCERNED WITH THE PROTECTION OF CHILDREN

A. The European Committee of Social Rights

The original version of the European Social Charter, initially in Article 17, required states to take “all appropriate and necessary measures” to ensure the “effective exercise of the rights of mothers and children to social and economic protection.”²⁴⁶ The revised Article 17, inspired by the UN Convention on the Rights of the Child requires states to take all appropriate and necessary measures “to protect children and young persons against negligence, violence or exploitation”²⁴⁷

By January 2007, the European Committee of Social Rights (ECSR), which monitors compliance with the Social Charter and Revised Social Charter, found eighteen member states not to be in conformity with Article 17 because the corporal punishment of children was not fully prohibited in those states. The eighteen states not in conformity are Belgium,²⁴⁸ the Czech Republic,²⁴⁹ Estonia,²⁵⁰ France,²⁵¹ Greece (the law was changed in 2006),²⁵² Hungary (the law was changed in 2004),²⁵³ Ireland,²⁵⁴ Lithuania,²⁵⁵ Malta,²⁵⁶ Netherlands (the law was changed in 2007),²⁵⁷ Poland (the law was changed in 2010),²⁵⁸ Moldova,²⁵⁹

246. European Social Charter art. 17, *opened for signature* Oct. 16, 1961, Europ. T.S. 035, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm>.

247. European Social Charter (revised), art. 17, *opened for signature* May 3, 1996, Europ. T.S. 163, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

248. European Comm. of Soc. Rights, *European Social Charter (revised): Conclusions 2007 Volume I*, 226–27 (Dec. 2007), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/2007Vol1_en.pdf.

249. European Comm. of Soc. Rights, *European Social Charter: Conclusions XVII-2 Volume I*, 149 (Sept. 2005), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/XVII2Vol1_en.pdf.

250. European Comm. of Soc. Rights, *European Social Charter (revised): Conclusions 2005 Volume I*, 193 (Sept. 2005), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/2005Vol1_en.pdf.

251. European Comm. of Soc. Rights, *supra* note 248, at 240–41.

252. European Comm. of Soc. Rights, *supra* note 249, at 326.

253. *Id.* at 422.

254. European Comm. of Soc. Rights, *Decision on the Merits; Collective Complaint No. 18/2003 from the World Organisation Against Torture (OMCT) Against Ireland*, ¶¶ 65–66 (2004).

255. European Comm. of Soc. Rights, *supra* note 250, at 368.

256. European Comm. of Soc. Rights, *European Social Charter: Conclusions XVII-2 Volume II*, 568–69 (Sept. 2005), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/XVII2Vol2_en.pdf.

257. *Id.* at 607.

258. *Id.* at 659.

259. European Comm. of Soc. Rights, *European Social Charter (revised); Conclusions 2005 Volume 2*, 474 (Sept. 2005), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/2005Vol2_en.pdf.

Romania (the law was changed in 2004),²⁶⁰ Slovak Republic,²⁶¹ Slovenia,²⁶² Turkey,²⁶³ and the United Kingdom.²⁶⁴

In 2001 the ECSR made a General Observation which concluded “that Article 17 requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere.”²⁶⁵ The ECSR added that any form of degrading punishment or treatment of children must be prohibited in legislation “and combined with adequate sanctions in penal or civil laws.”²⁶⁶

In 2003 the ECSR issued a finding of nonconformity with Article 17 in the case of Poland.²⁶⁷ This was the first time it had done so in relation to corporal punishment in the family. It examined Poland’s report on its implementation of Article 17 and concluded,

Ministerial regulations prohibit the corporal punishment of children in public schools. The committee requests information about the situation in private schools and in institutions; it notes that the corporal punishment of children in the home is not prohibited. . . . The Committee concludes that the situation in Poland is not in conformity with Article 17 of the Charter on the following grounds: corporal punishment of children in the home is not prohibited.²⁶⁸

The ECSR came to similar conclusions in reports on a number of other countries including France, Romania, the Slovak Republic, and Slovenia.²⁶⁹ In relation to France, the ECSR commented,

. . . [T]he Committee noted that the Penal Code prohibits violence against the person and provides for increased penalties where the victim is under 15 years of age or where the perpetrator is related to the child or has authority over the child, but does not necessarily cover all forms of corporal punishment which it found not to be in conformity with the revised Charter.²⁷⁰

Two years later (in 2005) the ECSR noted that neither Poland nor France had made any progress towards the goal of eliminating corporal punishment.²⁷¹

260. *Id.* at 612.

261. European Comm. of Soc. Rights, *European Social Charter: Conclusions XVI-2 Volume 2*, 805 (2003), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/Year/XVI2Vol2_en.pdf.

