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## The Case for the Prohibition of Corporal Punishment in the U.S.

Katie Coyle<sup>1</sup>

It is undeniable that the United States (“U.S.”) has experienced significant social changes within the past 150 years. Social progress has been made regarding issues related to both race and gender. For example, until the 1870s, men were legally entitled to physically chastise their wives.<sup>2</sup> It was just a decade prior to this that slavery had been abolished. At the root of these issues was the notion that women and people of color were not autonomous holders of rights, but rather were property that belonged to their owners or partners. Arguably, one area of U.S. civil rights where this concept has not shifted is regarding the rights of children. Scholars have proposed that the perspective of children as “property” may serve to maintain individual and societal beliefs that condone and perpetuate violence against children.<sup>3</sup> This belief is at odds with international legal principles of a child’s right to be heard,<sup>4</sup> and the notion that children are autonomous holders of rights. Before proceeding to analyse alternative, accepted practices adopted throughout Europe, this paper will outline the history of events in the U.S. which have led to the current conception of corporal punishment throughout the U.S. Drawing on this comparison, this paper will then examine current efforts to prohibit corporal punishment in the U.S., and whether the U.S. is likely to experience a policy shift like that experienced in Europe.

### I. EVOLUTION OF CORPORAL PUNISHMENT POLICIES IN THE UNITED STATES

There are two key distinctions at the centre of the policies of corporal punishment:<sup>5</sup> the right for one to inflict corporal punishment on their child and the right of authority or state figures to inflict corporal punishment upon children, particularly within the classroom. This paper will explore both issues, as both are generally permitted within the U.S. Substantial contradictions exist within the U.S. legal system with respect to protecting children from corporal punishment. In more than half of all U.S. states, corporal punishment is not permitted in public schools.<sup>6</sup> In contrast, it is permitted in the home, largely because of strongly held beliefs about parents’ rights to discipline, as well as a societal view of parents as “owners” of their

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<sup>2</sup> Fulgham v. State, 46 Ala. 143, 145 (1871).

<sup>3</sup> P.S. Lilleston et al., *Understanding Social Norms and Violence in Childhood: Theoretical Underpinnings and Strategies for Intervention*, 22 PSYCH., HEALTH & MED. 122, 125 (2017).

<sup>4</sup> Comm. on the Rts. of the Child, *Convention on the Rights of the Child General Comment No. 12: The Right of the Child to be Heard*, ¶ 2, U.N. Doc. CRC/C/GC/12 (Nov. 20, 1989) [hereinafter CRC].

<sup>5</sup> George W. Holden et al., *History of and Progress in the Movement to End Corporal Punishment in the United States*, in *CORPORAL PUNISHMENT OF CHILD*. 293, 300 (2018) (Bernadette J. Saunders et al., eds., 2018) [hereinafter Holden].

<sup>6</sup> Susan H. Bitensky, *Corporal Punishment of Children Violates International Human Rights Laws*, in *CORPORAL PUNISHMENT OF CHILD.: A HUMAN RIGHTS VIOLATION* 47, 57 (2006). Corporal punishment is legal in all private schools, except for those in Iowa and New Jersey. See Denise-Marie Ordway, *Corporal punishment in schools: Research and reporting tips to guide your coverage*, THE JOURNALIST’S RES. (Mar. 1, 2023) <https://ewa.org/data-research-tips/corporal-punishment-in-schools-where-is-it-practiced>.

children.<sup>7</sup> Within the home, a majority of parents continue to report that they occasionally spank and slap their children.<sup>8</sup> A nationally representative poll found that 76% of men and 65% of women agreed that a child sometimes needs a “good hard spanking.”<sup>9</sup> Nevertheless, this attitude favoring corporal punishment has declined from the previous 84% in the 1980s.<sup>10</sup>

Physical punishment in U.S. schools was derived from European practices and was largely supported by Puritan religious views.<sup>11</sup> In particular, John Calvin, a principal figure in the development of the system of Christian theology, preached notions of original sin and innate depravity that heavily influenced educators’ perceptions of children and encouraged their use of physical punishment.<sup>12</sup> A widely held belief was that God mandated chastisement, with Puritan educators even believing that they were “beating the devil” out of their pupils.<sup>13</sup> As early as 1645, colonial schools and universities incorporated physical punishment into their procedural rules. School practices and policies encouraged educators’ use of physical punishment as an extension of parental and religious authority.<sup>14</sup>

Scholars have identified three waves of national efforts which worked towards ending corporal punishment within U.S. schools.<sup>15</sup> Lasting from the 1820s to the mid-1850s, the first wave of the movement was part of a larger movement to create a nonviolent, temperate society focused on childrearing more generally.<sup>16</sup> Society began to shift away from puritanical perceptions, which prompted increased public concern for children’s mental, moral, and physical well-being.<sup>17</sup> During this period, the Monitorial system was introduced in schools, which provided an alternative to punishment by focusing on character development. The Monitorial system motivated students through the use of rewards, modelling appropriate behaviour, and promoting healthy competition among peers.<sup>18</sup> These changing views were not universally embraced; rather, they were contested in debates in the 1830s and 1840s about classroom discipline.<sup>19</sup> Shortly after the civil war ended, the first wave of activism saw progress with New Jersey becoming the first state to ban the use of school

<sup>7</sup> Kevin Noble Maillard, *Rethinking Children as Property*, 75 SYRACUSE UNIV. 1, 6 (2012).

<sup>8</sup> Adam J. Zolotor et al., *The Emergence of Spanking Among a Representative Sample of Children Under Two Years of Age in North Carolina*, 2 FRONTIERS IN PSYCHIATRY 1, 1 (2011).

<sup>9</sup> Kristopher Turner, *Child Trends Databank, Attitudes toward Spanking: Indicators on Children and Youth*, CHILD TRENDS (2015).