262. European Comm. of Soc. Rights, *supra* note 259, at 650.

263. *Id.* at 792–93.

264. *Id.* at 835–36.

265. Council of Europe, Commissioner for Human Rights, *Children and Corporal Punishment: “The Right Not to Be Hit, Also a Children’s Right”* (Jan. 2008) available at https://wcd.coe.int/ViewDoc.jsp?id=1237635&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P136_10286.

266. *Id.*

267. European Comm. of Soc. Rights, *supra* note 261, at 660.

268. *Id.* at 660–61.

269. European Comm. of Soc. Rights, *supra* note 250, at 240–41 (France); European Comm. of Soc. Rights, *supra* note 259, at 612 (Romania), 650 (Slovenia); European Comm. of Soc. Rights, *supra* note 261, at 805 (Slovak Republic).

270. European Comm. of Soc. Rights, *supra* note 250, at 240.

271. *Id.* at 240–41 (France); European Comm. of Soc. Rights, *supra* note 256, at 659.

And in its conclusions on Belgium and Greece,²⁷² it referred to decisions in the complaints brought against these states by the World Organisation Against Torture under the collective-complaints procedure.²⁷³

Under this mechanism, the ECSR decides whether a complaint is admissible, and if it is, takes a decision on the merits of the complaint. It then forwards this to the parties concerned and to the Committee of Ministers in a report made public within four months of being forwarded. The Committee of Ministers adopts a resolution, if appropriate, and may recommend that the state take specific measures to bring the situation into line with the Charter.²⁷⁴ In December 2003, collective complaints were declared admissible against five countries (Belgium, Greece, Ireland, Italy, and Portugal). The complaints alleged that the countries were not in conformity with the Charter because all corporal punishment and other humiliating treatment of children were not prohibited. A decision on these cases was made by the Committee of Ministers in January 2005. It found a violation in the cases of Greece, Belgium, and Ireland.²⁷⁵

In *World Organisation Against Torture (OMCT) v. Greece*, the ECSR found a breach of Article 17 on the ground that corporal punishment was not adequately prohibited in the home, in secondary schools, and in institutions caring for children.²⁷⁶ It stressed that, even if violence against the person is punished under the criminal law and subject to increased penalties when the victim is a child, this is not enough to satisfy Article 17.²⁷⁷ The ECSR found that the legal provisions relied upon by the Greek government did not constitute an adequate legal basis.²⁷⁸ In 2006 Greece introduced legislation prohibiting corporal punishment in all settings.²⁷⁹

In *World Organisation Against Torture (OMCT) v. Belgium*, the Committee reached a similar decision. It found that Belgian law did not adequately prohibit all forms of violence, including corporal punishment by parents and “other persons.”²⁸⁰

272. European Comm. of Soc. Rights, *supra* note 249, at 85, 326.

273. *Id.*

274. See Council of Europe, *Building a Europe for and with Children* (Aug. 2006), available at http://www.coe.int/t/transversalprojects/children/pdf/booklet_en.pdf.

275. See Council of Europe, *List of Complaints and State of Procedure*, available at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp (list of complaints with information about subsequent activity in each case).

276. European Comm. of Soc. Rights, *Decision on the Merits; Collective Complaint No. 17/2003 from the World Organisation Against Torture (OMCT) Against Greece*, ¶¶ 34–46 (2004).

277. *Id.* ¶ 38.

278. *Id.*

279. See *Greece Outlaws Corporal Punishment in the Home*, <http://www.endcorporalpunishment.org/pages/news/greece-2006.html> (describing Greek statute 3500/2006 passed on October 19, 2006) (last visited Apr. 3, 2010).

280. European Comm. of Soc. Rights, *Decision on the Merits; Collective Complaint No. 21/2003 from the World Organisation Against Torture (OMCT) Against Belgium*, ¶¶ 37–41 (2004).

In *World Organisation Against Torture (OMCT) v. Ireland*, Ireland too was found to be in violation of Article 17.²⁸¹ The ECSR noted that Ireland, like other common-law jurisdictions, had the defense of “reasonable chastisement.”²⁸² Thus, as far as parental discipline was concerned, Ireland was in breach. In relation to foster care, residential care, and certain child-minding settings, the ECSR noted there were guidelines, standards, and inspection requirements, but these did not have the force of law and that the reasonable chastisement defense probably applied too.²⁸³

The ECSR did not find a breach of Article 17 regarding Italy²⁸⁴ or, initially, Portugal.²⁸⁵ In both countries court decisions effectively ruled out corporal punishment. Italy’s dated from 1996.²⁸⁶ But in 2006 the Supreme Court in Portugal ruled that slaps and spankings are “legal” and “acceptable” in child-rearing, and that failure to employ these punishment methods could even be “educational neglect.”²⁸⁷ The case concerned cruelty and ill treatment of mentally disabled children in a children’s institution. Not surprisingly, the OMCT submitted a second complaint against Portugal, alleging that it does not explicitly or effectively prohibit all corporal punishment of children. In 2007 the ECSR agreed with the complainant and concluded that Portugal was in violation of Article 17.²⁸⁸ Portugal has now banned the corporal punishment of children, and so is no longer in breach of Article 17 (or so it is assumed).²⁸⁹

B. The Committee of Ministers of the Council of Europe

The Committee of Ministers of the Council of Europe was one of the first institutions to turn its attention to corporal punishment, and one of the first to condemn the practice. Recommendation No. R (85) 4 proposed in 1985 that states review their legislation on the power to punish children, to limit or prohibit corporal punishment, even if violation of such a prohibition does not

281. European Comm. of Soc. Rights, *Decision on the Merits; Collective Complaint No. 18/2003 from the World Organisation Against Torture (OMCT) Against Ireland*, ¶¶ 58–66 (2004).

282. *Id.* ¶ 65.

283. *Id.* ¶ 66.

284. European Comm. of Soc. Rights, *Decision on the Merits; Collective Complaint No. 19/2003 from the World Organisation Against Torture (OMCT) Against Italy*, ¶¶ 40–52 (2004).

285. European Comm. of Soc. Rights, *Decision on the Merits; Collective Complaint No. 20/2003 from the World Organisation Against Torture (OMCT) Against Portugal*, ¶¶ 33–43 (2004).

286. See BITENSKY, *supra* note 121, at 247–54 (discussing the Italian Supreme Court’s decision in *Cambria*).

287. PETER NEWELL, BRIEFING FROM GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN 2 (2007), available at <http://www.endcorporalpunishment.org/pages/pdfs/briefings/CAT%20briefing%20Apr-May%202007.pdf>.

288. European Comm. of Soc. Rights, *Decision on the Merits; Collective Complaint No. 34/2006 from the World Organisation Against Torture (OMCT) Against Portugal*, ¶¶ 17–22 (2006).

289. It outlawed corporal punishment by parents in 2007 in an amendment to the Penal Code, in Article 152 of law 59/2007. See Global Initiative to End All Corporal Punishment of Children, State Reports: Portugal, <http://www.endcorporalpunishment.org/pages/progress/reports/portugal.html> (last visited May 26, 2010).

necessarily entail a criminal penalty.²⁹⁰ This was a cautious and somewhat limited response, but it was twenty-five years ago, when only Sweden and Finland had banned corporal punishment in the home. The Committee of Ministers' explanatory memorandum described corporal punishment as "an evil which must at least be discouraged as a first step towards outright prohibition."²⁹¹ In the memorandum the Committee asked the public to question the assumption that corporal punishment of children is "legitimate": this, the committee thought, opened the way to "all kinds of excesses" (and presumably to child abuse).²⁹²

In 1990, in "Social Measures Concerning Violence in the Family," the Committee of Ministers noted that "trends towards the democratisation of the family, implying respect for members of the family as individuals with equal rights and equal opportunities, can help to discourage violence."²⁹³ In its "measures for children," the recommendation states, "The importance should be emphasised of the general condemnation of corporal punishment and other forms of degrading treatment as a means of education, and of the need for violence-free education."²⁹⁴

In 1993, in Recommendation R (93) 2 (Medico-Social Aspects of Child Abuse), the Committee, referencing the UN Convention on the Rights of the Child, urged member states "to emphasise the rights of all children and young people to freedom from abuse and the need to change patterns of upbringing and behaviour which threaten this," and "to minimise levels of violence within society and the resort to violence in child-rearing practices."²⁹⁵

In 2006 the Committee issued a recommendation again calling for nonviolent positive parenting in the context of respect for, and the implementation of, children's rights.²⁹⁶ In the same year the Council of Europe published a document and began a campaign entitled *Building a Europe for and with Children*.²⁹⁷ The Council described the abolition of all corporal punishment

290. Council of Europe Comm. of Ministers, *Recommendation No. R (85) 4 of the Committee of Ministers to Member States on Violence in the Family*, ¶ 12 (Mar. 26, 1985).

291. Council of Europe Parliamentary Assembly, *Report: Europe-wide Ban on Corporal Punishment of Children*, ¶ 22 (June 4, 2004), available at <http://assembly.coe.int/documents/WorkingDocs/doc04/EDOC10199.htm>.

292. *Id.*

293. Council of Europe Comm. of Ministers, *Recommendation No. R (90) 2 of the Committee of Ministers to Member States on Social Measures Concerning Violence Within the Family*, ¶ 18 (Jan. 15, 1990).