<sup>10</sup> *Id.*

<sup>11</sup> Michael Donnelly & Murray A. Straus, *Putting Corporal Punishment of Children in Historical Perspective*, in CORPORAL PUNISHMENT OF CHILDREN IN THEORETICAL PERSPECTIVE 41, 45 (Michael Donnelly & Murray A. Straus, eds., 2005) [hereinafter Donnelly].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 46.

<sup>14</sup> Rex Forehand & Briton McKinney, *Historical Overview of Child Discipline in the US: Implications for Mental Health Clinicians and Researchers*, 2 J. OF CHILD. AND FAM. STUDIES 221, 226 (1993).

<sup>15</sup> Donnelly, *supra* note 11, at 50.

<sup>16</sup> Holden, *supra* note 5, at 295.

<sup>17</sup> *Id.*

<sup>18</sup> Francis J. Ryan., *From Rod to Reason: Historical Perspectives on Corporal Punishment in the Public School, 1642–1994*, 72 EDUC. HORIZONS 70, 76 (1994).

<sup>19</sup> James Jewett, *The Fight against Corporal Punishment in American Schools*, 4 HIST. OF EDUC. J. 1, 1–2 (1952).

corporal punishment in 1867.<sup>20</sup> Meanwhile, increased concerns about child abuse and cruelty were brought to light by the 1874 case of Mary Ellen Wilson in New York City. Her abuse and neglect led to the founding of the New York Society for the Prevention of Cruelty to Children (“SPCC”).<sup>21</sup> The formation of the SPCC spawned the creation of other organizations and societies against child abuse. These organizations promoted the growing awareness of children’s rights and the marked similarities between corporal punishment and physical abuse, which ushered in the second wave of activism against corporal punishment.<sup>22</sup> By the 1890s, corporal punishment had emerged as a topic of debate among educators and expanded beyond pedagogical issues to include broader social implications.<sup>23</sup> By 1905, the reliance on corporal punishment in the classroom had declined. Cities such as New York, Chicago, Baltimore, Cleveland, and Louisville had somewhat prohibited the use of corporal punishment in schools.<sup>24</sup>

The third wave of the movement to abolish corporal punishment in schools began in the early 1960s with the publication of pediatrician Henry Kempe’s “Battered Child Syndrome” article.<sup>25</sup> In its 1972 report, the National Education Association’s Task Force on Corporal Punishment recommended eliminating corporal punishment in American schools and instead providing training in alternative disciplinary methods.<sup>26</sup> In tandem with these studies, a number of civil rights lawyers in the U.S. focused significant attention on attempting to end corporal punishment within the U.S.<sup>27</sup> A number of attorneys and law school faculty members at this time wrote books and law review articles about the topic.<sup>28</sup> Despite these efforts, the consistent view of the U.S. Supreme Court has consistently held that the use of corporal punishment does not violate constitutional rights. By the close margin of a 5 to 4 vote, the Supreme Court in *Ingraham v. Wright* (1977) held that “moderate corporal punishment” does not violate the Eighth Amendment protection against cruel and unusual punishments, nor does it infringe up<sup>30</sup>. It is of further note that this case was related to the paddling of a child to the extent medical attention was required.<sup>31</sup> The Court ruled that the cruel and unusual punishments clause of the Eighth Amendment applied only to convicted criminals, and therefore could not be violated by practicing corporal punishment in schools.<sup>32</sup><sup>33</sup> In reaching its

<sup>20</sup> Holden, *supra* note 5, at 298.

<sup>21</sup> *Id.* at 299.

<sup>22</sup> Ann-Marie Szymanski, *Child Abuse, Policy Communities, and Frame Contestation During the Progressive Era*, J. OF POL’Y HIST., 31(2), 167 (2019).

<sup>23</sup> Ray Hiner, *Children’s Rights, Corporal Punishment, and Child Abuse: Changing American Attitudes, 1870–1920*, 43 BULL. OF THE MENNINGER CLINIC 233, 241 (1979).

<sup>24</sup> *Id.* at 242.

<sup>25</sup> Holden, *supra* note 5, at 298.

<sup>26</sup> *Id.*

<sup>27</sup> Irwin A. Hyman et al., Manning, J., *Discipline in the Good Old Days*, in CORPORAL PUNISHMENT IN AMERICAN EDUCATION: READINGS IN HISTORY, PRACTICE, AND ALTERNATIVES, (Philadelphia, PA: Temple University Press, 1979).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Ingraham v. Wright*, 430 U.S. 651, 1419 (1977).

<sup>31</sup> *Id.* at 1403.

<sup>32</sup> *Id.* at 1409-1410.

<sup>33</sup> *Id.* at 1411.

decision, the Court gave great weight to the historical tradition of corporal punishment in U.S. public schools<sup>34</sup>The judgement also cited safeguards which the Court deemed sufficient<sup>35</sup> Florida law regarding corporal punishment recognized students' common law right to be free from excessive corporal punishment and mandated that teachers exercised prudence and restraint. Unreasonable or excessive punishment carried the possibility of both criminal and civil liability.

Despite the ruling, in the years following *Ingraham*, the use of corporal punishment began to significantly decrease.<sup>36</sup> Between the years 1976 and 2006, paddling incidents peaked at just over five percent of public-school students in 1982 and have steadily declined since then.<sup>37</sup> To date, over 30 states have banned public-school corporal punishment.<sup>38</sup> While corporal punishment still exists in many schools today, it is much less accepted socially. In 2016, John B. King, Jr., the U.S. Education Secretary, sent an open letter to the governors and school officers in the nineteen states where corporal punishment was still legal, urging them to end the practice.<sup>39</sup>

In the U.S., the typical citizen makes a distinction between corporal punishment in homes and in schools. Parents commonly believe it is acceptable for parents to physically punish their own children. Consequently, there has been more public support for ending corporal punishment administered by teachers rather than by parents.<sup>40</sup> It has been more commonly accepted for parents to exert the authority to punish their own child. The extremity of this view could be observed in early laws such as "stubborn child laws" passed in 1646 in the Massachusetts Bay Colony, which went as far as to sanction the killing of disobedient youth.<sup>41</sup> While there are no records of this defense being invoked, it does reveal the complete authority parents held over their children at the time.