294. *Id.* app. B, ¶ 14.

295. Council of Europe Comm. of Ministers, *Recommendation No. R (93) 2 of the Committee of Ministers to Member States on the Medico-Social Aspects of Child Abuse*, app., ¶ 1.2 (Mar. 22, 1993).

296. Council of Europe Comm. of Ministers, *Recommendation (2006) 19 of the Committee of Ministers to Member States on Policy to Support Positive Parenting*, ¶ 2 (Dec. 13, 2006).

297. Council of Europe, *Building a Europe for and with Children* (Aug. 2006), available at http://www.coe.int/t/transversalprojects/children/pdf/Booklet_en.pdf.

as “a human rights issue,”²⁹⁸ one with “serious consequences for the health and development of children and for society as a whole.”²⁹⁹ The emphasis was on “changing attitudes, not prosecuting parents.”³⁰⁰ The Council described a role for the media (“the dissemination of an unequivocal message against corporal punishment”)³⁰¹ and described children as “prime actors in this process.”³⁰² In response, the Committee of Ministers commented positively on the program’s breadth:

Given that the member states of the Council of Europe have entered into numerous commitments under general human rights conventions and specific conventions on children’s rights and that human rights treaties of the Council of Europe (as well as the UN Convention on the Rights of the Child) require states to prohibit and fight all forms of violence and ill-treatment of children, the programme will assist member states in fulfilling their obligations under such treaties. It will be done in particular by implementing prevention policies and alerting professional circles and the general public to the problem. The programme will address all forms of violence, wherever it takes place (family, school, resident institutions, the community, media and cyberspace) with a special attention to fighting sexual abuse and corporal punishment.³⁰³

C. The European Network of Ombudspersons for Children

The European Network of Ombudspersons for Children (ENOC) was formed in 1997. There are now thirty-two institutions in twenty-three member states of the Council of Europe in the network. These institutions are pledged to work collectively to advance children’s rights, in particular by encouraging the fullest possible implementation of the UN Convention on the Rights of the Child.

In 1999 the network adopted a position statement on corporal punishment of children. It urged “the governments of all European countries, the European Union, the Council of Europe and other European institutions and non-governmental organisations concerned with children to work collectively and individually towards ending all corporal punishment of children.”³⁰⁴ It argued that this would improve “children’s status as people,” and reduce “child abuse and all other forms of violence in European societies.”³⁰⁵ It stated, “Hitting children is disrespectful and dangerous. Children deserve at least the same

298. Council of Europe, *Highlights – Building a Europe for and with Children* 18 (Apr. 2006), available at http://www.coe.int/t/transversalprojects/children/pdf/Highlights_GB.pdf.

299. *Id.* at 19.

300. *Id.*

301. *Id.*

302. *Id.*

303. Council of Europe Comm. of Ministers, *Written Question No. 492 to the Committee of Ministers by Mrs Bargholtz: “Collective complaint 18/2003 under the Revised Social Charter against Ireland” — Reply of the Committee of Ministers*, CM/AS(2006)Quest492 (Sept. 29, 2006), available at [http://wcd.coe.int/ViewDoc.jsp?Ref=CM/AS\(2006\)Quest492&Language=lanEnglish&Ver=final](http://wcd.coe.int/ViewDoc.jsp?Ref=CM/AS(2006)Quest492&Language=lanEnglish&Ver=final).

304. BUILDING A EUROPE FOR AND WITH CHILDREN PROGRAMME, COUNCIL OF EUROPE, ELIMINATING CORPORAL PUNISHMENT: A HUMAN RIGHTS IMPERATIVE FOR EUROPE’S CHILDREN 67 (2d ed. 2007).

305. *Id.*

protection from violence that we as adults take for granted for ourselves.”³⁰⁶ It noted that, although corporal punishment had been eliminated from schools and other institutions in almost all European countries, it remained “common and legally and socially accepted in the family home in most countries.”³⁰⁷ The ENOC position statement was critical of the “reasonable” or “moderate” chastisement defense and noted, “Where the law is silent, corporal punishment tends to be accepted in practice.”³⁰⁸ The network committed itself to working actively on what it called “this fundamental human rights issue.”³⁰⁹

VIII

THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The African Child Policy Forum³¹⁰ considers violence to involve a violation of rights that every human being (including children) must have: the right to life, security, dignity, and physical and psychological well-being. Article 16 of the African Charter on the Rights and Welfare of the Child provides,

States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.³¹¹

There is concern with corporal punishment in Africa, but other forms of violence against children, including rape, domestic violence, incest, domestic slavery, and female genital mutilation, assume a greater profile, and for obvious reasons. This is reflected in reports of the African Child Policy Forum, which held a conference in Addis Ababa, Ethiopia in May 2006.³¹² The reports observed that it is primarily girls who are the victims of violence.³¹³ This is not to say that boys are not also affected: many are forcibly recruited into armed

306. *Id.*

307. *Id.* In the ten years since this statement there has of course been a lot of progress, with at least twelve European countries banning corporal punishment by parents.

308. *Id.*

309. *Id.* at 68.

310. This is an independent advocacy organization working for the realization of children’s rights. It was founded in 2003, with headquarters in Addis Ababa, Ethiopia. Among the reports it has published that may be singled out are VIOLENCE AGAINST GIRLS WITHIN THE HOME IN AFRICA (2006) and BORN TO HIGH RISK: VIOLENCE AGAINST GIRLS IN AFRICA (2006).

311. African Charter on the Rights and Welfare of the Child art. 16, *entered into force* Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49 (1990); *see also id.* art. 11(5) (A child subjected to discipline “shall be treated with humanity and with respect for the inherent dignity of the child . . .”); *id.* art. 17 (discussing protection of children against torture and inhuman or degrading treatment or punishment in the context of juvenile justice); *id.* art. 21 (titled “Protection against Harmful Social and Cultural Practices”); *id.* art. 27 (States Parties shall “protect the child from all forms of sexual exploitation and sexual abuse.”); *id.* art. 22 (armed conflict).

312. AFRICAN CHILD POLICY FORUM, BORN TO HIGH RISK: VIOLENCE AGAINST GIRLS IN AFRICA, *supra* note 310.

313. *Id.* at 2.

conflict (as, indeed, girls are, too).³¹⁴ All African countries, except Somalia, have ratified the UN Convention on the Rights of the Child and most have ratified the African Charter and therefore have aspirations to further children's human rights, but these countries' diversity of cultures and legal systems makes change less easy to achieve. Africa's pluralistic culture is undoubtedly a barrier to the enforcement of children's rights.³¹⁵

Nevertheless, many African countries are reviewing their child-protection legislation, recognizing that it is not in conformity with either the UN Convention or the African Charter. A number of African countries, including South Africa and Uganda, have included children's rights provisions in their constitutions.³¹⁶ Although the symbolic importance of these provisions cannot be underestimated, their impact is not as great as would be hoped.

The physical punishment of children is widespread in Africa and can be severe. Even where it has been abolished in schools, the practice continues. Sanctions against it are limited and seldom imposed. Teachers can get away with maiming children: in one widely reported case in Ghana, a girl was blinded.³¹⁷ Teachers will say they have few alternatives. In families, the use of physical violence to discipline children is culturally and legally tolerated. A characteristic shared by almost all of the countries in Africa is the belief that children are traditionally meant to be submissive, so that physical discipline is seen as a necessary element of child-rearing, and not in any way as problematic.³¹⁸

The UN Study on Violence Against Children, Middle East and North Africa Region (the 2005 MENA Report) noted these factors contributing to violence against children: economic factors (poverty, unemployment); social factors (dysfunctional families, family conflicts, marital disputes, large families, polygamy); prevalent cultural beliefs; a lack of awareness regarding appropriate child-rearing practices; the role of the media and programs that encourage

314. Kathy Vandergrift, *Challenges in Implementing and Enforcing Children's Rights*, 37 CORNELL INT'L L.J. 547, 550 (2004).

315. Chuma Himonga, *Implementing the Rights of the Child in African Legal Systems: the Mthembu Journey in Search of Justice*, 9 INT'L J. CHILD. RTS. 89, 90 (2001). See generally N. Barney Pityana, *The Challenge of Culture for Human Rights in Africa*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 219 (Malcolm Evans & Rachel Murray eds., 2002).

316. S. AFR. CONST. 1996, § 28(1) (South Africa); see Julia Sloth-Nielsen & Benyam D. Mezmur, *2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002–2006)*, 16 INT'L J. CHILD. RTS. 1, 1–28 (2008) (South Africa); Julia Sloth-Nielsen, *Domestication of Children's Rights in National Legal Systems in African Context: Progress and Prospects*, in CHILDREN'S RIGHTS IN AFRICA—A LEGAL PERSPECTIVE 53, 62 (Julia Sloth-Nielsen ed., 2008) (Uganda).

317. Nicole O'Neal, *Corporal Punishment in Public Schools: A Call for Legal Reform*, 8 AFR. HUM. RTS. L.J. 60, 61 (2008).