Belief in the benefits of corporal punishment have changed due to psychological and scientific research which began to assess the potential negative effects of corporal punishment and whether it was effective in promoting positive behaviour.<sup>42</sup> Some academics, such as Durrant, have argued that the use of corporal punishment on children can have a broader negative impact within society.<sup>43</sup> The The

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<sup>34</sup> *Id.* at 1415.

<sup>35</sup> *Id.*

<sup>36</sup> Bi-annual surveys conducted by the US Department of Education's Office of Civil Rights indicated a decrease from roughly 3 million incidents per year in schools in the early 1980s to approximately 500,000 by the early 1990s.

<sup>37</sup> Elizabeth T. Gershoff et al., CORPORAL PUNISHMENT IN U.S. PUBLIC SCHOOLS: LEGAL PRECEDENTS, CURRENT PRACTICES, AND FUTURE POLICY 11 (2015).

<sup>38</sup> *Id.* at 1-6.

<sup>39</sup> *End Paddling of Students, Education Secretary John B. King Jr. Urges States*, CBS NEWS (Nov. 22, 2016), <https://www.cbsnews.com/news/end-paddling-of-students-education-secretary-john-b-king-jr-urges-states/>.

<sup>40</sup> MURRAY A. STRAUS & DENISE A. DONNELLY, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS ON CHILDREN 81 (Transaction Publishers 2001).

<sup>41</sup> John R. Sutton, *Stubborn Children: Law and the Socialization of Deviance in the Puritan Colonies*, 15 FAM. L. QUARTERLY 31 (1981).

<sup>42</sup> Joan Durrant & Ron Ensom, *Physical Punishment of Children: Lessons From 20 Years of Research*, CMAJ (Sep 4, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3447048/>.

<sup>43</sup> *Id.*

American Academy of Child and Adolescent Psychiatry has observed that “corporal punishment signals to the child that a way to settle interpersonal conflicts is to use physical force and inflict pain.”<sup>44</sup> Thus, they may fail to develop the necessary skills to settle disputes peacefully which can have broader implications for society.<sup>45</sup> A significant body of evidence supports the finding that physically punishing children tends to lead to an increase in aggression.<sup>46</sup> Cultures in which corporal punishment is more accepted have higher overall levels of societal violence.<sup>47</sup> Murray A. Straus of the University of New Hampshire discovered in 2013 that children who were spanked committed more crimes as adults than children who were not spanked, regardless of the strength of their connection with their parents.<sup>48</sup>

Despite these studies, the practice of corporal punishment persists in the U.S. Within the 2015-2016 school year, nearly 100,000 school children were legally struck by their instructors, sometimes for minor offenses, and a disproportionate number of children affected by these laws are black or have a disability.<sup>49</sup> Due to the private nature of the home environment it is difficult to obtain wholly accurate statistics on this issue. Some studies have indicated that corporal punishment occurs in over 50% of families, however. A 2023 report published by End Violence Against Children and End Corporal Punishment stated, “Almost two thirds (65%) of three-year-olds in a sample of nearly 2,000 families had been “spanked” by one or both parents in the previous month. The study examined the prevalence of corporal punishment and intimate partner aggression, with 49% of the families reporting both of these.”<sup>50</sup> Research has indicated that corporal punishment is detrimental to society because of its lasting negative impact on the child and the overall impacts of corporal punishment on heightened societal violence.<sup>51</sup> Research also indicates that corporal punishment can serve as a gateway for child abuse.<sup>52</sup> In Sweden, a key aim of prohibiting corporal punishment was to clearly identify at-risk children early in the

<sup>44</sup> AACAP (2014) Corporal PUNISHMENT IN SCHOOLS, [https://www.aacap.org/aacap/Policy\\_Statements/1988/Corporal\\_Punishment\\_in\\_Schools.aspx](https://www.aacap.org/aacap/Policy_Statements/1988/Corporal_Punishment_in_Schools.aspx)

<sup>45</sup> *Id.*

<sup>46</sup> Jennifer E. Lansford, *Corporal Punishment*, ENCYCLOPEDIA ON EARLY CHILDHOOD DEVELOPMENT (2022).

<sup>47</sup> Jennifer E. Lansford & K.E. Dodge. *Cultural Norms for Adult Corporal Punishment of Children and Societal Rates of Endorsement and Use of Violence*. PARENT SCI PRACT. 1;8(3) 257 (Jul. 2008).

<sup>48</sup> Murray Straus, *College Students More Likely to be Lawbreakers if Spanked as Children, New UNH Research Finds*, UNH TODAY (Nov. 22, 2013), <https://www.unh.edu/unhtoday/news/release/2013/11/22/college-students-more-likely-be-lawbreakers-if-spanked-children-new-unh>.

<sup>49</sup> Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, 30 SOC. POL'Y REP. 1 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5766273/>; Ryan Park, *The Supreme Court Didn't Ban Corporal Punishment. Local Democracy Did*, WASH. POST, (Apr. 11, 2019), [https://www.washingtonpost.com/opinions/the-supreme-court-didnt-ban-corporal-punishment-local-democracy-did/2019/04/11/b059e8fa-5554-11e9-814f-e2f46684196e\\_story.html](https://www.washingtonpost.com/opinions/the-supreme-court-didnt-ban-corporal-punishment-local-democracy-did/2019/04/11/b059e8fa-5554-11e9-814f-e2f46684196e_story.html).

<sup>50</sup> CORPORAL PUNISHMENT OF CHILDREN IN THE USA, END CORPORAL PUNISHMENT, END VIOLENCE AGAINST CHILDREN. (2023) <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/USA.pdf>

<sup>51</sup> See generally Joan E. Durrant, *Evaluating the Success of Sweden's Corporal Punishment Ban*, 23 CHILD ABUSE AND NEGLECT, 435 (1999).

<sup>52</sup> *Joint Statement on Physical Punishment of Children and Youth*, CHEO (last visited Apr. 2, 2023). [www.cheo.on.ca/en/physicalpunishment](http://www.cheo.on.ca/en/physicalpunishment).

cycle of abuse.<sup>53</sup> The Swedish legislature further intended that Swedish citizens would act promptly upon witnessing or hearing disclosures of physical harm.<sup>54</sup>

The American Academy of Child and Adolescent Psychiatry opposes the use of corporal punishment in schools and takes issue with laws in some states that legalize punishment.<sup>55</sup> Multiple studies indicate that parents are more prone to adopt aversive techniques of discipline when they are angry or irritable, depressed, fatigued, and stressed.<sup>56</sup> According to the American Academy of Paediatrics, “[t]he only way to maintain the initial effect of spanking is to systematically increase the intensity with which it is delivered, which can quickly escalate into abuse.”<sup>57</sup> In the U.S., interviews with parents revealed that as many as two-thirds of documented instances of physical abuse began as acts of corporal punishment meant to correct a child's behaviour.<sup>58</sup> They estimate that such release of pent-up anger makes parents more likely to hit or spank their children in the future.<sup>59</sup> The Royal College of Paediatrics and Child Health of the United Kingdom remarked that “corporal punishment of children in the home is of importance to paediatricians because of its connection with child abuse. . . all paediatricians will have seen children who have been injured as a result of parental chastisement.”<sup>60</sup> A 2008 study at the University of North Carolina at Chapel Hill found that mothers who reported spanking their children were three times more likely to also report using forms of punishment considered abusive to the researchers, “such as beating, burning, kicking, hitting with an object somewhere other than the buttocks, or shaking a less than 2-year-old.”<sup>61</sup>

The culmination of studies like these is reflective of a global decrease in the number of states which permit the defence of parental chastisement. As of 2023, corporal punishment is illegal in all EU school settings and in all EU homes except in Slovakia and the Czech Republic.<sup>62</sup> It was the EU country of Sweden that was the first state to completely prohibit corporal punishment in 1979—a decade before the UN Convention on the Rights of the Child was even adopted (“UNCRC”).<sup>63</sup> This paper now transitions to assess the legal and political will and context which led to the highly influential Swedish model, before assessing the international standards which support this stance.

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<sup>53</sup> *Id.* at 444.

<sup>54</sup> *Id.*

<sup>55</sup> *See generally*, American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *Guidance for Effective Discipline*, 101 PEDIATRICS 723 (Apr. 1998).

<sup>56</sup> *Id.* at 727.

<sup>57</sup> *Id.* at 726.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Royal College of Paediatrics and Child Health Position Statement on Corporal Punishment* (PDF), November 2009, Archived from the original (PDF).

<sup>61</sup> J. Outlaw, *UNC Study Shows Link Between Spanking and Physical Abuse*, UNC NEWS ARCHIVES (2013) <https://uncnewsarchive.unc.edu/2008/08/19/unc-study-shows-link-between-spanking-and-physical-abuse-2/>

<sup>62</sup> EUROPEUM.ORG BLOG: EU APPROACH V. THE CZECH REPUBLIC: INVISIBLE GAP IN CZECHS HUMAN RIGHTS’ LEGISLATION, EUROPEUM.ORG. (2023) <https://www.europeum.org/en/articles/detail/5432/blog-eu-approach-v-the-czech-republic-invisible-gap-in-czechs>.

<sup>63</sup> *Id.* at 435.

## I. COMPARATIVE AND INTERNATIONAL ANALYSIS OF CORPORAL PUNISHMENT

International human rights bodies, such as the UN Committee on the Rights of the Child, the Council of Europe and the Inter-American Commission on Human Rights, have all advocated for an end to all forms of corporal punishment, arguing that it violates children's dignity and right to bodily integrity.<sup>64</sup> The basis for these arguments goes beyond the issue that corporal punishment is ineffective or that it leads to violence in society.<sup>65</sup> Moreso, according to the jurisprudence of these bodies, the use of corporal punishment is a violation of children's fundamental rights and must be prohibited immaterial of outcomes or consequences.<sup>66</sup> The Council of Europe has called for the abolition of corporal punishment stressing that corporal punishment is "a violation of children's rights to respect for human dignity and physical integrity."<sup>67</sup>

This stance is codified in Article 19 the Convention on the Rights of the Child (UNCRC), for example, states that "parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of corporal and mental violence."<sup>68</sup> The UN Committee on the Rights of the Child clarified in 2006 that all forms of corporal punishment are incompatible with the Convention on the Rights of the Child.<sup>69</sup> In the Committee's view, "[a]ddressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it, in the family, schools and other settings, is not only an obligation of States parties under the Convention. It is also a key strategy for reducing and preventing all forms of violence in societies."<sup>70</sup> Since the UNCRC was adopted, the number of countries banning all corporal punishment against children has grown significantly.<sup>71</sup> Only four countries had such a ban when the UNCRC was created.<sup>72</sup>

As noted, Sweden took steps to codify such norms long before they were even incorporated into international instruments.<sup>73</sup> In 1957, the section of the Swedish Penal Code permitting parents to use force in reprimanding their children was

<sup>64</sup> CORPORAL PUNISHMENT, COUNCIL OF EUROPE, <https://www.coe.int/En/Web/Children/Corporal-Punishment> (last visited Apr. 15, 2023).

<sup>65</sup> See generally *Ending Corporal Punishment of Children*, UNITED NATIONS HUMAN RIGHTS (Jan. 31, 2013), <https://www.ohchr.org/en/stories/2013/01/ending-corporal-punishment-children>.

<sup>66</sup> *Id.*

<sup>67</sup> Council of Europe, *supra* note 65; Council of Europe, *ELIMINATING CORPORAL PUNISHMENT: A HUMAN RIGHTS IMPERATIVE FOR EUROPE'S CHILDREN*, (2nd ed. 2008).

<sup>68</sup> CRC, *supra* note 4, at ¶ 120.

<sup>69</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment* (Arts. 19; 28, Para. 2; and 37, *inter alia*), 2 March 2007, CRC/C/GC/8.