318. FARHANA ZUBERI, ASSESSMENT OF VIOLENCE AGAINST CHILDREN IN THE EASTERN AND SOUTHERN AFRICAN REGION: RESULTS OF AN INITIAL DESK REVIEW FOR THE UN SECRETARY GENERAL'S STUDY ON VIOLENCE AGAINST CHILDREN 19 (2005), available at www.crin.org/docs/ESA_Regional_Assessment_Final.doc.

violence; the lack of provisions in legislation that target the protection of children; and, where such provisions exist, inadequate enforcement.³¹⁹

The African Commission on Human and Peoples' Rights is a quasi-judicial institution that handles individual complaints of breach of the African Charter. Though it has been criticized for its ineffectiveness in ensuring compliance, it has an increasingly important role in setting regional standards, and, in doing so, it has raised some awareness of the issue of corporal punishment. A good example is the case of *Doebbler v. Sudan*.³²⁰ This action, brought by a human-rights lawyer, was a challenge to the judicial corporal punishment of juveniles in Sudan. Several students had been convicted of violating "public order" contrary to Sudanese criminal law. The girls had been wearing trousers, kissing and dancing with men, crossing legs with men, sitting with boys, and sitting and talking with boys at a picnic. They were sentenced to fines and between twenty-five and forty lashes. These lashes were administered on bare backs with an unclean plastic whip and without a doctor present.³²¹ It was alleged that this amounted to cruel, inhuman, or degrading punishment. The Commission was influenced by the decision of *Tyrer v. United Kingdom* and noted that even when birching had been carried out in private in the presence of a doctor and in hygienic conditions, it was regarded as "degrading punishment."³²² The Commission decided that the Sudanese use of judicial corporal punishment was contrary to the African Charter and incompatible with international human-rights law. It recommended that the Sudanese Government amend the criminal law to ensure its conformity with the Charter and with relevant human-rights instruments. It also recommended that the judicial punishment of lashes be abolished and that its victims in the present case be paid compensation.³²³ Evidently, the Sudanese Government has failed to comply with the Commission's recommendations in this case.³²⁴ But this does not mean its effect is nugatory. If nothing else, the case encourages pressure on governments from lobbying groups and NGOs, and it does, of course, have some educational value.

There has now been some progress. The Interim Constitution of Southern Sudan (2005) includes a provision that prohibits the use of corporal punishment by parents. The draft has a section devoted to the rights of children, and this includes the following provision: "Every child has the right: . . . to be free from corporal punishment and cruel and inhuman treatment by any person including

319. U.N. Study on Violence Against Children, Middle East and North Africa Region.

320. Curtis Francis Doebbler v. Sudan, Comm. No. 236/2000, African Comm'n on Human and Peoples' Rights (2003), available at <http://www1.umn.edu/humanrts/africa/comcases/236-2000.html>.

321. *Id.* ¶ 31.

322. *Id.* ¶ 38. See also *Tyrer*, *supra* note 203.

323. *Id.* ¶ 44.

324. See Frans Viljoen & Linette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, 101 AM. J. INT'L L. 1, 5 (2007).

parents, school administrations and other institutions”³²⁵ The Children’s Bill of South Sudan, however, now in the process of becoming law, does not include parents in the category of persons prohibited from using corporal punishment on children.³²⁶ Daksha Kassan comments that this omission “could” be seen as a retrogressive step, though she attempts, rather unconvincingly, to defend the omission because the phrase “any other person in any other place” covers parents.³²⁷ But, of course, it does not specifically say so. At any rate, consideration of corporal punishment by anyone in Sudan is progress in this poor, war-torn country.

Kassan also refers to a Kenyan decision, *Isaac Mwangi Wachira v. Republic High Court of Kenya (Nakuru)*,³²⁸ in which the father appealed his conviction of subjecting a child to torture. The case against him alleged that in order to punish her—she was three years old—he pinched her with his fingernails in her face, ears, back, and thighs. He was sentenced to three years’ imprisonment. This was, on appeal, reduced to one year. The length of the sentence is immaterial: the court’s decision, supported by the appellate court, is an unequivocal disapproval of this kind of conduct. The appeal court (the High Court) observed that the father had “no justification in injuring . . . his own daughter.” Further, the court reasoned that the action “could not be said to have been disciplining a child of three years,” nor could “the child . . . be said to have been at fault to deserve the punishment that was meted out to her by [her father].”³²⁹ The offense was subjecting a child to torture, and therefore the case cannot be considered to constitute rendering unlawful any corporal punishment by a parent of a child. Nevertheless, the decision is significant. As Kassan notes, “[I]t confirms the power of the Kenyan court to judicially subject the status of corporal punishment by parents to scrutiny and . . . brings to the fore a need for an explicit legislative ban on corporal punishment by parents.”³³⁰ The decision is particularly significant, too, in demonstrating the legal procedure of challenging corporal punishment in Anglophone Africa.