<sup>70</sup> *Id.*

<sup>71</sup> University of North Carolina School of Medicine, *Corporal Punishment of Children Remains Common Worldwide, Studies Find*, SCIENCE DAILY (9 August 2010), [www.sciencedaily.com/releases/2010/08/100809111232.htm](http://www.sciencedaily.com/releases/2010/08/100809111232.htm).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



completely removed.<sup>74</sup> The intent of this change was to provide children with the same protection from assault that adults receive and to clarify the grounds for criminal prosecution of parents who abused their children.<sup>75</sup> A number of clarifying legislative measures were incorporated through 1979, although confusion remained in Swedish society with regards to whether physical punishment was allowed.<sup>76</sup> Thus, in 1979, Sweden became the world's first nation to explicitly ban corporal punishment of children through an amendment to the Parenthood and Guardianship Code which stated: "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."<sup>77</sup> Multiple nations, particularly other European countries, have modeled their own systems off the Swedish model, including Denmark, Spain, Greece, Portugal, Germany, and the Netherlands.<sup>78</sup>

In Swedish society, there were some objections to the law, particularly on religious grounds.<sup>79</sup> Nonetheless, this law was unanimously accepted by the Swedish parliament, particularly as the prevention of child abuse had become an important political issue at the time.<sup>80</sup> In the 1970's in Sweden a number of "brutal child abuse" stimulated discussion on the potential to ban corporal punishment.<sup>81</sup> This contributed to a decision by the Minister of Justice to appoint a Commission on Children's Rights with the objective of reviewing the Parents' Code.<sup>82</sup>

According to studies conducted on behalf of the international nongovernmental organization, Save the Children, the ban adopted in Sweden was never intended to be punitive; rather, it was meant to be educational.<sup>83</sup> Several international studies have claimed that this ban on corporal punishment has helped to reduce violent childrearing in Sweden, and exerted a major influence on both the attitudes and behaviour of parents.<sup>84</sup> In Sweden, before the 1979 ban, more than half of the population considered corporal punishment a necessary part of childrearing.<sup>85</sup> In the 1960s, more than 90 percent of Swedish parents reported using physical

<sup>74</sup> Cecilia Modig, *Never Violence- Thirty-Five Years on from Sweden' Abolition of Corporal Punishment* 12 (2009), <https://resourcecentre.savethechildren.net/document/never-violence-35-years-swedens-abolition-corporal-punishment/>.

<sup>75</sup> *Id.* at 8.

<sup>76</sup> *Id.* at 12.

<sup>77</sup> *The Children and Parent Code*, CHAPTER 6, SECTION 1, 1979 (2021), <http://ceflonline.net/wp-content/uploads/Sweden-Parental-Responsibilities.pdf/>; Sweden's Children and Parent Code, *FUTUREPOLICY.ORG.* (last visited Apr. 2, 2023) <https://www.futurepolicy.org/rightsofchildren/swedens-children-and-parent-code-to-prohibit-all-corporal-punishment-and-other-humiliating-treatment-of-children/>.

<sup>78</sup> Kai-D Bussmann et al., *The Effect of Banning Corporal Punishment in Europe: A Five-Nation Comparison*, MARTIN-LUTHER-UNIVERSITÄT HALLE-WITTENBERG, GERMANY, 1, 2 (2009).

<sup>79</sup> *Id.*

<sup>80</sup> Sara Hegelsof, *Children's Rights and Corporal Punishment in Sweden: A Content Analysis of the 1978 Bill Against Corporal Punishment.* (2019).

<sup>81</sup> *Id.*

<sup>82</sup> Durrant, *supra* note 51 at 436.

<sup>83</sup> Joan E. Durrant, *A Generation Without Smacking: the Impact of Sweden's Ban on Physical Punishment* 6 (2000).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 9.

punishment.<sup>86</sup> By the 2000s, the gap between belief in the necessity of corporal punishment and practice had nearly disappeared, with slightly more than 10 percent of parents reporting that they use corporal punishment.<sup>87</sup> The legislative arguably achieved its goal, as it brought a significant shift in attitudes to oppose the use of corporal punishment in Swedish society.<sup>88</sup>

After the 1979 change to the Parenthood and Guardianship Code, children entering state care in Sweden did not increase. In fact, the number significantly decreased.<sup>89</sup> A 2000 study found that while the number of reported assaults on children increased, the majority of these were punished by requiring payment of a minor fine; in turn these minor escalations potentially prevented an escalation to more serious violence.<sup>90</sup> There have also been more social-service interventions conducted with parental consent and fewer compulsory interventions.<sup>91</sup> Durrant wrote that the authorities had three goals: (1) to bring about a change in public attitudes away from support for corporal punishment; (2) to facilitate the identification of children likely to be physically abused; and (3) to enable earlier intervention in families with the intention of supporting parents.<sup>92</sup> It can be further noted that the ban on corporal punishment did not lead to higher crime rates in Swedish society.<sup>93</sup> Theft convictions and suspects in narcotics crimes among Swedish youth significantly decreased, and youth drug and alcohol use and suicide rates also decreased.<sup>94</sup> Some scholars contend that a decrease in child abuse deaths in Sweden cannot be attributed to the ban on corporal punishment alone due to a number of other important variables.<sup>95</sup> Durrant contends that whether directly or indirectly correlated, it is clear that the original goal of the Swedish corporal punishment ban has been met - to change societal attitudes towards violence against children.<sup>96</sup>

In 1982, a group of Swedish parents brought a complaint to the European Commission of Human Rights ("The Commission") asserting that the ban on parental physical punishment breached their right to respect for family life and religious freedom; however, this case was dismissed.<sup>97</sup> This signalled greater international support with respect to the view against the use of corporal punishment. The European Court of Human Rights ("the ECtHR") found corporal punishment to be a violation of children's rights under the European Convention on Human Rights

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<sup>86</sup> *Id.* at 10.

<sup>87</sup> *Id.*

<sup>88</sup> Gershoff, *supra* note 37.

<sup>89</sup> The Positive Impact of Prohibition of Corporal Punishment on Children's Lives: Messages From Research, GLOBAL PARTNERSHIP TO END VIOLENCE AGAINST CHILDREN (March 2023); Durrant, *supra* note 83.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Durrant, *supra* note 42.

<sup>93</sup> Joan E Durrant, *Trends in Youth Crime and Well-Being Since the Abolition of Corporal Punishment in Sweden*, 31.4 YOUTH & SOCIETY 437, 437 (2000).

<sup>94</sup> *Id.* at 447.

<sup>95</sup> "THE SWEDISH MYTH:" THE CORPORAL PUNISHMENT BAN AND CHILD DEATH STATISTICS, 35 BRIT. J. SOC. WORK 1411, 1414 (2005).

<sup>96</sup> Joan E. Durrant, *Legal Reform and Attitudes Toward Physical Punishment in Sweden*, 11 INT'L J. CHILD. RIGHTS 156, 169 (2003).

<sup>97</sup> *Id.*

(“the ECHR”), stating that bans on corporal punishment did not violate religious freedom or the right to private or family life.<sup>98</sup> As recently as 2018, the case of *Wetjen and Others v. Germany*<sup>99</sup> indicated that the removal of parental rights from a parent who invoked corporal punishment did not constitute a violation of Article 8 of the ECHR.<sup>100</sup>

The ECtHR has also indicated a tendency to view corporal punishment as a violation of the human rights of the child. *Tyrer v. United Kingdom*<sup>101</sup> was the first landmark decision of the ECtHR where it was held that the states’ use of corporal punishment could constitute a violation of Article 3 of the ECHR. Article 3 stipulates that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>102</sup> The applicant, a fifteen-year-old boy named Tyrer, was sentenced to three strokes of birch for unlawful assault of another pupil at his school.<sup>103</sup> The Court ruled out the possibility of the punishment amounting to torture or inhuman punishment as it did not reach the required level of severity; thus, the Court considered whether the punishment was degrading.<sup>104</sup> It was held that such a violation had occurred, citing Article 3 of the ECHR, which intended to “protect a person’s dignity and physical integrity.”<sup>105</sup>

Corporal punishment in schools was later considered by the ECtHR in the case of *Costello-Roberts v. United Kingdom*,<sup>106</sup> in which a seven-year-old boy was “slipped” (i.e., beaten with a shoe) by his headmaster.<sup>107</sup> Nevertheless, the Court did not find a violation of Article 3 of the ECHR because the punishment did not attain the minimum threshold for it to be degrading. In the case of *A v. United Kingdom*,<sup>108</sup> the ECtHR considered whether a nine-year-old boy who was regularly hit by his stepfather with a garden cane, causing him bruises, amounted to a violation of Article 3 of the ECHR.<sup>109</sup> Applying the test derived from *Tyrer*, the Court found the punishment did reach the required minimum level of severity to fall within the ambit of Article 3.<sup>110</sup>

Regarding *A*, the Court then had to consider whether the State could be held responsible for beatings carried out by the stepfather.<sup>111</sup> Under international law, the duty of due diligence as applied to the ECHR means that states have an obligation to exercise due diligence to prevent, investigate and punish acts of violence. The ECtHR

<sup>98</sup> UNCRC Committee, *supra* note 71.

<sup>99</sup> Case of *Wetjen & Others v. Germany*, 68125/14,72204/14 Eur. Ct. H.R., <https://hudoc.echr.coe.int/fre> (2018).

<sup>100</sup> *Id.*

<sup>101</sup> *Tyrer v. The United Kingdom*, 5856/72, Eur. Ct. H.R. (1978), <https://www.refworld.org/cases.ECHR.402a2cae4.html>.

<sup>102</sup> *Id.* at para [28].

<sup>103</sup> *Id.* at para [9].

<sup>104</sup> *Id.* at para [33].

<sup>105</sup> *Id.*

<sup>106</sup> *Costello-Roberts v. The United Kingdom*, 89/1991/341/414, Eur. Ct. H.R. (1993).

<sup>107</sup> *Id.* at para [9].

<sup>108</sup> Case of *A v. The United Kingdom* (100/1997/884/1096) Eur. Ct. H.R. (1998).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

applied the principle of due diligence regarding Article 1 of the ECHR, as it did in *Costello-Roberts*, and determined that the State has a positive obligation to take measures to avoid individuals being subjected to ill-treatment prohibited by Article 3.<sup>112</sup> It held that English law did not provide adequate protection to A per Article 3.<sup>113</sup>

The ECtHR has yet to issue a ruling encouraging a blanket prohibition on the use of corporal punishment. However, a general trend can be observed in Europe towards this direction. The Parliamentary Assembly of the Council of Europe urges a total ban on "all forms of corporal punishment and any other forms of degrading punishment or treatment of children" as a requirement of the European Social Charter.<sup>114</sup> Other member states, such as Sweden, have called for the incorporation of a total European ban on the use of corporate punishment.<sup>115</sup>

Other international bodies, such as the UN Committee on the Rights of the Child follow a similar stance.<sup>116</sup> The Inter-American Commission on Human Rights concluded in 2009 that corporal punishment "constitutes a form of violence against children that wounds their dignity and hence their human rights," asserting that "the member states of the Organization of American States (OAS) are obliged to guarantee children and adolescents special protection against the use of corporal punishment."<sup>117</sup> UNESCO also recommends that corporal punishment be prohibited as a use of discipline since it violates human rights and ineffective in the education of children.<sup>118</sup>

## II. THE CASE FOR PROHIBITING CORPORAL PUNISHMENT IN THE U.S.

The U.S. is not the only country where corporal punishment has not been prohibited. A recent World Health Organization report highlighted how corporal punishment is still permitted among 60% of the world's population of children aged two to fourteen.<sup>119</sup> As previously noted, countries which permit corporal punishment often tend to have a higher rate of violence more generally.<sup>120</sup> While this paper has largely focused on the use of international human rights norms as indicators that

<sup>112</sup> *Id.* at 5.