325. INTERIM CONST. OF S. SUDAN, 2005 § 21(f). See Kassan, *supra* note 167, at 176 (describing the development of the Interim Constitution).

326. Kassan, *supra* note 167, at 176 n.16.

327. *Id.*

328. *Id.* at 177. The case (Application 185 of 2004) is unreported. See also Godfrey Odongo, *Kenyan Law on Corporal Punishment in the Home*, 1 ARTICLE 19, 6, at 7 (2005).

329. Odongo, *supra* note 328, at 7.

330. Kassan, *supra* note 167, at 177.

IX

THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: THE DECLARATION OF THE RIGHTS AND DUTIES OF MAN

In 1948 the Organization of American States (OAS) adopted the American Declaration of the Rights and Duties of Man.³³¹ This is similar to, but not identical with, the Universal Declaration of Human Rights adopted by the UN shortly thereafter. The Inter-American Commission on Human Rights is expected to implement this Declaration. The Declaration applies to all member states of the OAS, even those that are not parties to the American Convention on Human Rights. Article 7 lays down that “all children have the right to special protection, care and aid.”³³² The OAS has also adopted the American Convention on Human Rights.³³³ The powers of this go beyond its European counterpart: the Inter-American Commission has an advisory jurisdiction and the power to order provisional measures in cases of extreme urgency and gravity.

Again unlike its European counterpart, the Inter-American Commission has a specific article on “The Rights of the Child,”³³⁴ which provides, “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.” Article 5 more broadly prohibits any torture or cruel, inhuman, or degrading punishment or treatment. Though cases decided under Article 5 apply specifically to adults, they offer some guidance on the attitude of the Inter-American institutions to corporal punishment. The first is *Winston Caesar v. Trinidad and Tobago*, in 2005.³³⁵ Caesar was sentenced to twenty years’ imprisonment with hard labor plus fifteen strokes of the cat-o’-nine tails for the offense of attempted rape. The Corporal Punishment Act of Trinidad and Tobago allowed for the imposition of corporal punishment to male offenders above the age of sixteen.³³⁶ The evidence was that Caesar was in poor physical condition when the punishment was administered, and he suffered adverse physical and psychological effects of the lashes he received.³³⁷ The Inter-American Court of Human Rights emphasized that the prohibition of torture and of inhuman and degrading punishment or treatment had reached the status of a “peremptory norm[] of international law.”³³⁸ It based this on a reading of international human-rights instruments as well as on regional case law. It took into account the institutionalized nature of

331. Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States (1948), *reprinted in* Organization of American States, Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 rev.12 (Jan. 31, 2007).

332. *Id.* art. VII.

333. American Convention on Human Rights, *entered into force* July 18, 1978, O.A.S.T.S. No. 36.

334. *See id.* art. 19.

335. 2005 Inter-Am. Ct. H.R. (ser. C) No. 123 (Mar. 11, 2005).

336. *Id.* at 2.

337. *Id.* at 14.

338. *Id.* at 24.

the violence against Caesar, his extreme humiliation, and his severe physical and psychological suffering, and concluded that there had been a violation of Article 5 of the American Convention on Human Rights. In addition, the court ruled that Trinidad and Tobago's Corporal Punishment Act contravened Article 5. That legislation should therefore have been abrogated when Trinidad and Tobago ratified the Convention; failure to do so was a breach of the state's obligation.³³⁹

The second case was *Prince Pinder v. Bahamas* in 2007.³⁴⁰ Pinder was convicted of armed robbery and sentenced to a lengthy term of imprisonment and to be flogged (six strokes in two installments).³⁴¹ The flogging had not yet been carried out, but, according to the Inter-American Commission, "the mere anticipation of flogging is within the parameters of the cruel, inhuman and degrading elements of judicial corporal punishment. Corporal punishment is not simply about the actual pain or humiliation of a flogging, but also about the mental suffering that is generated by anticipating the flogging."³⁴² Pinder had waited nearly a decade by the time these words were pronounced. The delay had aggravated his suffering and was "compounded even more by the fact that he has been sentenced to receive the flogging in two installments."³⁴³ The Commission concluded that Pinder's rights under Article I, XXV, and XXVI of the American Declaration had been violated.³⁴⁴ Article I lays down the right to "security of his person." Article XXV generates the right to "humane treatment" in custody, and Article XXVI creates the right "not to receive cruel, infamous or unusual punishment."³⁴⁵ The Commission accordingly recommended commutation of the sentence of corporal punishment and abrogation of the punishment of flogging by the state of Bahamas.³⁴⁶

X

CORPORAL PUNISHMENT IN ASIA

A number of Asian states have abolished corporal punishment in schools.³⁴⁷ None, apart from Israel, as yet, has banned it in the home.³⁴⁸ Asia lacks a

339. *Id.* at 29.