<sup>113</sup> Dorianne Hardy, *Corporal Punishment of Children – the Evolutionary Approach of International Law*, KING'S STUD. L.R. 2013, (En.) <https://blogs.kcl.ac.uk/kslr/2013/12/09/427/>; European Convention for the Protection of Human Rights and Fundamental Freedoms, <https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/european-convention-for-the-protection-of-human-rights-and-fundamental-freedoms/>.

<sup>114</sup> Eur. Parl. Ass., *Recommendation 1666 (2004): Europe-Wide Ban on Corporal Punishment of Children*, 21st sitting, (2004), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10558>.

<sup>115</sup> *Id.*

<sup>116</sup> United Nations Committee on the Rights of the Child, *supra* note 97.

<sup>117</sup> Report on Corporal Punishment and Human Rights of Children and Adolescents, Inter-Am. Comm'n H.R. Rapporteurship on the Rights of the Child, 38 (2009).

<sup>118</sup> Paulo Sérgio Pinheiro, *Preface* of HART, STUART N. ET AL., *ELIMINATING CORPORAL PUNISHMENT: THE WAY FORWARD TO CONSTRUCTIVE CHILD DISCIPLINE. EDUCATION ON THE MOVE*, 17-19 (Paris: UNESCO 2005).

<sup>119</sup> *Corporal Punishment and Health*, WORLD HEALTH ORGANIZATION. WORLD HEALTH ORGANIZATION (Nov. 23, 2021), <https://www.who.int/news-room/fact-sheets/detail/corporal-punishment-and-health>.

<sup>120</sup> *See generally*, Lansford & Dodge, *supra* note 47.

corporal punishment should be prohibited, it should be noted that the U.S. can be cited as an outlier regarding its adherence to international human rights principles. The U.S. is the only country in the world that has not ratified the UNCRC.<sup>121</sup> Thus, it is unlikely that the U.S. will alter its stance on corporal punishment in response to pressure from the international human rights community.

That being said, it can be questioned whether *Ingraham* would be decided the same way today, given the close margin and the tremendous global attitude shift against corporal punishment in its aftermath.<sup>122</sup> Indeed, *Ingraham* was decided before Sweden incorporated its landmark legislation prohibiting the use of corporal punishment completely. In *Graham v. Florida*,<sup>123</sup> it was indicated that, while solely influential, foreign influences can have some impact on the decisions of the Court.<sup>124</sup> It also is not unheard of that the Supreme Court could overturn a previous ruling, such as that seen in the departure of *Ferguson*<sup>125</sup> for *Brown*.<sup>126</sup>

There has also been significant lobbying within the U.S. in recent years regarding corporal punishment; both from “bottom-up advocacy that focus on education and individual cases, and also through top-down legislative lobbying.”<sup>127</sup> Scholars such as Susan Bitensky and Deana Pollard Sacks, have articulated how corporal punishment is a human rights violation.<sup>128</sup> Victor Vieth, the Senior Director of the Gundersen National Child Protection Training Centre, has also written extensive law review articles advocating an end to the practice of hitting children.<sup>129</sup> Scholars have noted that in the Swedish example, as well as in Germany, changes to legislation on corporal punishment were also accompanied by significant education reforms and awareness campaigns within society.<sup>130</sup>

In Sweden, the passage of the 1970s legislation was accompanied by national distribution of a 16-page public education brochure.<sup>131</sup> In addition, information about the law was printed on milk cartons for two months in order to have information about the law present at mealtimes so that families could discuss the issue.<sup>132</sup> The primary purpose of the change to Swedish law was to educate, not to coerce or criminalise

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<sup>121</sup> Miriam Abaya et al, *US High-Level Office for Children is Critical for Children's Rights* (2022) HEALTH & HUMAN RIGHTS J., <https://www.hhrjournal.org/2022/03/us-high-level-office-for-children-is-critical-for-childrensrights/#:~:text=The%20United%20States%20remains%20the.rights%20treaty%20in%20the%20world.>

<sup>122</sup> *Id.*

<sup>123</sup> *Graham v. Florida*, 560 U.S. 48, 97 n.12 (2010) (Thomas, J., dissenting).

<sup>124</sup> *See, Id.* (part of *Graham*'s argument was that his sentence violated international legal norms).

<sup>125</sup> *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896).

<sup>126</sup> *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954).

<sup>127</sup> Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 UC DAVIS L. REV. 1165, 1212-13 (2009).

<sup>128</sup> *Id.* at 1216.

<sup>129</sup> Victor I. Vieth, *Unto the Third Generation: A Call to End Child Abuse in the US within 120 Years*, 12 J. OF AGGRESSION, MALTREATMENT & TRAUMA 1, 14-39 (2007); CRC, *supra* note 4, at ¶ 47.

<sup>130</sup> Klaus A. Ziegert, *The Swedish Prohibition of Corporal Punishment: A Preliminary Report*, 45 J. OF MARRIAGE AND THE FAM. 917, 922 (1983).

<sup>131</sup> Durrant, *supra* note 51, at 436.

<sup>132</sup> *Id.*

parents.<sup>133</sup> It can also be noted that campaigns continuously occur in Sweden even though the law was introduced many decades ago.<sup>134</sup> This difference between campaigns and the law indicates that intensive education campaigns need to accompany the laws which are introduced.