340. Case 12.513, Inter-Am. C.H.R., Report No. 79/07, OEA/Ser.L./V/II.130, doc. 22, rev. 1 (2007).

341. *Id.* ¶ 1.

342. *Id.* ¶ 35.

343. *Id.*

344. *Id.* ¶ 36.

345. *Id.* ¶ 24.

346. *Id.* ¶ 42.

347. The group includes China, Japan, Philippines, and Thailand. See Global Initiative to End All Corporal Punishment of Children, Global Progress Towards Prohibiting All Corporal Punishment, <http://www.endcorporalpunishment.org/pages/pdfs/charts/Chart-Global.pdf> (last visited May 26, 2010).

348. Abolition is under discussion in several countries: for example, Bangladesh, Sri Lanka, and Pakistan (these countries made a commitment to abolition at the July 2006 meeting of the South Asia Forum). Taiwan stated its commitment to prohibition in August 2005. In the Philippines various bills have been filed but not heard. There is draft legislation in Mongolia also (this was due for consideration

regional human-rights mechanism analogous to those that exist in Europe, Africa, and the Americas. There are, however, subregional cooperations.

The South Asian Association for Regional Cooperation (SAARC) has adopted the SAARC Social Charter. This Charter recognizes the principles of human dignity and nonviolence, and provides for the legal protection and respect for the dignity of the child.³⁴⁹ The Association of Southeast Asian Nations (ASEAN) has also set up a working group for an ASEAN human-rights mechanism. As yet, though, neither of these institutions has moved to tackle corporal punishment. But individual countries are beginning to express a concern about corporal punishment. It is therefore possible that the subregional cooperations may also take the initiative. The example of other regional human-rights systems may also eventually have an impact.

XI

CONCLUSION

There are grounds for optimism. Twenty-nine countries, mostly in Europe, have now outlawed corporal punishment by parents. More will do so. Sadly, others, predominantly in the English-speaking world, will resist change. There can be few more-dismal documents than a so-called consultation paper issued by the British government in 2000.³⁵⁰ This paper stated outright that the government did “*not* consider that the right way forward is to make unlawful all smacking and other forms of physical rebuke and this paper explicitly rules out the possibility.”³⁵¹ The paper makes no reference to children’s rights, their dignity, or their best interests. It conceded that “we all have an interest in making sure that children thrive[] and are helped to grow up into healthy and socially responsible adults.”³⁵² It took no note of the overwhelming evidence that such an objective was likely to be frustrated by the practice of corporal punishment. The consultation then sought opinions on the perimeters of reasonable chastisement. Should the law state that physical punishment that causes or is likely to cause injuries to the head including the brain, eyes, and ears never be accepted as “reasonable”?³⁵³ It is difficult to believe such a question can even have been asked. But this was from a government that believed in “loving smacks,” a classic oxymoron.³⁵⁴

in 2008). See links to tables with individual states’ progress reports available at <http://www.endcorporalpunishment.org/pages/progress/global.htm>.

349. South Asian Association for Regional Cooperation Social Charter, *available at* <http://www.saarc-sec.org/SAARC-Charter/5/>.

350. U.K. DEP’T OF HEALTH, PROTECTING CHILDREN, SUPPORTING PARENTS: A CONSULTATION DOCUMENT ON THE PHYSICAL PUNISHMENT OF CHILDREN (2000), *available at* http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_4083513.

351. *Id.* ¶ 1.5.

352. *Id.* ¶ 1.8.

353. *Id.* ¶ 5.7.

354. Tony Blair, the former Prime Minister, referred to “loving smacks.” See, e.g., *Children in Anti-Smacking Protest*, BBC NEWS, Apr. 15, 2000, <http://news.bbc.co.uk/1/hi/uk/713992.stm>.

But even in Britain change will come. (Wales may take the lead, if given the constitutional powers to do so.)³⁵⁵ And it must. The international impetus points in only one direction. The emphasis must be on prevention and on educating parents rather than punishing them. And change must be grounded in an understanding of the child's best interests and his or her dignity. This is not to say the argument that this change will also create a less-violent society—of benefit to us all—is unimportant. But best interests (as the Committee on the Rights of the Child stresses) and dignity must activate change.

To emphasize dignity is to engage with our conception of what it is to be human. It is also a point of closure: it is definitive and universal. It is not a value that tolerates either derogation or dissent. We recognize this in all sorts of areas, including American constitutional law.³⁵⁶ We must now recognize dignity's significance for children and for the corporal-punishment debate.

355. *See supra* note 135 and accompanying text.

356. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (striking down Oklahoma's Habitual Criminal Sterilization Act and referencing "dignity").