In the fall of 2017, “two organisations (American Professional Society on the Abuse of Children and the New York Foundling) hosted a summit that brought together 38 leaders from professional organisations, academia, and social change agencies.”<sup>135</sup> The strategy behind this campaign was to facilitate a nationwide strategy which can end corporal punishment.<sup>136</sup> The APSAC, for example, continues to regularly conduct trainings and advocacy events in society.<sup>137</sup> Furthermore, a partner organisation, the U.S. Alliance to End the Hitting of Children, has formed an alliance of multiple individuals, groups, and organizations to end corporal punishment of children.<sup>138</sup>

The impact of top-down advocacy<sup>139</sup> cannot be underestimated also. It can be argued that Sweden primarily altered public sentiment through the top-down approach of passing legislation. It can also be noted that the original U.S. ban on school corporal punishment was introduced in New Jersey by a single representative who did not consult any school officials.<sup>140</sup> In recent years, state representatives such as Alma Allen in Texas and Barbara Norton in Louisiana have repeatedly attempted to introduce bills to Congress, although these have been largely rejected. On a federal level, members of the U.S. House of Representatives like Major Owens, Carolyn McCarthy, and Alcee Hastings have introduced legislation aiming to restrict corporal punishment.<sup>141</sup> One method of enforcement seen amongst these bills was to force states to end the practice of corporal punishment by tying its abolition to federal funding.<sup>142</sup>

Scholars have argued that this resistance to change is because the beliefs and attitudes that sustain the practice are so deeply entrenched in American society through culture, tradition, or religion that corporal punishment can be regarded as a deeply ingrained cultural practice.<sup>143</sup> It can be argued that, unlike Sweden, the political will that would be necessitated to end corporal punishment in the U.S. is not present, as

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<sup>133</sup> *Id.*

<sup>134</sup> Durrant, *supra* note 96.

<sup>135</sup> Holden, *supra* note 5, at 314.

<sup>136</sup> *Id.*

<sup>137</sup> *New! APSAC Alert Prosecutor's Edition on Using Closed Circuit Television for Children's Testimony*, AM. PRO. SOC'Y ON THE ABUSE OF CHILD. (Dec. 15, 2021), <https://www.apsac.org/single-post/new-apsac-alert-prosecutor-s-edition-on-using-closed-circuit-television-for-children-s-testimony/>; *About Us*, U.S. ALL. TO END THE HITTING OF CHILD. (last visited Feb. 7, 2023), <https://www.endhitting.org/>

<sup>138</sup> *Id.*

<sup>139</sup> Top-down advocacy refers to passing laws at state or government level rather than bottom-up advocacy that focuses on grassroots and community level initiatives.

<sup>140</sup> Donald R. Raichle, *The Abolition of Corporal Punishment in New Jersey Schools*, 2 HIST. OF CHILDHOOD Q. 53, 53-78 (1974).

<sup>141</sup> Gershoff & Font, *supra* note 49.

<sup>142</sup> H.R.1234 - ENDING CORPORAL PUNISHMENT IN SCHOOLS ACT OF 2021 117TH CONGRESS (2021-2022). § 448.

<sup>143</sup> Christina Roderiguez, *Cultural Issues in Corporal Punishment Use: Forging New Paths*, AMERICAN PSYCH. ASS'N (Apr.2017), <https://www.apa.org/pi/families/resources/newsletter/2017/04/corporal-punishment>.

evidenced by the failure of recent bills in congress. A recent 2022 incident in Missouri also saw the controversial decision of a school district to reinstate spanking as punishment subject to parental approval.<sup>144</sup> The local Superintendent Merlyn Johnson stated "We've had people actually thank us for it."<sup>145</sup> Nonetheless, recent cases indicate significant shifts in society's attitude towards corporal punishment in other regions of the U.S.; for example, sixteen years ago, the North Carolina legislature voted to maintain corporal punishment within the state. In just over a decade, however, all of those school districts changed attitudes and voted to terminate the practice of corporal punishment in schools.<sup>146</sup>

### III. CONCLUSION: ENDING CORPORAL PUNISHMENT IN THE U.S.

Corporal punishment within the U.S. has deep roots extending to laws as far back as the 1600s. While the use of corporal punishment was initially a European practice, this belief has become deeply entrenched in some regions of the U.S., despite deviating from corresponding foreign and international sentiments regarding the issue. While the majority of Europe has moved towards a prohibition on the use of corporal punishment, the use of corporal punishment within the U.S. remains legal in some regions. This paper has drawn attention to studies and standards of human rights transnationally; for example, Sweden has legislation making corporal punishment illegal within the country. While U.S. Supreme Court precedent has accepted corporal punishment, some argue that with "corporal punishment rare and getting rarer,"<sup>147</sup> now might be the time for the Supreme Court to consider reversing the *Ingraham* decision. It can be noted that in just a decade, corporal punishment in schools has decreased to 100,000 reported incidents from 223,000.<sup>148</sup> This figure further represented a sharp drop from the *Ingraham* era, wherein more than one million children were hit in schools annually.<sup>149</sup> Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has argued that the Supreme Court traditionally protects civil liberties by stamping out the "outliers" and the "practices that have already disappeared or dwindled among the states."<sup>150</sup> In the face of mounting research opposed to corporal punishment, widespread advocacy, and dwindling support for corporal punishment, it can be argued that a modern challenge to the *Ingraham* precedent carries at least a chance of success in schools. While many have argued that the U.S. is progressively moving towards a blanket prohibition on corporal punishment in schools, it can be argued that a prohibition on the use of such in the home is much further afield. Unlike the ECtHR case of *A*<sup>151</sup>, the U.S. maintains

<sup>144</sup> The Associated Press, *A Missouri School District Reinstated Spanking if Parents Give Their OK*, NPR (Aug. 27, 2022), <https://www.npr.org/2022/08/27/1119790279/missouri-school-district-spanking-parents>.

<sup>145</sup> *Id.*

<sup>146</sup> 295 (S.B.)/ House Bill 295 (2019-2020) Prohibit Corporal Punishment in Public Schs. 2019-2020 Session. N.C.

<sup>147</sup> Park, *supra* note 49.

<sup>148</sup> *Id.*

<sup>149</sup> Durrant *supra* note 51, at 436.

<sup>150</sup> Park, *supra* note 49.

<sup>151</sup> *A. v. The United Kingdom*, App. No. 100/1997/884/1096, ¶ 24 Eur. Ct. H.R. (1998).

firmly entrenched support for autonomy of parental control over the rights of the child.<sup>152</sup>

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<sup>152</sup> *See generally*, Parham v. J.R., 442 U.S. 584 (1979).